American (Dis)Trust of the Judiciary

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IAALS, the Institute for the Advancement of the American Legal System, published this paper as part of its series entitled "Are We at a Boiling Point?" IAALS serves only as the forum for this conversation. To offer a broader perspective than IAALS' own empirical research could, IAALS invited several writers to offer their (often conflicting) analyses of the decidedly troubling level of public mistrust in the American legal system. The views expressed in this paper and its companion papers are the authors' alone.[1] To read all the papers in IAALS' "Are We at a Boiling Point?" series, visit iaals.du.edu/boilingpoint.

I. INTRODUCTION

American courts have always faced their fair share of criticism from politicians. Thomas Jefferson criticized America's greatest Supreme Court Justice, John Marshall, for his "gloomy malignity" and "garblings of evidence."[2] Jefferson thought that *Marbury v. Madison* was so wrong that it made "our Constitution a complete *felo de se* [suicide]."[3] Under *Marbury*, the Constitution was made "a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."[4] James Madison was similarly caustic about Marshall. In response to *McCulloch v. Maryland*, Madison wrote that "few, if any, of the friends of the Constitution," a.k.a. the Founders, anticipated "that a rule of construction would be introduced as broad and as pliant as what has occurred."[5]

The trend has been bipartisan. Franklin Delano Roosevelt famously called the Supreme Court's strict definition of the commerce clause a "horse-and-buggy definition of interstate commerce" that created a "no-man's land where no Government – State or Federal – can

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[2] FAWN MCKAY BRODIE, THOMAS JEFFERSON: AN INTIMATE HISTORY 410 (1998).
[3] Caprice L. Roberts, *Jurisdiction Stripping in Three Acts: A Three String Serenade*, 51 VILL. L. REV. 593, 633 n.165 (2006).
[4] *Id.*
[5] MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 71 (2006).

function."[6] In 2010, Barack Obama explicitly criticized the Supreme Court's decision in *Citizens United* during his State of the Union Address to Congress, saying it "reversed a century of law" and "will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections."[7] The New York Times called it a "rare rebuke" and Justice Alito seemed to nod "no" vigorously while mouthing "not true" in response.[8]

Donald Trump has likewise expressed characteristic displeasure with the courts. I am happy to refer you to my colleague James Lyons' excellent paper for the details, but suffice it to say that Donald Trump has been particularly dyspeptic (even for him) when discussing judges and the courts. Every unfavorable decision is seemingly another opportunity to bash the American judiciary.

Meanwhile, public trust in the judiciary has fallen this decade. This raises a chicken/egg debate. Are politicians just echoing the sentiments of their constituents, or are they driving the change in public perception—or is it some combination of both? Regardless of causation, public perception of the courts has been in decline. In 2015, a Pew Research Center poll showed that 43% of Americans had an unfavorable opinion of the Supreme Court, the highest level of dissatisfaction since the poll began in 1985.[9] A 2014 Gallup poll showed a 30-year low in public

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[6] William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court – and Lost*, SMITHSONIAN MAGAZINE, May, 2005, https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/.

[7] Robert Barnes, *Reactions Split on Obama's Remark, Alito's Response at State of the Union*, WASH. POST, January 29, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012802893.html.

[8] Adam Liptak, *Supreme Court Gets a Rare Rebuke, In Front of a Nation*, N.Y. TIMES, January 28, 2010, https://www.nytimes.com/2010/01/29/us/politics/29scotus.html.

[9] Pew Research Center, *Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction*, July 29, 2015, http://www.people-press.org/2015/07/29/negative-views-of-supreme-court-at-record-high-driven-by-republican-dissatisfaction/.

confidence in the Supreme Court, down to just 30 percent.[10] In 2015, Gallup found that only 53 percent of Americans had "a great amount" or "a fair amount" of trust in the judicial branch of the federal government.[11] This result represented a substantial decline from 76 percent in 2009. A 2012 Clarus Poll found that only 26 percent of Americans believe the civil justice system provides timely and reliable resolution of disputes.[12] Faith in the criminal justice system has been even lower. In 2015 and 2016 only 23 percent of Americans expressed a "great deal" or "quite a lot" of trust in the criminal justice system.[13] State courts have polled more strongly, with 70 percent of respondents expressing either a "great deal" or "some" trust in state courts over 2014-2017, down slightly from 75 percent in 1999, but still stronger than federal courts.[14] As described below, the more recent trend is somewhat better.

The judiciary operates best when it is considered a fair and neutral arbiter, trusted by litigants and citizens alike. America is a country built on the rule of law, and from as far back as the adoption of our Constitution, our faith in our judiciary has been a defining characteristic. As such, waning trust in the judiciary strikes us as more alarming than a loss of trust in other parts of the government. Dissatisfaction with politicians has an easy fix: vote the bums out.

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[10] Justin McCarthy, *Americans Losing Confidence in All Branches of U.S. Gov't*, GALLUP, June 30, 2014, https://news.gallup.com/poll/171992/americans-losing-confidence-branches-gov.aspx.
[11] Jeffrey M. Jones, *Trust in U.S. Judicial Branch Sinks to New Low of 53%*, GALLUP, September 18, 2015, https://news.gallup.com/poll/185528/trust-judicial-branch-sinks-new-low.aspx.
[12] Ron Faucheux, *By the Numbers: Americans Lack Confidence in the Legal System*, The Atlantic, July 6, 2012, https://www.theatlantic.com/national/archive/2012/07/by-the-numbers-americans-lack-confidence-in-the-legal-system/259458/.
[13] Gallup, *Confidence in Institutions*, *available at* http://news.gallup.com/poll/1597/confidence-institutions.aspx (last visited July 23, 2019).
[14] The 70% average from 2014-17 can be found here: NCSC, THE STATE OF STATE COURTS POLL 2017 5 (2017), http://www.ncsc.org/~/media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/State-of-the-State-Courts-2017-slides.ashx. The 1999 survey can be found here: NCSC, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 SURVEY 12 (1999), https://ncsc.contentdm.oclc.org/digital/collection/ctcomm/id/17/ http://www.flcourts.org/core/fileparse.php/243/urlt/publicop_natl.pdf.

Dissatisfaction with the judiciary, and especially a federal judiciary where judges are appointed for life, has a much darker edge to it, because judges (and justices) are so much harder to remove from office. A loss of faith in the judiciary corrodes faith in the country itself.

Disconcerting, right? We do seem to be living in unprecedented times. If you find yourself persuaded by Chief Justice Chase Rogers (ret.) and Stacy Guillon's outstanding companion piece decrying the precarious state of our courts and the rule of law, that is fair enough.

That said, this essay offers a closer look at the history and nature of the American judiciary with an eye towards perspective and context. I am not here to persuade you that all is well, but I do assert that we've been through worse. The American judiciary has survived serious attacks before. That said, the ride has been bumpy, and some previous periods of judicial strife ended after we were challenged by cataclysmic national emergencies like the Civil War or the Great Depression/World War II, hardly a cheerful precedent.

First, a word of clarification about what we mean by "distrust" or "dissatisfaction" with the judiciary, along with a word about some methodological challenges. We have very good survey data on America's approval of the Supreme Court and the federal judiciary from Gallup from 1973 forward, and a smattering of other data on that Court from as far back as the 1930s. We have fewer surveys on local/state courts, so we are limited in that area to just the last 20 years or so. This means we will have to make some guesses about the ups and downs of American courts based upon historical eras, rather than survey data.

This also means that in spots we are stuck talking about the U.S. Supreme Court more than other federal courts or state courts. On the one hand, this is fair enough, because the Supreme Court has always loomed large in America's impressions of its judiciary. On the other

hand, Americans are obviously more likely to have a personal experience in a state or local court than a federal court—let alone the Supreme Court—so focusing on the Supreme Court naturally mixes apples and oranges in places.

Discussing distrust/dissatisfaction with courts also conflates several different causes of the dissatisfaction. So, for example, recent polling data has shown that Americans think that handling a dispute in court takes too long and costs too much money. This complaint is reflected in what we call the access to justice crisis—many poor and middle-class Americans cannot afford desperately needed legal services/court procedures.[15] IAALS has been a leader in documenting this crisis, from *Cases Without Counsel*, a qualitative study of pro se family court litigants, to various surveys of the public's desire for local courts to innovate.[16] These surveys show that Americans want courts to be friendlier to *pro se* litigants and more tech savvy.

These efficiency/cost complaints strike me as super fair, but also much less destabilizing to our view of the judiciary overall, since they are largely procedural and not an attack based on judicial bias. I also think these complaints are basically true, and based upon many informal conversations with judges, lawyers, and clerks, they agree as well, making it a rare point of general consensus.

Rhetoric about courts making decisions based mostly or solely on politics is more concerning, because that transcends procedural concerns to strike at the heart of the fairness of the judiciary altogether. Recent surveys show that a majority of Americans think courts exhibit at

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[15] My favorite book on this subject is DEBORAH RHODE, ACCESS TO JUSTICE (2004).
[16] The Institute for the Advancement of the American Legal System, iaals.du.edu. Rebecca Love Kourlis, *Action to Justice: IAALS 2017 Annual Report*, March 22, 2018, http://iaals.du.edu/blog/action-justice-iaals-2017-annual-report; IAALS, CASES WITHOUT COUNSEL PROJECT, http://iaals.du.edu/honoring-families/projects/ensuring-access-family-justice-system.

least some bias towards the wealthy and corporations and against poor people and people of color.[17] These complaints may also be true, but are much more corrosive and challenging.

With those caveats in mind, this essay attempts to present a broad description of the causes and nature of America's unusual relationship with its judiciary, and a history of popular distrust of the judiciary. The essay begins by discussing just how radical and unusual our Constitution was and what an outsized role the Founders expected both written law and judges to play in our nascent republic. It spends a little time discussing the historical reasons why America granted so much power to judges and juries, when civil law jurisdictions like France, Japan, or Germany traditionally treated judges as relatively low-level bureaucrats and did not use juries at all. This comparison reminds us that high-functioning, free market democracies can exist with less prestigious and powerful judiciaries. Indeed, no other country in the world places so much faith in its judiciary.

Then the essay turns to a very brief history of three previous periods when judges faced withering criticism in America: Jacksonian Democracy, FDR's court-packing plan, and the rights revolution from *Brown v. Board of Education* through *Roe v. Wade*. This is obviously not a comprehensive history of the courts in America, but highlighting these eras can help us put our current predicament in perspective.

This history carries good news and bad news. The good news is that the current crisis in confidence is hardly unprecedented. In fact, we may have our expectations backwards: periods where courts are respected and trusted may in fact be the exception in this country, not the rule. The bad news is that the history suggests that the natural end to these periods of intense distrust

[17] DAVID B. ROTTMAN, NATIONAL CENTER FOR STATE COURTS, PUBLIC PERCEPTIONS OF THE STATE COURTS: A PRIMER (2000) 5-9, *available at*, https://ncsc.contentdm.oclc.org/digital/api/collection/ctcomm/id/24/download.

is either a war, or a cataclysmic event like the Great Depression, or both. For a recent example, polling shows that our faith in the judiciary (and other government institutions) hit a 20-year high point immediately after 9/11.

II. American Courts play an Unusually Large Role in Our Government and Lives

Every civilization of any size or complexity, from Babylon to Rome, had some kind of written law and judges to apply the law to specific disputes. Consider the Old Testament/Torah stories of the Israelite civilization almost four millennia ago: these scriptures are filled with very detailed legal prohibitions and stories of judges enforcing them.[18]

America has taken this tradition further than almost any other country, however. Here is an abbreviated and incomplete list of some of our unique features:[19] 1) The idea of a written constitution that would be a single, comprehensive charter of rights, powers, and responsibilities for a new government was itself unheard of in the late eighteenth century; 2) Separating the judicial power from the executive power into a coequal branch of government. In England (and the rest of the world) the judiciary was an expression of the power of the monarchy, not a separate power, and thus usually not a check on the monarch's power. In England and elsewhere, the judiciary was sometimes used as a check on the power of noblemen or local government

[18] In my first-year Torts class I always remind the students that owner liability for injuries caused by animals is hardly a new problem. Consider Exodus 21:28-32 "If a bull gores a man or woman to death, the bull is to be stoned to death, and its meat must not be eaten. But the owner of the bull will not be held responsible. If, however, the bull has had the habit of goring and the owner has been warned but has not kept it penned up and it kills a man or woman, the bull is to be stoned and its owner also is to be put to death. However, if payment is demanded, the owner may redeem his life by the payment of whatever is demanded. This law also applies if the bull gores a son or daughter. If the bull gores a male or female slave, the owner must pay thirty shekels of silver to the master of the slave, and the bull is to be stoned to death."

[19] Each of these features is discussed in the first three chapters of MICHAEL STOKES PAULSEN & LUKE PAULSEN, THE CONSTITUTION: AN INTRODUCTION (2017).

officials, but always as an exercise of the King's power, not as a separate judicial power; 3) The creation of a Supreme Court to head up this third branch of the government; 4) The eventual idea that the judiciary would be in charge of reviewing the constitutionality of the actions of other branches of the government and could void those actions if unconstitutional; and 5) The centrality of juries. The criminal jury is guaranteed in both the Constitution itself and again in the Bill of Rights. The United States is still the only country in the world with a civil jury trial right as broad as the one stated in the Sixth Amendment.

Taken together, the Founders expected law, judges, and juries to carry a heavy load in our new democracy. If Alexis de Tocqueville is to be believed, America did, indeed, place the judiciary at the very heart of our polity. Tocqueville, a French aristocrat who toured America in 1831, wrote an engaging and still remarkably insightful book entitled *Democracy in America*. Tocqueville was particularly surprised by how important judges and lawyers were in America, noting that the "American aristocracy is found at the bar and on the bench."[20] This observation was about more than just social class. Tocqueville noted that in America "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[21] Tocqueville thought that allowing the judiciary to settle even political disputes acted as a natural brake on the excesses of democracy, because judges and lawyers were a (small-c) conservative and moderating force in American politics, tamping down suggestions for radical change.

Every time I read Tocqueville, I am struck by how true his observations in 1835 remain today. From the outset, America placed courts and lawyers center stage, and it has continued unabated. Over half of America's presidents have been members of the legal profession, and

[20] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 313 (G. Bevan trans., 2003).
[21] ID. at 315.

lawyers have also been a dominant force in Congress and state legislatures.[22] And, of course, former lawyers acting as judges completely dominate a third of our tripartite government.

In modern times, we seemingly count on courts more than ever. In a pluralistic melting pot, courts are counted on to handle issues that more homogenous societies handle via norms, social opprobrium, or other branches of government.[23] There are examples great and small. America relies more heavily on tort law than other developed countries to discourage dangerous behavior and to recompense medical expenses. America also seems to have an unusual number of lawsuits between neighbors over things like noise or spite fences, or other seemingly small-bore disputes. We also count on our courts to handle some of our most sensitive cultural issues, from desegregation and civil rights in the 1950s and 1960s to gay marriage and gun ownership today.

III. Where Did the Founders' Faith in Judicial Structures Come From?

Why did the Founders count on the judiciary to serve such a central role? Remember that 32 of the 55 framers of the Constitution and 25 of the 56 signers of the Declaration of Independence were lawyers.[24] Nor were they lawyers in name only. If you have read Jean Edward Smith's exceptional biography of John Marshall or Ron Chernow's masterwork on Alexander Hamilton, you know that many of our founding fathers were practicing lawyers first and foremost, with a heavy emphasis on "practicing."[25] Marshall, Hamilton, Aaron Burr, John

[22] BENJAMIN H. BARTON, GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION 239 (2015).
[23] *See generally* JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, THE CIVIL LAW TRADITION (3rd ed. 2007).
[24] BARTON, GLASS HALF FULL, *supra* note 29 at 239.
[25] JEAN EDWARD SMITH, MARSHALL: DEFINER OF A NATION (2004); RON CHERNOW, ALEXANDER HAMILTON (2005).

Jay, and others tried cases (including murder cases), handled transactional matters, and thus knew firsthand the critical need for a well-run, impartial judiciary.[26]

Further, there was great disappointment with the behavior of the royal courts before the revolution. The eighth and ninth specifications of the Declaration of Independence argued that the King "has obstructed the Administration of Justice" and "made Judges dependent on his Will alone." The importance of neutral and independent courts grew directly from this concern. For example, John Adams's influential 1776 pamphlet *Thoughts on Government* argued explicitly for an independent and powerful judicial branch: "the judicial power ought to be distinct from both the legislative and executive, and independent" from both.[27]

Last, the Founders came from the British common law system, and for historical reasons somewhat unique to England they believed that a court system could mitigate or eliminate some governmental abuses of power. One example is the development of a separate Court of Chancery in England that worked as an equitable check upon the excesses of common law courts.[28] The powers of *mandamus* (to compel a government official to do his duty), *quo warranto* (to question the legality of an act by a public official), and *habeus corpus* (to challenge the legality of an imprisonment) are other examples.[29] Based upon their knowledge of the role British courts had played over the years, Americans had a vision of a judiciary that might limit governmental abuses. The Founders hoped that an enhanced system of courts and a robust jury right, plus a written constitution, would safeguard America's newly won liberties.

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[26] For Hamilton, *see* THE LAW PRACTICE OF ALEXANDER HAMILTON (Julius Goebel, Jr., ed., 1964). For Marshall, *see* SMITH, *supra* note 32 at 87-114. For Burr, *see* ESTELLE FOX KLEIGER, THE TRIAL OF LEVI WEEKS (2001). For Jay, *see* HERBERT A. JOHNSON, JOHN JAY: COLONIAL LAWYER (2006).

[27] SCOTT DOUGLASS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY 25 (2011) .

[28] MERRYMAN & PEREZ-PERDOMO, *supra* note 30, at 50-52.

[29] ID.

IV. THE CENTRALITY OF AMERICAN COURTS IS AND WAS UNUSUAL: CIVIL LAW JUDGES

Americans naturally assume that an American-style judiciary is a necessary ingredient to the rule of law. Critical elements include well-respected and powerful judges, working in a single judicial hierarchy, with a Supreme Court on top. Moreover, every American court is capable of hearing constitutional challenges to governmental actions or laws, and every court has the power to declare any governmental act it deems unconstitutional null and void.[30]

This model has worked well in America (more or less), so we think that some or all of these features must be necessary to a successful rule of law. Nevertheless, this vision of the judicial power is out of step with many of our common law brethren, let alone civil law countries. Roughly 60 percent of the world's population lives under a civil law system, including virtually all of continental Europe, Japan, and China; internationally, we are very much the exception, not the rule, even amongst other free market democracies with strong commitments to the rule of law.[31]

The civil law tradition traces itself back to Roman law, and especially the sixth century Civil Code of the Emperor Justinian.[32] At the highest level of generality, civil law systems are organized around a written legal code that is the source of all law. There is no equivalent to the "common law," or judicially created law. To the contrary, judges are explicitly barred from making law. If you want to know more about this subject, I heartily recommend John Henry Merryman and Rogelio Perez-Perdomo's short, readable masterpiece *The Civil Law Tradition*.[33]

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[30] *See, e.g.,* JOHN M. SCHEB, INTRODUCTION TO THE AMERICAN LEGAL SYSTEM (2002).
[31] MERRYMAN & PEREZ-PERDOMO, *supra* note 30, at 1-5.
[32] *See* GEORGE MOUSOURAKIS, ROMAN LAW AND THE ORIGINS OF THE CIVIL LAW TRADITION (2014).
[33] MERRYMAN & PEREZ-PERDOMO, *supra* note 30.

The civil law system has a radically different vision of the judicial role. Merryman and Perez-Perdomo note that judges in the civil law system are very different from American common law judges.[34] Civil law judges are mostly life long civil servants/bureaucrats. Civil law judges are trained separately from lawyers and work their way up a judicial hierarchy over the course of their career, with little chance of a lateral exit from the judiciary, or a lateral entry.

These status issues are hardly the most important difference between common law and civil law judges. As noted above, the nature of the job itself is quite different. The baseline expectation of a civil law judge is that he or she will not make any new law.[35] Written civil codes will naturally require some interpretation because of the slipperiness of legal language, but these moments of interpretive freedom are to be minimized wherever possible, and under no circumstances should this interpretive function grow to the point where a judge "makes law."[36]

Philosophically and structurally, civil law systems tend to express a certain level of paranoia and discomfort with the judicial power. For example, before the Second World War, very few civil law countries had any equivalent to the U.S. Supreme Court's power of constitutional review.[37] If the goal is to limit the "law-making" power of judges, there are few greater judicial powers than the enforcement of a constitution. Since World War II, the trend has been to add a separate constitutional "court" even in civil law countries, but these courts are generally separate from all other courts and are much less "legal." For example, the French version is called a "council," not a court, and is staffed by a mix of former politicians, former judges, and other prominent citizens, not just lawyers or former judges.

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[34] All of the facts in this paragraph can be found ID. at 34-38.
[35] *See* THOMAS LUNDMARK, CHARTING THE DIVIDE BETWEEN COMMON AND CIVIL LAW 116-212 (2012).
[36] ID.
[37] All of these facts can be found in MERRYMAN & PEREZ-PERDOMO, *supra* note 30, at 134-42.

There are multiple historical reasons for the very different nature of civil law judges. In Roman law, the functionary who actually handed down legal decisions, the *iudex*, was not the true expert in the law.[38] The *praetor* or *jurisconsults* were the experts in the law and advised or instructed the *iudex* in decision making, so the original Roman judicial role was very limited.[39]

Second, the Napoleonic Code and the post-revolutionary French civil law system has been extremely influential on all civil law systems.[40] The new French system was very hostile to any judicial authority at all, and *especially* the idea of judges making law. This was partially because, before the French Revolution, judgeships were bought and sold as property (typically by members of the nobility.) So, in the battle between the rising merchant class and the nobility, pre-revolutionary French judges regularly favored the interests of the nobility. Courts were thus high on the list of the French Revolution's list of grievances.

This meant that, post-revolution, it was critical that the new French judiciary *never* make law. The new government drafted and enacted the Napoleonic Code so that the law could be found in a simple and readily applicable form, and judges were instructed to simply apply the law as written. At first, French judges were required to forward any questions of interpretation back to the legislature for clarification. This proved unwieldy for obvious reasons, but the baseline expectation remained—civil law judges were to be bit players in making law and applying it.

Note the historical differences between the British, American, and French experiences. In England, the common law courts tended to be more on the side of the mercantile class and more

[38] PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 132-44 (2014).
[39] ID.
[40] The facts in this paragraph and the next can be found in MERRYMAN & PEREZ-PERDOMO, *supra* note 30, at 15-19.

likely to stand up to governmental overreach, so when the democratic revolution came to the U.S. and eventually England, the courts held a central and trusted position. By contrast, the courts were a vanguard of the nobility in France and paid the price after the revolution. The Napoleonic Code is one of the two modern masterpieces of the civil law (the German Civil Code of 1896 is the other), so the French influence is felt all over the civil law world.

There are several lessons here for present-day America. The first is that the centrality of our courts is partially due to historical accident. The second is that it is certainly possible to run a high-functioning democracy with a very different role for the judiciary. Germany, France, Japan, and a host of other countries are doing quite well, thank you. But remember, it is more than the role that is different. From an American point of view, civil law countries are almost paranoid in their insistence that judges are not to make law. In some ways, civil law countries show us that it is possible to have a functioning rule of law while maintaining a healthy skepticism about judges.

The last is to draw your attention once more to how unusual America's judiciary is. Most every developed nation has a visible and functioning judiciary to handle legal disputes fairly. In America, however, we've elevated the judiciary to a true co-equal status with the legislative and executive branches. In much of the world, judges are limited to deciding narrow, individual disputes, and even those decisions are not subject to a formal tradition of stare decisis. In America, judges are not only allowed to make law—between common law and constitutional law, they make law daily, often while settling some of our most divisive issues.

V. All of This Has Happened Before: Jacksonian Democracy

The fact that America asks its judiciary to do so much may make you even more concerned that Americans are losing faith in the judiciary. After all, the nature and influence of

the American judiciary is one of our primary democratic innovations. If Americans no longer trust our judges, what can they trust?

This is not our first crisis of confidence in the judiciary—Jacksonian Democracy offers a very close parallel. Andrew Jackson ran for President in 1824, along with three other candidates: John Q. Adams, Henry Clay, and William Crawford.[41] No candidate earned a majority of votes or electoral college votes, although Jackson did receive the most popular and electoral college votes in the field. But because no candidate garnered a majority of electoral college votes, the House of Representatives got to decide, and John Quincy Adams triumphed—much to Jackson's chagrin.

Jackson ran again in 1828 as a loud and proud populist, railing against elites and using the slogan: "Andrew Jackson and the Will of the People."[42] He argued that a "corrupt bargain" between Adams and Henry Clay had "cheated" the people and him of the presidency.[43] He called the common man the "bone and sinew of the country" and Jackson swore to return the government and the country to them. Jackson railed against big business, moneyed interests, and elites of all kinds.[44]

The argument appears to have worked. Almost three times more Americans voted in 1828 than in 1824 and Jackson won almost 60 percent of the vote.[45] This election launched the period historians call "Jacksonian Democracy." Jackson and his followers displayed a deep

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[41] The facts in this paragraph can be found in DONALD JOHN RATCLIFFE, THE ONE-PARTY PRESIDENTIAL CONTEST: ADAMS, JACKSON, AND 1824'S FIVE-HORSE RACE (2015).
[42] The facts and quotes in this paragraph come from H.W. BRANDS, ANDREW JACKSON: HIS LIFE AND TIMES 376-413 (2006).
[43] LYNN H. PARSONS, THE BIRTH OF MODERN POLITICS: ANDREW JACKSON, JOHN QUINCY ADAMS, AND THE ELECTION OF 1828 109-10 (2011).
[44] SEAN WILENTZ, ANDREW JACKSON 155 (2007).
[45] The facts in this paragraph can be found in DONALD B. COLE, VINDICATING ANDREW JACKSON: THE 1828 ELECTION AND THE RISE OF THE TWO-PARTY SYSTEM (2009).

distrust and hatred of the wealthy, exclusive privileges, or monopolies. Majority rule and direct democracy were preferable, because they reflect the will of the common man.

Unsurprisingly, unelected judges and lawyers were a primary target. The best-known incident is Jackson's disinclination to push for the enforcement of the Supreme Court's 1832 decision in *Worcester v. Georgia*.[46] John Marshall served as Chief Justice from 1801 to 1835 and wrote a series of sweeping opinions that basically created the modern Supreme Court. Marshall established the Court's power of constitutional review and its ability to hold acts of Congress or the states unconstitutional and thus void. These decisions are now hailed as triumphs of constitutional reasoning, but as seen in the quotes of Jefferson and Madison above, they were very controversial at the time. Jackson and many others decried an expansionist Court usurping power from legislatures and states.

These issues came to a head in *Worcester v. Georgia*. In that case, the Court held that the relationship between the Cherokees and the United States was that of nations and that the federal government alone had the power to deal with the Indian nations.[47] Since Jackson had spent the bulk of his career fighting and displacing Indian tribes generally, and the Cherokee specifically, Jackson was not amused. Jackson is reported to have dismissed the decision outright, saying "John Marshall has made his decision, now let him enforce it."[48] This remark may be apocryphal, but Jackson later wrote "the decision of the Supreme Court has fell still born, and they find that they cannot coerce Georgia to yield to its mandate," basically expressing the same emotion.[49]

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[46] SMITH, *supra* note 32 at 482-522.
[47] The facts in this paragraph can be found in JON MEACHAM, AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE 202-205 (2009).
[48] ID.
[49] ID.

Jackson's actions in this particular case were small potatoes in comparison to Jacksonian Democracy's main effect on American courts: the rise of the elected judiciary. Jackson suggested amending the Constitution to allow elections in the federal judiciary, but little came of it.[50] In contrast, state governments all over the country pledged to replace appointed judges with a judiciary "of the people." In 1832, Mississippi amended its Constitution to become the first state to elect all of its judges, including those on courts of appeals.[51] The debates during the Ohio Constitutional Convention of 1850-1851 capture the flavor of the times: a delegate railed against judges who acted like "little aristocrats" who "legislated judicially despite the wishes of the people." And thus, judicial elections were adopted.[52]

Mississippi and Ohio were not alone. Between 1846 and 1853, 16 states amended their constitutions to provide for the election of all state judges, four other states adopted elections for some state judges, and only Massachusetts and New Hampshire considered but rejected judicial elections.[53] Before 1845, every state that entered the Union featured an appointed judiciary.[54] From 1846 to 1959, the trend completely reversed and each new state elected at least some of their judiciary. In 1865, judicial elections occurred in 24 of the 34 states. The election of judges is among the foremost remaining legacies of Jacksonian Democracy. Currently 39 states use some form of election at some level of court.[55]

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[50] WILENTZ, *supra* note 51, at 156.
[51] JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 122 (2007).
[52] KERMIT HALL, THE JUDICIARY IN AMERICAN LIFE 343 (1987).
[53] Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1080-1114 (2010).
[54] The facts in the remainder of this paragraph and the next two paragraphs come from BARTON, *supra* note 21, at 22.
[55] Brennan Center for Justice, *Judicial Selection: Significant Figures*, *available at* https://www.brennancenter.org/rethinking-judicial-selection/significant-figures (last visited July 23, 2019).

The organized legal profession faced heavy attack as well. For example, New Hampshire, Maine, Wisconsin, and Indiana expressly abolished any requirements for appearing in those states' courts. Those states which maintained a bar admission requirement significantly slackened their standards. In 1800, 14 of the 19 states or territories had formal bar admissions standards. In 1840, 11 out of 30 required a set period of preparation for admission. By 1860, it was only nine of 39.

Over this same period, legislatures attempted to codify the common law and to eliminate special pleading forms. This was another populist effort to bring the law to the people by breaking the lawyers' and judges' monopoly on pleading and deciding lawsuits.

All of these changes came over heavy objections from the bench and bar. A former Mississippi Supreme Court Justice stated that, because of elected judges, "Our constitution is the subject of ridicule in all the States where it is known. It is referred to as a full definition of mobocracy."[56] A mid-century lawyer captured the flavor of the times nicely: "The voice of the multitude is against the legal community. . . . The bar finds no favor at the ballot box. . . . A cry is going out over the land. Radicalism is infectious as the pestilence. The tide of popular will must soon sweep away our prerogative, unless we stay its waters."[57] We obviously do not have any polling from this period, but if political results are a fair reflection of popular opinion, the rise of the elected judiciary alone suggests that public opinion of judges and lawyers hit an all-time low during the middle of the nineteenth century.

[56] JOHN H LANGBEIN, ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 504 (2009).
[57] *New Publications*, 7 PENN. L.J. 99 (1848).

VI. FDR's "Court-Packing" Plan

The next time public dissatisfaction with the courts (or at least the Supreme Court) came to a boil was early in Franklin Delano Roosevelt's second term, during the so-called "court-packing" crisis. The Supreme Court held that whole swaths of Roosevelt's "New Deal" legislation was unconstitutional, including the National Industrial Recovery Act, the Agricultural Adjustment Act, railway pension legislation, farm debt relief, and state minimum wage legislation, frustrating the president and Congress.[58] In 1935, Roosevelt argued that the Court was withholding from "the Federal Government the powers which exist in the National Governments of every other nation in the world. We have been relegated to the horse-and-buggy definition of interstate commerce."[59]

These decisions had not come out of the blue. The period from 1890 until 1937 is generally called the "Lochner era" of the Supreme Court, after the 1905 case of *Lochner v. New York*.[60] In that case, the Supreme Court held that a New York statute capping working hours at 10 hours a day and 60 hours a week violated the Due Process Clause of the Constitution and freedom of contract. This decision was of a piece with the Court's generally stringent review of economic regulation during the Lochner era.

This skepticism crashed head on into the New Deal, and for a few years Roosevelt and others worried that the Court might hold most or all of the New Deal unconstitutional.[61] When Roosevelt was elected to a second term in 1936, the President had reached the end of his

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[58] William H. Rehnquist, *Judicial Independence*, 38 U. RICHMOND L. REV. 579, 592 (2004).
[59] William Lasser, *Justice Roberts and the Constitutional Revolution of 1937 – Was There a "Switch in Time"?*, 78 TEX. L. REV. 1347, 1370 (2000).
[60] The facts in this paragraph can be found in Ilana Waxman, *Hale's Legacy: Why Private Property is not a Synonym for Liberty*, 57 HASTINGS L.J. 1009, 1010-11 (2006).
[61] The facts in this paragraph can be found in JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT V. THE SUPREME COURT (2011).

patience. In early 1937, he introduced the Judicial Procedures Reform Bill of 1937, also known as the court-packing plan. One provision of the law would have allowed the President to nominate one new Justice to the Court for every sitting Justice that did not retire after turning 70.[62] The law as written would have allowed Roosevelt to add as many as six new Justices to the court.

Roosevelt pushed hard for the plan. Consider the following from a March 9, 1937 "fireside chat":

> The Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions. . . . The Court has been acting not as a judicial body, but as a policy-making body. . . . We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself.[63]

Three weeks later, the Supreme Court upheld a Washington State minimum wage law in *West Coast Hotel Co. v. Parrish* 5-4, with Justice Owen Roberts joining four other Justices in the majority opinion and opening the way for the Court to allow more direct governmental regulation of the economy.[64] This was the so-called "switch in time that saved nine," and Roosevelt's plan never made it out of committee in the House or Senate.[65] Still, the scope and aggressiveness of Roosevelt's proposed solution shows the depth of popular (or at least presidential) dissatisfaction with the Supreme Court.

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[62] The draft legislation provided: "When *any* judge of *a* court of the United States, appointed to hold office during good behavior, has heretofore or hereafter attained the age of seventy years . . . and within six months thereafter has not resigned or retired, the President . . . shall nominate . . ." http://www.presidency.ucsb.edu/ws/index.php?pid=15360.
[63] WILLIAM D. PEDERSON, THE FDR YEARS 367 (2009).
[64] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
[65] SHESOL, *supra* note 69.

Contemporary Gallup polls suggest that the public was of two minds on the issue. On the one hand, when asked in 1935 whether "the Supreme Court should be more liberal in reviewing the New Deal measures," 59 percent answered "Yes."[66] Similarly, when asked in 1937 whether Congress should either pass, modify, or defeat Roosevelt's plan, 38 percent responded pass, 23 percent modify, and 39 percent defeat, suggesting a majority of Americans were open-minded to making some changes to the Court.[67] On the other hand, when asked directly "are you in favor" of the plan, "No" garnered 53 percent to "Yes" at 47 percent.[68]

VII. The Supreme Court from Brown to Roe v. Wade

The next time that dissatisfaction with courts reached a boil was during the period that roughly spanned from *Brown v. Board of Education* in 1954 to *Roe v. Wade* in 1973, or during and immediately after the Warren Court. Over this period, the Supreme Court desegregated schools and public accommodations, strengthened the rights of criminal defendants, advanced a broad right to privacy, and limited religion in public life. Richard Nixon explicitly campaigned against the Warren Court during his winning 1968 campaign, and over this period resistance to the role and nature of courts rose considerably.[69]

Brown itself was actually relatively popular. In 1955, a Gallup poll showed 55 percent support against 40 percent disapproval for the decision.[70] Support had risen to 62 percent by

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[66] Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7, 68 (2002).
[67] *Id.* at 71.
[68] *Id.* at 68 & n.339.
[69] CHRISTOPHER L. TOMLINS, THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 300 (2005).
[70] Joseph Carroll, *Race and Education 50 Years After Brown v. Board of Education*, GALLUP, May 14, 2004, https://news.gallup.com/poll/11686/race-education-years-after-brown-board-education.aspx.

1961.[71] Not surprisingly, public disapproval of the Court spiked in the South over this period. As the 1960s proceeded, broader opposition to the Court grew. In 1965, Gallup found that 60 percent of Americans thought courts were "not harsh enough" when dealing with criminals.[72] In 1966, only 24 percent of Americans supported the *Miranda* decision.[73] In 1970, a Time Magazine poll found that 77 percent of Americans thought that Supreme Court decisions made it too easy for criminals to escape punishment.[74]

In 1973, the first year that Gallup asked (and before Watergate broke), Americans ranked the judicial branch of the federal government last in terms of trust. The executive branch came in at 73 percent (great deal or fair amount of trust and confidence), legislative at 71 percent, and the judicial at 66 percent.[75] Sixty-six percent is still quite good, especially under recent conditions, but still, as of 1973, the judiciary was the *least* trusted branch of the federal government. In every year since, the judiciary has come in as the most trusted branch of the government.[76]

The bottom line is that between *Brown* and *Roe*, the Court became much more polarizing and political, culminating in *Roe*. Without expressing any opinion on the merits of the case, or whether the political battles that flowed from it are fair or unfair, most observers can agree that *Roe* was a watershed for the Court and has made the Supreme Court a salient and divisive political issue ever since. Most observers can also agree that the Court retreated a little from such watershed cases for a decade or so after *Roe*.

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[71] *Id.*
[72] Hazel Erskine, *The Polls: Causes of Crime*, 38 PUB. OPINION Q. 288, 294 (1974).
[73] Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 PENN. L. REV. 1361, 1422-23 (2004).
[74] PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 54 (Nathaniel Persily, et al., eds. 2008).
[75] Jeffrey M. Jones, *Trust in Judicial Branch Up, Executive Branch Down*, GALLUP, September 20, 2017, https://news.gallup.com/poll/219674/trust-judicial-branch-executive-branch-down.aspx.
[76] *Id.*

VIII. Some Lessons from These Periods of Discontent

Clearly, faith in judges and the judiciary has waxed and waned in the US over the years, so today's period of discontent is not unprecedented. To the contrary, the loss of trust looks quite mild in comparison to the 1930s and 1830-1860.

We can also learn something from the *end* of these periods. Both Jacksonian Democracy and the Lochner era ended with trauma and radical change. You can't pinpoint an end date for a historical era like Jacksonian Democracy, but the Civil War and then the Industrial Revolution changed the course of public opinion and government action decisively, including a wave of re-professionalization.[77] The legal profession reorganized and lobbied for bar exams and formal legal education. State and federal judiciaries were expanded and formalized to deal with the commercial disputes, criminal charges, and other legal matters that arose as America transitioned from a decentralized agrarian country into an industrialized urban one. Simultaneously, a wave of immigrants meant that courts and legal processes were being called upon to handle some matters that smaller and more homogenous American communities had handled via social opprobrium or other non-legal means. All of this meant that the Jacksonian Democratic opposition to judges and lawyers tapered off. Likewise, the "switch in time that saved nine" also occurred during the trauma of the Great Depression, followed immediately by World War II.

Alternatively, one might argue that it is not national trauma that ended these Supreme Court eras, but judicial trauma. In each of the three eras discussed above, the Supreme Court entered a period of limited controversy after criticism reached a boiling point. After *Dred Scott* and related cases were among the causes of the Civil War, the Court entered a period of relative quiet. The end of the Lochner era is similar. After the Court (and FDR) brought the court to the

[77] BARTON, *supra* note 21 at 23-32.

precipice of constitutional crisis, the Court reversed course and became much more amenable to government action. The period immediately following *Roe v. Wade* was also a period of Court retrenchment.

You may be of two minds on this trend. On the one hand, if your main goal is to maintain high levels of trust and satisfaction with the Supreme Court, the answer may be a more modest Court. On the other hand, modest Courts sometimes pass up chances to enforce the Constitution, which carries its own problems. Consider *Plessy v. Ferguson*, when a weary Supreme Court upheld "separate but equal" rather than more directly addressing the meaning of the Fourteenth Amendment and the post-Civil War actions of the southern states. *Korematsu v. United States* is a similar case from 1944. With the U.S. still fighting in Asia and Europe, a cowardly Court held the creation of Japanese internment camps constitutional. Post-*Roe v. Wade*, the Court's decision to find the death penalty constitutional in *Gregg v. Georgia* (essentially overruling a 1972 case that held the opposite) is another example of the Court retreating—although public and scholarly opinion over the constitutionality of the death penalty is still much more split than over the incorrectness of *Plessy* and *Korematsu*. The main takeaway here is that popular faith in the Supreme Court is a complicated issue. Many readers may think that a properly run Supreme Court is not very popular, just as a properly run ACLU must often take unpopular positions.

IX. Courts Are Not the Only Institution Experiencing Declining Trust

America has experienced a long-term decline in its faith in its institutions over the last 50 years, punctuated by a recent, steep collapse. In 2017, the Pew Research Center found that only

18 percent of Americans trusted the government in Washington to do what is right "just about always" or "most of the time."[78] In 1964, that number was 77 percent.[79]

The 2018 Edelman Trust Barometer, a survey of 33,000 people in 28 countries, found that America's trust in all institutions (including government, business, media, and NGOs) collapsed by 33 percent between 2016 and 2017.[80] This single-year decline was the largest ever for any country in the 17-year history of the survey. The decline was led by Americans' loss of faith in the government (only 33 percent of Americans reported trusting the government) and a collapse in support for institutions among what Edelman calls the "informed public."[81] America's informed citizens are now among the most distrustful in the world. Only the well-informed in Russia and South Africa have a lower opinion of their country's institutions than America.

X. Don't Call It a Comeback

In comparison to institutions as a whole, courts are seeing a small renaissance in the last year or two. Post-9/11, all American institutions have seen a long-term downward trend. For big chunks of that period, trust in the courts was deteriorating faster than in other institutions, an alarming trend that reached bottom sometime between 2014 and 2016.

In 2017, a Gallop poll showed trust in the judicial branch bouncing back to 68 percent, the best since 2009.[82] The Supreme Court has likewise been on a roll. In 2016, only 42 percent of respondents approved of the way the Supreme Court was handling its job. In 2018, 53 percent of

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[78] Pew Research Center, *Public Trust in Government: 1958-2017*, May 3, 2017, http://www.people-press.org/2017/05/03/public-trust-in-government-1958-2017/.
[79] Id.
[80] The facts in this paragraph come from Edelman Trust Barometer, *2018 Edelman Trust Barometer Reveals Record-Breaking Drop in Trust in the U.S.*, *available at* https://www.edelman.com/news-awards/2018-edelman-trust-barometer-reveals-record-breaking-drop-trust-in-the-us (last visited July 23, 2019).
[81] *Id.*
[82] Jones, *supra* note 83.

respondents approved.[83] In a time of polarization, readers will not be surprised to know that the decline during the Obama years was largely among Republicans, and that the bounce back in 2018 reflects a jump in approval following the election of President Trump.[84] This is not a new phenomenon. Republican approval of the Supreme Court rose under Nixon and Eisenhower, for example, while Democratic approval shrank.

In 1999, respondents in a National Center for State Courts study reported that 75 percent of respondents had "a great deal" or "some" trust in the "courts in your community."[85] This number was ahead of the media (50 percent) but just behind the Office of the Governor (77 percent) and the state legislature (76 percent).[86] In 2017, respondents were less enthusiastic about all of these institutions, but courts had declined the least: state court systems garnered 71 percent, Governors 61 percent, and state legislatures 57 percent.[87] Looking at the recent polls, it looks like the courts of all stripes are seeing a slight increase in confidence, especially when considered against the overall collapse in trust in other institutions.

XI. Some Takeaways

If you care about the national standing of the courts, you should be concerned about the current rise in populism on both the left and right. In spots during 2015 and 2016, Bernie Sanders and Donald Trump sounded remarkably similar in their attacks upon American elites, and their suggestion that some combination of moneyed interests had "rigged the system" against regular

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[83] Megan Brenan, *Supreme Court Approval Highest Since 2009*, Gallup, July 18, 2018, https://news.gallup.com/poll/237269/supreme-court-approval-highest-2009.aspx.
[84] *Id.*
[85] NCSC, How the Public Views the State Courts: A 1999 Survey 12 (1999), https://ncsc.contentdm.oclc.org/digital/collection/ctcomm/id/17/.
[86] Id.
[87] NCSC, The State of State Courts 2017 Poll 5 (2017), http://www.ncsc.org/~/media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/State-of-the-State-Courts-2017-slides.ashx.

people. President Trump's thoughts on the judiciary are well known, but remember that Sanders called *Citizen's United* a "disastrous" and "absurd" decision that allows the wealthiest people in this country "to purchase the US Government."[88] None of this should be surprising. As Jacksonian Democracy well establishes, there are few juicier targets for populists than judges and lawyers. If America's problem is its self-dealing elites, then judges and lawyers should batten the hatches, because they will be in for rough seas.

Even with that warning in mind, the current problem of public trust in the courts is hardly at a historical boiling point, especially in comparison to a) the collapse in trust in other government institutions and b) the tone and regularity of current political attacks on courts. How can we tell without robust polling before the 1970s? Just look at the salience of efforts to reform/destroy (depending on your point of view) the judiciary. We are a long way from a court-packing plan or instituting judicial elections in other courts.

In fact, based upon the history itself we may actually have our baseline expectations wrong. American faith in institutions generally, and courts especially, seems to have been at a high ebb in the relative peace and prosperity of the post-World War II era. The country had just pulled itself out of the Great Depression and defeated a global enemy intent on conquering the world. The war effort also largely destroyed the manufacturing capacity of our main economic competitors, ushering in a few decades of theretofore unknown prosperity and a tremendous growth in the middle class. Taken together, you can see why satisfaction with institutions was high, but perhaps artificially so. In particular, if you look at the full history of our courts, it seems like periods of intense dissatisfaction are at least as prevalent as times of quiet trust.

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[88] Bernie Sanders, *Getting Big Money Out of Politics and Restoring Democracy*, BERNIESANDERS.COM, https://berniesanders.com/issues/money-in-politics/ (last visited July 19, 2018).

Some of the public perception of courts—especially the Supreme Court—is also cyclical and well beyond our control. Over its history, the Court has wandered in and out of trouble and become more or less of a political flashpoint depending on the issues of the day and how involved the Court became. This is *not* to suggest that the Court should choose to go along to keep its approval rating high. Virtually every constitutional expert and the vast majority of Americans are quite satisfied with the Court's decision to tackle desegregation in *Brown v. Board of Education* and later cases, regardless of the cost to the institution in the short term. Many Americans feel the same way about *Obergefell* (gay marriage) or *Heller* (Second Amendment gun rights) or *Citizen's United*.

Even though those decisions have raised the profile of the Court and generated disapproval, supporters have been thrilled, although there are few Americans who were happy about all three of these recent decisions. Therein lies the conundrum—when courts of any level address heated issues, they please some partisans and anger others, so some level of dissatisfaction is just a cost of doing business. We certainly do not want our courts to operate primarily on the basis of pleasing the most people or of avoiding all cases that might anger others.

If some of the critique of courts is based upon populism, it might also be a good idea to have the courts look slightly less elite. In 2012, I studied the backgrounds of every Supreme Court Justice from John Jay to the present.[89] The study showed that the current Court is obviously more diverse in terms of gender and race. But the Court is much less diverse in terms of educational and professional backgrounds: today's Justices come from the most elite

[89] See Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137-1187 (2012); Benjamin H. Barton & Emily Moran, *Measuring Diversity on the Supreme Court with Biodiversity Statistics*, 10 J. EMPIRICAL L. STUD. 1-34 (2013).

background possible, from elite undergraduate degrees to law school at Harvard or Yale, to a fancy clerkship, and other elite professional backgrounds. Judges of all stripes tend to come from more elite backgrounds. Readers may consider this a triumph of meritocracy, and appropriate for the Supreme Court and all courts. Yet a less elite judiciary might be less of a lightning rod and might better understand the concerns of ordinary Americans.

We should also remember to be proud of the sturdiness of our courts, even in a time of political roil. Without discussing the merits at all, note that when courts enjoined the executive order suspending the Deferred Action for Childhood Actors (DACA) program or when courts ordered the reunification of children separated from their parents at the US border, opponents complained loudly, but the White House and the rest of the executive branch followed the court orders and waited on appeals courts to iron the issues out.[90] It would be better if the rhetoric was toned down, but just the fact that court orders were followed and legal processes were allowed to run their course is cause for cheer. Remember that when faced with a similar choice, President Jackson allegedly refused to enforce a Supreme Court decision he abhorred, so progress has been made.

Further, in comparison to the Supreme Court, perception of our local courts is more within our control, and, frankly, insofar as disapproval is based upon inefficiency or resistance to change, those critiques are fairer. For time immemorial, Americans have worried about the efficiency and fairness of our court system. Consider Roscoe Pound's famous 1906 speech to the

[90] For DACA *see* Dan Mangan & Christina Wilkie, *Immigration Officials Will Keep Processing DACA Renewals Because of Court Injunctions*, MSNBC.COM, March 8, 2018, https://www.cnbc.com/2018/03/07/us-immigration-officials-will-keep-processing-daca-renewals.html. For the reunification order, *see* Alene Tchekmedyian & Kristina Davis, *California Federal Judge Orders Separated Children Reunited with Parents Within 30 Days*, L.A. TIMES, June 27, 2018, http://www.latimes.com/local/lanow/la-me-judge-immigration-20180626-story.html.

American Bar Association, "The Causes of Popular Dissatisfaction with the Administration of Justice," which notes American irritation with lengthy and contentious court procedures more than one hundred years ago.[91] Recent IAALS surveys have found that this concern remains prevalent, and that survey recipients are very interested in technological and procedural fixes to this problem.[92]

Here the data supports my strong personal preference for courts of all stripes, from local traffic court to appellate courts, to rethink and revamp their policies, procedures, and technology around serving the unrepresented and simplifying and hastening case resolution. IAALS's outstanding Court Compass project report lists many of these promising approaches.[93] This is the one part of the problem we have the most power to address, and the solutions are right in front of us. We may never be able to address the sense that courts favor the rich over the poor or that politics play an unfortunate role in justice, but you would hope that addressing known inefficiencies would be a winning bipartisan strategy.

Last, and most importantly, we should remember to grade public perception of our courts on a curve. American courts are probably the most powerful in the world, and they have been since our founding. Almost 200 years ago, de Tocqueville noted that "[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one."[94] American courts and legal processes are still called upon to settle some of the country's most sensitive and divisive issues. In a pluralistic melting pot, we need courts and law to carry a heavier load here than in more homogenous countries. Under these circumstances, courts are bound to be a

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[91] ROSCOE POUND, THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE (1906), *available at* https://law.unl.edu/RoscoePound.pdf.
[92] IAALS, *supra* note 23.
[93] ID.
[94] DE TOCQUEVILLE, *supra* note 19, at 315.

lightning rod. And yet here we find ourselves, in the world's longest continuously running democracy, with a court system that creaks under pressure but still largely gets the job done.