An "Intellectual Feast" of Decidedly Dubious Distinction

An Earth Manifesto publication by Dr. Tiffany B. Twain
July 12, 2022

This essay investigates the Great Debate that is taking place right now between Supreme Court conservatives and liberals, and between factions within the broader public, about proper rulings in the judiciary and lawmaking in Congress and the Executive branch of the federal government, and between state governments and the federal government.

Supreme Court conservatives are single-mindedly focused on wielding power imperially, arguing from a retrograde "originalist" standpoint of using technicalities and basically espousing Anti-Federalist doctrines. The debate today is egregiously skewed, so it is illuminating to look back and see that two centuries ago a similar debate between Federalists and Anti-Federalists took place that was much healthier, and compromises were made in the interests of the common good so that the framers of the U.S. Constitution were able to create a powerful and adequately flexible document that would be able to endure for centuries.

Today, however, the debate is despotically influenced by unelected Supreme Court conservatives, most of them appointed by presidents who lost the popular vote. Today, these eminences are ruling in egregiously partisan ways, and selfishly focusing on controlling the populace and giving ever more power and privileges to conservatives to wield domineering dominion over the masses.

Conservatives should remember our American history and tradition of loving liberties and independence. We all have in our DNA a propensity inherited from our colonial ancestors to have an antipathy to being ruled by an imperious King and those in his authority-abusing mercantile empire regime.

Historical Context

Our colonial ancestors courageously declared independence from exploitive British rule 246 years ago on July 4, 1776. Soon thereafter, Articles of Confederation serving as the first American frame of government were approved on November 15, 1777, after much debate by the Second Continental Congress, and they came into force on March 1, 1781, after the Articles had been ratified by all the original 13 states.

The Articles established a weak central government that was given only those powers which the former colonies had recognized as belonging to king and parliament, and they had a guiding principle to establish and preserve the independence and sovereignty of the states. They did not provide for an executive branch -- no President or administrative agencies -- or a federal judiciary to adjudicate conflicts between state courts. The central government was also weak because it had no authority to raise revenues, so it had no money to fund an army or navy, and even had a hard time running the post office.

The Confederation Congress attempted to govern the continually growing U.S. states, but its delegates discovered that the limitations placed upon the central government (such as in assembling delegates, raising funds and regulating commerce) rendered it ineffective. As the government's weaknesses became apparent, especially after an armed uprising against the government known as Shays' Rebellion, some prominent political thinkers in the fledgling union began asking for changes to the Articles. Their hope was to create a stronger government. Initially, in September 1786, some states met to address interstate protectionist barriers between them. Shortly

thereafter, as more states became interested in meeting to revise the Articles, a meeting was set in Philadelphia on May 25, 1787. This became the Constitutional Convention. Delegates quickly agreed that the defects of the frame of government could not be remedied by altering the Articles, and so went beyond their mandate by striving to replace it with a new constitution.

An intense intellectual battle ensued, and it was informed by arguments made for ratifying the new U.S. Constitution by American Patriots that included James Madison and Alexander Hamilton in the Federalist Papers. An opposing faction argued in a series of Anti-Federalist Papers against the new Constitution.

But the weakness of the Articles of Incorporation had become so manifest that a required supermajority finally agreed to a new Constitution that strengthened the federal government, and also strengthened protections of people and created a separation of powers by establishing good checks and balances between branches of government, and provided for reform, accountability, and fighting corruption and safeguarding against despotism.

Thomas Paine inspired Americans with his sentiments like "These are the times that try men's souls", and "We have it in our power to begin the world over again."

I like to think this is true, but today, with unelected and unaccountable reactionaries on the Supreme Court now emboldened to make twisted rationalizations for overturning long-standing legal precedents -- and with the legislative branch of the federal government being dysfunctional and almost incapable of passing fair laws to deal with big issues like economic inequality, women's rights and climate change -- our crippled democracy seems to be faltering. Finding effective ways to alter this retrogressive course is practically impossible, even though it is highly desirable for our representatives to help ensure that our national slide toward despotism and undemocratic authoritarian minority rule will be arrested.

The Republican Party is becoming radically opposed to democratic fairness, honesty and the common good, and to majoritarian democracy itself. In fact, it is becoming anti-republican in the sense that it is standing against a fair balance between executive, legislative and judicial branches of the federal government, and between federal and state governments. It is also standing against fair governance by the majority, and against respecting the reasonable rights of minority groups.

Aggressive actions by unaccountable conservative judges on the Supreme Court -- like overturning *Roe v. Wade* -- is causing the United States to lurch toward authoritarian rule. These Eminences are brashly violating the separation of church and state, barbarously taking away women's rights, endangering public safety, and diminishing the ability of the federal government to govern fairly, sensibly, wisely and in the best interests of the citizenry. It is clear that over the years the Supreme Court has become yet another partisan institution, and one that is unacceptably unaccountable to the American people.

These Supreme Court "conservatives" are revealing themselves to be brutishly reactionary authoritarians, making rulings using twisted ideological rationalizations for political actions consistent with their anti-democratic judicial activism. Remember, as historian Gordon Wood said, the Founders were radicals for their time, not conservatives.

Justice Samuel Alito wrote in his imperious ruling eviscerating abortion rights, "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives." He quoted the late Justice Antonin Scalia, who wrote: "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." This, Alito wrote, "is what the Constitution and the rule of law demand."

That rationale is cynicism on steroids, given that the reasons red states are dominated by overly conservative lawmakers and government officials is due the highly corrupting influence of Big Money unleashed by undemocratic rulings of unaccountable judges. Moreover, this political domination is compounded by the Supreme Court's contributing to radicalizing polarization of the populace that is being caused by unfairly discriminatory gerrymandering and a whole litany of perverse influences of influence peddling schemes, restrictive voting rights, media manipulation, social media distortions, the power of demagogic rhetoric and deceitful propaganda, and a host of structural inequities like representation in the U.S. Senate giving outlandishly excessive and democratically unfair

power to states with small populations, as well as having the supermajority procedural rule of the filibuster in place that hinders rule-making by the majority.

Harvard law professor Alan Dershowitz points out that the fact of the matter is that "the current conservative majority is anything but conservative. It is a judicially activist majority comprised of justices with agendas. They decide cases more broadly than necessary, and they render decisions depriving the other branches of government of their legitimate powers."

The politicization of the judiciary has become extreme since Mitch McConnell and Trump Republicans managed to get three anti-abortion judges appointed to the high court between 2017 and 2021. These judges were chosen by the right-wing Federalist Society specifically for their intellectual deviousness in rationalizing anti-progressive "originalist" interpretations of the Constitution, and for their shrewd opposition to the right for women who have gotten pregnant to choose to safely and legally terminate an unwanted pregnancy.

Religious conservatives dominate the Supreme Court due to hyper politicized partisanship that began during confirmation hearings for Robert Bork, a prominent judge that Ronald Reagan nominated to the Supreme Court back in 1987. Bork's attempt to get confirmed to a lifelong position on the Court faltered when he was too candid in answering questions concerning the views he held that would influence his hoped-for tenure on the high court, because he declared he looked forward to an "intellectual feast" in serving on the court.

This intellectual feast, it turns out, is much more like a "Great Barbecue". This is the term that the historian Vernon Parrington called inequities in 1927 when he referred to Gilded Age giveaways. "Congress had rich gifts to bestow -- in lands, tariffs, subsidies, favors of all sorts, and when influential citizens made their wishes known to the reigning statesmen, the sympathetic politicians were quick to turn the government into the fairy godmother the voters wanted it to be. A huge barbecue was spread to which all presumably were invited."

Yes, all were supposedly invited, but "not quite all, to be sure; inconspicuous persons, those at home on the farm or at work in the mills and offices were overlooked; a good many indeed out of the total number of the American people. But all the important persons, leading bankers and promoters and business men, received invitations."

"One hundred years later, in the 1980s, the next course was served by the Reagan Revolution. As Contributing Editor Cally Carswell reports, Reagan's pick to head the Environmental Protection Agency, Anne Gorsuch (the mother of Neil Gorsuch, Donald Trump's first Supreme Court appointee) led the charge to slash her own agency's budget and relax pollution standards. Scott Pruitt, the Trump administration's first EPA administrator, staked out an eerily similar path."

"As the Trump administration scuttled regulations on everything from the oil and gas industry to drug manufacturers and bankers, and pushed a budget that would bloat the military while starving programs designed to help people and the environment, it is clear that the Great Barbecue never really ended. Many of our fellow citizens are still eagerly begging for scraps."

<u>Supreme Court Shenanigans</u>

The PBS flagship investigative journalism series Frontline did a documentary in 2020 about the takeover of the Supreme Court by conservatives. Titled *Supreme Revenge: Battle for the Courts,* it tells the story of the decades-long judicial wars that ramped up after Robert Bork was nominated to replaced Lewis Powell upon his announced retirement in 1987. Because of his tone-deaf comment about looking forward to an "intellectual feast" on the high court, he was "borked" out of contention.

In retaliation, Mitch McConnell vowed to wreak vengeance, and he got his first chance when the liberal Justice Thurgood Marshall, a Black man, retired in 1991 after 24 years of praiseworthy service on the high court. McConnell and his Republican colleagues pushed through a Black man to replace him, Clarence Thomas, whose judicial philosophies were antagonistically antithetical to those held by Thurgood Marshall.

This drastic switch of a conservative judge to replace a liberal judge was echoed even more drastically in October 2020, when the great champion of women's rights Ruth Bader Ginsburg was replaced in highly rushed confirmation

hearings less than two weeks before the 2020 election by a religious fundamentalist, Amy Coney Barrett.

In 2017, after Mitch McConnell had denied President Obama his constitutional right to replace Antonin Scalia on the Supreme Court for almost a year (Scalia had died in mid February 2016), Republicans put Neil Gorsuch on the court. And then the hearings for Brett Kavanaugh became another hyper partisan battle, and partisanship obviously was reigning supreme. "More than any of the other fights, the Kavanaugh nomination hearings really ended up tarnishing the Court's reputation as an apolitical institution. What seemed like a sort of shocking freak occurrence when it happened with Bork, now seems like a fait accompli with Kavanaugh. He now is up there on the bench and everybody assumes it's only because of politics."

What is really tarnishing the Court's reputation as an apolitical institution is the subsequent outrageous overturning of established precedents along partisan political lines.

The politics of destruction in confirmation hearings has come home to roost, and unfortunately Trump and McConnell Republicans are especially skilled at smearing others and using character assassination to get elected and do the unscrupulous bidding of the Big Money interests that support them.

With what Ellie Mystal called "the worst Supreme Court term almost ever" that ended on June 30, House Speaker Nancy Pelosi acknowledged in a letter to Democrats, "It is clear that the path forward will depend on the outcome of the upcoming midterm elections."

"The contrast between our parties could not be clearer: while Democrats are the party of freedom and safety, Republicans are the party of punishment and control," she said. "We must 'Remember in November' that the rights of women, and indeed all Americans, are on the ballot."

President Joe Biden confirmed this fact, noting "This fall *Roe* is on the ballot. Personal freedoms are on the ballot. The right to privacy, liberty, equality, they're all on the ballot." Biden called the court's action the "realization of extreme ideology."

But unfortunately, Republican may have the inside track right now on regaining control of the House and the U.S. Senate. This is because of their success in hyping up anger about inflation while sabotaging efforts to deal with it, along with their efforts to inflame emotions over hot button social issues, and their fear-mongering efforts and resentment-stoking attack ads funded by libertarian billionaires, right-wing front groups, dishonest politicians and white supremacist MAGA zealots. Their propaganda is aimed at convincing voters to look the other way from issues of fairness and reproductive rights, and to ignore the crucial importance of such issues, and instead to give right-wing politicians and their puppet masters more power to achieve their agenda, which prominently includes giving more tax breaks to the rich and depriving women of their natural human rights to have agency and self-determination in their lives.

The ruling by Supreme Court conservatives to take away a constitutional right that has been guaranteed to women for almost 50 years will spell financial disaster for many women, "particularly those who already have the fewest resources, economists and other experts say." "I see chaos," says Leila Abolfazli, director of federal reproductive rights at the National Women's Law Center, which filed an amicus brief in the case supporting the right to abortion. "I see economic security chaos, legal chaos, fear, betrayal."

Over 150 economists had filed an amicus brief with the court in the Mississippi case that led to the Supreme Court overturning Roe. These economists highlighted decades of economic research that clearly demonstrates the causal connections between abortion access and women's economic opportunities.

The research shows how abortion access "profoundly" affects women's financial lives by determining when and under what conditions they become mothers, said Caitlin Myers, economics professor at Middlebury College and a signatory of the amicus brief.

"Legalizing abortion in the 1970s gave women more control over those conditions. The benefits have been far-reaching: abortion access leads to fewer teen pregnancies, which has 'ripple effects' throughout the rest of the woman's life, says Meyers. Women's education levels, labor force participation, and future earnings all increase, as

Treasury Secretary Janet Yellen recently noted during a Congressional hearing. Teen marriage also falls, as does infant mortality."

These are reasons that forcing women to have unwanted children is an outrage against fairness, justice and sanity. These are powerful reasons why this ruling is an abominable decision. Many more good reasons are adduced in my essay, *Women's Rights: Let Freedom Ring – Honestly!*

To remedy these wrongs, Congress must pass legislation along the lines of the proposed Women's Health Protection Act to preserve access to abortion nationwide, and especially to prevent unjust discrimination against women of color and the poor.

The Intellectual Feast of Insurrectionist Ginni Thomas' Husband and His Originalist Co-Conspirators

Historian Heather Cox Richardson wrote on June 24, 2022: "At yesterday's hearing of the House Select Committee to Investigate the January 6th Attack on the U.S. Capitol, we heard overwhelming proof that former president Trump and his congressional supporters tried to overturn the will of the voters in the 2020 presidential election and steal control of our country to keep a minority in power."

"Today, thanks to three justices nominated by Trump, the Supreme Court stripped a constitutional right from the American people, a right we have enjoyed for almost 50 years, a right that is considered a fundamental human right in most liberal democracies, and a right they had indicated they would protect because it was settled law." … "For the first time in our history, rather than conveying rights, the court has explicitly taken a constitutional right away from the American people."

"These two extraordinary events are related. The current-day Republican Party has abandoned the idea of a democracy in which a majority of the people elects their government. Instead, its members have embraced minority rule."

Judges perversely engaged in intellectual subterfuge to deceive U.S. Senators in order to get lifelong positions on the Supreme Court, and they are now revealing themselves to be traitors against unity, justice, domestic tranquility, public security, the general welfare and the broadly inclusive blessings of liberty. They had all wheedled their way onto the Supreme Court with the support of right-wing Big Money, and now they are making polarizing and arrogantly partisan political rulings that overturn long-standing precedents in order to disadvantage women and racial minorities in favor of white males, corporate overlords, and fundamentalist Christian dominionists. This is a betrayal of the common good, and cannot be allowed to prevail.

Thomas, Alito, Roberts, Gorsuch, Kavanaugh and Barrett are showing their true colors by making retrograde rationalizations for ossified originalist interpretations of the U.S. Constitution. They are haughtily overturning long-established fair-minded precedents in order to push the perverse far right political agenda that they were chosen by the diabolical old man Mitch McConnell to pursue.

Let's look to a vastly more honorable person, Birch Bayh, who was a long-serving Senator from Indiana from 1963 to 1981. He had became Chairman of the Subcommittee on Constitutional Amendments shortly after entering the Senate, and in that role he authored two constitutional amendments: the Twenty-fifth -- which establishes procedures for an orderly transition of power in the case of the death, disability, or resignation of the President of the United States -- and the Twenty-sixth, which lowered the voting age to 18 throughout the United States. He is the first person since James Madison and only non-Founding Father to have authored more than one constitutional amendment. He also made extraordinarily efforts to ratify the Equal Rights Amendment and eliminate the Electoral College, both changes that are desperately needed in the world today. Unfortunately, influence-abusing conservatives are staunchly blocking such eminently fair reforms.

Birch Bayh also authored Title IX of the Higher Education Act of 1965, which bans gender discrimination in higher education institutions that receive federal funding.

Now religious reactionaries are telling women that they do not have any choice, and must remain barefoot and pregnant rather than making any other choice once they have been impregnated by any man, no matter what the

circumstances.

It makes me think of the story long ago in the 1860s, when highwaymen in the Nevada Territory accosted Mark Twain in a stagecoach and robbed him and his fellow passengers, imperiously ordering them to "Stand and deliver!"

On June 24, 2022, in the worst heist in American history, Republican religious fundamentalists put down the law for women, and arrogantly ordered them to "Lay down subserviently and deliver!"

There is a deep level of deceit in the conservatives' intellectual originalism arguments and their contention that "gee, we're not being either pro-life or pro-choice, we're merely letting individual states decide the issue of women's rights." Red states, of course, tend to be governed by anti-choice politicians that have gained domineering power by a confluence of excessive influence of Big Money, discriminatory voter restrictions, contorted gerrymandering and excessive influence of fundamentalist religious reactionaries.

Think about this latter influence. There is an unholy alliance in the U.S. between political conservatives and right-wing factions in Christian churches.

Every established religion has its own range of beliefs within its congregations from the ultra conservative to the ultra liberal, and as with politics, the extreme conservatives demand that they exert domineering control and be able to wield dominating authority, even though that power is antithetical to the moral tenets espoused by their savior Jesus Christ.

Today's originalist intellectual arguments are technicalities that conceal a reactionary agenda to keep the U.S. Constitution and American Society from progressing.

A Dangerous New Attempt to Subvert Democracy

Supreme Court Republicans are gunning to further sabotage American democracy by taking up a case that could give gerrymandered state legislatures supreme power by torpedoing the ability of state supreme courts and state constitutions to protect the populace from the evil designs of unfairly rigged legislatures. Here's the story.

As the Supreme Court ended its term on June 30, 2022, it agreed to hear the case *Moore v. Harper*, in which right-wing plaintiffs argue that the North Carolina Supreme Court did not have the jurisdiction to strike down gerrymandered maps that gave the GOP undue advantage in state elections. If the Supreme Court rules for the plaintiffs, as they are demonstrating a likelihood to do, it could undermine the democratic process and empower partisan politicians to draw gerrymandered election maps, no matter how unfair, discriminatory and polarizing, without recourse for those opposed to such injustices.

In this case, Republicans are pushing a dubious legal theory that could have drastic consequences for elections. As the Brennan Center for Justice makes clear in *The 'Independent State Legislature Theory,' Explained,* "Long relegated to the fringe of election law, the theory will soon be front and center before the Supreme Court, which has agreed to hear a case concerning the North Carolina congressional maps in the fall. If the Supreme Court were to adopt the theory, it would radically change our elections."

"There's a thread that links the partisan gerrymandering of congressional maps in North Carolina, attempts to dissolve the Wisconsin Election Commission, and efforts to overthrow the 2020 presidential election in Pennsylvania and elsewhere. In each case, the participants have invoked a dubious interpretation of the Constitution called the 'independent state legislature theory.'"

This theory "is a reading of the Constitution, pushed in recent years by a small group of advocates, that would give state legislatures wide authority to gerrymander electoral maps and pass voter suppression laws. It has even been used as political cover to try to overturn elections."

Proponents of this theory insist that the Elections Clause in the U.S. Constitution gives state legislatures exclusive and near-absolute power to regulate federal elections. If the Supreme Court holds this to be the case, as they may wrongly do in their zeal to give gerrymandered state legislatures more power for partisan political advantages, the

result would be "that when it comes to federal elections, legislators would be free to violate state constitutions -- and state courts couldn't stop them."

Since this case could fundamentally change how elections are run in the U.S., Rep. Alexandria Ocasio-Cortez of New York sounded the alarm about extremist justices' apparent intentions to stage a "judicial coup." She said that it is time for political leaders to take decisive actions to stop the far right Supreme Court from further eroding Americans' rights.

The Supreme Court could rule in the *Moore v. Harper* case that state legislatures alone have the power to set election rules, even if their laws violate state constitutions.

"The case comes from North Carolina, where the state supreme court rejected a dramatically partisan gerrymander. Republicans say that the state court cannot stop the legislature's carving up of the state because of the 'independent state legislatures doctrine.' This is a new idea, based on the clause in the U.S. Constitution providing that 'the times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by Law make or alter such Regulations.' Those adhering to the independent state legislature theory ignore the second part of that provision."

"Until now, states have interpreted 'legislatures' to mean the state's general lawmaking processes, which include shared power and checks and balances among the three branches of state government. Now, a radical minority insists that a legislature is a legislature alone, unchecked by state courts or state constitutions that prohibit gerrymandering. This interpretation of the Constitution is radical and new. It caught on in 2015, when Republicans wanted to get rid of an independent redistricting commission in Arizona."

"This doctrine is, of course, what Trump and his allies pushed for to keep him in power in 2020: Republican state legislatures throwing out the will of the people and sending electors for Trump to Congress rather than the Biden electors the majority voted for."

"That doctrine would also give to state legislatures the power to control who can vote, and how and where they can do so. It would strip power from elections commissions and secretaries of state, and it would take from state courts the power to challenge gerrymandering or voter suppression. Republicans currently control 30 state legislatures, in large part thanks to the gerrymandering and voter suppression in place in a number of those states."

"Revered conservative judge J. Michael Luttig has been trying for months to sound the alarm that this doctrine is a blueprint for Republicans to steal the 2024 election. In April, before the court agreed to take on the *Moore v. Harper* case, he wrote: 'Trump and the Republicans can only be stopped from stealing the 2024 election at this point if the Supreme Court rejects the independent state legislature doctrine (thus allowing state court enforcement of state constitutional limitations on legislatively enacted election rules and elector appointments) and Congress amends the Electoral Count Act to constrain Congress' own power to reject state electoral votes and decide the presidency.'"

"And yet in March, when the Supreme Court let the state supreme court's decision against the radical map stay in place for 2022, Justices Samuel Alito, Neil Gorsuch, Clarence Thomas and Brett Kavanaugh indicated they are open to the idea that state courts have no role in overseeing the rules for federal elections."

"In the one term Trump's three justices have been on the court, they have decimated the legal landscape under which we have lived for generations, slashing power from the federal government, where Congress represents the majority, and returning it to states, where a Republican minority can impose its will. Thanks to the skewing of our electoral system, those states are now poised to take control of our federal government permanently."

Some 35 years ago, "when President Ronald Reagan nominated originalist Robert Bork for the Supreme Court, Senator Edward Kennedy recognized his legal theory for what it was: an unraveling of the modern United States."

"Kennedy said: 'Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of

government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.'"

"America is a better and freer nation than Robert Bork thinks," Kennedy said. And yet, here we are."

Another Instance of Supreme Court Treachery

In another stark instance of political partisanship, the Supreme Court made a late-day ruling on June 30 that reinstated a vote-suppressing redistricting map in Louisiana after multiple lower courts had blocked it due to concerns of racial bias.

"This is a painful loss that will have repercussions very soon in a case focused on Alabama, and will certainly be used by vote-suppressing state legislators in other states like Florida, Georgia, Texas and more. We have to fight back against the opponents of voting rights in state capitols nationwide to protect our right to vote!"

Opponents of voting rights have used the tried and true tactic of gerrymandering minority voters for many decades. And conservatives on the current activist, ideologically motivated court are not only blessing extremely partisan gerrymanders that favor Republicans, but they are also doing everything they can to reverse the entirety of the original Voting Rights Act and remove many of the voter protections that people have been fighting for since the days of discriminatory Jim Crow laws. Our democracy is at stake, and we must come together to strengthen voting rights for all Americans, and to encourage all qualified citizens to vote.

More Supreme Court Treachery

In a clean-sweep of dirty wrongheaded decisions in its term ending June 30, Supreme Court conservatives ruled to curb the authority of the Environmental Protection Agency to address climate change and protect the environment.

The decision was a blow to the Environmental Protection Agency's powers under the Clean Air Act to regulate carbon emissions from power plants. It thus undermines the ability of the government to effectively govern in the interests of the greater good rather than the narrow interests of profiteers intent on foisting externalized costs and harms onto society.

In dissent, the court's three liberal justices wrote that the majority had stripped the E.P.A. of "the power to respond to the most pressing environmental challenge of our time." Writing for the dissenters, Justice Elena Kagan, said: "The Court appoints itself -- instead of Congress or the expert agency -- the decision-maker on climate policy. I cannot think of many things more frightening."

In a statement, a White House spokesman called the ruling "another devastating decision from the court that aims to take our country backwards."

"Our lawyers will study the ruling carefully, and we will find ways to move forward under federal law," Abdullah Hasan said. "At the same time, Congress must also act to accelerate America's path to a clean, healthy, secure energy future."

Richard Lazarus, a Harvard environmental law professor, said in a statement that by insisting that an agency "can promulgate an important and significant climate rule only by showing 'clear congressional authorization' at a time when the Court knows that Congress is effectively dysfunctional, the Court threatens to upend the national government's ability to safeguard the public health and welfare at the very moment when the United States, and all nations, are facing our greatest environmental challenge of all: climate change."

The ruling "was the product of a coordinated, multiyear strategy by Republican attorneys general, conservative legal activists and their funders to use the judicial system to rewrite environmental law, weakening the executive branch's ability to tackle global warming."

Congress has been gridlocked on climate legislation and that lack of action by lawmakers is a dangerous impasse that has increased the need for the federal government to rely on regulations to lower United States greenhouse gas emissions. The Supreme Court has now sided with conservatives and big corporations to block needed action.

The extremists on the Supreme Court value industry's desire for no regulation more than they care about people's freedom from pollution and responsible efforts to fight climate change.

The ruling to drastically diminish the authority of the EPA to deal with climate action may be a reasonable decision in that Congress should rightly have the primary responsibility for such action. But Congress has become so politicized and corrupted by corporate Big Money that it is incapable of taking responsible action. Now that the judiciary has been illegitimately stacked with far right partisans who are not willing to defend voting rights and citizens in racial minorities from discriminatory gerrymandering, unelected and lifelong unaccountable judges are usurping power to side against responsible action.

"The court's decision sharply curtails the EPA's authority to set carbon emissions standards from the power sector. Power plants are the second-largest source of US carbon emissions today, so those regulations are *critical* to our nation's efforts to tackle climate change (and we're already behind where the science shows we need to be). It also sets a dangerous precedent that could limit the ability of federal agencies to incorporate the latest science into many public safeguards."

The petitioners who brought this case include state-level political officials and coal companies who are single-mindedly determined to block climate action and perpetuate fossil fuel dependence to serve their narrow political or business interests.

Historian Heather Cox Richardson wrote about the extremist ruling by Supreme Court conservatives in her daily opinion column on June 30, 2022: "Today, the court's decision in *West Virginia v. Environmental Protection Agency* reversed almost 100 years of jurisprudence by arguing that Congress cannot delegate authority on 'major questions' to agencies in the executive branch. At stake were EPA regulations that would push fossil fuel producers toward clean energy in order to combat climate change. The vote was 6 to 3, along ideological lines. That the court agreed to hear the case despite the fact that the rules being challenged had been abandoned suggested they were determined to make a point."

"That point was to hamstring federal regulation of business. The argument at the heart of this decision is called the 'nondelegation doctrine,' which says that Congress, which constitutes the legislative branch of the government, cannot delegate legislative authority to the executive branch. Most of the regulatory bodies in our government are housed in the executive branch. So the nondelegation doctrine would hamstring the modern regulatory state."

"To avoid this extreme conclusion, the majority on the court embraced the 'major questions' doctrine, which Chief Justice Roberts used today for the first time in a majority opinion."

"That doctrine says that Congress must not delegate 'major' issues to an agency, saying that such major issues must be explicitly authorized by Congress. But the abuse of the Senate filibuster by Republican senators means that no such laws stand a hope of passing. So the Supreme Court has essentially stopped the federal government from responding as effectively as it must to climate change. And that will have international repercussions: the inability of the U.S. government to address the crisis means that other countries will likely fall behind as well. The decision will likely apply not just to the EPA, but to a whole host of business regulations."

The specific ruling in *West Virginia v. EPA* was actually fortunately quite narrow, but by endorsing a legal doctrine about major questions, it could provide ammunition for opponents of a vast swath of government regulations in the future, and severely hamper the ability of the executive branch to enforce regulatory laws. The major questions doctrine is both vague and powerful; in future cases, it could be used to hobble the ability of federal agencies to interpret statutes and write commonsense regulations to protect public health or the environment. In her dissent, Justice Kagan argued that "special canons like the 'major questions doctrine' magically appear" when it aligns with the court's broader goals.

"Kagan's dissent noted the hypocrisy of the Republican justices claiming to be originalists when they are, in fact, inventing new doctrines to achieve the ends they wish. 'The current Court is textualist only when being so suits it,' she wrote. 'When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards. Today, one of those broader goals makes itself clear: Prevent

agencies from doing important work, even though that is what Congress directed."

Justice Kagan argued that Congress had, in fact, properly given authority to the EPA to act, recognizing that agencies need to be able to respond appropriately to new and big problems. 'Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues -- even significant ones -- as and when they arise.' She noted that 'the Clean Air Act was major legislation, designed to deal with a major public policy issue.' 'This is not the Attorney General regulating medical care, or even the CDC regulating landlord-tenant relations. It is EPA (that's the Environmental Protection Agency, in case the majority forgot) acting to address the greatest environmental challenge of our time. "

Senate minority leader Mitch McConnell (R-KY) applauded the ruling, saying it limited the power of "unelected, unaccountable bureaucrats." As if Supreme Court Justices themselves are not unelected and unaccountable!

The prominent environmentalist and climate activist Bill McKibben observed in his article *The Supreme Court Tries to Overrule the Climate - A destructive decision in West Virginia v. E.P.A.* that the ruling in this case "is the culmination of a five-decade effort to make sure that the federal government won't threaten the business status quo. Lewis Powell's famous memo, written in 1971, before he joined the Supreme Court -- between the enactment of a strong Clean Air Act and a strong Clean Water Act, each with huge popular support -- called on 'businessmen' to stand up to the tide of voices 'from the college campus, the pulpit, the media, the intellectual and literary journals, the arts and sciences, and from politicians' calling for progressive change. He outlined a plan for slowly rebuilding the power of industrial elites, almost all the elements of which were taken up by conservative movements over subsequent years: monitoring textbooks and TV stations, attacking left-wing faculty at universities, even building a publishing industry. ('The news stands -- at airports, drugstores, and elsewhere -- are filled with paperback and pamphlets advocating everything from revolution to erotic free love. One finds almost no attractive, well-written paperbacks or pamphlets on 'our side,' Powell wrote, but he was able to imagine a day when the likes of Ann Coulter or Sean Hannity would reliably top the best-seller lists.)"

"Fatefully, he also wrote: 'American business and the enterprise system have been affected as much by the courts as by the executive and legislative branches of government. Under our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change.' At the time he was writing, the 'activist' court was standing up for things that most Americans wanted, such as clean air and water -- and the right of women to control their own bodies. But the Supreme Court, and hence the judiciary, has now come under the control of the kind of men that Powell envisioned -- he may not have envisioned women on the bench, but Amy Coney Barrett is otherwise his type of judge. And, with this ruling, they have taken more or less total control of Washington's ability to generate policy that might disrupt the status quo."

"In essence, the ruling begins to strip away the power of agencies such as the E.P.A. to enforce policy: instead of allowing federal agencies to enforce, say, the Clean Air Act to clean the air, in this new dispensation, Congress would have to pass regulations that are much more explicit, as each new pollutant came to the fore. As West Virginia's attorney general explained, 'What we're looking to do is to make sure that the right people under our constitutional system make the correct decisions … these agencies, these federal agencies, don't have the ability to act solely on their own without getting a clear statement from Congress. Delegation matters.'"

"But, of course, the Court has also insured that 'getting a clear statement from Congress' to address our deepest problems is essentially impossible. The decision in *Citizens United v. F.E.C.*, in 2010, empowered corporations to game our political system at will. That explains, in part, why Congress has not passed a real climate bill in decades. The efforts that Democratic administrations have made to try and control greenhouse gasses have mostly used provisions of the Clean Air Act because it is the last serious law of its kind that ever came to a President's desk (Nixon's, in this case)."

"And this new jurisprudence would, in turn, make it even harder to achieve any international progress on rising temperatures. If the United States -- historically, the world's largest emitter of carbon -- can't play a serious policy role, it won't play a serious leadership role. John Kerry, Biden's climate envoy, who has been trying to rally the world for more aggressive climate action, is running out of cards to play."

"Given the record flooding in Asia, the record heat in the Mideast, the record fires in the Southwest, and the record rainfall in Yellowstone, there's a nihilist strain to this ruling. Be careful what you wish for: the biggest threat to corporate futures today is not a paperback about 'erotic free love'; it's an out-of-control climate that will undercut financial stability. But the conservative drive to roll back federal power has long since become more ideological than practical; the right-wing luminary Grover Norquist updated Powell's plan for a feistier age, when he said that he wanted to shrink the federal government to a size that he could then 'drown in a bathtub.' But drowning whole communities as the sea level inexorably rises?"

"And what about the large majority of Americans who want action on climate change, and the activist campaigners who have pushed that desire to the fore? Those activists have engaged with good faith over many years in an effort to use the latent power of the federal government to make necessary change, but now that effort seems less and less sensible. There remains an outside hope that the Build Back Better bill might still pick up fifty votes in the Senate before the fall, when Republicans could potentially regain control of Congress; the tax credits for renewable energy it contains would probably pass Supreme Court muster. But beyond that it's hard to see exactly what the point of demanding federal climate action is now; why march on the Capitol or the White House if the Supreme Court won't let elected leaders act even if they want to? And there's no real way to march on the Supreme Court -- it exists outside the ambit of normal politics -- though rulings like this will also raise the pressure to expand the size of the Court, if and when the Democrats have the votes to do so."

"You could also hope that an engaged Federal Reserve might take action -- as Aaron Regunberg pointed out in a recent article, Court precedent (for whatever that's still worth) might give the Fed some latitude. And state legislatures can act, too, though even there the Court may hem in their ability to, say, set mileage restrictions on cars -- in fact, Republican attorneys general from around the country have already filed suit in the D.C. circuit court to do just that. (The D.C. circuit court contains new appointees such as Neomi Rao, who oversaw deregulation efforts in the Trump Administration before he offered her a seat on the bench.) Campaigners will keep trying to win elections, and to write policy, but it took Lewis Powell fifty years to win this fight, and it may take fifty years to win it back -- and we do not have that kind of time in the fight against warming."

"Wall Street may be the only other actor large enough to actually shift the momentum of our climate system. The pressure on banks, asset managers, and insurance companies will increase precisely because the Court has wrenched shut this other spigot. Convincing banks to stop funding Big Oil is probably not the most efficient way to tackle the climate crisis, but, in a country where democratic political options are effectively closed off, it may be the only path left."

<u>History and Tradition -- Really?!</u>

Supreme Court Republicans have been using what they lionize as "history and tradition" in several rulings this year, including those on issues of gun ownership, abortion rights, and the line between church and state.

"In a triumph of originalism -- the interpretive theory most commonly associated with conservatism -- the Supreme Court is increasingly focused on what the country's founders thought constitutional protections meant. Though history and tradition have always been part of the court's analysis when deciding the bounds of constitutional rights, now it is the exclusive mechanism," said Holly Hollman of the Baptist Joint Committee, a faith-based nonprofit focused on religious liberty."

Let's be honest, and see clearly. Contorted "originalist" reasoning is an intellectual feast of treacherously roguish malicious mischief.

Conservatives are really contorting facts and history to spin their narratives and rationalize their rulings. Take it from the brilliant historian Heather Cox Richardson, who in her July 6 edition of *Letters from an American: A newsletter about the history behind today's politics,* makes an eminently convincing point:

"Both the Organization of American Historians and the American Historical Association, the flagship organizations of professional historians in the U.S., along with eight other U.S. historical associations (so far), yesterday issued a joint statement expressing dismay that the six Supreme Court justices in the majority in the *Dobbs v. Jackson*

Women's Health decision that overturned Roe v. Wade ignored the actual history those organizations provided the court and instead 'adopted a flawed interpretation of abortion criminalization that has been pressed by anti-abortion advocates for more than thirty years.' Although the decision mentioned 'history' 67 times, they note, it ignored 'the long legal tradition, extending from the common law to the mid-1800s (and far longer in some states, including Mississippi), of tolerating termination of pregnancy before occurrence of "quickening," the time when a woman first felt fetal movement.'"

"The statement focuses less on politics than on the perversion of history, noting that '[t]hese misrepresentations are now enshrined in a text that becomes authoritative for legal reference and citation in the future,' an undermining of the 'imperative that historical evidence and argument be presented according to high standards of historical scholarship. The Court's majority opinion … does not meet those standards.'"

This supreme failure by Supreme Court conservatives to portray and interpret history honestly reveals how wrong they are in seriously twisting rationales to make their imperious rights-eviscerating and harm-engendering rulings.

Republicans are emulating Vladimir Putin in their coldly-calculating efforts to twist history and historical events as a means of gaining political advantages and rationalizing undemocratic abuses of power.

"Putin was always interested in history from the very beginning of his presidency," said Ivan Kurilla, a professor of history at the European University at St. Petersburg, who studies the political use of history in contemporary Russia. Kurilla said that for a long time he viewed Putin's historical rhetoric as "just instrumental, just a tool." But lately, he's come to see it differently. "When Putin started to explain his Ukrainian war with a long lecture about history, I started to think that actually he's quite serious. He has some weird ideas about the past and about Russian history. And he's trying to find a place for himself in that history."

Let's be fair. Now that the consequential wrongness of the court capture scheme has been so wildly successful as to allow a supermajority of democracy-destroying political hacks in the federal judiciary, the American people must demand restitution. The Supreme Court must be expanded to add four new Justices to make the high court a more respectable institution once again. Accomplish this by passing the Judiciary Act of 2021, as sponsored by Senator Edward Markey of Massachusetts. Also, enact term limits and other reforms to make the court fairer, more inclusive and more adaptive.

<u>Overturning Precedents</u>

Washington Post columnist Dana Milbank wrote in a humorously incisive article, *Et tu, Alito? Murder of stare decisis creates legal circus maximus:* "Respect for precedent -- known by the Latin *stare decisis*, 'to stand by things decided' -- had been a centuries-old cornerstone of the rule of law, necessary so 'the scale of justice' doesn't 'waver with every new judge's opinion,' as the 18th-century legal philosopher William Blackstone wrote."

"But — *et tu*, Alito? — the Supreme Court's radical right put the knife in stare decisis in its decision overturning *Roe v. Wade* and destroying 50 years of precedent upon precedent."

"The dissenting justices wrote that 'the majority abandons stare decisis,' an act that 'threatens to upend bedrock legal doctrines', 'creates profound legal instability' and 'calls into question this Court's commitment to legal principle.'"

"The majority protested that it didn't abandon stare decisis — then explained why it did: 'Stare decisis is not an inexorable command. … Stare decisis is not a straitjacket.'"

"The burial of stare decisis leaves us, ipso facto, with a void: Which Latin phrase best describes the legal doctrine of this new era, in which judges rule by whim, not precedent? Well, thank your lucky stares, because my classics consultant, Vanessa (she asked that her surname not be used in order to speak Latin frankly), has many options."

"Labels such as 'judicial modesty', 'judicial restraint' and 'originalism' were trashed along with stare decisis. For this radical majority to claim 'restraint' now would be the very definition of *stare mendaciis* — to stand by lies. Other better labels for the court majority's new philosophy are *stare deviis* (to stand by inconsistent things), or perhaps *stare fetore* (to stand by a foul odor), in honor of the question Justice Sonia Sotomayor posed during oral

arguments: 'Will this institution survive the stench that this creates?'"

"But maybe most accurate is *stare sodalitate* — to stand by your political party. To the Romans, this meant either 'electioneering gang' or 'religious fraternity,' both apt descriptions of this court's right wing."

"There are other potential principles being thrown about. This week's Jan. 6 committee hearing revealed that President Donald Trump, upon receiving displeasing information (such as his attorney general's refusal to bless his election lies), would hurl his meal at the wall. This would be *stare cibo iacto* — to stand by thrown food (although other scholars use *stare vasis fractis* — to stand by broken dishes)."

"The Republican Party, even now, remains steadfastly loyal to Trump, adhering to something called the Wynette Doctrine, *stare homine tuo* -- stand by your man."

"The court's recent rulings invite many other Latin descriptors: *stare atrocitate* (to stand by cruelty), *stare decuriatione* (to stand by intimidation), *stare deminutione capitis* (to stand by the loss of liberties). But ultimately a court that has abandoned precedent stands for nothing (*stare nullis*) except the raw exercise of power — *stare imperio*. And that leads to one place: *stare ruina*, to stand by destruction.

Historical Perspective

"The Supreme Court did not arrive at this pivotal moment by chance. For decades, ultra-wealthy conservative donors, libertarian think tanks, and their allies within the Republican Party have orchestrated a campaign to thwart the federal government's efforts to regulate corporations — including efforts to regulate greenhouse gas emissions, which threaten the profits of the fossil fuel industry. Over the years, they have paid considerable attention to the judiciary, methodically installing conservative judges in anticipation of a case that could kneecap agencies they view as overstepping their authority."

"The 1970s marked the dawn of a new era of concern about the environment. Americans were growing increasingly alarmed by high pollution levels and environmental destruction. There had just been an enormous oil spill off the coast of Santa Barbara, the Cuyahoga River had caught fire in Cleveland, and a thick layer of smog regularly smothered cities like Los Angeles. Congress responded by drafting the country's bedrock environmental laws: the National Environmental Policy Act, the Clean Air Act of 1970, the Clean Water Act, and the Endangered Species Act -- all passed with bipartisan support."

"The sudden expansion of federal powers galvanized a new, hard-line libertarian movement helmed by an oil executive named Charles Koch. Koch had inherited a handful of companies from his father in 1967, including a lucrative refinery in Minnesota and a network of pipelines, barges, and trucks that shipped oil across the country. Koch was an ardent believer in capitalism and opposed any government action that went beyond the protection of private property. As he built his business into the second largest privately-owned company in the country, he also began building a network of think tanks and nonprofits to infuse his fringe views into the mainstream."

According to investigative journalist Jane Mayer's 2016 book *Dark Money*, which chronicles how conservative billionaires shaped the radical right, Charles Koch and his brother and business partner, David, have personally spent well over $100 million on advancing a libertarian agenda. But even more consequentially, they streamlined the efforts of a small group of like-minded elites towards building what one Koch operative called a "fully integrated network" that has influenced every aspect of the country's political system.

The Federalist Society, a conservative group that has grown into the most powerful legal organization in the country, became a critical node in that network. In 1982, law students at the University of Chicago and Yale formed the group to promote a deeply conservative legal perspective. The organization received start-up funding from the conservative John M. Olin Foundation, began hosting annual symposia and opening chapters at prestigious law schools, and soon attracted large donations from the Kochs and their peers.

At first, the Federalist Society was an all-volunteer group geared mainly towards law students. In the early 1990s, it hired one of its first paid employees, Leonard Leo, who expanded the organization to include lawyers, judges and others. From the early 2000s to 2020, Leo served as the group's executive vice president, overseeing a network of

about 60,000 members. (All six conservative justices on the Supreme Court are associated with the organization.)

The Kochs' network of conservative billionaires hasn't only focused on the judiciary. As they poured money into the Federalist Society, they were also pouring money into deregulation efforts, including many related to climate change. Through the years, Koch- and fossil fuel-backed groups like the Global Climate Coalition, American Energy Alliance, Competitive Enterprise Institute, and American Legislative Exchange Council have lobbied against climate legislation and funded research casting doubt on the science and highlighting the costs of taking action.

But it has long been clear to them that the judiciary would be crucial to eviscerating the government's ability to regulate corporations and to dismantling the administrative state — the government agencies within the executive branch that create and enforce regulations.

The libertarian groups' judicial efforts have been focused on usurping a 1984 Supreme Court precedent known as Chevron deference with a relatively new and controversial legal argument known as the major questions doctrine. Chevron deference says that if Congress has not clearly articulated its intention in a law, courts should defer to an agency's interpretation, as long as that interpretation is reasonable. The idea is that agencies possess expertise that Congress and the courts do not, and that agencies are indirectly accountable to the people through presidential elections.

To the libertarian movement, "Chevron is anathema," said Lisa Graves, a former senior official for the Department of Justice who is now the executive director of True North Research. "For decades now, they have been seeking ways to reverse this precedent, to minimize this precedent."

In its stead, conservatives have put forth the major questions doctrine, which says that in "extraordinary" cases that could have "vast" economic and political consequences, the court can ignore an agency's interpretation of a broad law and prevent it from enacting a regulation unless it receives clearer authority from Congress.

The Supreme Court decided *West Virginia v. EPA* based on this argument. In doing so, it has undermined agencies' ability to enact regulations to respond to new threats to the environment or public health if they lack clear guidance from Congress — which has failed to pass any serious climate legislation or any significant new environmental laws since it last amended the Clean Air Act more than 30 years ago.

"That's radical," said Patrick Parenteau, an environmental lawyer and professor at Vermont Law School. "That's going to have massive implications for environmental law across the board."

While libertarians have long despised administrative agencies' ability to regulate corporations, it took a while for them to build up enough influence on federal courts to begin whittling it away. In 1991, President George H. W. Bush nominated Justice Clarence Thomas, a Federalist Society member who has repeatedly objected to Chevron deference, to the Supreme Court. About a decade and half later, President George W. Bush nominated Justice John Roberts, a former Federalist Society member, and Harriet Miers, who was a family friend but not a member. The organization mobilized against Miers, and eventually Bush nominated Justice Samuel Alito, who had long been affiliated with the Federalist Society, instead. Roberts wrote the majority opinion in *West Virginia v. EPA,* and both Thomas and Alito concurred.

Another major conservative victory came in the mid-2010s, when then-Senate Majority Leader Mitch McConnell — a Republican from Kentucky and a Koch ally — led a stunningly successful effort to prevent President Barack Obama from appointing federal judges and blocked Merrick Garland's nomination to the Supreme Court, which he called "one of my proudest moments." This paved the way for Donald Trump to install more than 200 federal judges, including three Supreme Court justices.

Guiding Trump was Leo, then the executive vice president of the Federalist Society. In March 2016, Leo met with Trump and Donald McGahn, a member of the Federalist Society who later served as President Trump's White House counsel. Leo later gave Trump several lists of potential Supreme Court nominees that the Federalist Society would support, including Justice Neil Gorsuch. The Trump campaign released the lists in an effort to court the Republican base, and in a July 2016 campaign rally in Iowa, Trump said: "If you really like Donald Trump, that's great, but if you

don't, you have to vote for me anyway. You know why? Supreme Court judges." About a year later, Justices Brett Kavanaugh and Amy Coney Barrett appeared on another list of Federalist Society recommendations.

Once Trump was elected, Leo shepherded the nominations of Gorsuch, Kavanaugh, and Barrett through the Senate. According to Internal Revenue Service filings compiled by True North Research, between 2014 and 2020, Leo and his allies raised more than $580 million for conservative nonprofits that do not have to disclose their donors. The network of nonprofits used much of that to hire conservative media relations firms to place opinion essays, schedule pundits on television shows, send speakers to rallies, and create online videos — all to drum up public support and pressure senators to confirm Trump's picks.

Now, decades of coordinated efforts by ultra-wealthy conservative donors, libertarian think tanks, and the Republican Party are all coming to a head. While the Supreme Court's ruling in *West Virginia v. EPA* could have been even more restrictive, it is still a consequential win for fossil fuel interests and a blow to American efforts to address climate change. To Graves, the Supreme Court's new direction amounts to revival of the robber baron era, "when courts put their thumb on the scale to strike down laws sought by people in our democracy in favor of corporations," she said. "You have a Supreme Court that has been captured by special interests."

Things could soon get even more bleak. Republican state attorneys general are pushing several climate-related cases through the federal court system. The courts could use the major questions doctrine to hobble the ability of the government to restrict tailpipe emissions or to consider the carbon when reviewing new infrastructure or environmental rules. Parenteau points out that a proposed rule requiring companies to publicly disclose climate risks is now vulnerable, too.

Congress could act to stem the damage. Senator Elizabeth Warren, a Democrat from Massachusetts, has called on her colleagues to expand the court. "I believe we need to get some confidence back in our court, and that means we need more justices on the United States Supreme Court," she told ABC News. Congress could pass legislation to add more justices, but so far Democratic leadership has not been keen on the idea.

Representative Alexandria Ocasio-Cortez, a Democrat from New York, has argued that the Senate should impeach Gorsuch and Kavanaugh for misleading Congress about their views on Roe v. Wade, another radical ruling handed down by the court last week. "They lied," she told NBC News. "I believe lying under oath is an impeachable offense." Removing justices from the court would require a two-thirds majority in the Senate.

<u>The Great Debate</u>

A great debate over the proper powers of government has been waged ever since the days of our colonial ancestors. Two prominent factions existed back then when the authors of the U.S. Constitution were wrestling with how to create an fair and effective government that would safeguard the people from despotism: Federalists and Anti-Federalists. Federalists were led by Alexander Hamilton, who advocated the importance of a strong federal government in leading the country forward, while opposing voices were expressed by those in the party of Democratic Republicans at the time, which were led by Thomas Jefferson.

Revealing insights into this debate can be found in *The Federalist Papers,* a collection of 85 articles and essays written by Alexander Hamilton, James Madison and John Jay under the collective pseudonym "Publius". They were written and published in newspapers in October 1787 through May 1788 to promote the ratification of the U.S. Constitution just before it was ratified on June 21, 1788. The collection was commonly known as The Federalist until they were designated *The Federalist Papers* in the 20th century.

Since the authors of *The Federalist* intended to influence the voters to ratify the Constitution, they explicitly set that debate in broad political terms in Federalist No. 1: "It has been frequently remarked, that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force."

Remember that both Federalists and Anti-Federalists were intent on trying to ensure that despotism like that

imposed on the colonialists by King George III would be prevented.

In Federalist No. 51, James Madison distills arguments for checks and balances in an essay often quoted for its justification of government as "the greatest of all reflections on human nature."

In opposition, Anti-Federalists also published a series of essays. The *Anti-Federalist Papers* is the collective name given to the works written by the Founding Fathers who were opposed to or concerned with the merits of the U.S. Constitution. They were published starting on September 25, 1787 (eight days after the final draft of the US Constitution) and running through the early 1790s. These Anti-Federalists argued against a stronger and more energetic union as embodied in the new Constitution. "Although less influential than their counterparts in The Federalist Papers, these works nonetheless played an important role in shaping the early American political landscape and in the passage of the United States Bill of Rights."

Understanding this background, it can be clearly understood that healthy debate and deliberation gave us both the great U.S. Constitution and the great Bill of Rights.

Further historical background: "Following its victory against the British in the Revolutionary War, the United States was plagued by a variety of internal problems. The weak central government could not raise taxes to cover war debts and was largely unable to pass legislation. Many early American politicians and thinkers believed that these issues were the result of the Articles of Confederation, the first governing document of the United States. In 1787 a convention gathered in Philadelphia to attempt to amend it. Soon, however, the gathering shifted its focus to constructing a newer and more powerful Constitution for the fledgling country. Two main competing factions emerged, the Federalists and the Anti-Federalists. The former supported a more powerful central government while the latter opposed it."

"During the lengthy and heated national debate following this convention, both groups wrote extensively in favor of their respective positions. The Anti-Federalist papers are a selection of the written arguments against the U.S. Constitution by those known to posterity as the Anti-Federalists. As with the Federalist papers, these essays were originally published in newspapers. The most widely known are a series of sixteen essays published in the *New York Journal* from October 1787 through April 1788 during the same period. The Anti-Federalist essays were appearing in New York newspapers under pseudonyms like 'Brutus'.

The Anti-Federalist papers were written over a number of years by a variety of authors who used pen names to remain anonymous, and debates over authorship continue to this day. Unlike authors of *The Federalist Papers*, written by a group of three men working closely together, the authors of the Anti-Federalist papers were not engaged in an organized project. Thus, in contrast to the pro-Constitution advocates, there was no single collection of Anti-Federalist Papers. The essays were the product of many authors, working individually rather than as a group.

Until the mid-20th century, there was no full compilation of Anti-Federalist papers. The first major collection was put together in 1965 by Morton Borden, a professor at Columbia University. He "collected 85 of the most significant papers and arranged them in an order closely resembling that of the 85 Federalist Papers". The most frequently cited contemporary collection, *The Complete Anti-Federalist*, was compiled by Herbert Storing of the University of Chicago and published in 1981. At seven volumes and including many pamphlets and other materials not previously published in a collection, this work is considered by many to be the authoritative compendium on the publications.

Considering their number and diversity, it is difficult to summarize the contents of the Anti-Federalist papers. Generally speaking they reflected the sentiments of the Anti-Federalists, which Akhil Reed Amar of the Yale Law School generalized as: a localist fear of a powerful central government, a belief in the necessity of direct citizen participation in democracy, and a distrust of wealthy merchants and industrialists. Essays with titles such as "A Dangerous Plan of Benefit Only to The 'Aristocratick Combination'" and "New Constitution Creates a National Government; Will Not Abate Foreign Influence; Dangers of Civil War And Despotism" fill the collection, and reflect the strong feelings of the authors.

On June 21, 1788, the proposed Constitution was ratified by the minimum of nine states required under Article VII.

Towards the end of July 1788, with eleven states having ratified the new Constitution, the process of organizing the new government began.

Noam Chomsky, a Brilliant Intellectual

Here is fascinating perspective contained in a June 30 article in Truthout by C.J. Polychroniou that is titled *Chomsky: Overturn of "Roe" Shows How Extreme an Outlier the US Has Become.*

"*An NPR/Ipsos* poll released in January revealed that the overwhelming majority of Americans believe that U.S. democracy is 'in crisis and at risk of failing.' What the poll does not disclose, of course, is the anomalous situation of the United States in comparison to other democracies. For starters, the U.S. is a very conservative and militaristic country, with a two-party system and a political culture that overwhelmingly favors powerful private interests over the common good. Indeed, in many respects, it operates more like a reactionary plutocracy than a democracy. For instance, the U.S. is the only wealthy country without a universal health care system. It spends more on health care than any other high-income country but has the lowest life expectancy. The U.S. is also a global outlier in terms of gun ownership, gun violence and public mass shootings. Income and wealth inequality is also higher in the U.S. than in almost any other industrialized country, and the U.S. also has the distinction of spending less on children than almost any other wealthy country. Moreover, as evidenced by the recent decision to overturn *Roe v. Wade*, the United States Supreme Court acts for the most part as an agent of reaction."

Indeed, the U.S. is a "highly unusual society, in many ways," as Chomsky stated in an interview about the economic and political organization of the U.S. and the shockingly reactionary rulings of the Supreme Court on guns and abortion.

Chomsky is the father of modern linguistics, a leading dissident and social critic, and one of the world's most cited intellectuals. His work has influenced a variety of fields, including cognitive science, philosophy, psychology, computer science, mathematics, childhood education and anthropology. He has received numerous awards, including the Kyoto Prize in Basic Sciences, the Helmholtz Medal and the Ben Franklin Medal in Computer and Cognitive Science. He is the recipient of dozens of honorary doctorate degrees from some of the world's most prestigious universities, and is the author of more than 150 books.

Today's Zeitgeist

Nearly every American has a foreboding the country they love is losing its way, by David Ignatius on July 3, 2022:

> "What does our national portrait look like on this Independence Day? Many of us see an angry, traumatized face, rather than the radiant glow of the Founders. That's the odd thing about this hyper partisan moment: Nearly every American, whatever their political perspective, has a foreboding that the country they love is losing its way."
>
> "How great is the danger of national decline? The Pentagon's in-house think tank, which has the mysterious name 'Office of Net Assessment,' commissioned a study of the problem by Michael J. Mazarr, a senior political scientist at the Rand Corp. It was just published under the title, 'The Societal Foundations of National Competitiveness.' It's hardly upbeat summer reading, but it can be downloaded free online, and it's well worth the time."
>
> "Mazarr's disturbing conclusion is that America is losing many of the seven attributes he believes are necessary for competitive success: national ambition and will; unified national identity; shared opportunity; an active state; effective institutions; a learning and adaptive society; and competitive diversity and pluralism."
>
> "America remains an opportunity society, in principle, but Mazarr sees growing constraints. He cites the evidence of rising inequality. Between 2001 and 2016, the median net worth of the middle class fell 20 percent, and that of the working class plummeted 45 percent. He notes evidence that in each generation since 1945, children have been less likely to make more money than their parents."
>
> "These problems are obvious, but government hasn't been willing or able to correct them. Mazarr quotes a World Bank assessment of gradually declining 'governance effectiveness' in the United States over the past 20 years.

It isn't just a government problem, though. Private-sector productivity has been stagnant for decades, and corporations struggle with bureaucracy and bloat. Universities spend nearly as much on administration as teaching, and administrative costs account for a third of total health-care spending."

"Part of America's DNA is the idea that our problems are fixable. I'm still in that party of optimists. But I found Mazarr's conclusions chilling. When countries begin to fail, he argues, 'it is a negative-feedback loop, a poisonous synergy.' The energy that could reverse decline becomes sapped by mistrust and misinformation. Some people get so angry they want to burn the house down and start over."

"We're not at that cataclysmic point yet. I see positive signs in the slow but growing Republican willingness to challenge Donald Trump, and in the broad, bipartisan anger at the extremism of recent Supreme Court decisions. But bad things can happen to good countries, as our modern history shows."

The American character was once easy to define. We were a young, optimistic nation, fusing 'one out of many,' as the Latin phrase engraved on our coins puts it. Wherever Americans had come from, they embraced the aspiration for 'Life, Liberty and the pursuit of Happiness,' written in the Declaration of Independence. May it ever be so."

Unfair and Unbalanced

B Kean made compelling observations in his article on the Medium platform at the end of October 2020, titled *The Fair and Balanced Supreme Court of the US — 3 of out 6 conservative judges came of professional age watching Fox.*

Amy Coney Barrett is in. "The extra from a *Handmaid's Tale* has become the sixth judge placed by a Republican president." And the damages are mounting.

"McConnell and the modern-day GOP have outsmarted, out-dirty-tricked us and spent years undermining our democracy under the guise of 'work with us and we will work with you,' only to just always go and do what they want anyway."

"Mitch McConnell's success is yet another reason we on the so-called left need to remind ourselves that they aren't for America anymore -- they are for the GOP. The framework for governing our nation as established in our Constitution no longer guides them; and so, they must be treated accordingly, gunned-up, white nationalists and Fox be damned."

The Supreme Court has finally been made "fair and balanced," which in Conservative-lingo means: the rules only apply to you, sucker, we will do whatever we want and love it and soon you won't even be able to protest about it.

"While one of them tries to decide cases with one eye on the Constitution and the other on preserving the legitimacy of the Court and its place in our three-branch system; the other five would certainly warrant a 'yep, that's him,' if a precinct detective was showing a victim a book of mug shots entitled 'typical frenzied Fox consumers.'"

"Fair and Balanced was the motto of Fox since its inception. It was quietly abandoned after the Roger Ailes sexual harassment scandals -- today it is *Most Watched. Most Trusted.* With three of the six conservative judges having all come to professional age under the era of Fox and Roger Ailes, at a time when the Republican Party was at first supported wholly by Fox and then was remade in the image of Fox, it is both odd and very telling that then nominee Amy Barrett forgot the fifth freedom guaranteed to Americans in the First Amendment -- *the right to protest.*"

"This is the very same right that Fox, Trump and anyone who has lost track of our core values tell us is destroying the nation. The gunned-up white nationalists plotting to assassinate elected officials gets little or no aghast-condemnation, though; they are patriots, remember? The mask-less, and yes, gunned-up guys -- who we would later find out plotted to kill the Michigan governor -- storming state buildings back in April demanding that pandemic-instated lockdowns be ended, were patriots not protesters, remember?"

Speaking of Debate and Civility

Civil debate should feature civility. But speaking of debate, think about Ted Cruz, who is the most widely reviled

person in the U.S. Senate. Cruz was a participant on a debate team at Princeton University in 1992, and has been known for having a repulsive character ever since. He has been described as "abrasive", "creepy" and "arrogant." He is a fundamentalist religious Ted Cruz dominionist, and a reprehensible human being that poorly represents the people of Texas and has a very negative influence on political discourse and national politics in the United States.

Former House Speaker John Boehner, a Republican, had nothing nice to say about Ted Cruz, and he was not shy about it. The longtime Ohio lawmaker ripped the Texas senator in a talk at Stanford University, calling him "Lucifer in the flesh." According to the Stanford Daily, a student-run paper, Boehner said, "I have Democrat friends and Republican friends. I get along with almost everyone, but I have never worked with a more miserable son of a bitch in my life."

Cruz was first elected to Washington in 2012 and immediately began causing headaches for the GOP leadership. He forced a 16-day government shutdown the next fall and goaded on the rebellious House Freedom Caucus, the group of tea party "knuckleheads" and "goofballs," in Boehner's words, whose resistance to toeing the party line eventually led to Boehner's decision to resign.

Others who have leveled severe and deserved criticism of Ted Cruz include the following.

(1) Lindsey Graham, *Republican senator from South Carolina:* "If you killed Ted Cruz on the floor of the Senate, and the trial was in the Senate, nobody would convict you." (2) Donald Trump: "He's a nasty guy. Nobody likes him. Nobody in Congress likes him. Nobody likes him anywhere once they get to know him." (3) Ann Coulter: *Conservative media personality and Trump supporter:* "Just look at Cruz's face: it's got career scum politician, aka liar, written all over it." And (4) John McCain: "You know, it's always the wacko birds ... that get the media megaphone," he once said referring to Mr. Cruz and others.

<u>Dominionism is Rising: A Theocratic Movement Hiding in Plain Sight</u>

"The rise of Ted Cruz is a singular event in American political history. The son of a Cuban refugee and evangelical pastor, Cruz was raised in the kind of evangelicalism-with-a-theocratic-bent that has come to epitomize a significant and growing trend in American public life. That is, dominionism: a dynamic ideology that arose from the swirls and eddies of American evangelicalism to animate the Christian Right, and become a defining feature of modern politics and culture."

"Dominionism is the theocratic idea that regardless of theological view, means, or timetable, Christians are called by God to exercise dominion over every aspect of society by taking control of political and cultural institutions."

"Analyst Chip Berlet and I have suggested that there is a dominionist spectrum running from soft to hard as a way of making some broad distinctions among dominionists without getting mired in theological minutiae.106 But we also agree that: (1) Dominionists celebrate Christian nationalism, in that they believe that the United States once was, and should once again be, a Christian nation. In this way, they deny the Enlightenment roots of American democracy. (2) Dominionists promote religious supremacy, insofar as they generally do not respect the equality of other religions, or even other versions of Christianity; and (3) Dominionists endorse theocratic visions, insofar as they believe that the Ten Commandments, or "biblical law," should be the foundation of American law, and that the U.S. Constitution should be seen as a vehicle for implementing biblical principles.

<u>More on Federalism and Anti-Federalism</u>

Today's Supreme Court, dominated as it is by extreme conservatives, is basically Anti-Federalist in its ruling to overturn women's rights to abortion and allow states to make laws restricting people's rights to their perverse heart's content.

"A Madisonian system (one consist with The Federalist) is not completely democratic, if by 'democratic' we mean completely majoritarian. It assumes that in wide areas of life majorities are entitled to rule for no better reason that they are majorities. We need not pause here to examine the philosophical underpinnings of that assumption since it is a "given" in our society; nor need we worry that 'majority' is a term of art meaning often no more than the shifting combinations of minorities that add up to temporary majorities in the legislature. That majorities are so

constituted is inevitable. In any case, one essential premise of the Madisonian model is majoritarianism. The model has also a counter-majoritarian premise, however, for it assumes there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny."

"Some see the model as containing an inherent, perhaps an insoluble, dilemma. Majority tyranny occurs if legislation invades the areas properly left to individual freedom. Minority tyranny occurs if the majority is prevented from ruling where its power is legitimate. Yet, obviously, neither the majority nor the minority can be trusted to define the freedom of the other. This dilemma is resolved in constitutional theory, and in popular understanding, by the Supreme Court's power to define both majority and minority freedom through interpretation of the Constitution."

"Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution. But this resolution of the dilemma imposes severe requirements upon the Court. For it follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority."

An "originalist" having an intellectual feast criticizing progressive change as the decades pass, wrote the following: "Following its own predilections while pretending to apply neutral theory is of course what the Supreme Court has been busy doing since the New Deal, when it abdicated its role as guardian of the Constitution's restraints on government power. Particularly since the drunken rampage of judicial legislation unleashed by Chief Justice Earl Warren, the Court has done little else in its role of judicial review besides replacing long-standing principles of constitutionalism with whatever personal preferences may then be fashionable among the justices. This has invariably facilitated the tyranny of transient majorities, as we just saw with the Obamacare decision. Justices Antonin Scalia, Clarence Thomas, and Samuel Alito have emerged as stalwarts of principle, but that was not always true even for them — and for the other justices, and other courts, the rampage of judicial legislation continues largely unabated, impelled by an unholy marriage of *stare decisis* and terrible precedents."

A Common Good Solution

The Electoral College system has allowed the loser of the national popular vote to win the presidency twice in the 21st century. This is causing dire threats to democratic fairness and good governance in our democratic republic, and allowing dangerous factions to usurp and abuse power in ways inimically to the greater good of the people.

Axios has reported that the January 6 committee has split behind the scenes over what actions to take after this month's public hearings. Some members reportedly want big changes on voting rights -- including abolishing the Electoral College -- while others are resisting proposals to overhaul the U.S. election system.

We're stunned that these members of Congress -- who were all there at the time of the insurrection and know how close we came to losing our democracy -- still want to preserve the flawed Electoral College system that made the whole scheme possible in the first place.

With a popular vote system, there would not need to be any debates about power of the Vice Presidential to certify the vote, or fake slates of electors, or people assaulting the Capitol, or any of the other madness.

The remedy is simple: **eliminate the Electoral College.** A popular vote system will take all the shady legal practices, alternate slates of electors and other long shot legal theories off the table. Not to mention that it makes every vote count the same and doesn't favor some states over others.

One of America's leading law professors believes the Electoral College helped enable the January 6th insurrection, and that without significant reform to how we choose a president, we could be facing worse in the 2024 election.

On a parallel tack, and possibly easier and more fairly effective, in order to dramatically strengthen our democracy

and guarantee liberties and fairer justice for all, we need to succeed in getting the National Popular Vote Interstate Compact guaranteed. This is an agreement among a group of U.S. states and the District of Columbia to award all their electoral votes to whichever presidential candidate wins the overall popular vote in the 50 states and the District of Columbia. The compact is designed to ensure that the candidate who receives the most votes nationwide is elected president, and it would come into effect only when it would guarantee that outcome. As of May 2022, it has been adopted by fifteen states and the District of Columbia. These states have 195 electoral votes, which is 36% of the Electoral College and 72% of the 270 votes needed to give the compact legal force.

Truly,
Tiffany B. Twain
July 12, 2022