HOW THE SUPREME COURT BECAME A THREAT TO DEMOCRACY*

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INTRODUCTION

The Law Review has posed a profoundly important question for us all to think about: Can we rely on the judiciary to protect democracy? My answer, which is my thesis this afternoon, is I hope so. But I'm not sure. History makes me doubtful whether we can rely on the federal judiciary to perform that function. When I first saw the topic, two things came to mind. One is: Can we rely on the judiciary to protect the democratic process itself? The second is: Can we rely on the judiciary to protect us if ever there's going to be an authoritarian government? I'd like to address each of these questions in turn.

I. CAN WE RELY ON THE JUDICIARY TO PROTECT THE DEMOCRATIC PROCESS ITSELF?

In terms of the first of these—can we rely on the judiciary to protect the democratic process—I think there's nothing more important for the federal judiciary than making sure that our electoral process, our democratic process, meets constitutional standards and is fair and equitable. The late-John Hart Ely in his book *Democracy and Distrust* persuasively argued why we especially need the judiciary when the democratic process fails and is unlikely to correct itself.[1] Yet, as I look over the course of American history, there are reasons to be doubtful about whether the courts will perform this function. What I want to do in broadly sketching this history is look at it before the Warren Court, examine the Warren Court, and then focus on what's happened since the Warren Court, especially during the Roberts Court era. The reason I divide it in this way is that during the first of these three times the Supreme Court failed to protect democracy. In the second, I suggest that the Supreme Court briefly succeeded. Then in the third, our contemporary era, I argue that the Supreme Court itself has become a threat to democracy, which is the title that I've chosen for my piece.

1. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

A. THE PRE-WARREN COURT ERA: A FAILURE TO PROTECT DEMOCRACY

From the founding of the Constitution in 1787 until the adoption of the Fourteenth and Fifteenth Amendments there were not Supreme Court decisions protecting the electoral process or protecting the right to vote. That shouldn't be surprising. The right to vote was left at that point to the state and local governments, and there were little constitutional limits on what state and local governments could do. The Fourteenth Amendment was about limiting the states, and one of the key provisions says that no state can deny a person equal protection of the law. That would certainly imply not being able to deny any person of the equal ability to vote. But it quickly became apparent that the Fourteenth Amendment wasn't enough to protect the right to vote and the democratic process. Just a couple of years later, in 1870, the Fifteenth Amendment was added. It says that no person shall be denied the right to vote on account of race or previous condition of servitude.

What happened after the Fourteenth and Fifteenth Amendments were adopted? Did the Supreme Court use these to protect the right to vote and the democratic process? Very quickly, the answer became "no." In 1875, the Supreme Court decided *Minor v. Happersett*.[2] It involved a woman in the State of Missouri who argued that denying women the right to vote was a violation of equal protection. After all, the Equal Protection Clause says that *no person* shall be denied equal protection of the law. But the Supreme Court rejected her argument and concluded that it did not violate equal protection to deny women the right to vote. It wasn't until 1920, when the Nineteenth Amendment was adopted, that the right to vote was granted to women.

A year after the Court decided *Minor v. Happersett*, the Court again failed to protect the right to vote in *United States v. Reese*.[3] After the Fifteenth Amendment was enacted, Congress passed what was called the Implementation Act. It was to give meaning to the broad language of the new amendment protecting the right to vote. Tennessee, after the Civil War, adopted a law that kept those of African descent, Black individuals, from voting. Isn't that a clear violation of the Fifteenth Amendment's very terms? But in the *Reese* case, the Supreme Court declared the Federal

2. Minor v. Happersett, 88 U.S. 162 (1874).

3. United States v. Reese, 92 U.S. 214 (1876).

Implementation Act unconstitutional, and upheld the ability of Tennessee to deny the right to vote to Black individuals, notwithstanding the Fifteenth Amendment.

I don't mean to say that the Supreme Court never protected the right to vote in the years after the adoption of the Fourteenth and Fifteenth Amendments. *Guinn v. United States*, in 1915, involved judicial protection of the right to vote.[4] Oklahoma, like most southern and border states, adopted literacy tests as a condition for voting. One of the things these states did was say that a person wouldn't have to take a literacy test if they had a grandparent that had been able to vote. This is where the phrase "grandfather clauses" comes from. This was a transparent effort on the part of southern states to allow White but not Black individuals to vote. The Supreme Court saw it as that and found that the grandfather clause violated the Constitution.

Another example of the Court protecting the right to vote was in the "White Primary cases" that said that the State of Texas could not give the ability to hold political primaries to private parties, which then excluded racial minorities from voting.[5] But overall, I think there is no doubt that the Supreme Court was a failure during this era in protecting the right to vote.

Consider some statistics. During Reconstruction, 90% of Black men in Mississippi were registered to vote. By 1892, only 6% of Black men in Mississippi were registered to vote. Now, you might say, "Well, that was a very long time ago." Focus on 1964, the year before the Voting Rights Act of 1965 was adopted. In 1964, only 43% of eligible Black individuals were registered to vote in the states we would regard as southern. In Alabama in 1964, only 23% of Black individuals registered to vote. In Mississippi in 1964, only 7% of Black individuals were registered to vote—only 1% higher than it had been in the 1892. Isn't this clear evidence of the failure of the Supreme Court to realize the promise of the Fourteenth and Fifteenth Amendments?

4. Guinn v. United States, 238 U.S. 347 (1915).

5. Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); Smith v. Allwright, 321 U.S. 649 (1944).

B. THE WARREN COURT ERA: A BRIEF SUCCESS IN THE PROTECTION OF DEMOCRACY

There was, as I said, a brief time of success, during the Warren Court. These were the years 1954 to 1969, and especially within the 1960s. The Warren Court did many things to enforce the Fourteenth and Fifteenth Amendments. It found that some restrictions on voting were unconstitutional. In *Harper v. Virginia Board of Elections* in 1966, the Supreme Court said that poll taxes in state and local elections were unconstitutional.[6] Poll taxes were another systematic way that southern states disenfranchised Black individuals from being able to vote. The Court found that malapportionment of state legislatures was unconstitutional. In *Baker v. Carr* in 1962, the Supreme Court reversed an earlier Supreme Court decision, *Colegrove v. Green*,[7] and said that federal courts could hear challenges to malapportionment.[8] And then in *Reynolds v. Sims,* the Supreme Court articulated the principle of "one person, one vote": that for any elected body with districts, other than the United States Senate, all districts must be roughly the same in population.[9] When Chief Justice Earl Warren finished his tenure on the Supreme Court, he was asked what was the most important ruling involving the chief justice. It might surprise you, though, that he said it was the "one person, one vote" cases, because this was an area where the political process was not going to protect itself. Legislators who benefited from malapportionment were not going to redistrict themselves out of office. It took the judiciary to perform that role.

Another example of what occurred during the Warren Court, one I will come back to in a moment, is it upheld the constitutionality of the Voting Rights Act of 1965. In *South Carolina v. Katzenbach* in 1966, the Supreme Court upheld Congress's power to prevent race discrimination in voting.[10]

Again, though, the story isn't entirely consistent. There are instances where the Warren Court failed to protect the right to vote. In 1959 in *Lassiter v. Northampton County Board of Elections*, the Supreme Court upheld the constitutionality of literacy tests for

6. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
7. Colegrove v. Green, 328 U.S. 549 (1946).
8. Baker v. Carr, 369 U.S. 186 (1962).
9. Reynolds v. Sims, 377 U.S. 533 (1964).
10. South Carolina v. Katzenbach, 383 U.S. 301 (1966).

voting.[11] Literacy tests, again as Judge Lemelle pointed out,[12] were a systematic way of disenfranchising minority voters. But overall, this was the one time in American history where the Supreme Court consistently and systematically protected the democratic process.

C. THE CONTEMPORARY COURT: A THREAT TO DEMOCRACY

What's happened since? Earlier you heard Judge Milazzo talk about *Bush v. Gore*.[13] Look what the Supreme Court did there with regard to the democratic process; for the first and only time in history the Court effectively decided the outcome of a presidential election. I want to argue to you that the Supreme Court itself has become a threat to the democratic process during the Roberts Court era. Consider four examples.

1. THE GUTTING OF THE VOTING RIGHTS ACT OF 1965

First, the Supreme Court has gutted the Voting Rights Act of 1965. I regarded the Voting Rights Act of 1965 as one of the most important laws adopted in my lifetime. The statistics I presented a moment ago, of voter registration in 1964, shows the importance of this law. There are many things in the Voting Rights Act of 1965, but the two most important operative provisions are Section Five and Section Two. Section Five says the jurisdictions with a history of race discrimination in voting needed to get pre-approval, called "preclearance," in order to make significant changes in election systems. Usually this was obtained by the Attorney General of the United States, but the pre-approval could come from a three-judge federal district court. The provision was scheduled to expire in 1982. Congress, after careful consideration, extended it for another twenty-five years. But that then meant it was scheduled to expire in 2007. And so, Congress in 2006 held fifteen different hearings. They compiled the legislative history of almost 16,000 pages, documenting the continued race discrimination in voting in the jurisdictions that were required to have preclearance. They pointed to hundreds of instances where the Attorney General had denied preclearance. There were likely thousands more where preclearance was never sought because the jurisdiction decided not to try to make that change in its election system. The Senate voted

11. Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45 (1959).

12. *See* Ivan L. R. Lemelle, *Amending the Constitution: If Not Now, When?*, 69 LOY. L. REV. 367 (2023).

13. Bush v. Gore, 531 U.S. 98 (2000).

98–0 to extend these provisions for another twenty-five years. Can you imagine the current Senate doing anything 98–0? There were only thirty-two "no" votes in the House of Representatives. President George W. Bush signed it into law.

But on Tuesday, June 25, 2013, in *Shelby County v. Holder*, the Supreme Court declared preclearance to be unconstitutional.[14] Shelby County is near Selma, Alabama. It's a jurisdiction in a state with a long history of race discrimination in voting. It argued to the Supreme Court that the requirement of preclearance was unconstitutional. And the Supreme Court, 5–4, struck down the preclearance provisions. Chief Justice Roberts wrote the opinion of the Court, joined by the other four conservative justices. Justice Ruth Bader Ginsburg wrote one of her most famous and iconic dissents, joined by the other three liberal justices.

The question I always ask my students when I teach *Shelby County* is: "Why did the Supreme Court declare this unconstitutional?" What constitutional tradition or principle did the preclearance requirement violate? Chief Justice Roberts said that the formula for preclearance was based on an old data; that when Congress reenacted the law in 2006, it didn't create a new formula. But there's nothing in the Constitution that says that Congress has to rely on new data. Why does relying on old data make the law unconstitutional? Again, what constitutional provision or principle did that violate?

What the Supreme Court said was that the Voting Rights Act violated the principle of equal state sovereignty—that Congress has to treat all states the same. Where is that found in the Constitution? I'm obviously not an originalist, but the same Congress that voted to ratify the Fourteenth Amendment also voted to create Reconstruction and impose military rule on southern states. Nothing could be farther from the principle of equal state sovereignty.

From 1965 to the 2013, there was a steady, consistent increase in Black voter participation. There was never a year when it had gone down. Since 2013, for the first time since 1965, there's been a decrease in Black voter registration and participation that can be tied to the Court's decision in *Shelby County v. Holder*. Immediately, states like Texas and North Carolina put into effect the very restrictions on voting where preclearance had been denied.

14. Shelby County v. Holder, 570 U.S. 529 (2013).

Chief Justice Roberts, though, in *Shelby County* offered reassurance that even though this ended preclearance, there still was Section Two of the Voting Rights Act. Section Two says that state and local governments can't have election systems or practices that discriminate based on race. In 1982, Congress amended this specifically to say that there only needed to be proof of a racially disparate impact; there wouldn't have to be proof of discriminatory intent. In July 2021, the Court decided *Brnovich v. Democratic National Committee*.[15] The issue in this case is: when do state election practices violate Section Two of the Voting Rights Act? The case came out of Arizona. It involved a couple of provisions of Arizona law. One said that an absentee ballot would have to be turned in by the voter or a relative of that person. The other said that a vote wouldn't count unless it was cast at a polling place in the precinct where the person lived. The Ninth Circuit found in an en banc decision that both of these requirements had a racially discriminatory impact.[16] The Ninth Circuit said that Native American communities often lacked access to U.S. postal facilities and that requiring that only the person or a relative to turn in the ballot will have a disparate impact against them. In terms of precincts, the Ninth Circuit said that the statistics demonstrated that polling places were moved much more often in communities of color, so thus violating the Voting Rights Act.

The Supreme Court, in a 6–3 decision, reversed. The Court was split along ideological lines, with Justice Alito writing for the Court and Justice Kagan for the dissent. Justice Alito identified five guideposts that should be used when deciding whether there's a violation of Section Two of the Voting Rights Act. What's stunning is none of those five factors are in any way mentioned, or even implied, in the statute or the legislative history of the Act. One factor, for example, requires a court to balance the effect against voting with regard to the state's interest in preventing voter fraud. You can read the entire statute—you're not going to find anything about balancing the state's interest in preventing voter fraud against the need to stop race discrimination in voting. The effect of *Brnovich* is that it is going to make it so much more difficult to challenge the laws that have been adopted in nineteen states since 2020 that impose restrictions on voting.

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15. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

16. Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989 (9th Cir. 2020), *rev'd and remanded sub nom*. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

The other place where Section Two of the Voting Rights Act comes up is when there are challenges to the way election districts are drawn. There is a case now before the Supreme Court; when it came up it was called *Merrill v. Milligan*[17] and is now called *Allen v. Milligan*.[18] It comes out of Alabama. Alabama is a state where the population is 27% African-American individuals. There are seven congressional districts in Alabama. After the 2020 census, when Alabama redrew its election districts, it packed African-American voters into one of those districts and spread the remaining African-American voters over the other six districts. So, it's likely that only one Black representative will be elected in Alabama to Congress. The three-judge federal district court, with two appointees of President Trump on the panel, found that this violated Section Two of the Voting Rights Act.[19] The Supreme Court stayed their order and heard oral arguments on October 4, 2022. My fear is, again, the Supreme Court is going to gut Section Two of the Voting Rights Act and make it much more difficult to prove that redistricting violates the Constitution.

2. THE INDIFFERENCE TO PARTISAN GERRYMANDERING

A second way in which the Supreme Court has become a threat to democracy is by allowing partisan gerrymandering by refusing to allow federal courts to stop it. Partisan gerrymandering, of course, is where the political party that controls the legislature draws election districts to maximize safe seats for that party. It's where a Republican-controlled state legislature draws election districts to maximize seats for Republicans, and where a Democrat-controlled city council draws election districts to maximize seats for Democrats. Partisan gerrymandering is nothing new. It takes its name from a Governor of Massachusetts early in American history, Elbridge Gerry, who engaged in the practice. But through sophisticated computer programs, partisan gerrymandering has become far more successful than ever before.

The key Supreme Court case was *Rucho v. Common Cause* in 2019.[20] North Carolina is basically a purple state. It went for Obama in 2008, Romney in 2012, and for Trump in the last two

17. Merrill v. Milligan, 142 S. Ct. 879 (2022) (granting certiorari and staying district court preliminary injunction).

18. Allen v. Milligan, Docket No. 21-1086, SUPREME COURT, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-1086.html.

19. Singleton v. Merrill, 582 F. Supp. 3d 924 (N.D. Ala. 2022).

20. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

presidential elections, but always it was very close. Trump beat Biden in 2020 in North Carolina by 1.35%. When Republicans gained control of the North Carolina Legislature, they decided to engage in redistricting for congressional seats. They had 3,000 possible maps drawn in order to be able to see which would give Republicans the best chance of winning. Their goal was to secure ten of thirteen seats in the House of Representatives from North Carolina. It shouldn't surprise you that they picked the map that was most likely to give Republicans control of ten of thirteen seats. And it worked. In 2016, Republicans won ten of thirteen seats in Congress in North Carolina. In 2018, Democratic and Republican candidates for Congress in North Carolina had almost exactly the same number of votes statewide, but Republicans won ten of thirteen seats. The three-judge federal court found that this violated equal protection,[21] but the Supreme Court in a 5–4 decision reversed. Chief Justice Roberts wrote for the conservative majority, and Justice Kagan wrote for the liberal dissenters. Chief Justice Roberts said that challenges to partisan gerrymandering are non-justiciable political questions. Simply, this means that partisan gerrymandering, no matter how extreme, cannot be challenged in the federal court. This is a serious threat to democracy. The most basic precept of democracy is that it is the voters who are supposed to be choosing their elected officials. With partisan gerrymandering, it's the elected officials who are choosing their voters.

3. THE DEFERENTIAL REVIEW OF PHOTO IDENTIFICATION LAWS

My third example is how the Supreme Court has upheld restrictions on voting. Again, to give an example, the Supreme Court has allowed photo ID requirements for voting, despite overwhelming evidence that the effect is going to be discriminatory against voters of color and Democratic voters. The case was *Crawford v. Marion County Election Board* in 2008.[22] Indiana adopted a requirement for photo ID for voting. Every Republican in the Indiana Legislature voted in favor of it. Every Democrat voted against it. The evidence was overwhelming that there would be a disparate impact against voters of color and against Democratic voters. Nonetheless, the Supreme Court upheld this,

21. Common Cause v. Rucho, 279 F. Supp. 3d 587 (M.D.N.C. 2018); Common Cause v. Rucho, 284 F. Supp. 3d 780 (M.D.N.C. 2018).

22. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

and the Supreme Court has never found the requirements of photo identification for voting to be unconstitutional. It overturned without opinion, on the so-called "shadow docket," attempts by lower courts to stop this requirement, even when there's overwhelming proof of a racially discriminatory impact.

4. PREVENTING CAMPAIGN FINANCE REFORM

The fourth and final example of how the Supreme Court has become a threat to democracy concerns campaign finance, and the case, of course, is *Citizens United v. Federal Election Commission*.[23] Justice Ginsburg, in a speech in San Diego several years before she died, said that she believed that history would regard *Citizens United* as one of the worst Supreme Court decisions ever. Congress had adopted a piece of legislation called the Bipartisan Campaign Reform Act which limited what corporations and unions could spend in the time right before primary and general elections. Seven years before the Supreme Court's decision in *Citizens United*, the United States Supreme Court upheld the very provisions that it struck down in *Citizens United*.[24] What changed between 2003 and 2010? Did the Court find some musty history of the First Amendment during that time that led it to believe that it made a mistake? Had the Supreme Court's decision in *McConnell v. Federal Election Commission* proven impossible practice? No. What had happened was between 2003 and 2010, Justice Sandra Day O'Connor, who had been in the majority in upholding the provisions, was replaced by Justice Samuel Alito. And that shifted the Court from 5–4 to uphold to 5–4 to strike down. The Supreme Court held, as you know, that corporations can spend unlimited amounts of money in election campaigns, from the corporate treasuries, to get candidates elected or get candidates defeated. Political scientists have documented the tremendous impact of *Citizens United* in our election system. Not so much with regard to presidential elections, because they involve such vast amounts of money, but especially in more local elections, where campaign spending really matters because there's not name recognition or visibility. *Citizens United* has given corporations tremendous undue influence in our political system.

Now if you think of the examples that I've just mentioned, all of them are Supreme Court decisions that were divided on a

23. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

24. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

partisan basis. Most were 5–4, or now 6–3, decisions. And all were a Republican majority on the Court making decisions that benefit Republican politicians running for elections. Overall, I think the Supreme Court itself has become a real threat to our democratic system.

II. CAN WE RELY ON THE JUDICIARY IF EVER THERE'S GOING TO BE AN AUTHORITARIAN GOVERNMENT?

I said in my introduction the other thing that came to mind when I saw the topic for this symposium is whether or not the Supreme Court would stand up if ever there was authoritarian rule. We see in so many countries around the world a turn towards authoritarianism. Can we rely on the Supreme Court to protect us if it happens here? There's some encouraging evidence to point to. Judge Morgan pointed out that after the 2020 election, every court—state or federal, whether the judge was appointed or elected, whether they were Republican or Democratic—rejected the claims that President Trump and his supporters made of election fraud. This is a strong indication that the judiciary upheld the guardrails of democracy. That is a basis for confidence for the future. Judge Milazzo mentioned an example that I was going to use, the Supreme Court's decision in *United States v. Nixon*.[25] In many ways the Nixon presidency was a threat to democracy. But most of all what *United States v. Nixon* stood for was that no one—not even the President of the United States—is above the law. That is the core of the rule of law. It was the Supreme Court affirming it.

A. A COURT PERMISSIVE OF AUTHORITARIANISM: AN HISTORICAL REVIEW

And yet, as I look at the sweep of American history, when there's been a tendency toward authoritarian government, the Supreme Court has failed. Let me quickly give you many examples. During the Civil War, President Abraham Lincoln suspended the writ of habeas corpus. He did this even though the Constitution is clear in Article One, Section Nine that's a power of Congress, not the President. Many individuals were imprisoned during the Civil War for nothing but criticizing how the North was waging it. And they had no recourse to federal court because a writ of habeas corpus had been suspended. And it wasn't until after the Civil War,

25. United States v. Nixon, 418 U.S. 683 (1974).

in *Ex parte Milligan*, that there's indication from the Court that that was unconstitutional.[26]

Or consider World War I, the next major crisis in American history. Congress adopted two laws, the Espionage Acts of 1917 and 1918. Especially the latter was used to prosecute, convict, and imprison those who criticized the war. *Schenk v. United States* was the first major Supreme Court decision about freedom of speech.[27] It involved an individual who went and handed out leaflets arguing that the military draft was involuntary servitude in violation of the Thirteenth Amendment. It simply said, "Do not submit to intimidation." There wasn't a shred of evidence that Schenk's leaflets had the slightest effect on military recruitment or enlistment. Nonetheless, he was convicted and sentenced to ten years in prison. This was upheld by the Supreme Court in an opinion by Justice Oliver Wendell Holmes. He said when there's a clear and present danger, the government is allowed to punish speech. I can't think of any definition of "clear and present danger" that would allow Schenk's speech to meet that standard.

The same year, 1919, the Court decided *Debs v. United States*.[28] Eugene Debs was a prominent Socialist leader. He gave a speech to a group of college students where he said, "You are good for more than cannon fodder. There's more that I'd like to say, but I can't." For saying just that, he was convicted and sentenced to ten years in prison. He ran for president while in prison, and the Supreme Court upheld his conviction and sentence.

The next major crisis in American history was during World War II. *Korematsu v. United States* in 1944.[29] The Supreme Court upheld the evacuation of Japanese-Americans from their lifelong homes. 110,000 Japanese-Americans, citizens and non-citizens, adults and children, were booted from their lifelong homes and placed in what President Franklin Roosevelt called "concentration camps." Race alone determined who was going to be imprisoned behind barbed wire. Nonetheless, the Supreme Court in a 6–3 decision upheld what the United States government was doing. Justice Hugo Black, who we regard as a civil libertarian, wrote the opinion of the Court. William Douglas, who many think was the

26. *Ex parte* Milligan, 71 U.S. 2 (1866).
27. Schenk v. United States, 249 U.S. 47 (1919).
28. Debs v. United States, 249 U.S. 211 (1919).
29. Korematsu v. United States, 323 U.S. 214 (1944).

most liberal justice to ever sit on the Supreme Court, was part of the majority. Justice Black said war is about partnerships and these are the hardships that Japanese-Americans would have to suffer. It's hard to imagine the government doing something more authoritarian or inconsistent with the Constitution and its protection than it did to Japanese-Americans during World War II. Yet the Supreme Court upheld it.

You might know that in 2018, in *Trump v. Hawaii*, Chief Justice Roberts said that *Korematsu* has been overruled by the court of history.[30] There's an irony to that, because in *Trump v. Hawaii*, the Supreme Court upheld President Trump's travel ban that designated countries and excluded individuals from them solely on the basis of their large Muslim populations. I think what President Trump was doing was in some ways so much like what the United States government did during World War II. He was allowing the government to presume that people were dangerous solely on the basis of race, on the basis of national origin, on the basis of ethnicity. Rather than requiring an individual determination of dangerousness, the Court allowed race and national origin to substitute for that. Certainly, that doesn't instill confidence that *Korematsu* has really been overruled. In his dissent in *Korematsu*, Justice Robert Jackson said the decision in *Korematsu* "lies about like a loaded weapon" to be used in the future by the government.[31]

Or skip ahead to the next crisis in American history, the McCarthy era. It was the age of suspicion. It was a time where just being suspected of being a Communist was enough for somebody to lose a job or even be imprisoned. The leading case to come to the Supreme Court during this time was *Dennis v. United States*.[32] It involved a situation where individuals were prosecuted and convicted. What was their alleged offense? They organized to teach the work of Marx and Lenin. And this was a situation where it wasn't just the Supreme Court. If you go back and read Judge Medina in the federal district court, read how much even the lower courts were caught up in the hysteria of the McCarthy era.[33] These individuals appealed their convictions to the United States

30. Trump v. Hawaii, 138 S. Ct. 2392 (2018).

31. *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

32. Dennis v. United States, 341 U.S. 494 (1951).

33. *See* Nathaniel L. Nathanson, Comment, *The Communist Trial and the Clear-and-Present-Danger Test*, 63 HARV. L. REV. 1167 (1950).

Supreme Court. There was no evidence whatsoever that their teaching the works of Marx and Lenin was any threat to the United States. There's no indication that they had many followers. Certainly, there was no proof that a Communist revolution was likely. But the Supreme Court opinion by Chief Justice Fred Vinson upheld the convictions and sentences. Chief Justice Vinson, writing for the majority, said that when the evil is as grave as the overthrow of the United States government, there doesn't have to be any proof that the speech increases the likelihood of one.[34]

One more example of the Supreme Court failing in a time of crisis happened after 9/11, when the federal government rounded up people solely on the basis of religion and imprisoned many of them for a period of time, when individuals were held without trial or any semblance of due process. What did the Supreme Court do during this time? Well, in *Hamdi v. Rumsfeld*, the Supreme Court said that the federal government could hold individuals as enemy combatants without having to try them.[35] The Court said they would have to provide some due process, like notice and hearing, but said that the burden of proof can be placed on these individuals to demonstrate that they weren't enemy combatants. The United States government held Jose Padilla and others as enemy combatants even though they were United States citizens—and never did the Supreme Court declare this unconstitutional, ducking the issue on procedural grounds.

Think about the Guantanamo detainees. Your immediate reaction might be, "Well, in *Rasul v. Bush* in 2004,[36] and in *Boumediene v Bush* in 2008,[37] the Supreme Court said that Guantanamo detainees would have access to writs of habeas corpus." But if you stop there, you're ignoring what happened after the Supreme Court's decision in *Boumediene v. Bush*. *Boumediene* was decided on June 12, 2008. From that date on, never again did

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34. *See Dennis*, 341 U.S. at 509. The majority emphasized the intent to overthrow, to the exception of any other interest:

> Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt.

Id.

35. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

36. Rasul v. Bush, 542 U.S. 466 (2004).

37. Boumediene v. Bush, 553 U.S. 723 (2008).

the Supreme Court grant certiorari in a case involving Guantanamo detainees. In case after case, the lower courts ruled against the Guantanamo detainees, and the Supreme Court denied certiorari. In many of those cases, federal district court judges voted in favor of the Guantanamo detainees, only for the D.C. Circuit—often in express, open defiance—to deny the writ of habeas corpus. And the Supreme Court denied review.

B. THE NEW AUTHORITARIAN THREAT: POLITICAL POLARIZATION

I believe that if there is going to be a time where there's a threat of authoritarian government in the United States, it will be because there is a crisis. The Framers of the Constitution knew that in times of crisis there would be an impulse to centralize power. It's one of the reasons they put separation of powers into the structure of the Constitution. They knew that in a time of crisis, as history taught, rights would be taken away. And so, the question is: If there's going to be another crisis in the future, for whatever cause, can we rely on the Supreme Court to stand up to authoritarianism and protect democracy? So, you can see why my answer to the question of "can we rely on the courts to protect democracy" is I hope so. But I'm not sure you can. I'm skeptical.

Think about the United States today. I think that the greatest threat to our democracy today is how deeply polarized American political society is right now. There are so many measures of polarization. One that I would focus on is during the Trump presidency, President Trump had 90% approval among Republican voters and 8% approval among Democratic voters. That was the largest gap since they began doing these opinion polls. Or during the Biden presidency, the gap is a bit less, but still the second largest in American history. I can take almost any major issue today and show you the unprecedented gap between Democrats and Republicans. And here's the question that goes to the heart of what this symposium is about: At a time when a country is so politically divided, what will it mean to have a Supreme Court that's come down so clearly on one side of that divide? What will it mean for the Supreme Court's legitimacy? What will it mean for a democracy? For the future?

And my answer to that is, I'm not sure. But I'm really worried.

Thank you.