Off-Balance: How US Courts Privilege Conservative Policy Outcomes

Brian Highsmith, Maya Sen and Kathleen Thelen

A growing literature has challenged some of the more influential accounts regarding the role of courts in the development of social and economic policy in the United States. We highlight some of the more durable features of the American federal judiciary that together tend to privilege ideologically conservative outcomes on matters of politics and public policy. Situating the United States in a comparative perspective, we build our argument in three parts. First, we review interdisciplinary accounts documenting how institutional features of US courts—including the unusually strong powers of judicial review—can tilt outcomes in a conservative-leaning direction. Second, we document how these formidable powers interact with judicial selection processes that currently skew the composition of the judiciary in favor of conservative candidates. Third, we show how the combination of the two factors—institutional and compositional—biases federal courts' interventions toward privileging conservative policy outcomes.

US courts exercise a powerful and consequential role in the development of social and economic policy. During the term ending in June 2022, for example, the Supreme Court initiated a dramatic rightward shift across a wide range of contested policy issues. In a series of rulings largely split along partisan lines, the high court ended the federal constitutional right to abortion, overturned state restrictions on public carrying of guns, stripped the administrative state of its authority to limit power plant emissions, and determined that the federal government lacked the authority to require public health measures during a pandemic. This conservative lurch signaled a Court-led move toward long-standing conservative policy positions on a host of issues.

Popular explanations of these outcomes often focus on directly proximate causes; for example, sudden vacancies or the influence of groups such as the Federalist Society in the confirmation process. In this article, we apply a comparative perspective and take a longer-term view of courts' role in the policy-making process. In doing so, we draw on interdisciplinary accounts that emphasize features of the US judiciary that tend to privilege ideologically conservative outcomes on matters of politics and public policy. The first set of features concerns enduring *institutional* features of the American judiciary that set the United States apart from peer democracies. Here we highlight the ways in which the unusually strong veto powers wielded by the federal courts interact with other features of the American political system to tilt outcomes in a conservative direction. Second, we consider the highly distinctive processes of judicial selection in the US federal system and show how they skew the *composition* of the federal judiciary in a

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conservative direction. These two factors—individually but especially working in tandem—make US federal courts asymmetrically useful to political actors pursuing conservative policy goals.[1]

Drawing from various literatures, we highlight a perspective that has recently emerged as an alternative to classic scholarship on the judiciary's role in the political landscape. Within political science, canonical accounts tended to view courts' engagement with policy as either constrained (Rosenberg 2008) or powerful but ideologically neutral in processes and outcomes (Kagan 2019) or, alternatively, tethered to electoral forces via the appointments process (Dahl 1957). We join other scholars (see, e.g., Bagley 2019; Baumgardner and TerBeek 2022; Bowie 2021; Burke and Barnes 2024; Rahman and Thelen 2022) who have argued that particular features of the federal judiciary may systematically privilege conservative or libertarian policy outcomes. In contrast to analyses that view the United States in isolation, generalize from specific periods in time, or evaluate the Supreme Court's powers in the abstract without attention either to the ideological valence attached to these powers or to the broader institutional landscape within which they are wielded, our account focuses on the comparatively distinctive features of US courts' long-standing institutional design and current composition.

In short, we join others in arguing that the power of the US federal courts should be understood not just as formidable but also as highly *asymmetric*—both in its availability and its usefulness to political actors. Compared to peer democracies, American courts wield unusually strong powers of judicial review, powers that interact with other features of the American political system and with judicial selection processes in ways that make the courts particularly effective as a tool for well-organized and well-resourced business interests (Rahman and Thelen 2022) and for right-leaning policy makers favoring more limited or smaller government (Burke and Barnes 2024). US courts stand out in comparative perspective in their capacity to circumscribe the ability of legislative majorities to redress economic inequalities and power differentials: in this way, they favor those who seek to maintain historical social, economic, and political inequalities (Bowie 2021).

This article proceeds as follows. The next section outlines distinctive *institutional* features of US courts, focusing not just on their sweeping but blunt powers of judicial review but also on features of the broader political context within which these powers are exercised. Operating against a backdrop in which other branches are stymied or gridlocked, the power of US courts to veto legislative reform efforts often operates to privilege conservative outcomes. We then highlight the highly distinctive features of judicial selection processes in the United States that amplify this bias in contemporary times by skewing the *composition* of the judiciary in favor of conservative judges. Finally, we discuss how our framework relates to contemporary debates in political science, underscoring the way in which the interaction of legislative and judicial dynamics magnifies the utility of the courts as a vehicle for advancing conservative policy goals.

How Federal Courts' Institutional Features Privilege Conservative Policy Outcomes

Courts in the United States exercise formidable institutional powers that are uncommonly broad in comparative perspective. As other scholars have suggested, the courts' powers to suspend or nullify even major legislation, in whole or in part, are not equally useful across all political projects. Instead, these powers are most useful to political actors seeking to strike down legislative reforms or to limit government intervention in markets and society (e.g., Bagley 2019; Burke and Barnes 2024). As Burke and Barnes (2024, 32) put it, US courts "are much better at gumming things up than they are at making things work." This asymmetry has significant implications for the role that judicial review will tend to play within a political system.

A vast literature, from historical texts in political philosophy to contemporary public opinion research, conceptualizes ideological conservatism in the United States as being invested in limiting the size of government and government activity, with a particular focus on resistance to governmental involvement in the functioning of free markets.[2] For example, a recent review identified the "unifying theme of all conservative ideology" as the attempt to forestall radical political and social change by "set[ting] limits to the scope of political action" (O'Sullivan 2013, 293–94; see also Jost, Federico, and Napier 2009, 310, and McClosky and Zaller 1987, 189). Closely related to modern conservativism's "commitment to the limited state" (O'Sullivan 2013, 300) is the protection of existing economic, social, and political institutions. Samuel Huntington (1957, 457), for instance, observed that the "characteristic elements of conservative thought … all serve the overriding purpose of justifying the established order." Thus, following the literature, we take conservative policy positions to be ones that prioritize constraining the role of government, particularly so in terms of the market. In turn, these policy positions tend to protect established power, economic, and social hierarchies, although not always. As Huntington (455) writes, "The essence of conservatism is the passionate affirmation of the value of existing institutions."

Recent accounts have highlighted how these goals can be facilitated by a branch of government well suited to suspending or nullifying government policy or legislation. For example, writing about judicial review in the context of federal administrative law, Bagley (2019, 346) observes, "Increasing the stringency of judicial review for new agency regulations … will tend to aid those who have the most to

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lose from government action" while "curbing judicial review will help those who stand to gain." He goes on to suggest that institutional designs that serve to restrain the state will tend to operate, on net, as "more congenial to a libertarian agenda than a progressive one" (360). Other scholars have underscored the distinct partisan valence of these institutional dynamics. Whittington (2005, 584), for example, notes that "judicial review is likely to be more useful to some political coalitions than others, depending in part on their substantive agenda and in part on the extent to which they have been able to define the status quo." Most recently, Burke and Barnes (2024, 42) argue, "Given that it is conservatives, not liberals, who are more often interested in constraining the government, this makes [the courts] a more congenial policy tool for Republicans than Democrats."

Many Americans now take for granted judicial supremacy —that the Supreme Court has the final word on constitutional meaning and that other branches must follow its interpretive authority—as a foundational characteristic of the American system or an inevitable feature of democratic governance. But this institutional arrangement was not provided in the text of the US Constitution; it was initially assumed by courts and then politically contested over time (Whittington 2009). As summarized by Ross (1993, 5), "The power of judicial review was a distinctly American innovation, and the United States has remained the nation in which this power is most potent."

Comparative analysis has revealed that this design feature is by no means neutral in its effects. At the broadest level, this judicial power primarily takes the form of an institutional veto, enabling courts to strike down policy that has successfully navigated legislative or regulatory processes. An extensive cross-national literature "supports the idea that status quo bias induced by veto points limits redistribution, undermines welfare-state generosity, and exacerbates inequality" (Kelly and Morgan 2022, 56).[3] Stepan and Linz's (2011) comparative analysis of the impact of multiple veto points shows that the US system places more barriers in front of efforts to reform policy than that of any other rich democracy, a factor they point to in explaining high levels of inequality in the United States (see also Birchfield and Crepaz 1998). The fact that their tally of veto points does not even include the courts only reinforces the argument, because as Tsebelis (1995, 307) points out, "Requiring the agreement of the courts for certain legislation is equivalent to adding another chamber to the legislative process."[4] Other studies of postindustrial democracies have documented a similar relationship between institutional veto points and various measures of governmental efforts to reduce economic inequalities associated with market liberalism (Crepaz and Moser 2004; Immergut 1992; Stephens and Huber 2001).

These results help clarify which policy goals and associated ideological coalitions may be most likely to benefit —on net and over time—from a distinctive judicial veto that operates within a constitutional system already characterized by an unusually high number of veto points. As Kelly and Morgan (2022, 55) observe, multiple veto points and other structural biases against democratic change ultimately privilege elites "who controlled or limited policymaking options in the past"—such that "maintaining the status quo preserves the preferences of those who constructed existing institutions and policy legacies." Thus, institutional design features such as judicial review can often hobble the ability of representative policymaking bodies to respond to democratic demands for economic, social, or political change—and, by extension and in the aggregate, work to privilege conservative goals.

Of course, the institutional power of judicial review is not unique to the United States, but the American system of judicial supremacy is far from a universal feature of contemporary democratic governance.[5] Some peer common-law countries such as the United Kingdom and New Zealand do not have a written constitution and thus also lack formal judicial review in the broad sense that this term is usually understood in the United States.[6] In other countries where the principle of parliamentary supremacy fuses executive and legislative powers, courts have traditionally been assigned a subordinate function. The Netherlands represents perhaps the strongest surviving version of this model in Europe. There, the constitution expressly prevents the High Court from reviewing the constitutionality of acts of parliament (Lijphart 1999), although the Dutch are now outliers in this regard within the European Union and are considering reforms to introduce judicial review (Schyff 2020).

In other European countries, high courts have grown more powerful in the postwar period, but parliamentary supremacy has often still meant that the judiciary exercises these powers with restraint. For instance, Iris Nguyen Duy (2015, 18) describes the behavior of the courts in Scandinavia as characterized by "judicial reluctance," although she also notes that the growing influence of European law has generated some movement toward less reticent courts.[7] Japan presents an extreme example of judicial self-restraint: however, in this case it is the political hegemony of the Liberal Democratic Party and its subtle dominance in shaping the composition of the judiciary that have rendered the court so cautious that it almost never challenges the government (see, especially, Law 2009).[8]

Other wealthy Western states—especially federal states such as Germany and Canada—provide examples of strong judicial review of legislative action. However, the role of the apex court in such systems is different and often more circumscribed than in the United States. Lijphart's (1999) comparative analysis of 36 democracies suggested that, when it comes to the power of judicial review, only Germany's Federal Constitutional Court even approaches

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the US Supreme Court in its power. Germany's High Court (*Bundesverfassungsgericht*) can and does indeed strike down legislation. But negative rulings often either inspire a search for compromise between the conflicting interests in a particular case or trigger a back-and-forth with the legislature to shape the contested legislation in ways that align with existing constitutional principles (Greene 2021; Sweet and Cananea 2021, 1551–52). In sum, alongside greater deference toward popularly elected legislatures in most parliamentary democracies, even countries that allow for judicial review often rely on practices that depart from the "traditional and binary American model of simply declaring whether a law is constitutionally valid or not," in some cases by adopting a more reflexive approach "to coax state organs to a consensus or optimal result" (Langford and Berge 2019, 215).

Equally important, judicial review elsewhere is typically more centralized, and this feature contrasts especially sharply with the United States, where even lower-level federal trial courts are able to issue rulings immediately striking down national-level policies. Again, this institutional power privileges outcomes that constrain government action—and thus can be used more effectively by conservatives, who are more likely to prioritize constraining government action (as compared to social and economic reformists). In 2018, for example, a Republican-appointed federal district judge sitting in Fort Worth, Texas, ruled that the Affordable Care Act was invalid in its entirety. In 2022, a different Republican-appointed federal district judge—from the same Fort Worth court—struck down President Biden's plan to cancel billions of dollars in outstanding student debt. In 2023, yet another Republican-appointed federal district judge elsewhere in Texas ordered the withdrawal of the abortion medication mifepristone from the nationwide market, suspending the Food and Drug Administration's regulatory approval 23 years after it had been issued. It is difficult to identify examples of such consequential rulings from individual lower-court judges in any other wealthy democratic country.[9]

In addition, although it is possible for the government to appeal an injunction, the hemorrhaging may in the end be fatal to a piece of legislation. For example, a 2024 review by the editors of the *Harvard Law Review* notes,

> A successful defense against a nationwide injunction in one court is barely a win for the government at all: because that decision has no preclusive effect on new plaintiffs, other plaintiffs are free to bring the exact same lawsuit elsewhere and "shop 'til the statute drops." All it takes is one judge siding with the plaintiffs to enjoin the challenged law. These asymmetric consequences force the federal government to engage in a game of whack-a-mole… . If enough plaintiffs sue—and if they can each target the forum most likely to be hostile to the government's action—it seems almost inevitable that the action will be nationally enjoined (p. 1711).

Of course, there are similar accounts of district judges striking down conservative policies or of courts expanding government powers.[10] For example, several of President Trump's immigration policies were famously enjoined by district courts in Hawaii and California. Additionally, as Melnick (1983, 1994) has demonstrated, there are cases where the judicial role of statutory interpretation has been used to "enlarge programs created by other branches of government" (1994, 17) through institutional reform litigation. For example, Melnick (1983, 3) examines judicial oversight of air pollution regulation during the 1960s and 1970s and concludes that "far from constraining the growth of governmental power, court decisions led to further increases in the size of governmental programs."[11] But such counterexamples are not inconsistent with our suggestion that the aggregate net consequence of such institutional designs is to bias policy making against the forms of legislative change that conservative coalitions are more likely to oppose. After all, and as noted earlier, scholars have documented consistent and predictable biases in policy making where legislative veto points stymie progressive goals.

Moreover, the power of judicial review as a policy tool must be considered in light of other features of the US political and institutional landscape. It would be one thing if American courts' interventions in political matters could be revisited and potentially revised or rebuffed by other actors. But due to the high hurdles to formal amendment of the Constitution and the proliferation of veto points, the Supreme Court's word—both on constitutional matters and on statutory meaning—is generally final on many contested issues. This is often the case for extended (often indefinite) periods and even where its rulings are deeply unpopular among the voting public.

On this point, consider, first, the formal amendment mechanism (found in Article V of the US Constitution). In a review of constitutional amendment mechanisms in 32 written national constitutions, Lutz (1994) finds that the US Constitution is the most difficult to amend. A glance at the timeline of constitutional amendments in the United States and other advanced countries highlights the extent to which the United States is an outlier in terms of the rarity with which it revisits its constitution (see https://comparativeconstitutionsproject.org/chronology/). Thus, one underappreciated consequence of the myriad hurdles specified in the Article V amendment process is that the site of collective decision making about contested fundamental rights is shifted to an unelected tribunal of nine that requires only a simple majority. These constraints mean, institutionally, that laws that are struck down as unconstitutional may not be so easily reimagined or reinstituted. This feature again will tend to favor the interests of those coalitions that generally seek more limited government or whose interest lies in blocking legislative reforms.

In many ways the court whose powers most resemble those of the US Supreme Court is the European Court of Justice (ECJ).[12] As with the Supreme Court, the ECJ's power to authoritatively interpret the provisions of the

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EU's founding treaties (which serve the same functions as national constitutions and are even more difficult to amend)[13] lies beyond the reach of the democratically elected legislatures of the member states; it is also unchecked by the weak European Parliament (Manow and Schmidt 2023; Scharpf 2017, 316–17). The resulting lack of democratic control and accountability has been one of the factors contributing to the EU's "democratic deficit" and the associated legitimacy crisis.

Although the powers discussed so far are permanent features of the US institutional landscape, other, more temporal factors also play a role. For example, polarization between the Democratic and Republican Parties in other branches of government also enhances the power of the courts by making it difficult to assemble the supermajorities needed to substantively "correct" the Supreme Court's interpretation or overturning of important legislation. In principle, Congress always has the power to revise the Court's interpretation of a federal statute by amending it or by passing a new law. Hasen (2012), however, shows that political gridlock also magnifies the role of the Supreme Court on matters of statutory interpretation. His work documents a dramatic drop in congressional overrides of the Supreme Court's statutory interpretations since 1991 and shows that override activity basically stopped in 2009—concluding that, under current conditions of gridlock and polarization, "the Court's word on the meaning of statutes is now final almost as often as its word on constitutional interpretation" (209). To be sure, gridlock is best understood as the interaction between the *enduring* institutional arrangements described earlier and *variable* political dynamics (including most consequentially polarization) that wax and wane over time. But this dynamic nevertheless reflects structural features of our institutional arrangements, with direct consequences for the role of courts in policy making.[14]

This has the effect of empowering an institution that, as we noted, is especially well equipped to overturn legislation and thus act to constrain active government. As an example of this dynamic, consider the Voting Rights Act (VRA) of 1965. Introduced into Congress following the deadly repression of voting-rights marches from Selma to Montgomery, bipartisan legislative majorities overcame the threat of a southern filibuster to enact the law by a final vote of 79–18 in the Senate and 328–74 in the House. As described by Mickey (2015, 260), this landmark enactment, in conjunction with the Civil Rights Act of 1964, "brought on the death blows" to the authoritarian rule that characterized the Jim Crow South. The VRA subsequently was reauthorized and amended five times—on each occasion by large bipartisan majorities, including most recently in 2006 when it passed the Senate without a dissenting vote (98–0). But in 2013, in *Shelby County v. Holder*, the Supreme Court invalidated the law's geographic coverage formula—effectively abrogating its requirement that covered states and localities receive federal "pre-clearance" before making changes to their voting laws and practices. Efforts to reauthorize the legislation have been unsuccessful, blocked even under periods of unified Democratic rule by the threat of Republican filibuster.

The finality of Supreme Court decisions represents an important aspect of American courts' power, but its importance is sometimes overlooked. In some cases, as Tsebelis (2002, 223) observes, political decisions in the United States are "delegated to courts because the political system is unable to legislate on the issue." In such instances, he continues, "In the United States the Supreme Court decided on several extremely important issues that in most other countries would have been the prerogative of the legislative branch" (223). And of course, kicking an issue to the Supreme Court can be strategic: as Whittington (2005) and others have emphasized, politicians may prefer to give courts the final say on contested issues, especially where the probable outcome aligns with their own goals. The important point is that when courts opt to strike down a statute, they are doing more than shifting it back to the political branches: in practice, they are wielding what is in effect a final *super veto.*

Lastly, federal courts operate as a powerful veto player within the US system in large part because of the power to strike down legislation and amend the public meaning of constitutional law, both by a simple majority vote. But an important feature of their power derives from the interaction between their affirmative authority and the fact that other bodies and the people themselves cannot easily do the same. Whereas the process for enacting legislation requires multiple successive moments of consensus from different actors, the Supreme Court can act swiftly with a bare five-person majority. This can be especially convenient for minority interests who oppose popular legislation and who seek to preserve the traditional status quo. By outsourcing to judges the task of striking down these policies or limiting their (and thus government's) reach, such interests can achieve their objectives while avoiding electoral backlash—offloading the task to a handful of individuals isolated from public accountability, whose constitutional decrees are unreviewable by the political branches that will bear most of the blame for possibly unpopular retrenchments.

How Judicial Selection Mechanisms Tend to Privilege Conservative Policy Outcomes

In addition to the permanent features of US courts that make them asymmetrically useful to those pursuing conservative policy outcomes, other features of federal institutional design and characteristics of the contemporary American political landscape result in judicial composition that is distributed asymmetrically across the parties—and in a manner that privileges conservative judicial appointments.

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In other words, federal judges tilt to the right, relative to the electorate at large, and this is a pattern that, although temporal and tied to current political forces, is fairly durable.

A key reason has to do with the judicial selection procedures that again make the United States an outlier in comparative perspective. Appointments to the federal bench—and to the Supreme Court in particular—are intense partisan battles, increasingly accompanied by vigorous (and expensive) campaigning by well-resourced outside interest groups (Cameron et al. 2017; Rahman and Thelen 2022; Vogel and Goldmacher 2022). This kind of overt politicization of the judicial selection process contrasts sharply with Europe, where seats on the bench are more often a matter of rigorous civil service education and testing, internal promotion, and appointment by special neutral judicial bodies (Kagan 2019, chap. 1, esp. 8, 12). In the United Kingdom, for example, a special judicial appointments commission is charged with reviewing applications to High Court appointments and making a recommendation to the Lord Chancellor. Although a political appointee, the Lord Chancellor is limited in the extent to which she or he can veto candidates that the committee puts forth. Moreover, when the nomination is forwarded to the prime minister, he or she is obliged to pass the recommendation on to the monarch for formal approval (Millhiser 2019). The process is similar in Denmark and Sweden, where independent expert panels manage the nomination and interview processes before forwarding their recommendations to the government for final approval.

In other countries, the appointment process is more political but generally far less politicized. In Germany, for example, the legislature is more directly involved in judicial selection because nominations come from commissions established in each of the parliamentary chambers (with proportional representation by the parties). Importantly, however, confirmation requires a two-thirds supermajority, which has effectively blocked the appointment of ideologically extreme candidates.[15] Politics also plays a role in appointments to the High Court in France, where the president, the leader of the National Assembly, and the president of the Senate are empowered to (each) nominate three of the nine seats on the High Court. There, however, political conflicts over the appointment process are blunted somewhat by the fact that judges are not appointed for life (instead, for nonrenewable nine-year terms). A regular and predictable appointment schedule—one-third of the High Court's members are replaced every three years—ensures that successive democratically elected governments will have their own chance to shape the Court's composition (Morton 1988, 98–99).[16]

By contrast, the prize of appointing judges with lifetime tenure, combined with political (as opposed to expert) control over federal court appointments in the United States, encourages the politicization of the appointments process. Indeed, as Bonica and Sen (2020) have documented, there are substantial ideological differences in judicial composition resulting from judicial selection via merit commissions versus selection via the executive appointment system used in the federal courts. Because merit-based selection mechanisms—of the sort used in several states and in other countries (e.g., Denmark and Sweden, as noted earlier)—rely on lawyers' involvement in initiating or approving recommendations, such processes tend to reinforce the preferences of the legal elite, which, in the United States currently leans less conservatively than the general public (Bonica and Sen 2020; see also Fitzpatrick 2009).

By contrast, executive appointments will return a judicial composition that largely reflects the preferences of the president and those who must provide "advice and consent"—in the federal context, members of the US Senate. These officials, anticipating that rulings will tend to follow from ideological preferences and that the party of the appointing president accurately predicts rulings (Segal and Spaeth 2002), are incentivized to choose ideologically like-minded individuals. Thus, federal courts largely track the composition of federal-level political actors, specifically those of presidents and senators (see Bonica and Sen 2017; 2020).

Although they are temporal and dependent on which party holds the presidency and controls the Senate when appointments to the Supreme Court are made, these arrangements introduce a conservative bias in judicial composition that is not only detectable but also quite enduring, given that appointments are for life. There are three reasons for this bias. First, the structure of the electoral college has resulted in two presidential elections (in 2000 and 2016) won by more conservative candidates who lost the popular vote. Second, smaller and more rural states wield power in the Senate that is disproportionate to their populations; this currently tips the body that is formally charged with confirming these appointments in a more conservative direction than the national electorate (Rodden 2019, 2). As Zoffer and Grewal (2020) have recently demonstrated, this has led to a modern phenomenon of "minoritarian" judges who were selected by a president and then confirmed by a Senate that each lacked popular-vote support. Lastly, as another temporal factor, note that, as Senate Republicans have shifted to the right—as part of broader trends in asymmetric partisan polarization—this has translated into shifts to the right in Republican judicial appointments as well (shown by Bonica and Sen 2021). Evidence shows that Supreme Court justices are to the right of the average US voter and are more closely in line with the average Republican voter (Jessee, Malhotra, and Sen 2022). These are not permanent or institutional features, and the political landscape could, of course, shift, but all accounts point to these factors contributing to a durable, right-leaning compositional skew.

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In terms of international comparisons, the closest comparator to the United States is Japan. In that case, as David Law (2009, 1545–46) has argued, institutional features combine with the political hegemony of the dominant conservative party, the Liberal Democratic Party, to "disguise" the party's influence by "delegating political control of the judiciary to ideologically reliable agents within the judiciary itself" in ways that have given the (formally independent) High Court a decided, long-standing conservative slant. Note, however, the very different mechanisms driving the outcome in the two cases: in the Japanese case, the conservative tilt ultimately stems (as Law argues) from the almost uninterrupted rule of the Liberal Democratic Party for longer than the past half-century. In the United States, where the Republican Party does not enjoy the same dominance, the conservative tilt in the Court is a function both of the current trends in party dynamics and of the specific institutional features just discussed that together give conservative interests disproportionate power over the appointment and confirmation processes.

Implications for Existing Scholarly Frameworks of Judicial Power

Understanding these forces and how they interact helps explain a key puzzle: If US courts indeed wield such unusual power, why have many influential accounts arrived at the opposite conclusion—that they are primarily "constrained" in their ability to independently effectuate significant policy change? We contribute to an emerging literature documenting the ideologically asymmetric policy consequences of judicial review by connecting the two factors we discussed: (1) strong veto powers interacting with legislative and constitutional counter-majoritarianism and (2) a conservative bias in judicial selection to the federal bench. These powers, wielded by a conservative judiciary, are particularly effective in *blocking* reforms that aim to expand the government's role in challenging traditional hierarchies of social and economic power and in addressing economic inequalities or problems generated by market forces. Thus, these two factors powerfully interact to tilt judicial outcomes in a conservative direction in a more enduring way than typically acknowledged.

Because so many influential accounts of courts' power have generalized from assessments of their ability to *advance* progressive goals, like school integration and gay marriage, scholars have drawn incorrect conclusions about the degree to which courts can independently influence policy outcomes. Recall, in this context, Rosenberg's (2008, xiii) description of his research question as understanding the degree to which courts are constrained in their ability to "produce liberal change." His classic account considered the extent to which the judiciary might be a vehicle for overcoming American politics' stubborn resistance to large-scale, redistributive efforts or efforts oriented toward equality for historically disadvantaged groups.[17] Based on an analysis of significant decisions such as *Brown v. Board of Education* (1954) and its progeny, his conclusion is that whatever hope the Court offers to social reformers is ultimately "hollow" because its impact on policy outcomes is minimal, especially compared to that of the elected branches.

Many researchers—correctly observing that social welfare expansions tend to come from legislatures rather than courts—have extrapolated from this finding to make fairly broad statements about courts' power to effect policy change generally. Such reasoning, however, obscures what may be the most important role of courts in the development of our social protections—which is not as an *originator* of reform but rather as a reliable and powerful *obstacle* both to their initial success and to their endurance over time. Revisiting his classic account in 2023, Rosenberg (576) observed that American courts "are not symmetrically constrained from furthering both progressive and conservative ends … because, typically, progressive litigators are asking the courts to require institutional change while conservatives are supporting the status quo." In short, we join Rosenberg and other emerging accounts that emphasize that a "constrained" Court—one that can strike down legislative enactments but not promulgate them effectively—is constrained primarily in one ideological direction.[18] Its extraordinary powers to veto or circumscribe legislation means that the judiciary can, indeed, be very effective in furthering outcomes, but these outcomes are primarily ones that limit the reach or scope of government—and these tend to be more in concert with conservative policy goals. This is the case even as its ability to secure progressive goals is, as Rosenberg's classic account identified, constrained.

Our argument also can be distinguished from alternate accounts that emphasize American courts' dynamic power. Consider, for example, Kagan's (2019) seminal argument of "adversarial legalism," which highlights the unusual degree to which American legal processes replace what in other countries are typically handled by regulatory agencies. Kagan's argument has profoundly shaped how political scientists view policy implementation in the United States and has drawn attention to some of the negative externalities of American reliance on adversarial legalism (e.g., socially wasteful litigation costs). However, he largely sidesteps discussion of how adversarial legalism might introduce an ideological bias into the *outcomes* of such litigation, focusing instead on distortions to its *process.* He observes, for example, that often "adversarial legalism produces generally desirable outcomes but at a disturbingly high price in time and money" (2019, 38) and stipulates that "often it produces a difficult-to-evaluate-or-agree-upon mix of costs and benefits" (39).[19]

Although we join Kagan in his emphasis on the uniqueness of America's system of regulation through adversarial litigation and judicial decision making, we depart from the

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ideological neutrality he assigns to this system with respect to substantive outcomes. Instead, we emphasize that what Kagan describes as adversarial legalism—and the central role of courts in resolving conflicts of all sorts, including political—is hardly outcome-neutral in two important ways. First, by setting bounds on the administrative state itself (and instead prioritizing regulation via litigation), adversarial legalism reduces the ability of governments to engage in regulation across substantive arenas and tilts the playing field toward organized groups that command the resources necessary to pursue their political goals through expensive and drawn-out litigation (Rahman and Thelen 2022). If we understand the conservative position to be one of minimal government regulation, particularly in constraining the interests of capital, then adversarial legalism will more often than not privilege these outcomes.

Second, adversarial legalism slows down such regulation: even in instances where regulation moves forward, judicial review of administrative actions means that it can still be stalled in litigation, in some instances indefinitely. This is why regulatory arbitrage ("moving fast and breaking things," including the law) has been such a powerful mechanism through which firms have been able to create "facts on the ground" before regulators can react (Hacker et al. 2022; Pollman and Barry 2017). As Burke and Barnes (2024, 42) note, "The predominant tendency in adversarial legalism, with its multiple access points for contesting government policies is to slow things down, not speed them up; to block government actions rather than to initiate them." By favoring policy inaction, these features again privilege conservative or small-government policy positions.

Moreover, to the extent that litigation results in administrative involvement by the judiciary, this calls into play the compositionally conservative nature of the courts—and the US Supreme Court in particular. On this last point, the Supreme Court's recent overturning of the *Chevron* administrative law doctrine has the potential to submit many areas of federal regulation to the scrutiny of a conservative-leaning Court. Indeed, the rise and fall of the *Chevron* doctrine—which mandated judicial deference to federal agencies' interpretation of congressional statutes—aptly illustrate this point. As Craig Green (2021, 633) has described, the original case emerged in 1984 from efforts by "conservative political leaders" during the Reagan Administration "to use [agencies'] interpretive authority to implement deregulatory policies immediately without new federal legislation." Yet, four decades later—with Republicans having lost the popular vote in seven of nine subsequent presidential elections while also appointing a six-justice supermajority onto the Supreme Court—the Court significantly curtailed the doctrine's application and eventually overturned it altogether during the 2024 term (*Loper Bright Enterprises v. Raimondo*). Following this ruling, federal agencies are no longer entitled to deference in their interpretations of statute, a switch that could potentially bring significant amounts of administrative regulations under increased judicial oversight. One prominent Republican, former Senate majority leader Mitch McConnell, called the dismantling of *Chevron* "far and away the most important, most consequential thing I've done during my time as leader" (Brugger 2024).

Our argument also implicates other influential frameworks explaining the role of courts in American politics, including Dahl's (1957) classic treatment. We find much in common with Dahl's underlying premise that the US Supreme Court operates as a *political* institution, rather than simply a forum for mediating legal disputes. Like Dahl, we similarly emphasize how "a court can and does make policy decisions by going outside established 'legal' criteria found in precedent, statute, and constitution" (278). Even more directly, we conceptualize our research question in near-identical terms, by asking, just as Dahl did, "What groups are benefited or handicapped by the Court and how does the allocation by the Court of these rewards and penalties fit into our presumably democratic political system?" (281).

But we arrive at a different answer. Dahl (1957, 285) argues "that the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States." On this view, disagreements in outcomes between the Court and other branches and the public at worst reflect a temporary lag before interbranch alignment is again achieved. Although this assumption resolves the democratic dilemma that Dahl identifies, recent patterns in party polarization have translated into a more pronounced rightward shift in judicial appointments and in elected judges. Indeed, recent research reveals that the Supreme Court is sharply out of step with mainstream public opinion (Jessee, Malhotra, and Sen 2022). Other work projects this rightward hold on the Supreme Court as lasting roughly until 2085, given "the status quo of nomination politics" (Cameron and Kastellec 2021). This pattern, in tandem with the institutional features that enable courts to strike down—but generally not to buttress—legislation, results in a Court that is more useful for pursuing conservative policy outcomes. As recently summarized by Baumgardner and TerBeek (2022), "Today's Supreme Court is not a Dahlian court, and it is not part of a dominant national alliance. Instead, it is allied to a specific political project set forth by modern movement conservatism" (149).

Relatedly, an important line of scholarship in the legal academic literature cites democratic justifications in defense of the expressly counter-majoritarian nature of judicial review. Most prominently, Ely's (1980, 8) *Democracy and Distrust* argues that the aspirational task of constitutional law "has been and remains that of devising a way or ways of protecting minorities from majority

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tyranny that is not a flagrant contradiction of the principle of majority rule." To be sure, judicial review can be and has been used to strike down long-standing legislation that reinforces traditional hierarchies of power, as courts did in many of the most closely studied (and widely celebrated) exercises of this power. However, as Doerfler and Moyn (2022) note, this sanguine view of the role of the courts is premised on the "empirical conjecture" that the judicial veto will tend to protect *vulnerable minorities* who are excluded from the political process. But a longer view of history—and the institutional dynamics we describe—suggest that this conjecture is questionable. To the contrary, and as Bowie (2021) points out, "As a matter of historical practice, the Court has wielded an antidemocratic influence on American law, one that has undermined federal attempts to eliminate hierarchies of race, wealth, and status." Our argument provides a more comprehensive explanation for Bowie's historical observation. To the extent that "minority" interests are reliably protected, they will be entities whose interests are best served by minimal government intervention and by the slowing down or blocking of the legislative process (Burke and Barnes 2024)—which by and large will dovetail with outcomes favored by conservatives.

In turn, this has implications for the Court's legitimacy itself. As shown by Bartels and Johnston (2013), Jessee, Malhotra, and Sen (2022), and others, the more the Court drifts away from the preferences of the public—that is, the more there is ideological disagreement—the more the legitimacy of the Court will be called into question. Thus, although these are temporal patterns, we are not surprised to see a decline in feelings of legitimacy toward the Court among left-leaning citizens that has corresponded with the rightward shift in the Court's rulings (Jessee, Malhotra, and Sen 2022), which in turn, has been driven by the forces we describe here.

Conclusion

We suggest here that courts in the United States, due largely to comparatively anomalous features of their institutional design, as well as unusual selection mechanisms that currently privilege a conservative composition, systematically privilege conservative outcomes. That is, these forces result in policy and political outcomes that are more conservative than what would plausibly result from the alternatives adopted in peer countries, and this helps explain important features of American political life. This possibility has been the focus of recent literature, to which we contribute, that has challenged some of the more influential political science accounts regarding courts' role in the political process.

We disaggregate the sources of this bias into two component parts—*institutional* conservatism and *compositional* conservativism—with the effects of both amplified by each other and by US courts' uncommonly politicized role within American politics and political economy. We detail institutional features of the judiciary that have shaped it into a cohesive veto player: it generally lacks the authority to generate social reforms independently but functions as a highly effective mechanism for blocking efforts to expand or modify the role of government, thus limiting its ability to intervene in addressing economic and societal hierarchies (Bowie 2021; Burke and Barnes 2024). This policy veto is wielded by members of a judiciary that, recent empirical evidence demonstrates, is compositionally conservative—one notable consequence of the country's unusual judicial selection processes combined with current patterns of spatial polarization in the electorate.

In sum, the United Stands stands out especially in the interaction of these two dimensions: (1) the power of the courts in matters of public policy and (2) a distinctive conservative tilt in the selection of judges. This combination of features makes the courts an ideal venue for resourceful actors to stop legislation and strategically shift and shape the venue in which political battles are waged—allowing them to achieve sometimes unpopular objectives through strategic litigation that advances their material interests and ideological convictions (Burke and Barnes 2024; Rahman and Thelen 2022). And it is this combination of features that allows organized interests to turn to the courts when they fail to achieve their ends through traditional legislative politics (Burbank and Farhang 2017; Highsmith 2019) or in times of legislative gridlock (Hasen 2012).

Our argument has implications for how we understand the federal court's role within the US institutional framework. It is not only that the American judiciary offers only "hollow hope" for progressive change: the institution should be understood as being a particularly effective policy tool for advancing conservative goals.

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Notes

1 As this article was going into production, we became aware of a recently published article by Thomas Burke and Jeb Barnes (2024) that advances a similar argument.

2 In making a comparison with European traditions, John Gray (2010, 166) argues, "United States conservative thought is merely an indigenous variation on classical liberal themes of *limited government*, individualism and economic progress [reflecting the] near-ubiquity in American intellectual culture of

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individualist, universalist and Enlightenment themes" (emphasis added). William F. Buckley Jr. (1955), at the time introducing a new magazine focused on American conservatism (*The National Review*), wrote, "It is the job of centralized government (in peacetime) to protect its citizens' lives, liberty and property. All other activities of government tend to diminish freedom and hamper progress. The growth of government (the dominant social feature of this century) must be fought relentlessly." Note that we do not take Republican Party ideology as tantamount to conservative ideology, although, of the two primary political parties, the Republican Party is clearly most associated with conservative policy outcomes.

3 In fact, Kelly and Morgan (2022, 56) argue that the negative relationship between the number of veto points and redistribution is among "the most robust findings in comparative political economy research."

4 Kagan (2019, 10) similarly observes that "adversarial legalism typically is associated with and is embedded in decision-making institutions in which *authority is fragmented* and in which *hierarchical control is relatively weak*."

5 Here, we follow Jeremy Waldron (2016) and others in distinguishing judicial review (the ability to make certain rulings) from judicial supremacy (the consequences of those rulings). But whereas the former represents an affirmative power wielded by courts, which is comparatively distinctive but not without peers, comparativists have distinguished American courts by the *finality* of their decrees.

6 The New Zealand Supreme Court (created in 2004) and the UK Supreme Court (established in 2005) are not empowered to invalidate laws passed by Parliament, though they are charged with interpreting and enforcing such laws (as well as the common law).

7 In other cases (e.g., Italy and France), postwar reforms have resulted in High Courts possessing powers that are formally comparable to those of the United States, but these courts are embedded in broader institutional configurations that render positive policy making less difficult (see the later discussion of veto points).

8 Law (2009, 1546-47) characterizes the Supreme Court of Japan as "conservative" in the dual sense of passive and sharing the ideology of the right-leaning Liberal Democratic Party that has dominated Japanese politics since 1955 (see also the following discussion).

9 The scope of judicial oversight over government policy has recently been strengthened with the Supreme Court's ruling in *Loper Bright Enterprises v. Raimondo* (2024), an important and closely related corollary to what we discuss here. In this case, the Court overturned the ruling of *Chevron U.S.A. v. National Resources Defense Council* (1984), which had established wide latitude for federal agencies' interpretation of congressional statutes. Following *Loper Bright*, courts will not give agencies this "*Chevron* deference," directly shifting power away from agencies and toward the courts, giving them additional powers to overturn agency decision making. The ruling has been widely lauded by conservative elites, as well as by business interests, and we discuss it again later.

10 Indeed, we do not suggest that the political goal of limiting legislative change or of constraining governmental authority should be understood as conservative in every instance. In addition, as in the case of the Trump immigration orders, we would expect the courts to be less useful to conservative policy goals that seek to expand or use new government powers. Although there are instances of both, an institutional vehicle for restricting new government powers is nonetheless still likely to be more useful to conservative coalitions than to liberal economic and social reformers.

11 Of note, Melnick (1994, 12) identifies the comparatively unusual number of legislative veto points as empowering this judicial role—noting, for example, that "the features of the Constitution that promote cautiousness in the legislative process seem at the same time to breed assertiveness in the judicial." In this respect, Melnick's account aligns with many aspects of the institutional framework that we develop here.

12 We thank Fritz Scharpf for this insight.

13 Amendments to the treaties require unanimity among the member states (Scharpf 2017, 316).

14 As Highsmith (2019, 911) has argued, "The state of persistently divided government—particularly where, as we see today, each party experiences an enduring advantage at different given levels or institutions of government—increases the frequency of situations in which a party finds it advantageous to pursue its policy objectives through strategic litigation rather than orthodox lawmaking."

15 Moreover, in Germany policy matters are often handled by specialized courts—for example, for labor issues, social policy matters, or finance—staffed by judges who have knowledge of these fields. This contrasts with the United States, where cases with wildly different substantive foci all land before the Supreme Court and where many scholars view politicians' selection of justices as one dominated by ideological concerns (see, e.g., Krehbiel 2007).

16 As Morton (1988, 99–100) suggests, regular turnover arguably also renders the court more responsive and accountable to the French electorate.

17 In a recent response to criticism of his book, Rosenberg emphasized the narrowness of his research question: "*The Hollow Hope* is narrowly focused on a

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particular type of litigation designed to produce what I call significant social reform, … It is in these and only these types of cases that I found, absent certain conditions, courts could not produce significant social reform. And in finding that these conditions were rare, I emphatically did not conclude that courts don't matter or have no impact on the broader society. I argued more narrowly, concluding only that courts were unlikely to further significant social reform." Our argument thus takes issue not so much with Rosenberg's framework but rather with the way that—as he discusses in the reflection—many researchers have mischaracterized his argument as standing for a broader claim about whether courts are generally constrained.

18 Other accounts have recognized that the nature of judicial power varies across various institutional contexts. For example, Hall (2010, 5) has argued that the Supreme Court is constrained primarily when "its ruling cannot be directly implemented by lower courts and public opinion is opposed to the ruling." The institutional veto that we emphasize here *can be* implemented by lower courts, as described earlier.

19 In the second edition of *Adversarial Legalism*, Kagan (2019, xi) addresses the impact of the rise of the conservative legal movement, which he sees (as we do) as having mounted a sustained assault on "some kinds of [liberal] litigation" while also using the courts to advance their own agenda. Where we depart from Kagan's assessment is in the relative symmetry he continues to assign to the system as a whole, despite these developments: "Adversarial legalism's basic legal structures and traditions remain in place, used by conservatives as well as liberals to advance their values and interests" (xi).

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