CASE-BAITING: FUTURE LEGISLATING FROM THE LONG ARM OF THE BENCH

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INTRODUCTION

The October 2017 United States Supreme Court term proved historically consequential and divisive.[1] It opened with a full accompaniment of nine justices; the bench's conservative vacant seat having been filled by President Trump's nominee, Justice Neil Gorsuch, after Justice Antonin Scalia's 2016 passing.[2] Following the term's conclusion, pivotal swing-voter Justice Anthony Kennedy announced his retirement, giving the President a second occasion to fill a Supreme Court void.[3] Justice Brett Kavanaugh's October 2018 Senate confirmation, preceded by extensive scrutiny over his ideology and prior conduct, cemented what was predicted to be a more conservative majority into the foreseeable future.[4] Although the Court's composition was seen by many as highly politicized before this period, this recent term provided the evolving bench ample opportunity to stake its claim over crucial issues affecting American life.

Beginning October 2, 2017 the Court issued nineteen 5-4 decisions, fourteen of which included Justice Kennedy's *swing* vote among the four more conservative decision-makers.[5] In addition, three Kennedy swing votes resulted in the Court's reversal of precedent.[6] These included the majority prohibiting California from requiring crisis pregnancy centers to supply abortion information,[7] upholding a baker's refusal to create a wedding cake for a homosexual couple,[8] striking a federal law banning states from allowing commercial sports betting,[9] and – in Justice Kennedy's swing vote finale – overruling long-standing precedent that required evidence of physical presence before a state could collect sales taxes from remote sellers in *South Dakota v. Wayfair, Inc.*[10]

Delivered at the close of the term, *Wayfair's* impact extends far beyond the Question Presented. The Court's willingness to overturn precedent, replace the historical "physical presence" requirement with an "economic nexus" standard, and allow states to collect sales tax from online retailers significantly impacts the entire retail industry in a nation heavily dependent

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[1] *See* Brennan Hoban, *The Supreme Court's 2017-2018 term: A roundup of Brookings analysis*, BROOKINGS.COM, July 30, 2018, https://www.brookings.edu/blog/brookings-now/2018/07/30/the-supreme-courts-2017-2018-term-a-roundup-of-brookings-analysis. *See also* ANDREW NOLAN, ET AL., CONG. RESEARCH SERV., R45316, SUPREME COURT OCTOBER TERM 2017: A REVIEW OF SELECTED MAJOR RULINGS (2018).

[2] *See* Colleen Shalby, *Scalia's seat has been vacant longer than any Supreme Court justice's in nearly 50 years*, LOS ANGELES TIMES (Mar. 30, 2017), https://www.latimes.com/politics/washington/la-na-essential-washington-updates-scalia-s-seat-has-been-vacant-longer-1490908519-htmlstory.html.

[3] *See* Katherine Jones, *On Account of Sex: How Massachusetts's Equal Rights Amendment Can Protect Choice*, 28 B.U. PUB. INT. L.J. 53, 53-54 (2019).

[4] *Id.* at 55.

[5] *SCOTUSBlog StatPack October Term 2017*, SCOTUSBLOG (June 29, 2018), http://www.scotusblog.com/wp-content/uploads/2018/06/SB_5-4cases_20180629.pdf. The four conservative justices comprising these fourteen majority decisions were Justices John Roberts, Samuel Alito, Neil Gorsuch and Clarence Thomas.

[6] *Id. See also* South Dakota v. Wayfair, 138 S. Ct. 2080 (2018), Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018), and Janus v. Am. Fed. Of State, County & Munic. Emps., 585 U.S. ___ (2018). *See also* BRANDON J. MURRILL, CONG. RESEARCH SERV., R45319, THE SUPREME COURT'S OVERRULING OF CONSTITUTIONAL PRECEDENT (2018).

[7] Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018). Justice Thomas delivered the 5-4 majority opinion, joined by Justices Roberts, Kennedy, Alito and Gorsuch.

[8] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018). Justice Kennedy delivered the 7-2 majority opinion, joined by Justices Roberts, Thomas, Breyer, Alito, Kagan and Gorsuch.

[9] Murphy v. NCAA, 138 S. Ct. 1461, 1484-85 (2018). Justice Alito delivered the 6-3 majority opinion, joined by Justices Roberts, Kennedy, Thomas, Kagan, and Gorsuch.

[10] 138 S. Ct. 2080 (2018). Justice Kennedy delivered the 5-4 majority opinion joined by Justices Thomas, Ginsburg, Alito and Gorsuch.

on electronic commerce.[11] The emergency legislation[12] undertaken by South Dakota that successfully drew the Court to overturn precedent, transformed *Wayfair* from an important single-term decision into a modern day roadmap for U.S. Supreme Court case-baiting.[13]

In addition, Chief Justice Roberts' dissent in *Wayfair* raises questions about the ideologically-scattered majority acting beyond the scope of its authority, providing another layer to the growing debate about the Court's evolution towards being the most powerful of the three federal branches.[14] *Wayfair*'s decision, resulting in one of the most conservative Justices warning the majority about breaking with stare decisis, beckons an examination of increased criticisms of "judicial advocacy" that might foil the historical roots of separation of powers. [15]

This article evaluates the *Wayfair* case in three important ways. First, it proposes that Roberts' *Wayfair* dissent adds a new element to the debate surrounding the Supreme Court's evolution as the most powerful branch of American government.[16] This article incorporates an analysis of historical Supreme Court dissenting opinions that chastised the majority for exercising judicial powers beyond the scope of authority envisioned by the Founding Fathers. We conclude that the Supreme Court had the Constitutional authority to make its *Wayfair* decision.[17]

Second, this article advances existing literature by promoting *Wayfair* as a prototypical example of a Supreme Court decision falling within what we refer to as the "sovereign zone of twilight". This expanded term derives roots from Justice Felix Frankfurter's introduction of the term "zone of twilight" as applies to uncertainty existing between executive and legislative authority.[18] Our broadened term extends the historical application of the zone of twilight to embrace the point of uncertainty existing between legislative and judicial action.[19]

Third, this article advances current literature by endorsing *Wayfair* as the prototypical example of case-baiting.[20] Although risky, case-baiting is an effective tool available to states and local governments to entice the Supreme Court to reconsider precedent. This article is the first to examine case-baiting from the purest, most direct approach (which the *Wayfair* case epitomizes),

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[11] *See* Taylor N. Armstrong and Caitlin E. Correa, *Sales and Use Taxes*, 35 GA. ST. U.L. REV. 187, 199 (2018) (discussing the replacement of physical presence with "economic nexus").

[12] *See* S.B. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016) (codified at S.D. CODIFIED LAWS §10-64 (2017)) [hereinafter S.B. 106]. ("An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to *declare an emergency*.") (emphasis added).

[13] *See infra*, Part II. We define case-baiting as "a tactic adopted by state/ local jurisdictions to deliberately pass legislation in direct conflict with federal precedent or law to lure the Supreme Court into granting certiorari and ruling in favor of state/ local interests."

[14] *See infra* Part II.

[15] See *Wayfair*, 138 S. Ct. 2080, 2101 (Roberts, C.J., dissenting). ("If stare decisis applied with special force in *Quill*, it should be an even greater impediment to overruling precedent now…")

[16] *See infra* Part II (b).

[17] *See infra* Part II (a) and (c).

[18] The term "zone of twilight" was first introduced by in Justice Frankfurter's 1952 concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (the "zone of twilight" is the zone "in which he [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."). *See infra* Part II(d) for a discussion on the expansion of this term. *See infra* Part II (d).

[19] Literature suggests that the term "zone of twilight" is broad enough to encompass all three branches of government. *See* Caprice L. Roberts, *Jurisdiction Stripping In Three Acts: A Three String Serenade*, 51 VILL. L. REV. 593, 601 (2006) (expanding the *Youngstown* definition of the "zone of twilight" to "where the branches exercise overlapping authority and into the core functions of a separate branch of government.").

[20] *See infra* Part III.

as well as the more common, indirect baiting approach that states have used to chip away at legal precedent on issues including abortion rights and firearms regulations. While legally sound, direct case-baiting raises significant ethical considerations that should be considered in future research. However, South Dakota's successful effort to bait the Court into action sets the stage for other states to use similar tactics to influence federal policy.

To address the full impact of *Wayfair*, this article proceeds as follows: Part I examines the history of *Wayfair*, including applicable case precedent, Congress' failure to pass legislation resolving the tax implications of online commerce, and the efforts taken by South Dakota to "bait" the Supreme Court into action. Part II analyzes the criticisms surrounding "judicial advocacy" and the role that *Wayfair* could play in the separation of powers debate. This section explores the Framers' original intent and examines the scrutiny over the Court's evolution as one of the most powerful branches. This section also provides evidence of numerous cases where dissenting justices have rebuked the majority for legislating from the bench. Finally, this section advocates that *Wayfair* is a premier example of the Court taking action within the sovereign zone of twilight. Part III introduces case-baiting in its two primary forms – direct challenges and indirect challenges to federal policy. This section provides a thorough analysis of the procedural process required in direct case-baiting, using *Wayfair* as the quintessential model. This section also introduces marijuana legalization as a parallel example of state efforts currently underway and offers recommendations for successful case-baiting attempts in this arena. Part IV concludes that *Wayfair*'s impact extends far beyond the tax case brought by South Dakota. This case serves as a significant model for the continued debate surrounding the Court's evolution towards superiority among branches, epitomizes the application of the sovereign zone of twilight and – due to the magnitude of South Dakota's success - endorses one of the riskiest tools available to states to bait the Supreme Court into action.

PART I: *SOUTH DAKOTA V. WAYFAIR* – A DEVELOPMENT IN STARE DECISIS DOCTRINE

On June 21, 2018 the United States Supreme Court issued an important 5-4 decision in *South Dakota v. Wayfair*.[21] The Court, surely feeling the heat from parties of all political persuasions, reconsidered long-standing precedent requiring a remote seller to have a physical presence before states could mandate sales or use tax collection.[22] This decision represents a significant triumph for states and brick-and-mortar retailers who were disadvantaged when their online competitors were relieved of the duty to collect sales and use taxes from customers.[23] The decision also reflects an uncommon split across ideological lines, with the classically conservative Chief Justice John Roberts departing from his more conservative brethren to join the liberal-leaning minority in dissent.[24] *Wayfair* also exemplifies a brazen state tactic to intentionally draft

[21] 138 S. Ct. 2080 (2018).

[22] Aspyn S. Butzler, *The Eradication of Online Retailers' Tax Shelter: How South Dakota v. Wayfair Eliminated the Physical Presence Standard and Reinterpreted the Commerce Clause To Allow Collection of State Sales Tax on Remote Sellers*, 54 GONZ. L. REV. 174, 175-176 (2018).

[23] Maria Peroni, *What Does South Dakota v. Wayfair Mean for Retailers*, AM. BOOKSELLERS ASSOC. (July 31, 2018), https://www.bookweb.org/news/what-does-south-dakota-v-wayfair-mean-retailers-104882.

[24] Bernie Becker and Josh Gerstein, *Supreme Court Hands States a Victory In Tax Case That May Cost Consumers*, POLITICO (June 18, 2018, updated June 21, 2018), https://www.politico.com/story/2018/06/21/supreme-court-online-sales-tax-collection-661647.

legislation in direct violation of Supreme Court precedent. South Dakota's case-baiting approach was encouraged by Justice Anthony Kennedy in a prior case.[25] Although the Court's decision raises crucial issues of separation of powers and case-baiting,[26] the purpose of this Part is to discuss the *Wayfair* case and its implications for taxes and e-commerce.

Wayfair overturned a historic and controversial line of Supreme Court precedent that began in 1967 with *National Bellas Hess v. Department of Revenue of Illinois.*[27] In *Bellas Hess*, the Court held that states could not require remote retailers to collect and remit use tax if they had no physical presence in the jurisdiction.[28] The Court further resolved that the Due Process and Commerce Clauses required a "minimum connection" before a state could enforce tax collection.[29] Even after mail-order catalogues and telephone sales were usurped by modernized retail outlets like direct marketing and e-commerce, *Bellas Hess* effectively barred states from enforcing tax collection on most remote sellers.[30]

Twenty-five years later, the Court revisited the physical presence standard in *Quill Corp. v. North Dakota*.[31] In *Quill*, the majority held that physical presence of a remote seller in a state trying to force the retailer to collect taxes was unnecessary under the Due Process Clause, but required under the Commerce Clause.[32] Upholding the stare decisis principle established in *Bellas Hess*, the Court reaffirmed that tax collection on remote sellers having no minimum connection with the jurisdiction was impermissible, absent Congressional action.[33] However, the Court also conceded that *Bellas Hess* was perhaps flawed, thereby inviting Congress to take action.[34]

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[25] Kerry Murdock, *Sales Tax Pro on Impact of Supreme Court's Wayfair Decision*, PRACTICAL ECOMMERCE (June 28, 2018), https://www.practicalecommerce.com/sales-tax-expert-impact-supreme-courts-wayfair-decision.

[26] *See infra* Parts II and III.

[27] 386 U.S. 753 (1967). Note that *Wayfair*, like the cases that preceded it, did not technically involve sales taxes; rather, these cases deal with the use tax which is a complementary or compensating tax for sales taxes not collected.

[28] *Id*.

[29] *Id.* at 756 (One test presented to asses "whether an out-of-state business must comply with a state levy" is whether "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" exists). *See also* Scripto, Inc. v. Carson, 362 U.S. 207 (1960) (upholding use tax collection in Florida on a Georgia retailer whose Florida representatives solicited sales on the retailer's behalf) and National Geographic Society v. California State Board of Equalization, 430 U.S. 551 (1977) (upholding a California Supreme Court decision that the state could collect use tax from an out-of-state nonprofit corporation that had two offices in California).

[30] *See* Eric A. Ess, Comment: *Internet Taxation Without Physical Representation?: States Seek Solution To Stope-Commerce Sales Tax Shortfall*, 50 ST. LOUIS L.J. 893, 917 (2006) (noting that remote Internet sales are analogous to mail-order and phone sales).

[31] 504 U.S. 298, 318 (1992).

[32] *Id*. at 308, 310.

[33] *Id. at* 317-318 (1992) ("…the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law… this aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve.").

[34] *Id.* at 311, 318. The timing of *Quill* was interesting in retrospect as it was unlikely the Court could have foreseen the coming growth of e-commerce. From the first sale in 1994, e-commerce sales grew to eventually account for approximately 10 percent of all retail sales in the U.S. in 2017. Though mail order sales were a growing concern in the time leading up to *Quill*, the states became increasingly alarmed at the even greater loss of sales tax revenue from e-commerce and, simultaneously, concerns emerged that tax-free Internet sales were damaging local brick-and-mortar retailers. *See* Richard Auxler and Kim Reuben, *The Evolution of Online Sales Taxes and What's Next for States: National Bellas Hess to Quill to Wayfair*, TAX POLICY CENTER, https://www.taxpolicycenter.org/publications/evolution-online-sales-taxes-and-whats-next-states/full (June 26,

Post-*Quill*, states worked to simplify and unify sales and use tax collection to enhance fair play between the thriving e-commerce industry and deteriorating brick-and-mortar market.[35] Nevertheless, for twenty-six years Congressional attempts to address *Quill* proved fruitless.[36] As remote sales and use tax revenues declined, frustrations mounted.[37] Recognizing these concerns, in 2016 Justice Kennedy called for challenges to be brought against *Quill* and *Bellas Hess* in his concurring opinion in *Direct Mktg. Ass'n. v. Brohl (DMA)*.[38] Although *DMA* was based on Colorado statutory tax law, Kennedy took advantage of this opportunity to inspire the legal community to "find an appropriate case" that would allow the Supreme Court to reconsider the "doubtful authority" endorsed by earlier precedent.[39]

Following *DMA*, the National Conference of State Legislatures encouraged states to pass legislation in direct contravention to *Quill*.[40] Acquiescing these calls, South Dakota introduced one of the first statutes aimed at overturning *Quill.* [41] South Dakota Senate Bill (S.B.) 106 required remote sellers with more than $100,000 of taxable sales or over 200 transactions within the state to collect and remit sales tax.[42] S.B. 106, which focused on economic presence rather than physical presence,[43] was signed into law on March 22, 2016, specifically documenting an intent to overturn Supreme Court precedent as swiftly as possible:

> Given the urgent need for the Supreme Court of the United States to reconsider doctrine, it is necessary for this state to pass this law clarifying its immediate intent to require collection of sales taxes by remote sellers, and permitting the most expeditious possible review of the constitutionality of this law.[44]

Less than one month later, South Dakota filed a lawsuit against out-of-state retailers Wayfair, Inc., Overstock.com, Newegg, and Systemax for failure to collect sales taxes on purchases made by South Dakota customers.[45] Swiftly challenged, the state Circuit Court granted a motion for

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[35] *See* Kathryn Kisska-Schulze, *The Future of E-mail Taxation in the Wake of the Expiration of the Internet Tax Freedom Act*, 51 AM. BUS. L.J. 315, 356 (2014) (documenting that the Streamlined Sales and Use Tax Agreement (SSUTA) was initiated to "simplify and modernize sales and use tax administration…" among states in an effort to relax the nexus requirements established in *Quill*.).

[36] Alyson Outenreath, *Cheers! Ending Quill… What Can Be Learned From the Wine Industry*, 48 N.M.L. REV. 372, 396 (2018). *See also, e.g.,* Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013); Marketplace Fairness Act of 2015, S. 698, 114th Cong. (2015); Marketplace Fairness Act of 2017, S. 976 (115th Cong. (2017).

[37] *See* Audrey Taylor, *Supreme Court Taxes Up Battle Between States, Web Retailers Over Sales Tax*, ABCNEWS (Apr. 17, 2018), https://abcnews.go.com/Politics/supreme-court-takes-battle-states-web-retailers-sales/story?id=54526312.

[38] *See* Direct Marketing Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015).

[39] *Id.* at 1135 (In inviting states to bring forward a case, Justice Kennedy acknowledged that the *DMA* case did not "raise the issue [reconsideration of the *Quill* decision] in a manner appropriate for the Court to address it.").

[40] NAT'L CONFERENCE OF STATE LEGISLATURES, *Letter to Legislative Leaders* (January 20, 2016), http://www.ncsl.org/documents/fiscal/State_Leaders_Call_For_Action.pdf (the Conference went so far as to prepare and disseminate to state legislators draft legislation).

[41] S.B. 106.

[42] *Id*. at §1 and §8.

[43] Susan R. Dana and Liz Diers, *Redefining Nexus in Wayfair*, THE CPA JOURNAL (Jan. 2019), https://www.cpajournal.com/2019/01/30/redefining-nexus-in-wayfair/.

[44] S.B. 106, §8(8).

[45] South Dakora v. Wayfair, 229 F. Supp. 3d 1026. Systemax was ultimately not included in the lawsuit as it agreed to comply and voluntarily register and collect sales tax from South Dakota customers prior to the filing of the suit.

summary judgment in favor of the defendants, which the state appealed.[46] The South Dakota Supreme Court held that the state was bound by the physical presence standard articulated in U.S. Supreme Court precedent.[47] South Dakota filed for writ of certiorari to the U.S. Supreme Court, which was granted. Justice Kennedy, who had previously invited states to take action, drafted the opinion of the Court which repudiated *Quill*'s physical presence standard.[48]

Overruling this tax barrier, *Wayfair* finally permits states to capture Internet sales tax revenue from remote sellers with no physical presence. However, this case raises questions about South Dakota's tactic to fast track through the court system, as well as the Court's potential usurpation of Congressional power. *Wayfair* calls for an examination of whether the Court had the Constitutional authority to make this decision and, if so, whether states should use this case-baiting tactic in the future. Part II dissects the roots of separation of powers, concluding that the Court had broad Constitutional authority to take action on this and other issues falling within the sovereign zone of twilight that exists at the intersection of Supreme Court and Congressional authority.

PART II: CASE-BAITING & AN INQUIRY INTO SEPARATION OF POWERS

Wayfair represents a shift away from the conservative-leaning Court's application of originalism, toward more modernized application of law entwined with technology.[49] The majority's decision prompted cries of "judicial activism" which encroached upon Congressional responsibilities.[50] Conservative-leaning Chief Justice Roberts was joined by the Court's three liberal-leaning Justices in urging that the Court not stray from stare decisis, arguing that Congress – not the Court – held the power and responsibility to nullify established precedent in Commerce Clause cases like this.[51] The majority's decision and the Chief's dissent signified atypical alignment of the current Justices.[52]

Wayfair is not the first Supreme Court decision receiving criticism for alleged legislation from the bench. For decades the judiciary has endured accusations that its decisions infringe on

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[46] *Id.* at 1.

[47] State v. Wayfair Inc., 2017 SD 56, 901 NW 2d. 754, 761 (2017). In its appeal, the state specifically requested that the South Dakota Supreme Court affirm the lower court decision "as expeditiously as possible" to all the state to "advocate that Quill… be reconsidered by the Supreme Court of the United States." *See South Dakota v. Wayfair, Inc.*, Sup. Ct. of S.D., No. 28160, App. Brief.

[48] *Wayfair*, 229 F. Supp. 3d 1026.

[49] Carl Szabo, *Maybe Brett Kavanaugh Can Save Conservative Supreme Court Justices From Their Judicial Activism*, THE DAILY CALLER (July 18, 2018), https://dailycaller.com/2018/07/18/kavanaugh-and-conservative-supreme-court-judicial-activism/.

[50] Jonathan E. Maddison, *Why Wayfair Won't Matter*, TAX EXECUTIVE (May 31, 2018), https://files.reedsmith.com/files/Uploads/Documents/2018/0518_TE_CoverFeature_Maddison_Wayfair_FINAL.PDF. *See also* Szabo, *id.* ("Nowhere else was this judicial activism by Conservative judges more apparent than in last month's 5-4 Supreme Court decision in South Dakota v. Wayfair).

[51] *See Wayfair*, 138 S. Ct. 2080, 2101 (Roberts, C.J., dissenting) ("If stare decisis applied with special force in *Quill*, it should be an even greater impediment to overruling precedent now, particularly since this Court in *Quill* tossed the ball into Congress's court, for acceptance or not as that branch elects.") *See also* Quill Corp. v. North Dakota, 504 U.S. 298, 317-318 (1992) ("This aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the power to resolve.").

[52] Cristian Farias, *Supreme Court: Forget What We Said Before About Not Having To Pay Sales Tax Online*, INTELLIGENCER (June 21, 2018), http://nymag.com/intelligencer/2018/06/scotus-sticks-it-to-etsy-shoppers.html?gtm=bottom&gtm=top (noting that Justice Anthony Kennedy and Chief Justice John Roberts were on opposite sides of the spectrum on this decision).

the boundaries of separation of powers.[53] However, *Wayfair* exemplifies a blatant attempt by a state to bait the Court into legislative action with a hanging carrot. Based on Roberts' dissent, the Court bit.

Historic cases suggest that assertions of legislative activity from the High Court are not confined to the court of public opinion; instead, dissenting judges have admonished majority decision-makers for championing initiatives that should perhaps be left to Congress to resolve.[54] These dissents raise important questions about the Court's exercise of legislative authority in the absence of an increasingly inactive Congress.[55] Whether the Supreme Court's authority has expanded beyond that envisioned by early Framers is critical to addressing if the *Wayfair* majority exercised excessive power. To evaluate these issues, this Part proceeds as follows: Section (a) reviews the roots of separation of powers; Section (b) examines the Supreme Court's evolution as perhaps the most powerful branch; Section (c) identifies cases where dissenting justices have expressed concerns of judicial legislation; and Section (d) advances that the Supreme Court has broad Constitutional authority to take aggressive action on issues falling within the sovereign zone of twilight.

a. The Roots of Separation of Powers

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[53] *See e.g.,* Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, 95 GEO. L.J. 929, 940 (2007) ("[I]t remains the role of the legislature to legislate, and the Judiciary to interpret. An activist court "legislates from the bench", and thus, "encroaches on the legislature's constitutional turf." Legislating from the bench "destroys the proper end of judging, and therefore, is the greatest threat to judicial independence, the means to that proper end."); Michael D. Weiss & Mark W. Bennett, *New Federalism and State Court Activism*, 24 MEM. ST. U.L. REV. 229, 260 (1994) ("Legislatures should legislate, and the judiciary should interpret; when a court is activist, it inevitably legislates and, therefore, encroaches on the legislature's constitutional turf."); Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U. CIN. L. REV. 1103, 1157 (1991) ("It has become increasingly popular for politicians to decry the evils of judicial activism, and judicial candidates often feel that they must portray themselves as practitioners of "judicial restraint" who are sensitive to the evils of "legislating from the bench."); Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555, 568-569 (2010) ("[T]he accusation that judges are "legislating from the bench" and "imposing personal views" may imply a failure to show proper deference, but it may also suggest lawlessness in pursuit of a personal agenda."); Jane S. Schacter, *Putting The Politics Of "Judicial Activism" In Historical Perspective*, 2017 SUP. CT. REV. 209, 211 (2017) ("Throughout these years, the idea that courts had outrageously overstepped their bounds was one of the cornerstones of political attacks."). *See also* Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 KY. L.J. 679, 721 (1999) ("House Judiciary Committee Chairman Henry Hyde (R-Ill.) agreed: I do not believe that impeachment can or should be based upon a judge's decision on the merits of any particular case or upon the judge's political philosophy. . . . There is no precedence for such an approach, and for good reason. . . . Instances of systematic abuse of power and aggressive legislating from the bench must be addressed, possibly by impeachment."); *Id*. at 692 ("Senator Edward Kennedy (D-Mass.) agrees, believing that '[o]ur Re-publican colleagues in Congress are taking an Alice-in-Wonderland view of the federal judiciary. What was once respected as 'judicial independence,' they now call 'judicial activism.' What were once hailed as 'land-mark decisions' are now condemned as 'legislating from the bench.'").

[54] *See* Bruce G. Peabody, *Legislating From the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 186-187 (2007) (noting that judicial attacks by politicians, scholars, and interest groups have increased since the 1980s).

[55] *See* Farias, *supra* note 52 (noting that in the absence of real action by Congress, the Supreme Court must fill in the gaps); Mickey Edwards, *We No Longer Have Three Branches of Government*, POLITICO (Feb. 27, 2017), https://www.politico.com/magazine/story/2017/02/three-branches-government-separation-powers-executive-legislative-judicial-214812 (discussing that Congress has abdicated its responsibilities since pre-Newt Gingrich); Bernie Becker, *A Taxing Case on the Supreme Court's Docket*, POLITICO (Apr. 17, 2018) (promoting that the Supreme Court took the *Wayfair* case because Congress failed to take action on online sales tax legislation).

Since its inception, the Supreme Court has historically walked the fine line adhering to the separation of powers and federalism.[56] Alexander Hamilton and James Madison promoted this separation as the cornerstone of the new government.[57] The Framers, intent on safeguarding a "check against tyranny," balanced authority across three sovereigns to avoid accrual of power in the hands of one.[58] This hierarchical approach positioned the national government above states to split "the atom of sovereignty."[59] The powers separating one branch from another are tempered by checks and balances, resulting in separate-yet-balanced powers.[60] The Constitution does not enforce strict separation of powers between branches; instead, it allows each division a means of defending itself against encroachment by others.[61]

Significant legal scholarship has focused on separation of powers.[62] Similarly, preserving separate-yet-balanced powers has been endorsed by the judiciary.[63] Although the Court has

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[56] *See e.g.*, Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (noting "respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms"). *See also* Regents of University of Michigan v. Ewing, 474 U.S. 214, 230 (1985) (Powell, J., concurring); McDonald v. City of Chicago, 561 U.S. 742, 912 (2010) (Stevens, J., dissenting); Obergefell v. Hodges, 135 S. Ct. 2584, 2618 (2015) (Roberts, J., dissenting).

[57] *See* Jeffrey S. Brand, *Eavesdropping on Our Founding Fathers: How a Return to the Republic's Core Democratic Values Can Help Us Resolve the Surveillance Crisis*, 6 HARV. NAT'L SEC. J. 1, 33 (2015) (particularly focusing on Federalist Paper Nos. 47 and 51).

[58] *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts under Article III*, 65 IND. L.J. 233, 233 (1990) (identifying the U.S. government as being "institutional architecture"). *See also* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 397 (1996) (noting that the separation of powers doctrine balances governmental authority and delegates authority to the branches). *See also The Federalist Papers*: No. 47 ("[T]he legislative, executive, and judiciary departments ought to be separate and distinct" and the "WHOLE power" of one governmental department should not belong to the "same hands which possess the WHOLE power of another department." Further noting "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny."); *The Federalist Papers*: No. 48 ("power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it."); *The Federalist Papers*: No. 51 ("TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution?"). *See also* Charles Herman Winfree, Note, *State ex rel, Martin v. Melott: The Separation of Powers and the Power to Appoint*, 66 N.C.L. REV. 1109, 1109 (1988) (Noting that the founding fathers ideal of separation of powers prevented power being accumulated in the hands of one).

[59] Richard Albert, *The Separation of Higher Powers*, 65 SMU L. REV. 3, 6 (2012). *See also* United States Term Limits v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

[60] David S. Rubenstein, *The Paradox of Administration Preemption*, 38 HARV. J. L. & PUB. POL'Y 267, 284 (2015)

[61] James Etienne Viator, *A Round Table On American Constitutional Law: Marbury v. Madison: History, Legitimacy, Influence: Marbury and History: What Do We Really Know About What Really Happened?*, 37 R.J.T. 329, 359 (2003). *See also* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1130 (2000) (noting the importance of both defensive and policing roles of each branch). *See also* U.S. v. Dewiler, 338 F. Supp. 2d 1166, 1169 (2004) ("'[W]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.' Consequently, the Supreme Court has focused upon ensuring adequate checks and balances, and that each Branch jealously guards its own powers and resists encroachment by the others.") (quoting Mistretta v. United States, 488 U.S. 361, 381 (1989)).

[62] *See* Magill, *id.* at 1129. A LexisNexis search of the term "separation of powers" results in over 10,000 law review and journal citations.

[63] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (noting that the Constitution enjoins "upon its branches separateness but interdependence, autonomy but reciprocity."); U.S. v. Nixon, 418 U.S. 683, 706-707 (1974) (The Court stating that the powers separating branches are not "intended to operate with absolute independence."); Mistretta v. United States, 488 U.S. 361, 372 (1989) (documenting that

supported Madison's tripartite approach,[64] an interesting inquiry is which, if any, of the three branches holds the greatest power. In the 1789 *Annals of Congress*, Madison offered, "[T]he legislative [branch] . . . is the most powerful."[65] Some have since contended that the executive branch reigns supreme.[66] Others claim that the judiciary has established itself as the most powerful branch of the U.S. government.[67] These assertions invite an examination of whether the Supreme Court has evolved as superior in today's modern culture.

b. The Supreme Court's Evolution Toward Superiority

Although the *Federalist Papers* specify that "none of [the branches] ought to possess, directly or indirectly, an overruling influence over the others in the administration of their

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separation of powers does not prohibit Congress from securing aid from the other branches). *See also* Kline, *supra* note 53, at 684 (1999) (noting that Chief Justice William Rehnquist proclaimed in his 1996 year-end speech on the state of the judiciary that, "[T]he Judicial branch of the federal government is separate, equal, and independent from the Legislative branch. Yet both must work together if feasible solutions are to be found to the practical problems that confront today's federal judiciary.").

[64] *See e.g.*, U.S. v. Nixon, 418 U.S. 683, 704 (1974) ("Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government."). Nixon v. Adm'r of General Servs., 53 L. Ed. 2d 867, 890 (1977) ("But the more pragmatic, flexible approach of Madison in the Federalist Papers and later of Mr. Justice Story was expressly affirmed by this Court only three years ago in United States v. Nixon"); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1215 (2015) ("Although this Court has repeatedly invoked the 'separation of powers' and 'the constitutional system of checks and balances' as core principles of our constitutional design, essential to the protection of individual liberty, it has also endorsed a 'more pragmatic, flexible approach' to that design when it has seemed more convenient to permit the powers to be mixed." (citing to Stern v. Marshall, 564 U.S. 462, 510 (2011) and Nixon v. Administrator of General Services, 433 U. S. 425, 442, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977)); and Stern v. Marshall, 564 U.S. 462, 483 (2011) ("We have recognized that the three branches are not hermetically sealed from one another.").

[65] Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1263 (1988) (citing to 1 ANNALS OF CONG. 454 (J. Gales ed. 1789)).

[66] *See, e.g.*, Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U.L. REV. 259, 265 (2009) (noting that the executive branch has become the most powerful governmental branch); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725, 1727 (1996)(documenting that in the two centuries since the U.S. Constitution came to fruition, "never has the executive branch been more powerful."); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 507 (2008) (stating that the Presidency has become the more powerful branch); Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. PA. J. LAB. & EMP. L. 225, 270 (2005) (providing that the federal executive branch has become most powerful); Robert Bejesky, *War Powers Pursuant to False Perceptions and Asymmetric Information in the "Zone of Twilight"*, 44 ST. MARY'S L. J. 1, 52 (2012) (opining that the Presidency seat is most dominant); and Geoffrey Corn and Eric Talbot Jensen, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, The President, and Congress*, 44 HOUS. L. REV. 553, 592 (2007) (noting the presidency as the most powerful branch).

[67] *See e.g.*, Abram Chayes, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026, 1041 (1988) ("the judiciary is the most powerful branch."); Christopher Osakwe, *A Soviet Perspective on the Supreme Court of the United States: An Introductory Note*, 53 TUL. L. REV. 713, note 4 (1979) (documenting that the Supreme Court as the de facto most powerful branch); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L. J. 217, 327 (1994) (noting that "[T]he playing-out of checks and balances among the branches may produce results that, in many cases, resemble judicial supremacy"); Sarah Frisque, *Preventing Mudsliding in Chambers: Alternatives After the Demise of the Announce Clause in Republican Party of Minnesota v. White*, 122 S. CT. 2528, note 104 (2002) (citing to Justice 2002, A Project of the Illinois Civil Justice League which dictated that the judicial branch is the most powerful); and Stacy Hawkins, *Diversity, Democracy & Pluralism: Confronting the Reality of Our Inequality*, 66 MERCER L. REV. 577, 628 (2015) (providing that some estimates find the U.S. Supreme Court to be the most powerful branch).

respective powers," Congress was envisioned to assume the head seat.[68] While support of Congressional superiority may have been communal, the Framers' concerns of misappropriated powers concentrated on the legislative and executive branches only, with little consideration given to the judiciary's threat.[69] In fact, Hamilton branded the judiciary as being the "least dangerous" of the three branches.[70] Two hundred years later, some questioned that sentiment.

In his 1962 book *The Least Dangerous Branch*, renowned legal scholar Alexander Bickel documented, "[t]he least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known."[71] Judicial supremacy was also acknowledged by Harvard law scholar Abram Chayes, who concluded that the Court reigns supreme due to its ability to affect American social culture, persuading society "at the deepest and most fundamental level" that its conclusions are correct.[72] Chayes deduced that the Court's motives are not influenced by legislators or voters, thus allowing the branch to speak "about the basic values that define us as a nation and a society" without fear of negative recourse.[73] Modern scholars have debated these assertions.[74]

Article III of the Constitution grants great power to the judiciary because of its brevity and broad grants of authority.[75] Its language does not contain explicit regulations for Supreme Court review.[76] Instead, Article III's allowance that the Court hear "all cases" of federal law, and all "controversies" between parties has evolved to embrace the ideal of "justiciability."[77] It is the Court itself that helped plant the seeds establishing judicial power. History supports that some of

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[68] *The Federalist Papers*: No. 48. *See also* Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1342, 1388 (1983) (noting that the Framers likely viewed Congress as most powerful). *See also* Krent, *supra* note 65, at 1263 (citing to The Federalist Paper No. 48, where James Madison prescribed the legislative branch as being the most powerful); Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 239 (2005) (noting the argument that some feel Congress was meant to be the most powerful and important branch); Marshall, *supra* note 66, at 507 (discussing that Madison and others felt the legislature was the most powerful).

[69] *See* Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 599 (1986).

[70] *The Federalist Papers*: No. 78.

[71] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 1 (1962).

[72] Chayes, *supra* note 67. (explaining that the judiciary is the most powerful branch because it is not motivated by officials, legislators, or voters).

[73] *Id.*

[74] *See e.g.*, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U.L. REV. 333 (1998) (providing a historical framework for the rise in judicial supremacy); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L. J. 1013, 1016 (1984) ("Hardly a year goes by without some learned professor announcing that he has discovered the final solution to the countermajoritarian difficulty, or, even more darkly, that the countermajoritarian difficult is insoluble."); Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1846 (2004) (determining that principled minimalism protects the political system against excessive judicial intrusion, while allowing the branch to perform its prescribed role); Paulsen, *supra* note 67, at 343 (arguing that the judicial branch holds no superiority over other branches in interpreting the law); and Rachel E. Barkow, *More Supreme Thank Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002) (exploring the Supreme Court's role in building its own supremacy).

[75] U.S. CONST. art. III, §§ 1-2.

[76] Barkow, *supra* note 74, at 253.

[77] Robert J. Pushaw, Jr., *Article III's Case/ Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 447 (1994).

the most influential U.S. Supreme Court cases have not only identified the boundaries within which the Court should perform its duties, but also furnished a platform upon which the Court brought about its own ennoblement.[78]

In the Court's earlier years, Chief Justice John Marshall qualified that the Court is not a political branch and should avoid political issues so as not to "substitute its own judgement for that of Congress."[79] Almost a century and a half later, and without deference to Marshall's words, *Dred Scott* became one of the earliest and most obscenest examples of judicial activism.[80] However, it is the onset of the *Lochner* era that has been regarded as the turning point of the Court expropriating its power in defiance of Constitutional textual meaning.[81]

Although the Lochner Court exercised early twentieth-century ennoblement, the term "judicial activism" and subsequent Court criticisms emerged later.[82] A 1947 *Fortune* article by Arthur Schlesinger identified select Supreme Court justices as being "Judicial Activists."[83] Soon after, the Warren Court materialized. A 2002 Maryland Court opinion best summarized the activities of that era: "The Warren Court majority was fairly perceived, by friend and foe alike, as liberal on the subject of defendants' rights and as activist in its approach to constitutional interpretation."[84] It was during this term that questions of judicial overreach accelerated.

Brown v. Board of Education is recognized as the first activist decision where the "ends justifies the means" philosophy signified the Court's intent to affix Constitutional meaning based on social preferences.[85] *Brown* raised serious questions of judicial overreach.[86] The Court

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[78] *See generally*, KENNETH W. STARR, FIRST AMONG EQUALS THE SUPREME COURT IN AMERICAN LIFE (2002). See also Marbury v. Madison, 5 U.S. 137, 177 (1803).

[79] *See* Barkow, *supra* note 74, at 249 (citing to Speech of the Honorable John Marshall (Mar. 7, 1800)). See also Marbury v. Madison, 5 U.S. 137, 177 (1803); McCullock v. Madison, 17 U.S. 316, 423 (1819)("to undertake here to inquire into the degree of [the bank's] necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.").

[80] Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1214 (2009). *See also* Dred Scott v. Sandford, 60 U.S. 393 (1957) (finding that a slave is property under the 5th Amendment, and any deprivation of a slave owner of such property is unconstitutional).

[81] Schacter, *supra* note 53, at 219. *See also* Richard E. Levy and Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 351-352 (1989) (noting this period saw the Court substantiating a vision of prudent economic policy in defiance of Constitutional text); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 171 (2002) (noting the Court's movement away from Constitutional textualism); *See, e.g.*, Green, *supra* note 80, at 1209 (documenting that the Lochner era "alleged 'activism (had the word been known) took several forms."); Thomas B. Colby and Peter J, Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015) (analyzing the activism of the Lochner era); Joshual Park, *Economic Protectionism: Irrationally Constitutional*, 45 PEPP. L. REV. 149, 58 n. 54 (2018) (noting that the *Lochner v. New York* decision encouraged more judicial activism).

[82] *See* Keenan D. Kmiec, *The Origin and Current Meanings of Judicial Activism*, 92 CA. L. REV. 1441, 1445-1446 (2004).

[83] *Id.* at 1446 (citing to Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE (Jan. 1947) at 202, 208).

[84] Ashford v. State, 147 Md. App. 1, 35 (2002).

[85] *See* Brown v. Board of Education, 347 U.S. 483 (1954). *See also* Daniel J. Castellano, *Plessy and Brown under Originalist Principles*, ARCANEKNOWLEDGE.ORG, 2007, rev. 2018, http://www.arcaneknowledge.org/histpoli/brown.htm.

[86] Joel K. Goldstein, *Approaches to Brown v. Board of Education: Some Notes on Teaching a Seminal Case*, 49 ST. LOUIS L.J. 777, 794 (2005). *See also* 102 Cong. Rec. 4460 (1956), available at http://web.utk.edu/~mfitzge1/docs/374/TSM1956.pdf which read, ""We regard the decision of the Supreme Court in

aggrandized its supremacy in another desegregation case, *Cooper v. Aaron*.[87] Justice Warren's majority opinion in this case lauded the Court's Constitutional interpretation as the "supreme law of the land."[88] Such cavalier proclamation endorsed the Court's opinions as being on equal footing with Constitutional text.[89] The Warren Court further exemplified judicial legislating in *Miranda v. Arizona*.[90] Years later, Justice Scalia chastised the *Miranda* Court's adoption of "prophylactic rules to buttress constitutional rights."[91] Scholars have since scrutinized the Court's decision in this case.[92]

Warren Court activism generally encompassed issues of individual rights, with particular attention paid to racial inequality and the handling of criminal defendants.[93] While Bickel denounced the Warren Court's actions as an "assault upon the legal order,"[94] others have defended the actions of this era.[95] Chief Justice Rehnquist noted that many of the Warren Court's holdings have become "part of our national culture."[96] Still, it was not the final period invoking criticisms of judicial overreach.

The Burger Court was heavily chastised for legislating from the bench in *Roe v. Wade*.[97]

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the school cases [*Brown v. Board of Education*] as clear abuse of judicial power. It climaxes a trend in the Federal judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the states and the people."

[87] Cooper v. Aaron, 358 U.S. 1 (1958) (the Supreme Court held that the Arkansas School Board was bound by the decision in *Brown v. Board of Education*, thus denying it the right to delay desegregation for a period).

[88] *Id.* at 18. ("It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land.").

[89] William D. (Bill) Graves, *Evolution, the Supreme Court, and the Destruction of Constitutional Jurisprudence*, 13 REGENT U.L. REV. 513, 551 (2000).

[90] *See* Miranda v. Arizona, 384 U.S. 436 (1966). *See also* STARR, *supra* note 78, at 192-193 and 200.

[91] Dickerson v. United States, 530 U.S. 428, 460 (2000) (Scalia, J., dissenting) ("[T]hat the Court has, on rare and recent occasion, repeated the mistake [going beyond what the Constitution actually requires] does not transform error into truth, but illustrates the potential for future mischief that the error entails.").

[92] *See, e.g.*, Donald A. Dripps, *Miranda For the Next Fifty Years: Why the Fifth Amendment Should Go Fourth*, 97 B.U. L. REV. 893 (2017) (analyzing various critiques of the Miranda rules); Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of Bush v. Gore*, 11 WM. & MARY BILL OF RTS. J. 343, 362 (2002) (noting that in the aftermath of *Miranda*, critics argued that the Court created rules that were illegitimate); John F. Stinneford, *The Illusory Eighth Amendment*, 65 AM. U. L. REV. 437, 445 (2013) (documenting that proponents of *Miranda* accused the court of violating the Constitutional limitations imposed on the judicial branch); Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 929, 959 (1999) (opining on the Warren Court's expansion of the role of prophylactic rules, to include within the *Miranda* decision); and Russell L. Weaver, *Bright-Line & Prophylactic Rules: Reflections From Miranda*, 50 TEX. TECH L. REV. 33, 41 (2017) (discussing that *Miranda* involved the Court functioning as a legislator instead of a court).

[93] Larry D. Kramer, *No Surprise. It's an Activist Court*, NY TIMES (Dec. 12, 2000), https://www.nytimes.com/2000/12/12/opinion/no-surprise-it-s-an-activist-court.html.

[94] David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 847 (2007) (citing, Alexander M. Bickel, The Morality of Consent 120 (1975)).

[95] *See, e.g.*, Thomas W. Merrill, *Judicial Opinions As Binding Law and As Explanations For Judgements*, 15 CARDOZO L. REV. 43, 52 (1993) ("The Cooper v. Aaron episode… cannot be regarded as definitive proof of the existence of a legal duty on the part of the executive branch to conform to judicial opinions…"); Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053 (2014) (questioning the assertions made in the *Southern Manifesto* as applied to *Cooper*).

[96] *See* Daniel R. Schuckers, *On the Cover: Acceptance of Precedents From the Warren Court (1953-1969)*, 39 PENN. LAWYER 20 (2017).

[97] *See* Roe v. Wade, 410 U.S. 113 (1973). *See also* David J. Zampa, Note: *The Supreme Court's Abortion*

Not only have numerous scholars analyzed the Court's resolve to enact abortion legislation,[98] but in his dissenting opinion Justice Rehnquist called out the majority, stating. "The decision here . . . partakes more of judicial legislation."[99] In a similar posture, Justice White voiced concerns in *Roe*'s companion case *Doe v. Bolton*, noting, "… [I]n my view [the Court's] judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court."[100] As will be discussed in Part III, states have since worked to chip away at the *Roe* decision, exemplifying the indirect challenge approach to case-baiting.[101]

Although Rehnquist was verbose in his admonition of the *Roe* Court's actions, his term was committed to conservative judicial activism.[102] In one of the most famous Rehnquist cases, *Bush v. Gore* closely approached the line of helping determine a presidential election for the first time in American history.[103] While the decision did not facially advocate judicial overreach, the Court's role in preempting the drawn-out vote recount spawned questions of unconstitutional appropriation of power.[104] Other notable cases heralding activist decisions during the Rehnquist

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Jurisprudence: Will the Supreme Court Pass The "Albatross" Back To The States, 65 NOTRE DAME L. REV. 731, 742 (1990) (noting that "trimester framework" in this case exemplifies judicial legislation).

[98] *See e.g.*, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements On Constitutional Law In the Twentieth Century*, 100 MICH. L. REV. 2062, 2145 (2002) (documenting that pro-life traditionalists found the Court's decision in *Roe* to be "the most arrogant example of judicial legislation"); Stephen B. Presser, *Judicial Ideology And the Survival of the Rule of Law: A Field Guide to the Current Political War over the Judiciary*, 39 LOY. U. CHI. L.J. 427, 462-463 (2008) (discussing the judicial legislating of Roe v. Wade as applied to the confirmation battles of Justices Roberts and Alito); Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing In Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, 244 (2007) (stating, "In Roe v. Wade, the Court created judicial legislation" in the form of a trimester framework); Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson From Abolitionists*, 62 ALB. L. REV. 853, 874 (1999) (documenting that three years after *Roe*, a survey of state and federal judges felt the decision amounted to judicial legislation); and Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293, 294 (1986) (noting Alexander Bickel blasted *Roe* as being judicial legislation).

[99] Roe v. Wade, 410 U.S. 113, at 174 (Rehnquist, J., dissenting).

[100] Doe v. Bolton, 410 U.S. 179, 222-223 (1973) (White., J., dissenting).

[101] *See* infra Part III(b).

[102] Kramer, *supra* note 93. *See also* Barkow, *supra* note 74, at 241 ("The Rehnquist Court's view of the relationship among the three branches of the federal government is decidedly more hierarchical than coordinate."); Aviam Soifer, *Courting Anarchy*, 82 B.U. L. REV. 699, 702 (2002) (noting that post-Bush v. Gore, "illustrates the glib unconcern among the Justices for the usual roles of other branches, for the states, or even for everyday lawyering. Instead, we begin to see a sustained effort to break down the public nature of government at all levels."); Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337, 1357 (2002) ("the Rehnquist Court has indeed engaged in activism in criminal procedure); Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why it Matters)*, 69 OHIO ST. L.J. 255, 259 (2008) (In contrast to the Warren Court's deference to congressional power, the Rehnquist Court was considerably more "activist" in its approach to that coordinate body.").

[103] *See* Bush v. Gore, 531 U.S. 90 (2000).

[104] Louise Wineberg, *Elections: The Constitutionality of Bush v. Gore*, 82 B.U. L. REV. 609, 611 (2002) (noting that the Court's preemption was an "unconstitutional assumption of power"). *See also* Jesse H. Choper, *Why the Supreme Court Should Not Have Decided The Presidential Election of 2000*, 18 CONST. COMMENTARY 335 (2001) (critically examining the Court's decision to invoke such power in Bush v. Gore); Susan Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793, 803 (2003) (noting that arrogance of the Bush v. Gore Court's decision); Richard L. Hasen, *You Don't Have To Be a Structuralist To Hate the Supreme Court's Dignitary Harm Election Law Cases*, 64 U. MIAMI L. REV. 465, 472 (2010) (stating that the Court "violated a core political equality principle" in its Bush v. Gore decision, specifically minimizing "the right to have one's vote counted"); Paul D. Carrington and Roger C. Crampton, *Judicial Independence In Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 616 (2009) (opining that the Court usurped the electoral college's and House of Representative's powers in making its decision); Lani Guinier, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4, (2008) (referencing to

era include *U.S. v. Lopez* and *U.S. v. Morrison*.[105]

Since the Warren Court, the Supreme Court has decided controversial issues that Congress has been unable to resolve.[106] Following *Roe*, it was the Court that set the agenda on abortion rights.[107] On multiple occasions the Supreme Court has foiled Congress' attempt to pass federal campaign finance reform.[108] It was the Supreme Court that extended marital rights to interracial[109] and same-sex couples.[110] Because of the Court, cities cannot regulate handguns in the home for self-defense,[111] prayer in public schools is barred,[112] a U.S. president was elected under serious protest,[113] and states can charge tax on remote sellers having no physical presence in the jurisdiction.[114]

Some argue that the Court's respect for the Constitution has been replaced by politics and power.[115] Although commentators and scholars have shaped the debate around the Court's legislative prowess, these discussions should also incorporate insights from the bench, itself. As noted, Justice Roberts chastised the Court for making a decision better left to Congress to resolve in *Wayfair*.[116] Similarly, Justice Scalia berated *Miranda* as evidencing judicial bootstrapping,[117] and Justice Rehnquist stressed the perils of the majority's decision in *Roe*.[118] Looking to dissenting

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the Court's "power grab" in deciding the 2000 presidential election).

[105] *See* U.S. v. Lopez, 514 U.S. 549 (1995) and U.S. v. Morrison, 529 U.S. 598 (2000). *See also* Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1288 (2002) (concluding that both of these cases are activist cases in that the Court held Congress to its enumerated powers).

[106] Kim R. Holmes, *Fight Over Kavanaugh Proves Supreme Court Has Become Too Powerful*, THE HERITAGE FOUNDATION (Oct. 3, 2018), https://www.heritage.org/courts/commentary/fight-over-kavanaugh-proves-supreme-court-has-become-too-powerful.

[107] Lawrence Hurley, *On abortion, Trump agenda likely leads to Supreme Court, not Congress*, REUTERS (Feb. 6, 2019), https://www.reuters.com/article/us-usa-trump-abortion/on-abortion-trump-agenda-likely-leads-to-supreme-court-not-congress-idUSKCN1PV2CE. *See also* Edward Correia, *The Uneasy Case for a National Law on Abortion*, THE AMERICAN PROSPECT (Spring 1991), https://prospect.org/article/uneasy-case-national-law-abortion.

[108] Lauren McCauley, *How SCOTUS Campaign Finance Rulings 'Distorted' US Democracy*, MOYERS (Mar. 15, 2017), https://billmoyers.com/story/scotus-campaign-finance-rulings-distorted-us-democracy/. *See also* Buckley v. Valeo, 424 U.S. 1 (1975) (holding that restrictions on individual contributions to political campaigns is not in violation of the First Amendment, while certain other restrictions were in violation); Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 604 (1996) (holding that federal campaign financing limits on the amount of money that political parties can spend violate the First Amendment); and Citizens United v. FEC, 558 U.S. 310 (2010) (spawning the creation of super PACS that can accept unlimited contributions for elections).

[109] Living v. Virginia, 388 U.S. 1 (1967).

[110] Jane S. Schacter, *Obergefell's Audiences*, 77 OHIO ST. L.J. 1011, 1014 (2016). *See also* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[111] District of Columbia v. Heller, 554 U.S. 570 (2008). *See also* McDonald v. City of Chicago, 561 U.S. 742 (2010).

[112] Engel v. Vitale, 370 U.S. 421 (1962).

[113] Bush v. Gore, 531 U.S. 98 (2000).

[114] *Wayfair*, 138 S. Ct. 2080 (2018).

[115] Holmes, *supra* note 106 (noting the Court's disrespect for the text of the Constitution). *See also* Joshua D. Hawley, *The Most Dangerous Branch*, NATIONAL AFFAIRS (2019), https://www.nationalaffairs.com/publications/detail/the-most-dangerous-branch (finding that the Court has become the most dangerous branch of government).

[116] *See Wayfair*, 138 S. Ct. 2080 (Roberts, C.J., dissenting).

[117] *See* Jonathan B. Zeitlin, *Voluntariness With A Vengeance: Miranda And A Modern Alternative*, 14 ST. THOMAS L. REV. 109, 131 (2001). *See also* Dickerson v. United States, 530 U.S. 428, 460 (2000) (Scalia, J., dissenting).

[118] *See* Robert J. Pushaw, Jr., *Partial-Birth Abortion And the Perils of Constitutional Common Law*, 31 HARV. J.

opinions offers an additional layer to the debate surrounding the Court's encroachment on legislative powers, signifying questions of Court superiority.

c. Activism From the Eyes of Dissenters

As discussed, *Miranda* represents the flagrant era of Warren Court activism.[119] While Schlesinger's article propelled "judicial activism" into the limelight, those combined words never appeared in a Supreme Court case until the tail end of the Warren era. Tucked into the final sentence of his 1967 *U.S. v. Wade* dissenting opinion, Justice Black perceived the Court's holding as encroaching on "'judicial activism' at its worst."[120] From that point forward, there emerged a plethora of U.S. Supreme Court dissenters who charged the majority with encroaching on Congressional responsibility.

The Burger Court (1969-1986) engaged in its own activist decisions; however, this period is better identified as a transition between the liberal Warren Court and more conservative Rehnquist Court (1986-2015).[121] Compared to its predecessor, the Burger Court was largely made up of conservative justices appointed by Republican presidents.[122] Although not nearly as liberal or activist as the Warren Court, the Burger Court is criticized for exercising more liberal-oriented activism in its holdings.[123] Decisions during this period offered ample opportunity for dissenting justices to rebuke the majority's exercise of perceived legislative power.

In *Mills v. Elec. Auto-Lite Co.*, Justice Black dissented that the "need for recovery of attorneys fees to effectuate the policies of the [Securities and Exchange] Act… should… be met by Congress, not by this Court."[124] As previously discussed, Justices Rehnquist and White admonished the *Roe* and *Doe* majorities for exercising abuse of judicial power.[125] In *Teleprompter Corp. v. Columbia Broadcasting*, Justice Douglas reproved the majority for making a "legislative

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L. & PUB. POL'Y 519, 534 (2008). *See also* Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).

[119] Ashford v. State, 147 Md. App. 1, 43 n. 8 (2002).

[120] United States v. Wade, 388 U.S. 218, 250 (1967) (Black, J., dissenting in part and concurring in part) ("Should I do so [tell state or federal courts that the Constitution forbids them to allow courtroom identification without the prosecutor's first proving that the identification does not rest in whole or in part on an illegal lineup], I would feel that we are deciding what the Constitution is, not from what it says, but from what we think it would have been wise for the Framer to put in it. That to me would be "judicial activism" at its worst. I would leave the States and Federal Government free to decide their own rules of evidence. That, I believe, is their constitutional prerogative.").

[121] Eskridge, *supra* note 98, at 2068 (the activism of this period was particularly in response to the women's movements). *See also History of the Burger Court*, SUPREME COURT OPINIONS, http://supremecourtopinions.wustl.edu/?rt=index/history (last visited March 15, 2019) (documenting the Burger era as being transitional).

[122] Michael J. Gerhardt, *The Rhetoric of Judicial Critique; From Judicial Restrain to the Virtual Bill of Rights*, 10 WM. & MARY BILL OF RTS. J. 585, 626 (2002).

[123] *Id.* at 629 (citing EARL M. MALTZ, THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969-1986, at 1-2 (2000)).

[124] Mills v. Elec. Auto-Lite Co., 396 U.S. 375 (1970) (Black, J., concurring in pt. and dissenting in pt.) (minority shareholders brought an action under the Securities Exchange Act of 1934 following a misleading proxy solicitation).

[125] *See* Roe v. Wade, 410 U.S. 113, 174 (Rehnquist, J., dissenting) ("the decision… partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment). *See also* Doe v. Bolton, 410 U.S. 179, 222-223 (1973) (White, J., dissenting) ("in my view its judgment is an improvident and extravagant exercise of the power of judicial review…").

decision that not even a rampant judicial activism should entertain."[126] Other notable castigations by Burger Court dissenters involved issues of school segregation[127], federal budget deficits,[128] federal habeas corpus proceedings,[129] Fourth Amendment rights,[130] discriminatory hiring practices,[131] the validity of arbitration clauses,[132] and the adequacy of Miranda warnings.[133]

The close of the Burger Court germinated the creation of one of the most conservative Supreme Courts in history.[134] Much scholarly effort is dedicated to Rehnquist Court activism,[135] and dissenters of this period had plenty to say about it. In *Rust v. Sullivan*, Justice O'Connor's dissent warned of the majority of taking away Congress' legislative freedom.[136] She again attacked the majority *McFarland v. Scott*, declaring, "Congress is apparently aware of the clumsiness of its

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[126] Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394, 416 & 419 (1974) (Douglas, J., dissenting).

[127] Columbus Bd. of Educ. V. Penick, 443 U.S. 449, 489 (1979) (Powell, J., dissenting) ("Courts, of course, should confront discrimination wherever it is found to exist. But they should recognize limitations on judicial action inherent in our system and also the limits of effective judicial power. The primary and continuing responsibility for public education, including the bringing about and maintaining of desired diversity, must be left with school officials and public authorities.").

[128] Bowsher v. Synar, 478 U.S. 714, 759 (1986) (White, J., dissenting) ("Like the Court, I will not purport to speak to the wisdom of the policies incorporated in the legislation the Court invalidates; that is a matter for the Congress and the Executive, both of which expressed their assent to the statute barely half a year ago.").

[129] Engle v. Isacc, 456 U.S. 107, 137 & 144 (1981) (Brennan, J., dissenting ("Today's decision is a conspicuous exercise in judicial activism"… "that the Court so deprecates in other contexts.").

[130] N.J. v. T.L.O., 469 U.S. 325, 375 (1984) (Stevens, J., dissenting) ("In characteristic disregard of the doctrine of judicial restraint, the Court avoided that result in this case by ordering reargument and directing the parties to address a constitutional question that the parties, with good reason, had not asked the Court to decide. Because judicial activism undermines the Court's power to perform its central mission in a legitimate way, I dissented from the reargument order.").

[131] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 663 (Stevens, J., dissenting) ("I cannot join this latest sojourn into judicial activism.").

[132] Rodriguez de Quijas v. Shearson/ American Express, Inc., 490 U.S. 477, 486-487 (1989) (Stevens, J., dissenting) ("…when our earlier opinion gives a statutory provision concrete meaning, which Congress elects not to amend during the ensuing 3 1/2 decades, our duty to respect Congress' work product is strikingly similar to the duty of other federal courts to respect our work product…None of these arguments… carries sufficient weight to tip the balance between judicial and legislative authority and overturn an interpretation of an Act of Congress that has been settled for many years.").

[133] Duckworth v. Eagan, 492 U.S. 195, 228 (1989) (Marshall, J., dissenting) ("The federal courts have been reviewing Miranda claims on federal habeas for 23 years, and Congress has never even remotely indicated that they have been remiss in doing so. To the extent Justice O'Connor is unhappy with Miranda, she should address that decision head on. But an end run through the habeas statute is judicial activism at its worst.").

[134] Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1339 (2011) (documenting that the Rehnquist Court and Roberts Court served as the two most conservative courts in U.S. history).

[135] *See, e.g.*, Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1139 (2002) (commenting on accusations of the Rehnquist Court exercising "conservative judicial activism"); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1128 (2006) (noting, "it is easy to be drawn into a spirited debate about whether the [Rehnquist] Court's decisions manifest activism or passivity…"); Erwin Chemerinsky, *The Rehnquist Court & Justice: An Oxymoron?*, 1 WASH. U. J.L. & POL'Y 37, 37 (1999) (explaining that the Rehnquist Court was a "disaster", and an "activist, conservative Court."); Smith, *supra* note 102, *at* 1337 (offering an essay on the positive role of activism from the Rehnquist Court); Zietlow, *supra* note 102, at 287- 292 (2008) (documenting activism of the Rehnquist Court); Donald H. Zeigler, *The New Activist Court*, 45 AM. U.L. REV. 1367, (1996) (exemplifying the Rehnquist Court's activism).

[136] Rust v. Sullivan, 500 U.S. 173, 224 (1991).

handiwork… The remedy for this problem, however, lies with Congress.... I would leave the matter to Congress to resolve."[137] Justice Breyer provided a strong dissent in *Bush v. Gore*, rebuking the majority for determining an electoral dispute that he felt was better suited to Congress to resolve.[138] That same year, Justice Stevens contended in *Kimel v. Fla. Bd. of Regents* that the Court's majority decision signified "judicial activism".[139]

The conservative Roberts Court (2005-2010) is observed as the least activist of the historical Supreme Courts, displaying a reluctance in exercising the power of judicial review.[140] Perhaps this explains why opinions from this period offer few examples of dissenters rebuffing the majority for exercising overbroad power. One illustration exists in the workplace discrimination case *Ledbetter v. Goodyear Tire*, where Justice Ginsberg noted, "This is not the first time the Court has ordered a cramped interpretation… Once again, the ball is in Congress' court."[141] Ginsberg again alluded to the Court's overreach in the *Exxon Shipping Co. v. Baker*, dissenting that "Congress is the better equipped decisionmaker".[142] Justice Stevens, in a separate dissent, similarly surmised that Congress, not the Court, "should make the empirical judgements expressed."[143]

After the Roberts Court, dissenters have continued to express disdain for the majority's usurpation of Congressional power, particularly in high-profile cases. In *McCutcheon v. FEC*, Justice Breyer advocated that Congress – not the Court - be entitled to deference in determining whether anticorruption objectives justify contribution limits.[144] Justice Scalia provided a scathing dissent in *King v. Burwell*, documenting that the majority decision "both aggrandizes judicial power and encourages congressional lassitude."[145] Finally, as discussed earlier in Part I, Chief Justice Roberts pressed that it is not the Court, but Congress who should nullify past precedent in *Wayfair*.[146]

The above dissents are not meant to serve as an exhaustive list of historical to present day

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[137] McFarland v. Scott, 512 U.S. 849, 859-860, 863 (1994) (O'Connor, J. concurring in pt. and dissenting in pt).

[138] Bush v. Gore, 531 U.S. 98, 155 (2000) (Breyer, J., dissenting) ("The decision by both the Constitution's Framers and the 1886 Congress to minimize this Court's role in resolving close federal presidential elections is as wise as it is clear. However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court…").

[139] Kimel v. Fla. Bd. of Regents, 528 I.S. 62, 98 (2000) (Stevens, J., dissenting).

[140] Keith E. Whittington, *The Least Activist Supreme Court In History? The Roberts Court and the Exercise of Judicial Review*, 89 NOTRE DAME L. REV. 2219, 2220 (2014).

[141] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsberg, J. dissenting). Congress subsequently overrode *Ledbetter* with its enactment of the Lilly Ledbetter Fair Pay Act of 2009. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[142] Exxon Shipping Co. v. Baker, 554 U.S. 471, 523 (2008) (Ginsberg, J., concurring in pt. and dissenting in pt).

[143] *Id*. at 516, 519 (Stevens, J., dissenting) ("I believe Congress, rather than this Court, should make the empirical judgements expressed… The congressional choice not to limit the availability of punitive damages under maritime law should not be viewed as an invitation to make policy judgments… that Congress is better able to evaluate than is this Court.").

[144] McCutcheon v. FEC, 572 U.S. 185, 259 (2014) (Breyer, J., dissenting) ("These kinds of questions, while not easily answered, are questions that Congress is far better suited to resolve than judges."). *See also* John O. McGinnis, *Neutral Principles and Some Campaign Finance Problems*, 57 WM. & MARY L. REV. 841, 873 (2016) (discussing Justice Breyer's dissent in this case).

[145] King v. Burwell, 135 S. Ct. 2480, 2506 (2015) (Scalia, J., dissenting) (addressing whether Patient Protection and Affordable Care Act (ACA) tax credits are available in States that have a Federal Exchange.).

[146] *Wayfair*, 138 S. Ct. 2080 (Roberts, C.J., dissenting).

"insider" claims that the Court has infringed on Congressional power. Instead, they serve as additional evidence to be considered in the debate over the Court's increasing superiority. What was historically deemed a negligible threat by the Founding Fathers, the Supreme Court may, as Chayes deduced, be gaining power vis-à-vis the other branches.[147] With magnified power, the current era of Congressional gridlock could further prompt self-interested states like South Dakota to activate the riskiest tool available to them - direct case-baiting - to lure the Supreme Court into granting certiorari and ruling in their favor. Scholars have noted that since 2000, there has been a significant decrease in Congressional overrides of U.S. Supreme Court decisions.[148] It has also been hypothesized that Congress is progressively assuming a secondary policymaking role, thus fueling the Court's empowerment.[149] These dissents support theories that the Court could be evolving into a "preference outlier," prompting more states to case-bait the Court into action.[150]

While the above mentioned scholarly debates and dissenting opinions bolster arguments that the Supreme Court is evolving towards superiority, it is important to observe the Court as one of three branches of the U.S. government.[151] Though not unchecked, the Supreme Court is sovereign within its own sphere, enjoying nearly unbridled Constitutional power.[152] Congress has absolute authority to challenge any Supreme Court decision through statutory override. [153] This power to check does not delineate the Court's ability to constitutionally hear and decide a case, as it did in *Wayfair*. While Roberts' *Wayfair* dissent may evidence the Court's exercise of legislative prowess, it is Congress' diminution of its own checking power amidst an extended era of gridlock that will continue to prompt states like South Dakota to case-bait the Court. In addition, we hypothesize that because of South Dakota's *Wayfair* success, more states may take assertive action to bait the Court on issues falling within the sovereign zone of twilight.

d. Decision Making in the Sovereign Zone of Twilight

The American system of checks and balances is designed to somewhat balance the powers between governmental branches.[154] This interplay allows the judicial branch to review unconstitutional acts of the President, Congress, or state and local governments when necessary.[155]

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[147] *See supra* notes 72-74 and accompanying text.

[148] Adam Liptak, *In Congress' Paralysis, a Mightier Supreme Court*, NY TIMES (Aug. 20, 2012), https://www.nytimes.com/2012/08/21/us/politics/supreme-court-gains-power-from-paralysis-of-congress.html. *See also* William N. Eskridge, *Overriding Supreme court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 416 (1991) (noting the Congress should be concerned at the few number of Supreme Court overrides).

[149] Peter Suderman, *Can a Stronger Congress Check the Supreme Court?*, NY TIMES (July 3, 2018), https://www.nytimes.com/2018/07/03/opinion/trump-supreme-court-kennedy.html.

[150] *See* Eskridge, *supra* note 148, at 416 (noting Congressional trouble "when the raw preference of Congress and the Court are very far apart, when the Court75- is becoming a preference outlier without significant dissenting voices, and when the Court's preference can be backed up by a presidential veto.").

[151] *See supra* Part II(a). *See also* G. Edward White, *William Howard Taft Lecture: Revising the Ideas of the Founding*, 77 U. CIN. L. REV. 969, 979 (2009) (noting the sovereignty of the three branches of government).

[152] *See supra* notes 75-78 and accompanying text.

[153] *See* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 582 (2009) (discussing the separation of powers and Congress' ability to override the Supreme Court's interpretations of statutory law if either incorrect or "not in accordance with congressional will.").

[154] *See* Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1107 (2000) (noting the American system of checks and balances).

[155] *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989) (holding constitutional the Sentence Reform Act of

In addition, if Supreme Court statutory interpretation is questioned, Congressional overrides serve as a check.[156] Numerous analyses have evaluated the quantity and breadth of these overrides.[157] As noted above, dissenting judges may invite Congressional consideration of statutory override.[158] However, scholars Matthew Christiansen & William Eskridge, Jr. established that following the "golden age of statutory overrides" in the 1990s, the number of congressional overrides fell.[159] In fact, in 2017 Congress did not override a single U.S. Supreme Court statutory holding.[160] The legislative branch's relative inaction to modern Court decisions has prompted suggestions that the Court has risen "above politics" and is "largely immune to political response and redress."[161] Others have suggested that the decline in congressional overrides results from inflated partisanship.[162] We further theorize that the decrease in Congressional action may be due in part to the Court's exercise of Constitutional authority on issues falling in what we conceive as the sovereign zone of twilight.[163]

In 1952 Justice Frankfurter coined the now-established term "zone of twilight" as the gray area where both the President and Congress hold concurring authority.[164] Per Frankfurter's

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1984 as Congress neither delegated excessive legislative power or upset the balance of powers among the three branches of government); Bowsher v. Synar, 478 U.S. 714 (1986) (Congress has no authority to exercise removal power over an officer performing executive functions); INS v. Chadha, 462 U.S. 919, 951 (1983) (Congress may not control the execution of laws except through Art. I procedures); Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (Congress may not confer Art. III jurisdiction on an Art. I judge); Loving v. United States, 517 U.S. 748 (1996) (The President has authority to prescribe aggravating factors that allowed a court-martial to impose the death sentence); *Youngstown Sheet*, 343 U.S. 579 (The presidential order directing the government to take possession of most of steel mill plants was not within his constitutional authority); U.S. v. Nixon, 418 U.S. 683 (1974) (The President does not have an absolute, unqualified privilege of immunity from judicial process under all circumstances); Franklin v. Massachusetts, 505 U.S. 788 (1992) (The President is not subject to review by courts under the Administrative Procedure Act); Myers v. United States, 272 U.S. 52 (1923) (The President is authorized to remove a postmaster from his appointment on grounds that the power of removal in inherent in the power to appoint).

[156] Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1321 (2014).

[157] Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 159 (2018) (citing to Christiansen & Eskridge, *id.* at 1318; Eskridge, *supra* note 148, at 334; Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 210 (2013); Virginia A. Hettinger & Christopher Zorn, *Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court*, 30 LEGIS. STUD. Q. 5, 6 (2005); Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503, 504 (1996); Widiss, *supra* note 153, at 516-517; Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 865 (2012)).

[158] *See supra* Part II(c).

[159] Christiansen & Eskridge, *supra* note 156, at 1318 (noting that the number judicial overrides fell "dramatically after 1991").

[160] Jason Mazzone, *Above Politics: Congress And The Supreme Court In 2017*, 93 CHI.-KENT L. REV. 373, 406 (2018).

[161] *Id.* at 408-409.

[162] Hasen, *supra* note 157, at 209.

[163] This term takes its root from Justice Frankurter's initiation of the term "zone of twilight" in *Youngstown Sheet*, 343 U.S. 579, 637 (Frankfurter, J., concurring) (referencing the "zone of twilight in which he [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."). We have added "sovereign" to the beginning for two reasons: (1) to minimize confusion with the general term "zone of twilight' as has been applied by both the Court and scholars to the existence of uncertainty between the executive and legislative branches, and (2) to reference decisions made by the judiciary - as one of three sovereign federal branches – when another sovereign branch (e.g., the legislature) is silent on an issue.

[164] *Youngstown Sheet*, 343 U.S. 579, 637-638 (Frankfurter, J., concurring). Justice Frankfurter divided

analysis, executive authority is strongest when acting under Congressional will, weakest when acting contrary to Congressional will, and uncertain when acting within the zone of twilight.[165] The literature supports that where Congress is silent on a particular matter and the President acts on it within his own Constitutional authority, such matter falls within the zone of twilight.[166]

The Supreme Court has yet to apply this term to matters of authoritative uncertainty arising between the Court and the other branches; however, literature suggests the zone of twilight can be applied broadly to any of the three branches.[167] Relying on this premise, we endorse the following: (1) Where the distribution of power between the Court and Congress is uncertain, (2) Where one or more dissenting Justices challenges the Court majority for infringing on Congressional turf, and/ or (3) Where Congress is silent on a statutory matter at issue and the Court steps in to exercise authority and rule on the matter, such matter falls within the sovereign zone of twilight.[168] In circumstances where the distribution of power between the legislative and judicial branches is uncertain, we promote that the Court is on sound Constitutional ground to rule within the sovereign zone.

Wayfair serves as a premier example of a matter falling within the sovereign zone of twilight. For twenty-six years Congress failed to address the online sales tax issue. When presented the opportunity, the Court - following years of silence by the legislative branch - moved to overturn long-standing precedent. Chief Justice Roberts' dissent surmised that the decision was within Congress' purview, not the Court's. Congress' failure to legislate in this area, combined with Roberts' dissent indicate that the distribution of powers between branches was uncertain. Therefore, the Court's majority decision was constitutionally sound. A similar review of the previously discussed cases where dissenters have challenged the majority for encroaching on legislative duties may garner similar determinations; however, future research on this theory is necessary.

In the shadow of South Dakota's enactment of emergency legislation that successfully enticed the Court to overturn precedent and rule in its favor, *Wayfair* serves as the quintessential roadmap for U.S. Supreme Court case-baiting. During this current era of Congressional paralysis, we theorize that states will continue to take action similar to that of South Dakota in order to lure

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Presidential authority into tripartite categories: (1) the President acts under express or implied Congressional authorization, (2) the President and Congress share concurrent authority or the distribution of powers between the branches is uncertain (the "zone of twilight") and (3) the President's actions are incompatible with the will of Congress. *Id.*

[165] Kevin Fandl, *Adios Embargo: The Case for Executive Termination of the U.S. Embargo on Cuba*, 54 AM. BUS. L.J. 293, 310 (2017).

[166] *See* Andrew Coan and Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765, 809 (2016) (implying that when Congress is silent on a matter, that matter falls within the "zone of twilight" as between Congress and the President). *See also* Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51, 96 (1994) (discussing the "zone of twilight" when the President acts on an issue that Congress has been silent on). *See also* Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 409 (2008) (documenting that "an unclear, ambiguous division of power between the branches" results in uncertainty).

[167] Roberts, *supra* note 19, at 593, 601 (expanding the *Youngstown* definition of the "zone of twilight" to "where the branches exercise overlapping authority and into the core functions of a separate branch of government.").

[168] *See* Coan and Bullard, *supra* note 166, *at* 809 (implying that when Congress is silent on a matter, that matter falls within the "zone of twilight" as between Congress and the President).

the Supreme Court into action and rule on significant hot-button issues that fall within the purview of the sovereign zone of twilight. The remainder of this article discusses the ways a state might case-bait the Court into action, using *Wayfair* as a guide.

PART III: CASE-BAITING & THE SUPREME COURT

Case-baiting and other challenges to federal policy are possible because of the unique federalism component to democracy in the United States.[169] U.S. federalism requires the federal government to share a great deal of power with the states and, most importantly, the people.[170] This design grants all sovereigns latitude to control their interests while working in unison under the overarching guidelines of the U.S. Constitution.[171] Such dispersion of power insures that state and local interests not be subservient to national interests unless in direct conflict.[172]

The complication is that conflicts of interest abound in the current bustling regulatory and political culture. Swelling national policies inevitably create burdens that harm particular state governments and local economies.[173] It is virtually impossible for the federal sovereignties to fully synchronize both federal and state interests across all areas at all times for the greater good. To remedy this conflict, the Supremacy Clause demands that federal policy supersede conflicting state policy.[174] This tiebreaker approach is prudent. However, federal supremacy often leaves states frustrated.

The conflicts of interest embedded in federal supremacy are more pronounced under a system of pure federal authority. Many global jurisdictions operate as so-called unitary states, where local jurisdictions are virtually powerless to combat federal laws, precedent, and policies unless the national government grants them autonomy or power.[175] In these jurisdictions, the

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[169] *See Encyclopedia Britannica*, FEDERALISM, https://www.britannica.com/topic/federalism (last viewed April 10, 2019) (defining Federalism as "the mode of political organization that unites separate states or other polities within an overarching political system in such a way as to allow each to maintain its own fundamental political integrity.").

[170] The Tenth Amendment to the United States Constitution reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. AMEND. X.

[171] Local jurisdictions – generally cities and municipalities – also challenge federal policy via case-baiting. *See e.g.*, McDonald v. City of Chicago, 561 US 742 (2010) (striking down Chicago and Oak Park, Illinois gun-control laws that the plaintiffs deemed to violate federal policy as announced the Supreme Court's *D.C. v. Heller* case (554 U.S. 570, 635 (2008)); it is not a huge logical leap to interpret these local laws as being at least partially enacted to bait the Supreme Court into reinterpreting the Second Amendment a mere two years after *Heller*.)

[172] *See* U.S. CONST. ART. VI, §2 and Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 210-11 (1824) (discussing the Supremacy Clause and the repercussions of its utilization to state policy).

[173] An interesting example of this expansion is based on the Supreme Court's ever-expanding interpretations of the Constitution's Commerce Clause. *See e.g.*, John-Michael Seibler, *Commerce Clause Just Keeps on Expanding* (Apr. 4, 2018), THE HERITAGE FOUNDATION, https://www.heritage.org/government-regulation/commentary/commerce-clause-just-keeps-expanding (stating one position as follows: "Abused and overworked, the Commerce Clause in Article I of the U.S. Constitution authorizes Congress to regulate commerce 'with foreign nations the Indian Tribes [and] among the several states.' Today, Congress and the courts treat those provisions as though they are limitless. The result: worrisome encroachments upon state sovereignty and individual liberty.").

[174] This is often called vertical preemption. *See e.g.*, Lea Brilmayer, *A General Theory of Preemption: With Comments on State Decriminalization of Marijuana*, 58 B.C.L. REV. 895, 902-03 (2017).

[175] *See Wikipedia*, UNITARY STATE, https://en.wikipedia.org/wiki/Unitary_state (stating that a "large majority of the world's states (165 of the 193 UN member states) have a unitary system of government").

central government possesses the vast majority of constitutional authority. Case-baiting in unitary states is nearly impossible. Although not perfect, U.S. states fair better under our system of federalism than their global counterparts that are tethered to pure federal authority.

Increased local U.S. autonomy and power liberates state governments from bearing the brunt of federal policies deemed inequitable to their constituents. Even amidst Supremacy Clause limitations, state sovereigns possess powerful tools - including case-baiting - to push back against the federal government. Case-baiting, however, raises questions of the judiciary skirting Constitutionally-enumerated boundaries, encouraging the Court to rule on political questions perhaps better suited to the executive and legislative branches.[176] Such questions invite further scholarly exploration of issues falling within the sovereign zone of twilight. However, to better evaluate the role of case-baiting in the hands of state and local jurisdictions, this Part proceeds as follows: Section (a) evaluates direct challenges made to federal statutes and Supreme Court precedent via case-baiting through state legislation. It includes an analysis of common case-baiting procedural maneuvering, assesses the risks involved, and offers current examples of direct case-baiting. Section (b) analyzes the more common-yet-indirect approach to case-baiting, which allows states to chip away at federal statutes and Supreme Court precedent through state legislation.

a. The Primary Forms of Case-Baiting

States can directly challenge a federal statute, precedent, or policy in a number of ways; however, three methods are chiefly prominent.[177] First, a state can file a legal challenge in federal court arguing that: (a) Congress did not possess the power to enact a particular statute,[178] (b) recent Congressional amendments to a statute render a federal law unconstitutional,[179] or (c) an Executive Branch regulation is unconstitutional.[180] This direct-challenge-via-lawsuit approach taken by states to combat federal policy is the least controversial method of challenge.[181]

The downside to this approach is that the probability of the Supreme Court accepting the

[176] *See e.g.,* Sara Somerset, *Can Article V Federally Legalize Cannabis?,* FORBES (Aug. 12, 2018), https://www.forbes.com/sites/sarabrittanysomerset/2018/08/12/can-article-v-federally-legalize-cannabis/#5dad982e76de (discussing how states are trying to force - in courtrooms - a change in the federal Controlled Substances Act and its scheduling of marijuana as a Schedule I drug and then evaluating why some judges have ruled that such changes are political questions outside of their court's jurisdiction).

[177] *See id.* (discussing how states might utilize Article V of the Constitution to craft an amendment that reschedules marijuana within the Controlled Substances Act thereby bypassing the Congressional legislative role and affecting federal legislation).

[178] *See e.g.,* NFIB v. Sebelius, 567 U.S. 519, 686 (2012) (discussing how twenty-six states sued the federal government arguing that the Affordable Care Act violated the enumerated powers of Congress).

[179] *See e.g.,* Texas v. United States, 340 F. Supp. 3d 579, 591 (N. D. Tex. 2018) (showing that officials from nineteen states sued the federal government alleging that recent amendments to the Affordable Care Act rendered it unconstitutional because they took away the hook to Congress' enumerated power to tax).

[180] *See e.g.,* California v. Azar, 911 F.3d 558, 567-68 (9th Cir. 2018) (describing a lawsuit against various federal agencies concerning an expanded religious exception for the Affordable Care Act's contraceptive mandate).

[181] People tend to view lawsuits filed by state and local governments as par for the course. In fact, many were amused when former Texas Attorney General (now Governor) Greg Abbott told delegates at the state GOP convention on that he had a simple job where, "I go the office. I sue the federal government. Then I go home." *See* Wayne Slater, *Atty Gen Greg Abbott Says His Job is Simple: Sue the Federal Government, Then Go Home*, DALLAS NEWS (June 2012), https://www.dallasnews.com/news/politics/2012/06/07/atty-gen-greg-abbott-says-his-job-is-simple-sue-the-federal-government-then-go-home.

challenge and ruling in a state's favor are low. Justices are hearing fewer cases, a somber statistic for petitioners seeking a coveted spot on the Supreme Court's docket.[182] Of the minimal number of cases granted certiorari each year, only a handful include a state or local governmental entity as a party. Outside of the capital punishment, habeas corpus, civil and criminal procedure, and original jurisdiction context, only five October 2018 Term decisions list a state or local government as a party.[183] Of these, zero resulted in a change to federal law, precedent, or policy in a way that benefitted a state or local government.[184] The 2017 term was much the same, further evidencing the relative ineffectiveness of the direct-challenge-via-lawsuit approach.[185]

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[182] *See e.g.*, Matt Ford, *The Supreme Court is Making History – with its Snail's Pace*, THE NEW REPUBLIC (Apr. 19, 2018) https://newrepublic.com/article/148049/supreme-court-making-history-with-snails-pace (finding that "the 2017-2018 [Supreme Court] term is one of the slowest terms on record for publishing decisions, according to . . . a statistical expert on the court [who stated,] '[t]hrough the end of March 2018, the court released the fewest signed majority opinions of any term since [John] Roberts was appointed chief justice [in 2005] . . . It is also the lowest output through March of a term at least since 1946.'").

[183] *See* United States Supreme Court, *Opinions of the Court – 2018*, SUPREMECOURT.GOV, https://www.supremecourt.gov/opinions/slipopinion/18 (last visited May 4, 2019) (these cases are: (1) City of Escondido [California] v. Emmons (139 S. Ct. 500, 503-04 (2019) (holding that an excessive force case against two police officers must be remanded in part to apply the correct standard for qualified immunity), (2) Dawson v. Steager (139 S. Ct. 698, 706 (2019) (holding that West Virginia lost its ability to tax certain state pensioners less than certain federal pensioners because of the way its law was written), (3) Mount Lemmon Fire District [Arizona] v. Guido (139 S. Ct. 22, 27 (2018) (holding that a municipal fire district lost its fight to not be counted as an "employer" under the Age Discrimination in Employment Act because of the way the ADEA classifies employers), (4) Timbs v. Indiana (139 S. Ct. 682 (2018) (holding that the Eighth Amendment's Cruel and Unusual Punishment Clause was incorporated against the states which was not Indiana's preferred outcome), and (5) Wash. State Dep't of Licensing v. Cougar Den, Inc. (139 S. Ct. 1000, 1015-16 (2019) (holding that a Washington state fuel tax imposed upon a particular Native American tribe violate an 1855 treaty between the two parties). A few of these cases should perhaps be omitted from the list because the state was not the party who brought the challenge to alter federal policy but was instead the defendant in the trial court. We listed them because the state's arguments to the Supreme Court had the chance to alter federal policy.

[184] The *Emmons* case is as close as it comes to a state prevailing on the merits in the October 2018 term, and that decision merely remanded the case back to the Ninth Circuit to properly apply Supreme Court precedent on qualified immunity. *See Emmons*, 139 S. Ct. 500, 503-04 (2019).

[185] *See* United States Supreme Court, *Opinions of the Court – 2017*, SUPREMECOURT.GOV, https://www.supremecourt.gov/opinions/slipopinion/17 (last visited May 4, 2019). There were only a handful of cases during the 2017-2018 term where a state was a party. The most important of such cases were (1) Abbott [Governor of Texas] v. Perez, 138 S. Ct. 2305, 2335 (2018) (holding that the lower court erred, with a limited exception, in enjoining the use of the redistricting maps at issue; this can be counted as a win for the state); (2) Benisek v. Lamone, 138 S. Ct. 1942, 1945 (2018) (upholding a District Court judge's refusal to grant a preliminary injunction to parties challenging the state's redistricting map; this can be counted as a win for the state); (3) Collins v. Virginia, 138 S. Ct. 1663, 1675 (2018) (holding that a county police officer violated the Fourth Amendment by conducting a warrantless search on the curtilage of residence in search of a vehicle; this can be counted as a loss for the state); (4) Gill v. Whitford 138 S. Ct. 1916, 1933-34 (2018) (expressing no view on the merits of this redistricting case; this is at best a tie at this point in the litigation); (5) Husted v. A. Philip Randolph Institute, 138 S. Ct. 1833, 1848 (2018) (holding that certain Ohio voter laws did not violate the National Voter Registration Act; this can be counted as a win for the state); (6) Lozman v. Riviera Beach, 138 S. Ct. 1945, 1955 (2018) (holding that the lower court used the wring standard to determine whether a retaliatory arrest occurred; this can be counted as a loss for the government even though the city could still win on remand); (7) *Masterpiece Cakeshop*, 138 S. Ct. 1719, 1732 (2018) (holding that actions of the Colorado Civil Rights Commission violated the First Amendment; this can be counted as a loss for the state); (8) Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1891-92 (2018) (holding that Minnesota's political apparel ban violated the First Amendment; this can be counted as a loss for the state); (9) *Murphy*, 138 S. Ct. 1461, 1484-85 (2018) (holding that parts of the Professional and Amateur Sports Protection Act that prohibit states from licensing sports gambling violate the anticommandeering rule under the Constitution; this can be counted as a win for the state); (10) North Carolina v. Covington, 138 S. Ct. 1624, 1626 (2017) (holding that a federal district court exceeded its

The second method entails a state or local governmental entity lobbying one of the federal branches to either legislate differently, create or eliminate executive agency rules and regulations, or overrule precedent.[186] Such lobbying can be political in nature, or occur via the filing of amicus briefs in federal courts.[187] Not all state actors are effective at Congressional lobbying; the data on the effectiveness of lobbying Congress is murky since not all state lobbyist groups are the prototypical Congressional lobbyists having tedious reporting requirements.[188] There are, however, instances when state lobbying has succeeded in forcing the Supreme Court's hand in hearing and ruling on an issue that maneuvers precedent towards a particular state's preference.[189] Still, as noted above, the odds that such efforts ultimately generate the desired results is low considering the Supreme Court has heard fewer cases in recent Terms, with minimal cases listing states as parties on the docket.

Finally, and most relevant to this article, the third method of challenge requires that a state enact legislation in direct conflict with a federal law, precedent, or policy. We refer to this method

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authority in ruling on additional redistricting issues once the case's racial gerrymandering claim was resolved; this can be counted as a win for the state); (11) Ohio v. American Express Company, 138 S. Ct. 2274, 2289-90 (2018) (holding that American Express' steering provisions do not violate federal antitrust law; this can be counted as a loss for the state); (12) *Wayfair*, 138 S. Ct. 2080, 2100 (2018) (overruling prior precedent and holding that an online retailer without a physical presence in a state may nevertheless be required to collect sales tax for a state where it does business; this can be counted as a win for the state); (13) *Trump*, 138 S. Ct. 2392, 2423 (2018) (holding that President Trump's immigration ban was authorized under a broad grant of discretion in the Immigration and Nationality Act; this can be counted as a loss for the state); and (14) Washington v. United States, 138 S. Ct. 1832, 1833 (2018) (affirming by an equally divided court the circuit court opinion holding that Washington state violated a treaty with Indian tribes by restricting tribal fishing rights; this can be counted as a loss for the state). Of these cases, a state or local jurisdiction was only able to change federal policy or get the federal government to back off in *Husted* (voting law), *Murphy* (sports gambling) *Wayfair* (use tax case), as well as most of the redistricting cases listed above. That is not a promising sign for states that desire to use this direct-challenge-by-lawsuit approach to change federal policy.

[186] *See e.g.*, Chuck DeVore, *Government Spends Millions to Lobby Government - Time to End the Practice*, FORBES, Sept. 29, 2018, https://www.forbes.com/sites/chuckdevore/2018/09/29/government-spends-millions-to-lobby-government-time-to-end-the-practice/#3f2a3d30d99f (stating that in "most states . . . there is a large biosphere of lobbyists serving counties, cities, school districts and special districts. Their job is simple: represent the interests of the government entity who hired them to the state or federal level of government. Put more specifically, they work to get more money for their client, more ability to borrow money and raise taxes locally, more flexibility from state or federal law or rules, less oversight, and more power. Their chief messaging point is: LOCAL CONTROL.") (emphasis in original).

[187] *See e.g.*, Brief of Indiana and 43 Other States in Support of Petitioners, at 2-3, *Franchise Tax Bd. v. Hyatt*, 136 S. Ct. 1277 (2016) (No. 17-1299) (arguing in an amicus brief at the Supreme Court that a precedent dealing with the sovereign immunity of the states was wrongly decided and should be overruled) and Brief for the State of Texas [and 16 Other States] in Support of Petitioners, at 2, *Cal. Sea Urchin Commission v. Combs*, 139 S. Ct. 411 (2018) (No. 17-636) (arguing in an amicus brief filed at the Supreme Court that the so-called *Chevron* doctrine of granting judicial deference of agency interpretations of federal laws be reconsidered). An example of this type of lobbying includes groups of state actors styled the "Midwestern Governors Association" or the "American Association of State Highway and Transportation Officials" advocating for their state and local interests.

[188] *See e.g.*, Jennifer M. Jensen, *Local and State Governments Lobby the Feds Much More than you Might Think*, LONDON SCHOOL OF ECONOMICS U.S. CENTRE BLOG, March 29, 2019 (stating that "it is difficult to measure just how effective state and local government lobbyists are [at lobbying the federal government] . . . because the most significant players are the associations of public officials, but they typically don't show up in lobbying reports, so it is difficult to track how much they spend.") (internal citations omitted).

[189] *See e.g.*, Edith Honan, *Maryland, Maine, Washington Approve Gay Marriage*, REUTERS.COM (Nov. 6, 2012), https://www.reuters.com/article/us-usa-campaign-gaymarriage/maryland-maine-washington-approve-gay-marriage-idUSBRE8A60MG20121107 (discussing states' same-sex marriage debates).

as case-baiting, which we define as a tactic adopted by state/ local jurisdictions to deliberately pass legislation in direct conflict with federal precedent or law to lure the Supreme Court into granting certiorari and ruling in favor of state/ local interests. The Supreme Court has less incentive to deny certiorari when case-baiting is introduced. Particularly, the Supreme Court Rules state that the Justices are more inclined to act in cases where a state court "has decided an important federal question in a way that conflicts with relevant decisions of" the Supreme Court.[190] Although South Dakota was successful in its case-baiting of *Wayfair*, the likelihood of a state successfully convincing the Court to rule in its favor is low when directly challenging a federal policy due to the Court's general adherence to stare decisis. However, lower court opinions that choose to ignore, distinguish, or narrow federal precedent entertain Supreme Court interest, and have proven successful at slowly chipping away at precedent.[191] Since case-baiting is more effective in engaging federal action than suing or lobbying the government, the remainder of section focuses on case-baiting in both its direct and indirect forms.

i. Direct Challenges to Federal Policy: Case-Baiting in its Purest Form

Case-baiting is straightforward and bold. It requires a state or local government to identify a Supreme Court precedent it considers harmful to its interests or citizens, and subsequently crafting a statute in direct violation of federal precedent. State legislators operate under the knowledge that the law will be immediately challenged and struck down by lower courts bound by precedent. On appeal, the state files a petition for certiorari to the Supreme Court in an effort to bait recently-appointed Supreme Court Justices who will hear the case, and either overrule or substantially modify precedent.[192] Case-baiting is a risky tactic with potentially significant benefits if the injurious precedent is overruled or modified. However, case-baiting can also result in colossal loss for many states if the Court reaffirms, and thus strengthens, existing precedent. This section evaluates the case-baiting procedural process in more detail, using *Wayfair* as the prototypical example.

1. STEP ONE: Identify an Inequity Caused by Supreme Court Precedent or Federal Law.

The impetus for the *Wayfair* lawsuit came from South Dakota's calculation that it was losing $48 to $58 million in revenue annually via the inability to collect taxes from online vendors.[193] Because the state does not have an income tax, sales and use taxes account for 60

[190] *See Rules of the Supreme Court of the United States: Rule 10(c)* (Apr. 18, 2019), available at https://www.supremecourt.gov/ctrules/2019RulesoftheCourt.pdf (stating: The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers [in granting a petition for certiorari] . . . (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.").

[191] *See e.g.*, Ronald Schneider, *State Court Evasion of United States Supreme Court Mandates: A Reconsideration of the Evidence*, 7 VAL. U. L. REV. 191, 192-95 (1973) (discussing this issue and stating that the "studies indicate that the state courts often ignore, repudiate or narrowly construe Supreme Court decisions.").

[192] In *Wayfair*, South Dakota asked the Court to: (1) "formally overrule" *Quill* or (2) "limit that decision to its precise facts involving traditional catalog mailers rather than contemporary e-commerce." Petition for a Writ of Certiorari at 20-21, *South Dakota v. Wayfair*, 2017 U.S. S. Ct. Briefs LEXIS 3795 (No. 17-494) [hereinafter Wayfair *Petition*].

[193] *See Wayfair*, 138 S. Ct. 2080, 2088.

percent of the government's general fund.[194] In essence, the *Bellas Hess* and *Quill* precedents meant that a large percentage of South Dakota's primary revenue source remained untaxed. In addition, South Dakota recognized that its mainly rural population prefers shopping online to driving lengthy distances to brick-and-mortar stores.[195] With advancements in technology making online purchases easier and more common, the state understood that this tax revenue would continue declining over time.[196] South Dakota recognized that *Bellas Hess* and *Quill* were major roadblocks to collecting sale and use tax revenue.

Direct case-baiting generally arises when Congress has the authoritative power to solve an issue, alleviate a burden, or otherwise provide relief, yet does nothing. In *Wayfair*, Congress had the Constitutional authority to address the taxation of online retailers having no physical presence in a state. However, at the point that South Dakota passed its legislation in 2016 Congress had not acted on this issue in the 26 years following *Quill*. In fact, Congressional inaction was a primary focus of Roberts' dissent: "The Constitution gives Congress the power '[t]o regulate Commerce . . . among the several States.' I would let Congress decide whether to depart from the physical-presence rule that has governed this area for half a century."[197] Although reasons for Congressional inaction are often difficult to identify, case-baiting arises when state and local governments determine that waiting for federal action is untenable. South Dakota made this exact point in its Complaint to the Supreme Court.[198]

2. STEP TWO: Draft Legislation Contradicting Precedent or Federal Law

Case-baiting cuts through the normal bureaucracy of state government because the interests of the relevant actors tend to be aligned. The law in *Wayfair* was first read in the South Dakota Senate on January 27, 2016 and quickly passed that body unanimously, 33 to 0, on February 19, 2016.[199] It then passed the South Dakota House of Representatives by a similarly-wide margin of

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[194] *See id.*

[195] *See Wayfair* Petition, *supra* note 192, at 1a (reprinting the South Dakota Supreme Court's opinion).

[196] *See e.g.*, Madeline Farber, *Consumers Are Now Doing Most of Their Shopping Online*, FORTUNE (June 8, 2016) (stating that for "the first time ever, shoppers are going to the web for most of their purchases. An annual survey . . . found that consumers are now buying more things online than in stores. The survey . . . polled more than 5,000 consumers who make at least two online purchases in a three-month period. According to results, shoppers [beginning in 2016] made 51% of their purchases online, compared to 48% in 2015 and 47% in 2014.").

[197] *Id.* at 2104-05.

[198] Complaint at 3, *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018) (No. 17-494), *available at* http://dor.sd.gov/taxes/business_taxes/State%20v.%20Wayfair%20Inc.%20et%20al.pdf [hereinafter Wayfair *Complaint*] ("Nonetheless, in the 24 years since Quill was decided, Congress has failed to make good on the Supreme Court's invitation to address this issue through legislation at the federal level. Bills are introduced and debated, but routinely fail to receive even an up-or-down vote because of committee leaders advancing esoteric interests or other well-understood "veto" points that make congressional inaction the strong default rule. Indeed, while many states (including South Dakota) reacted to Quill by creating a "Streamlined" system that would allow out-of-state retailers to easily comply with the rationalized sales and use tax laws of all those states at once, Congress has not taken the necessary action to allow the Streamlined system to take effect.").

[199] The bill in the Senate was referred to simply as Senate Bill 106. *See* S.B. 106. *See also* South Dakota Legislature: Legislative Research Council, *Senate Bill 106*, SDLEGISLATURE.GOV, https://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=106&Session=2016 (last viewed Apr. 19, 2019) [hereinafter *S.D. Legislative Research Council*] (cataloging the votes and timeline surrounding this law). There was a hearing on the bill held on February 17, 2016 where no opposition was raised. *See An Act to Provide for the Collection of Sales Taxes from Certain Remote Sellers, To Establish Certain Legislative Findings, and to Declare an Emergency:*

64 to 2 on March 1, 2016.[200] The bill was then promptly signed by Governor Daugaard on March 29, 2016 – less than a month after its passage and a little over two months from its introduction in the legislature.[201] This is astonishingly fast for a process purposefully designed to be bogged down by politicians and interest groups.[202] South Dakota noted universal state alignment in its Petition for Certiorari: "Here, in reliance on an express invitation from one of this Court's members [to give the Court another chance to consider the *Bellas Hess* line of cases], the entire machinery of South Dakota's government came together to bring this issue before this Court."[203]

It is important to note that South Dakota continued the case-baiting efforts initially launched by North Dakota in *Quill*, this time requiring larger online sellers with no physical presence in the state to collect sales taxes. The language of the South Dakota bill is straightforward:

> Notwithstanding any other provision of [South Dakota] law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, shall be subject to [laws governing South Dakota taxes], *and the seller shall collect and remit the sales tax*. The seller shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state [with limited exceptions for small businesses].[204]

Recall that the *Quill* Court expressly, yet reluctantly, held that North Dakota's imposition of a duty to collect sales taxes from online sellers with no physical presence in the state violated *Bellas Hess* – a case the Court was not willing to overrule at that time.[205] Justice Stevens, offering *Quill*'s majority opinion, stated the Court "must either reverse the [North Dakota] State Supreme Court or overrule *Bellas Hess*. While we agree with much of the state court's reasoning, we take the former course."[206] Although North Dakota's case-baiting attempt was unsuccessful, it set the stage for South Dakota's later challenge.

Words of uncertainty at overruling longstanding precedent are not typical in Supreme Court opinions. South Dakota recognized the bench's conflict, ultimately luring a hesitant Court to reconsider its stance via case-baiting. In an attempt to make a more compelling case than

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Hearing on S.B. 106 Before the S. Comm. on State Affairs, 2016 Legis. Assemb., 91st Sess. 2:27 (S.D. 2016), available at http://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=106&Session=2016.

[200] *See S.D. Legislative Research Council*, *id.*

[201] The final law was codified in Title 10 of the South Dakota code which deals with taxation. *See S.*D. Codified Laws § 10-64-1 through § 10-64-9 (2016).

[202] *See e.g.*, Kurt Sevits, *Senate Republicans Seek to Slow Down Colorado Legislature by Calling for Full Reading of 2,000-page Bill*, THE DENVER CHANNEL (March 11, 2019) https://www.thedenverchannel.com/news/politics/watch-senate-republicans-seek-to-slow-down-colorado-legislature-by-calling-for-full-reading-of-2-000-page-bill (stating that "Republicans in the Colorado Senate who say Democratic lawmakers are moving too fast are trying to slow things down by calling for a full reading of a bill that's more than 2,000 pages long. . . . The request for a full reading of the lengthy bill aims to slow down Senate proceedings, as Republicans complain that Democrats, who have a majority in the Senate, have not been giving ample time for debate and discussion of legislation.").

[203] Wayfair *Petition*, *supra* note 192, at 37.

[204] *South Dakota Senate Bill 106*, §1 (emphasis added).

[205] See *Quill*, 504 U.S. 298, 318-19.

[206] *Id.* at 301-02.

previously launched by North Dakota, South Dakota professed this issue as an emergency, documenting, "Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist."[207] North Dakota had not taken such drastic step in its *Quill* efforts.[208] South Dakota's "emergency" declaration was crafty, and ultimately played a prominent role in the Supreme Court's decision.[209]

3. STEP THREE: Lose In The Lower Courts

Step Three requires state governments to swiftly navigate the lower court process using a utilitarian-type means-to-an-end strategy. Normally, parties prefer to win at the lower court level, thus alleviating further expense and uncertainty of appeals. Case-baiting has the opposite goal – the state must tolerate initial losses in order to vie for the possibility of securing nationwide policy change.

In South Dakota's complaint, the state acknowledged that a declaratory judgment in its favor, "will require abrogation of the United States Supreme Court's decision in *Quill Corp. v. North Dakota* . . . and ultimately seeks a decision from the United States Supreme Court to that effect in this case."[210] This language all but assured that the lower court would rule in the opponent's favor, thus pushing the state closer to successfully luring the Supreme Court. South Dakota was also relying on a few select Justices to take the bait. The state needed Justice Kennedy's support, who had previously stated in *DMA* that given "changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier."[211] In addition, South Dakota need the support of newly-appointed Justice Gorsuch, who had questioned the *Quill* doctrine while sitting as a judge on the federal Tenth Circuit Court of Appeals:

> Everyone before us acknowledges that *Quill* is among the most contentious of all dormant commerce clause cases. Everyone before us acknowledges that it's been the target of criticism over many years from many quarters, including from many members of the Supreme Court. But, the plaintiffs remind us, *Quill* remains on the books and we are duty-bound to follow it. And about that much the plaintiffs are surely right: we are obliged to follow *Quill* out of fidelity to our system of precedent whether or not we profess confidence in the decision itself.[212]

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[207] *South Dakota Senate Bill 106, §*8. This emergency language is familiar as South Dakota also uses it in other emergency situations such as those caused by natural disasters. *See e.g.*, 2019 Bill Text SD S.B. 172 (using the same language as in the *Wayfair* legislation).

[208] N.D. Senate Bill 2298, *available at* https://www.legis.nd.gov/assembly/65-2017/documents/17-0968-04000.pdf (omitting the declaration of emergency language used in the South Dakota online seller tax).

[209] *Wayfair*, 138 S. Ct. 2080, at 2097 (internal citations omitted)("South Dakota Legislature has declared an emergency which again demonstrates urgency of overturning the physical presence rule.").

[210] *Wayfair* Complaint, *supra* note 198, at 1-2.

[211] *Direct Mktg.*, 135 S. Ct. 1124, 1135 (Kennedy, J., concurring).

[212] Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1148 (10th Cir. 2016) (Gorsuch, J., concurring) (internal citations

Further, the state needed Justice Thomas' support, who previously noted that the entire dormant commerce clause doctrine "has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."[213]

South Dakota took advantage of the fact that at least three sitting Justices who had the power to consider its *Wayfair* petition had previously expressed interest in overturning *Quill*. The state was confident enough in its impending lower court loss that it drafted the legislation to provide for injunctions preventing any defendants from owing back taxes during the pendency of lawsuits over the legislation.[214] The legislature also added language that stated, "[a]ny appeal from the decision with respect to the cause of action established by this Act may only be made to the State Supreme Court. The appeal shall be heard as expeditiously as possible."[215] In effect, South Dakota was blatantly baiting the Supreme Court into action.

The South Dakota Circuit Court granted summary judgement to the defendants without holding a hearing.[216] Following the lower court's decision, the South Dakota Supreme Court affirmed, predictably and unanimously holding:

> However persuasive State's arguments on the merits of revisiting the issue, *Quill* has not been overruled. *Quill* remains the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes. We are mindful of the Supreme Court's directive to follow its precedent when it 'has direct application in a case' and to leave to that Court 'the prerogative of overruling its own decisions.' Therefore, we affirm.[217]

It was time to bait the Highest Court in the nation.

4. STEP FOUR: Bait the Court

After losing at the state Supreme Court, this step requires that the "injured" state file a Petition for Certiorari with U.S. Supreme Court. The reasons provided in the petition generally mirror other certiorari petitions requesting the Court to overturn precedent, including (1) times have changed,[218] (2) the precedent has become unworkable or its value has been chipped away by the Court,[219] (3) the precedent violates state sovereignty guaranteed under federalism,[220] (4) the

omitted).

[213] Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J. dissenting).

[214] *See South Dakota Senate Bill 106, §* 3.

[215] *Id.* at § 4.

[216] *See* State v. Wayfair Inc., 2017 SD 56, 901 N.W.2d 754, 760 (S.D. 2017).

[217] *Id.* at 761 (internal citations omitted). South Dakota Justice Severson was joined by Chief Justice Gilbertson, Justices Zinter and Kern, and retired Justice Wilbur.

[218] *See e.g.*, Wayfair Petition, *supra* note 192, at 38-39 (stating that "*Quill's* infirmities have become far more obvious in the 25 years since [its announcement], as critical legal and technological changes have disproven its premises.").

[219] *See e.g.*, Petition for A Writ of Certiorari at 11, *Kisor v. O'Rourke*, 2018 U.S. S. Ct. Briefs LEXIS 2421 (No. 18-15) (June 29, 2018) [hereinafter Kisor *Petition*] (stating that beyond "criticizing *Auer*, the Court has substantially chipped away at it, continuously narrowing its scope.") (internal citations omitted).

[220] Wayfair *Petition*, *supra* note 192, at 20 (stating that "*Quill* is doubly costly from a federalism perspective: It

case has caused great confusion in the lower courts,[221] or (5) the issue is important and the Court must get it right.[222]

South Dakota initiated this step on October 2, 2017 – filing its Petition for Certiorari a mere 18 months after filing its civil complaint in Hughes County, South Dakota.[223] Not surprisingly, the state included a stylized case-baiting argument toward the end of its Petition:

> Here, in reliance on an express invitation from one of this Court's members [Justice Kennedy], the entire machinery of South Dakota's government came together to bring this issue before this Court. The Legislature passed a statute, the State has prosecuted a suit, and the state courts adjudicated it expeditiously, all to answer Justice Kennedy's request that the system produce a vehicle without further delay. When a State commits itself to such measures in reliance on this Court's statements, this Court should give that State a chance to make its case.[224]

This language endorsed that all branches of South Dakota's sovereign government collaborated to push this case through to the U.S. Supreme Court. The state's efforts worked. The Court took the bait and Justice Kennedy, who put the wheels of this challenge into motion, wrote the majority opinion.

5. STEP FIVE: Pray

Experts proclaim it a fool's errand to predict the Supreme Court.[225] In fact, there exists a fascinating article on this topic titled, *Why the Best Supreme Court Predictor in The World is Some Random Guy in Queens.*[226] Even following oral argument it is difficult to predict the outcome of any specific case.[227] Although it successfully baited the Court, South Dakota could not know at

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not only harms state and local governments and economies, it also strips from States a power preserved by the Constitution and Tenth Amendment.").

[221] Kisor *Petition*, *supra* note 219, at 12 (stating it is "no surprise, then, that widespread confusion persists in the lower courts. While, as here . . . lower courts generally acknowledge that *Auer* remains binding in theory, its uncertain status casts a shadow over the doctrine when invoked.") (internal citations omitted).

[222] *See id.* at 13 (stating that certiorari "is additionally warranted because the doctrine is important. If, as we maintain, *Auer* is wrong, it is imperative that the Court correct it.").

[223] Wayfair *Petition*, *supra* note 192, at 38.

[224] *Id.* at 37.

[225] *See e.g.*, Janelle MacDonald, *Legal Experts Say It's Tough to Predict Supreme Court Decision*, WAVE3NEWS.COM (July 26, 2006) (stating that "[m]ost lawyers will tell you that it's a dangerous game to speculate on what the [Supreme Court] justices will do.").

[226] Oliver Roeder, *Why the Best Supreme Court Predictor in the World is Some Random Guy in Queens*, FIVETHIRTYEIGHT.COM (Nov. 17, 2014), https://fivethirtyeight.com/features/why-the-best-supreme-court-predictor-in-the-world-is-some-random-guy-in-queens/.

[227] *See e.g.*, David Yin*, How Predictive is Oral Argument Questioning?*, HARV. L. & POLY REV. (Mar. 29, 2012) (stating: Rex E. Lee, a former Solicitor General, was often asked just how much an oral argument affected a case. His response was always "a confident 'I don't know.'" While Lee's point was not intended to imply that oral argument is not useful, one might deduce that even one of the greatest oral advocates could not reliably predict whether his side was helped, or hindered, by the Court's questioning.). *See also* Daniel Martin Katz, Michael J. Bommarito II, Josh Blackman, *A General Approach for Predicting the Behavior of the Supreme Court of the United States*, PLOS ONE

the onset if its efforts would ultimately prove fruitful.

Based on statements made in prior opinions by Justices Kennedy, Thomas, and Gorsuch, South Dakota was hunting for the Court to kill *Quill*. The remaining six Justices, however, had never previously recorded their views on the matter. During oral argument, Justice Ginsburg seemed to tip her hand to South Dakota, remarking that "the Court should overturn its own obsolete precedents, not leave the job to Congress."[228] With Ginsberg's vote increasingly likely, it was still unclear after oral arguments where Justices Roberts, Breyer, Alito, Sotomayor, and Kagan stood. Particularly, these remaining Justices seemed disinclined to overrule *Quill.*[229]

During oral argument, Justice Alito – a pivotal fifth vote for the majority – emphasized that the "competing considerations in play cried out for a resolution by Congress that could balance those considerations and reach a more nuanced outcome than the Court could reach… [and] that a win for South Dakota… would remove the incentive for states to urge Congressional action and hence might reduce the likelihood of Congress stepping in."[230] Interestingly, this point paralleled that made by the Chief Justice in his *Wayfair* dissent.[231] Following oral argument, experts maintained that the outcome "remains very much in doubt [but given] the exchanges at the oral argument… it would not be surprising if the physical-presence rule again survives by a whisker, as it did in *Quill* a quarter of a century ago."[232]

12(4): E0174698, https://doi.org/10.1371/journal.pone.0174698 (2017) ("Despite the multitude of "pundits and vast human effort devoted to the task, the quality of the resulting predictions and the underlying models supporting most forecasts [of Supreme Court decision making] is unclear. Not only are these models not backtested historically, but many are difficult to formalize or reproduce. When models are formalized, they are typically assessed ex post to infer causes, rather than used ex ante to predict future cases.").

[228] Alan Horowitz, *Oral Argument in Wayfair Raises the Possibility That a Sharply Divided Court Will Preserve* Quill, TAX APPELLATE BLOG (Apr. 18, 2018), https://appellatetax.com/2018/04/18/oral-argument-in-wayfair-raises-the-possibility-that-a-sharply-divided-court-will-preserve-quill/.

[229] *See Horowitz, id.* (recounting more of the *Wayfair* oral argument and writing:

> In particular, Justices Sotomayor and Alito seemed opposed to changing the law. Justice Sotomayor began the questioning by pointing to "a whole new set of difficulties" that would be created if *Quill* were overruled, such as possible retroactivity and a "massive amount of lawsuits" about what minimum level of contact would be necessary to obligate a seller to collect sales taxes. Even if Congress were to act to ameliorate these problems, she noted that there would be an "interim period" in which there would be significant "dislocations and lawsuits." Justice Alito emphasized that the competing considerations in play cried out for a resolution by Congress that could balance those considerations and reach a more nuanced outcome than the Court could reach. . . . Justices Kagan and Breyer "also seemed fairly sympathetic to retaining *Quill*. Making more of an economic than a constitutional point, Justice Breyer expressed strong concern about the entry costs for small e-commerce businesses, remarking that overruling *Quill* would undermine the "hope of preventing oligopoly." . . . Chief Justice Roberts . . . remarked that the problem of uncollected sales and use tax seemed to be diminishing as Amazon and other large sellers are now collecting sales tax in all 50 states, which would tend to support the view that "we should leave *Quill* in place." He later added that perhaps Congress has already made a decision to leave things as they have been for the last 25 years.).

[230] *Id.*

[231] *See Wayfair*, 138 S. Ct. 2080, at 2102-03 (Roberts, C.J., dissenting) (stating that "by suddenly changing the ground rules, the Court may have waylaid Congress's consideration of the issue. Armed with today's decision, state officials can be expected to redirect their attention from working with Congress on a national solution, to securing new tax revenue from remote retailers.").

[232] *Id.*

Their predictions proved incorrect, and South Dakota prevailed by the slimmest of margins. The breakdown of the Justices was not ideological, with liberal-leaning Justices Breyer, Sotomayor, and Kagan joining the more-conservative Chief Justice's dissent. Justice Ginsburg joined the more conservative-leaning Justices who extricated the Court from problems created by their predecessors in earlier precedent. Ultimately, this was a hold-your-breath-and-pray case. Had Justice Ginsburg instead joined her more liberal-leaning colleagues, South Dakota would have lost. Under that scenario, *Quill* would have been strengthened by *Wayfair* instead of destroyed.

ii. Additional Examples of Direct Case-Baiting

Due to the success of South Dakota's case-baiting states can now tax online retailers without an in-state physical presence. However, case-baiting opportunities extend far beyond than the context of tax policy. The most prominent examples involve marijuana, gambling, and immigration legislation. This section discusses case-baiting as it relates to marijuana legalization, leaving the other identified areas for future research.

As of April 2019, ten states allow the recreational use of marijuana while another 33 states approve the use of a marijuana plant (as opposed to marijuana-based oils) only for certain medicinal purposes.[233] Other states limit the drug's use to "nonpsychoactive marijuana extract called cannabidiol" or require a prescription from a physician to obtain marijuana.[234] Complete marijuana use prohibitions only exist in four states.[235] Data supports that the American public has grown more comfortable with legalization efforts.[236]

The major impediment to a smooth legalization process is the federal Controlled Substances Act (CSA) which classifies marijuana as a Schedule I drug along with heroin, LSD, ecstasy, and peyote.[237] Schedule I "drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse."[238] The CSA makes no distinction between use for medicinal or recreational purposes – both are illegal under federal law.[239] CSA Penalties are harsh; "any person who 'knowingly or intentionally' grows, distributes, dispenses, or possesses marijuana, [is subject to] minimum prison sentences of ten or even twenty years in extreme cases, in addition to stiff fines."[240] The law also penalizes businesses maintained "for the

[233] *See e.g.*, ProCon.Org, *33 Legal Medical Marijuana States and DC Laws*, PROCON.ORG (Apr. 3, 2019), https://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 [hereinafter *ProCon*] (collecting data and listing Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington as the ten states that have legalized recreational marijuana use) and Dianna Benjamin, *Support for Cannabis Grows: States that Legalized Weed in 2018*, WIKILEAF.COM, https://www.wikileaf.com/thestash/states-legalized-weed/ (collecting data and showing that all marijuana use is still illegal in Idaho, Kansas, Nebraska, and South Dakota).

[234] *ProCon*, *id.*

[235] *See id.*

[236] *See e.g.*, Max Greenwood, *Poll: Support for Legal Marijuana Hits All-Time High*, THEHILL.COM, https://thehill.com/homenews/news/385018-poll-support-for-legal-marijuana-hits-all-time-high.

[237] *See* 21 USC § 812(c) (2011) and Drug Enforcement Agency, *Drug Scheduling*, DEA.GOV, https://www.dea.gov/drug-scheduling (last visited April 30, 2019).

[238] *Id.* at 21 USC § 812(b)(1).

[239] *See e.g.*, Americans for Safe Access, *Federal Marijuana Law*, SAFEACCESSNOW.ORG, https://www.safeaccessnow.org/federal_marijuana_law (last visited Apr. 30, 2019).

[240] Franklin R. Guenthner, *Pot, Printz, and Preemption*, MINN. L. R. (Apr. 26, 2017) (citing 21 U.S.C. § 841(b)).

purpose of manufacturing, distributing, or using any controlled substance."[241]

There is a caveat, however, as the CSA does not expressly preempt all state laws regarding marijuana. In fact, Congress has granted select power to states in this area. The CSA's preemption clause reads:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.[242]

This language alters the general preemption analysis. The three major types of state law preemptions conflicting with federal law are: (1) express preemption, (2) field preemption, and (3) conflict preemption.[243] The CSA's preemption clause shows that Congress did not expressly preempt state marijuana laws, claiming it had no desire to occupy the field of marijuana regulation. This leaves conflict preemption as the only viable option since field preemption is inapplicable. Conflict preemption exists where it is physically impossible to comply with state and federal law simultaneously,[244] or where the state law stands as an obstacle to the achievement of federal law.[245]

The most successful opportunity for case-baiting in the area of legalizing marijuana is for states to continue legislating via obstacle preemption. Obstacle preemption requires that a state place a "substantial obstacle" in the path of federal law.[246] This is a high bar, but not an insurmountable one. In this endeavor, a state must convince the Supreme Court to take its case, ultimately ruling that the state law at issue (and similar state laws relaxing restrictions on marijuana) does not pose a substantial obstacle to federal law.

As an example, New Mexico allows marijuana for medicinal purposes.[247] As part of what it calls its Compassionate Use Act, the state also requires state authorities to return marijuana paraphernalia to caregivers who use the drug to treat their patients, are arrested, and later found to have been in compliance with state law.[248] At the federal level, the executive branch could change

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[241] *Id.* (citing 21 U.S.C. § 856(a)).

[242] 21 U.S. Code § 903 (2011).

[243] *See e.g.*, Luke C. Waters, *Does Federal Law Preempt State Marijuana Law? Analyzing the "Conflict"*, COLORADO LAWYER, at 35 (Dec. 2018) [hereinafter *State Marijuana Law*].

[244] *See e.g.*, Barnett Bank, N.A. v. Nelson, 517 U.S. 25, 31 (1996) (internal citations omitted).

[245] *See State Marijuana Law*, *supra* note 243, at 36.

[246] *See id.*

[247] *See* N.M. Stat. Ann. § 26-2B-2 et seq. (2016).

[248] *See e.g.*, N.M. Stat. Ann. § 26-2B-4(G) (2016) (requiring that:

> Any property interest that is possessed, owned or used in connection with the medical use of cannabis, or acts incidental to such use, shall not be harmed, neglected, injured or destroyed while in the possession of state or local law enforcement officials. Any such property interest shall not be forfeited under any state or local law providing for the forfeiture of property except as provided in the Forfeiture Act. Cannabis, paraphernalia or other property seized from a qualified patient or primary caregiver in connection with the claimed medical use of cannabis shall be returned immediately upon the determination by a court or prosecutor that the qualified patient or primary

its position on marijuana enforcement at any time and rigorously challenge state laws that require the return of any Schedule I drug paraphernalia.[249] Further assume that the executive branch cannot convince the legislative branch to amend the CSA's preemption clause. If the executive branch then challenges New Mexico's law as presenting a substantial obstacle to the enforcement of the CSA, the Supreme Court will be baited into action. Similar to *Wayfair*, the Court would have to wrestle with precedent. As marijuana legalization becomes more prominent, we surmise that direct case-baiting in this arena is likely to arise.

iii. Risks and Rewards of Direct Case-Baiting

The direct approach to case-baiting has major strengths. First, it streamlines the navigation of the state case through the lower court system. State attorneys need not craft tenuous arguments documenting how the law avoids a conflict with precedent. Direct case-baiting does not require the sleight of hand involved with indirect case-baiting, as will be discussed below, where precedent must be chipped away rather than confronted directly. The state's goal is to lose at the lower court levels in order to control the content and timing of the appeals process. In addition, case-baiting places the specific issue of merit squarely within the Question Presented in the state's petition to the Supreme Court. This decreases the chances of the Court punting the case or ruling on an lesser sub-issue. Finally, successful direct case-baiting results in monumental decisions impacting all states.

Although the rewards are great, there is major risk involved if a states loses its direct case-baiting efforts. As discussed, *Wayfair* resulted in a four-Justice dissent. This verdict could have easily flipped, reasserting *Quill* and *Bellas Hess* as binding and strengthened precedent. Such decision would have been a disaster not only for South Dakota, but all other states whose sales and use tax revenue make up a disproportionate share of the jurisdiction's general funds. Although South Dakota was successful, if a single state effectively baits the Supreme Court into action yet loses on appeal, the Court's binding decision will likely minimize future attempts to overturn now strengthened precedent. Effectively, one state's unilateral attempt could inevitably strengthen controversial precedent currently in place, and diminish other states' efforts to cast their own bait. This risk raises important, ethical questions about direct case-baiting that require further research.

b. The Indirect Challenge: Chipping Away at Precedent

While the crux of this article focuses on direct case-baiting using *Wayfair* as a model, the indirect challenge approach to case-baiting is far more common. Under this approach, states pass laws designed to chip away at precedent instead of confronting precedent head on. The purpose of the indirect challenge is to convince the Supreme Court to modify existing precedent one case at a time. This strategy is commonly used to challenge hot-button topics including firearms

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caregiver is entitled to the protections of the provisions of the Lynn and Erin Compassionate Use Act, as may be evidenced by a failure to actively investigate the case, a decision not to prosecute, the dismissal of charges or acquittal.) (internal citations omitted).

[249] A better approach would be to try and convince Congress to amend the CSA and state that the federal government desires to occupy the field of marijuana regulation. This seems to be a big stretch considering Congressional inaction in any number of areas and the recent popularity of state marijuana decriminalization or legalization laws. This hypothetical assumes that this option is a non-starter.

regulations and abortion.[250] For example, states have already taken advantage of conservative-leaning Justice Kavanaugh's appointment to the bench to trim the sails of *Roe* via indirect case-baiting.[251] Examples of recent indirect case-baiting efforts on abortion rights include a Missouri law proposing to ban abortions once a fetal heartbeat is detected,[252] and an Indiana law prohibiting "someone from obtaining a pre-viability abortion if their decision is based on the race or sex of the fetus or concerns that the fetus has a diagnosis or 'potential diagnosis' of Down syndrome or 'any other disability.'"[253] Although neither of these laws directly confronts *Roe* with the goal of overturning precedent, they could eventually bait the Court into considering narrowing the scope of highly-controversial abortion precedent. However, many of these laws are likely to be struck down by state courts, with the Supreme Court thus far showing little interest in extending an opportunity for review.[254]

Although indirect case-baiting is more common across hot-button topics, there do exist recent direct case-baiting attempts in the abortion rights arena. For example, in April 2019 the Alabama House of Representatives "passed a bill that would make it a crime for doctors to perform abortions at any stage of a pregnancy, unless a woman's life is threatened."[255] The American Civil Liberties Union (ACLU) of Alabama responded to this case-baiting attempt, documenting that

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[250] *See e.g.*, James Phillips and John Yoo, Opinion: *Finally, the Supreme Court is Taking Up Gun Rights Again*, L.A. TIMES (Jan. 27, 2019), https://www.latimes.com/opinion/op-ed/la-oe-phillips-yoo-guns-court-20190127-story.html (stating that over "the last decade, the high court has been missing in action on the 2nd Amendment. In 2008, the court found, for the first time, that the 2nd Amendment recognizes an individual right to bear arms [in] *District of Columbia vs. Heller*. Two years later it ruled in *McDonald vs. City of Chicago* that the 2nd Amendment applied to city and state laws, not just federal ones. Ever since, there has been deafening silence. *Until this week, the Supreme Court has steadfastly refused to hear another gun control case, and liberal state and local governments have taken advantage of this judicial neglect to methodically chip away at gun rights.")* (emphasis added) and *States Chipping Away at* Roe v. Wade, N.Y TIMES (2013), https://archive.nytimes.com/www.nytimes.com/interactive/2013/03/26/us/abortion_laws.html?_r=0 (detailing in graphic form how *"[a] number of states in recent years have passed restrictions on abortions that strike at the foundation of abortion rules set out by Roe v. Wade* and other Supreme Court rulings, which give women the right to an abortion until the fetus is viable outside the womb, usually about 24 weeks into pregnancy.") (emphasis added).

[251] Priyanka Boghani, *The Abortion Divide: How States Are Preparing for a Potential* Roe v. Wade *Challenge*, PBS.ORG (Apr. 23, 2019), https://www.pbs.org/wgbh/frontline/article/how-states-are-preparing-for-a-potential-roe-v-wade-challenge/ (emphasis added). *See also* Erin Heffernan, *Missouri Abortion Activists Ramp Up for a Fight after Kavanaugh Appointment to Supreme Court*, STLTODAY.COM (Oct. 14, 2018), https://www.stltoday.com/news/local/metro/missouri-abortion-activists-ramp-up-for-a-fight-after-kavanaugh/article_46abbeb4-02a3-508c-acb8-81760711ed0e.html.

[252] The Missouri House of Representatives passed a law containing this type of provision styled the Stand for the Unborn Act; it is now being debated in the state Senate. *See* HB 126, https://house.mo.gov/billtracking/bills191/hlrbillspdf/0461S.04C.pdf. *See also* Edward McKinley, *After Emotional Debate, Missouri House Poised to Pass 'Strongest Pro-life Bill' in U.S.*, KANSASCITY.COM (Feb. 26, 2019), https://www.kansascity.com/news/politics-government/article226832584.html.

[253] *See House Enrolled Act No. 1337* and Jessica Mason Pieklo, *Supreme Court Weighs Indiana Law Requiring Fetal Burial After Miscarriages*, REWIRE.NEWS (Jan. 9, 2019), https://rewire.news/article/2019/01/09/supreme-court-weighs-indiana-law-requiring-fetal-burial-after-miscarriages/.

[254] *See e.g.*, David Pitt, *Judge Declares Iowa Fetal Heartbeat Law Unconstitutional*, ASSOCIATED PRESS (Jan. 22, 2019), https://www.apnews.com/f0130851a91c4c2ab561391684862e15.

[255] Debbie Elliott, *Alabama Lawmakers Move to Outlaw Abortion in Challenge to* Roe v. Wade, NPR.ORG (May 1, 2019) (stating that the "legislation is part of a broader anti-abortion strategy to prompt the U.S. Supreme Court to reconsider the right to abortion."). *See also* Ala. HB 314, §4(a) & (b) (stating that it "shall be unlawful for any person to intentionally perform or attempt to perform an abortion except . . . if an attending physician licensed in Alabama determines that an abortion is necessary in order to prevent a serious health risk to the unborn child's mother.").

these "lawsuits are a part of a plan to overturn *Roe v. Wade* at the Supreme Court. They know they will not win in federal, district, or appeals courts because these bills are flagrantly unconstitutional."[256] Based on our analysis in this Part, we surmise that this is precisely what Alabama expects to happen en route to its filing a Petition for Certiorari to the U.S. Supreme Court. This case has the potential to be *Wayfair* draped in profoundly controversial clothing as compared to tax statutory law, which could very well be its ultimate downfall.

PART IV: CONCLUSION

In 2018 the U.S. Supreme Court issued a significant 5-4 decision in *South Dakota v. Wayfair*.[257] Arising from more than 50 years of precedent that effectively barred states from enforcing tax collection on remote sellers, the majority overruled the Constitutional barriers involved, providing a new opportunity for states to capture Internet sales tax revenue. However, this decision invoked a break in ideological lines, with one of the most conservative justices leading the liberal minority in warning the Court against straying from stare decisis, invoking questions of judicial activism that have previously haunted the evolving Court. This case also raises questions about a single state's unilateral tactic to fast-track an issue of national importance through the court system, ultimately succeeding in its attempt to bait the Highest Court into action.

Justice Roberts' *Wayfair* dissent coincides with numerous Supreme Court decisions where dissenting judges have admonished the majority for legislating from the bench. These dissents, in combination with numerous scholarly debates, raise questions about the Court's evolving superiority. In the current era of Congressional stalemate, it has been hypothesized that Congress has become a secondary policymaker, thus catapulting the Court's empowerment. However, this article advocates that in circumstances where the distribution of power between the Court and Congress is uncertain, *Wayfair* serves as the premier example of the Court acting within the scope of its Constitutional authority under the sovereign zone of twilight.

Further, South Dakota's success in *Wayfair* could prompt states to use one of the most effective tools available to challenge federal policy - case-baiting. Case-baiting can be applied directly, requiring that a state to enact legislation to directly conflict with federal law, precedent, or policy, or indirectly which requires that states slowly chip away at precedent. *Wayfair*'s success is due entirely to direct case-baiting.

Case-baiting is legally sound, but conceivably perilous. Although *Wayfair* was ultimately triumphant, had the swing vote gone in the opposite direction the decision would have been catastrophic for South Dakota and all states whose sales and use tax revenue encompass a disproportionate share of state funding. The risks generated by case-baiting raise important ethical issues that should be addressed. Still, the unilateral efforts undertaken by South Dakota to draw the Supreme Court into action transformed *Wayfair* from a single-term decision into a modernized roadmap for case-baiting, thus endorsing one of the riskiest tools available to bait the U.S. Supreme Court into action.

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[256] ACLU Alabama, *HB314/SB211 (2019) - Abortion Ban*, ACLUALABAMA.ORG, https://www.aclualabama.org/en/legislation/hb314sb211-2019-abortion-ban (last visited May 3, 2019).

[257] 138 S. Ct. 2080 (2018).