

THE YELLOW JACKET POLICY RESEARCH SERIES



The Juridical Primacy Problem

*How American Governance Defaulted to Judicial Review,
Why the Capture Was Not Accidental,
and What to Do About It*

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A Note Before You Begin

This paper is about a structural pathology that predates the current political moment, survived every partisan turnover of the last forty years, and has now reached a stage at which it cannot be corrected by the mechanism — litigation — that most Americans instinctively reach for when they want to fix something in the law.

The pathology is the transfer of primary policy authority from the legislative branch to the judicial branch. The transfer was not sudden. It was not, in the ordinary sense, intentional. It was not a conspiracy. It was the cumulative product of two centuries of small decisions, each defensible on its own terms, that in their aggregation produced a constitutional order in which the Supreme Court has become a continuous policy-making institution and Congress has become a body that primarily reacts to what the Court has done.

The pathology has an accelerant. Beginning in the early 1980s, a coordinated intellectual and institutional project — centered on the Federalist Society but extending well beyond it — recognized that the site of real American policy authority had shifted to the judiciary and organized itself around capturing that site. The project succeeded. The progressive legal establishment, operating on an older theory under which courts were the primary vehicle for rights expansion, cooperated in the transfer by continuing to pursue litigation as its privileged strategy even as the field was being reorganized around it. Both sides, in different ways, accelerated the departure of policy authority from the legislative branch.

The Trump presidencies did not cause this condition. They revealed it. The monitoring record produced by the *Yellow Jacket Policy Research Series* — the voter-roll database consolidations, the Presidential Records Act repudiations, the three-branch emergency-authority expansions of April 2026 — is readable as a pattern of executive-branch architecture-building that succeeds precisely because the legislative branch has, for forty years, been ceding the authority required to resist it. Each development in the monitoring log is also a symptom of the deeper condition named in this paper.

The purpose of this paper is not to criticize the judiciary. The purpose is to describe accurately, with citation to the primary sources and the scholarly literature, the structural condition under which the judiciary has become something it was never designed to be, and to propose — at the doctrinal, legislative, and constitutional layers — what a serious response would look like.

The American Upgrade project, of which the Yellow Jacket series is a diagnostic precursor, requires this paper as a foundation. Governing instruments that do not address the condition of juridical primacy will fail to produce governance. This paper is an attempt to make that condition visible enough that a different kind of legislative response becomes thinkable.

— E.L.A., April 2026

THE THREE-LAYER HISTORY

CHAPTER 1

The Founding Ambiguity

The Constitution of the United States does not grant the judiciary the power to strike down acts of Congress. The claim is commonly made that it does, and generations of law students have been taught that it does, but the text itself is silent on the question.

Article III vests "the judicial Power of the United States" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."¹ The judicial Power is defined, in the subsequent section, as extending to cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," among other categories.² Article VI declares the Constitution, together with federal laws and treaties made under it, to be "the supreme Law of the Land," and binds state judges to follow it "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."³

None of this text identifies which branch of the federal government is to interpret the Constitution when branches disagree. The question was live at the Founding and was not resolved by the Founders.

The most celebrated defense of judicial review in the founding-era literature is Alexander Hamilton's in *Federalist* No. 78, which argued that the judiciary would be "the least dangerous" of the three branches because it would have "neither Force nor Will, but merely judgment."⁴ Hamilton's framing has been read, by later generations, as an assertion of judicial supremacy over constitutional interpretation. Read in its original context, it asserts something considerably narrower: that courts, when deciding cases, must prefer the Constitution to inconsistent statutes, because the Constitution is the superior law.

This is a proposition about the judicial function. It is not a proposition about which branch's constitutional interpretation binds the others.

The alternative view — that each branch interprets the Constitution in the course of performing its own functions — is called the "departmental" theory. The theory is most associated with Thomas Jefferson, who articulated it in a sustained correspondence throughout his presidency and retirement. In a letter of September 1819 to Virginia jurist Spencer Roane, Jefferson wrote that "the constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots."⁵ He returned to the theme repeatedly. James Madison held a modified version of the same view.⁶ Abraham Lincoln would later invoke the departmental theory in rejecting the binding authority of *Dred Scott*, and we will return to Lincoln's formulation in Part Three.

The Supreme Court itself, in its earliest years, did not claim the supremacy that is now routinely attributed to it. In *Hylton v. United States* (1796), the Court reviewed and upheld an act of Congress as constitutional; Alexander Hamilton argued on behalf of the statute's validity.⁷ In *Ware v. Hylton* (1796), the Court struck down a Virginia law as inconsistent with a federal treaty, a form of judicial review that tracked the Supremacy Clause's express text.⁸ Neither case was treated as an occasion for the broader assertion of supremacy over coordinate federal branches.

The Founding ambiguity, then, is this: the Constitution establishes judicial review of some kind, but the scope and supremacy of that review — whether judicial interpretations bind the other branches, or whether each branch interprets the Constitution for itself — was left unresolved by text and contested from the beginning.

This ambiguity matters because the modern structure of American governance has been built on the resolution of that ambiguity in one particular direction. The resolution was not inevitable. It was historical. It occurred over two centuries and through a sequence of decisions and institutional developments that could have gone differently. A paper that argues for reopening the question must begin by acknowledging that the question was open long enough that its closure cannot be treated as natural law.

CHAPTER 2

The *Marbury* Distortion

The decision in *Marbury v. Madison* (1803) is routinely cited as the moment judicial review was established. Virtually every first-year constitutional law course opens with it. The Federal Judicial Center describes it as "the dramatic opening scene of the master narrative of the history of American constitutional interpretation."⁹

This framing is not wrong, but it is incomplete to the point of distortion. The scholarly work of the last two decades has substantially revised the meaning of *Marbury* within its original context. The most important such revision is Larry Kramer's *The People Themselves: Popular Constitutionalism and Judicial Review*, published by Oxford University Press in 2004 and drawn from work Kramer conducted while on the faculties of NYU and Stanford.¹⁰ Kramer's central claim, set out in the article that preceded the book and developed at length in it, is this:

"Read in context, *Marbury* is best understood as a retreat from judicial supremacy — a self-conscious backing away from the claim that constitutional interpretation is a uniquely legal and judicial responsibility."¹¹

Kramer's argument proceeds by reconstructing what Chief Justice Marshall actually wrote and what he pointedly did not write. Marshall began the *Marbury* opinion with the principle, drawn from the founding generation generally, that the Constitution is "a superior, paramount law" and that an act of the legislature repugnant to the Constitution is void.¹² This is the departmental position. Every branch, encountering a statute inconsistent with the Constitution, must treat the Constitution as controlling. Marshall then explained that courts, when deciding cases, must exercise this duty by preferring the Constitution to inconsistent statutes in the cases before them.

What *Marbury* does not say — what it pointedly does not say — is that the Supreme Court's interpretation of the Constitution binds the other branches in their own subsequent exercises of authority. The case involved a conflict between the Judiciary Act of 1789 and Article III; Marshall found the relevant section of the Judiciary Act unconstitutional and declined to exercise the jurisdiction it purported to grant. The opinion resolved the case. It did not purport to resolve every future case of constitutional interpretation for every other branch of the federal government.

The transformation of *Marbury* into the doctrinal foundation of judicial supremacy is a twentieth-century development. The pivot point is *Cooper v. Aaron* (1958), in which the Supreme Court unanimously described *Marbury* as "declar[ing] the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."¹³

One searches *Marbury* in vain for this proposition. The Kramer scholarship, together with subsequent work by David Strauss, Jed Shugerman, and others, has established in the academic literature what any careful reader of *Marbury* can confirm for themselves: the 1958 *Cooper* formulation is not a restatement of *Marbury*'s holding but an innovation layered on top of it.¹⁴

The innovation had a specific historical context. *Cooper v. Aaron* was decided in the aftermath of *Brown v. Board of Education* (1954), at a moment when southern states were engaged in what came to be called "massive resistance" to desegregation. The Court's assertion of supremacy in *Cooper* was understood, by the justices who wrote it, as necessary to secure compliance with *Brown*. The rhetorical expansion of *Marbury* was, in 1958, a weapon against segregationist state governments.

The expansion has endured well beyond its originating circumstance. Having been used once to assert final authority against state resistance to civil rights, the doctrine of judicial supremacy has become the operative understanding of the Supreme Court's relationship to every other institution of American government. Justice Robert Jackson's famous formulation — "We are not final because we are infallible, but we are infallible only because we are final" — captures with unintended clarity the self-referential character of the claim.¹⁵ Chief Justice Charles Evans Hughes stated it more bluntly: "We are under a Constitution, but the Constitution is what the judges say it is."¹⁶

The distortion matters, because it forms the doctrinal foundation on which the modern structure of juridical primacy rests. If judicial supremacy is a natural outgrowth of *Marbury*, then the current condition is the inevitable result of a founding choice, and there is nothing to be done about it. If judicial supremacy is a twentieth-century innovation built on a selective reading of *Marbury*, then the current condition is the result of historical developments that can be historically revised. The argument of this paper depends on the latter view.

The latter view is the correct view, and it is the view held by serious constitutional scholars across the ideological spectrum. The mainstream legal academy's acceptance of judicial supremacy as the normal state of American constitutional governance is itself a historical development of the twentieth century, not a reflection of the original constitutional design.

CHAPTER 3

Modern Judicial Supremacy, 1958-2026

The ratification of judicial supremacy in *Cooper v. Aaron* was followed by a half-century of doctrinal developments that further centralized policy authority in the judiciary. Three waves deserve attention.

3.1 The Rights Revolution and the Habituation to Judicial Policymaking

The Warren Court (1953-1969) and the early Burger Court (1969-1973) produced a sequence of decisions that reshaped American policy in ways Congress and state legislatures could not — or would not — match. *Brown v. Board of Education* (1954) ended state-mandated school segregation. *Mapp v. Ohio* (1961) applied the exclusionary rule to the states. *Gideon v. Wainwright* (1963) guaranteed the right to counsel in state felony prosecutions. *Miranda v. Arizona* (1966) required police to notify suspects of their rights. *Griswold v. Connecticut* (1965) established a constitutional right of marital privacy. *Loving v. Virginia* (1967) struck down state laws banning interracial marriage. *Roe v. Wade* (1973) established a constitutional right to abortion.

The Warren and early Burger Courts did work that, in a functioning legislative system, might have been done through Congress and the states. Because the work was done by courts, a generation of reformers came to see litigation as the privileged vehicle for social change. This was rational as a short-run strategy; the Warren Court was sympathetic, the Burger Court initially followed its lead, and the alternative — building legislative majorities state by state against entrenched opposition — appeared to promise only partial and reversible gains.

The long-run consequence was structural. The reformist legal establishment, having built its institutional apparatus around litigation, continued to pursue litigation as its privileged strategy even after the composition of the federal judiciary began to change. The result was a feedback loop. Reformist energy flowed into the courts; the courts, now the operative venue for social policy, became the target of counter-mobilization. The counter-mobilization, when it came, was prepared to contest the same terrain on which the reform movement had chosen to fight.

Robert Bork, who would become one of the Federalist Society's intellectual patrons, wrote the critique of this arrangement early. In *The Tempting of America* (1990), Bork argued that the Warren Court and its progeny had substituted judicial preferences for democratic judgments on an expanding range of questions, and that the appropriate response was not to replace those preferences with different judicial preferences but to remove the questions from the judiciary entirely.¹⁷ Bork's critique, though associated with a political movement whose broader commitments this paper does not endorse, identified the structural condition accurately. The reform movement, by making the judiciary the primary venue for social change, had also made it the primary venue for social counter-change.

3.2 The Administrative-State Expansion and the Rise of the D.C. Circuit

In parallel with the rights revolution, the federal government during the twentieth century vastly expanded its regulatory activity. The New Deal era established or strengthened the Securities and Exchange Commission, the National Labor Relations Board, the Federal Communications Commission, and dozens of other agencies. The Great Society and its aftermath produced the Environmental Protection Agency, the Occupational Safety and Health Administration, the Consumer Product Safety Commission, and a further wave of regulatory authority delegated to the executive branch.

The delegation was legally possible because Congress, in the foundational statutes creating these agencies, granted broad rulemaking authority to executive officials. The constitutional doctrine permitting such delegation — the so-called "intelligible principle" standard articulated in *J.W. Hampton, Jr., & Co. v. United States* (1928) — permitted Congress to hand off enormous policy authority to agencies so long as the statute provided some "intelligible principle" to guide the agency's exercise of that authority.¹⁸

The result was a system in which the substantive policy fight increasingly happened in the administrative record — the agency's notice-and-comment rulemaking, its adjudications, its interpretive guidance — rather than in the statutory text Congress had produced. And when parties disagreed with agency action, they went to court. They specifically went, in the majority of cases, to the United States Court of Appeals for the District of Columbia Circuit, which by statute has jurisdiction over most challenges to federal agency action.¹⁹

The D.C. Circuit became, over the course of the twentieth century, the most consequential court in the country after the Supreme Court. The judges appointed to it made policy in the reviewing of agency rules. Their decisions determined what the Clean Air Act actually meant, what the Commodity Exchange Act actually required, what the National Labor Relations Act actually permitted. The political significance of appointments to the D.C. Circuit — which would produce Antonin Scalia, Ruth Bader Ginsburg, Clarence Thomas, and John Roberts, among many others — reflected the institutional significance of the court.

In *Chevron U.S.A. v. Natural Resources Defense Council* (1984), the Supreme Court established the doctrine that would govern judicial review of agency statutory interpretation for the next forty years.²⁰ Under *Chevron*, courts were to defer to agency interpretations of ambiguous statutes so long as the interpretation was "permissible." The doctrine was initially celebrated by both conservatives (who saw it as restraining activist judges) and progressives (who saw it as protecting agency expertise from conservative judicial interference). The bipartisan embrace of *Chevron* in 1984 is striking to recall in the context of its ultimate partisan fate.

What *Chevron* did, in practice, was shift the substantive policy fight from the judiciary back to the administrative agencies. Congress would produce ambiguous statutes; agencies would interpret them through rulemaking; courts would defer to the interpretations. Congress, freed from the need to resolve the hard policy questions explicitly, could produce legislation that handed those questions to agencies. The administrative state became, in the *Chevron* era, the operational legislature of the United States.

3.3 The Conservative Legal Movement, 1982 to Present

The Federalist Society was founded in 1982 by a group of conservative and libertarian law students at Yale, Chicago, and Harvard. Its founders — including Steven Calabresi, David McIntosh, and Lee Liberman Otis — were responding to what they perceived as the overwhelming liberal dominance of elite law schools and the legal profession.²¹

The definitive academic treatment of the movement is Steven Teles's *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*, published by Princeton University Press in 2008.²² Teles, a political scientist at Johns Hopkins, was granted access to previously unavailable archival materials from the Olin Foundation, the Federalist Society itself, the Center for Individual Rights, the Institute for Justice, and the Law and Economics Center. His book is not a polemic; it is a carefully documented account of how a self-conscious intellectual and institutional project captured one of the major centers of American power.

The capture was deliberate. Teles writes:

*"Starting in the 1970s, conservatives learned that electoral victory did not easily convert into a reversal of important liberal accomplishments, especially in the law. As a result, conservatives' mobilizing efforts increasingly turned to law schools, professional networks, public interest groups, and the judiciary — areas traditionally controlled by liberals."*²³

The strategic decision was explicit. Teles documents the internal discussions among the movement's architects in the late 1970s and early 1980s in which the conclusion was reached that conservative victory at the ballot box would not produce durable policy change because the operative center of American policy authority had moved elsewhere. The authority had moved to the judiciary, to the administrative state, and to the intellectual infrastructure that produced the reasoning those institutions drew upon. The counter-project, therefore, had to target those sites.

Teles characterizes the strategy: *"Transforming the courts required a strategy of elite rather than popular mobilization."*²⁴ The phrase is critical. The Federalist Society project was not organized around democratic persuasion or electoral majorities. It was organized around the cultivation of a pipeline of ideologically aligned law students, law professors, clerks, judges, and eventually justices, each of whom would reinforce the others through a dense network of institutional relationships.

The most important operational effect of the movement, Teles argues, is not judicial appointments per se. It is the "supply-and-demand relationship between the judges and the network":

*"Judges need scholarship and arguments extending Federalist principles into new areas. Where new legal theories depart from the status quo, they need them to be vetted and legitimized through public debate."*²⁵

A Federalist Society-aligned judge does not merely rule conservatively. The judge draws on an intellectual apparatus — law review articles, amicus briefs, treatises, conference proceedings — that has been produced, over decades, by the Federalist Society's network of academics and practitioners. The apparatus produces the reasoning the judge uses. The judge's opinion legitimizes the reasoning, which is then cited by subsequent scholarship and briefs. The loop is closed.

This is an accurate description of how elite-level American legal culture now works. It is not a conspiracy theory. It is a straightforward account, documented from the movement's own archives, of how the capture was accomplished.

The fair point to make against this description is that the Federalist Society did not invent the conditions under which it succeeded. The site of real American policy authority had moved to the judiciary before the Federalist Society existed. The legal-academic and litigation-centric character of elite American policy-making was the creation of the Warren Court, the rights revolution, and the administrative-state expansion — not the Federalist Society. The Federalist Society organized itself around a target that the reform movement had, in effect, constructed and abandoned.

This point is fair, but it does not acquit the capture. An accurate description of the condition must include both facts: the target existed before the Federalist Society chose to capture it, *and* the Federalist Society captured it by a sustained, deliberate, well-funded, multi-decade intellectual and institutional campaign whose mechanisms

are now publicly documented. The progressive legal establishment's mistake was not to have made the judiciary the primary venue for social change. It was to have assumed, after doing so, that the judiciary would remain sympathetic. It did not. It was, precisely, taken.

The capture produced the doctrinal developments that now define the current judicial era. The most consequential of those developments are surveyed in the next chapter.

CHAPTER 4

The 2013-2024 Inflection

Four Supreme Court decisions between 2013 and 2024 reveal the operational consequence of the capture. Each represents a judicial override of legislative judgment on a matter of first-order national importance. Read together, they establish that the American system has completed its transition to juridical primacy.

4.1 *Shelby County v. Holder* (2013)

On June 25, 2013, the Supreme Court decided *Shelby County v. Holder*, 570 U.S. 529.²⁶ The 5-4 majority opinion, written by Chief Justice Roberts and joined by Justices Scalia, Kennedy, Thomas, and Alito, struck down Section 4(b) of the Voting Rights Act of 1965 — the coverage formula determining which state and local jurisdictions were subject to preclearance requirements under Section 5.²⁷ Justice Ginsburg wrote the dissent, joined by Justices Breyer, Sotomayor, and Kagan.²⁸

The factual context of the case requires specification because the Court's reasoning turned on it. In 2006, Congress had reauthorized the Voting Rights Act, including Sections 4 and 5. The reauthorization passed the House of Representatives on July 13, 2006, by a vote of 390 to 33 (197 Democrats, 192 Republicans, and 1 Independent in favor).²⁹ It passed the Senate by a vote of 98 to 0 on July 20, 2006.³⁰ President George W. Bush signed it on July 27, 2006, days after addressing the NAACP national convention. The reauthorization extended the coverage formula and preclearance requirements for 25 years.³¹

The legislative record supporting the 2006 reauthorization was extensive. The House Judiciary Committee Chairman, James Sensenbrenner (R-WI), described it as "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27½ years" he had served in the House.³² The Brennan Center and the Mexican American Legal Defense and Educational Fund, among many other organizations, testified before committees; thousands of pages of hearings and reports documented the continuing incidence of voting discrimination in covered jurisdictions.³³

In *Shelby County*, Chief Justice Roberts wrote: "*Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.*"³⁴ Roberts further wrote that "no one can fairly say" the record showed "anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that clearly distinguished the covered jurisdictions from the rest of the Nation in 1965."³⁵

The characterization is notable because it sets aside the legislative judgment of 98 senators, 390 representatives, a Republican president, and the most extensively deliberated civil rights statute in American history on the basis of the Court's own assessment of contemporary conditions. The Ginsburg dissent marshaled extensive evidence to the contrary; the majority opinion substituted its own reading of the empirical record for the one the legislative branch had compiled.³⁶

The post-*Shelby* empirical record is dispositive. In a study published in the *American Political Science Review*, Schuit and Rogowski demonstrated that "preclearance under the VRA appeared to substantially increase Black representation in the contemporary era."³⁷ The factual premise of the *Shelby* majority — that preclearance had become unnecessary because its underlying rationale had dissipated — was empirically wrong. The Court struck down a law that was, by the relevant measure, still doing exactly what Congress had designed it to do.

The appropriate analytical framing of *Shelby County* is this: the Supreme Court, without elected authority, set aside the considered and repeatedly-reaffirmed judgment of the most democratically representative bodies in American government, on the basis of a factual premise that was incorrect, and replaced that judgment with its own. The post-decision history — the wave of voter-suppression legislation that followed in formerly-covered jurisdictions — has vindicated the dissent and discredited the majority.³⁸

Shelby County is the paradigm case of judicial override of legislative judgment in the modern era. It is also the paradigm case, for the argument of this paper, of the structural problem. No legislative response has been possible. The John R. Lewis Voting Rights Advancement Act, introduced in multiple Congresses to restore the preclearance regime, has repeatedly failed in the Senate. The legislative branch, having been told its judgment was inadequate, has not been institutionally capable of reasserting that judgment in an amended form.

4.2 *Dobbs v. Jackson Women's Health Organization* (2022)

On June 24, 2022, the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215.³⁹ The 6-3 majority opinion, written by Justice Alito, overturned *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992), returning the regulation of abortion to the states.

The analytical significance of *Dobbs* for this paper is not the substantive merits of the decision. Reasonable people hold deeply different views on the constitutional status of abortion. The significance is structural: *Dobbs* represents the second pole of the same dynamic documented in *Shelby County*. In 1973, the Supreme Court constitutionalized abortion regulation on the basis of a claim of constitutional meaning. In 2022, the Supreme Court unconstitutionlized the prior constitutionalization, again on the basis of a claim about constitutional meaning. Neither event involved the legislative branch.

In a system of functioning departmental governance, the 1973 constitutionalization would have been followed by a legislative response at the federal level — either codifying the right, qualifying it, or substituting alternative legislative protections. No such federal response was ever produced. The abortion question was handled, for nearly fifty years, as a constitutional question adjudicated by courts. When the composition of the Supreme Court changed sufficiently, the prior adjudication was reversed. The venue of the policy fight moved to state legislatures and to subsequent rounds of constitutional litigation.

The *Dobbs* dissent, written jointly by Justices Breyer, Sotomayor, and Kagan, made precisely this structural point:

"The Court reverses course today for one reason and one reason only: because the composition of this Court has changed."⁴⁰

The dissent's framing is analytically precise. When a legal question is resolved constitutionally rather than legislatively, its continued resolution depends on the continued composition of the court that resolved it. This is an unstable basis for national policy. It makes the content of constitutional meaning a function of judicial turnover rather than of democratic deliberation.

The lesson of *Dobbs*, taken alongside the lesson of *Shelby County*, is that the juridical-primacy system is unstable in both directions. A Supreme Court of one composition can constitutionalize policies the legislature did not produce; a Supreme Court of another composition can unconstitutionlize them. Neither move involves the legislative branch. Both moves bypass the process by which, in a legislative-supremacy system, policy is meant to be made.

4.3 *Loper Bright Enterprises v. Raimondo* (2024)

On June 28, 2024, the Supreme Court decided *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369.⁴¹ The 6-3 majority opinion, written by Chief Justice Roberts and joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, overturned the *Chevron* doctrine established in 1984.⁴² Justice Kagan wrote the dissent, joined by Justice Sotomayor and (in part) Justice Jackson.⁴³

The holding:

*"Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Chevron deference precludes courts from exercising the judicial power vested in them by Article III to say what the law is."*⁴⁴

The practical effect is that federal courts are no longer required — or, under the opinion, even permitted — to defer to agency interpretations of ambiguous statutes. When a private party challenges a federal regulation, the reviewing court must determine for itself what the underlying statute means, without reference to the interpretation the agency adopted in promulgating the rule.

The implications are systemic. Every federal regulation promulgated during the forty-year *Chevron* era was drafted on the assumption that reviewing courts would defer to the agency's reasonable interpretation of ambiguous statutory text. That assumption is now gone. Every such regulation is, in principle, open to re-challenge under the new standard. The law firm Squire Patton Boggs summarized the institutional consequence: *"The ruling signals a new era for the administrative state marked by a hobbled executive, an empowered judiciary, and a Congress that must now more explicitly delegate any authority left to the federal agencies."*⁴⁵

The critical word in that summary is "empowered." The Supreme Court in *Loper Bright* has empowered itself — and the lower federal courts — by withdrawing deference it previously extended to the executive branch. The authority withdrawn from the agencies did not return to Congress. It accrued to the judiciary.

4.4 The 2024 Trifecta: *Loper Bright*, *Corner Post*, *Jarkesy*

Loper Bright did not stand alone. In the same Supreme Court term, two additional decisions further expanded judicial authority over the administrative state.

Corner Post, Inc. v. Board of Governors of the Federal Reserve System (2024) held that the Administrative Procedure Act's six-year statute of limitations for challenging agency rules begins to run not when the rule is promulgated but when the plaintiff is first injured by it.⁴⁶ The practical effect is that no final agency rule is ever permanently safe from challenge. A plaintiff newly subject to a rule — a newly-formed corporation, a newly-licensed practitioner — can challenge a rule that has been on the books for decades, so long as their injury is recent. The combination of *Loper Bright* and *Corner Post* is that every federal regulation is now vulnerable to de novo judicial reinterpretation at any time.

SEC v. Jarkesy (2024) held that the Seventh Amendment right to jury trial applied to Securities and Exchange Commission civil enforcement actions for securities fraud, and therefore that the SEC's use of administrative law judges for such proceedings was unconstitutional.⁴⁷ The decision calls into question the adjudicatory structures of virtually every federal regulatory agency, which routinely use administrative adjudication for enforcement. The reach of the decision is still being worked out in the lower courts.

The Public Health Law Center characterized the three decisions as a unit: *"a remarkable sequence of decisions ... ushering in a new era of judicial oversight over administrative actions and discretion."*⁴⁸ The characterization is appropriate. The 2024 term established, in a single four-month window, that the federal judiciary had consolidated its position as the primary reviewer, interpreter, and in many cases the primary policymaker in the American regulatory system.

4.5 The Dimensional Summary

The four decisions surveyed in this chapter, taken together, complete the transition to juridical primacy:

- *Shelby County* (2013): judicial override of legislative judgment on a matter of first-order civil rights importance.
- *Dobbs* (2022): judicial reversal of prior judicial policy-making, with no legislative venue available to resolve the underlying question.
- *Loper Bright* (2024): withdrawal of judicial deference to executive agencies, consolidating interpretive authority in the courts.

- *Corner Post + Jarkesy* (2024): extension of the withdrawal to the procedural structure of regulatory enforcement itself.

The cumulative effect is a system in which the judicial branch — unelected, life-tenured, and composed of a supermajority cultivated by a decades-long capture project documented from the movement's own archives — exercises primary policy authority across the major domains of American government. The legislative branch has been reduced, as a structural matter, to reacting to judicial action by either acceding to it or attempting to work around it through mechanisms (litigation, further delegation to agencies, executive action) that route the substantive policy fight back to the courts.

This is the condition the Yellow Jacket monitoring record is documenting in real time. It is also the condition this paper is attempting to name with enough clarity that a different kind of legislative response becomes thinkable.

THE LEGISLATIVE DECLINE

CHAPTER 5

The Productivity Collapse

If the judiciary has consolidated primary policy authority, the legislative branch has, in the same period, produced less and less of the kind of legislation that would constitute a meaningful counterweight. The data are unambiguous.

The Everything Policy brief on Congressional Lawmaking, published in February 2026, documented the decline with precision. Total enactments have fallen from 713 in the 100th Congress (1987–88) to 276 in the 118th Congress (2023–24) — a decline of 437 laws, or 61 percent, over the span of a single professional career.⁴⁹ When the data are adjusted to exclude non-major bills (building renamings, commemorative-coin authorizations, technical corrections), the decline is less dramatic but still substantial: from 388 major bills in the 100th Congress to 164 in the 118th, a decline of 214 laws, or 55 percent.⁵⁰

The 118th Congress (2023–24) passed just under 150 bills over its two-year term, according to Quorum data reported by *Axios*.⁵¹ The 112th Congress (2011–12) passed 283 laws, the previous modern low.⁵² The 113th Congress (2013–14) passed 296 laws, barely avoiding the "least productive" title only because of an exceptionally active lame-duck session.⁵³ Molly Reynolds of the Brookings Institution, commenting on the 118th, noted that "even comparing against other periods of divided government, 2023 was definitely not a high water mark for Congress's productivity."⁵⁴

A methodological note is worth making, because defenders of the status quo sometimes cite it. Modern bills are longer than historical bills. The 112th Congress's 283 laws filled 2,495 pages in the statute book. Fifty years ago, the 88th Congress enacted 666 laws averaging just 3 pages each; the 112th Congress averaged 16.78 pages per law.⁵⁵ By total word count, GovTrack data show that Congress has typically enacted 4–6 million words of new law in each two-year Congress since World War II, with the overall word count remaining relatively stable even as the number of distinct enactments has collapsed.⁵⁶

This methodological point, however, cuts against rather than for the defenders. Fewer, longer bills is the signature of legislation that has been drafted to survive the appropriations process, bundled into omnibus vehicles, or packaged for reconciliation. It is not the signature of ordinary legislative work. The comprehensive, freestanding statutory reforms that characterized mid-twentieth-century governance — the Civil Rights Act of 1964, the Voting Rights Act of 1965, Medicare, Medicaid, the Clean Air Act of 1970, OSHA, ERISA — are no longer the normal output of the legislative branch. They have become historical artifacts, studied as examples of what Congress used to do rather than as templates for what Congress should be doing now.

The critical inference: Congress is not merely producing less legislation. It is producing a different kind of legislation. The legislation it does produce is increasingly drafted with an awareness that its ultimate fate will be determined by judicial review of the executive action implementing it, not by its legislative text alone. Drafters have adapted to the new conditions. Severability clauses are standard. Broad delegations to agencies, coupled

with judicial-review-friendly findings sections, are standard. Language calibrated to anticipate and survive the major-questions doctrine is increasingly standard. The legislative product has been reshaped by the juridical primacy it is produced under.

This is not the condition of a healthy legislative branch. It is the condition of a legislative branch that has adapted, at the level of craft and institutional expectation, to the fact that its output will be rewritten by someone else before it takes effect.

CHAPTER 6

The Institutional Feedback Loop

The legislative decline and the juridical expansion are not independent developments. They feed each other, in a reinforcing cycle that makes each condition worse over time.

The cycle has five steps. Each step is defensible on its own terms. The cumulative effect is the pathology.

Step One: Congressional drafting avoids hard questions. Producing comprehensive legislation requires coalitions that can resolve contested policy questions explicitly. When such coalitions cannot be assembled — because of polarization, because of procedural obstacles like the Senate filibuster, because of the political cost of on-the-record positions on divisive issues — drafters write legislation that delegates the hard questions to the executive branch. The statute establishes objectives, identifies an agency, and instructs the agency to promulgate regulations "as necessary and appropriate" to achieve the objectives.

Step Two: Agencies fill the gaps through rulemaking. Executive agencies, receiving broad delegations, fill in the substantive content of the law through notice-and-comment rulemaking. The result is policy made not by Congress but by agency bureaucrats applying their expertise to statutory texts Congress did not resolve.

Step Three: Affected parties challenge the rules in federal court. Private parties, state attorneys general, or activist organizations challenge agency rules they disagree with. The challenges are filed in the courts of appeals — most often the D.C. Circuit — where the merits are adjudicated. In the post-*Loper Bright* era, the courts decide de novo what the underlying statute means.

Step Four: Court rulings become the operative policy. The judicial opinion becomes the interpretation of the statute. The agency either complies, repromulgates under the new interpretation, or waits for a different political environment. The judicial decision is the effective law until reversed.

Step Five: Legislative response is not forthcoming. Congress, having avoided resolving the hard question in the original statute, is not institutionally capable of resolving it in response to the judicial decision. The same coalitional and procedural obstacles that prevented explicit resolution the first time prevent legislative override the second time. The judicial decision stands. The next iteration of the cycle begins.

The cycle reinforces itself because each step makes the others more likely in subsequent rounds. Congress learns that its detailed drafting will be second-guessed and adapts by drafting more broadly. Agencies learn that their interpretations will be second-guessed and adapt by drafting regulations with more robust administrative records. Courts learn that Congress will not respond to their decisions and expand the scope of their interventions. The system equilibrates at a state in which the judiciary is making policy, the agencies are implementing policy the judiciary permits, and Congress is reduced to periodic appropriations and the ceremonial renewal of expiring programs.

This is not the constitutional system the Founders designed. It is the system that the accumulated decisions of two centuries — and, most acutely, the accumulated decisions of the last forty years — have produced. The question of whether to do something about it is a question of whether the current arrangement can be sustained, and at what cost, if it continues on its present trajectory.

The argument of this paper is that it cannot, and should not, be sustained. The final part of the paper addresses what can be done.

THE PULSE OF THE NATION AND THE FIX

CHAPTER 7

What Americans Actually Think

The argument made in the preceding chapters is a structural one. It does not require popular support to be correct. But the question of whether it is actionable — whether a serious legislative response to juridical primacy is politically possible — does depend on the state of public opinion. The state of public opinion, at the time of this paper's writing in April 2026, is substantially more favorable to the argument than the scholarly and political debate would suggest.

The data are recent, consistent, and robust across methodologies.

7.1 Collapse of Court Confidence

The Annenberg Public Policy Center at the University of Pennsylvania has tracked Supreme Court trust since 2019. The March 2025 Annenberg survey found that Supreme Court trust had fallen from 68 percent (2019) to 41 percent (2025) — a 27-percentage-point decline in six years.⁵⁷ Nearly one-third of respondents (32 percent) reported having "no trust at all" in the Supreme Court "to operate in the best interests of 'people like you.'"⁵⁸ The percentage of Americans reporting "no or low trust" in the Court grew from 55 percent to 59 percent in just ten months between May 2024 and March 2025.⁵⁹

A separate Annenberg study documented an even longer decline. The percentage of Americans with "a great deal" or "a fair amount" of trust in the federal judicial branch fell from 75 percent in 2000 to under 50 percent in 2022 — a quarter-century decline that predates the Trump presidencies and has continued through them.⁶⁰

Gallup's August 2025 analysis found that party gaps in approval of both the Supreme Court and Congress were the largest in Gallup's historical trend.⁶¹ Forty-three percent of Americans described the Supreme Court as "too conservative" — the highest in Gallup's trend.⁶² Between 2020 and 2024, Americans' confidence in the U.S. judicial system and courts declined by 24 percentage points, one of the largest country-level drops for the courts measured globally since 2006.⁶³

An Associated Press-NORC Center survey in June 2024 found that seven in ten Americans believe Supreme Court justices are "more influenced by ideology" than by law. Only about three in ten believe the justices "are more likely to provide an independent check on other branches of government by being fair and impartial."⁶⁴

An Elon University Poll conducted April 10-17, 2025, found that two-thirds of Americans feared a constitutional crisis between the Trump administration and the courts.⁶⁵ The finding is notable because it reflects public recognition that the juridical-primacy system, having reached its current stage, is now institutionally fragile.

7.2 Support for Specific Reforms

Support for structural reform of the Supreme Court is not only majoritarian but supermajoritarian and bipartisan.

YouGov polling conducted in July 2024 found that 78 percent of Americans support Supreme Court term limits — a 12-point increase from 2022.⁶⁶ Eighty-six percent of Democrats and 62 percent of Republicans support a binding code of ethics for the Supreme Court.⁶⁷ Both reforms command broad bipartisan majorities.

Empirical research by Benjamin Woodson and Christopher Parker, published in 2025 in the journal *Politics and the Life Sciences*, examined public preferences on judicial reform in greater depth.⁶⁸ The central finding is this: a substantial portion of Americans *do not desire a legalistic court but instead desire a representative court that follows the doctrine of popular constitutionalism*. The preference is not a fringe position; it is held by a meaningful plurality of the survey sample, and it corresponds to the academic framework that Kramer, Waldron, and Tushnet have been developing for two decades.

This is a finding of high strategic significance. The academic framework this paper draws on is not elitist academic argument against popular opinion. The academic framework names, in rigorous scholarly terms, something a large fraction of the public already intuitively and prefers. The public does not want the Court to be a pure legal tribunal disconnected from democratic politics. The public wants the Court to operate in some form of meaningful accountability to democratic judgment. The academic apparatus is available to translate that popular preference into operational legislative and constitutional proposals.

7.3 Congressional Approval

The data on congressional approval are worth including for contrast. Congressional approval has, for most of the last fifteen years, hovered between 12 and 25 percent.⁶⁹ Independents' approval of Congress reached 7 percent in December 2011 — the all-time low.⁷⁰ Americans do not approve of Congress either. The right inference is not that Americans prefer the judiciary to the legislature. The right inference is that Americans have lost confidence in both branches, and are looking for something neither is currently providing: a functioning government that responds to democratic judgment.

7.4 The Public Pulse, Summarized

The data taken together sustain four claims:

1. Americans have lost confidence in the federal judiciary at unprecedented rates. The decline is structural, not episodic; it predates Trump and has continued through both Trump presidencies.
2. Americans correctly perceive the Court as ideologically driven rather than legally constrained.
3. Americans support specific structural reforms — term limits, ethics codes, jurisdictional changes — by bipartisan supermajorities.
4. Americans do not prefer a "legalistic" court model to a "representative" one; the legalistic model is the elite assumption, not the popular preference.

The diagnostic argument of this paper has a popular constituency. The constituency is not being mobilized because no major political actor is speaking to it. The institutional-response gap is not a public-persuasion problem. It is a legislative-action problem.

CHAPTER 8

The Fix, In Three Layers

The operational answer has three components, arranged by escalation. They are complementary, not alternative. A serious response to juridical primacy requires all three. The argument of this chapter is that the three layers are available, the constitutional authority for each exists, and the political work required to deploy them is within the range of what functioning democratic politics can achieve.

8.1 The Doctrinal Layer: Restoring the Departmental View

The first and cheapest component of the fix is intellectual. The Federalist Society spent forty years reconstructing the intellectual infrastructure that produces conservative judicial reasoning. A parallel project — not partisan, not organized around any particular substantive policy agenda, but oriented toward restoring the

departmental understanding of constitutional interpretation — is the doctrinal prerequisite for everything else.

The core intellectual move is straightforward: reject judicial supremacy while preserving judicial review. The distinction is consequential.

Under judicial supremacy, as articulated in *Cooper v. Aaron* (1958) and operationalized in the half-century since, the Supreme Court's interpretation of the Constitution binds all other branches and all future proceedings. The Court is, in this view, the exclusive or final authority on constitutional meaning. All other branches must accept its interpretations as binding.

Under the departmental view, held by Jefferson, Madison, Lincoln, and much of the American constitutional tradition before the mid-twentieth century, each branch interprets the Constitution in the course of its own functions. The judiciary's interpretations bind the judiciary and the cases before it. The legislative and executive branches, in their own subsequent exercises of authority, are not bound to accept judicial interpretations they believe to be wrong.

Abraham Lincoln's first inaugural address (1861) is the canonical American articulation of the departmental view. Addressing the Supreme Court's 1857 decision in *Dred Scott v. Sandford*, Lincoln said:

*"The candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having, to that extent, practically resigned their government into the hands of that eminent tribunal."*⁷¹

Lincoln's position is not a rejection of judicial review. It is a rejection of judicial supremacy. Lincoln accepted that the Court's *Dred Scott* decision resolved the case of Dred Scott himself. He rejected that the decision bound the executive branch or Congress in their own subsequent exercises of authority with respect to the status of slavery in the territories.

The Lincoln position is available again. It does not require constitutional amendment. It does not require statutory action. It requires that the political branches begin, in their own exercises of authority, to behave as though they have the coequal constitutional interpretive authority the departmental view accords them. Concrete applications:

- The President, in signing or vetoing legislation, takes a position on constitutional meaning that is not required to accept prior contrary Supreme Court precedent if the President believes, in good faith, the precedent was wrongly decided.
- Congress, in legislating, takes a position on constitutional meaning that is not required to accept prior contrary Supreme Court precedent if Congress believes the precedent was wrongly decided.
- The Supreme Court's interpretation binds the Court itself and the specific case before it. It does not bind the other branches in their own subsequent exercises of authority.

This is not a radical proposition. It is how Lincoln approached *Dred Scott*. It is how Jefferson approached *Marbury*. It is how Jackson approached *McCulloch v. Maryland*. The radical proposition is the one that currently obtains — the view that the Supreme Court's nine justices are the final word on the meaning of a Constitution that the American people, in amending, ratifying, and living under, are authorized to interpret only through the mediation of judicial pronouncement.

The doctrinal layer of the fix is the restoration of a view that held for most of American history and was displaced by a 1958 decision that the contemporary scholarly literature has substantially revised. The work required is intellectual, institutional, and political. It is not legally impermissible. It is, at present, only unimagined.

8.2 The Legislative Layer: Jurisdiction, Ethics, Structure

The second component of the fix uses the existing constitutional authority of Congress to rebalance the relationship between branches. Four mechanisms deserve specific treatment.

Jurisdiction stripping under the Exceptions Clause. Article III, Section 2, Clause 2 of the Constitution provides that the Supreme Court "shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."⁷² Article III, Section 1 provides that the inferior federal courts exist only as Congress chooses to "ordain and establish" them.⁷³ These two provisions, taken together, grant Congress plenary authority to determine the scope of federal court jurisdiction.

Congress has exercised this authority repeatedly throughout American history, typically without constitutional crisis. The Judiciary Act of 1789 itself established the jurisdiction of federal courts under the express authority Article III provided. Subsequent acts have expanded and contracted that jurisdiction in specific areas. In *Ex parte McCardle* (1869), the Supreme Court upheld a congressional withdrawal of its appellate jurisdiction over a pending case involving the habeas corpus rights of a Reconstruction-era prisoner, demonstrating that Congress can, in principle, strip jurisdiction even over cases the Court has begun to hear.⁷⁴

The contemporary scholarly literature on jurisdiction stripping is extensive. Christopher Jon Sprigman, writing in the *NYU Law Review* in 2020, framed jurisdiction stripping as "a means by which substantial, durable democratic majorities can push back against constitutional entrenchment and the counter-majoritarian force" of judicial decisions.⁷⁵ Richard Fallon's authoritative treatment in *Jurisdiction-Stripping Reconsidered* (2010) surveys the constitutional limits on the power and concludes that, within identified constraints (the "Battaglia principle" and the rule of *Klein*), jurisdiction stripping is broadly permissible.⁷⁶

Specific applications for serious consideration:

- **Voting rights.** Congress could strip federal court jurisdiction over certain categories of voting-rights challenges, directing those challenges to state courts under state constitutional provisions — many of which contain express voting-rights guarantees. This would not eliminate judicial review; it would redistribute it to jurisdictions with different institutional characteristics.
- **Administrative law.** Congress could, in specific statutes, specify that agency interpretations of particular provisions are entitled to deference notwithstanding *Loper Bright*. This would effectively reinstate *Chevron* for the designated areas without requiring a constitutional change.
- **Social insurance protection.** Congress could specify that certain features of Social Security, Medicare, or similar programs are not subject to judicial review on specified constitutional grounds. This is a more aggressive application of the authority but is not constitutionally foreclosed.

Jurisdiction stripping is rhetorically fraught because it has most often been proposed historically by conservative actors seeking to protect conservative legislation from judicial review. But the authority itself is politically neutral. It is a tool of democratic self-governance that is available to whoever is willing to use it. The argument for its use now is that the juridical-primacy condition has reached a state at which the normal mechanisms of legislative-judicial interaction are insufficient to restore balance.

Supreme Court ethics legislation. The constitutional question of whether Congress can impose binding ethics rules on the Supreme Court is contested. The better view is that Congress can. The Constitution establishes the Court but does not immunize it from congressional regulation of its ethical conduct; the broader constitutional tradition of congressional oversight of the judicial branch (including impeachment, salary, and administrative rules) supports the authority.

The Supreme Court Ethics, Recusal, and Transparency Act, introduced in multiple recent Congresses, provides a template.⁷⁷ Passage would impose enforceable ethics rules where none currently exist. The political case is overwhelming: 86 percent of Democrats and 62 percent of Republicans support the reform. The political obstacle is not public opinion. It is the Senate filibuster and the institutional reluctance of senators from both parties to be seen as interfering with the Court. Both obstacles can be overcome if the legislative will exists to overcome them.

Term limits. Eighteen-year staggered terms for Supreme Court justices, with senior-status designation thereafter, is the most commonly proposed structural reform. The constitutional question is whether Article III's "good behavior" clause permits the structure through ordinary legislation, or whether a constitutional amendment is required.

The Biden Commission on the Supreme Court, in its 2021 report, concluded that term limits "might require a constitutional amendment, but at a minimum, the Commission agrees that staggered, 18-year terms would be a legitimate innovation if enacted constitutionally."⁷⁸ The better view, articulated in the Commission report and elaborated in subsequent scholarship, is that staggered terms with senior-status designation after eighteen years can be enacted by statute. Senior-status justices would retain the life tenure Article III requires; what changes is their active-service posture on the Court.

Seventy-eight percent of Americans support the reform.

Court expansion. The most politically fraught but constitutionally unambiguous reform is expansion of the Court beyond its current nine-member composition. The number of justices is set by statute, not the Constitution, and has changed seven times in American history — from six (1789) to seven (1807) to nine (1837) to ten (1863) to seven (1866) to nine (1869), with contested proposals at many intervals.⁷⁹ The current size has held since 1869.

Court expansion should be on the legislative menu not as the first option but as the option available when other reforms fail. The reason for its inclusion is institutional: a Court that expects to be expanded if it overreaches will restrain itself more effectively than a Court that assumes its composition is permanent. The availability of the option changes the incentive structure even without its exercise.

8.3 The Constitutional Layer: Structural Amendment

The third component of the fix is the slowest and the most durable. It is also, in the long run, the only component that permanently resolves the underlying problem. Constitutional amendment, though difficult under Article V, is the mechanism the Constitution itself provides for resolving sustained disagreements about constitutional meaning.

Two amendments deserve specific consideration.

A judicial review amendment. A constitutional amendment clarifying the scope and limits of judicial review. The amendment would not abolish judicial review, which would destabilize more than it would solve. It would formalize the departmental view — that each branch interprets the Constitution in the course of its own functions, and that the political branches' interpretations are entitled to coequal weight with the judicial branch's.

Draft language for consideration, offered as a starting point for the drafting work that would follow:

"The power of the judicial branch to review the constitutionality of legislative and executive action shall not imply supremacy of the judicial branch's constitutional interpretation over that of the coequal branches. In cases of sustained disagreement between the branches regarding constitutional meaning, such disagreement may be resolved through the democratic processes provided by this Constitution, including the amendment process of Article V. No branch of the federal government shall claim sole or final authority over the interpretation of this Constitution."

This is a starting draft. The final language would require extensive consultation with constitutional scholars, legislative drafters, and coalition partners. The point is that a constitutional-amendment path exists, is available, and is not incoherent. The amendment would do at the textual level what Kramer's scholarship has done at the interpretive level: restore the original understanding of a system that has drifted into a configuration its designers did not contemplate.

A court-structure amendment. A second amendment could formalize the structural features — term limits, Court size, ethics requirements — that are available through statute but that benefit from being removed from the vicissitudes of ordinary politics. A court-structure amendment could:

- Fix the Supreme Court at a specific number of justices (nine, or another number).
- Establish eighteen-year staggered terms with senior-status designation thereafter.
- Impose binding ethics requirements enforceable through a mechanism (a recusal panel, a binding code with specified penalties) that Congress designs.
- Clarify congressional authority over federal court jurisdiction, to remove any residual uncertainty about the scope of the Exceptions Clause.

Both amendments face the difficulty of Article V — ratification by three-fourths of the states. This is the feature of the constitutional design that makes amendment rare. But the ratification threshold is not insurmountable, and it has been cleared before on structural questions (direct election of senators, women's suffrage, eighteen-year-old voting). The case for the effort is that the alternative — continued juridical primacy, with its accumulating costs to democratic legitimacy and institutional coherence — is worse than the work of amendment.

CONCLUSION

THE CONDITION AND THE CHOICE

This paper has argued that American governance has defaulted, over two centuries and with accelerating intensity in the last fifty years, to a system in which major policy questions are resolved not through legislation produced by Congress but through judicial review of executive action.

The argument has three parts. First, the transition to juridical primacy predates Donald Trump, the Federalist Society, and the modern partisan realignment. The doctrinal foundations were laid in the mid-twentieth century; the institutional consolidation occurred through the rights revolution, the administrative-state expansion, and the conservative legal movement's deliberate capture of a judiciary that had already become the operative center of American policy authority. Second, the legislative branch has, during the same period, undergone a structural decline in productive capacity that is documented in unambiguous quantitative terms. Congressional output has fallen by more than half since the late 1980s, and the output that remains has been reshaped at the level of craft to accommodate the juridical-primacy condition rather than to resist it. Third, the public opinion data show a collapse of confidence in the judiciary and a bipartisan supermajority preference for structural reform, paired with strong (and scholarly-documented) latent support for what the academic literature calls popular constitutionalism — a departmental, non-supremacist understanding of constitutional interpretation.

The fix is available in three layers: doctrinal, legislative, and constitutional. Each layer is within the range of what functioning democratic politics can produce. None of them requires revolutionary change. All of them require a serious recognition, by political actors with the authority to act, that the current condition is not the natural order of American constitutional governance but a historically produced configuration that has reached a stage at which its continuation threatens the legitimacy of the system it has overtaken.

The Yellow Jacket Policy Research Series has, since its first document, documented the operational effects of this condition in real time. The voter-roll database consolidations documented in *The 25th State* and *The Aggregator*; the Presidential Records Act repudiation documented in *The Post-Watergate Settlement*; the Defense Production Act emergency-authority expansions documented in *Three Presidential Determinations* — each of these developments is simultaneously an independent architectural move and a symptom of the deeper condition this paper has attempted to name. The monitoring record is the evidentiary basis for the argument. The argument is what the monitoring record means.

What is required now is the legislative response. The litigation response is not sufficient, because the litigation response is itself a manifestation of the condition. A litigation-centered opposition to executive-branch architecture-building reinforces the juridical-primacy system whose incentives produced the architecture in the first place. The response that is actually required — legislative, structural, durable — is one the current legislative branch is not producing because the conditions that caused its productivity collapse have not been addressed.

The American Upgrade project, of which this paper is the diagnostic companion, is an attempt to produce the kind of legislative response that is actually required. A governing blueprint organized around structural, durable, administratively self-executing statutes is the operational answer to the condition documented here. The work of producing that blueprint is the work of the months and years ahead.

This paper's contribution is to make the condition visible. The condition is a century in the making, accelerated by a capture project documented from its own archives, empirically evident in the data, and palpably felt by a public whose confidence in the judiciary has collapsed. The condition is also, critically, corrigible. The doctrinal tools exist. The legislative authorities exist. The constitutional amendment process exists. What has not yet existed is the political will to deploy them.

That deficit is not inevitable. It is the product of a political culture that has habituated itself to juridical primacy as the default mode of American governance. The habit can be broken. Breaking it is the precondition for every serious project of democratic renewal that the Yellow Jacket series, the American Upgrade, and kindred efforts are attempting to build.

The Constitution is not what the judges say it is. The Constitution is what the people, through the democratic processes it establishes, decide it is.

Lincoln was right. The question is whether the American political order can, at this late date, remember that he was.

Notes

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2. U.S. Const., Art. III, § 2.
3. U.S. Const., Art. VI, cl. 2.
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5. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in 10 *The Writings of Thomas Jefferson* 140, 141-42 (Thomas Jefferson Randolph ed., 1829). Cited in Larry D. Kramer, *Marbury and the Retreat from Judicial Supremacy*, 20 Const. Comment. 205 (2003).
6. See Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford Univ. Press 2004), Chapter 3.
7. *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).
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11. Larry D. Kramer, *Marbury and the Retreat from Judicial Supremacy*, 20 Const. Comment. 205 (2003).
12. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).
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14. See Kramer, *The People Themselves*, *supra* note 10; see also William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 18 Duke L.J. 1 (1969); Jed Handelsman Shugerman, *Marbury and Judicial Deference: The Shadow of Whittington v. Polk and Maryland Judiciary Battle*, 5 U. Pa. J. Const. L. 58 (2002).
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16. Charles Evans Hughes, Speech at Elmira, New York (May 3, 1907), in *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906-1908*, 139 (1908).
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18. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).
19. 28 U.S.C. §§ 2341-2351 (Hobbs Act); 42 U.S.C. § 7607 (Clean Air Act); and numerous other specific statutes lodging exclusive or primary review authority with the D.C. Circuit.
20. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
21. On the founding of the Federalist Society, see Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton Univ. Press 2008), Chapter 5.
22. Teles, *supra* note 21.
23. Teles, *supra* note 21, at jacket description, summarizing the book's thesis.
24. Teles, *supra* note 21, at 138.
25. Teles, *supra* note 21, cited in Federalist Society entry, Wikipedia, and reproduced in multiple secondary sources; see also *The Rise of the Conservative Legal Movement*, Chapter 6 ("The Federalist Society").
26. *Shelby County, Alabama v. Holder*, 570 U.S. 529 (2013).
27. *Id.* Roberts, C.J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Alito, JJ., joined. Thomas, J., filed a concurring opinion.
28. *Id.* Ginsburg, J., filed a dissenting opinion, in which Breyer, Sotomayor, and Kagan, JJ., joined.
29. House Roll Call Vote 374, 109th Congress (July 13, 2006), available at <https://clerk.house.gov/Votes/2006374> (showing 390 Aye, 33 No, with 197 Democratic, 192 Republican, and 1 Independent in the affirmative).
30. Senate Roll Call Vote on H.R. 9, 109th Congress (July 20, 2006).
31. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.
32. Rep. James Sensenbrenner, quoted in multiple legislative history materials and cited in the *Shelby County* dissent. See *Shelby County*, 570 U.S. at 577 (Ginsburg, J., dissenting).
33. On the legislative record, see *Shelby County*, 570 U.S. at 568-580 (Ginsburg, J., dissenting); Brennan Center for Justice,

- Pass the John R. Lewis Voting Rights Advancement Act* (2023).
34. *Shelby County*, 570 U.S. at 557.
 35. *Id.* at 554.
 36. *Id.* at 559-595 (Ginsburg, J., dissenting).
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 38. On post-*Shelby* voting rights litigation and legislation, see Brennan Center for Justice, *Voting Laws Roundup* (annual publications); NAACP Legal Defense Fund, *Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder* (2016).
 39. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).
 40. *Id.* at 347 (Breyer, Sotomayor, and Kagan, JJ., dissenting).
 41. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).
 42. *Id.* Roberts, C.J., delivered the opinion of the Court, in which Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, JJ., joined.
 43. *Id.* Kagan, J., filed a dissenting opinion, in which Sotomayor, J., joined, and in which Jackson, J., joined as it applies to the companion case.
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 45. Squire Patton Boggs, *Chevron Has Fallen: Supreme Court Seismically Shifts Regulatory Power From Agencies to Courts* (June 28, 2024).
 46. *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 603 U.S. 799 (2024).
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 50. *Id.*
 51. Andrew Solender & Stephen Neukam, *Capitol Hill shock: The 118th Congress passed the fewest laws in decades*, Axios (Dec. 30, 2024).
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 53. Drew Desilver, *In late spurt of activity, Congress avoids 'least productive' title*, Pew Research Center (Dec. 29, 2014).
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 58. *Id.*
 59. *Id.*
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