

Activist Judicial Restraints

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For decades, jurists and scholars have touted the virtues of judicial restraint—a characteristic of judges who only adjudicate issues they are competent to resolve, thereby avoiding political thickets and preserving their authority. Judicial restraint is ingrained in justiciability doctrines that emanate from Article III of the Constitution. When applied evenhandedly, standing requirements, the political question doctrine, and prudential manageability prerequisites to litigation help the Court maintain an appropriately restrained docket.

The Roberts Court falls well short of this restrained ideal in potentially dangerous and destructive ways. The Court has changed justiciability doctrines into “activist judicial restraints” that, rather than avoiding unnecessary controversy, actively insert the judiciary into political debates and policy decisions. As this Article demonstrates with both a theoretical discussion and an empirical investigation, activism permeates the Roberts Court’s justiciability decisions. An examination of several high-profile cases shows how the Justices have turned justiciability doctrine into faux-restraints and used them to provide dissembling cover for activism. An empirical analysis of all justiciability cases decided by the Roberts Court then provides the first data-driven insight into the Court’s activist application of justiciability doctrines. All Justices, but especially the Court’s most conservative members, frequently sidestep causes from political opponents while opening the courthouse doors to politically sympathetic litigants.

Activist judicial restraints threaten societal stability. They are doctrinally incoherent, favor concrete monetary interests, and severely undermine institutional respect for the Supreme Court. They erode the Court’s authority to act, when it must, in ways that both the public and coordinate branches will respect. To preserve its role in society, the

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Supreme Court must avoid judicial activism cloaked behind the rhetoric of justiciability. The Court should terminate activist judicial restraints.

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INTRODUCTION

The ideal judge should have many qualities: hyper-intelligence,¹ pragmatism,² predictability,³ passivity,⁴ minimalism,⁵ humility,⁶ and, perhaps most importantly, judicial restraint. Though judicial restraint has many meanings,⁷ most theorists argue that it is a laudable quality⁸ that forces judges to limit their own role in government, ceding policy choices to the political branches.⁹ Its antonym, judicial activism, describes decisions that fail to respect coordinate branch power, contain faulty reasoning, or commit other serious errors.¹⁰ Though malleable, judicial restraint is widely touted as a central tenet of good jurisprudence.¹¹

But on today's Supreme Court, the primary tools of judicial restraint are increasingly deployed as activist weapons that are far from politically

1. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 238–58 (1986) (describing the mythically intelligent judge Hercules).

2. See, e.g., Richard Posner, *Pragmatic Adjudication*, 18 *CARDOZO L. REV.* 1, 19–20 (1996).

3. See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 33–94, 106 (rev. ed. 1969).

4. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–18 (1986).

5. See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 3–4 (1999) (mounting a minimalist defense of the Supreme Court's decision-making). *Contra* Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 *N.Y.U. J.L. & LIBERTY* 347, 347 (2010) (attacking the concept of “Minimalism” itself).

6. See, e.g., Michael Gentithes, *Precedent, Humility, and Justice*, 18 *TEX. WESLEYAN L. REV.* 835, 835 (2012).

7. See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 *CALIF. L. REV.* 519, 520–21 (2012).

8. See Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 *U. COLO. L. REV.* 1401, 1401–03 (2002). The terms “judicial restraint,” “judicial self-restraint,” and “judicial activism” appear with some frequency in Supreme Court opinions. See Posner, *supra* note 7, at 533 n.54. Between 1950 and 2009, those terms appeared in Supreme Court opinions a total of 132 times, with relatively greater frequency in more recent decades as the total number of opinions issued each term has decreased. *Id.*

9. See, e.g., Posner, *supra* note 7, at 520–21 (describing three forms of “judicial self-restraint,” including one that involves deference to legislative and executive decisions, and another that includes reluctance to declare legislative or executive action unconstitutional); Joseph S. Diedrich, *Article III, Judicial Restraint, and This Supreme Court*, 72 *SMU L. REV.* 235, 256 (2019) (“[J]udicial restraint . . . describe[s] how the Supreme Court, when given the choice between exercising, asserting, fortifying, or self-defending the judiciary's own Article III power on the one hand and not doing so (or doing the opposite) on the other hand, chooses to do the latter.”).

10. Craig Green, *An Intellectual History of Judicial Activism*, 58 *EMORY L.J.* 1195, 1201, 1205 (2009).

11. See Easterbrook, *supra* note 8, at 1401–03.

neutral. Justiciability doctrines—which counsel against judicial resolution of some issues best left to the political branches¹²—have become what I call “activist judicial restraints.” They insert the judiciary into policy decisions, rather than limiting the judiciary’s political influence.¹³ Such faux restraints create an untoward appearance of judicial activism cloaked behind the rhetoric of a limited judiciary.¹⁴

As this Article demonstrates with both a theoretical discussion and an empirical investigation, Justices on the Roberts Court of all political stripes have manipulated justiciability doctrines to apply differently depending upon the political viewpoint of the parties. Even if they are not acting intentionally, the Justices undermine public faith in the judiciary by “gerrymandering” their application of legal doctrine.¹⁵ Manipulation of

12. Justiciability doctrines include Article III standing requirements, the political question doctrine, and an emerging manageability prerequisite to constitutional litigation. *Lin v. United States*, 177 F. Supp. 3d 242, 248 (D.D.C. 2016); Michael Gentithes, *A Manageable Constitution*, 64 B.C. L. REV. 1331, 1333 (2023). Others have referred to them as “sidestepping doctrines” or “doctrinal exit ramps” that judges can use to avoid adjudicating cases. Katrina Fischer Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 ECOLOGY L.Q. 731, 754 (2019) (sidestepping doctrines); see also Donald G. Gifford, *Climate Change and the Public Law Model of Torts: Reinvigorating Judicial Restraint Doctrines*, 62 S.C. L. REV. 201, 232–33 (2010) (doctrinal exit ramps).

13. “Denying access to courts for positions a judge disagrees with is a highly effective way of shaping policy in the judge’s desired direction and in this sense can be seen as a significant exertion of power.” David E. Klein, *Modesty, of a Sort, in the Setting of Precedents*, 86 N.C. L. REV. 1213, 1237 (2008).

14. Judge Posner has posed this same question of the followers of James Bradley Thayer’s version of judicial self-restraint over the past century. Posner, *supra* note 7, at 533. As Posner asks, “Were its advocates restrained, or did they merely employ a rhetoric of restraint to conceal (not necessarily consciously) a judicial program based on ideology and personal preference rather than on orthodox guides to judicial decision making?” *Id.*

Justice Jackson decried such duplicity in her recent dissent in *Diamond Alternative Energy, LLC v. EPA*, arguing that “[w]hen courts adjust standing requirements to let certain litigants challenge the actions of the political branches but preclude suits by others with similar injuries, standing doctrine cannot perform its constraining function. Over time, such selectivity begets judicial overreach and erodes public trust in the impartiality of judicial decisionmaking.” 606 U.S. 100, 128–29 (2025) (Jackson, J., dissenting).

15. This aligns with the concept of “methodological gerrymandering” coined by David Simson. David Simson, *Methodological Gerrymandering*, 72 CLEV. ST. L. REV. 145, 145 (2023). Simson argued that just as

legislators can ‘gerrymander’ the geographical boundaries of electoral districts by drawing them in a way that makes it very likely that their ideologically-preferred candidates will win elections, Supreme Court Justices can ‘gerrymander’ the legal boundaries of what the Constitution permits or prohibits by choosing their interpretive methodology in a way that makes it very likely that constitutional doctrine implements their political or ideological preferences for how society should be organized.

justiciability doctrines to exhibit faux-restraint in politically charged cases is undoubtedly activism that “abuse[s] unsupervised power . . . outside the bounds of judicial role.”¹⁶ And it is particularly discordant with theories of interpretation that suggest each legal controversy has a knowable, consistent right answer, which would seem to limit the need for judicial deference to political branches.¹⁷

The Roberts Court has ideologically invoked justiciability doctrines in ways that, prior to this Article, largely eluded empirical investigation.¹⁸ This Article builds upon the work of Stefanie A. Lindquist and Frank B. Cross that measured how Justices used justiciability to achieve political outcomes prior to 2004.¹⁹ My study reveals that, while nearly all Roberts Court

Id. at 149.

16. Green, *supra* note 10, at 1222. On Green’s definition, not all deference to coordinate branches demonstrates judicial restraint. *See id.* at 1227–28. Deferring too frequently in the face of inappropriate actions by coordinate branches may be “activist,” in that it abdicates the judicial role and favors particular policy outcomes. *See id.* Activist judicial restraint is exactly that kind of judicial activism.

17. As Justice Posner has suggested, if a Justice truly believes that their theory of interpretation minimizes discretion so completely as to provide determinate outcomes in each case, that Justice should not need to defer to other branches to answer any legal question. *See* Posner, *supra* note 7, at 535–36; *see also* Susan D. Carle, *The Failed Idea of Judicial Restraint: A Brief Intellectual History*, 49 LAW & SOC. INQUIRY 569, 587–89 (2024) (arguing that nine judges with such immense power may find it impossible to exercise judicial restraint, simply as a matter of human nature).

18. In fact, the Roberts Court otherwise appears relatively restrained. As Keith Whittington has noted, the early Roberts Court struck legislative work product as unconstitutional at historically low rates. 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, 2229 (2014). On that basis, Whittington has argued that the Roberts Court has largely averted judicial activism. *Id.* (“The Court since 2000 has been unusually restrained for the modern era, invalidating federal laws at a relatively low rate and striking down state laws at a historically low rate. The Roberts Court rivals the post-New Deal Court for its restraint in striking down laws, exceeding it slightly in its depth.”). Thus, Whittington argues that the early Roberts Court was not guilty of the sort of activism, in terms of striking legislative work-product, that many conservative court-watchers decried in the 1990s. *Id.* at 2221, 2225 (collecting sources from conservative scholars and politicians decrying judicial activism in the 1990s and early 2000s). The early Roberts Court’s rate of striking down legislation, as a whole, stood at an historical low in the modern era. *Id.* at 2229. Whittington notes that the early Roberts Court was even less activist, in terms of the rate of striking statutes, than the late Rehnquist Court. *Id.* at 2240. But Whittington also noted the possibility of greater activism by the Roberts Court as new Justices are appointed: “Replacing Kennedy on the Court might well shift the ideal point of the Court sufficiently to alter the status quo and generate a new round of activity by the Court to bring the state of law into alignment with the views of the pivotal Justices.” *Id.* at 2244.

19. *See* STEFANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 116 (2009).

Justices manipulate justiciability doctrines to some degree, the most conservative Justices deploy activist judicial restraints at alarming rates.

This Article begins by cataloguing the expansion and common vocabulary of justiciability's sidestepping doctrines on the Roberts Court. First, Article III standing has expanded its concreteness requirement and added teeth to its redressability prong, precluding a variety of litigation, including major class-action suits, in federal courts.²⁰ Second, the political question doctrine now includes a vast prudential strand, separate and apart from limitations based explicitly on constitutional text.²¹ That prudential strand allows judges to claim that a growing number of cases and controversies are non-justiciable simply because of the high degree of difficulty in creating and administering legal tests.²² Third, federal judges have begun to apply a manageability prerequisite to all constitutional litigation, even if the traditional political question doctrine does not apply to the issue.²³ That manageability prerequisite threatens to sharply limit justiciability in federal courts in a variety of areas, including voting rights, environmental law, criminal justice reform, or women's health.²⁴

Next, the Article provides specific examples of those sidestepping doctrines evolving into activist judicial restraints. Often, judges make the dissembling claim that they are limiting their own power while actually expanding the policy impact of their decisions, many times in ways that undermine individual rights.²⁵ Federal court access appears limited to those

20. See, e.g., Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1195 n.20 (2014) (collecting sources); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 324–30 (2002); Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1, 7 (2016); Richard L. Heppner Jr., *Statutory Damages and Standing After Spokeo v. Robins*, 9 CONLAWNOW 125, 125–26 (2018).

21. See, e.g., Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 265 (2002); McKay Cunningham, *Gerrymandering and Conceit: The Supreme Court's Conflict with Itself*, 69 HASTINGS L.J. 1509, 1526 (2018); Michael Gentithes, *Gobbledygook: Political Questions, Manageability, & Partisan Gerrymandering*, 105 IOWA L. REV. 1081, 1084 nn.11–12 (2020) (collecting sources).

22. See Gentithes, *supra* note 21, at 1082–87.

23. See Gentithes, *supra* note 12, at 1333.

24. *Id.*

25. See *id.* (noting the impact of manageability prerequisites on voting rights, environmental law, criminal justice reform, and women's health); see also *Rucho v. Common Cause*, 588 U.S. 684, 695 (2019); *June Med. Servs., LLC v. Russo*, 591 U.S. 299, 316–17 (2020); *Juliana v. United States*, 947 F.3d 1159, 1171–73 (9th Cir. 2020); *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1242 (11th Cir. 2020); *Luft v. Evers*, 963 F.3d 665, 671 (7th Cir. 2020); *Bennett v. Metro. Gov't of Nashville*, 977 F.3d 530, 553 (6th Cir. 2020) (Murphy, C.J., concurring); *Mecinas v. Hobbs*, 468 F. Supp. 3d 1186, 1207 (D. Ariz. 2020), *rev'd*, 30 F.4th 890 (9th Cir. 2022); *Miller v. Hughes*, 471 F. Supp. 3d 768, 774 (W.D. Tex. 2020); *Banerian v.*

with significant financial resources or the ability to demonstrate vast financial repercussions in any given case, excluding many worthy plaintiffs.²⁶ Faux-restraint frequently favors the wealthy and business communities.²⁷

The Article then supports these specific examples with empirical research demonstrating the rate at which the Roberts Court deploys activist judicial restraints. Using the coding scheme developed by Harold Spaeth for the U.S. Supreme Court Judicial Database,²⁸ I filtered Roberts Court decisions by subject matter to create a dataset of decisions where justiciability was a primary issue. I then used Spaeth's coding, supplemented by my own review of each case in the dataset, to determine the political valence of the lower court decision and, thus, the petitioner in the Supreme Court case. I then catalogued each Justices' votes on the justiciability issues in each case, measuring both how often the Justice granted or denied access and the frequency with which their votes favored a particular political direction. This allowed me to empirically demonstrate the activist nature of judicial restraints on today's Supreme Court, with several important results.²⁹ First, when voting to grant access, Justices of all political stripes favored their political preferences: those appointed by a Democrat voted to grant access for liberal causes in 76.77% of justiciability cases, while those appointed by a Republican voted to grant access for conservative causes in 60.67% of justiciability cases. Second, when voting to deny access, Justices appointed by a Republican president were particularly activist, voting to preserve a conservative status quo in 82.53% of justiciability cases. Finally, when considering votes to both grant and

Benson, 589 F. Supp. 3d 735, 739 (W.D. Mich. 2022); *Nelson v. Warner*, 472 F. Supp. 3d 297, 304 (S.D.W. Va. 2020); *Coal. for Good Governance v. Raffensperger*, No. 1:20-cv-1677, 2020 WL 6106630, at *1 (N.D. Ga. May 26, 2020).

26. As I have argued elsewhere, recent Supreme Court standing analyses have strengthened concreteness requirements in ways that could preclude a growing number of litigants from the courthouse. See Note, *Article III Standing—Separation of Powers—Class Actions—TransUnion v. Ramirez*, 135 HARV. L. REV. 333, 340 (2021); *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021) (emphasizing that the Court would only resolve “a real controversy with real impact on real persons”) (quoting *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 87 (2019) (Gorsuch, J., concurring)).

27. See *Article III Standing—Separation of Powers—Class Actions—TransUnion v. Ramirez*, *supra* note 26, at 340.

28. See *The Supreme Court Database*, WASH. UNIV. L., <http://scdb.wustl.edu/about.php> [<https://perma.cc/ZZY6-VN2Z>].

29. The results also demonstrated that the Roberts Court is much more likely to use justiciability doctrines to reverse a liberal lower court outcome, doing so in 53.45% of cases. *Infra* Section II. In contrast, the Court used justiciability doctrines to reverse a conservative lower court outcome in just 17.24% of cases. *Infra* Section II.

deny access, six Justices, all appointed by Republican presidents, favored one ideological outcome over another by at least a factor of two.³⁰ And several favored conservative outcomes by extremely wide margins: Justice Scalia favored conservative outcomes by more than a 9 to 1 ratio, Alito by more than 7 to 1, and Thomas, Kennedy, and Roberts all by more than 3 to 1. It comes as no surprise, then, that as whole the Roberts Court was much more likely to use justiciability doctrines to reverse a liberal lower court outcome (53.45% of justiciability cases) than to reverse a conservative lower court outcome (only 17.24% of justiciability cases).

After presenting the empirical results, the Article provides a normative critique of activist judicial restraints. First, activist judicial restraints are doctrinally incoherent. The extensive wiggle-room for discretion that they create only makes judges' work harder. Rather than providing clarity where a legal issue is hopelessly opaque, they add layers of opacity and create unpredictable, discretionary choices to navigate at the outset of innumerable cases. The Roberts Court has willingly deployed that discretion in ways that align with the Justices' political preferences, not any dispassionate reasoning or logic. Second, activist judicial restraints severely damage the Supreme Court as an institution, undermining public trust by both improperly limiting and unjustifiably expanding the Court's docket. Engaging activist judicial restraints either to avoid politically disfavored causes or to hear more favored ones is hugely counter-productive. It undermines the societal faith in judges that is needed for the judiciary to act, when it must, in a way that both the public and coordinate branches will respect. Finally, activist judicial restraints share important and undertheorized parallels to changes in *stare decisis* doctrine, as both favor concrete monetary interests. Just as activist judicial restraints prioritize economic interests in Article III standing's concreteness requirement, the Court's recent treatment of *stare decisis* suggests that the only reliance interests that are worthy of protection are concretely economic.³¹ Fortunately, the relationship between justiciability doctrines as an entrance mechanism to the judiciary and *stare decisis* as a guide to Court review of existing decisions provides an opportunity for tradeoffs. Doing so might

30. This included Justices Kennedy, Alito, Thomas, Gorsuch, Scalia, and Roberts. See *infra* Section II, tbl. 4.

31. See Michael Gentithes, *Concrete Reliance on Stare Decisis in a Post-Dobbs World*, 14 CONLAWNOW 1, 6–10 (2022).

balance the need for judicial clarity and the protection of less concrete, but no less important, legal interests.³²

This Article begins in Part I by reviewing the concept of judicial restraint, then examining one of the primary doctrinal tools of such restraint: justiciability. It then explains the evolution of justiciability in recent years into activist judicial restraints, which pay only lip service to genuine restraint. This Part uses specific examples of recent jurisprudence to demonstrate that doctrinal evolution. Next, Part II of the Article contains an empirical analysis that is the first to measure activist judicial restraints on the Roberts Court. The results demonstrate that ideology and politics play a significant role in the votes of all Justices on the Roberts Court in justiciability cases, and that the effect is most pronounced amongst the Court's most conservative members. Finally, Part III of the Article offers a normative critique of activist judicial restraints, which are both dissembling and dishonest in ways that exceed the scope of the judiciary's constitutional charge.³³ Such dissembling undermines what little respect the Court still has in the eyes of the public.³⁴ The Court should terminate activist judicial restraints.

I. JUDICIAL RESTRAINT AND JUSTICIABILITY

A. *Defining Judicial Restraint*

Judicial restraint and judicial activism—two sides of the same analytical coin—are malleable concepts with meanings that shift depending upon the author and context. Though a full semantic examination of judicial restraint is beyond the scope of this Article, this subpart presents a brief review of its usage in scholarly literature. This Article will focus on a specific form of

32. As I argue in Section III.C below, even though *stare decisis* is weaker when it only protects concrete reliance interests, that development may be acceptable if, in exchange, Justices are willing to lower the concreteness hurdle in Article III standing doctrine, allowing courts to reach more issues outside the purely economic realm in the first instance. Additionally, the manageability prerequisite should be cabined in exchange for a more thoroughgoing review of hard cases under the workability prong of *stare decisis*. *Infra* Section III.C.

33. As Craig Green has argued, decisions that exercise power “outside the bounds of judicial role” are a form of judicial activism, not restraint. Green, *supra* note 10, at 1222.

34. See Robert Barnes & Seung Min Kim, *Supreme Court Observers See Trouble Ahead as Public Approval of Justices Erodes*, WASH. POST (Sept. 26, 2021), https://www.washingtonpost.com/politics/courts_law/supreme-court-public-opinion/2021/09/25/379b51ec-1c6c-11ec-bcb8-0cb135811007_story.html.

judicial restraint that sees a limited institutional role for the judiciary in American government.

The dichotomy between judicial activism and judicial restraint is often credited to Arthur Schlesinger's 1947 critique of the Supreme Court.³⁵ Schlesinger divided then-sitting Justices into "activists" or "champions of [judicial] restraint."³⁶ Schlesinger sought to highlight tendencies of certain Justices to expand the footprint of the Court beyond structural limitations required by a government of divided powers.

Schlesinger's terminology built upon a longstanding philosophical debate over the propriety of judge-made positive law, dating back to William Blackstone and Jeremy Bentham³⁷ and carrying through the founding and early years of United States history.³⁸ Critics have frequently argued that the Supreme Court committed various forms of activism, although not always in the same terms or for the same reasons.³⁹ And in the early usage of the term, "judicial activism" was not always a pejorative, sometimes carrying a positive connotation.⁴⁰ The Warren Court, for example, has been both pilloried and lauded for its activism, even as the impact of its activist decisions remains debatable.⁴¹

Even when critics use "judicial activism" pejoratively, the term has many meanings. Critics are often simply describing outcomes they find abhorrent or reasoning they find insufficient to support a decision.⁴² "Judicial restraint," by the same reasoning, means avoiding abuse of the judiciary's own unsupervised power and thereby aligning with contemporary understandings of the judicial role.⁴³

35. Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CALIF. L. REV. 1441, 1446 n.22 (2004).

36. See *id.* at 1446. For discussion of Schlesinger's definition and its role in the evolution of the term, see *id.* at 1446 n.22; LINDQUIST & CROSS, *supra* note 19, at 1–2.

37. Kmiec, *supra* note 35, at 1444; Brian Bix, *Positively Positivism*, 85 VA. L. REV. 889, 907 n.108 (1999) (book review) (quoting RICHARD A. COSGROVE, *SCHOLARS OF THE LAW: ENGLISH JURISPRUDENCE FROM BLACKSTONE TO HART* 56–57 (1996)).

38. See LINDQUIST & CROSS, *supra* note 19, at 2.

39. *Id.* (quoting ARTHUR SELWYN MILLER, *TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT* 6 (1982)).

40. Kmiec, *supra* note 35, at 1451.

41. LINDQUIST & CROSS, *supra* note 19, at 3–4. See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (3d ed. 2023) (arguing against the effectiveness of litigation as a tool for social reform).

42. Green, *supra* note 10, at 1201 (noting that modern definitions of judicial activism include accusations simply of reasoning errors or undesirable results).

43. This follows closely from Craig Green's proposed definition of judicial activism: "the abuse of unsupervised power that is exercised outside the bounds of judicial role." *Id.* at 1222.

Early scholarship examining judicial restraint, on the other hand, focused on the judiciary's limitations for effective and efficient policymaking, especially when addressing wide-reaching social issues on a case-by-case basis.⁴⁴ James Bradley Thayer's writings on judicial restraint emerged from his concerns about the Supreme Court's restrictions on Congressional power to enforce the Reconstruction Amendments.⁴⁵ Thayer worried that a lack of restraint would lead judges to impose their policy preferences in a way that usurped the judicial function and allowed legislators to abdicate their proper authority.⁴⁶ Restraint aims to ensure that the judicial branch addresses only issues that it is competent to resolve within the constitutional structure.⁴⁷ And restraint may also preserve judicial authority and, ultimately, supremacy; by intervening less frequently, the Court strengthens its voice in the few cases where intervention is vital.⁴⁸

More recently, Judge Richard Posner offered a helpful exegesis of three distinct meanings of the term "judicial restraint" in the Brennan Center's 2011 Thomas Jorde symposium.⁴⁹ The first meaning Posner described is a type of "formalism," suggesting that judges "apply law, they don't make it . . . or, better, 'the law made me do it.'"⁵⁰ Second, Posner described a type of "institutional competence" or "modesty," suggesting that "judges defer to a very great extent to decisions by other officials—appellate judges defer to trial judges, and administrative agencies, and all judges to legislative and executive decisions."⁵¹ Third, Posner described a type of "constitutional restraint," suggesting that "judges are *highly* reluctant to declare legislative or executive action unconstitutional—deference is at its zenith when action is challenged as unconstitutional."⁵²

44. Kmiec, *supra* note 35, at 1452–54 (discussing Edward McWhinney, *The Supreme Court and the Dilemma of Judicial Policy-Making*, 39 MINN. L. REV. 837, 837 (1955)).

45. Carle, *supra* note 17, at 575.

46. *Id.* at 576–77.

47. See Kmiec, *supra* note 35, at 1452–54.

48. See Carle, *supra* note 17, at 570 (noting that one can logically support both judicial restraint and judicial supremacy).

49. The University of Chicago, *2010-11 Brennan Center Jorde Symposium: "The Rise and Fall of Judicial Self-Restraint,"* YOUTUBE (May 2, 2011), https://www.youtube.com/watch?v=_ro0w0_Az_s [<https://perma.cc/4FHV-Z6XC>].

50. Posner, *supra* note 7, at 520.

51. *Id.* at 520–21.

52. *Id.* at 521. There is strong empirical evidence to suggest that judicial restraint of this type is dying, at least in the Supreme Court. Using a dataset that included all Supreme Court cases considering the constitutionality of a federal law between 1937 and 2009, Lee Epstein and William M. Landes noted that the rate of striking federal laws rose sharply beginning in the 1960s. Lee Epstein & William M. Landes, *Was There Ever Such a Thing as Judicial Self-Restraint?*, 100 CALIF. L. REV. 557, 559, 563 (2012). The rate went from around 3% from 1937

Though each of Posner's proposed definitions are potentially relevant, this Article's focus is on the second type of "institutional competence" or "modesty." Doctrines of justiciability support this form of restraint by limiting the scope of issues that courts can address. When the Court uses sidestepping doctrines to restrict access to the judiciary, it asserts that other political actors are better suited to resolve some claims. Such judicial restraint suggests the limited capability of the judiciary, rather than focusing on the propriety of certain types of judicial acts like creating law or declaring statutes unconstitutional.

This "institutional competence" variant of judicial restraint may be necessary to preserve popular support for the judiciary so that it can fulfill its role as the arbiter of constitutional meaning. Public discontent with the judiciary and Supreme Court seems ever-present,⁵³ and it may only rise if the public perceives that the Court reaches beyond its proper ambit. That could undermine Court efforts to define the constitutional limits of those coordinate branches. As Larry D. Kramer has argued, if the Court wants to have the final say on the constitutionality of coordinate branch actions, then it should exhibit restraint elsewhere to preserve its institutional power.⁵⁴ Kramer argues that "[i]n a world of judicial supremacy . . . deference is simply a matter of expediency; of how far the Court can, as a practical matter, go without sacrificing too much of its political capital."⁵⁵ And that

to 1952, then up to 24% from 1953 to 2009, with the strongest spike from 1986 to 2009 at 30%. *Id.* at 563. Additionally, the Justices most willing to strike legislation maintained a strong liberal or conservative preference. *See id.* at 567, 576.

This is not to say there was no such thing as judicial activism before the Warren Court. Though the data is incomplete, Library of Congress research on cases in which the Supreme Court has invalidated a federal or state law suggests that invalidation spiked in the post-Civil War period, as well as in the early-twentieth-century *Lochner* era, all prior to the Warren Court's work. Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579, 584–86 (2012). As Huq points out, the data does not clearly define what amounts to invalidation and does not include a denominator that would demonstrate the percentage of cases the Court invalidated over time. *Id.* at 589–91.

53. Polls by the Pew Research Center showed that by the summer of 2024, a majority of Americans (50%) had an unfavorable view of the Supreme Court, a three-decade low, while 32% of Americans believed the Court had too much power. Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Sept. 3, 2025), <https://www.pewresearch.org/short-reads/2025/09/03/favorable-views-of-supreme-court-remain-near-historic-low> [<https://perma.cc/9JFQ-V7KY>]. Gallup research polls show a similar trend, with only 27% of respondents in 2025 having a "great deal" or "quite a lot" of confidence in the Supreme Court. *Supreme Court*, GALLUP, <https://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/Y7HC-XK6Y>].

54. *See* Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 633 (2012).

55. *Id.*

political capital is also undermined when the Court applies justiciability doctrines inconsistently, showing an apparent willingness to hear from only certain types of litigants.⁵⁶

If the Justices are concerned about the Court's popular respect, they should also be careful to make their methods of restraint clear and consistent. Otherwise, "restrained" Justices will face accusations of unprincipled and unfair applications that would, counterproductively, undermine confidence in the judiciary. Posner noted that past followers of restraint might be asked whether "its advocates [were] restrained, or did they merely employ a rhetoric of restraint to conceal (not necessarily consciously) a judicial program based on ideology and personal preference rather than on orthodox guides to judicial decision making?"⁵⁷ A skeptical public could ask the same questions of Justices that applied doctrines of justiciability to avoid certain types of hard cases, especially if those doctrines appear inconsistent or malleable.⁵⁸ It may be psychologically impossible for nine Justices with such tremendous power to maintain principled restraint in all cases;⁵⁹ nonetheless, the effort to do so may be vital if the Justices seek to maintain that very institutional power.

This Article suggests that just such an inconsistency now permeates the Court's justiciability doctrine. Though I take no position on the propriety of activism *per se*, my critique is of the Justices' dissembling use of formerly restraining doctrines to actively support their policy preferences. No matter one's political viewpoints, such activist judicial restraint is a normatively undesirable technique for Justices to deploy.⁶⁰

56. As Justice Jackson argued in *Diamond Alternative Energy, LLC v. EPA*, inconsistent rulings on standing may "give[] fodder to the unfortunate perception that moneyed interests enjoy an easier road to relief in this Court than ordinary citizens." 606 U.S. 100, 129 (2025) (Jackson, J., dissenting).

57. Posner, *supra* note 7, at 533 (discussing a possible critique of followers of James Bradley Thayer's call for judicial respect for statutes).

58. As I discuss below in Section III.B, this definition of judicial restraint suggests that, just as there are some cases courts are not institutionally competent to address, judicial restraint is no excuse to avoid hard cases simply because they are hard.

59. Carle, *supra* note 17, at 589 (arguing that nine judges with such immense power "simply may be unable to practice judicial restraint as a basic matter of human nature" (emphasis omitted)).

60. As discussed below in Section III.B, activist judicial restraints send a stronger, more final message about the possibility of relief for certain issues than mere denials of certiorari, although the decreasing rate of certiorari grants is certainly worth additional study.

B. Defining Justiciability

Doctrines of justiciability set the legal standards that litigants must meet before a court can resolve their claims.⁶¹ In the American federal system, these doctrines largely stem from the language in Article III of the Constitution, which states that the judicial power includes “cases” and “controversies” that can be adjudicated.⁶² The Court has interpreted those terms to limit the issues federal courts can address to those with “a live dispute, a personal injury, and the availability of a judicial remedy.”⁶³

1. Standing

Standing requirements provide the broadest justiciability doctrine derived from Article III. Those requirements are a relatively new development, historically speaking. Standing’s earliest historical roots trace back to the 1920s,⁶⁴ while the modern law of standing emerged in the 1940s, and the Court elucidated its primary doctrinal elements in the 1970s.⁶⁵ Over time, standing doctrine has grown to include a strong conservative valence.⁶⁶

61. See *Nixon v. United States*, 506 U.S. 224, 226 (1993) (“But before we reach the merits of such a claim, we must decide whether it is ‘justiciable,’ that is, whether it is a claim that may be resolved by the courts.”).

62. U.S. CONST. art. III, § 2.

63. LINDQUIST & CROSS, *supra* note 19, at 109.

64. See Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 595–96 (2010) (noting that “[f]rom 1921-1930, standing arose largely unanimously”).

65. Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1766 (1999). “In 1970, Justice William Douglas in a majority opinion announced that Article III required a plaintiff to demonstrate an individualized ‘injury in fact,’ replacing the former focus on an injury at law. Over the next few years, the Court added the ‘fairly traceable’ and ‘redressability’ requirements.” Robert J. Pushaw, Jr., *The Court Continues to Confuse Standing: The Pitfalls of Faux Article III “Originalism”*, 31 GEO. MASON L. REV. 893, 897 (2024) (citing *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152–54 (1970); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617–19 (1973)). Professor Pierce adds that “the Court has expanded standing law in unprecedented ways during the 1990s.” Pierce, *supra*, at 1766.

66. Ho & Ross, *supra* note 64, at 650 (“Our evidence demonstrates a sharp shift in the valence of standing around 1950. From 1950–1980, nearly every standing issue took a conservative valence.”).

This modern form of standing can be characterized as a tool of judicial restraint aimed at limiting judicial dockets and precluding judicial hostility towards actions of the political branches. Robert J. Pierce, Jr. links the development of standing to “a perceived need to insulate democratic institutions from activist, politically unaccountable judges who were hostile to the new preferences expressed by the people and their elected representatives.” Pierce, *supra* note 65, at 1767. Robert J. Pushaw, Jr. adds that:

To demonstrate Article III standing, a plaintiff must prove three elements: (1) a concrete and particularized injury in fact (2) that was caused by the challenged conduct (3) which can be redressed by a favorable decision.⁶⁷ Standing thus requires more than a general grievance about the government's operation shared by all citizens, which should be resolved through the political process.⁶⁸ Instead, standing ensures that only litigants who will personally be affected by the challenged conduct can access the courthouse.⁶⁹

Over time, the concreteness requirement of Article III standing has grown stronger.⁷⁰ This has been especially clear where Congress has attempted to create legislative causes of action.⁷¹ For instance, in *Spokeo, Inc. v. Robins*, the Supreme Court suggested that Congress cannot create concrete injuries by fiat simply by including a statutory damages remedy in legislation.⁷² This shifted the focus of standing jurisprudence from the connection between challenged conduct and an individual plaintiff to the

[t]he Court has not candidly acknowledged that it created and developed modern standing doctrine mainly as a docket-control device, probably because doing so would fly in the face of its longstanding precedent that the Constitution authorizes Congress alone to determine the federal courts' jurisdiction—and that they cannot decline to exercise the jurisdiction conferred.

Pushaw, *supra* note 65, at 925.

67. See, e.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (The plaintiff must show that they “‘personally . . . suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,’ and that the injury ‘fairly can be traced to the challenged action’ and ‘is likely to be redressed by a favorable decision.’” (citations omitted)); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (“First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized and (b) ‘actual or imminent, not “conjectural” or “hypothetical.”’ Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’ Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be redressed by a favorable decision.” (citations omitted)). The redressability requirement itself has two requirements: (1) that the relief sought is substantially likely to redress the plaintiff's injuries; and (2) that that relief is within the district court's power to award. *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020) (citing *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018)).

68. Hall, *supra* note 20, at 7.

69. As Justice Scalia famously put it, the question standing doctrine asks is “[w]hat’s it to you?” Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983).

70. See Gentithes, *supra* note 12, at 1341–42.

71. See Pierce, *supra* note 65, at 1776.

72. See 578 U.S. 330, 339–41 (2016); Heppner, *supra* note 20, at 125–26.

nature of the injury itself.⁷³ *Spokeo* suggests that even if an injury is sufficiently particularized (in that it can be causally related to a specific plaintiff), it may not be sufficiently concrete (in that it has enough demonstrable consequences in the real world to support a lawsuit).⁷⁴ Five years later, in *TransUnion LLC v. Ramirez*, the Court again noted that an injury does not become concrete simply because Congress creates a statutory cause of action to redress it—although such Congressional action might be instructive.⁷⁵ The *TransUnion* Court emphasized that it would only resolve “a real controversy with real impact on real persons.”⁷⁶

2. Political Questions

Similar to standing, the political question doctrine suggests that the judicial branch is not institutionally competent to address certain issues, on the basis that some controversies should instead be resolved by the elected branches.⁷⁷ In *Marbury v. Madison*, the Court noted that some actions of the executive branch are constitutionally “submitted to the executive” and therefore “only politically examinable.”⁷⁸ The Court’s fullest statement of the political question doctrine came in 1962’s *Baker v. Carr*, which focused on a “textually demonstrable constitutional commitment of the issue to a coordinate political department,” in addition to other, more prudential aspects of a political question.⁷⁹ Many scholars have thus suggested that the

73. “With *Spokeo*, . . . the focus shifted to [deciding] . . . [w]hen is an injury real and personal—not abstract or attenuated—enough to grant standing?” Heppner, *supra* note 20, at 128; see also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563–67 (1992); Pushaw, *supra* note 65, at 900 (arguing that *Lujan* is an example of how “[t]he Court has often applied the injury standard in ways that frustrate Congress’s express purposes, thereby undermining standing’s separation-of-powers rationale”).

74. See *Spokeo*, 578 U.S. at 339–41.

75. 594 U.S. 413, 425–26 (2021).

76. *Id.* at 424 (quoting *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 87 (2019) (Gorsuch, J., concurring)).

77. See LINDQUIST & CROSS, *supra* note 19, at 112.

78. 5 U.S. (1 Cranch) 137, 166, 170 (1803).

79. 369 U.S. 186, 217 (1962). The Court in *Baker* later described five additional features “[p]rominent on the surface of” a political question, including “a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.* As I have argued elsewhere, the Court’s description in *Baker* emphasizes that the manageability “feature” of political questions is of somewhat less

strands of the political question doctrine are either classical, such as issues textually assigned to a coordinate branch, or prudential,⁸⁰ such as issues that lack clear legal tests for judges to utilize or which judges cannot decide without making a political policy choice.⁸¹

Most of the Court's applications of the political question doctrine are classical, in that they concern issues that the constitutional text commits to a political branch.⁸² For instance, in holding that National Guard training was a non-justiciable political question in *Gilligan v. Morgan*, the Court emphasized that the issue was textually committed to the political branches by Article I, Section 8 of the Constitution.⁸³ The Court likewise held that an issue was a non-justiciable political question based upon a textual commitment to a coordinate branch in *Nixon v. United States*.⁸⁴ Chief Justice Rehnquist acknowledged that this normative concern was primary, though it might be informed by prudential concerns about the manageability of legal standards to resolve it.⁸⁵ The Court again suggested that manageability was a lesser concern in *Zivotofsky v. Clinton*, where it began its analysis by highlighting that political question jurisprudence has distilled the doctrine to just the first two criteria listed in *Baker*, eschewing the remaining four.⁸⁶

importance; more critical is whether an issue has been assigned to a coordinate branch by the Constitution itself. Gentithes, *supra* note 12, at 1338.

80. See Barkow, *supra* note 21, at 246, 256; Alexander M. Bickel, *The Supreme Court 1960 Term—The Passive Virtues*, 75 HARV. L. REV. 40, 79 (1961); Cunningham, *supra* note 21, at 1525–28 (collecting authorities); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1211–12 (2006); LINDQUIST & CROSS, *supra* note 19, at 112.

81. *Baker*, 369 U.S. at 217.

82. Brief for Constitutional Law Professors as Amici Curiae in Support of Appellees at 9, *Gill v. Whitford*, 585 U.S. 48 (2018) (No. 16-1161) (first citing *Nixon v. United States*, 506 U.S. 224, 229–36 (1993); and then citing *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973)) (“[E]ven where the Court has held an issue nonjusticiable as a political question, the Court has relied primarily upon commitment of that issue to the political branches.”) (summarizing the emergence of the political question doctrine).

83. 413 U.S. at 6–11.

84. See 506 U.S. at 229–36. The Court ruled that the procedure by which the Senate conducted impeachment trials was a political question primarily because, under Article I, Section 3, “[t]he Senate shall have the sole Power to try all Impeachments.” *Id.* at 229 (quoting U.S. CONST. art. 1, § 3, cl. 6).

85. See *id.* at 228–29 (“[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”).

86. 566 U.S. 189, 195 (2012). Commentators have also noted an evolution in the political question doctrine towards an emphasis on only the first two common characteristics of political questions. Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation*

More recently, the Court has emphasized the prudential aspects of the political question doctrine, especially when addressing challenges to extreme partisan gerrymandering.⁸⁷ Similar trends have emerged in other areas of litigation, largely through the manageability prerequisite to federal litigation described in the next subsection.

3. Manageability

The Supreme Court has recently elevated manageable legal tests into a prerequisite for adjudicating constitutional disputes.⁸⁸ The trend began in *Gill v. Whitford* and *Rucho v. Common Cause*, two cases where plaintiffs sought relief from extreme partisan gerrymandering.⁸⁹ In *Rucho*, the Court claimed that cases “that lack ‘judicially discoverable and manageable standards’” for resolution fall into a discrete category of nonjusticiable controversies.⁹⁰ The Court’s analysis of justiciability in *Rucho* then centered upon the need for manageable standards, rejecting all of the litigants’ proposals.⁹¹ The Court ultimately found extreme partisan gerrymandering

and Disappearance of the Political Question Doctrine, 80 N.C. L. REV. 1203, 1213 (2002) (“[T]he Court has not invoked the more obviously flexible criteria articulated in *Baker v. Carr*—the last four of the six on its list—in any recent case, to the point where it seems fair to say that the only real components of the doctrine are the first two: a textually demonstrable commitment to the political branches and the lack of judicially manageable standards.”); Brief for Constitutional Law Professors as Amici Curiae in Support of Appellees, *supra* note 82, at 8 (citing *Zivotofsky*, 566 U.S. at 195) (“Some decisions mentioning judicial manageability, for example, treat it as the only factor to be considered in political question analysis in addition to commitment to the political branches.”). Jesse Choper has suggested a set of four criteria to determine the existence of a political question, including whether “there is a textual commitment to a coordinate political department,” whether “judicial review is thought to be unnecessary for the effective preservation of our constitutional scheme,” whether “[the Court] cannot formulate principled, coherent tests as a result of ‘a lack of judicially discoverable and manageable standards,’” and whether the plaintiffs complain of “constitutional injuries that are general and widely shared.” Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1462–63 (2005).

87. *Gentithes*, *supra* note 21, at 1092–94; *see, e.g., Gill*, 585 U.S. at 60–65 (identifying the absence of judicially manageable standards for partisan gerrymandering claims as an unresolved threshold question); *Rucho v. Common Cause*, 588 U.S. 684, 696, 707, 718–21 (2019) (dismissing partisan gerrymandering claims as nonjusticiable political questions for lack of judicially manageable standards and emphasizing the availability of political-process remedies).

88. *Gentithes*, *supra* note 12, at 1345–49.

89. *Gill*, 585 U.S. at 66; *Rucho*, 588 U.S. at 696.

90. *Rucho*, 588 U.S. at 696.

91. *Id.* at 710–18.

non-justiciable because it found no “limited and precise standards that are clear, manageable, and politically neutral.”⁹²

In so doing, the Court elevated manageability, which was previously a little-used prudential strand of the political question doctrine, into a full-fledged, free-standing prerequisite to adjudication in constitutional cases.⁹³ Unmanageable claims are now a discrete category of non-justiciable cases, and the requirement for manageable standards can be deployed in a wide array of subjects including individual rights, environmental law, and criminal justice.⁹⁴

Manageability’s focus, however, is slightly different than either standing or the classical political question doctrine.⁹⁵ Standing suggests that certain litigants are not sufficiently tethered to the alleged harm at issue to obtain judicial resolution of their claims.⁹⁶ Classical political questions focus on the constitutional assignment of certain responsibilities to political branches.⁹⁷ In contrast, manageability focuses on the difficulty of the judicial task in resolving certain kinds of cases.⁹⁸ It suggests that no matter how closely tied a litigant may be to a harm, or how clearly the case falls within the constitutional ambit of the judiciary, judges still have some additional layer of protection against cases that are simply too hard. The manageability prerequisite suggests that judges are inherently limited and unable to resolve certain problems on their own, without greater guidance on how to resolve them.⁹⁹

4. Mootness and Ripeness

Two related doctrines, mootness and ripeness, also provide a basis for courts to sidestep some cases. These doctrines differ slightly from those discussed above; they focus on factual circumstances surrounding the specific litigants in a case that preclude review, rather than the nature of the issues presented by those litigants. Applying these justiciability doctrines thus ends the individual case, but does not necessarily render the issue at its core nonjusticiable. Instead, mootness and ripeness suggest that the facts of the specific suit either have not yet presented, or no longer present, a

92. *Id.* at 707.

93. Gentithes, *supra* note 12, at 1333.

94. *Id.* at 1345–56 (collecting cases that rely upon the manageability prerequisite).

95. *Id.* at 1342–43.

96. *See id.* at 1342.

97. *See id.*

98. *Id.*

99. *See id.*

controversy courts can resolve. They create more practical barriers to specific factual scenarios, rather than permanent disqualification of issues from the judicial ambit.¹⁰⁰

Mootness arises when events that occur while litigation is pending “make it impossible for the Court to provide effective relief on the initial claim.”¹⁰¹ Because the issues “are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome,” the judiciary cannot resolve the case.¹⁰² However, in some instances, such as where circumstances are “capable of repetition, yet evading review,” claims may remain justiciable, even if changed facts make relief impossible for the parties to the present case.¹⁰³ The most common example is abortion litigation, where a woman’s pregnancy is sure to end before the litigation, yet pregnancies may recur, making the litigation capable of repetition.¹⁰⁴ Similarly, class action claims where the outcome may be moot to some members of the class but not others may still be adjudicated.¹⁰⁵

Ripeness doctrine precludes review where the parties raise an issue too early, such that it depends upon “contingent future events that may not occur as anticipated, or indeed may not occur at all.”¹⁰⁶ Ripeness doctrine “is often used to postpone review until the factual record is better developed,” unless “delay would cause undue hardship to one of the

100. Gene R. Nichol, *The Impossibility of Lujan’s Project*, 11 DUKE ENV’T. L. & POL’Y F. 193, 200 (2001).

Because mootness and ripeness focus more on those temporary hurdles to justiciability presented by specific parties, rather than the ability of judges to address the issues underlying the suit, they are less central to the thesis of this Article. Activist judicial restraints allow Justices to wholly and permanently avoid some issues based upon political and policy preferences. Mootness and ripeness offer more temporary reprieves from such issues. Admittedly, a Supreme Court decision finding a case nonjusticiable as moot or not yet ripe may have the practical effect of rendering the issue unreviewable for the foreseeable future. But it remains at least theoretically possible for subsequent litigants to raise those issues under slightly different factual circumstances. And the subsequent review could be achieved without arguing for the prior decision to be overruled, unlike an effort to relitigate an issue that was previously avoided through activist judicial restraints.

101. LINDQUIST & CROSS, *supra* note 19, at 110.

102. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)).

103. *S. Pac. Terminal Co. v. Interstate Com. Comm’n*, 219 U.S. 498, 515 (1911).

104. LINDQUIST & CROSS, *supra* note 19, at 110. Another scenario the Court has found to fit this exception to the mootness doctrine is challenges to campaign finance reform laws. *See, e.g.*, *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 735–36 (2008).

105. *See* LINDQUIST & CROSS, *supra* note 19, at 110.

106. *Trump v. New York*, 592 U.S. 125, 131 (2020) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)); *see* Richard L. Heppner, Jr., *Let the Right Ones In: The Supreme Court’s Changing Approach to Justiciability*, 61 DUQ. L. REV. 79, 80 (2023).

parties.”¹⁰⁷ When deployed, ripeness should prevent courts from “premature adjudication” that would “entangl[e] themselves in abstract disagreements.”¹⁰⁸ Ripeness is thus less a statement on the jurisdictional power of the courts than it is on the actionability of the particular facts presented in a specific case.¹⁰⁹

Though this Article focuses largely on other justiciability doctrines described above, it is worth noting that, on occasion, the Roberts Court has been willing to adjudicate cases it believes are especially important despite mootness concerns. One recent example is *Moore v. Harper*, where the Court assessed whether the Elections Clause of the Federal Constitution provided state legislatures with unreviewable authority over districting decisions, including extreme partisan gerrymanders.¹¹⁰ It was far from clear whether a live controversy remained when *Moore* was decided.¹¹¹ When the Court granted certiorari, the North Carolina Supreme Court had struck down maps drawn by the state legislative defendants, and the trial court had rejected subsequent maps the legislative defendants drew.¹¹² But subsequent to certiorari, a newly elected North Carolina Supreme Court both “overruled” its prior decision on the initial maps and reversed the trial court’s refusal to adopt the legislature’s redrawn maps.¹¹³ This seemed to render the controversy moot, but the Supreme Court still found it live. It noted that the newly elected North Carolina Supreme Court had not reinstated the state legislature’s original maps; instead, it let the legislature draw new maps after dismissing the plaintiffs’ claims.¹¹⁴ In the Supreme Court’s eyes, that meant that the decision of the original North Carolina Supreme Court, which enjoined the use of the state legislature’s original maps, remained in effect—even if those maps were no longer in use for any election or supported by any party to the litigation.¹¹⁵ The Supreme Court heard the case, using it to reject the fullest version of the independent state legislature theory proposed by the legislative defendants.¹¹⁶ *Moore v.*

107. LINDQUIST & CROSS, *supra* note 19, at 111–12.

108. *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 148 (1967).

109. Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 162 (1987).

110. 600 U.S. 1, 7–10 (2023).

111. See Michael Gentithes, *Threading the Needle in Extreme Partisan Gerrymandering Cases*, 73 CLEV. ST. L. REV. 67, 80–83 (2024).

112. *Moore*, 600 U.S. at 11–12.

113. *Id.* at 12–13.

114. *Id.* at 13–14.

115. *Id.* at 14–15.

116. *Id.* at 37; see Alan B. Morrison, *The Court That Does Not Let Standing Stand in Its Way*, 92 GEO. WASH. L. REV. ARGUENDO 1, 11–12 (2023).

Harper thus illustrates the Roberts Court's willingness, when properly motivated, to ignore mootness barriers.¹¹⁷

C. *The Evolution of Activist Judicial Restraints*

On the Roberts Court, justiciability's sidestepping doctrines have significantly evolved and expanded. Today, standing, the political question doctrine, and manageability are not neutral rules of justiciability, but rather activist judicial restraints that give the Justices wide discretion to vote in alignment with their political and policy preferences.

1. Heightened Standing Hurdles

Recent history suggests that the Justices have manipulated standing doctrine to make it a tool for activism rather than a genuine limit to justiciability.¹¹⁸ The Court's standing doctrine precludes many cases where a litigant's interests are intangible by deploying a stiffer concreteness requirement. But that requirement mixes substance with justiciability. An intangible interest, though difficult to quantify, may be just as real as an economic one, and it may be justiciable. Under the guise of standing, the Court has "prioritize[d] economic interests over social, interpersonal, and even familial interests,"¹¹⁹ suggesting that the latter are not worthy of judicial protection simply because they are harder to reduce to a numerical equation. The net result is the protection of a *status quo* that favors economic interests over individual rights and large corporate entities over individual litigants.¹²⁰ Justices use standing to claim they are following

117. See Morrison, *supra* note 116, at 5. Alan B. Morrison noted that the Roberts Court has undergone:

[A] significant shift that has enabled the Court to reach the merits in a number of cases in which standing and other Article III jurisdictional barriers could have . . . required the Court to dismiss the action. But it did not, which made it possible to decide a number of cases on the merits, often coming down on the side of the conservative political position.

Id.

118. Pushaw, *supra* note 65, at 894 ("In general, liberal Justices apply standing principles loosely to allow plaintiffs to vindicate progressive federal laws but strictly to foreclose challenges to such laws, whereas conservatives relax standing to help their preferred plaintiffs (such as private corporations) but rigorously enforce the doctrine to shut out leftist plaintiffs.").

119. See Gentithes, *supra* note 31, at 9.

120. Pushaw, *supra* note 65, at 895. "[T]he modern switch to the injury-causation-redressability triad has created analytical confusion and has allowed federal courts to abdicate

neutral principles in their decision-making, while the principles that they actually follow are novel methods to justify the protection of a conservative status quo.¹²¹

The Court's standing doctrine has also recently stressed a "judicially cognizable" requirement likely to exclude many litigants from the courthouse. For instance, in 2023's *United States v. Texas*, the Court held that states lacked standing to seek the vacatur of a Department of Homeland Security guideline on immigration enforcement issued during the Biden administration.¹²² After initially outlining the three prongs of standing analysis, the Court noted that prior decisions have "also stressed that the alleged injury must be legally and judicially cognizable."¹²³ The Court added that history and tradition play a prominent role in determining judicial cognizability, such as clear precedent that has found disputes of that type justiciable.¹²⁴ Where there is no such tradition of judicial resolution of a controversy, the case remains non-justiciable,¹²⁵ and the Court will "maintain[] the longstanding jurisprudential status quo."¹²⁶

This "judicially cognizable" requirement both lacks support in existing precedent on standing and requires the Court to follow conservative historical precedents that will preclude future litigation. First, the language of "judicially cognizable interests" is relatively novel. It emerged in cases where the plaintiff sought to compel the prosecution of another that were resolved on redressability grounds; references to "judicially cognizable interests" in those cases were largely dicta.¹²⁷ Justice Barrett has called that

their duty to exercise their jurisdiction, granted by Congress pursuant to Article III, over 'all Cases' involving statutory and constitutional rights." *Id.* Professor Pushaw adds that "[t]his confusion cuts across all subjects, but is most evident in cases involving Acts of Congress that addressed critical emerging issues like civil rights, the environment, and the transparency of political organizations." *Id.* at 897.

121. *See* Gentithes, *supra* note 31, at 8–10.

122. 599 U.S. 670, 674 (2023).

123. *Id.* at 676 (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)).

124. *Id.* at 676–77.

125. *Id.* at 677–78. The Court emphasized that the State litigants in *United States v. Texas* "have not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions." *Id.* at 677.

126. *Id.* at 686.

127. The "judicially cognizable interests" language first emerged in *Linda R.S. v. Richard D.*, where a mother sought to enjoin a prosecutor to bring a child support action against her child's father. 410 U.S. 614, 615–16 (1973). The Court first noted that the plaintiff's claim was not likely to be redressed by a court ruling in her favor, because enforcement of the statute would result in the father's imprisonment, not necessarily his payment of child support. *Id.* at 619. The Court only then added the observation that, "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of

dicta a mere “bonus discussion,”¹²⁸ not a rule added to standing doctrine.¹²⁹ The Court’s efforts to turn that “cognizability” language into an additional hurdle to standing, then, have little basis in precedent.

Second, by tying standing doctrine to “interests that courts often are called upon to protect” in our nation’s history and tradition,¹³⁰ the Court essentially freezes justiciability and prevents adjudication of a wide variety of modern, non-monetary interests that might be litigated today.¹³¹ This could include any number of new issues, from climate change to artificial intelligence to self-driving cars. Courts have no history and tradition of resolving controversies arising from those novel developments. But novelty itself is counted against those issues by the Court’s standing jurisprudence.¹³²

Such malleable standing rules give Justices discretion to grant or deny standing for any reason,¹³³ which the Justices often use when a case might lead to an outcome they politically dislike. In a study of thirty-three cases involving environmental plaintiffs, Professor Richard J. Pierce, Jr. found that:

another.” *Id.* Similar language was repeated in *Allen v. Wright*, where the Court held that abstract racial stigma, though serious, is not judicially cognizable. 468 U.S. 737, 754–55 (1984). And in some environmental cases, the Court has suggested that this “interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right.” *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000).

128. *United States v. Texas*, 599 U.S. at 706 (Barrett, J., concurring).

129. Justice Alito echoed Barrett’s point that *Linda R.S.* was decided on redressability grounds rather than any new rules about standing. *Id.* at 726–27 (Alito, J., dissenting). See Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331, 331–34.

130. *United States v. Texas*, 599 U.S. at 678.

131. As F. Andrew Hessick argues, the Court’s precedent establishes “that a claim for damages to remedy the violation of a right is ‘cognizable’ only if the plaintiff demonstrates having suffered a loss that can be compensated under traditional measures of damages,” meaning they have suffered “a loss of anything of value.” F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 314–15 (2008).

132. This is not to mention the Court’s inconsistent application of a “judicially cognizable” requirement, which at times allows cases to remain justiciable even where traditional private legal rights were not violated. As F. Andrew Hessick argues, “[a]t various times, the Court has found a cognizable injury arising from the potential reduction of water available for irrigation and the loss of bargaining power. None of those complaints involved the violation of a right, yet the Court did not hesitate to grant standing.” *Id.* at 309 (footnotes omitted).

133. Robert J. Pushaw, Jr. suggests that “whether a party has experienced a sufficiently concrete and particularized injury often depends on a judge’s whims.” Pushaw, *supra* note 65, at 905. Similarly, Richard J. Pierce, Jr. argues that standing law “is extraordinarily complicated and malleable. In a high proportion of cases, a judge can write an opinion that either grants or denies standing without departing from the norms that define the craft of judging.” Pierce, *supra* note 65, at 1775.

Republican judges voted to deny standing to environmental plaintiffs in 43.5% of cases, while Democratic judges voted to deny standing to environmental plaintiffs in only 11.1% of cases. In other words, a Republican judge was almost four times as likely as a Democratic judge to vote to deny an environmental plaintiff standing [over a nearly five-year period].¹³⁴

In another study of nearly 700 taxpayer standing cases, Professor Nancy C. Staudt found that the United States Supreme Court decisions on standing are often based upon political preferences, and that circuit court standing decisions will follow the law unless the court believes that higher court review is unlikely, in which case politics again becomes the best predictor of standing decisions.¹³⁵ A study by Professor Heather Elliot suggested that Justices rarely abuse their discretion in the opposite direction by easing standing requirements inappropriately,¹³⁶ though in recent litigation over EPA regulations of emissions standards, dissenting Justice Jackson accused the majority of just that sort of manipulation in favor of wealthy corporate plaintiffs that might not otherwise have access to the courthouse.¹³⁷

2. Political Questions Proliferate from Below

The political question doctrine now includes a vast prudential strand, separate and apart from limitations based explicitly on Constitutional text. That prudential strand allows judges to claim that a growing number of cases and controversies are non-justiciable simply because of the high degree of difficulty in creating and administering legal tests. Such prudential concerns were historically secondary to the classical version of

134. Pierce, *supra* note 65, at 1760.

135. Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 668–69 (2004); *see also* Pushaw, *supra* note 65, at 903 (“Overall, in taxpayer and citizen standing cases, the Court has split badly. The Justices’ opinions appear to be driven more by their political and ideological leanings than by anything in Article III’s text or history.”).

136. Elliot found that in the first eight terms of the Roberts Court, there was only one case in which the Court did not discuss standing, even though it was probably lacking, and three additional cases where standing was questionable but probably present, yet the Court failed to discuss it at all. Heather Elliot, *Does the Supreme Court Ignore Standing Problems to Reach the Merits? Evidence (or Lack Thereof) from the Roberts Court*, 23 WM. & MARY BILL RTS. J. 189, 205 (2014) (“The fact that I could find only one case in eight terms [of strong manipulation], however, shows that this kind of strong manipulation is rare.”).

137. *Diamond Alt. Energy, LLC v. EPA*, 606 U.S. 100, 129 (2025) (Jackson, J., dissenting) (arguing that the majority “rests its decision on a theory of standing that the Court has refused to apply in cases brought by less powerful plaintiffs”); *see id.* at 132 (noting differences in the Court’s approach to standing in cases involving corporate plaintiffs and individuals claiming civil rights violations).

the political question doctrine, until the Court recently elevated manageability to a primary consideration in extreme partisan gerrymandering cases.¹³⁸ That prudential strand instructs courts to steer clear of issues that are so complex or nuanced that judges have little hope of crafting a manageable test to resolve them.¹³⁹

One might contend that the political question doctrine has little jurisprudential impact because the Supreme Court itself has rarely invoked it recently.¹⁴⁰ But the political question doctrine is far from a dead letter. Lower courts have followed the Supreme Court's doctrinal lead, continuing to rely upon the political question doctrine in cases the Supreme Court has upheld by denying certiorari as its docket has shrunk.¹⁴¹ Curtis A. Bradley and Eric A. Posner empirically studied 1,200 cases in lower federal courts that mentioned the political question doctrine between 1962 and 2022, finding that the doctrine was widespread even after Supreme Court cases that seemed to limit its applicability.¹⁴² More than half of their random sample of cases were dismissed based upon the political question doctrine, with over 50% of those dismissals invoking factors like a lack of a judicially manageable standard or the impossibility of deciding the case without a policy determination.¹⁴³ The subject matter of the dismissed cases varied widely, including "criminal statutes, civil forfeiture, employment disputes, arbitration, First Amendment claims, immigration law, education, nuisance law, and tax law," as well as separation-of-powers claims.¹⁴⁴ All of these rulings have a substantive policy effect; practically, a political question doctrine dismissal has the same effect as a ruling in favor of a challenged government action.¹⁴⁵ The political question doctrine thus remains influential in federal courts, in ways that the Supreme Court has left unchallenged on its own docket.

138. See Gentithes, *supra* note 21, at 1090.

139. Cunningham, *supra* note 21, at 1526.

140. Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 STAN. L. REV. 1031, 1034 (2023).

141. *Id.* at 1040. Bradley and Posner specifically note, as one such example, lower court decisions invoking the political question doctrine on the legality of the Vietnam War, which the Supreme Court chose not to review. *Id.* at 1043.

142. *Id.* at 1050 (noting that lower courts continued using the political question doctrine at similar rates after *Bush v. Gore*, 531 U.S. 98 (2000) and *Zivotofsky v. Clinton*, 566 U.S. 189 (2012)).

143. *Id.* at 1052–53.

144. *Id.* at 1054.

145. *Id.* at 1077.

3. The Unmanageable Growth of Manageability

Federal judges have begun to apply a manageability prerequisite to all constitutional litigation, even if the traditional political question doctrine does not apply to the issue. Both the Supreme Court itself and the lower federal courts have recently seized upon the manageability prerequisite as a limit to justiciability in a variety of areas, including voting rights, environmental law, criminal justice reform, and women's health.¹⁴⁶ As the meaning of manageability grows, it threatens almost any legal norm that contains even a modicum of malleability.

In extreme partisan gerrymandering cases, the Court was unwilling to resolve a controversy simply because it was difficult. In *Rucho*, the Court claimed that cases “that lack ‘judicially discoverable and manageable standards’” for resolution fall into a discrete category of nonjusticiable cases that can never be resolved.¹⁴⁷ Without “limited and precise standards that are clear, manageable, and politically neutral,” judicial review was impossible.¹⁴⁸ This suggests that any challenging case, or any case addressing novel issues, will remain non-justiciable in perpetuity. Judicial experimentation is worthy of derision in the Court's manageability jurisprudence because novel cases cannot be resolved through a clearly established and long-standing legal norm. Furthermore, the Court's manageability prerequisite to litigation allows it to abdicate any responsibility for establishing reason-based boundaries around the actions of coordinate branches.¹⁴⁹ The Court can simply insist that there are no such reasonable boundaries, and thus anything goes when it comes to the actions of coordinate branches—even if nothing in the Constitution's text precludes courts from setting such boundaries.¹⁵⁰

The Supreme Court has also used oblique references to manageability in decisions that limited the scope of individual rights and of agency decision-making. In his dissenting opinion in *June Medical Services v. Russo*, Justice

146. Gentithes, *supra* note 12, at 1345–57.

147. *Rucho v. Common Cause*, 588 U.S. 684, 696 (2019) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

148. *Id.* at 707, 710.

149. Rakesh K. Anand argues that the Court's claim that “no judicially manageable standards are available by which to adjudicate the dispute” is tantamount to denying “that an individual's or institution's political existence must be reasonable and that the Court is required to reinforce this boundary in and through its decision-making.” Rakesh K. Anand, *A Professionally Responsible Supreme Court?*, 74 CASE W. RES. L. REV. 903, 932 (2024).

150. Rakesh K. Anand claims that the Supreme Court should be professionally obligated to intervene “in a dispute in which the government, by any measure, was forsaking its political responsibility to operate in a manner consistent with reason.” *Id.* at 909.

Gorsuch critiqued then-existing doctrine measuring the constitutionality of state abortion laws as too malleable for adjudication,¹⁵¹ claiming that “an administrable legal test even lies at the heart of what makes a case justiciable.”¹⁵² Gorsuch quoted *Rucho*’s requirement of “judicially discoverable and manageable standards for resolving” the issue,¹⁵³ centering manageability as a justiciability requirement when adjudicating individual rights. Similarly, the Court’s language in *Loper Bright*, which overruled *Chevron* deference to administrative agencies, suggested that many long-standing legal principles that admit of any malleability whatsoever are now unmanageable—at least in politically unpopular cases.¹⁵⁴ The *Loper Bright* majority claimed that “statutory ambiguity” was “in the eye of the beholder” and that “[o]ne judge might see ambiguity everywhere; another might never encounter it.”¹⁵⁵ Thus, the Court claimed that “ambiguity” itself is an “impressionistic and malleable concept” that “cannot stand as an everyday test for allocating interpretive authority between courts and agencies.”¹⁵⁶ That language suggests continued growth for the manageability prerequisite wherever Justices, for political or policy reasons, do not want to intervene.

II. MEASURING ACTIVIST JUDICIAL RESTRAINTS ON THE ROBERTS COURT

The evolution of justiciability doctrines into activist judicial restraints is not merely theoretical. As this Part demonstrates, there is empirical evidence that the Roberts Court, and especially its most conservative members, has ideologically deployed justiciability doctrines to favor their preferred political outcomes.

Prior studies have shown the pronounced effect that ideology has on voting patterns in justiciability cases. In a study of all Supreme Court cases ruling on justiciability issues from 1953 to 2004, Lindquist and Cross found

151. See 591 U.S. 299, 420–22 (2020) (Gorsuch, J., dissenting). This came in addition to Justice Gorsuch’s critique of the plurality’s reliance upon an incomplete factual record, unlike the record in *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582 (2016), decided four years earlier. See *id.* at 414–15.

152. *Id.* at 423.

153. *Id.*

154. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 408 (2024).

155. *Id.*

156. *Id.*

that ideological factors played an exceptionally strong role in the votes of conservative Justices¹⁵⁷:

Consider Justice Scalia, for example: he demonstrates an extreme commitment to judicial restraint when granting access would favor liberal causes, but is more than four times more likely to grant access when doing so would favor conservative litigants. Justice Rehnquist is more than five times more likely to grant access when it favors a conservative outcome, as is Justice Thomas.¹⁵⁸

Thus, while those Justices may have low “institutional activism,” in that they generally do not seek to have the Supreme Court review more cases than in the past, they have high “ideological activism,” in that they are willing to hear cases that align with their ideological or policy preferences.¹⁵⁹ Lindquist and Cross have noted that “decisions to deny access often produce conservative results simply because claimants seeking access in these cases typically seek more progressive legal policies. For that reason, conservative Justices’ apparent restraint could simply result from their preference for conservative outcomes.”¹⁶⁰ Another recent study of standing cases from 2010 to 2024 by Richard M. Re and Yoav Paz-Priel suggests the politicization of standing doctrine.¹⁶¹ In disputed standing cases from 2010 to 2019, their study shows a strong preference in favor of standing amongst liberal Justices and a strong preference against standing amongst conservative Justices.¹⁶² However, the trends appear to change in the period of 2020 to 2024 as a new conservative majority took hold on the Court, with conservative Justices favoring standing at far higher rates and liberal Justices showing more caution in standing cases.¹⁶³ The study provides reason to think that standing has overall become a lower hurdle in recent years on the Roberts Court.¹⁶⁴

Other studies have demonstrated policy preferences in the voting patterns of Supreme Court Justices in all cases. Examinations of Supreme

157. LINDQUIST & CROSS, *supra* note 19, at 118.

158. *Id.* at 117–18.

159. *Id.* at 119. Lindquist and Cross add that “sometimes judicial restraint in pursuit of the ‘passive virtues’ can mask strategic voting in the interests of a particular ideological outcome. Several justices exhibited such ideologically motivated behavior in these cases, particularly Justices Scalia, Thomas, and Rehnquist.” *Id.* at 120.

160. *Id.* at 116.

161. See Yoav Paz-Priel & Richard M. Re, *The Standing Realignment*, 2025 SUP. CT. REV. 251, 252, 272–73.

162. *Id.* at 262.

163. *Id.* at 263.

164. See *id.* at 263–65.

Court decisions to invalidate or uphold a law, rather than simply vote on the justiciability of an issue, reveal strong policy preferences by Justices of both political stripes.¹⁶⁵ In a study of the Burger, Rehnquist, and pre-2009 Roberts Court, Lee Epstein and Andrew D. Martin found that ideology significantly influenced the Justices' votes to invalidate or uphold legislation. "[O]ut of every ten conservative laws, the model expects conservative Justices to invalidate three and liberal Justices, seven. When the Court reviews a liberal law, the conservative Justices are more likely to strike (.46) than the liberals (.17)."¹⁶⁶ The same study revealed that in the early years of the Roberts Court, liberal Justices generally became more "restrained" in their frequency of invalidating laws of either conservative or liberal character, while conservative Justices generally became more "activist" by showing a slightly greater willingness to invalidate liberal laws.¹⁶⁷ Further, throughout the entire period studied, liberals appeared more likely to invalidate legislation in general than conservatives.¹⁶⁸ Ideology also seemed to exert a similarly strong influence on nearly all of the Justices studied in the period.¹⁶⁹

165. Lee Epstein & Andrew D. Martin, *Is the Roberts Court Especially Activist? A Study of Invalidating (and Upholding) Federal, State, and Local Laws*, 61 EMORY L.J. 737, 737–38 (2012) ("[T]he Justices' votes to strike (and uphold) statutes seem to reflect their political preferences toward the policy content of the law, and not an underlying preference for restraint (or activism).").

166. *Id.* at 743. These trends maintain even when considering other potentially influential factors, such as the ideological makeup of the lower court, whether the case was taken on certiorari, or whether the solicitor general argues the case or files an amicus brief. *Id.* at 750.

167. *Id.* at 753–54 ("Figure 4 shows that the liberals have grown less willing to strike liberal laws, from a predicted probability of .35 during the Burger years, to .23 during the Rehnquist Court, to .06 for the Roberts years. But they are also less likely to strike laws with conservative policy content (the predicted probability declines from .78 in the Rehnquist era to .62 in the Roberts era). The right wing of the Court, on the other hand, has grown somewhat more opportunistically restraintist (activist). The conservative Justices are less willing to invalidate conservative laws, from a predicted probability of .36 during the Rehnquist years to .15 for the Roberts era. At the same time, as Figure 4b shows, their willingness to strike laws has increased slightly, from .55 (Rehnquist Court) to .58 (Roberts Court).").

168. *Id.* at 751 (noting that liberal Justices had a .20 likelihood of invalidating a liberal law and a .81 likelihood of invalidating a conservative law, while conservative Justices had a .31 likelihood of invalidating a conservative law and a .52 likelihood of invalidating a liberal law).

169. *Id.* at 756 ("[I]deology exerts a significant effect for sixteen of the nineteen Justices (84%). The five most conservative Justices in our dataset (Thomas, Rehnquist, Scalia, Burger, and Alito) are all highly unlikely to invalidate conservative laws. The range in the predicted probabilities of invalidating is narrow, from .36 for Burger to .02 for Alito. The five most liberal Justices (Douglas, Marshall, Brennan, Stevens, and Ginsburg), on the other hand, are highly unlikely to sustain conservative laws. The model predicts that Ginsburg, the most likely of the five to uphold, votes to strike in seven out of every ten cases; Douglas, the least likely, strikes in nine out of ten. The story is much the same for left-leaning laws, only in the reverse.").

This Article builds upon that work by examining the voting behavior of Justices on the Roberts Court in justiciability cases. I relied upon the coding scheme developed by Harold Spaeth for the Supreme Court Database.¹⁷⁰ I used that database to filter Supreme Court decisions within the timeframe of the Roberts Court by subject matter, focusing on codes that related to justiciability doctrines.¹⁷¹ This revealed a total of fifty-eight cases from the time of Justice Roberts's appointment until the fall of 2025. I then used Spaeth's coding, supplemented by my own review of each case in the dataset, to determine the political direction of the lower court's decision and the petitioner's political affiliation in each case.¹⁷² This allowed me to divide the cases into four categories: (1) cases where the lower court outcome was conservative and the Supreme Court voted to uphold that result (six cases); (2) cases where the lower court outcome was conservative and the Supreme Court voted to reverse that result, opening the door to a liberal outcome (ten cases); (3) cases where the lower court outcome was liberal and the Supreme Court voted to uphold that result (eleven cases); and (4) cases where the lower court outcome was liberal and the Supreme Court voted to reverse that result, opening the door to a conservative outcome (thirty-one cases).

This initial cataloguing revealed an intriguing result, even before analyzing the Justices' individual votes. As a whole, the Roberts Court has used justiciability doctrines to reverse a liberal lower court outcome in 53.45% of its justiciability cases. That far outpaces the rate at which it has used justiciability doctrines to reverse a conservative lower court outcome, which occurred in just 17.24% of its justiciability cases. This suggests that

170. *The Supreme Court Database*, *supra* note 28.

171. I relied upon the following codes for the "issue" variable (variable 35) in the Supreme Court Database: 90130 mootness (cf. standing to sue: live dispute); 90210 standing to sue: adversary parties; 90220 standing to sue: direct injury; 90230 standing to sue: legal injury; 90240 standing to sue: personal injury; 90250 standing to sue: justiciable question; 90260 standing to sue: live dispute; 90270 standing to sue: parens patriae standing; 90280 standing to sue: statutory standing; 90290 standing to sue: private or implied cause of action; 90300 standing to sue: taxpayer's suit; 90310 standing to sue: miscellaneous.

172. To complete this step, I examined the variables "lcDispositionDirection" (variable 28) and "partyWinning" (variable 48) to categorize the cases. The "lcDispositionDirection" variable indicated whether the lower court decision was conservative or liberal (and thus, conversely, whether the petitioner was liberal or conservative). The "partyWinning" variable then indicated whether the petitioner or respondent, whom I had already determined was conservative or liberal, won each case. I then reviewed each case in the database, which allowed me to ensure that the coding procedure correctly identified the political valence of lower court decisions and to catalog each Justice's vote on the justiciability issue in each case (as the cases often presented other issues beyond justiciability).

justiciability doctrines on the Roberts Court have a strong conservative valence.

When cataloging the Justices' individual votes on the justiciability issues in each case, I measured both how often each Justice granted or denied access and the frequency with which their votes favored a particular political direction. This allowed me to empirically demonstrate the activist nature of judicial restraints on today's Supreme Court. Using the appointing party of the president that nominated each Justice as a proxy for political preferences, I could further demonstrate how Justices applied those activist judicial restraints to align outcomes with their political preferences.

Table 1 below shows the frequency of each Justices' votes to grant access to the Court, along with the ideological direction of those votes.

Table 1. Frequency of Justices' Votes to Grant Access to the Court

Justice	Percentage Votes to Grant Access	Percentage Votes to Grant Access Where Outcome Would Be Liberal	Percentage Votes to Grant Access Where Outcome Would Be Conservative	Total Votes	Nominating Party
Jackson	14.29%	100.00%	0.00%	7	Democrat
Roberts	20.69%	25.00%	75.00%	58	Republican
Scalia	21.88%	14.29%	85.71%	32	Republican
Barrett	23.08%	66.67%	33.33%	13	Republican
Kavanaugh	23.53%	50.00%	50.00%	17	Republican
Thomas	24.14%	35.71%	62.29%	58	Republican
Gorsuch	26.09%	33.33%	66.67%	23	Republican
Alito	29.31%	23.53%	76.47%	58	Republican
Kennedy	35.00%	50.00%	50.00%	40	Republican
Stevens	46.15%	66.67%	33.33%	13	Republican
Kagan	50.00%	77.27%	22.73%	44	Democrat
Souter	50.00%	83.33%	16.67%	12	Republican
Breyer	50.98%	76.92%	23.08%	51	Democrat
Sotomayor	53.33%	79.17%	20.83%	45	Democrat
Ginsburg	59.09%	73.08%	26.92%	44	Democrat

Several interesting trends emerge from this data. First, Justices appointed by Republican presidents enforced justiciability requirements much more stringently than their counterparts, voting to grant access in just 27.99% of justiciability cases. None of the Justices appointed by a Republican

president voted to grant access more than 50% of the time. The highest rates of votes to grant access were Justices Souter (50%), Stevens (46.15%), and Kennedy (35%); the remaining seven Justices fell below 30%. In contrast, Justices appointed by Democratic presidents voted to grant access in 51.83% of justiciability cases. And only Justice Jackson fell below 50% by voting to grant access in one of only seven cases (or 14.29%). As a whole, the Justices of the Roberts Court voted to grant access in 36.94% of cases.

Trends that Lindquist and Cross noted in their study were replicated in my study of the Roberts Court. Again, the most conservative Justices demonstrate extreme, but extremely selective, adherence to judicial restraint. For example, Justice Scalia was six times more likely to grant access when doing so would favor conservative litigants; Justices Alito and Roberts are three times more likely to grant access when doing so would favor conservative litigants. My study also demonstrates selective adherence to judicial restraint amongst liberal Justices. Justices Kagan, Breyer, Sotomayor, and Ginsburg are approximately three times as likely to grant access when doing so would favor liberal litigants.

The party of the Justices' appointing president correlated strongly with votes to grant access to the courts. When Justices appointed by a Democrat voted to grant access, they favored liberal causes 76.77% of the time. In contrast, when Justices appointed by a Republican voted to grant access, they favored liberal causes just 39.33% of the time, reserving 60.67% of such votes for conservative causes. Again, the most conservative Justices were especially likely to vote to grant access only for conservative causes. For example, 85.71% of Justice Scalia's votes to grant access favored a conservative petitioner, as did 76.47% of Alito's votes and 75% of Roberts's votes. Thus, Justices of the Roberts Court of all ideological stripes have been demonstrably willing to relax justiciability's restraints when it suits a cause aligned with their political preferences.

My study also revealed that when Justices vote to deny access on justiciability grounds, they are particularly likely to align with conservative political preferences. The trend is especially pronounced amongst Justices appointed by Republican presidents. Table 2 below shows the frequency of each Justice's votes to deny access to the Court, along with the ideological direction of those votes.

Table 2. Frequency of Justices' Votes to Deny Access to the Court

Justice	Percentage Votes to Deny Access	Percentage Votes to Deny Access Where Status Quo Would Be Liberal	Percentage Votes to Deny Access Where Status Quo Would Be Conservative	Total Votes	Nominating Party
Jackson	85.71%	66.67%	33.33%	7	Democrat
Roberts	79.31%	21.74%	78.26%	58	Republican
Scalia	71.43%	8.00%	92.00%	32	Republican
Barrett	76.92%	50.00%	50.00%	13	Republican
Kavanaugh	76.47%	38.46%	61.54%	17	Republican
Thomas	75.86%	18.18%	81.82%	58	Republican
Gorsuch	73.91%	23.53%	76.47%	23	Republican
Alito	70.69%	7.32%	92.68%	58	Republican
Kennedy	65.00%	7.69%	92.31%	40	Republican
Stevens	53.85%	14.29%	85.71%	13	Republican
Kagan	50.00%	36.36%	63.64%	44	Democrat
Souter	50.00%	16.67%	83.33%	12	Republican
Breyer	49.02%	20.00%	80.00%	51	Democrat
Sotomayor	46.67%	38.10%	61.90%	45	Democrat
Ginsburg	40.91%	22.22%	77.78%	44	Democrat

This table demonstrates that, on the Roberts Court, all Justices frequently vote to deny access where the status quo would remain conservative. Even those appointed by Democrats did so in more than 50% of the cases with a conservative outcome below (aside from Justice Jackson, who voted that way in two out of just six cases where she voted to deny access).

Despite that broadly conservative voting trend, the rates at which Justices voted to deny access where the status quo would remain conservative varied widely, depending upon the party of the appointing president. When Justices appointed by a Republican president voted to deny access, 82.53% of those votes would have preserved a conservative status quo. By contrast, when Justices appointed by a Democratic president voted to deny access, 68.48% of those votes would have preserved a conservative status quo. Thus, although Justices appointed by Republican presidents appear to be enforcing justiciability doctrines more stringently by voting to deny access in 72.01% of cases, in fact, they are using the doctrine actively to promote a status quo with a strong conservative valence. This is especially pronounced amongst the most conservative members of the

Court. For example, 92.68% of Justice Alito's votes to deny access preserved a conservative status quo, as did 92% of Justice Scalia's votes to deny access and 92.31% of Justice Kennedy's votes to deny access.

In their study of justiciability cases from 1953 to 2004, Lindquist and Cross taxonomized individual Justices as institutionally active and ideologically active based upon voting patterns. A Justice was highly institutionally active if they voted to grant access more than 40% of the time; a Justice was highly ideologically active if their votes to grant access favored one ideological outcome over another by at least a factor of two.¹⁷³ In the table below, I applied that same taxonomy to the Justices who have served on the Roberts Court as of 2025¹⁷⁴:

Table 3. Institutional v. Ideological Activism (Measured in Votes to Grant Access)

	High Ideological Activism	Low Ideological Activism
High Institutional Activism	Ginsburg	
	Sotomayor	
	Breyer	
	Souter	
	Kagan	Stevens
Low Institutional Activism	Alito	Kennedy
		Gorsuch
		Thomas
		Kavanaugh
		Barrett
	Scalia	
	Roberts	
	Jackson	

173. LINDQUIST & CROSS, *supra* note 19, at 119.

174. In each of the tables measuring institutional versus ideological activism below, I list the Justices with the highest overall rates of granting access at the top (led by Justice Ginsburg at 59.09%) and the lowest overall rates of granting access at the bottom (led by Justices Jackson and Barrett, both at 16.67%).

First, this table illustrates the high frequency of ideological activism on the Roberts Court in justiciability cases. Nine of the fifteen Justices are ideologically active, and two more, Justices Stevens and Barrett, only escape that category by a single vote. The group of ideologically active Justices is also ideologically diverse, as it includes four Justices appointed by Republican presidents and five Justices appointed by Democratic presidents (a tally which includes the relatively scant voting record of Justice Jackson). Each of the six remaining Justices who are low on the scale of ideological activism was appointed by a Republican president. And only one of the Justices who are low in ideological activism, Justice Stevens, is also willing to grant access more than 40% of the time overall, voting to do so in 46.15% of justiciability cases.

Lindquist and Cross's taxonomy, though helpful, fails to fully capture the activism of Justices when they vote to deny access in justiciability cases. In those cases, Justices also frequently vote in favor of a status quo that aligns with their political preferences. The table below focuses solely on votes to deny access, classifying Justices as ideologically active if those votes favored one ideological outcome by at least a factor of two.

Table 4. Institutional v. Ideological Activism (Measured in Votes to Deny Access)

	High Ideological Activism	Low Ideological Activism
High Institutional Activism	Ginsburg Breyer Souter Stevens	Sotomayor Kagan
Low Institutional Activism	Kennedy Alito Gorsuch Thomas Scalia Roberts	Kavanaugh Barrett Jackson

Ten of the fifteen Justices studied are highly ideologically active in how they vote to deny access in justiciability cases. Of the remaining five who showed little ideological activism in those votes, two Justices, Jackson and Barrett, are recent appointees with scant voting records. Interestingly, 80% of the Justices appointed by Republican presidents demonstrated high ideological activism, while only 40% of the Justices appointed by Democratic presidents demonstrated high ideological activism. And all of the Justices who were highly ideologically active in their votes to deny access were active in a conservative direction—including two Justices appointed by Democrats, Ginsburg and Breyer. This reaffirms that the Roberts Court heavily skews towards votes to deny access that will preserve a conservative status quo.

Finally, I created a combined measure for ideological activism for all justiciability votes. I added the number of votes to grant access for a liberal cause and to deny access to preserve a liberal status quo, then compared that total to the number of votes to grant access for a conservative cause and to deny access to preserve a conservative status quo. Again, Justices are highly

ideologically active if their votes for one ideological outcome outweigh their votes for the opposite ideological outcome by at least a factor of two.

Table 5. Institutional v. Ideological Activism (Measured in All Votes)

	High Ideological Activism	Low Ideological Activism
High Institutional Activism		Ginsburg Sotomayor Breyer Souter Kagan Stevens
Low Institutional Activism	Kennedy Alito Gorsuch Thomas Scalia Roberts	Kavanaugh Barrett Jackson

All six of the Justices who were classified as ideologically active by this measure were appointed by Republican presidents—Scalia, Alito, Thomas, Kennedy, Roberts, and Gorsuch. And all six skewed towards conservative causes and status quos by significant margins. Justice Scalia favored conservative outcomes by more than a nine to one ratio, Alito by more than seven to one, and Thomas, Kennedy, and Roberts all by more than three to one. In contrast, the Justices appointed by Democratic presidents were much more evenhanded in justiciability cases, with most only slightly favoring liberal outcomes. Only Justice Jackson, with a relatively scant voting record in just seven cases, skewed more heavily towards liberal outcomes.

* * *

Justiciability doctrines present themselves as tools that restrain Justices who might overreach where controversies are best left resolved by the

political branches. But the voting patterns of the Justices on the Roberts Court empirically demonstrate that justiciability has evolved. Justiciability's sidestepping doctrines are now weapons of activist judicial restraint. They permit Justices of all political stripes to insert themselves into policy debates based upon little more than their political preferences. As I argue below, such faux restraints cloaked in justiciability's rhetoric are potentially disastrous for the judiciary and for society as a whole.

III. CRITIQUING ACTIVIST JUDICIAL RESTRAINTS

In this Part, I discuss the normative flaws with activist judicial restraints. This critique is not focused on the policy outcomes of specific cases. Instead, it highlights the methodological, institutional, and social flaws that activist judicial restraints create. Such surreptitious activism courts disaster, no matter what policy goals motivate it in the short term.

A. Doctrinal Incoherence

Justiciability doctrines should clearly define the cases or controversies courts can resolve, making judges' work easier by evading questions that are either inevitably political or irreducibly complex. But today, justiciability doctrines have evolved into activist judicial restraints that leave so much wiggle-room for discretion that they ensnare judges in a political thicket, rather than avoiding such thickets altogether. Rather than providing clarity where a legal issue is hopelessly opaque, they add layers of opacity that judges must navigate at the outset of innumerable cases. Whether through hopelessly malleable standing requirements,¹⁷⁵ a political question doctrine that lower courts have expanded well beyond textual commitments to other branches,¹⁷⁶ or a manageability prerequisite that is

175. Pushaw, *supra* note 65, at 897 ("The Burger, Rehnquist, and Roberts Courts have continually tweaked [Article III standing] standards in ways that have generated unpredictability. . . . The major decisions on injury, causation, and redressability reveal these intractable analytical problems."); *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 384 (2024) ("Unfortunately, applying the law of standing cannot be made easy, and that is particularly true for causation. Just as causation in tort law can pose line-drawing difficulties, so too can causation in standing law when determining whether an unregulated party has standing.").

176. Bradley & Posner, *supra* note 140, at 1052–54; Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 51 (1961). Bickel suggested that, ultimately, invoking the political question doctrine is a prudential, but not entirely unreasoned, judgment. *Id.* ("[T]he techniques and allied devices for staying the Court's hand, as is avowedly true at least of certiorari, cannot themselves be principled in the sense in which we have a right to expect adjudications on the merits to be principled. They mark the point at which the Court gives the

itself unmanageable,¹⁷⁷ activist judicial restraints create a dense fog of requirements for judges and litigants to navigate. And they provide easy avenues for either calculated political influence or subconscious political bias to permeate any judge's decisions.

As this Article demonstrates, the Justices of the Roberts Court readily choose when and how to apply activist judicial restraints in ways that, consciously or not, support their political alliances. Such gamesmanship is akin to what David Simson has coined “methodological gerrymandering,” a process through which Justices “can ‘gerrymander’ the legal boundaries of what the Constitution permits or prohibits by choosing their interpretive methodology” to support “their political or ideological preferences.”¹⁷⁸ Activist judicial restraints appear to be exercises of raw power to reach desired results, rather than exercises of dispassionate reasoning.¹⁷⁹ They are a tempting tool, and this Article demonstrates that Justices have used that tool frequently, creating widely disparate results in justiciability cases depending upon the matter's political valence and supporting public perceptions of a Court that is open only to certain types of plaintiffs.¹⁸⁰

As activist judicial restraints have evolved, the Roberts Court has voted to reduce the judiciary's footprint well beyond what the Constitution requires. In total, the Justices have voted to grant access in justiciability cases at just a 36.2% rate (26.60% for Justices appointed by Republicans and 52.13% for Justices appointed by Democrats). That may undermine the modern judge's “duty to decide” based upon interpretive theories that allegedly minimize discretion.¹⁸¹

Activist judicial restraints provide cover for Justices who fear explicitly admitting that there is a right-remedy gap in justiciable cases—a gap that Pamela Karlan has suggested Justices truly committed to a strong form of

electoral institutions their head and itself stays out of politics, and there is nothing paradoxical in finding that here the Court is most a political animal. But this is not to concede unchanneled, undirected, unchartered discretion. It is not to concede judgment proceeding from impulse, hunch, sentiment, predilection, inarticulable and unreasoned.”).

177. *Gentithes*, *supra* note 12, at 1373 (“To date, the manageability prerequisite has proven to be an unmanageable standard for lower courts to define and apply with any consistency.”).

178. Simson, *supra* note 15, at 149.

179. *Id.* at 154.

180. As Justice Jackson argued in *Diamond Alt. Energy, LLC v. EPA*, inconsistent rulings on standing may “give[] fodder to the unfortunate perception that moneyed interests enjoy an easier road to relief in this Court than ordinary citizens.” 606 U.S. 100, 129 (2025) (Jackson, J., dissenting).

181. Judge Posner argues that this “duty to decide is the judge's primary duty,” adding that “[t]he judge can't refuse to decide a case just because there is no guidance in an authoritative text, such as a legislative or constitutional provision or a binding judicial precedent.” Posner, *supra* note 7, at 540.

judicial restraint may have to admit.¹⁸² Activist judicial restraint avoids the problem. Rather than admitting that some justiciable cases simply lack remedies that Justices are willing to order, Justices can sidestep the merits of those cases entirely by manipulating justiciability doctrine. That allows the Justices to avoid a merits ruling that might make plain that a constitutional violation of some sort has occurred, yet the Justices are too timid to remedy it. Perhaps the Justices know that they would never offer relief for a given constitutional violation, either because the nature of the violation is unclear, or because (more cynically) the Justices are so committed to the policy supported by the constitutional violation that they cannot bring themselves to repair it. Activist judicial restraints are a surreptitious method to create, without acknowledging, a right-remedy gap in the law.

As activist judicial restraints expand, courts can become bystanders to obvious injustice. Justices, and by extension the legal system, can rely upon activist judicial restraints to accept clear legal wrongs without challenge. Certainly, some controversies raise genuine justiciability issues and should be resolved elsewhere. But Justices can hide behind the rhetoric of activist judicial restraints in many others, precluding judicial resolution of a growing number of legal issues. Shielded from criticism by the rhetoric of justiciability, Justices can dodge the constitutional obligation to resolve many legal issues that the judiciary must tackle to ensure justice in a modern society.

Such growth in activist judicial restraints is especially inconsistent with originalist theories of interpretation. Originalists argue that their method of interpretation significantly limits judicial discretion, constraining judges to rule in accordance with the original intent, however defined, behind constitutional clauses.¹⁸³ Originalism promises to winnow the field of

182. Pamela S. Karlan, *The Transformation of Judicial Self-Restraint*, 100 CALIF. L. REV. 607, 618 (2012) (“Candid application of type (3) judicial restraint would force judges to admit—to the world and to themselves—a right-remedy gap even within justiciable claims.”).

183. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (“Originalism does not aggravate the principal weakness of the [constitutional] system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 35 (1971) (“The Supreme Court’s constitutional role appears to be justified only if the Court applies principles that are neutrally derived, defined and applied.”); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 23 (1982); Raoul Berger, *Ely’s “Theory of Judicial Review”*, 42 OHIO ST. L.J. 87, 87 (1981) (“[A]ctivist judicial review is inconsistent with democratic theory because it substitutes the policy choices of unelected, unaccountable judges for those of the people’s representatives.”); Mark Tushnet, *Heller and the*

permissible opinions on a question based upon the single, discernible meaning of the constitutional text.¹⁸⁴ Theoretically, originalism restrains the activist judge who seeks to rule according to their policy preferences rather than according to the law.¹⁸⁵

If originalist interpretive theories were true, no judge following them should aim to be “activist” or “restrained”; they should simply follow their theory towards whatever determinate answers it produces, which may (or may not) result in a minimized judiciary.¹⁸⁶ Justiciability doctrines would be unnecessary. Interpreting those doctrines themselves through originalist methods should naturally (and correctly) limit the scope of justiciability, without any need for a thumb on the scale against justiciability because of the potential threat of judicial activism. Originalism suggests such activism is all but impossible when interpretation is done correctly.

B. Institutional Repercussions and Lost Trust

Activist judicial restraints severely damage the Supreme Court as an institution. They undermine public trust by both improperly limiting and unjustifiably expanding the Court’s docket. When even the choice about what cases to hear becomes plainly political, Court observers can have little doubt that the Justices’ substantive decisions are guided far more by political beliefs than neutral principles of reason.¹⁸⁷

First, consider controversies that the Justices decline to hear based upon their political preferences by applying activist judicial restraints. Justices who use justiciability doctrines to avoid hard cases that seem politically unpalatable abandon their constitutional duty. If judges must be restrained by declining cases beyond their constitutional competence to win popular

New Originalism, 69 OHIO ST. L.J. 609, 610 (2008) (arguing that originalism aims to “minimize[] the role contested judgments play in constitutional interpretation”).

184. Scalia, *supra* note 183, at 854 (“[T]he Constitution, though it has an effect superior to other laws, is in its nature the sort of ‘law’ that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law.”).

185. See sources cited *supra* note 183; Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 7 (2015) (arguing that originalism “claims that constitutional actors (e.g., judges, officials, and citizens) ought to be constrained by the original meaning when they engage in constitutional practice (paradigmatically, deciding constitutional cases)”).

186. See Posner, *supra* note 7, at 536–37.

187. Inconsistent rulings on standing “give[] fodder to the unfortunate perception that moneyed interests enjoy an easier road to relief in this Court than ordinary citizens.” Diamond Alt. Energy, LLC v. EPA, 606 U.S. 100, 129 (2025) (Jackson, J., dissenting).

support, they must also boldly resolve controversies squarely within their jurisdiction to demonstrate their commitment to fulfilling a limited constitutional role. As Judge Posner argued, when judges are “faced with a case that is indeterminate from the standpoint of conventional legal reasoning, they cannot throw up their hands and say, ‘I can’t decide this case because I don’t know what the right answer to the question presented by it is.’”¹⁸⁸ Chief Justice Marshall similarly remarked that:

The judiciary cannot, as the legislature may, avoid a measure . . . because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.¹⁸⁹

Even Justice Alito has opined that although the Court must be “vigilant not to exceed the limits of our constitutional role. . . . [W]hen we have jurisdiction, we have a ‘virtually unflagging obligation’ to exercise that authority.”¹⁹⁰ Avoiding hard cases by relying on activist judicial restraints severely damages a constitutional democracy that relies upon a robust judiciary to resolve society’s pressing controversies and meaningfully check coordinate branches that harm the least powerful.

The Supreme Court’s recent manageability decisions exemplify particularly troubling efforts to avoid hard cases that should fall within the Court’s jurisdiction. In extreme partisan gerrymandering cases, the Justices complained both of tests that were too precise and too malleable, ultimately determining that no test could possibly guide the exercise of judicial discretion when politicians blatantly and explicitly choose their own voters.¹⁹¹ That self-defeating claim undermines the public’s trust in the Court itself, both because it demonstrates the Court’s willingness to bend justiciability’s rules to favor preferred political outcomes and because it suggests that the Court is unable to rely upon reason and judicial good faith to resolve difficult conflicts. It sets the bar far too low for an institution that must intervene, at least occasionally, in controversies wrought by coordinate branch misbehavior that can stymie democratic governance.

Second, consider controversies that the Justices are determined to hear for political reasons, and for which they dilute justiciability’s typical rules to ensure a day in court for favored causes. The empirical evidence in this

188. Posner, *supra* note 7, at 539.

189. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

190. *United States v. Texas*, 599 U.S. 670, 735 (2023) (Alito, J., dissenting) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

191. *Gentithes*, *supra* note 21, at 1098–1103.

Article suggests that Roberts Court Justices commonly vote to grant access to their preferred petitioners, supporting accusations of duplicity leveled by liberal Justices.¹⁹² When Justices appointed by Democrats voted to grant access, those votes supported an outcome that would be liberal 77.55% of the time.¹⁹³ In contrast, when Justices appointed by Republicans voted to grant access, those votes supported an outcome that would be conservative 57.83% of the time.¹⁹⁴ Such wide variation in the proportion of votes to grant access to favor cases with a specific political valence strongly suggests that Justices are willing to relax justiciability's rules when their preferred causes are presented.

When the same Justices apply extremely different versions of justiciability's rules in different cases, they give the public the impression that Justices vote based upon political preferences, rather than dispassionate reasoning.¹⁹⁵ What should be an apolitical determination about judicial authority becomes an apparent political choice. Even if the Justices' justiciability decisions are only unintentionally political, the stench of improper partisanship envelops the Court. The justiciability doctrine itself grows progressively more incoherent, rather than maintaining a logical structure that would allow the public and litigants to understand who really can access the courts under our Constitution.

Activist judicial restraints may be a particularly poignant reflection of Justice Roberts's inconsistent approach to the scope and power of the judiciary. Justice Roberts appears offended when other branches attempt to encroach upon the Court's powers under Article III, such as his votes in *Patchak* against the constitutionality of a statute that seemed to prohibit one specific suit about Indian land, or in *Oil States* to allow inter partes review of patent applications.¹⁹⁶ Similarly, Roberts's recent opinion in *Loper Bright* railed against judicial deference to administrative agencies, suggesting that Courts should maintain the power to answer even the most technical of

192. As Justice Jackson writes,

[N]othing in Article III's text or history justifies relying on 'commonsense' inferences in one standing context and not another. The Constitution does not distinguish between plaintiffs whose claims are backed by the Chamber of Commerce and those who seek to vindicate their rights to fair housing, desegregated schools, or privacy.

Diamond Alt. Energy, LLC, 606 U.S. at 132 (Jackson, J., dissenting).

193. See *supra* Table 1.

194. See *supra* Table 1.

195. See *Diamond Alt. Energy, LLC*, 606 U.S. at 128–29 (Jackson, J., dissenting).

196. See Diedrich, *supra* note 9, at 265–66.

legal questions.¹⁹⁷ Such a view is hardly restrained; it removes guardrails to judicial overreach in areas where judges lack subject-matter expertise.¹⁹⁸ But those decisions stand in stark contrast to Roberts’s justiciability holdings, especially around manageability. Roberts has argued that some cases are just too complex for any judge to resolve, and that no manageable legal test could be unearthed to guide judges towards the resolution of some controversies.¹⁹⁹ This seems plainly inconsistent with his view of judicial restraint.²⁰⁰ It appears that when Roberts perceives another branch attacking or encroaching on judicial power, his opinions are maximalist, such as his assertions in *Loper Bright*.²⁰¹ But when given the opportunity to read Article III powers expansively on his own, either in standing cases or gerrymandering controversies, Roberts is suddenly restrained, suggesting that federal judges have very limited abilities to parse hard, “unmanageable” issues.²⁰²

Engaging activist judicial restraints either to avoid politically disfavored causes or to hear more of favored ones is hugely counterproductive for Justices hoping to gain the public’s trust. The concept of judicial restraint,

197. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400–01 (2024) (“Perhaps most fundamentally, *Chevron*’s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do.”).

198. *Pierce*, *supra* note 65, at 1771 (“The *Chevron* doctrine greatly reduces the risk that an activist judge will engage in a creative exercise in statutory construction to force an agency to act in a manner consistent with the judge’s ideological preferences.”); *see also Loper Bright*, 603 U.S. at 452–53 (2024) (Kagan, J., dissenting) (providing examples of the highly technical issues courts must resolve without *Chevron* deference). Roberts’s decision in *Loper Bright* removed that restraint. *See id.* at 412.

199. *See Gentithes*, *supra* note 21, at 1098–103.

200. As Diedrich points out,

After all, Roberts’s votes in the *Klein*-principle cases (*Patchak* and *Bank Markazi*) and the public-rights cases (*Oil States*, *Wellness International*, and *Stern*) all come down on the side of asserting Article III power; but his votes in the standing cases (*Gill* and *Spokeo*) come down on the side of not asserting that power. When viewed through the lens of judicial restraint, then, Roberts’s votes on Article III issues indeed appear inconsistent.

Diedrich, *supra* note 9, at 266.

201. *See Loper Bright*, 603 U.S. at 400–01.

202. Diedrich, *supra* note 9, at 265–66; Gentithes, *supra* note 21, at 1098–103. This may also be true of Justice Gorsuch, who seems to broadly follow Roberts’s lead in both expanding judicial power in Article III cases and in limiting judicial reach with stringent standing requirements. Diedrich, *supra* note 9, at 268. Justice Gorsuch seems highly opposed to this kind of “defeatism” where technical questions cannot be answered intelligibly. *See, e.g., Loper Bright*, 603 U.S. at 444–45 (Gorsuch, J., concurring). That same reasoning would seem to undermine a manageability prerequisite where questions are too indeterminate for judges to resolve.

as promoted by judges and legal theorists alike, aims to increase the public's faith in the judiciary by ensuring that judges will neither overstep their limited powers nor shirk their constitutional responsibilities. Such increased public faith allows the judiciary to act, when it must, in a way that both the public and coordinate branches will respect. But deferring unnecessarily in hard cases, or weakening justiciability in politically attractive controversies, undermines public and coordinate branch faith in the judiciary even further.²⁰³ To maintain the judiciary's role in settling important constitutional controversies, activist judicial restraint must be terminated.²⁰⁴

203. *Diamond Alt. Energy, LLC*, 606 U.S. at 128–29 (2025) (Jackson, J., dissenting) (“When courts adjust standing requirements to let certain litigants challenge the actions of the political branches but preclude suits by others with similar injuries, standing doctrine cannot perform its constraining function. Over time, such selectivity begets judicial overreach and erodes public trust in the impartiality of judicial decisionmaking.”).

The Justices' votes in these cases send a stronger message than votes on their discretionary docket. If the Justices decide to deny certiorari, they are not sending a public message about the potential for that controversy to be heard in the future if a better vehicle presents itself. But a vote on justiciability can tell the parties that the Court will never (or likely never) hear this kind of case. In that way, activist judicial restraints that rely upon doctored justiciability doctrines are a much stronger rejection of certain issues.

204. There are, of course, high-profile counterexamples where the Roberts Court has deployed justiciability doctrines in an even-handed manner to avoid controversies it might have politically preferred to resolve. For instance, in *FDA v. Alliance for Hippocratic Medicine*, the Court maintained a status quo that seems unlikely to be favored by them politically. *See* 602 U.S. 367, 368–70 (2024). Kavanaugh's majority opinion emphasized repeatedly that standing derives from the separation of powers generally and the “cases and controversies” clause of Article III specifically, and noted that standing means that “the federal courts may never need to decide some contested legal questions” that will instead be resolved by the political branches. *Id.* at 378–80. The opinion keeps courts away from some number of political controversies, seeming to fit with the anti-activist-court origins of standing law. *See id.* at 380. It is different from many of the cases that stiffen the concrete injury requirement to preclude suits created by Congress, say, that seem to have obvious causal connections and a desire of the political branches to create suits. *FDA v. Alliance for Hippocratic Medicine* limits judicial activism that would thwart the will of political branches; those decisions directly thwart the will of political branches to create new justiciable causes of action.

Nonetheless, as this Article empirically demonstrates, such genuinely restrained decisions are a statistical outlier. It is far more likely that, in any given case raising justiciability concerns, the Justices will vote in ways that align with their political preferences. *See supra* Part II.

C. *Activist Judicial Restraints and Stare Decisis: Shrinking Access and Undermining Stability*

There are important and undertheorized parallels between strengthened justiciability doctrines that favor concrete monetary interests and an increasingly limited *stare decisis* doctrine that discounts non-monetary reliance interests. As noted earlier, the concreteness requirement of Article III standing has grown stronger in recent years, with a greater emphasis on financial losses that can measurably demonstrate a party's stake in the outcome of a case.²⁰⁵ The Court's recent *stare decisis* jurisprudence has similarly emphasized concrete reliance interests and discounted intangible interests that might be difficult for courts to identify.²⁰⁶ Both of these trends favor interests that judges can easily observe, making them similar to the Court's stated preference for manageable legal tests that courts can easily apply in future cases.

Recent *stare decisis* jurisprudence explicitly protects concrete monetary reliance interests while suggesting that more intangible and difficult-to-measure forms of reliance are not worthy of protection. When the Court overruled *Planned Parenthood of Southeastern Pennsylvania v. Casey* in *Dobbs v. Jackson Women's Health Organization*, it faced a problem; courts and the public had seemingly relied upon *Casey*'s analytical framework as settled law for thirty years.²⁰⁷ Justice Alito's *Dobbs* opinion worked around that problem by insisting that only concrete, tangible reliance interests matter in *stare decisis* analysis.²⁰⁸ Alito claimed that *Casey*'s own description of the *stare decisis* doctrine was an outlier because it protected intangible societal interests in family planning and the role of women in society.²⁰⁹ Instead, Alito argued that *stare decisis* only protects reliance interests that arise "where advance planning of great precision is most obviously a necessity."²¹⁰ Alito claimed that *stare decisis* protects only "very concrete reliance interests, like those that develop in 'cases involving property and contract rights.'"²¹¹ Alito's argument mirrored the arguments supporting an expanded manageability prerequisite to litigation, as both centered around the inability of courts to resolve complex controversies that

205. See *supra* Section I.B.1; see also Gentithes, *supra* note 12, at 1341–42.

206. See Gentithes, *supra* note 31, at 6–10.

207. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 414 (2022) (Breyer, J., dissenting).

208. See *id.* at 288.

209. *Id.* at 280, 288.

210. *Id.* at 287 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992)).

211. *Id.* at 288 (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). He added that "conventional, concrete reliance interests" simply are not present when abortion is at issue. *Id.*

otherwise seemed within their jurisdiction. Alito claimed that courts are only equipped to protect very concrete reliance interests with the *stare decisis* doctrine, because more intangible forms of reliance “depend[] on an empirical question that is hard for anyone—and in particular, for a court—to assess.”²¹² In contrast, concrete reliance interests with a basis on economic interests like property or contract are far easier for courts to discern, and thus easier for courts to protect through the *stare decisis* doctrine.²¹³ *Dobbs*’s “very concrete” requirement for reliance interests precludes protection for many intangible, non-economic interests.

Justice Roberts’s opinion in *Loper Bright*, which overruled *Chevron* deference to administrative agencies, similarly discounted any intangible reliance interests that might be difficult for courts to identify.²¹⁴ Roberts argued that *Chevron* did not provide “a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced.”²¹⁵ According to Roberts, *Chevron* actually brought instability to the law rather than any credible societal reliance because the test was based upon an initial determination of statutory ambiguity that was hopelessly vague and unclear.²¹⁶ That in turn led to outcomes that varied widely amongst courts, because “[o]ne judge might see ambiguity everywhere” while “another might never encounter it.”²¹⁷ According to Roberts, *stare decisis* did not protect *Chevron* because it was so unclear to lower courts that it produced unpredictable and inconsistent results.²¹⁸

212. *Id.* at 280, 288. Alito also briefly suggests that women have sufficient electoral power to influence the direction of abortion regulation, thereby reducing the need for courts to intervene to protect their more ephemeral reliance interests. *Id.* at 289 (“Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power.”).

213. *See id.* at 280.

214. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 410–12 (2024).

215. *Id.* at 410 (quoting *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 927 (2018)).

216. *Id.* at 410–11.

217. *Id.* at 408.

218. As Roberts writes,

Rather than safeguarding reliance interests, *Chevron* affirmatively destroys them. Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, with ‘[u]nexplained inconsistency’ being ‘at most . . . a reason for holding an interpretation to be . . . arbitrary and capricious.’

Id. at 410–11 (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

These parallel developments in justiciability and *stare decisis* doctrine have a destabilizing effect both upon courts and society. They ingrain judicial bias towards concrete, measurable economic interests and away from more intangible social or interpersonal interests. Only the former is worthy of protection, either through existing precedent or the validation of a legal claim in court. Furthermore, both activist judicial restraints and reduced *stare decisis* barriers seem to deny any role whatsoever for ambiguity in legal proceedings. These parallel developments suggest that only pellucid clarity, both in the nature of one's interest and the terms of a legal test, can be adjudicated in an American court.

Although these developments are troubling, the relationship between *stare decisis* as a protection for existing precedent and justiciability doctrines as a gateway to the development of new precedent presents an opportunity. There may be normatively desirable tradeoffs between *stare decisis* and justiciability that would stimulate an appropriate balance between the need for judicial clarity and the protection of less concrete, but no less important, legal interests. Where *stare decisis* protections are weaker, the Court will have greater opportunity to revisit its past decisions. With more opportunities for error-correction, the Justices might be willing to hear more issues and experiment with more varieties of judicial resolution.

The possible tradeoff builds upon William C. Marra's discussion of the relationship between *stare decisis* and the Supreme Court's dwindling docket in the age of discretionary jurisdiction.²¹⁹ Marra notes that when the Supreme Court's jurisdiction was largely mandatory, it frequently reconsidered issues multiple times in the years shortly after an initial decision, giving the Justices greater opportunity to correct any errors in an initial decision.²²⁰ Furthermore, the Justices did not have the luxury of deciding when to hear a case that might lead to overruling a prior decision until the perfect vehicle for upholding or overruling appeared.²²¹ Thus, mandatory jurisdiction led to repeated reaffirmation of many precedents, a form of constitutional liquidation that made it clear when a decision was truly worthy of society's reliance.²²² The Court could reconsider precedents early in their lifespan to see if they were working well or should be

219. William C. Marra, *Precedent and Jurisdiction*, 174 U. PA. L. REV. (forthcoming 2026) (manuscript at 6).

220. *Id.* at 5.

221. *See id.* at 15.

222. *Id.* at 18, 20 (citing William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 43 (2019)).

adjusted, leading to greater jurisprudential experimentation.²²³ This contrasts with today's discretionary docket, where "precedent is only reconsidered once every 40 or 50 years," leaving judges to their "subjective analysis of whether the question is settled—an analysis that will often merge with their own individual view of whether the precedent was rightly decided."²²⁴

While the Court may not wish to revisit its discretionary jurisdiction for a number of reasons,²²⁵ it may be willing to reconsider some of the higher hurdles to justiciability that this Article explores on the understanding that cases it does hear can be reviewed more frequently under a weaker version of the *stare decisis* doctrine. For instance, although *stare decisis* offers weaker protection for precedent when it only acknowledges "concrete" reliance interests, that weakness may be acceptable if, in exchange, Justices are willing to lower the concreteness hurdle in Article III standing doctrine. If claims with slightly less concrete interests at issue are justiciable, courts will be more able to creatively address those difficult-to-measure controversies, rather than shutting the courthouse doors to them at the outset. Courts could therefore reach more issues outside the purely economic realm. In exchange, *stare decisis* doctrine's evolution towards greater protection of concrete interests, rather than intangible ones, would mean that the Court can correct apparent missteps taken in those cases where judges were willing to hear claims based upon intangible interests, because those decisions are inherently entitled to somewhat reduced *stare decisis* protection. Thus, claims centered upon intangible interests would receive more hearings with greater flexibility for later review and error correction.

Second, the manageability prerequisite to constitutional litigation should be cabined in exchange for a more thoroughgoing review of hard cases under the workability prong of *stare decisis*. Manageability allows courts to force parties to provide workable legal tests *ex ante*, rather than allowing lower courts to experiment and decide *ex post* whether those experiments have proven unworkable and must be reversed.²²⁶ That approach precludes

223. *Id.* at 29 ("Rapid reconsideration of the case allowed for error correction before reliance interests grew too great.").

224. *Id.* at 50.

225. Marra himself notes that the Supreme Court's discretionary jurisdiction allows the Justices to ensure it does not overreach into uncomfortable questions best left to coordinate branches or society to resolve, and to ensure that any fundamental changes in doctrine can be sorted through by lower courts rather than repeated pronouncements from the nine unelected members of the Court. *See id.* at 42.

226. *See Gentithes, supra* note 12, at 1334–35.

judicial innovation and experimentation with creative new legal tests that might resolve even the most convoluted cases or controversies. Reducing the manageability prerequisite will also restore faith in the ability of judges, who, through good-faith reasoned analysis, can apply even amorphous legal standards in ways that predictably and accurately resolve issues. *Stare decisis* doctrine can provide additional protection, though, should such efforts to creatively address challenging legal issues run awry. If the workability prong of *stare decisis* is used to thoroughly review the effectiveness of judicial experiments with less-manageable legal tests, such that new tests that prove ineffective can be culled from existing jurisprudence, then the risks of judges addressing new areas will be minimized. Thus, both judges and society at large should accept a bargain that trades a reduced manageability prerequisite to constitutional litigation for a robust workability review under *stare decisis* doctrine.

IV. CONCLUSION

Judicial restraint is a laudable goal. Restrained judges can avoid overreaching into political quagmires while maintaining their political capital for hard cases they must resolve under our constitutional structure. Although it is difficult for judges to rule in perfectly restrained ways, justiciability doctrines should aid in that endeavor, giving aspiring jurists some doctrinal tools to define the limits of their authority and strengthen their authority in the eyes of the public and coordinate branches.

But the Roberts Court has done severe damage to those justiciability doctrines, turning them into tools for political activism that damage the Court's reputation and undermine the judiciary's role in our political structure. The Justices have turned justiciability doctrines into activist judicial restraints, allowing them to claim they are dispassionately ruling while in reality they are following their political preferences. Far from cabining the judiciary's reach, these activist judicial restraints insert the Court into the heart of political controversies, often by maintaining a status quo that the Court finds politically preferable to any substantive ruling on a case's merits.

This Article provides the first empirical study of the Roberts Court's justiciability cases, demonstrating the frequency with which the Justices, consciously or not, let their political preferences guide their choice of which parties can obtain judicial relief. Justices of all political stripes favor their political preferences when granting access to the courts, and the most conservative Justices favor politically aligned parties at startlingly high rates when either voting to grant or deny access. The Justices' votes are far

from politically neutral, signifying the Court's drift away from dispassionate reason and towards political preference.

The consequences of activist judicial restraints are alarming. They create a doctrinally incoherent version of justiciability doctrines that neither the lower courts nor the public at large can comprehend. They sow distrust amongst the public and cynicism about the Court's motivations. They improperly reduce the Court's role in many cases, while expanding the Court's reach when politically expedient to the Justices. And they weaken the Court's voice when it must resolve high-profile controversies, threatening the future of the nation's great democratic project. The Court must disavow activist judicial restraints and restore dispassionate reason as its guide in justiciability cases.