Many conservatives have taken the outcome of the Obamacare case, known to the courts as *National Federation of Independent Business v. Sebelius*, none too well. Their response is understandable: In an unusual judgment featuring two distinct 5-4 voting blocs bridged only by the chief justice, the Supreme Court concluded that Obamacare’s individual mandate was not constitutional as an exercise of Congress’s power over commerce, but was perfectly valid as a tax.

That conclusion is troubling, to say the least. While the decision penned by Chief Justice Roberts purported to place some bounds on Congress’s ability to regulate using the commerce clause, the four justices who shared Roberts’s conclusion refused to join his opinion—meaning that the commerce-clause limits Roberts endorsed may not be binding in future cases. Meanwhile, the rest of Roberts’s opinion, joined by the Court’s four more liberal justices, suggested that most any regulation Congress might wish to enact could simply be re-characterized as a tax—and be constitutionally sound as a result. Conservatives are right to be deeply worried.

Still, one did not have to listen too closely to the outcry on the right to hear more than concern about legal reasoning. Conservatives’ reaction was laced with a certain bitterness—a deeply felt, almost personal anger at the Court and its justices, particularly Chief Justice Roberts. This sense of betrayal was moved not only by a conviction that the Court had gotten the law wrong, but also by disgruntlement at having lost a profoundly important political battle—and at the hands of a supposed ally.

While conservatives surely have cause to be vexed with the Court for its legal judgment, it is this sense of betrayal that exposes just how

*Joshua D. Hawley is a former clerk to Chief Justice John G. Roberts, Jr., and an associate professor of law at the University of Missouri.*
dangerous the Court as an institution has become. The true peril posed by the Supreme Court in our time lies in the idea that the Court can ever serve as an ally, that it can resolve political difficulties, and that it can be counted upon as a political partner or an agent of political reform. It should do none of those things, and it threatens our constitutional order precisely to the degree that it attempts them.

For decades, conservatives have warned that the more frequently the Court departs from the text of the Constitution, the more troublesome it becomes. This is certainly true. But the danger the Supreme Court now poses to the constitutional order is more profound, and arises from the Constitution itself. That document embraces an assortment of principles—such as freedom of speech, due process of law, and no government takings without compensation—but aims in all its parts at one purpose: to establish a liberal form of participatory self-government. Because it is fixed in writing, our Constitution places the basic form of our regime beyond manipulation through political contest. But it leaves open many other fundamental questions—like what sort of economic system the country should have, how powerful the president should be, or why and in what manner the country should wage war.

The answers to these questions are not specified in the document, yet the Constitution’s principles surely bear on their resolution. The framers could certainly have left them to courts to decide. But in one of the great achievements of the founding period, that first generation of American statesmen realized that the task of applying constitutional principles to political controversies should be performed by the people themselves. In other words, the American people should be the Constitution’s chief interpreters, filling out its principles and clearing up its ambiguities by their choices at the ballot box.

This form of popular constitutionalism depends on a distinction between constitutional politics on one hand and constitutional law on the other. But here we confront a historical irony. The Supreme Court the framers designed holds the unique capacity to collapse that difference by treating questions of constitutional politics as law instead. When it does, it places political questions beyond the reach of the people and closes the public off from constitutional interpretation.

Through the repeated exercise of this authority over the past 50 years, the Court has steadily drained political power away from the people and toward itself. And even as it has done so, more and more Americans
seem eager to resolve questions of constitutional politics through legal channels. They either do not understand, or do not care, that this practice diminishes citizens as agents of self-rule and badly undermines our system of government.

To reverse this enfeebling of the sovereign people, we must understand how we came to our present predicament. This is a story about politics, our Constitution, and the promise and peril of our Supreme Court. It is also a story that, through the lessons it offers, can help us make the Supreme Court safe again for democracy.

**The Revolution of 1800**

That story begins in 1800, with what is still one of the most underappreciated constitutional events in our history: the disputed election of Thomas Jefferson. The crisis that election produced was so severe that it nearly led the nation to civil war. And it was in this context that Jefferson and the republic’s first generation of political leaders discovered a distinction that the framers had not considered at Philadelphia, but that was nevertheless essential to making the Constitution work: the distinction between constitutional politics and law.

The election of 1800 was the first in which political parties played a prominent role (something else the framers had not anticipated). The Federalists, anchored in the Northern states, nominated the incumbent John Adams as their standard-bearer and Charles Pinckney as their choice for vice president. The Democratic-Republicans, strong in the middle states and the South, selected Thomas Jefferson along with the infamous Aaron Burr.

The contest between these two parties featured perhaps the most profoundly philosophical campaign in American history. The Federalists had been in power since 1796, but their policies in favor of a national bank, internal development, and government-backed industrialization had prevailed since the beginning of George Washington’s first term in 1789. By the late 1790s, a group of dissenters—led by Thomas Jefferson and James Madison—had concluded that the Federalist agenda posed a mortal threat to the fledgling republic. Federalists, they feared, wanted to transform the United States from an agrarian republic into a capitalist aristocracy. They were alarmed at Federalists’ plans to fund a sizable national debt through federal borrowing. They did not approve of what they saw as the Federalists’ favoritism toward the emerging urban
merchant class. And the dissenters were especially disturbed by the Federalists’ enthusiasm for federal power at the expense of the states. Jefferson, Madison, and their cadre took the name “Republicans” to make a point: They were the defenders of republican democracy. They preached a return to agrarianism, liquidation of the debt, and a strict interpretation — reflecting a strictly limited view — of the federal government’s powers.

There was no precedent in America’s brief history, or indeed that of the Western world, for a campaign like this one. Opposition parties were as yet unknown even in England; to be in opposition meant to be opposed to the regime itself.

The sheer novelty of the 1800 campaign no doubt accounted for much of its apocalyptic tone. Each side accused the other of secretly scheming to destroy the Constitution. Federalists portrayed Jefferson as a Jacobin-sympathizing atheist intent on remaking American society in the image of the French Revolution. Republicans saw Federalists as “monocrats,” in Jefferson’s memorable phrasing — elitist lovers of money, privilege, and even monarchy.

But what most startled the nation’s political leaders was that there was political disagreement at all. By the time they had finished their labors in Philadelphia, the delegates to the Constitutional Convention believed they had set grand matters of principle to rest. Politics in the future, they anticipated, would consist largely of technical and administrative questions, like how best to organize the militia and what level of import duties to collect. They never imagined stark political disputes over the fundamental character of the republic. But then they failed to grasp just how fundamental questions of administration can be. And they failed to realize how many questions of principle their spare Constitution had left unresolved.

The election of 1800 divided these Philadelphia framers against one another. Some sided with the Federalists; others aligned with the Republicans. Each group was confident that its party, and its party alone, was keeping faith with the Constitution.

Then came the deadlock. The Constitution as drafted in Philadelphia instructed members of the electoral college to cast two votes, but prohibited them from designating which of their votes was for president and which for vice president. The 12th Amendment would reform this procedure, but in 1800 the rule produced an electoral tie: Both Jefferson
and Burr received precisely 73 votes apiece, with Adams running third. Not able to communicate with one another, the Republican electors had failed to arrange for one or more of their group to cast “second choice” votes for somebody besides Burr in order to assure Jefferson an outright majority. As a consequence, and as dictated by the Constitution, the tied election moved to the House of Representatives. Article II provided that the House would select a president and vice president from among the five candidates who had earned the most votes in the general election. Congressmen were to vote not individually but by state delegation.

Though the 1800 election had delivered Republicans a healthy majority in the House of Representatives, as a result of another quirk of constitutional design, the new Congress would not assemble until March 4, 1801. So it was the expiring Federalist-controlled House that held the fate of the presidency as the question came to the House floor in February 1801. And it was here that the country’s political division became a political crisis: Because they regarded Jefferson and his party as a threat to the Constitution, Federalist congressmen returned to Washington determined to deny him the presidency, regardless of what the voters wanted. Over six days and 35 ballots, Federalists refused to give Jefferson a majority. And yet, because they did not control a majority of state delegations, the Federalists were unable to elevate their own favored candidate in Jefferson’s place.

Meanwhile, rumors of unrest reached the capital. Each member of the Pennsylvania congressional delegation received a letter from Philadelphia Republicans warning that the day Congress denied Jefferson the presidency would be “the first day of revolution and Civil War.” Pennsylvania’s Republican governor, Thomas McKean, went so far as to prepare his state’s militia to mobilize in the event Federalists prevented Jefferson’s ascension. Virginia’s James Monroe did the same. As he waited for the House to determine his fate, Jefferson himself grew increasingly agitated at the Federalists’ apparent determination to overturn the results of the election. “This tells us who are entitled to the appellation of anarchists with which they have so liberally branded others,” he told a correspondent.

Finally, on February 17, 1801, nearly a week after voting began, the Federalists gave way. Their change of heart was forced by the realization that to deny the considered choice of the people would itself threaten the Constitution. Out of respect for that document and its principles,
they decided to ratify the selection the public had made—Jefferson for president, Burr for vice president—and hope that the Virginia Republican and his running mate would keep faith with the Constitution.

Jefferson came to office on March 4, 1801, the first time in recorded history that power had passed peaceably from a ruling party to an organized political opposition. For his part, Jefferson had carefully pondered the meaning of the election crisis in the weeks before his inaugural. He was the first to articulate the political truth he believed the cataclysm had exposed: that differences of political opinion, however profound, need not threaten the republic so long as they are resolved by the people.

“[E]very difference of opinion is not a difference of principle,” Jefferson famously concluded. Both Federalists and Republicans were devoted to the Constitution; what they could not agree on was what the Constitution meant in practice. If the contending parties agreed to respect the basic system of government the Constitution had created, however, these principled differences could be settled by something far short of revolution or coup d’état: They could be settled by democratic election. Jefferson pointed to his own election as an example. “[T]he contest of opinion through which we have passed,” he said, was “now decided by the voice of the nation, announced according to the rules of the Constitution.”

As Jefferson understood it, the practice of public election would substitute for that right of revolution he believed every people held by nature. When disputes arose over the interpretation of constitutional principle, the people could settle them by selecting among the answers offered by competing candidates and parties. Similarly, if and when a governing party transgressed the Constitution’s bounds, the public could discipline it with electoral defeat. In both cases, the people would determine the meaning of constitutional principles by the mechanism the Constitution supplied. “[T]he will of the majority is in all cases to prevail,” Jefferson explained, so long as the minority “possess their equal rights.”

Jefferson’s vision made the people both the principal interpreters of constitutional meaning and the primary enforcers of constitutional fidelity. The ability of citizens to play these roles turns on a distinction between what the Constitution requires as law and what it permits as politics. Constitutional law is the minimal content of constitutional meaning that all citizens must accept in order to participate in American democracy; it is beyond active political dispute, and is settled by courts
outside of the political sphere. Constitutional politics, on the other hand, concerns the practical meaning of constitutional principles and their application to the issues of the day; its meaning is settled by political deliberation and the voice of the majority. Constitutional principles guide the realm of politics no less than that of law, but the principles that animate the political sphere are open to interpretation. Unlike the constitutional principles that apply to the law, their meaning is not absolutely fixed by the document and its historical context.

This citizen-driven form of constitutional interpretation envisioned by Jefferson has become central to the working of our democracy. Its practice has engendered deep respect for the Constitution. It has made constitutional interpretation the most enduring of American political traditions. Most important, it has given the people control over their government. But this mode of constitutional self-rule cannot continue if the distinction between constitutional law and politics disappears. When that happens, citizens are forced to accept more and more matters of political principle as already given, like the law, beyond their control or their say. As constitutional law expands, citizens’ authority over their government withers and their ability to shape the destiny of the nation diminishes. Therein lies the danger increasingly posed by the United States Supreme Court.

**Merely Judgment**

Article III of the Constitution gives little hint of the Court’s troubling authority. It provides that the “judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” On the basis of this terse sentence, Alexander Hamilton argued that the Court was the Constitution’s “least dangerous” branch. The legislature “commands the purse” and “prescribes the rules by which the duties and rights of every citizen are to be regulated,” he explained; the executive “holds the sword of the community.” But the judiciary? “It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”

Hamilton’s logic was sensible, and it certainly represented the views of most of the framers. But experience has proved him wrong. Hamilton drastically underestimated the power and effect of constitutional judgment in a government committed to the rule of law. It is theoretically
possible that the executive would refuse to enforce judgments he did not like. But in a system in which the constitutional norm of equality among the branches is well entrenched, the likelihood of such a refusal to act is slim indeed. The same is true of the legislature. It could, hypothetically, strip the Supreme Court’s jurisdiction as punishment for decisions with which it disagreed. Once again, though, the constitutional norm of inter-branch equality is likely to prove too strong a deterrent. And if the judiciary can count on regular enforcement of its decisions by the president and respect for them by Congress, its power of judgment becomes just as weighty in the constitutional scheme as the executive’s power of the sword or the legislature’s control of the purse—quite contrary to Hamilton’s claims.

In fact, the judiciary’s power may be greater than that exercised by the other branches, because among the laws the Supreme Court is empowered to interpret is of course the Constitution itself. The judiciary, Hamilton said in Federalist No. 78, has the duty “to declare all acts contrary to the manifest tenor of the Constitution void.” John Marshall made this understanding binding law in Marbury v. Madison. Once the Supreme Court announces its judgment on a constitutional question, it cannot be altered by any vote or procedure save constitutional amendment; justices of the Supreme Court, meanwhile, cannot be removed except by impeachment. The Court thus effectively has the final say on every constitutional matter it adjudicates.

This is high-school civics. But consider what it means in a democracy in which nearly every political question of any import is eventually cast in constitutional-law terms. If the Supreme Court deploys its judgment authority to the full, it can become the Constitution’s primary interpreter as well as its principal enforcer. Strictly speaking, this would not be incompatible with democratic government of the kind the Constitution envisions. But it would make the Jeffersonian vision of citizen-inspired constitutional interpretation virtually impossible. Walled off from determining constitutional meaning through political channels, citizens would find their role in the task of governing radically diminished, and their ability to shape the direction and character of the country severely restricted. In this scenario, the most critical and far-reaching questions of constitutional principle would be settled by the Court, with citizens left merely to select between various means of implementing the Court’s authoritative interpretations.
When it comes to the Supreme Court’s true potential, the anti-Federalist writer who styled himself “Brutus” came nearer than Alexander Hamilton to the truth. American judges are independent, he said, “in the fullest sense of the word.” There is “no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature.” In sum, “they are independent of the people, of the legislature, and of every power under heaven.”

None of this might be particularly troublesome — judicial independence is, after all, a valuable tool for reaching decisions consistent with justice — were the boundary between constitutional law and politics clearly marked. Unfortunately, in our Constitution, it is not. And locating that boundary is left to the courts.

For the first century of its existence, the Supreme Court kept mostly clear of constitutional questions, hearing only two dozen or so constitutional cases and invalidating only two federal laws as unconstitutional. At least part of the reason for this approach stemmed from the Court’s understanding of what it was in the Constitution that the judiciary was supposed to enforce. The answer was not, principally, rights, but rather structure. This is not to say the Court did not recognize the constitutionally guaranteed rights named in the first ten amendments. But it held in 1833 that those rights did not apply against the states. And when it came to the federal government, the Court regarded the Constitution’s structural limits on federal power as the principal means of protecting democratic liberty.

That perception changed after the Civil War and the ratification of the 14th Amendment, with its broad guarantees of “privileges” and “immunities” and “due process of law” for all citizens — rights enforceable against both the federal and state governments. Now explicitly charged with enforcing rights, the Court found itself in the center of constitutional controversies far more frequently. And as early as the 1890s, the Court began to interpret broadly the rights referenced by the 14th Amendment and the Bill of Rights. Still, it was not until the middle of the 20th century that the Court made invalidating federal and state laws on constitutional grounds a habit. Not by chance, the Court’s fresh enthusiasm for constitutional adjudication coincided with the gradual emergence of a new interpretation of the 14th Amendment’s due-process clause — one that cast that provision as an open-ended guarantee of any
and all rights “so rooted in the traditions and conscience of our people as to be ranked as fundamental” (as the Court had put it in the 1934 case *Snyder v. Massachusetts*). What counted as fundamental, conveniently, was to be decided by the judiciary.

Thus armed with the authority to enforce an essentially nebulous notion of rights against all levels of government, the Supreme Court had by century’s end assumed a role less like the one Alexander Hamilton envisioned and more like the one the Philadelphia framers considered for two other proposed institutions (before rejecting them as ill-advised). As part of his influential Virginia Plan, James Madison had proposed to equip the national legislature with a veto over state laws. The idea was to prevent bad policy in the states, protect minority rights there, and clearly subordinate state governments to the national one. The Virginia Plan also proposed a national Council of Revision, to be composed of the president and select members of the judiciary, which would exercise veto authority over acts of Congress.

In the end, the framers elected to entrust the veto over Congress to the president alone and to eliminate the legislative veto over state laws altogether. The modern Supreme Court, however, goes a good way toward resurrecting both powers in one institution. Like the national legislature of the Virginia Plan, the Court routinely sits in judgment on state laws (and local ones as well), conforming them to a uniform national standard of the Court’s devising. And like the imagined Council of Revision, the Court often reviews acts of Congress to be sure they are in line with constitutional principles. Unlike Madison’s national legislature or Council of Revision, however, the Supreme Court contains no elective component. This is an important difference: The institutions the framers contemplated for reviewing state and federal law were *political* institutions (at least in part), and their judgment was part of constitutional politics. The Supreme Court, however, makes constitutional *law*.

The Court’s shift from enforcing structure to protecting rights, and undefined rights at that, has accelerated its intrusion into constitutional politics. Its decision in *Roe v. Wade* has been the most spectacular example of this change, though one could just as well cite its earlier judgment in *Lochner v. New York* (striking down limits on the working day) or in *Adkins v. Children’s Hospital* (invalidating a minimum-wage law). In each of these cases, the Court imposed as a matter of law an interpretation of constitutional principle that was not clearly mandated
by the Constitution, to the detriment of the people’s authority to apply constitutional principles themselves.

For years, conservatives have warned that the Supreme Court has slipped its leash, with justices ignoring the text of the Constitution as written in favor of their own moral predilections or policy views. Those criticisms remain valid and important. But the story of our constitutional development suggests that the real dilemma is not that justices are interpreting constitutional principles in the wrong way. It is that they are interpreting the Constitution altogether too much, too frequently, and with excessive certainty. For defenders of our constitutional order, then, the primary goal must be to re-establish the space between constitutional law and politics.

**Judging for Self-Government**

It is time to think in terms of structure. The dangerous merger of politics and law has been driven as much by constitutional design as by faulty jurisprudence, and any agenda that hopes to re-install the people as the primary interpreters of constitutional principle must be design-oriented.

We should start with judicial methodology. Conservatives have long advocated that judges give the Constitution’s text the meaning it bore at the time it was adopted. That is right as far as it goes, but even this originalism can all too easily fuel judicial imperiousness if it is not informed by the Constitution’s overarching — and original — goal: participatory self-government. This means that even as the Court goes about searching for the Constitution’s original meaning, it should bear in mind that it is not the only constitutional interpreter. And its judgments should reflect that reality.

To trace one application of this principle, the Court should confine its constitutional decisions to instances in which the text’s original meaning can be clearly determined. The Constitution is a historical document, and though we know a good deal about the historical context of most of its provisions, the precise meaning of a given clause can, as with many historical documents, be difficult to fix with certainty. If and when the Constitution is unclear or the evidence for its meaning is unsettled, the Court must refrain from acting. If the Court followed this principle, it would involve itself in far fewer matters than it does now.

Consider a famous pair of cases from recent years, *Apprendi v. New Jersey* and *United States v. Booker*. A majority of the Court,
including its most ardent originalists—Antonin Scalia and Clarence Thomas—concluded that the Sixth Amendment right to a jury trial rendered unconstitutional a set of sentencing guidelines that Congress had made mandatory for federal judges. According to the Court, mandatory guidelines trenched on prerogatives the founding generation committed to the jury. Taken in tandem, the decisions worked a revolution in the federal criminal-justice system, implicating every criminal trial in every federal court in the nation. But the historical evidence for the Court’s conclusion about what the Sixth Amendment originally meant and how it should apply was, to say the least, fiercely disputed. A judicial methodology more sensitive to structure would have abstained from such dramatic intervention on the basis of such little evidence.

Even when the Constitution’s meaning can be fixed with reasonable certainty, that meaning can be enforced in different ways. And so here is a second application of a participation-focused jurisprudence: The Court ought to craft enforcement rules that leave as much discretion as possible to the branches of government that represent the people. And it ought to defer to the representative branches when they offer substantive interpretations of constitutional meaning.

In 1990, for instance, the Supreme Court held that laws that burden a person’s free exercise of religion are constitutionally permissible so long as the law in question is “neutral” and “generally applicable”—that is, so long as it applies to everyone and not just a disfavored religious group. Congress responded three years later with the Religious Freedom Restoration Act, which adopted an appreciably more exacting test for government actions that interfere with religion. But in the 1997 case City of Boerne v. Flores, the Supreme Court struck down the act’s application to the states, arguing that only the Court had the authority to interpret the Constitution. In its opinion, which centered around a discussion of the 14th Amendment, the Court held that Congress was not entitled to its own understanding of the amendment’s enforceability against the states if the Court had a conflicting understanding of its own.

Were the Court more willing to recognize the people’s right to interpret the Constitution, it might have decided otherwise. Of course, Congress cannot be permitted to rewrite the Constitution or to interpret its provisions to mean whatever it likes. But when, as in the religious-freedom case, the people’s elected representatives express a considered judgment as to what the text means, the Court should not simply
demand that Congress agree with the Court’s judgment. On the contrary, it should ask whether Congress’s judgment is reasonable—or fairly possible—in light of constitutional text and original meaning. If it is, the people’s interpretation should prevail. Congress and the people, after all, are entitled to interpret the Constitution themselves.

These applications of the principle of participatory self-government have dealt with judicial methodology. But institutional reform may be necessary as well. Recall the anti-Federalist Brutus’s point that Supreme Court justices are independent of “every power under heaven,” not least because they hold office for life. That independence can breed in its beneficiaries a certain over-estimation of the Court’s importance as well as an over-confidence in the justices’ capacity to get constitutional questions right. With time, an individual justice may come to believe that, though interpretive questions are generally hard and should be left whenever possible to the political sphere, he can personally be trusted to decide correctly. Multiply this mentality by nine, and it becomes a formula for judicial aggression.

But what if justices were not appointed for life? Or, more precisely, what if they did not serve on the Supreme Court for life? One way to foster a more circumspect attitude toward the Court’s role is to change the justices’ incentives in deciding cases. If they know they will not remain on the Court for an extended period of time, and that the rules they craft will shortly be applied by someone else, they may be far less likely to charge so eagerly into constitutional politics. Article III demands that judges be appointed for life, but it does not necessarily require that Supreme Court justices serve for life—provided they remain judges when not on the Court. Thus Congress could stipulate that the Supreme Court be staffed with nine life-tenured judges drawn at random from the courts of appeals. These judges would serve on the Supreme Court for a term of several years, and then return to their original appointed posts on the lower appellate courts, to be replaced by another group of nine drawn by lot. The rotation of the judges on and off the Court could easily be staggered to ensure some continuity from year to year. Justices would thus acquire incentives for caution and moderation rather than judicial aggrandizement.

The federal judiciary is in many respects the nation’s best-functioning branch of government. It does justice in thousands of cases every day.
It defends and enforces Americans’ liberties; it is a model of efficiency, professionalism, and excellence. As for the Supreme Court, it too has done the country much good. But for all its proud history, it has proved to be a dangerous institution — the most dangerous, in fact, of any branch of government.

The Court’s very design makes it a threat to the vital separation of constitutional law and politics. And the Court’s praxis over the past half-century has turned that threat into very real harm. If conservatives want to make the Court safe for democracy, they should focus less on getting it to reach the right constitutional results — and should focus instead on having it reach far fewer constitutional results in the first place.