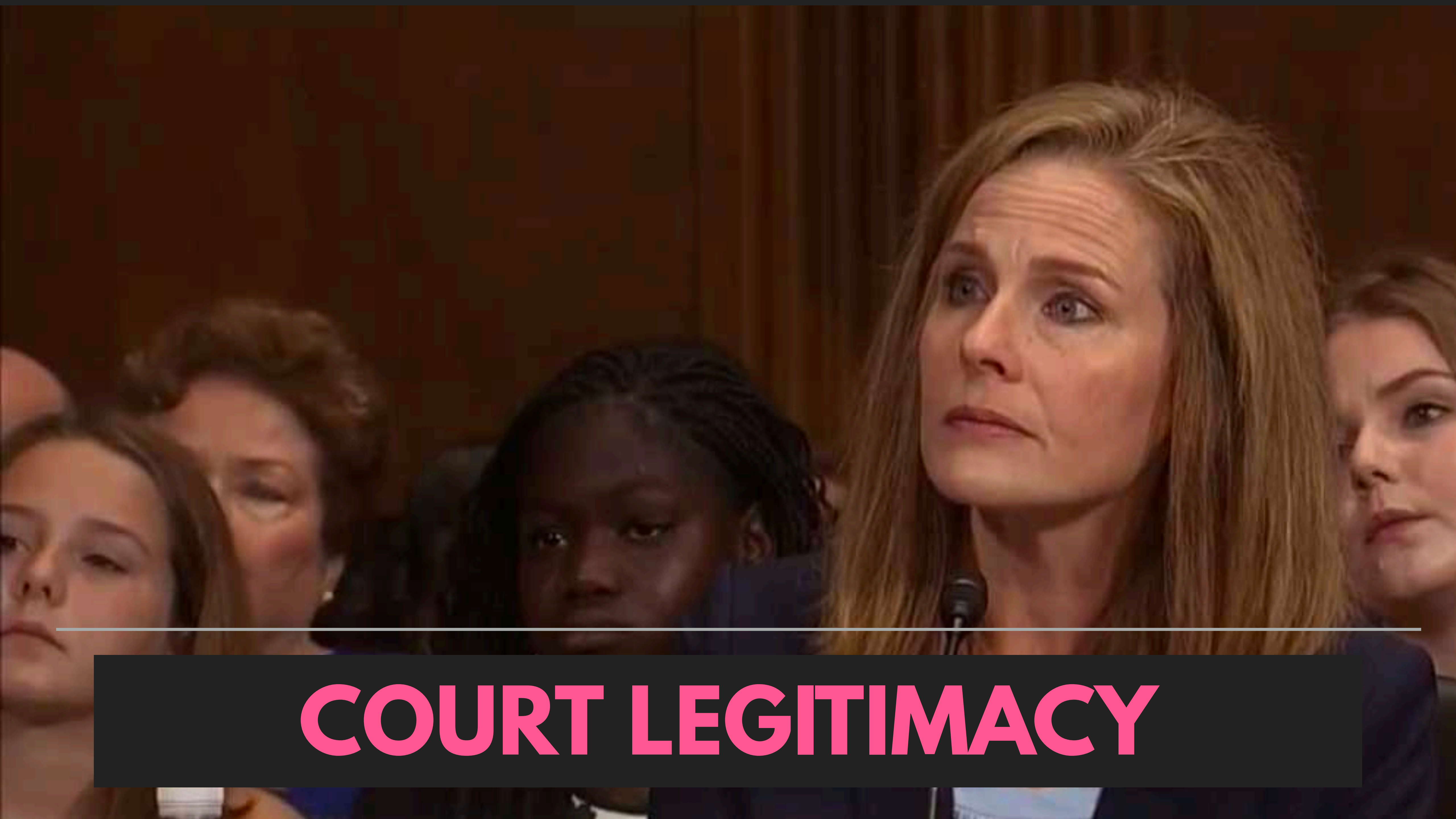


MR. POGREBA, PARKER SCHOOL

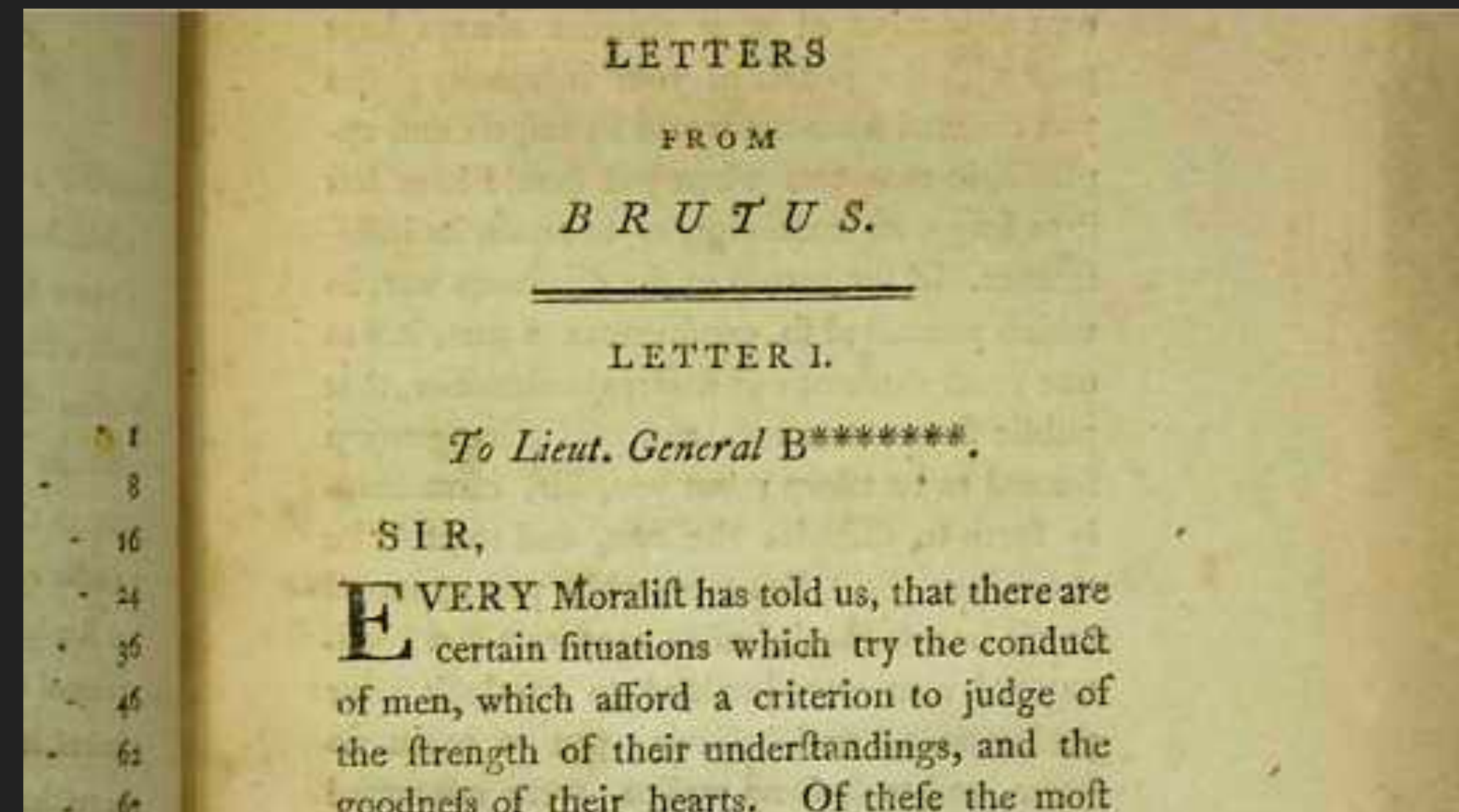
UNIT 4: THE JUDICIARY, Part 2



COURT LEGITIMACY

CONTINUITY AND CHANGE

- ▶ Throughout most of its history, the Court has been dominated by **continuity over change**. Justices have been loathe to overturn precedent, even when they disagree.
- ▶ **Critics** like Brutus (during ratification) and today, though, have argued that the Court **has too much power**. Brutus wrote that the justices would be “be placed in a situation altogether unprecedented in a free country—totally independent. No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications.”
- ▶ Recent Supreme Court nomination battles have undermined the legitimacy of the Court.



NOMINATION FIGHTS

- ▶ The nomination process became more controversial when President Reagan nominated **Robert Bork** to the Court and the Senate refused to seat him. The term being **borked** resulted.
- ▶ The **Clarence Thomas** nomination further increased tensions.
- ▶ During the Obama Presidency, the Republican Senate refused to seat a replacement, and Trump's appointees all faced very close votes (50-48, 54-45, 52-48).



BORK AND REAGAN



JUDICIAL PHILOSOPHY

JUDICIAL PHILOSOPHY

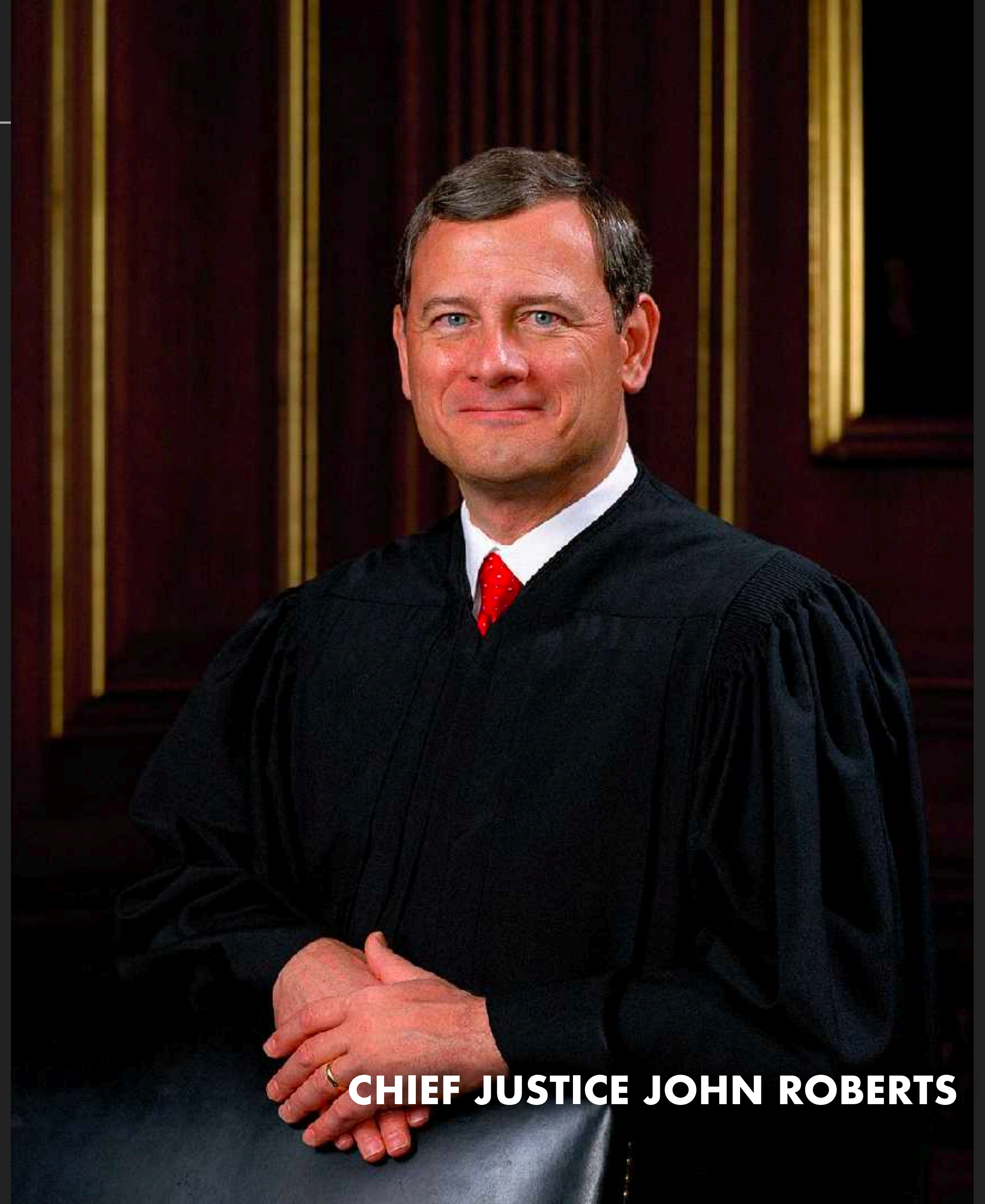
- ▶ **Strict constructionists** argue that the Court should follow the Constitution as it was written and intended at ratification.
 - ▶ For example, the Court argued in the 1900s, that minimum wage and child labor laws were unconstitutional.
 - ▶ Some critics argue that this **originalism** relies on misleading interpretation of Founder intent and outdated moral/legal values.
 - ▶ Some are **textualists**, who claim to rely on the written text only.
- ▶ **Liberal constructionists** interpret the Constitution as a **living document** that reflects changes in society.
 - ▶ For example, the 2015 Obergefell v. Hodges decision that permitted same sex marriages.
 - ▶ Some critics argue this ideology leads to dangerous **judicial activism**, where justices make, rather than interpret, law.



JAMES OBERGFELL AFTER THE COURT RULING

JUDICIAL PHILOSOPHY, PART 2

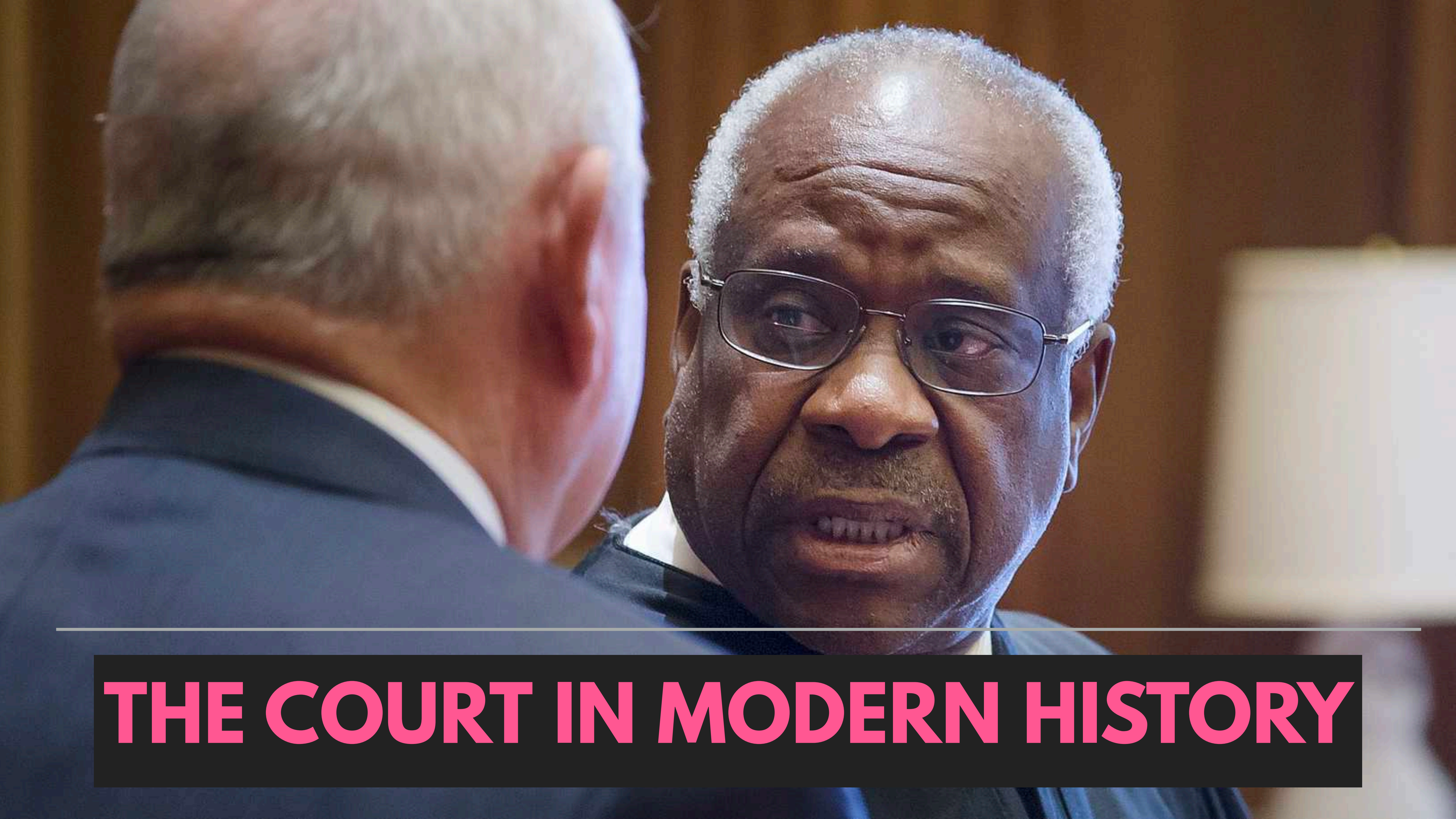
- ▶ **Judicial minimalists** believe the Court should rule on narrow questions of law and rarely change Constitutional understanding. **Chief Justice John Roberts** is a minimalist.
- ▶ **Maximalist or judicial activist** philosophy argues that the Courts should lead social change and make broad rulings. The era of the **Warren Court** exemplifies this approach.
- ▶ **IMPORTANT NOTE:** Some legal scholars argue **all these philosophical differences are merely cosmetic** and that justices make broad social policy no matter the philosophy they espouse.



CHIEF JUSTICE JOHN ROBERTS

“In his first Inaugural Address, delivered almost four years to the day after the court’s decision in *Dred Scott v. Sanford*, Abraham Lincoln warned that “if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court,” then the people “will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.”

Jamelle Bouie, 2021



THE COURT IN MODERN HISTORY

THE NEW DEAL

- ▶ The Court was very conservative during the Progressive Era, extending through the early New Deal.
- ▶ Chief Justice Charles Evan Hughes and the **Four Horseman** blocked early efforts by FDR to remake the US economy.
- ▶ This led to FDR's **court packing** scheme, a plan to add up to six justices to the Court.
 - ▶ The Constitution does not set a number for the size of the Supreme Court.
- ▶ By 1937, though, the Court was permitting New Deal legislation.



SUPREME COURT, 1932-37

THE WARREN COURT

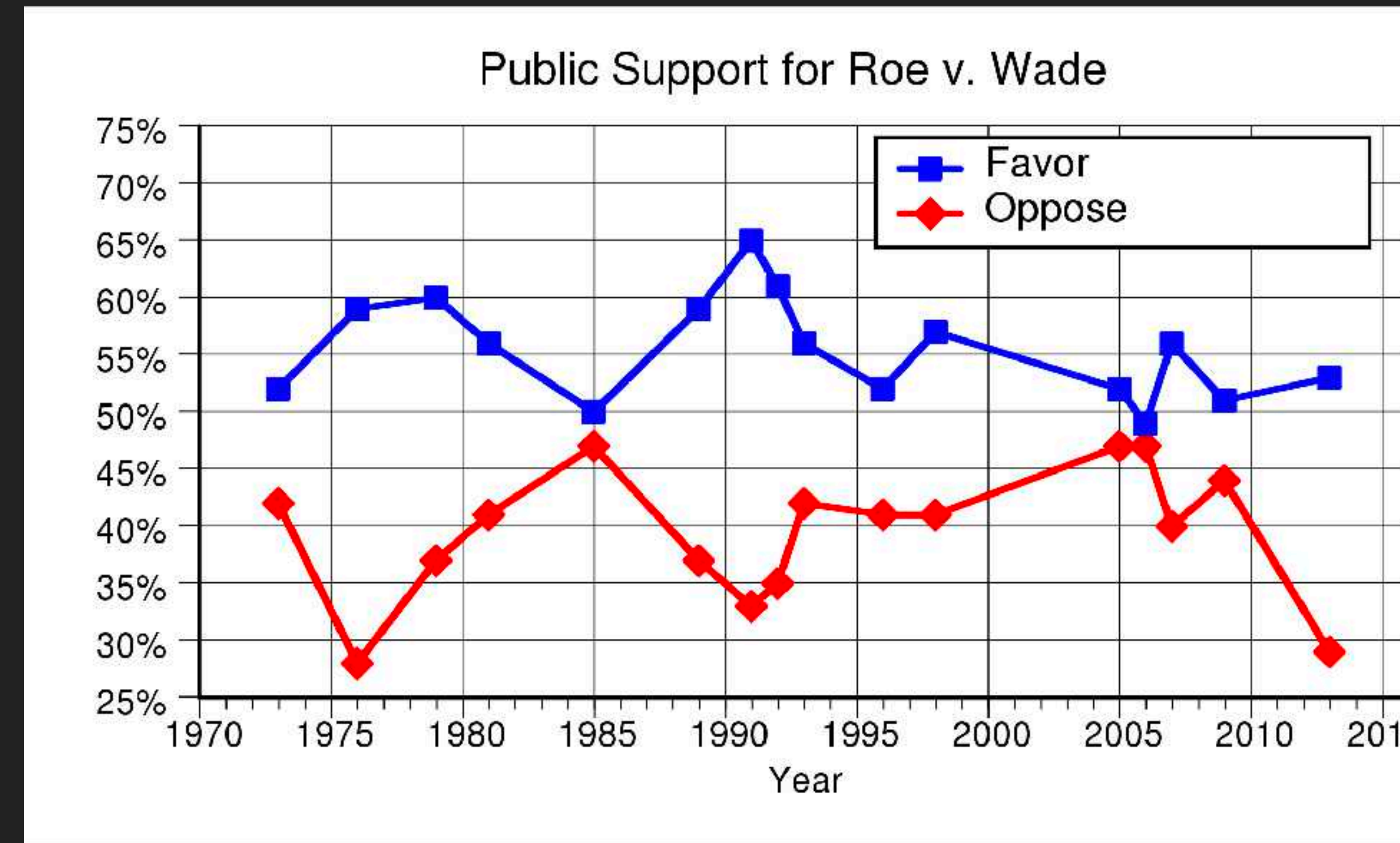
- ▶ After the appointment of Chief Justice **Earl Warren in 1953**, the **Warren Court** dramatically expanded civil liberties and civil rights.
- ▶ They:
 - ▶ Overturned segregation laws (**Brown v. Board**)
 - ▶ Ruled illegally obtained evidence was not admissible (**Mapp v. Ohio**)
 - ▶ Ended school-sponsored prayer (**Engle v. Vitale**)
 - ▶ Required all criminal defendants get an attorney (**Gideon v. Wainwright**)
 - ▶ Allowed student protest (**Tinker v. Des Moines**)



SUPREME COURT, 1958-1962

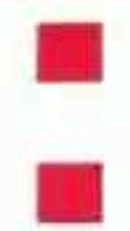
ABORTION

- ▶ Abortion provides an example of changing Supreme Court jurisprudence.
- ▶ In 1965, the **Griswold v. Connecticut** decision affirmed that there is a right to conception (privacy).
- ▶ In 1973, the **Roe v. Wade** decision extended the right to abortion, citing a "right to privacy," and protecting abortion through the first trimester.
- ▶ In 1992, the **Planned Parenthood v. Casey**, narrowed those protections and shifted the standard to fetal viability.
- ▶ In 2021, the Supreme Court heard **Dobbs v. Jackson Women's Health Organization**.
- ▶ Let's talk about maximalism/minimalism/stare decisis now.



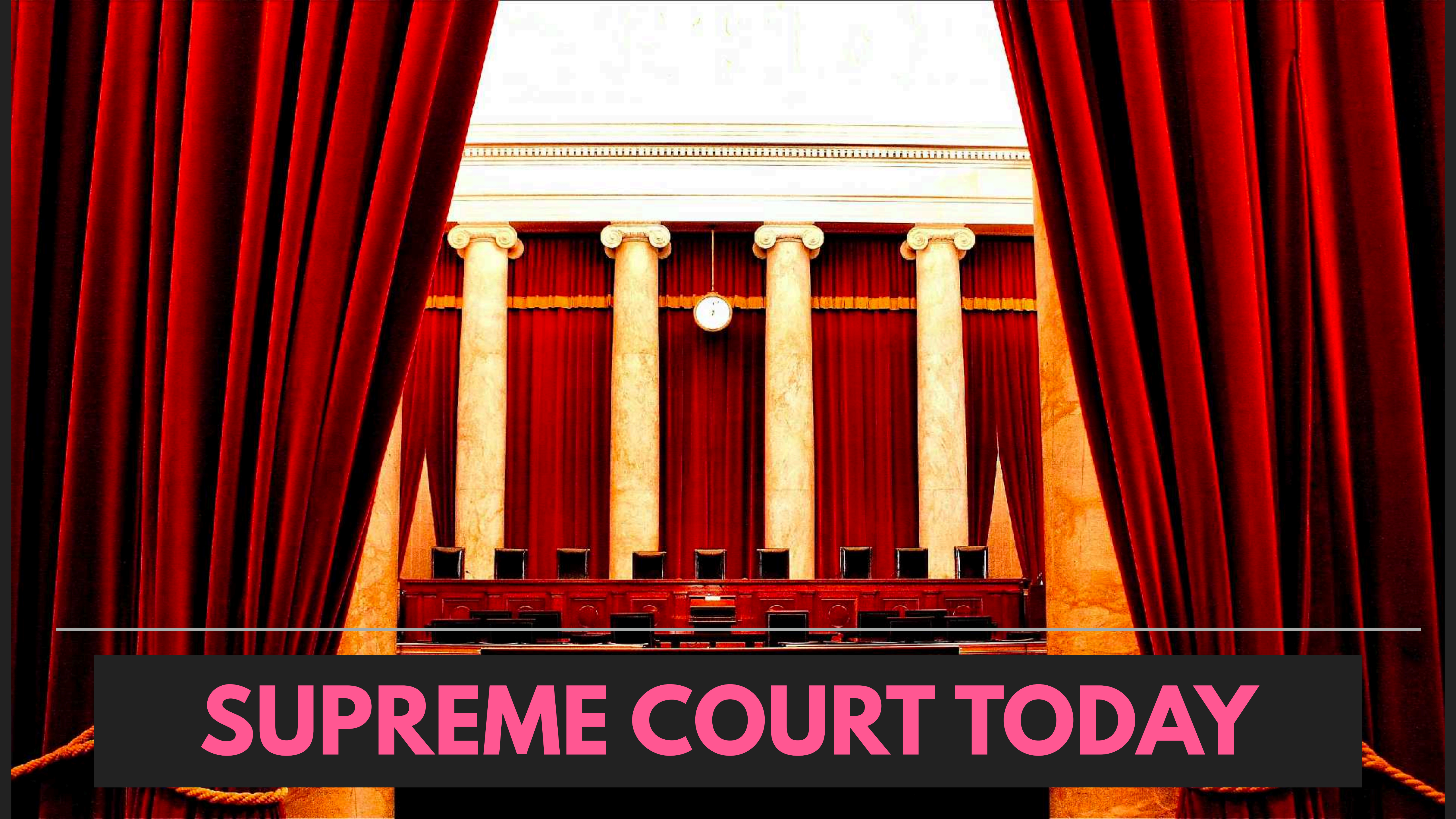


**CORONAVIRUS
PANDEMIC**



**EUROPEAN UNION LEADERS WEIGHING
POTENTIAL COVID VACCINE MANDATES**





SUPREME COURT TODAY

The image is an official portrait of the nine Justices of the United States Supreme Court. The Justices are arranged in two rows against a dark red, vertically-pleated curtain background. The front row consists of six Justices seated in wooden chairs, and the back row consists of three Justices standing. All Justices are wearing their traditional black judicial robes. The names of the Justices are printed in white and yellow text over the image. From left to right in the front row: Samuel Alito, Clarence Thomas, John Roberts, Stephen Breyer, and Sonia Sotomayor. In the back row: Brett Kavanaugh, Elena Kagan, and Neil Gorsuch. Amy Coney Barrett is standing on the far right of the back row, but her name is not labeled in this image.

BRETT KAVANAUGH

NEIL GORSUCH

AMY CONEY BARRETT

ELENA KAGAN

CLARENCE THOMAS

JOHN ROBERTS

SONIA SOTAMAYOR

SAMUEL ALITO

STEPHEN BREYER

THE ROBERTS COURT

- ▶ The current composition of the Court, with **conservative justices holding a 6-3 majority**, could lead to massive change.
 - ▶ Abortion
 - ▶ Gun rights
 - ▶ Federalism
- ▶ Thus far, Chief Justice Roberts has resisted efforts to dramatically swing the Court to the right and was even the deciding vote to maintain Obamacare.





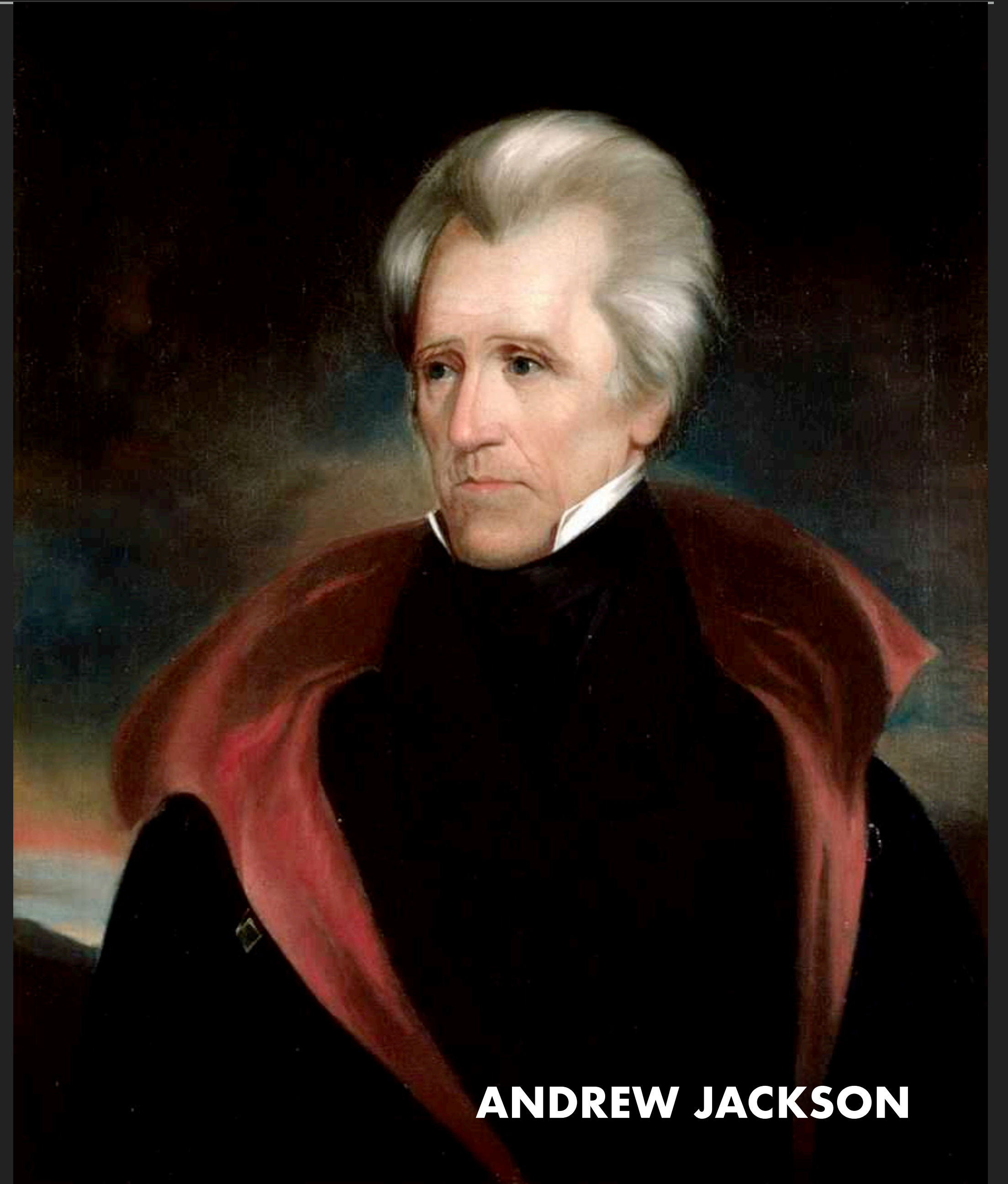
CHECKS ON JUDICIAL BRANCH

If judicial review were seriously curtailed, the executive and legislative branches of government could ignore most constitutional limits on their powers. This is a particularly grave danger in a world where government is as large and powerful as it is today – spending nearly 40 percent of our gross domestic product, and regulating almost every aspect of human activity. Without an independent judiciary to check their vast powers, federal and state governments would often be free to use their full might to censor opposition speech, confiscate property and otherwise persecute those they disapprove of. Avoiding that is well-worth the price of putting up with a good many flawed judicial rulings.

Ilya Somin, 2016

CHECKS ON JUDICIAL POWER

1. Courts have **no real enforcement power**. They rely on the executive branch to enforce and the legislative branch to change laws.
 - ▶ Andrew Jackson and the Cherokee
 - ▶ Federalized Natl Guard after Brown
2. Senate's role to **advise and consent** federal judge appointments.
 - ▶ **Litmus test** in modern confirmations
3. **Senatorial courtesy** has led to a tradition of Senators being able to block home state nominees.
 - ▶ **Blue notes**



ANDREW JACKSON

CHECKS ON JUDICIAL POWER, PART 2

4. **Impeachment:** Congress can impeach judges “ for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”
 - Some today call for impeachment of judges for their rulings.
5. **Article III** gives Congress the power to determine which courts have jurisdiction to hear cases.
 - ▶ In 2003-2005, the House voted to strip funding for courts hearing “under God” and same sex marriage cases, but the Senate did not act on the bills.



JUDGE JOHN PICKERING

ESSENTIAL IDEAS



TEST OVERVIEW

- ▶ If I were to prepare for a test over this unit, I would know broad truths and specific details about these concepts:
 - ▶ Explain the development and significance of **judicial review**.
 - ▶ Explain the role of **precedent** and **stare decisis** in court decisions.
 - ▶ Explain how **differences in judicial philosophy** play a critical role in the actions taken by the courts and public perception of those actions.
 - ▶ Explain the **three-part federal court system** and the **application of federalism** in American courts.
 - ▶ Explain the **checks on court power**.
 - ▶ Explain the critical role of **legitimacy for the Court** and the challenges to it.