

# How the Prohibition on “Under-Ruling” Distorts the Judicial Function (and What To Do About It)

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## *Abstract*

*Lower courts face a dilemma when forced to choose between older Supreme Court precedent that directly controls the present legal dispute and an intervening Supreme Court ruling that relies on rationale which erodes or undermines the rationale of the direct precedent. Nearly thirty years ago, the Supreme Court announced a rule requiring lower courts to follow the older precedent and disregard any inconsistency resulting from intervening rulings, effectively barring lower courts from “under-ruling” the older Supreme Court precedent. This prohibition on “under-ruling,” here referred to as the “Agostini Rule,” reflects a departure from the core rule-of-law values requiring similar cases to be decided similarly. The Agostini Rule enables the Court to avoid following its own precedents, without explanation. Thus, the Court possesses significant latitude when making policy decisions, only increasing the importance of a Justice’s life tenure. The failed nomination of Merrick Garland to the Supreme Court magnified the ramifications of the “under-ruling” prohibition, as political mobilization against Garland revealed the belief that replacing Justice Antonin Scalia with a Democratic President’s nominee would have enormous consequences. This article proposes a legislative remedy to “under-ruling” by requiring Con-*

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*gress to amend the statutes governing the Supreme Court’s jurisdiction to allow federal circuit courts to certify cases for, and effectively “force,” mandatory Supreme Court review. Consequently, the Supreme Court would no longer be able to evade its older precedents. This more consistent and transparent Court would both revive faith in the rule-of-law and improve the confirmation process, preventing any potential confirmation gridlock.*

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## I. INTRODUCTION

The nomination of Merrick Garland to the Supreme Court was a canary in our constitutional coal mine.<sup>1</sup> As such, that nomination’s agonizing demise should spur thoughtful, sustained reflection on what lessons the undeniably unseemly event teaches.<sup>2</sup> Thus, this symposium could hardly be more timely or significant.<sup>3</sup>

Our small contribution grows out of a longstanding interest in a problem many might be tempted to dismiss as mere mechanics and, we expect, few would connect to the Garland Affair.<sup>4</sup> But, as we argue below, the problem implicates some of the most fundamental values of any legal system.<sup>5</sup> It also

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1. See *infra* notes 112–16 and accompanying text. See generally Jordan Fabian, *Obama Nominates Merrick Garland to Supreme Court*, THE HILL (Mar. 16, 2016, 10:03 AM), <http://thehill.com/homenews/administration/273208-obama-nominates-merrick-garland-to-supreme-court>.

2. See *infra* Part IV.

3. See Pepperdine Law, *Pepperdine Law Review Symposium: Opening Address, Michael McConnell*, YOUTUBE (Apr. 21, 2017), <https://www.youtube.com/watch?v=1GwqNoPaRGs>.

4. See *infra* Part IV. See generally Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama’s Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U.L. REV. ONLINE 53 (2016) (describing the “Garland Affair” and further expanding on its implications.).

5. See *infra* Part IV.

reflects a more general, undisciplined drift in our legal culture that has subtly but substantially contributed to the Supreme Court’s status as a battleground in the political trench warfare that has characterized this young century.<sup>6</sup>

The problem we examine in this essay is, in brief, the dilemma a lower court confronts when forced to choose between, on the one hand, an older Supreme Court precedent, which could be characterized as directly controlling the present legal dispute, and, on the other hand, an intervening ruling or rulings that substantially undermine the rationale on which the older precedent rested.<sup>7</sup> For most of our history, the Supreme Court said very little about the matter, implicitly treating it as one of the many intellectual challenges met during a career in the law.<sup>8</sup> But starting almost thirty years ago, the Supreme Court announced a rule purporting to govern the discretion previously exercised by lower courts encountering this predicament.<sup>9</sup> Henceforth, they were to follow slavishly the older precedent, disregarding for purposes of the instant case whatever incongruities intervening rulings had introduced.<sup>10</sup> The rule expressly reserved to the Supreme Court alone “the prerogative of overruling its own decisions.”<sup>11</sup> To borrow a phrase coined by prior commentators, lower courts were barred from “under-ruling” the older Supreme Court precedent.<sup>12</sup>

The imperious dictum reserving to the Supreme Court the judgment that its more recent behavior had undercut its precedents is, to be sure, highhanded and insulting to the intelligence of not only the lower courts, but also the rest of the profession.<sup>13</sup> But the dictum is in its actual operation more toxic than that.<sup>14</sup> Among other untoward effects, it shelters the Supreme Court from at least some of the fallout of its own failure to follow the trajectory its precedents had laid down and, furthermore, relieves the Court of the duty even to acknowledge when, let alone explain why, it has done so.<sup>15</sup> A Supreme Court freed from these consequences and obligations casts off some

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6. See *infra* Part IV.

7. See *infra* Parts II–III.

8. See *infra* notes 137–44 and accompanying text.

9. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

10. See *id.*; see also *infra* Part II.

11. *Rodriguez de Quijas*, 490 U.S. at 484.

12. See *infra* note 29.

13. See *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (Ginsburg, J., dissenting) (referring to the pronouncement as the “no-competence instruction”); see also *infra* Part II.

14. See *infra* note 15 and accompanying text; see also *infra* Parts III–IV.

15. See *infra* Part IV.

of the core constraints that make it a “court,” rather than another, higher legislative chamber populated by lawgivers immune from the odious burden of running for office.<sup>16</sup> It should come as no surprise that lifetime appointment to such a body would become so significant that the confirmation protocols would collapse under the burden.<sup>17</sup> And so they have.<sup>18</sup>

To be clear, the wrinkle we focus upon is merely one aspect of a much grander re-imagining of the judicial role in both our constitutional and political cultures that has been long in the making and manifold in its manifestations.<sup>19</sup> We make no claim that the relatively recent pronouncement against under-ruling “caused” the Garland nomination to fail.<sup>20</sup> Or that sorting the problem out in a manner more faithful to our jurisprudential traditions will alone suffice to mend the constitutional fabric.<sup>21</sup> But the contemporary Supreme Court’s repeated prohibitions against under-ruling both reflect and reinforce key assumptions about the Court’s role in our constitutional order that have contributed to the poisonous environment that caused the ordinarily orderly succession of Justices to break down.<sup>22</sup> Moreover, not only reconsidering these assumptions, but also addressing the particular problem posed when lower courts are invited to under-rule antiquated precedents would contribute, however modestly, to a restoration of a more modest role for the Supreme Court.<sup>23</sup> Over time, such adjustments would lower the stakes and therefore the passions in Supreme Court confirmation proceedings.<sup>24</sup>

The problem we identify is one of the Court’s own creation and thus well within its power to address.<sup>25</sup> For the same reasons that brought us to this juncture, however, it seems unlikely that the Court can be counted upon to put its own house in order.<sup>26</sup> So we suggest a legislative fix that, via a modest expansion of the Supreme Court’s mandatory jurisdiction, would nudge the Court in the desired direction.<sup>27</sup>

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16. *See infra* Part IV.

17. *See infra* Part IV.

18. *See infra* Part IV.

19. *See infra* Part IV.

20. *See infra* Part IV.

21. *See infra* Parts IV–V.

22. *See infra* Part IV.

23. *See infra* Part V.

24. *See infra* Part V.

25. *See infra* notes 122–25 and accompanying text.

26. *See infra* Part IV.

27. *See infra* Part V.

This essay proceeds in four parts.<sup>28</sup> Part Two recounts the origins and meaning of the Supreme Court’s anti-under-ruling decrees. Part Three explores how the prohibition on under-ruling distorts the judicial function in the lower courts. Part Four then explains how this introduction of a separation between law as it is elaborated at the Supreme Court and law as it operates in all other courts frees the Supreme Court from core elements of the rule of law. Finally, Part Five briefly sketches a proposal that would create a limited ability for the U.S. Courts of Appeals to hold the Justices accountable, in the hopes that the power would be employed to prod the Supreme Court in the direction of being a bit less supreme and a bit more of a court.

## II. DO AS WE SAID NOT AS WE DO

The Court’s most recent pronouncement of the prohibition against under-ruling<sup>29</sup> appears in *Agostini v. Felton*,<sup>30</sup> but its genesis is the following dictum from *Rodriguez de Quijas v. Shearson/American Express, Inc.*: “If

28. See *infra* Parts II–V.

29. Some commentators have used the term “anticipatory overruling” in the same way we use “under-ruling.” See, e.g., C. Steven Bradford, *Following Dead Precedent: The Supreme Court’s Ill-Advised Rejection of Anticipatory Overruling*, 59 *FORDHAM L. REV.* 39, 43–52 (1990). Other commentators, however, have sometimes used “anticipatory overruling” to encompass predictions by lower courts about what the Supreme Court will do when and if the issue comes before it. See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 *TEX. L. REV.* 1, 70–72 (1994). Still others have applied the term to the Court’s own decisions which signal an intention to overrule when a particular issue next comes before the Court. Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 *EMORY L.J.* 779, 782–84 (2012) (offering as an example *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193 (2009)). Because our focus is on lower courts’ reliance on what the Supreme Court has *already done* with respect to the precedent in question, we have decided to use the term “under-ruling” so as to distinguish from the broader usages of “anticipatory overruling.” Note that we use “under-ruling” differently from Professor Christopher J. Peters, who applies the term to situations in which the Supreme Court intentionally changes the legal doctrine established by prior cases so as to effectively overrule them but does not admit that it is doing so. Christopher J. Peters, *Under-the-Table Overruling*, 54 *WAYNE L. REV.* 1067, 1072 (2008). Professor Barry Friedman refers to this type of decision-making as “stealth overruling,” which occurs when the Supreme Court itself “fail[s] to extend a precedent to the conclusion mandated by its rationale” or “reduce[s] a precedent to nothing,” a practice which, Professor Friedman argues, “obscures the path of constitutional law from public view, allowing the Court to alter constitutional meaning without public supervision.” Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 *GEO. L.J.* 1, 12, 63 (2010).

30. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). In her dissent, Justice Ginsburg refers to the pronouncement as the “no-competence instruction.” *Id.* at 259 (Ginsburg, J., dissenting). Accordingly, we call the prohibition “the *Agostini* rule” or, alternately, “the no-competence rule.”

a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”<sup>31</sup>

These words, written in 1989, marked the Court’s first doctrinal statement forbidding lower courts from declining to follow a prior, on-point precedent when later Supreme Court decisions have eroded or erased its justificatory foundations.<sup>32</sup> Previously, the Court itself both affirmed and reversed various cases on the merits, and consistently remained silent as to the propriety of the lower courts having entered into the doctrinal breach left by the Court’s live but seriously undermined prior precedent.<sup>33</sup>

The Court’s tacit acceptance of lower court disavowals of undermined precedent that was inconsistent with later Court decisions came to an abrupt halt in *Rodriguez de Quijas*.<sup>34</sup> There, the Justices stated that the Supreme Court—and only the Supreme Court—possesses the power to overrule a prior precedent, and that lower courts must follow any on-point precedent even when the justifying rationale supporting the holding of such precedent has been subsequently gutted in later Supreme Court cases.<sup>35</sup>

In *Rodriguez de Quijas*, the Supreme Court agreed with the circuit court that the rationale of the precedent case at issue had been so eroded by later

31. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

32. *See id.*; Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the “Judicial Power,”* 80 B.U. L. REV. 967, 970 (2000); C. Steven Bradford, *Following Dead Precedent: The Supreme Court’s Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 41 (1990); Bradley Scott Shannon, *Overruled by Implication*, 33 SEATTLE U. L. REV. 151, 152 (2009). Before 1989, most courts and commentators seem to have assumed that lower courts were empowered to recognize when later doctrinal developments have rendered earlier precedents obsolete and therefore no longer binding. Brent E. Newton, *Almendarez-Torres and the Anders Ethical Dilemma*, 45 HOUS. L. REV. 747, 799–800 (2008). This assumption was not universally shared, however, and perhaps has somewhat shallow roots in American jurisprudence; one commentator locates the genesis of the practice of disavowal in the 1940s as a result of the Court’s own new willingness to overturn prior precedent in the New Deal era. *See Lower Court Disavowal of Supreme Court Precedent*, 60 VA. L. REV. 494, 494 n.1 (1974).

33. Bradford, *supra* note 32, at 41. For two early examples of cases where lower courts did “under-rule” Supreme Court decisions without any negative comment by the Court on review, see *Barquette v. W. Va. Sch. Bd. of Educ.*, 47 F. Supp. 251, 252–53 (S.D.W. Va. 1942), *aff’d*, 319 U.S. 624, 642 (1943) and *Comm. for Indus. Org. v. Hague*, 25 F. Supp. 127, 150–51 (D.N.J. 1938), *aff’d*, 101 F.2d 774, 791 (3d Cir. 1939), *aff’d*, 307 U.S. 496, 516–18 (1939).

34. *See Rodriguez de Quijas*, 490 U.S. at 484; Bradford, *supra* note 32, at 41.

35. *Rodriguez de Quijas*, 490 U.S. at 484. In the words of one scholar, “the Court finally spoke in favor of blind obedience to precedent.” Bradford, *supra* note 32, at 41.

cases that the Court’s prior interpretation of the relevant statute was no longer valid.<sup>36</sup> Accordingly, the Court both upheld the court of appeals on the merits and expressly overruled the now-undermined precedent.<sup>37</sup> This time, however, the Court abandoned its previous practice of making no comment on the propriety of the lower court’s disavowal of the antiquated precedent case and applying instead the rationale of the later cases.<sup>38</sup> Rather, in dicta, the majority scolded the circuit court for disregarding the binding precedent, and asserted a new, broadly framed principle: that lower courts are not at liberty to conclude that the rationale of a prior, on-point precedent has been so undermined that it must give way to the rationale of later, relevant cases in adjudicating disputes.<sup>39</sup> Even the dissenters took the circuit court to task, labeling the lower court’s disavowal of the earlier precedent “an indefensible brand of judicial activism.”<sup>40</sup>

The Court’s “no-competence” rule, stated as it was in dicta, could have been narrowly cabined to cases closely analogous to *Rodriguez de Quijas*.<sup>41</sup> In 1997, however, the Court re-iterated the no-competence rule in *Agostini v. Felton*, a First Amendment case involving previously-granted injunctive relief under the Establishment Clause against the Board of Education for the City of New York (the “School Board”), and it did so broadly.<sup>42</sup>

In *Aguilar v. Felton*, the predecessor case to *Agostini*, the Supreme Court had found that the School Board’s Title I program, as then constituted, necessarily resulted in an “excessive entanglement of church and state in the administration of [government] benefits” in violation of the Establishment Clause of the First Amendment.<sup>43</sup> On remand, the district court entered a

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36. See *Rodriguez de Quijas*, 490 U.S. at 480–81.

37. See *id.* at 484–86.

38. See *id.*

39. See *id.* at 484.

40. *Id.* at 486 (Stevens, J., dissenting).

41. See *id.* at 484–85. The particular circumstances of *Rodriguez de Quijas* supplied the basis for restricting the decision’s sweep to cases involving differing interpretations of related statutes or to cases in which the Supreme Court had expressly reserved an issue or expressly declined to overrule a weakened precedent. *Id.*

42. *Agostini v. Felton*, 521 U.S. 203, 207 (1997); see also *Aguilar v. Felton*, 473 U.S. 402 (1985) (holding that the use of federal funds to pay public employees who teach in parochial schools violated the Establishment Clause of the First Amendment), *overruled by Agostini*, 521 U.S. at 203.

43. *Aguilar*, 473 U.S. at 414. Under Title I of the Elementary and Secondary Education Act of 1965, federal funding is available for “remedial education, guidance, and job counseling” to students who live in low-income public school districts who are failing or at risk of failing the state’s student performance standards. *Agostini*, 521 U.S. at 209. Funding under Title I must be made available to

permanent injunction barring the School Board from using Title I funds to provide teaching or counseling services on any sectarian school premises in New York City.<sup>44</sup>

A dozen years later, the parties who were bound by the *Aguilar* ruling sought vacatur of the district court’s injunction.<sup>45</sup> Toward this end, they filed a motion under Federal Rule of Civil Procedure 60(b) on the ground that significant changes had occurred in the Supreme Court’s post-*Aguilar* case law governing the Establishment Clause.<sup>46</sup> The district court determined that *Aguilar* remained good law—despite recent changes in the Supreme Court’s Establishment Clause jurisprudence—and, because *Aguilar* remained good law, the subsequent changes in the legal framework of the Establishment Clause were not sufficiently significant to grant the Rule 60(b) motion to vacate the injunction.<sup>47</sup> The Supreme Court reversed, stating that, “*Aguilar* is not consistent with our subsequent Establishment Clause decisions.”<sup>48</sup> According to the Court, *Aguilar*’s conclusions that (1) the School Board plan had the impermissible effect of advancing religion was based on four assumptions that subsequent decisions had undermined,<sup>49</sup> and (2) the expressly stated grounds upon which *Aguilar* had based its finding of unconstitutionality were similarly undermined by the Court’s later cases.<sup>50</sup> In light of the more recent developments within its Establishment Clause jurisprudence, the Court asserted: “[W]e must acknowledge that *Aguilar* . . . [is] no longer good law.”<sup>51</sup> The Court continued: “We therefore conclude that our Establishment Clause law has ‘significant[ly] change[d]’ since we decided *Aguilar*. . . . [T]his change in law entitles petitioners to re-

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all eligible students, including those who attend private school, including parochial schools. *Id.* at 209–10.

44. *See Agostini*, 521 U.S. at 212.

45. *See id.* at 214. The parties seeking vacatur included the School Board and a group of parents of parochial school students entitled to Title I services. *Id.*

46. *See id.* The current version of Rule 60(b), which reflects stylistic, but not substantive, changes from the operative version at the time *Agostini* was decided, provides in relevant part: “On motion and just terms, the court may relieve a party . . . from a final judgment [or] order . . . [when] applying it prospectively is no longer equitable.” FED. R. CIV. P. 60(b)(5).

47. *See Agostini*, 521 U.S. at 214.

48. *Id.* at 209.

49. *See id.* at 222–30.

50. *See id.* at 232–34.

51. *Id.* at 235.

lief under Rule 60(b)(5).”<sup>52</sup>

It might be fairly concluded, then, that the district court had erred in concluding that *Aguilar* was still good law, that the court should have granted the Rule 60(b) motion based on “significant change” in applicable decisional law, and that it abused its discretion in denying the motion.<sup>53</sup> In fact, however, the Court concluded, somewhat inconsistently, that the district court correctly denied the motion, as relief was inappropriate “unless and until this Court reinterpreted the binding precedent.”<sup>54</sup> The Court’s directive in *Agostini* states, quite broadly:

We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”<sup>55</sup>

As support for its “no-competence” rule, the Court cited *Rodriguez de Quijas* but offered no additional explanation or rationale.<sup>56</sup> Thus, the only justification the Court has offered for reserving to itself the power to recognize when an older case has been supplanted by subsequent doctrinal developments is a bare citation to the unconsidered dictum in *Rodriguez de Quijas*, which in turn furnished no legal authority or judicial reasoning to support it.<sup>57</sup> Nevertheless, lower courts have dutifully followed the Court’s directive in a variety of doctrinal contexts.<sup>58</sup>

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52. *Id.* at 237.

53. *See id.*

54. *Id.* at 238. According to Professor Bhagwat, “[t]he Court never resolved the obvious tension between these positions, suggesting an infirmity in the Court’s approach towards its own precedent.” Bhagwat, *supra* note 32, at 970 n.22.

55. *Agostini*, 521 U.S. at 237 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

56. *Id.*

57. *See Rodriguez de Quijas*, 490 U.S. at 484.

58. *See, e.g.*, *United States v. Danielczyk*, 683 F.3d 611, 615–17 (4th Cir. 2012) (constitutional interpretation of First Amendment protection in the campaign finance context); *United States v. Patton*, 451 F.3d 615, 636 (10th Cir. 2006) (discussed below).

## III. DISTORTION IN THE LOWER COURTS

The Tenth Circuit’s opinion in *United States v. Patton*,<sup>59</sup> provides a splendid, if rather tragic, illustration of one form of the mischief worked by the *Agostini* rule.<sup>60</sup> Because the circuit court’s reasoning in *Patton* is integral to understanding the *Agostini* rule’s significance, that reasoning is explored in some detail.<sup>61</sup>

In the early 1990s, Patton had twice been convicted in Kansas state court of gang-related felonies.<sup>62</sup> Upon completion of his sentence, and against his wishes, Patton was paroled back to Wichita, where both his former gang and their rivals continued to skirmish, making his desire to go straight immeasurably more difficult.<sup>63</sup> After being threatened at gun-point by a rival gang member, Patton, who as a felon was of course forbidden to own a firearm, purchased in the fall of 2001 a bullet-proof vest in an effort to provide himself at least some protection.<sup>64</sup> At the time, this purchase was lawful under both state and federal law.<sup>65</sup> But then Congress enacted the James Guelff and Chris McCurley Body Armor Act of 2002, which made it a federal crime for a felon to possess body armor.<sup>66</sup> In November of 2003, Wichita police responding to a domestic disturbance call discovered Patton wearing the bullet-proof vest.<sup>67</sup> He was subsequently convicted in a U.S. district court of violating the 2002 federal statute, which he challenged as exceeding Congress’s enumerated powers, at least as applied to him.<sup>68</sup>

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59. *Patton*, 451 F.3d at 636. *Patton* is our principal example of *Agostini*’s distorting influence in the lower courts, but in this respect *Patton* is by no means an isolated exception. See, e.g., *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 155–56 (3d Cir. 2005) (declining to address claim that *Lawrence v. Texas*, 539 U.S. 558 (2003) implicitly overruled earlier decisions sustaining the constitutionality of federal obscenity statutes); *Banks v. Gallagher*, 686 F. Supp. 2d 499, 515–17 (M.D. Pa. 2009) (declining to address the claim that *District of Columbia v. Heller*, 554 U.S. 570 (2008) implicitly overruled nineteenth-century decisions holding the Second Amendment inapplicable as a limitation on state law).

60. *Patton*, 451 F.3d at 636.

61. *Id.* at 634–36.

62. *Id.* at 619.

63. See *id.*

64. See *id.*

65. *Id.*

66. See 18 U.S.C. § 931(2016) (criminalizing the possession of body armor by felons, effective November 2, 2002).

67. *Patton*, 451 F.3d at 619.

68. *Id.* After the district court rejected Patton’s necessity defense, he pled guilty to the body-armor-possession offense, conditionally reserving his right to raise both his necessity and constitu-

In a meticulous opinion for the circuit court, then-Judge McConnell<sup>69</sup> emphasized not only that Patton’s purchase of the vest was lawful when made, but also that the federal statute criminalized neither the vest’s purchase by, nor its sale to, a felon.<sup>70</sup> Rather, the federal statute singled out *possession*, and even then only possession by felons, for criminal sanction.<sup>71</sup> Judge McConnell concluded that, so crafted, the statute fell outside the scope of Congress’s Commerce Clause authority as recognized by the Supreme Court’s pivotal ruling in *United States v. Lopez*.<sup>72</sup>

In *Lopez*, the Court had identified three broad categories that together comprised Congress’s power to regulate commerce among the several states.<sup>73</sup> The first category acknowledged plenary congressional authority to govern the “use of the channels of interstate commerce.”<sup>74</sup> As the indictment noted, Patton’s vest had been manufactured in California many years prior to his purchase of it in Kansas.<sup>75</sup> But Judge McConnell rebuffed the suggestion that the mere fact that the article had once moved in the channels of interstate commerce made subsequent prohibition of its subsequent possession a regulation of those channels.<sup>76</sup> Rather, he determined that this first category of congressional authority was “confined to statutes that regulate interstate transportation itself, not manufacture before shipment or use after shipment.”<sup>77</sup>

Nor could the Body Armor Act be justified as an exercise of Congress’s power to regulate “the instrumentalities of interstate commerce.”<sup>78</sup> This second category included the power to protect both the means of interstate commerce and items in interstate commerce from potential threats.<sup>79</sup> But body armor was not itself an instrumentality of commerce.<sup>80</sup> And the stat-

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tional defenses on appeal. *See id.* at 619–20.

69. Judge McConnell, who has since returned to the legal academy, delivered the opening address at this symposium. *See* Pepperdine Law, *supra* note 3.

70. *Patton*, 451 F.3d at 619–20.

71. *Id.* at 620.

72. *See id.* at 620–34 (citing *United States v. Lopez*, 514 U.S. 549 (1995)).

73. *See Lopez*, 514 U.S. at 558–59.

74. *Id.* at 558.

75. *Patton*, 451 F.3d at 619.

76. *See id.* at 621.

77. *Id.*

78. *See id.* at 621–22 (quoting *Lopez*, 514 U.S. at 558).

79. *Id.* at 621.

80. *Id.*

ute’s prohibition of “possession of body armor by a felon, wherever it occurs, and without regard to its use or effect” simply was not directed at protecting body armor when in transit across state lines or preventing the misuse of body armor in a way that would threaten or endanger the instrumentalities of interstate commerce.<sup>81</sup>

That left only the third category of commerce authority acknowledged by *Lopez*: Congress’s power to regulate activities substantially affecting interstate commerce.<sup>82</sup> But, Judge McConnell concluded, it could not be stretched to encompass the Body Armor Act either.<sup>83</sup> For one thing, mere possession of body armor was not “economic in nature” within the meaning accorded that phrase by the Court’s decisions in *Lopez* and *United States v. Morrison*,<sup>84</sup> which cast doubt on the appropriateness of aggregating all instances of a class of non-economic activities for the purposes of assessing the substantiality of an activity’s effect on interstate commerce.<sup>85</sup> Nor could the regulation of possession only by felons be understood as an integral part of a broader federal scheme regulating the interstate market for body armor; indeed, the statute left purchase and sale of body armor, even by felons, unregulated.<sup>86</sup> Also, the prediction by the Congressional Budget Office that the law would likely “affect fewer than [ten] cases” a year demonstrated the statute’s narrowness and the regulated conduct’s relatively trivial impact on commerce.<sup>87</sup>

To be sure, the Body Armor Act, unlike the laws invalidated in *Lopez* and *Morrison*, had a jurisdictional element—its express limitation of its pro-

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81. *See id.* at 622.

82. *See id.* at 622–34 (citing *Lopez*, 514 U.S. at 558–59).

83. *See id.* at 633–34.

84. *See id.* at 624–25 (citing *United States v. Morrison*, 529 U.S. 598, 613 (2000) and *Lopez*, 514 U.S. at 560).

85. *See Morrison*, 529 U.S. at 613 (“While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”); *Lopez*, 514 U.S. at 561 (holding that a statute not was not economic in nature “cannot . . . be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce”); *see also Patton*, 451 F.3d at 25 (“[W]here the regulated activity is not commercial in nature, Congress may regulate it only where there are “substantial” and not “attenuated” effects on other states, on the national economy, or on the ability of Congress to regulate interstate commerce.”).

86. *See Patton*, 451 F.3d at 626–28.

87. *See id.* at 629–30.

hibition only to a “product sold or offered for sale, in interstate or foreign commerce.”<sup>88</sup> But Judge McConnell dismissed this requirement as immaterial, observing that “[a] jurisdictional hook is not . . . a talisman that wards off constitutional challenges.”<sup>89</sup> Rather, “where a jurisdictional element is required, a meaningful one, rather than a pretextual incantation evoking the phantasm of commerce, must be offered.”<sup>90</sup> This conclusion followed from the premise that “[t]he ultimate inquiry is whether the prohibited activity has a substantial effect on interstate commerce, and the presence of a jurisdictional hook, though certainly helpful, is neither necessary nor sufficient.”<sup>91</sup> The Body Armor Act’s jurisdictional hook did little to cabin the statute’s reach, as “[n]early all body armor” would meet the requirement that it be “sold or offered for sale, in interstate or foreign commerce.”<sup>92</sup> Even more significantly, to the extent that this requirement mattered at all, there was no basis for concluding that qualifying body armor had any greater effect on interstate commerce than the body armor thereby excluded from the statute’s scope.<sup>93</sup> A prohibition on possession of an article that had moved in interstate commerce *might* support a congressional effort to suppress an interstate market.<sup>94</sup> Where, however, as was the case with body armor, Congress had left interstate commerce in its production, distribution, and sale untouched, the federal law’s limitation was arbitrary if not absurd.<sup>95</sup> Judge McConnell explained that, had the statute included a jurisdictional hook limiting it to

cases where the felon used body armor during commission of a crime that affected interstate commerce, we would know exactly what Congress’s theory of its authority is. We would then be able to evaluate whether, on the facts of the case, the substantial and non-attenuated connection to interstate commerce that Congress expected was present. As it is, however, section 931’s requirement that the body armor must once have traveled in interstate commerce

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88. *Id.* at 633 (quoting 18 U.S.C. § 921(a)(35)).

89. *Id.* at 632.

90. *Id.*

91. *Id.*

92. *Id.* at 633 (quoting 18 U.S.C. § 921(a)(35)).

93. *Id.*

94. *See id.* (“If Congress intended to suppress the interstate market in body armor, then directing a prohibition on possession towards armor that had moved in interstate commerce would make sense.”)

95. *See id.* at 627.

is so sweeping as to be unhelpful in determining whether the activities regulated by the statute have a substantial and non-attenuated effect on interstate commerce.<sup>96</sup>

Hence, the section's jurisdictional element, the most apparently promising basis for distinguishing it from the laws struck down in *Lopez* and *Morrison*, proved on close scrutiny insufficient to save the law.<sup>97</sup>

Judge McConnell summarized his analysis in unambiguous terms.<sup>98</sup> The Body Armor Act could not "be justified as a regulation of the channels of commerce, as a protection of the instrumentalities of commerce, or as a regulation of intrastate activity that substantially affects interstate commerce."<sup>99</sup> Even more succinctly: application of the statute "to the circumstances of this case cannot be reconciled with *Lopez* and *Morrison*."<sup>100</sup>

Given the bluntness of these statements, one might have expected the court's opinion to be a cause for Mr. Patton to celebrate. But any merriment on his part would have been wretchedly misplaced. For *deus-ex-machina*-like, the *Agostini* rule intervened in the last act of our play to rob Patton of relief.<sup>101</sup> As Judge McConnell noted, in *Scarborough v. United States*, the Supreme Court had expressly rejected a defendant's plea to construe a federal statute prohibiting felons from possessing firearms "in commerce or affecting commerce"<sup>102</sup> as requiring anything more than the mere fact that the firearm in question had moved in interstate commerce at some point in time, however distant from the defendant's possession.<sup>103</sup> Although *Scarborough* addressed only the statutory interpretation question, foregoing any discussion of the constitutional issue,<sup>104</sup> Judge McConnell, following prior precedents of both the Tenth and her sister circuits, found in *Scarborough* an implicit constitutional understanding "that Congress may regulate any firearm

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96. *Id.* at 633.

97. *See id.*

98. *See id.* at 634.

99. *Id.*

100. *Id.* at 629.

101. *Id.* ("[W]e conclude that we are bound by *Scarborough*, which was left intact by *Lopez*. . . . Any doctrinal inconsistency between *Scarborough* and the Supreme Court's more recent decisions is not for this Court to remedy." (citing *Agostini*, 521 U.S. at 237)).

102. *Scarborough v. United States*, 431 U.S. 563, 567 (1977).

103. *See id.* at 575.

104. *See id.* at 577-78.

that has ever traversed state lines.”<sup>105</sup> Judge McConnell found no relevant basis for treating body armor differently than firearms.<sup>106</sup> He acknowledged that the Court’s failure to so much as mention *Scarborough* in either *Lopez* or *Morrison* had caused judges in other circuits openly to doubt whether *Scarborough* remained good law.<sup>107</sup> Indeed, he conceded “considerable tension between *Scarborough* and the three-category approach adopted by the Supreme Court in its recent Commerce Clause cases.”<sup>108</sup> Citing *Agostini*, however, Judge McConnell determined that, as an intermediate appellate court, the Tenth Circuit was under a duty to adhere to *Scarborough*.<sup>109</sup> He concluded his thorough-going analysis by observing that, under *Agostini*, “[a]ny doctrinal inconsistency between *Scarborough* and the Supreme Court’s more recent decisions is not for this Court to remedy” and prognosticating that, in all likelihood, “the Supreme Court will revisit this issue in an appropriate case—maybe even this one.”<sup>110</sup> Twelve years have passed, and Judge McConnell’s prophecy has yet to be fulfilled.<sup>111</sup>

#### IV. LEGAL LICENSE IN THE SUPREME COURT

So what does Patton’s bullet-proof criminal conviction for body armor possession have to do with the dead-on-arrival Garland nomination?

That nomination starkly revealed that the Republican leaders of the Senate, and perhaps more importantly the constituencies those Senators most wish to appease, no longer believe that law substantially constrains the policy-making role of Supreme Court Justices.<sup>112</sup> Numerous conservative action

105. *United States v. Patton*, 451 F.3d 615, 634 (10th Cir. 2006).

106. *See id.* at 635. The court dismissed Patton’s claim that body-armor possession might be distinguished from the possession of firearms on the ground that the latter was more pervasively regulated. *See id.* at 635–36 (“[T]his difference between body armor and firearms is not relevant under the *Scarborough* line of analysis.”)

107. *See id.* at 634–35.

108. *Id.* at 636.

109. *See id.*

110. *Id.* (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

111. *See Patton v. United States*, 549 U.S. 1213 (2007) (denying certiorari); *see also Alderman v. United States*, 562 U.S. 1163, 1166 (2011) (Thomas, J., dissenting) (objecting to the Court’s denial of certiorari in another case presenting a constitutional challenge to the Body Armor Act and observing that “the lower courts have cried out for guidance from this Court” on the issue).

112. *See* David H. Gans, *Republicans Who Block Obama’s Supreme Court Pick Are Violating the Constitution*, NEW REPUBLIC (Mar. 16, 2016), <https://newrepublic.com/article/131700/republicans-block-obamas-supreme-court-pick-violating-constitution> (implying that Republicans refused to con-

groups made preventing President Obama from choosing Scalia’s successor their number one priority.<sup>113</sup> Senator Jerry Moran, a Kansas Republican, learned as much when he made the mistake of casually conceding at a Rotary Club event that he thought the Senate had “the responsibility to have a hearing” on an Obama nominee to replace Scalia.<sup>114</sup> He immediately found himself in the cross-hairs of organizations such as the Tea Party Patriots, the Judicial Crisis Network, and FreedomWorks (whose members flooded Moran’s office with 28,000 emails), with some critics suggesting that his comment merited recruiting a more trustworthy Republican to challenge Moran in the then-forthcoming August 2016 primary.<sup>115</sup> Moran, apparently a quick study on such matters, needed little time to reconsider his words and announce that he “didn’t need hearings to conclude that . . . Garland [was] unacceptable to serve on the Supreme Court.”<sup>116</sup>

What explains such impressive political mobilization in opposition to the nomination of a widely respected, highly qualified, relatively moderate sixty-three-year-old circuit judge to the Supreme Court? Only a belief that enormous and enduring consequences would result from replacing Scalia with just about *any* Democrat could explain action that swift and on that scale.<sup>117</sup> In fact, few if any on either side of the debate would contest the va-

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sider President Obama’s nominee because he does not follow the originalist viewpoints of Justice Scalia).

113. See Mike DeBonis, *Why the Effort to Keep Merrick Garland off the Supreme Court Has Been Remarkably Successful*, WASH. POST (Apr. 25, 2016), <https://www.washingtonpost.com/news/power-post/wp/2016/04/25/the-leader-of-the-opposition-to-merrick-garland-explains-why-hell-never-be-on-the-supreme-court/>; Eric Lipton, *Supreme Court Nomination Drives Groups From Left and Right to Fight*, N.Y. TIMES (Mar. 16, 2016), <https://www.nytimes.com/2016/03/17/us/politics/activists-protest-nomination-supreme-court.html>.

114. Jessie Hellman, *Tea Party Group Threatens Primary Challenge Over Supreme Court Hearings*, THE HILL (Mar. 25, 2016), <http://thehill.com/blogs/ballot-box/senate-races/274280-tea-party-group-threatens-to-primary-gop-senator-over-scotus>.

115. See Nick Gass & Seung Min Kim, *Conservatives Hammer GOP Senator Over Supreme Court Dissent*, POLITICO (Mar. 25, 2016), <https://www.politico.com/story/2016/03/jerry-moran-merrick-garland-tea-party-221233>; Amber Phillips, *Why Won’t Republicans Relent on Merrick Garland’s SCOTUS Nomination? Because of This Senator*, WASH. POST (Apr. 4, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/04/04/why-wont-republicans-give-in-on-merrick-garlands-supreme-court-nomination-because-jerry-moran/?utm\\_term=.1b124a899f54](https://www.washingtonpost.com/news/the-fix/wp/2016/04/04/why-wont-republicans-give-in-on-merrick-garlands-supreme-court-nomination-because-jerry-moran/?utm_term=.1b124a899f54).

116. Justin Wingter, *Sen. Jerry Moran Backtracks, ‘Didn’t Need Hearings’ for Supreme Court Nominee*, CJ ONLINE (Apr. 2, 2016), <http://www.cjonline.com/news/2016-04-02/sen-jerry-moran-backtracks-didnt-need-hearings-supreme-court-nominee>; see also Phillips, *supra* note 115.

117. See E.J. Dionne Jr., *A Supreme Court Fight for the Ages*, OMAHA WORLD-HERALD (Feb. 17, 2016), [http://www.omaha.com/opinion/e-j-dionne-a-supreme-court-fight-for-the-ages/article\\_4347fa52-aa41-553a-b6de-33c59da23be0.html](http://www.omaha.com/opinion/e-j-dionne-a-supreme-court-fight-for-the-ages/article_4347fa52-aa41-553a-b6de-33c59da23be0.html).

lidity of this view.<sup>118</sup> It was common ground that the stakes at issue were enormous.<sup>119</sup> A robust (and ideally justified) faith in the rule of law, however, would have dampened the ardor of partisans on both sides.<sup>120</sup> The intensity of the controversy surrounding the Garland nomination, and especially the paralysis that controversy induced, teaches that any such faith is well-nigh dead.<sup>121</sup>

As the *Patton* case illustrates, the *Agostini* rule at once reflects and facilitates the erosion of core rule-of-law values.<sup>122</sup> At its essence, the rule of law requires either that similar cases be resolved in similar fashion (consistency) or that a reasoned explanation of their material difference be provided (transparency).<sup>123</sup> But *Agostini* relieved the courts, High and low,<sup>124</sup> of

118. *See id.* (“Scalia’s death means that Obama or his successor—if a Democrat—could overturn the conservative majority on the court, which could lead it to revisit many of the most troubling decisions of recent years.”).

119. *See, e.g., id.*; Gregory Korte, *Bork Fight Still Haunts Supreme Court Confirmation Process*, USA TODAY (Mar. 7, 2016), <https://www.usatoday.com/story/news/politics/2016/03/07/bork-fight-still-looms-over-broken-supreme-court-confirmation-process/81414374> (“[T]he problem for Obama is not only that his nomination falls in an election year, but—like Bork—that nominee would likely change the balance of the court.”).

120. For present, if not all, purposes, John Locke’s description of the rule of law suffices. *See* JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, reprinted in *THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE* 27 (Paul E. Sigmund ed., 2005) (1689) (“[F]reedom of men under government is, to have a standing rule to live by, common to everyone of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.”). In the circumstances described by Locke, the identity, let alone the partisan affiliation of the magistrate matters little, so long as she or he is known to be a person of ability and integrity, which none disputed as to Merrick Garland. *See id.*; *see also* Matt Ford, *The Supreme Court Confirmation Battle Begins*, THE ATLANTIC (Mar. 16, 2016), <https://www.theatlantic.com/politics/archive/2016/03/obama-supreme-court-nominee/473784> (noting that Garland “ha[d] more federal judicial experience than any Supreme Court nominee in history,” and that he was a moderate in terms of political views).

121. *See* Monte Frank, James R. Silkenat & Jennifer Emens-Butler, *Senate’s Refusal to Move on Garland Continues to Undermine Rule of Law*, THE HILL (Apr. 26, 2016), <http://thehill.com/blogs/pundits-blog/the-judiciary/277615-senates-refusal-to-move-on-garland-continues-to-undermine>; *see also* David Smith, *Where the Supreme Court Battle Goes from Here: ‘There will be a Huge Fight,’* THE GUARDIAN (Dec. 31, 2016), <https://www.theguardian.com/law/2016/dec/31/donald-trump-supreme-court-picks-democrats-opposition>.

122. *See* *United States v. Patton*, 451 F.3d 615, 636 (10th Cir. 2006); *see also supra* notes 101–10 and accompanying text.

123. *See* Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. 1473, 1477 (2007) (observing that “consistency, stability, predictability, and transparency . . . are essential to the rule of law”); *see also infra* notes 127–34 and accompanying text.

124. We think that the *Agostini* bar on under-ruling produces many perverse consequences for

the twin, interrelated obligations of consistency and transparency insofar as the Carl Pattons of the world are concerned.<sup>125</sup> Patton’s case is, of course, but the tip of a very deep *Agostini* iceberg.<sup>126</sup>

When the judiciary is liberated from the constraints imposed by the rule of law’s related requirements of consistency and transparency, a fundamental distinction between judges and other policy makers dissolves.<sup>127</sup> A principal constraint on the judicial power is that whatever a court does for a friend, it must be willing to do for a foe.<sup>128</sup> This obligation counsels judicial caution and self-restraint, as a wise judge will be ever mindful that what today, in one context, might be celebrated as an enlightened innovation might become tomorrow’s beastly burden.<sup>129</sup> More concretely, the *Lopez* majority might have been more reticent about concluding, for the first time in nearly six decades, that a federal statute exceeded Congress’s Commerce Clause authority had those Justices known that their ruling would free the lower courts to reconsider the constitutionality of the thousands of federal criminal statutes on the books.<sup>130</sup>

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judges and litigants at all levels. *See supra* Parts III–IV. But in light of this symposium’s concern with what the Garland nomination teaches about the politicization of the Supreme Court, we focus our discussion in this essay on the rule’s impact on the Justices themselves. *See supra* Parts III–IV.

125. *See infra* notes 135–43 and accompanying text.

126. *See supra* Parts III–IV.

127. Alexander Tsesis, *Footholds of Constitutional Interpretation*, 91 TEX. L. REV. 1593, 1598 (2013) (describing the inability to follow established precedent as “substitut[ing] judicial fiat for representative policymaking” (quoting J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 92–93 (Oxford Uni. Press 2012))).

128. *See* Paul J. Mishkin & Clarence Morris, *ON LAW IN COURTS: AN INTRODUCTION TO JUDICIAL DEVELOPMENT OF CASE AND STATUTE LAW* 191 (1965) (“The ordinary judicial decision is closely related to an existing body of doctrines and precedents bearing on the issue before the court. The court has an obligation to line up these ordinary decisions with those authorities. This is the obligation of consistency.”). This principle is often evidenced in landmark First Amendment cases. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (“As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

129. *See* Caminker, *supra* note 29, at 11–12 (“Because today’s decision will be taken into account in future cases, the Court must judge not only what is best for today, but also how the current decision will affect the decision of other cases in the future.”).

130. *Cf.* Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL’Y 519, 579 (2008) (“[T]he Court in *Lopez* . . . declared that Congress cannot interfere with areas of ‘traditional state concern,’ such as crime and education, but did not explain why it had allowed Congress to pass over 3,000 criminal laws and establish a Depart-

It is no small irony that Judge Garland was nominated to fill the Supreme Court seat of Justice Antonin Scalia, who had warned his colleagues that a crucial difference between the properly political and the appropriately judicial, between law and politics, was that “the people, unlike judges, need not carry things to their logical conclusion” and that the Justices could avoid that obligation “only if . . . principle and logic have nothing to do with the decisions of this Court.”<sup>131</sup> Or as one of Justice Scalia’s lineal juridical ancestors, the Second Justice Harlan,<sup>132</sup> had decades earlier observed, once the Justices had awarded relief to one litigant, “when [a] similarly situated [litigant] comes before us, we must grant the same relief or give a principled reason for acting differently.”<sup>133</sup> Were the Court to fail in this duty, its rulings could no longer “properly be considered the legitimate products of a court of law, rather than the commands of a super-legislature.”<sup>134</sup>

As then-Judge McConnell eloquently explained in *Patton*, Alfonso Lopez and Carl Patton appeared to be similarly situated, at least insofar as the scope of Congress’s power under the Commerce Clause is concerned.<sup>135</sup> But the *Agostini* rule not only foreclosed the Tenth Circuit from granting Patton the same relief the Supreme Court had conferred on Lopez, but also relieved the inferior court of any need to supply a reasoned justification for this difference in treatment.<sup>136</sup> Nor have the Supreme Court Justices, who exercised their enviable discretion to sidestep Patton’s case<sup>137</sup> and others that raised the same issue,<sup>138</sup> offered to reconcile the rulings. Indeed, under ex-

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ment of Education.”); *see also supra* note 59 (citing additional lower-court cases illustrating how *Agostini* has allowed the Court to sidestep the implications of some of its more controversial departures from prior equilibria).

131. *See* *Lawrence v. Texas*, 539 U.S. 558, 604–05 (2003) (Scalia, J., dissenting) (prophetically rejecting the majority’s claim that its holding would not lead to a federal constitutional requirement that states recognize same-sex marriages). To be sure, another constraint on the Justices’ choices follows from the restriction that they declare “what the law is,” *Marbury v. Madison*, 5 U.S. 137, 177 (1803), only when necessary to the resolution of a live Article III case or controversy, though that restriction is to a great extent self-policed.

132. Justice Scalia replaced Justice Rehnquist, who had in turn replaced Justice Harlan. *See* Erwin Chemerinsky, *The Crowded Center*, 80 A.B.A. J. 78, 81 (1994).

133. *Desist v. United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting).

134. *Id.* at 259.

135. *See* *United States v. Patton*, 451 F.3d 615, 630 (10th Cir. 2006); *see also supra* notes 62–100 and accompanying text.

136. *See Patton*, 451 F.3d at 634–36.

137. *See Patton v. United States*, 549 U.S. 1213 (2007) (denying certiorari).

138. *See, e.g., Alderman v. United States*, 562 U.S. 1163 (2011) (denying certiorari in another case presenting a constitutional challenge to the 2002 Body Armor Act).

isting jurisdictional standards and practices, the Justices can easily avoid even the rather modest embarrassment of being directly confronted with the ramifications of their own rhetoric.<sup>139</sup> In recent years, the Supreme Court has averaged around seventy merits rulings per term.<sup>140</sup> Those cases are culled from a certiorari pool of nearly 10,000 petitions, which in turn constitute less than one-third of the annual merits decisions by the U.S. Courts of Appeals.<sup>141</sup> When the Court’s ability to deny review in a case like *Patton* (without either explanation or consequence)<sup>142</sup> is combined with *Agostini*’s insulation of the pre-*Lopez* legal equilibrium from the shockwave a decision as unsettling as *Lopez* would otherwise produce, the costs associated with lobbying *Lopez*-esque bombs are both attenuated and hidden.<sup>143</sup> Like legislative decrees, the judicial decisions in both *Lopez* and *Patton* stand as acts of will rather than judgment.<sup>144</sup>

Once again, it was Justice Scalia himself who memorably connected the erosion of the distinction between politics and law to the politicization of the Supreme Court and the exacerbation of the confirmation mess.<sup>145</sup> Noting “the twin facts that the American people love democracy and the American people are not fools,” he explained that

[a]s long as this Court thought (and the people thought) that we Jus-

139. See Peters, *supra* note 29, at 1102.

140. See Robert Barnes, *Scalia’s Death Affecting Next Term, Too? Pace of Accepted Cases at Supreme Court Slows*, WASH. POST (May 1, 2016), [https://www.washingtonpost.com/politics/courts\\_law/scalias-death-affecting-next-term-too-pace-of-accepted-cases-at-supreme-court-slows/2016/05/01/1d304d1c-0ecb-11e6-bfa1-4efa856caf2a\\_story.html?utm\\_term=.a10e03fe7b45](https://www.washingtonpost.com/politics/courts_law/scalias-death-affecting-next-term-too-pace-of-accepted-cases-at-supreme-court-slows/2016/05/01/1d304d1c-0ecb-11e6-bfa1-4efa856caf2a_story.html?utm_term=.a10e03fe7b45) (“In recent years, only about 70 or so cases receive writs of certiorari . . . signaling that the justices will review the decision of the lower court.”).

141. See Diarmuid F. O’Sconnlain, *Striking a Devil’s Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473, 482 tbl. 2 (2009) (noting that between October 1, 2007 and September 30, 2008, the U.S. Courts of Appeals decided 29,608 appeals on their merits).

142. At least since 1923, the Court has been explicit that its denial of certiorari is not to be accorded precedential significance. See *United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J., for a unanimous Court) (“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.”).

143. Cf. Peters, *supra* note 29, at 1102 (identifying situations in which the Supreme Court intentionally changes the legal doctrine established by prior cases but nevertheless declines to expressly overrule them in an effort to avoid scrutiny).

144. *But see* THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (describing the federal judiciary as having “neither Force nor Will, but merely judgment”).

145. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000–01 (1992) (Scalia, J., dissenting).

tices were doing essentially lawyers’ work up here—reading text and discerning our society’s traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making value judgments . . . , then a free and intelligent people’s attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. . . . [T]he people should demonstrate, to protest that we do not implement their values instead of ours. Not only that, but confirmation hearings for new Justices should deteriorate into question-and-answer sessions in which Senators go through a list of their constituents’ most favored and most disfavored alleged constitutional rights, and seek the nominee’s commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward.<sup>146</sup>

Poignantly, it was Justice Scalia’s own death that, at least to date, most clearly converted his prophecy to reality.<sup>147</sup> Within days of his passing, the Senate Republican leadership closed ranks to turn the 2016 presidential election into a plebiscite on the Supreme Court’s near-term agenda.<sup>148</sup> The only surprise is that anyone was surprised that they did so.<sup>149</sup>

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146. *Id.*

147. See *Supreme Court Timeline: From Scalia’s Death to Garland to Gorsuch*, USA TODAY (Jan. 31, 2017), <https://www.usatoday.com/story/news/politics/2017/01/31/timeline-of-events-after-the-death-of-justice-antonin-scalia/97299392>. Of course Justice Scalia found, as have so many others, it far easier to talk the talk than to walk the walk. For an argument by one of the authors of this article that Scalia’s actual exercise of power departed in significant ways from his prescriptions for himself and others, see generally A. Christopher Bryant, *What McDonald Means for Unenumerated Rights*, 45 GA. L. REV. 1073 (2011).

148. See Mitch McConnell & Chuck Grassley, *Democrats Shouldn’t Rob Voters of Chance to Replace Scalia*, WASH. POST (Feb. 18, 2016), [https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b\\_story.html?utm\\_term=.0c8775e2a884](https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b_story.html?utm_term=.0c8775e2a884).

149. Nor should it surprise anyone that the dysfunction has continued. See John Fritze, *Senate Voids Venerable Rule So It Can Confirm Gorsuch*, BALT. SUN (Apr. 7, 2017), [http://digitaledition.baltimoresun.com/tribune/article\\_popover.aspx?guid=42896cae-7af2-410c-8a40](http://digitaledition.baltimoresun.com/tribune/article_popover.aspx?guid=42896cae-7af2-410c-8a40)

## V. AN INTERROGATORY REMEDY

The tasks of saving the rule of law and the Republic far exceed both the scope of this essay and our humble abilities. But we do have a proposal to redress the *Agostini* piece of the puzzle.

The loophole created by the combination of the *Agostini* rule and the Supreme Court’s almost plenary control over its vanishing docket should be closed.<sup>150</sup> The *Agostini* half of it is a relatively recent, judicial invention.<sup>151</sup> The Court could simply renounce the dictum and return to the pre-1989 status quo,<sup>152</sup> which treated lower judges as peers rather than factotums.<sup>153</sup> But this solution is at least as unlikely as it is desirable.<sup>154</sup> The problem is that the Justices themselves undoubtedly like the loophole.<sup>155</sup>

Fortunately, an alternative, modest but likely efficacious remedy exists. Congress should amend the statutes governing the Supreme Court’s jurisdiction to allow federal circuit courts to certify cases for mandatory Supreme Court review.<sup>156</sup> This revision would of course leave in place, for the time being at least, the *Agostini* dictum, but it would ameliorate its most pernicious consequence, the ability of the Justices to avoid easily cases requiring

-152d4e7089ff. Indeed, as one distinguished commentator recently observed, after both the Republican recalcitrance in their opposition to Garland and the ensuing Democratic backlash against Gorsuch, it may now be “impossible for presidents to confirm any [Supreme Court] nominee at any point in their terms unless they also have control of the Senate.” Matt Flegenheimer, *The Roots of the Battle Over Neil Gorsuch: ‘They Started It,’* N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/us/politics/supreme-court-neil-gorsuch-senate.html> (quoting Jeffrey Rosen).

150. See *infra* note 152 and accompanying text.

151. See *supra* notes 54–55 and accompanying text.

152. See *supra* notes 32–33 and accompanying text.

153. See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

154. See Peters, *supra* note 29, at 1102; see also *supra* notes 137–39 and accompanying text.

155. See Peters, *supra* note 29, at 1102 (“[U]nderuling may allow the Court to have its cake and eat it too, preserving the appearance of impartiality while still correcting what the Court perceives as a wrongly decided precedent.”).

156. Limiting the Supreme Court’s wide discretion in the cases it hears is not revolutionary. See Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1243 (2012) (“On several occasions, Congress has altered the Supreme Court’s jurisdiction, which, in turn, has affected the Court’s docket.”). In fact, the Court’s docket was largely non-discretionary until the Judiciary Act of 1925. See *id.* at 1243–44 (“When it . . . enacted the Judiciary Act of 1925, Congress . . . limited the Court’s mandatory jurisdiction and expanded its discretionary docket. And, most recently in 1988, Congress passed legislation that removed virtually all of the Court’s mandatory jurisdiction, leaving Justices free to select the cases they wished to hear.”).

that they reconcile their more recent pronouncements with the older precedents still on the books.<sup>157</sup> When federal circuit courts confronted collisions between the two, they would not be restricted to hinting, as the *Patton* court did, that Supreme Court review might be appropriate.<sup>158</sup> They could force the issue.

We see no constitutional impediment to this proposed revision. The Court’s current luxurious control of its own docket is an anomaly when considered against its history, as during most of its life the great majority of its docket was non-discretionary.<sup>159</sup> Even quite recently, a significant portion of its docket was mandatory,<sup>160</sup> as indeed a few of its cases still are.<sup>161</sup>

Nor do we see any practical impediment to this jurisdictional alteration. The relative infrequency with which the *Agostini* rule appears in the federal reporters indicates that the number of cases at issue, while not trivial, would

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157. This proposal would prevent dilemmas like the one in *Patton*, where Circuit Courts are forced to adhere to Supreme Court precedent and hope that the Supreme Court will eventually resolve any “doctrinal inconsistency.” See *United States v. Patton*, 451 F.3d 615, 636 (10th Cir. 2006).

158. See *id.* (anticipating that the Supreme Court would “revisit this issue in an appropriate case—maybe even this one”); but see *Patton v. United States*, 549 U.S. 1213 (2007) (denying certiorari).

159. See Owens & Simon, *supra* note 156, at 1243–44. The docket remained largely non-discretionary until the Judiciary Act of 1925, which was the first time that Congress significantly reduced the Court’s mandatory docket by assigning many cases to its discretionary certiorari docket. See Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 WASH. & LEE L. REV. 737, 742–43 (2001); see also Jason Mazzone & Carl Emery Woock, *Federalism as Docket Control*, 94 N.C.L. REV. 7, 48–49 (2015) (explaining that the Judiciary Act of 1925 subjected a great portion of the Supreme Court’s jurisdiction to discretionary review, yet a significant mandatory docket remained until 1988).

160. See Owens & Simon, *supra* note 156, at 1244. Most recently, in 1988, Congress legislated further to eliminate even more classes of cases from the Court’s mandatory docket. *Id.*; Cordray & Cordray, *supra* note 159, at 751; Mazzone & Woock, *supra* note 159, at 49. The 1988 legislation erased four major classes of cases from the Court’s mandatory docket: direct appeals from a federal court decision that declared a federal statute unconstitutional; direct appeals from any decision of a federal court of appeals striking down a state statute as a violation of the federal Constitution, treaties, or laws; appeals from a state court of last resort holding a federal statute or treaty invalid; and appeals from a state court of last resort holding a state statute valid despite a challenge based on the federal Constitution, treaties, or laws. Cordray & Cordray, *supra* note 159, at 751; see also Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 977–78 (2013) (explaining that Congress eliminated most of the Court’s mandatory jurisdiction in 1988 pursuant to the Exceptions Clause of Article III).

161. See Cordray & Cordray, *supra* note 159, at 752. The few cases that remain on the Court’s mandatory docket include: cases under 28 U.S.C. § 1253, allowing for appeals in civil injunctive actions before three-judge district courts, and a very limited class of civil antitrust cases under the Antitrust Procedures and Penalties Act of 1974. *Id.*

not constitute an oppressive or unmanageable burden on the Justices.<sup>162</sup> They would, in any event, remain entirely free to dispense with the certified cases according to their best professional judgment, including by summary affirmance or reversal, the method by which they handle a substantial number of the rare cases they are presently obliged to decide.<sup>163</sup> Indeed, one possible objection to our proposal would be that the Justices could all too easily avoid its import by giving the certified cases only cursory attention.<sup>164</sup> This possibility ought not to dissuade the experiment, however, especially as merely forcing the cases onto the Court’s docket and out of the obscurity of the certiorari pool would raise the profile of the conflicts between what the Court has recently said and what it obliges the lower courts to do.<sup>165</sup> At some point, the rest of us must rely on shame to do its work.

And shame could be productive, as it would force the Justices to grapple with the implications of their theories, which would then be disciplined by the obligation (remaining at present on most other judges) to choose only those rules one is willing to live by.<sup>166</sup> This discipline would in turn be a small step towards making the Justices more judicial and their selection slightly less contentious. We suffer no delusions that our proposal could entirely remedy the present imbalance, which has been so long in the making and is the product of such a complex amalgam of social, cultural, intellectual, and political trends.<sup>167</sup> But there is reason to hope that such discipline

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162. The U.S. Courts of Appeals have cited *Agostini* 456 times since it was decided, but when confined to all citations even remotely concerning the under-ruling prohibition, the number drops to 252, for an annual average of 12.6. Even were every invocation to result in certification (an unlikely proposition), the trifling addition to the Supreme Court’s docket would be well within the capacity of a Court that not long ago decided more than twice the number of cases per term that it has over the last decade. (All citation counts are based on an April 2017 WESTLAW citation analysis.)

163. See, e.g., *Comptroller of Treasure of Md. v. Wynne*, 135 S. Ct. 1787, 1800 (2015) (“A summary affirmance ‘is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.’” (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977))).

164. See Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431, 471 (1996) (“[T]he Supreme Court has a summary reversal option, so it need not hear cases in order to reverse them.”); Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1293 (1979) (noting that some commentators view summary dismissals “as the functional equivalent of denials of certiorari”).

165. See Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts’ of Appeals Image*, 58 DUKE L.J. 1439, 1451(2009); see also Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 4 (2011).

166. See Caminker, *supra* note 29, at 11–12; see also *supra* notes 127–29 and accompanying text.

167. See generally Linzer, *supra* note 164 (discussing the evolution of the Supreme Court’s jurisdiction and of which cases it chooses to review).

would over time alter judicial and legal attitudes in the subtle but significant ways that will be necessary if any attempt to rescue the Court from its current quagmire is to succeed.<sup>168</sup>

## VI. CONCLUSION

The senatorial impasse on the Garland nomination reflects awareness, more widely shared than the professional elite either realized or is ready openly to acknowledge, that Supreme Court Justices at present enjoy a policy-making latitude little constrained by law.<sup>169</sup> As such, the importance of their selection has outgrown the institutional structures the framers provided and which had, with rare exceptions, previously functioned to keep the Court populated and relatively removed from the fiercest clashes of partisan politics.<sup>170</sup> Henceforth, however, the confirmation process for Supreme Court Justices may be subject to the same paralyzing gridlock that has made even modest technical fixes to major legislation impossible.<sup>171</sup>

Of what will likely be many post-mortem analyses of the Garland Affair, few will make mention of *Agostini*'s under-ruling prohibition. Ours has, however, because *Agostini* is both a creature and cause of a constitutional culture in which the Supreme Court has freed itself from the most elemental constraints of the rule of law.<sup>172</sup> By empowering itself to rule as it pleases in an instant case on the basis of a rationale in tension with but without effect on both prior precedents and their subsequent, mechanical application in the lower courts, the Supreme Court's embrace of the *Agostini* dictum relieves it of the twin rule-of-law duties of consistency and transparency.<sup>173</sup> Liberated from such constraints, the High Court functions more as a third legislative chamber—one with a roving veto authority over the acts of both Congress and the state legislatures.<sup>174</sup> It should come as no surprise that many Senators and the constituents they represent have proven unwilling to acquiesce placidly to the lifetime appointment to such an awesome tribunal

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168. See George & Gurthrie, *supra* note 165, at 1442–43.

169. See *supra* Part IV.

170. See *supra* notes 159–61 and accompanying text.

171. See *supra* notes 112–21 and accompanying text.

172. See *supra* notes 122–25 and accompanying text.

173. See *supra* notes 122–25 and accompanying text.

174. See Pushaw, *supra* note 142, at 531 n.54; see also *supra* note 134 and accompanying text.

of an individual who does not share their core values.<sup>175</sup>

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175. *See supra* notes 112–13 and accompanying text.