Written by **David Kelly** on December 20, 2022

Is an Imperial Supreme Court in Power?

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Justices on the U.S. Supreme Court have been scrutinized by just about everyone from politicians to legal scholars since the Court was established by the Constitution in 1787 and first assembled in 1790. For generations, SCOTUS decisions have changed the face as well as the fabric of our nation and governing bodies. Now we have legal scholars documenting their view on the "emergence of the imperial Supreme Court."

In November, Mark A. Lemley, a law professor at Stanford, wrote an article called "The Imperial Supreme Court" for *The Harvard Law Review*. This in-depth article claims that "conservative Justices on the Court have embarked on a radical restructuring of American law across a range of fields and disciplines."

Professor Lemley wrote, "The court has not been favoring one branch of government over another, or favoring states over the federal government, or the rights of people over governments," adding, "rather, it is withdrawing power from all of them at once."

Lemley continued, "It is a court that is consolidating its power, systematically undercutting any branch of government, federal or state, that might threaten that power, while at the same time undercutting individual rights."

The article covers SCOTUS actions on administrative agencies, Congress, states, federal courts, individual rights, and the justices' judicial philosophy as Lemley highlights cases and precedent to make his points of the Court going beyond its constitutional boundaries.

DNYUZ reporting on Lemley's critique of SCOTUS, reprinting a *New York Times* article, shared,

> Justice Elena Kagan noted the majority's imperial impulses in a dissent from a decision in June that limited the Environmental Protection Agency's ability to address climate change. "The court appoints itself — instead of Congress or the expert agency — the decision maker on climate policy," she wrote. "I cannot think of many things more frightening."

Another study to be published in Presidential Studies Quarterly concentrated on SCOTUS cases in questioning if the court is a "reliable backstop for an overreaching president" and or worse, a partisan court. This article found that by taking into account of 3,660 decisions since 1937, the study found that the court led since 2005 by Chief Justice John Roberts has been "uniquely willing to check executive authority."

"The study's authors, Rebecca L. Brown and Lee Epstein, both of the University of Southern California,

wrote that 'there is little indication that the Roberts court's willingness to rule against the president bears any reliable relation to preserving the balance among the branches or the workings and accountability of the democratic process,'" reported DNYUZ, adding, "Instead … there are increasingly frequent indications that the court is establishing a position of judicial supremacy over the president and Congress."

Pointing out the potential of a partisan court, Professor Brown shared in an interview, "When the court used to rule in favor of the president, they would do so with a sort of humility," she said. "They would say: 'It's not up to us to decide this. We will defer to the president. He wins.' Now the court says, 'The president wins because we think he's right.'"

Tejas Narechania, a law professor at the University of California, Berkeley, published this month "Certiorari in the Roberts Court," in which he explained his view of the current court. He wrote, "The Roberts court, more than any other court in history, uses its docket-setting discretion to select cases that allow it to revisit and overrule precedent."

The DNYUZ article shared that in September, in remarks at a judicial conference, Chief Justice Roberts insisted on the court's primacy. "You don't want the political branches telling you what the law is," he said, echoing Chief Justice John Marshall's famous statement in *Marbury v. Madison*, the foundational 1803 decision: "It is emphatically the province and duty of the judicial branch to say what the law is."

In regard to Lemley's study of the SCOTUS cases he highlighted, he found that "there is one consistent theme in the cases, however. They centralize power in the Supreme Court, which today is not only the most activist of any Court in the past century, but increasingly the locus of all legal power."

Lemley concluded by "suggesting, somewhat reluctantly, that we must begin to consider some more radical fixes to rein in the power of the Court, including changes to the number and tenure of Justices and limits on the Court's jurisdiction over certain matters. The objection to those measures — an objection I have long shared — has been that they will undermine the legitimacy of the Court, turning it in the minds of the public into just another political institution and undermining respect for the rule of law. But that ship has sailed."

These studies point to the growing political divide in this nation as well as to the importance of who is in power when appointing SCOTUS justices. Lemley warns that, in his opinion, "the immediate danger of the imperial Supreme Court is that it will damage our constitutional system by usurping power that doesn't belong to it."

If there is an imperial SCOTUS in development, the antithesis would be having a president such as Andrew Jackson, who is reported to have said "John Marshall has made his decision; now let him enforce it," in response to the 1832 decision in *Worcester v. Georgia*.

Only time will tell how this all plays out and if our Constitution can keep all the checks in balances in place regardless of who is president and who sits on the Court.