THE SENATE HAS NO CONSTITUTIONAL OBLIGATION TO CONSIDER NOMINEES

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INTRODUCTION

Justice Antonin Scalia's tragic and unexpected death sent shockwaves through the American legal community.[1] Few justices to sit on the Supreme Court have had as great an impact.[2] Justice Scalia's death also reignited the judicial confirmation wars. Conflict over judicial nominations had been smoldering,[3] but burst into flames once it became clear that President Obama would have the opportunity to nominate Justice Scalia's successor and, just prior to a presidential election, dramatically alter the ideological and doctrinal balance on the Court.[4]

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[1] *See* Robert Barnes, *Supreme Court Justice Antonin Scalia Dies at 79*, WASH. POST (Feb. 13, 2016), https://www.washingtonpost.com/politics/supreme-court-justice-antonin-scalia-dies-at-79/2016/02/13/effe8184-a62f-11e3-a5fa-55f0c77bf39c_story.html; Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0; *see also* Richard Wolf, *At Supreme Court, Justice Antonin Scalia's Impact Still Felt,* USA TODAY (May 9, 2016), http://www.usatoday.com/story/news/politics/2016/05/09/supreme-court-antonin-scalia-death-cases-decisions/83892680/.

[2] *See How Antonin Scalia Changed America*, POLITICO (Feb. 14, 2016), http://www.politico.com/magazine/story/2016/02/antonin-scalia-how-he-changed-america-213631; William Kelley, *Scalia's Lasting Impact on the Supreme Court*, CNBC (Feb. 14, 2016), http://www.cnbc.com/2016/02/14/scalias-lasting-impact-on-the-supreme-court-commentary.html; Jeffrey Rosen, *What Made Antonin Scalia Great*, THE ATLANTIC (Feb. 15, 2016), http://www.theatlantic.com/politics/archive/2016/02/what-made-antonin-scalia-great/462837/; Ilya Shapiro, *Scalia Will Be Impossible to Replace*, CNN (Feb. 15, 2016), http://www.cnn.com/2016/02/15/opinions/scalia-impossible-to-replace-shapiro/.

[3] *See, e.g.*, Russell Wheeler, *Confirming Federal Judges During the Final Two Years of the Obama Administration: Vacancies Up, Nominees Down*, BROOKINGS (Aug. 18, 2015), http://www.brookings.edu/blogs/fixgov/posts/2015/08/18-obama-federal-judges-confirmation-wheeler.

[4] *See* Adam Liptak, *Supreme Court Appointment Could Reshape American Life*, N.Y. TIMES (Feb. 18, 2016), http://www.nytimes.com/2016/02/19/us/politics/scalias-death-offers-best-chance-in-a-generation-to-reshape-supreme-court.html?_r=0 (discussing potential impact of Justice Scalia's replacement); *see also*, Erwin Chemerinsky, *The Conservative Era of the Supreme Court is Over*, L.A. TIMES, June 29, 2016, http://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-end-of-conservative-supreme-court-20160628-snap-story.html.

While replacing Justice Scalia with a justice appointed by a Democratic President would certainly have an effect on politically charged areas of the law in which the Court has recently split 5-4, it would also likely have an effect where the Court split 5-4 along non-traditional lines, such as criminal procedure,

Within hours of Justice Scalia's death, Senate Majority Leader Mitch McConnell preemptively announced that he would not allow a vote on a nomination to replace Justice Scalia prior to the election of a new President.[5] If the balance of the Supreme Court is to be altered, Senator McConnell and his allies declared, it should only occur after an intervening election in which the American electorate has the opportunity to consider what sort of change they would like to see on the Court.[6]

In response to the Senate Republican leadership's stated intention to refuse to consider any nominee to replace Justice Scalia, some began to argue that the Senate has a constitutional obligation to act on a Supreme Court nomination.[7] The progressive Alliance for Justice, for example, circulated a letter signed by more than 350 law professors arguing the Senate has a "constitutional duty" to provide a hearing and vote on a nominee to the Supreme

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where Justice Scalia often voted for more "liberal" outcomes. *See, e.g.*, Kevin Ring, *Antonin Scalia Was a Great Jurist for Criminal Defendants*, REASON (Feb. 16, 2016), http://reason.com/archives/2016/02/16/antonin-scalia-was-a-great-jurist-for-cr; Robert J. Smith, *Antonin Scalia's Other Legacy*, SLATE (Feb. 15, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/antonin_scalia_was_often_a_friend_of_criminal_defendants.html.

5 *See* Press Release, U.S. Senate Majority Leader Mitch McConnell, Justice Antonin Scalia (Feb. 13, 2016) [hereinafter McConnell Press Release], http://www.mcconnell.senate.gov/public/index.cfm/news?YearDisplay=2016&MonthDisplay=2&page=6; *see also* Susan Davis, *Scalia's Death Will Cast A Long Shadow Across This Year's Senate Races*, NAT'L PUB. RADIO (Feb. 15, 2016), http://www.npr.org/2016/02/15/466735802/scalia-s-death-and-the-2016-senate-races ("Within hours of Justice Antonin Scalia's death, Senate Majority Leader Mitch McConnell aimed to squash any expectation that President Obama will get to name his successor.").

6 *See* McConnell Press Release, *supra* note 5 ("The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President."); *see also* Orrin Hatch, *The Senate Is Justified in Waiting to Confirm a Supreme Court Nominee,* NAT'L REVIEW (Apr. 4, 2016), http://www.nationalreview.com/article/433570/merrick-garland-nomination-threatens-separation-powers.

7 *See, e.g.*, 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 ("The claims made by these senators that they can fulfill their 'advice and consent' responsibilities under the Constitution by doing nothing cannot be squared with the Constitution's text and history. The Constitution requires the president and Senate to work together to ensure a fully functioning Supreme Court."); Harry Reid, *Considering Merrick Garland's SC Nomination*, ASIAN J. (Apr. 7, 2016), http://asianjournal.com/editorial/considering-merrick-garlands-sc-nomination/ ("The Constitution does not exempt Senators from doing their jobs because it is an election year or because they don't like the President."); Nanya Springer, *Leading Constitutional Law Scholar Explains the Supreme Court Vacancy,* AM. CONST. SOC'Y (Feb. 19, 2016), http://www.acslaw.org/acsblog/leading-constitutional-law-scholar-explains-the-supreme-court-vacancy ("So, the Constitution creates a duty for the president to appoint Supreme Court justices by using the word 'shall.' There is no clause in Article II that says, 'but not in an election year.'" (quoting Erwin Chermerinsky, *Supreme Court Vacancy: What's Next?*, ACSLAW TALK PODCAST (Feb. 17, 2016) at 3:35–3:48, http://www.acslaw.org/sites/default/files/SCOTUS%20Vacancy%20-%20What's%20Next.mp3)); Geoffrey R. Stone, *Do the Right Thing: Obstruction of Supreme Court Nominee Sets a Disastrous Precedent for the Future*, AM. CONST. SOC'Y BLOG (Mar. 9, 2016), https://www.acslaw.org/acsblog/do-the-right-thing-obstruction-of-supreme-court-nominee-sets-a-disastrous-precedent-for-the.

Court.[8] This "obligation" is "clear," the letter proclaimed.[9] Harvard Law School Dean Martha Minow and Pepperdine School of Law Dean (and former judge) Deanell Tacha made a similar argument in the *Boston Globe*.[10] Vice President Joseph Biden also took to the op-ed pages to argue the Senate has a "constitutional obligation" to act on a Supreme Court nomination, and that fulfilling this "constitutional responsibility" requires "considering, debating, and voting on that nominee" on the floor of the Senate.[11] President Obama, for his part, proclaimed, "I have fulfilled my constitutional duty. Now it's time for the Senate to do theirs."[12]

The argument that the Senate has a constitutional obligation to act on a Supreme Court nomination is anything but "clear."[13] This claim finds no support in the relevant constitutional text, constitutional structure, or the history

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8 *Letter from Law Professors to Senate Leaders*, ALLIANCE FOR JUSTICE (Mar. 7, 2016), http://www.afj.org/wp-content/uploads/2016/03/Law-professor-SCOTUS-vacancy-letter.pdf. The letter reads, in part:

> As scholars deeply committed to the fair administration of justice, upholding the rule of law, and educating future generations of the legal profession, the undersigned professors of law urge you to fulfill your constitutional duty to give President Barack Obama's Supreme Court nominee a prompt and fair hearing and a timely vote.
>
> The Senate's obligation in this circumstance is clear. Under Article II of the Constitution, the president "shall appoint . . . judges to the Supreme Court," and the Senate's role is to provide "advice and consent." Yet before the president has even made a nomination to fill the current vacancy, a number of senators have announced that they will not perform their constitutional duty. Instead, they plan to withhold advice and consent until the next president is sworn in nearly a year from now. This preemptive abdication of duty is contrary to the process the framers envisioned in Article II, and threatens to diminish the integrity of our democratic institutions and the functioning of our constitutional government.

9 *Id.*

10 Martha Minow & Deanell Tacha, *US Needs a Government of Laws, Not People*, BOSTON GLOBE (Mar. 22, 2016), https://www.bostonglobe.com/opinion/2016/03/21/needs-government-laws-not-people/34oNmHmUH3TYEIbtXCQylM/story.html. The article reads in part:

> Article II of the Constitution is not ambiguous. It directs that the president "shall nominate, and by and with the advice and Consent of the Senate, shall appoint . . . judges of the Supreme Court." The senators swore their oath to the Constitution. An orderly process, adhering to these words of the Constitution, is not only what the law requires; it is essential to preserving the treasure that is our independent judiciary and rule of law.

11 Joseph R. Biden Jr., *Joe Biden: The Senate's Duty on a Supreme Court Nominee*, N.Y. TIMES (Mar. 3, 2016), http://www.nytimes.com/2016/03/04/opinion/joe-biden-the-senates-duty-to-advise-and-consent.html.

12 President Barack Obama, Remarks by the President Announcing Judge Merrick Garland as his Nominee to the Supreme Court (Mar. 16, 2016), https://www.whitehouse.gov/the-press-office/2016/03/16/remarks-president-announcing-judge-merrick-garland-his-nominee-supreme.

13 For arguments against the idea that there is a constitutional duty to consider Supreme Court nominations, *see, e.g.*, Vikram David Amar, *The Grave Risks of the Senate Republicans' Stated Refusal to Process Any Supreme Court Nominee President Obama Sends Them*, VERDICT (Feb. 26, 2016), https://verdict.justia.com/2016/02/26/the-grave-risks-of-the-senate-republicans-stated-refusal-to-process-any-supreme-court-nominee-president-obama-sends-them; Noah Feldman, *Obama and Republicans Are Both Wrong About Constitution*, BLOOMBERG (Feb. 17, 2016), https://www.bloomberg.com/view/articles/2016-02-17/obama-and-senate-are-both-wrong-about-the-constitution; *see also* Lana Ulrich, *Tracking the Controversy Over Judge Garland's Nomination*, CONST. CTR. (May 27, 2016), http://blog.constitutioncenter.org/2016/05/tracking-the-controversy-over-judge-garlands-nomination/;

of judicial nominations. While there are strong *policy* and *prudential* arguments that the Senate should promptly consider any and all nominations to legislatively authorized seats on the federal bench, and on the Supreme Court in particular, the argument that the Senate has some sort of constitutional obligation to take specific actions in response to a judicial nomination is erroneous. Interestingly enough, the argument that the Senate has an obligation to consider judicial nominations is not new. In the face of Senate intransigence on some of his judicial nominees, President George W. Bush declared that: "The Senate has a Constitutional obligation to vote up or down on a President's judicial nominees."[14] The argument was wrong then, and it is wrong now.

Senator McConnell's announcement of across-the-board opposition to any Supreme Court nominee undoubtedly escalated partisan conflict over judicial confirmations. There are many powerful arguments that such reflexive opposition is unwise and imprudent, and threatens to further undermine the functioning and independence of the federal judiciary.[15] These arguments do not, however, establish that refusal to consider the nomination of Judge Merrick Garland to replace Justice Scalia is unconstitutional.

I. TEXT

Article II, Section 2 of the United States Constitution provides for the appointment of federal judges. It reads, in relevant part:

> *The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint* Ambassadors, other public Ministers and Consuls, *Judges of the supreme Court*, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .[16]

This provision creates a three-part appointment process for federal judges (including justices to the Supreme Court).[17] First, the President nominates.

Adam White, *The Ginsburg Affair*, CITY J. (Aug. 4, 2016), http://www.city-journal.org/html/ginsburg-affair-14679.html.

14 Press Release, President George W. Bush, Statement on Judicial Nominations (Dec. 23, 2004), http://georgewbush-whitehouse.archives.gov/news/releases/2004/12/20041223-1.html. President Bush was hardly the first President to claim the Senate was obligated to act on presidential nominations. In 1789, President John Adams wrote that "[t]he whole senate must now deliberate on every appointment." John Adams, *John Adams to Roger Sherman*, *in* 4 THE FOUNDERS' CONSTITUTION 432 (Charles Francis Adams ed., 1850-56), http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s45.html.

15 *See, e.g.*, Amar, *supra* note 13 (noting that opposition to considering a nominee could backfire and escalate conflict over nominations).

16 U.S. CONST. art II, § 2 (emphasis added).

17 *See* Appointment of a Senate-Confirmed Nominee, 23 Op. O.L.C. 232, 232 (1999).

Second, the Senate provides advice and consent. Third, providing Senate consent has been forthcoming, the President then makes the appointment.

This process applies to Supreme Court justices, but it also applies to all other principal officers, ambassadors, and lower court judges.[18] The text itself makes no distinction among the various appointments covered by the clause. Further, nothing in this text imposes an affirmative obligation on the Senate to take any specific steps with regard to presidential nominees to the Supreme Court, let alone to hold hearings or a vote on the floor.[19]

The only apparent obligation imposed by Article II is in the declaration that the president "shall" make a nomination. This is an instruction to the President, however, and not to the Senate. The appointments clause conditions appointment on Senate consent. It does not impose an affirmative duty to consider a nominee in any particular way.

Understood in its historical context, it is not even clear the appointments clause imposes an affirmative obligation on the President.[20] While it is common to read the word "shall" in statutes to indicate an affirmative duty, it is not clear the Constitution should be read this way.[21] "The widespread view in modern statutory interpretation that 'shall' expresses a mandatory command does not easily cohere with 18th century constitutional drafting and 18th century American-English usage," argues Professor Seth Barrett Tillman.[22] Rather, Professor Tillman maintains, the word "shall" is often used in the Constitution to allocate authority and indicate a temporal sequence, rather than to impose a duty.[23]

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18 U.S. CONST. art II, § 2. The clause further provides "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.*

19 The claim that the Senate is obligated to hold hearings is particularly anomalous as judicial confirmation hearings are a relatively modern invention. There was not even a Senate Judiciary Committee until 1816 and the first time a Supreme Court nominee was called to testify before the Senate Judiciary Committee was 1925, and the second was in 1939. *Senate History: Nominations*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm (last visited Sept. 11, 2016).

20 *See, e.g.*, Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 762 n.123 (1999) ("[T]he Appointments Clause is best read as a grant of power rather than an affirmative duty.").

21 *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 112–15 (2012) (discussing the distinction between "mandatory" and "permissive" words).

22 Seth Barrett Tillman, *Does the President Have a Duty to Nominate Supreme Court Candidates? Does the Senate Have a Duty to Consider Nominees?*, THE NEW REFORM CLUB (March 18, 2016), http://reformclub.blogspot.com/2016/03/does-president-have-duty-to-nominate.html; *see also* Nora Rotter Tillman & Seth Barrett Tillman, *A Fragment on* Shall *and* May, 50 AMER. J. LEG. HIST. 453, 455–56 (2010).

23 *See, e.g.*, U.S. CONST. art. II, § 1, cl. 6 ("[T]he Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer *shall* then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.") (emphasis added). As Professor Tillman notes, it would be "odd" to maintain

The historical understanding of the Appointments Clause is consistent with this view. In *Marbury v. Madison*,[24] for example, Chief Justice John Marshall characterized the President's decision to nominate as "completely voluntary."[25] *Marbury* further characterized the subsequent appointment as "voluntary" as well, albeit contingent upon Senate "advice and consent."[26] This understanding is also consistent with that embraced by the Executive Branch, as represented by the opinions of the Department of Justice's Office of Legal Counsel ("OLC"). In a 1999 memo discussing whether the President is obligated to appoint and commission an officer after the Senate has consented to the appointment, OLC concluded that *all* steps in the appointments process, including Senate advice and consent, are "discretionary."[27] Given this understanding, it should be no surprise that, throughout the nation's history, Presidents have failed to make nominations to offices, including judgeships, covered by Article II, leaving such positions vacant and without any prospect for being filled.[28] They have even delayed making nominations to the Supreme Court when vacancies have arisen shortly before an election.[29]

Even if one were to conclude that Article II's declaration that the President "shall" make a nomination to fill a vacancy on the Supreme Court is mandatory, this is still insufficient to establish that the Senate has an affirmative obligation to take specific steps to consider the nomination. Under Article II, the Senate's role in the appointment process is to provide "advice and consent" before an appointment may be made. It is indisputable that the Senate may withhold its consent, and there is nothing in the text of the Constitution that suggests the Senate's failure to provide such consent must take any particular form. Much as the Senate may reject a legislative proposal that originated in the House of Representatives by voting it down, killing it in committee, or simply refusing to take up the measure, the Senate may withhold its consent by voting against confirmation of a nominee, rejecting the nomination in committee, or simply refusing to act.

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that the third use of "shall" in this clause imposes a mandatory duty. *See* Seth Barrett Tillman, *supra* note 22; *see also* U.S. CONST. art. II, § 2 (indicating that the President "shall be" Commander in Chief and "shall have power" to make treaties with the advice and consent of the Senate).

24 5 U.S. (1 Cranch) 137 (1803).

25 *See id.* at 155.

26 *Id.* (appointment of an officer "is . . . a voluntary act, though it can only be performed by and with the advice and consent of the Senate.").

27 *See* Appointment of a Senate-Confirmed Nominee, 23 Op. O.L.C. 232, 232 (1999) ("The Constitution thus calls for three steps before a presidential appointment is complete: first, the President's submission of a nomination to the Senate; second, the Senate's advice and consent; third, the President's appointment of the officer, evidenced by the signing of the commission. All three of these steps are discretionary.").

28 *See e.g.*, *Current Judicial Vacancies*, U.S. COURTS, http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies (last updated Oct. 11, 2016).

29 *See* Johnathan H. Adler, *In Election Years, a (Spotty) History of Confirming Court Nominees*, WASH. POST (Feb. 17, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/17/in-election-years-a-spotty-history-of-confirming-court-nominees/.

Other provisions of the Constitution reinforce the Senate's prerogative. Article I, Section 5 states, "[e]ach House may determine the Rules of its Proceedings."[30] This means that each house decides how to discharge its obligations, such as when and whether to rely upon committees or to impose specific procedural hurdles to final action. In the case of nominations, such hurdles for the consideration of judicial nominations have included allowing filibusters and sending nominations to the Senate Judiciary Committee, where many judicial nominations have gone to die.[31] As then-Senator Robert Byrd explained in a 2005 speech,

> There is no stipulation in the Constitution as to how the Senate is to express its advice or give its consent . . . . The Constitution itself does not say that each nominee is entitled to an up or down vote. The Constitution doesn't say that, it doesn't even say that there has to be a vote with respect to the giving of its consent. The Senate can refuse to confirm a nominee simply by saying nothing and doing nothing.[32]

Nor does the Constitution identify any criteria which the Senate is required to consider (or ignore) when deciding whether to consent to a nomination.

The history of the Appointments Clause confirms that Senate consent is a precondition for appointment, and not an affirmative duty. As documented by Adam J. White, the Constitution's drafters based Article II's appointment process on provisions in the Massachusetts Constitution of 1780.[33] Under the Massachusetts Constitution, however, it was common for the duty of "advice and consent" to be fulfilled by a refusal to consent, without any record of a vote or other formal action.[34] Further, as White details, the framers expressly rejected a proposal put forward by none other than James Madison that would have imposed a duty on the Senate to affirmatively reject a nomination of which the Senate disapproved.[35]

The Constitution contains multiple provisions under which one constitutional actor must obtain the consent of another in exercising constitutional authority, yet none of these provisions has ever been understood to create a

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30 U.S. CONST., art I, § 5.

31 Some of those who now claim the Senate has an affirmative duty to actively consider a Supreme Court nomination have previously defended the use of filibusters to prevent votes on judicial nominees, even when deployed for partisan reasons. *See, e.g.*, Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331, 331–32 (2005).

32 *Going Nuclear: The Threat to Our System of Checks and Balances* (C-SPAN2 television broadcast Apr. 25, 2005) (remarks of Sen. Robert C. Byrd, transcript *available at* https://cdn.americanprogress.org/wp-content/uploads/kf/GoingNuclearTranscript.pdf). The text of these remarks was subsequently placed in the *Congressional Record* by then-Senator Joseph Biden. Judicial Nominations, 151 CONG. REC. S. 4356, 4364 (Apr. 27, 2005) (statement of Sen. Joseph R. Biden, Jr.).

33 *See* Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J. L. & PUB. POL'Y 103, 132–33 (2005).

34 *Id.* at 135–40.

35 *Id.* at 141–46.

constitutional duty to act.[36] So, for instance, if the House passes a bill to raise revenue, the Senate is under no obligation to take up the measure. It may reject it simply by refusing to act. Article II, section 2 provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur,"[37] and yet there is no constitutional obligation for the Senate to schedule a vote or hearing on any treaty the President submits. And so on.

The Constitution does, however, consider the potential consequences of inaction in at least one instance: Article I, section 7, which outlines the requirements for a bill to become a law.[38] Under the normal course, once a bill has passed both houses of Congress, it is presented to the President. If the President signs the bill, it becomes a law. If, on the other hand, the President returns the bill with his objections (i.e., "vetoes" the bill) it does not become a law, unless the President's objections are overridden by a two-thirds vote in each house. In each of these cases, the President takes an affirmative step in response to the passage of a bill in Congress. But no affirmative step is required, and Article I, section 7 expressly addresses that possibility. It provides that if a President fails to act in response to the presentment of a bill, and neither signs nor vetoes it, the bill may nonetheless become law after ten days (provided other conditions are not met).[39] This suggests that if the framers understood the nomination of a justice to trigger an affirmative duty on the Senate to act—either by voting to approve or reject that nominee—Article II would say so (and, indeed, James Madison had proposed just such an obligation[40]). Instead, it establishes Senate "consent" as a precondition for an appointment to the bench, and such consent may be withheld by refusing to act.

A final point on the text. As noted above, the appointments clause in Article II makes no special provision for Supreme Court nominations. Rather, the reference to "Judges of the supreme Court" comes in the midst of other officers covered by the same clause, including "Ambassadors, other public Ministers and Consuls, . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for."[41] Thus, if the text requires the Senate to actively consider nominations to the Supreme Court, that same text would seem to require identical consideration of nominees to other offices governed by this clause, and yet such a claim is nearly impossible to maintain.

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36 *See* Amar, *supra* note 13 ("If we look at other constitutional settings in which one entity must consent to the proposal of another actor before the proposal can take legal effect, we have as a general matter not inferred any duty on the part of the second actor to do anything.").

37 U.S. CONST., art. II, § 2.

38 U.S. CONST., art. I, § 7.

39 *Id.* ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.").

40 *See* White, *supra* note 33, at 141–47.

41 U.S. CONST. art. II, § 2.

Neither the text nor the original understanding supports the claim that the Senate has an affirmative obligation to take any specific action in response to a Supreme Court nomination. If the proposition that the Senate has an affirmative obligation to consider a President's Supreme Court nomination is to stand, that argument must rest upon other grounds—grounds to which this essay now turns.

II. STRUCTURE

Some have argued that the Senate's failure to affirmatively consider a Supreme Court nomination is unconstitutional because it threatens the ability of the Court to function.[42] While the text of the Constitution may not impose an affirmative duty, this argument goes, an affirmative duty exists nonetheless because the failure to act threatens to undermine the constitutional structure by threatening the ability of the federal judiciary to fulfill its constitutional role. This argument is no more convincing than appeals to the text.

Article III of the Constitution provides for a Supreme Court.[43] It does not, however, provide for a set number of seats on the Court. There is no constitutional requirement that the Court have nine justices, or even an odd number. As originally constituted, there were six seats on the Court,[44] and federal law today still defines a quorum of the Court as six justices.[45] Refusing to fill a ninth seat may leave the Court deadlocked in a handful of cases—as may occur when a justice is required to recuse from a case—but it is hardly tantamount to eliminating the Supreme Court.[46] Leaving the Court with an even number of justices may be inefficient or unwise, but it is hardly unconstitutional. Were it otherwise, the Senate's obligation would extend to ensuring that each vacancy is filled—not merely that each nomination is considered—and such an obligation would eviscerate the Senate's power to withhold "advice and consent."

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42 For instance, at a recent debate on this question Dean Erwin Chemerinsky argued that the Senate has a constitutional obligation to act because "one branch . . . . can't interfere with the functioning of another . . . ." *Does the Senate Have a Duty to Hold Hearings on Supreme Court Nominees?*, NAT'L CONST. CTR. 4:04 – 4:09 (Apr. 7, 2016), http://blog.constitutioncenter.org/2016/04/podcast-does-the-senate-have-a-duty-to-hold-hearings-for-supreme-court-nominees/; *see also* Minow & Tacha, *supra* note 10.

43 *See* U.S. CONST., art. III.

44 Federal Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73 (1789).

45 28 U.S.C. § 1 (2012) ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.").

46 Justice Elena Kagan was required to recuse in twenty-eight cases during her first term on the Court. This amounted to over one-third of the Court's docket, and yet the Court still functioned. *See* Stephen Wermiel, *SCOTUS for Law Students (Sponsored by Bloomberg Law): Justice Kagan's Recusals*, SCOTUSBLOG (Oct. 9, 2012), http://www.scotusblog.com/2012/10/scotus-for-law-students-sponsored-by-bloomberg-law-justice-kagans-recusals/.

There is no question that Congress has the power to expand or reduce the size of the Court, and that this power could be used to impair the functioning of the Supreme Court and of lower courts.[47] Dramatically reducing the number of lower courts would impair the functioning of the federal judiciary, but it would be constitutional.[48] That the Senate's power to consent—or withhold consent—to the filling of judicial vacancies imposes similar risks is insufficient to create a constitutional obligation to act in a particular way. Just as Congress regularly uses its power over appropriations to advance substantive policy goals, the Senate may use its advice and consent power to affect the size and functioning of the federal judiciary. That this power may be misused does not disprove the existence of the power. The same can be said for Congress's power to enact other regulations governing the functioning of the judiciary. Some such regulations may enhance the judiciary's ability to function, while others may impair it. Regulations of the latter sort are not inherently unconstitutional. As Justice Joseph Story warned:

> It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to ingraft upon a general power a restriction which is not to be found in the terms in which it is given.[49]

Even those who argue that the Senate has an obligation to consider nominations recognize that the Senate may exercise this power to refuse to confirm a President's nominees, or block their consideration by the full Senate.[50] One way for the Senate to refuse consent is to vote against nominees. This power is just as prone to misuse as the power to refuse to consider a nomination. A seat on the Supreme Court remains open today because the Senate has refused to act. In the past, however, seats have remained open because the Senate refused to confirm a President's nominees. When Associate Justice Abe Fortas stepped down in May 1969 under a cloud of scandal, it would be a full year before his replacement was confirmed, as the Senate rejected President Richard Nixon's first two nominees for the seat (Clement Haynsworth and Harold Carswell) before confirming Harry Blackmun.[51]

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47 *See* Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803) (upholding the Repeal Act of Mar. 8, 1802 which abolished numerous federal judgeships).

48 I leave aside the question whether it would be constitutional for the Senate to permanently refuse to fill any Supreme Court vacancy. There is an argument such an action would violate Article III, which provides that there must be a Supreme Court. In the present instance, however, all that is at issue is whether the Senate is acting unconstitutionally by refusing to consider a single Supreme Court nomination for a limited period of time.

49 *See* Martin v. Hunter's Lessee, 14 U.S. 304, 344–45 (1816).

50 *See, e.g.* Fisk & Chemerinsky, *supra* note 31.

51 *See* Henry B. Hogue, *Supreme Court Nominations Not Confirmed, 1789 – August 2010*, CONG. RESEARCH SERV. 9–10 (Aug. 20, 2010), https://fas.org/sgp/crs/misc/RL31171.pdf; *Harry A. Blackmun, 1970–1994*, THE SUP. CT. HIST. SOC'Y, http://supremecourthistory.org/timeline_blackmun.html (last visited Sept. 14, 2016).

President John Tyler had it far worse than President Nixon. In the 1840s, the Senate rejected several of Tyler's nominees to the Supreme Court, leaving a seat vacant for over 800 days.[52] Among those rejected was Rueben Walworth, whose nomination was withdrawn (twice!) when the Senate refused to consider it.[53] The Senate's response to President Tyler's nominations may have been imprudent or unstatesmanlike, but it was hardly unconstitutional. The same can be said of the Senate's refusal to consider a nomination. Likewise, many would suggest that the Senate's recurring failure to act on nominations to fill lower court vacancies, particularly where "judicial emergencies" have been declared, impairs the functioning of the judiciary.[54] This does not, however, mean that the Senate is acting unconstitutionally when it reaches a different judgment about the advisability of filling a given judicial vacancy or otherwise withholds its consent.

III. HISTORY

Recognizing that neither the text nor structure of the Constitution is sufficient to impose a constitutional obligation on the Senate to consider a President's Supreme Court nomination, some have argued that such an obligation may be derived from the history of judicial nominations.[55] It is widely accepted that consistent practice may inform the resolution of constitutional questions.[56] Thus, if the Senate were to have a long, unbroken practice of considering judicial nominations in a particular fashion, there would be a colorable argument that this practice has a constitutional dimension, and that

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52 *See* 138 CONG. REC. 16,310 (1992) (noting that "a seat remained vacant for 28 months"); Drew DeSilver, *Long Supreme Court Vacancies Used To Be More Common*, PEW RES. CTR. (Feb. 26, 2016), http://www.pewresearch.org/fact-tank/2016/02/26/long-supreme-court-vacancies-used-to-be-more-common/.

53 *See* ARTEMUS WARD ET AL., HISTORICAL DICTIONARY OF THE U.S. SUPREME COURT 536 (2015).

54 *See* Alicia Bannon, *The Impact of Judicial Vacancies on Federal Trial Courts*, BRENNAN CTR. FOR JUST. (July 21, 2014), https://www.brennancenter.org/sites/default/files/publications/Impact%20of%20Judicial%20Vacancies%20072114.pdf; Russell Wheeler & Sarah Binder, *Do Judicial Emergencies Matter? Nomination and Confirmation Delay During the 111th Congress*, BROOKINGS INST. (Feb. 16, 2011), https://www.brookings.edu/research/do-judicial-emergencies-matter-nomination-and-confirmation-delay-during-the-111th-congress/. For a current listing of judicial emergencies, see *Judicial Emergencies*, http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies (last updated Oct. 11, 2016).

55 *See, e.g.*, Gans, *supra* note 7; Stone, *supra* note 7.

56 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 401 (1819) (noting that precise contours of each branch's powers may be defined and clarified by practice). *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("a systemic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.").

the failure to abide by this practice is tantamount to violation of a constitutional duty.[57] Yet no such historical norm exists.

There is a long history of Senate refusal to fill judicial vacancies, including by a simple refusal to consider Presidential nominees. As summarized by the Congressional Research Service:

> From the appointment of the first Justices in 1789 through its consideration of nominee Elena Kagan in 2010, the Senate has confirmed 124 Supreme Court nominations out of 160 received. Of the 36 nominations which were not confirmed, 11 were rejected outright in roll-call votes by the Senate, while nearly all of the rest, in the face of substantial committee or Senate opposition to the nominee or the President, were withdrawn by the President, or were postponed, tabled, or never voted on by the Senate.[58]

Most Supreme Court nominees have been confirmed, but there is nothing approaching an unbroken practice of confirmation, or even of active consideration of nominees. This is particularly so when one considers lower courts.[59] Looking more broadly at all nominations covered by Article II, one finds an even more widespread practice of a failure to act on Presidential nominees. As Professor Anne Joseph O'Connell has documented, positions subject to Senate confirmation have been "empty (or filled by acting officials), on average, one quarter of the time" during the administrations of President Jimmy Carter through President George W. Bush.[60]

As judicial confirmation fights have escalated over the past three decades, it has become increasingly common for the Senate to refuse to consider judicial nominations made during an election year.[61] In April 1988, for example, President Ronald Reagan nominated Judith Richards Hope to an open seat on the U.S. Court of Appeals for the D.C. Circuit.[62] She never received

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57 Consistent practice, by itself, is not necessarily sufficient to create a constitutional limitation or rule. For instance, prior to President Franklin D. Roosevelt, no President had ever sought re-election for a third consecutive term. It was nonetheless perfectly constitutional for FDR to seek a third and fourth term. Turning the two-consecutive-term norm into a constitutional rule required a constitutional amendment. *See* U.S. CONST., amend XXII.

58 *See* BARRY J. MCMILLION, CONG. RES. SERV., R44234, SUPREME COURT APPOINTMENT PROCESS: SENATE DEBATE AND CONFIRMATION VOTE (2015). The report summary also notes that "Six of the unconfirmed nominations, however, involved individuals who subsequently were re-nominated and confirmed." *Id.*

59 *See, e.g.*, DENIS STEVEN RUTKUS & KEVIN M. SCOTT, CONG. RES. SERV., RL34615, NOMINATION AND CONFIRMATION OF LOWER FEDERAL COURT JUDGES IN PRESIDENTIAL ELECTION YEARS (2008).

60 *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 921 (2009).

61 *See* Carl Tobias, *Filling Federal Court Vacancies in a Presidential Election Year*, 50 U. RICH. L. REV. 1233, 1233 (2016) (noting widespread understanding that "confirmations slow and ultimately halt over presidential election years").

62 *See Hope In-Law for Bork Seat,* N.Y. TIMES (Apr. 15, 1988), http://www.nytimes.com/1988/04/15/us/hope-in-law-for-bork-seat.html.

a hearing, let alone a vote. As both the *Washington Post* and *New York Times* reported at the time, the reasons were simple: Senate Democrats did not want to allow a Republican president to alter the balance of an important court in the year before an election.[63]

Many nominations made within a year of the next presidential election suffered a similar fate. John Roberts, for example, was first nominated to the U.S. Court of Appeals for the D.C. Circuit in January 1992, and the Senate took no action on his nomination.[64] The same was true for University of Virginia law professor Lillian BeVier who was nominated to the U.S. Court of Appeals for the Fourth Circuit in October 1991.[65] Professor BeVier was the first full-time female faculty member at the University of Virginia's law school and a prominent constitutional law scholar, but she never received a hearing, let alone a vote. Eastern District Court Judge Terrence Boyle was also nominated in 1991 and did not receive a hearing either.[66] These were not isolated examples. Over the past few decades, dozens of judicial nominations have been defeated by the Senate's simple refusal to take any formal action before the end of a President's term.[67] Further, as the Congressional Research Service has noted, one common reason for Senate refusal to act is the Senate majority's desire to leave seats open so that they may be filled by the next occupant of the White House.[68]

The Senate's recent history of refusing to consider judicial nominations made within a year of a pending Presidential election is largely confined to lower court nominees. Supreme Court nominations are much more rare, and election-year nominations are rarer still. Prior to Justice Scalia's death, the opportunity to make a Supreme Court nomination in a presidential election year had only arisen twice since World War II. In neither case, however, was there a confirmation prior to the election.

Most recently, in 1968, Chief Justice Earl Warren announced his intention to resign upon the confirmation of his successor. President Lyndon Johnson's decision to nominate Associate Justice Abe Fortas to be Chief Justice (and nomination of Homer Thornberry to fill Justice Fortas's seat) was con-

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63 *See* Saundra Torry, *D.C. Lawyer's Nomination to Court of Appeals Appears Stalled*, WASH. POST (Sept. 9, 1988), https://www.washingtonpost.com/archive/local/1988/09/09/dc-lawyers-nomination-to-court-of-appeals-appears-stalled/b8e4df04-2cf4-4eb9-9c8d-fbc2c569f171/; Susan F. Rasky and Linda Greenhouse, *Washington Talk: Briefing; A Second Chance?,* N.Y. TIMES (Nov. 18, 1988), http://www.nytimes.com/1988/11/18/us/washington-talk-briefing-a-second-chance.html.

64 *See History of the Federal Judiciary: Unsuccessful Nominations and Recess Appointments*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/judges_nominations.html (last visited Oct. 8, 2016) (charting the history of unsuccessful nominations by presidency).

65 *Id.*

66 *Id.*

67 *See* Rutkus & Scott, *supra* note 59.

68 *Id.* at 45–46.

troversial for many reasons, including "the propriety of a lameduck nomination."[69] Opposition to confirming Fortas was bipartisan. While Southern Democrats opposed his record supporting civil rights, other Senators were concerned about his alleged ethical improprieties, and others did not like the idea of filling a Supreme Court seat on the eve of an election.[70] Senator Robert Griffin, for example, declared there was "ample precedent" for the position that "the opportunity to make such nominations at this particular point in time should be reserved for the new President soon to be elected by the people," even if "for purely political reasons."[71] In the end, the Fortas nomination was defeated (and the Thornberry nomination along with it) when a cloture vote failed.

In September 1956, Justice Sherman Minton left the Court due to ill health. President Dwight Eisenhower filled the vacancy with the recess appointment of William Brennan, a Democrat. In January, after his re-election, President Eisenhower nominated Brennan to fill the empty seat, and the Senate confirmed him by a voice vote in March.[72] Although Eisenhower had not sought to fill the position permanently on the eve of the election—and picked someone of the opposite political party—it was still controversial. In 1960, the Senate passed a resolution opposing the use of recess appointments to fill Supreme Court vacancies.[73]

The last time a Supreme Court vacancy arose in the calendar year of a Presidential election and was filled prior to aelection was in 1932, when the Senate confirmed Benjamin Cardozo to fill the seat vacated by Justice Oliver Wendell Holmes.[74] Facing a Senate that was split down the middle, and an impending election, President Herbert Hoover, a Republican, decided to nominate a prominent Democrat to fill the seat.

In June 1992, when considering the possibility of an election-year vacancy to the Supreme Court, then-Senator Joseph Biden spoke on the Senate

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69 *See* 138 CONG. REC. 16,311 (1992) (statement of Sen. Biden).

70 *Id* at 16,316. ("And the 1968 filibuster against Abe Fortas' nomination—an assault that was launched by 19 Republican Senators, *before President Johnson had even named Fortas as his selection*—is similarly well known by all who follow this." (emphasis added)); *see also* 133 CONG. REC. 27,027 (1987) (statement of Sen. Maj. Ldr. Mitchell).

71 See *Nomination of Abe Fortas, of Tennessee, to be Chief Justice of the United States and Nomination of Homer Thornberry, of Texas, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 90th Cong. 45 (1968) (statement of Sen. Robert Griffin).

72 *See William J. Brennan, Jr., 1956-1990*, SUP. CT. HIST. SOC'Y, http://supremecourthistory.org/timeline_brennan.html (last visited Oct. 8, 2016).

73 *See* 106 CONG. REC. 18,145 (1960).

74 *See* John Anthony Maltese, *The Long History of Presidents Nominating Supreme Court Justices in Presidential Election Years,* THE COOK POL. REP. (Feb. 15, 2016), http://cookpolitical.com/story/9260. Justice Pierce Butler left the Court within twelve months of a presidential election, but not in an election year. He stepped down in November 1939. The Senate confirmed Justice Frank Murphy to replace Butler in 1940. *See Frank W. Murphy, 1940-1949*, SUP. CT. HIST. SOC'Y, http://supremecourthistory.org/timeline_murphy.html (last visited Oct. 8, 2016).

floor of "the tradition against acting on Supreme court nominations in a Presidential year."[75] In extended remarks, the then-Chairman of the Senate Judiciary Committee reviewed the history of Supreme Court nomination fights, explained why he believed Senate Democrats would be justified in delaying action on any prospective Supreme Court nominee should a vacancy occur prior to the election, and discussed how the Senate and President should work together on future Supreme Court nominations in future years. Senator Biden argued that should there be a Supreme Court vacancy that year, the President "should consider following the practice of a majority of his predecessors, and not—and not—name a nominee until after the November election is completed."[76] He added further that were such a nomination made, and the President were to go "the way of Presidents Fillmore and Johnson" and "press[] an election-year nomination, the Senate Judiciary Committee should seriously consider not scheduling confirmation hearings on the nomination until after the campaign season is over."[77] Senator Biden further noted that "no Justice has ever been confirmed in September or October of an election year—the sort of timing which has become standard in the modern confirmation process."[78]

Then-Senator Biden no doubt overstated the existence of a meaningful tradition against confirming Supreme Court justices in election years. There is no such meaningful tradition, but nor is there a meaningful tradition of filling Supreme Court vacancies that arise in election years either. In some cases, Presidents have refrained from making such appointments until after the election. In other cases, when nominations were made, the Senate refused to act prior to voters casting their ballots. Where the Senate responded quickly to pre-election nominations, it has usually been when the Senate majority and the President were of the same political party and the overall balance of the Court was not at stake.

All told, there have been 15 occasions in which a vacancy arose in an election year, defined as a vacancy that occurred within a year prior to the election.[79] Only seven of these vacancies were filled by a nominee confirmed

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75 138 CONG. REC. 16,316 (1992) (statement of Sen. Biden).

76 *Id*. at 16,317.

77 *Id.*

78 *Id.* at 16,316.

79 The fifteen vacancies were as follows:

- Sept. 30, 1800, filled on Jan. 27, 1801 by John Marshall;
- Jan. 26, 1804, filled on Mar. 24, 1804 by William Johnson;
- Aug. 25, 1828, filled on Mar. 7, 1829 by John McLean;
- Dec. 18, 1843, filled on Feb. 14, 1845 by Samuel Nelson;
- Apr. 21, 1844, filled on Aug. 4, 1846 by Robert Cooper Grier;
- July 19, 1852, filled on Mar. 22, 1853 by John Archibald Campbell;
- May 31, 1860, filled on July 16, 1862 by Samuel Freeman Miller;
- Oct. 12, 1864, filled on Dec. 6, 1864 by Salmon Chase;
- Mar. 23, 1888, filled on July 20, 1888 by Melville Fuller;
- Jan. 22, 1892, filled on July 26, 1892 by George Shiras Jr.;

by the Senate prior to the election.[80] In two others, a president's election year nominees were confirmed after the election, but in both of these cases the nomination was not made until after the election either (and in one, the nominee was the sixth sent up for that seat). The remaining vacancies were not filled until later, usually by subsequent presidents. Justice Anthony Kennedy was confirmed in a presidential election year, 1988, although the vacancy arose and his nomination was first made in 1987, after two prior nominations had failed.[81] In sum, there are too few instances of election-year vacancies upon which to build *any* claim of historical practice, in either direction, let alone the sort of unbroken tradition that could ripen into a constitutional norm obligating the Senate to act.

In an extensive and thoughtful article, Professors Robin Bradley Kar and Jason Mazzone argue that the Senate majority's refusal to consider the Garland nomination is historically unprecedented and violates a longstanding "historical rule" governing nominations:

> Whenever a Supreme Court vacancy has existed during an elected President's term and the President has acted prior to the election of a successor, the sitting President has been able to both nominate and appoint someone to fill the relevant vacancy, by and with the advice and consent of the Senate.[82]

- Jan. 2, 1916, filled on June 1, 1916 by Louis Brandeis;
- June 10, 1916, filled on July 24, 1916 by John Hessin Clarke;
- Jan. 12, 1932, filled on Feb. 24, 1932 by Benjamin Cardozo;
- Nov. 16, 1939, filled on Jan. 16, 1940 by Frank Murphy;
- Oct .15, 1956, filled on Mar. 19, 1957 by William Brennan.

See Jonathan H. Adler, *In Election Years, A (Spotty) History of Confirming Court Nominees,* WASH. POST (Feb. 16, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/17/in-election-years-a-spotty-history-of-confirming-court-nominees/; *Timeline of the Justices,* SUP. CT. HIST. SOC'Y, http://supremecourthistory.org/history_timeline.html (last visited Oct. 8, 2016); *Supreme Court Nominations, Present-1789*, UNITED STATES SENATE, http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited Oct. 8, 2016).

80 The seven nominees approved prior to the election were: Johnson, Fuller, Shiras, Brandeis, Clarke, Cardozo, and Murphy. *See Supreme Court Nominations, present-1789*, UNITED STATES SENATE, http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited Oct. 8, 2016).

81 President Ronald Reagan first nominated Judge Robert Bork to replace the Justice Lewis Powell. After the Senate rejected Bork's nomination, Reagan nominated Judge Douglas Ginsburg, but Judge Ginsburg withdrew his nomination after only a few days, and before his nomination was formally submitted to the Senate. Although Powell stepped down in June 1987, the approaching presidential election and the potential for his replacement to alter the balance of the Court, made the confirmation process for his successor more contentious than it might otherwise have been. As then-Senator Joseph Biden would recount in 1992, many "questioned our committee's ability to fairly process the Bork nomination—a year before the 1988 campaign—without becoming entangled in Presidential politics." 138 CONG. REC. 16,316 (1992) (statement of Sen. Biden).

82 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, 62–63 (2016).

The gerrymandered formulation of this rule—which seems to imply the Senate must confirm, and not merely consider, a nominee—should be sufficient to demonstrate that there is no constitutional norm with regard to Senate conduct, and certainly no norm requiring affirmative consideration of a nominee.[83]

In order to determine whether there is a constitutional norm governing Supreme Court nominations, one cannot consider Senate conduct in isolation. After all, as Kar and Mazzone note, the process necessarily involves engagement between the executive and legislative branch. Thus, one would have to consider the possibility of a norm of Senate conduct in conjunction with the possibility of a norm of presidential conduct, such as a norm against forwarding nominations to fill vacancies that arise in an election year prior to an election when the Senate is controlled by the opposition party.

Kar and Mazzone discount the Senate's rejection of Fortas (because there was no actual vacancy) and place substantial emphasis on the fact that the Senate has most commonly rejected election-year nominations when the President obtained office by succession. Yet they do not consider what effect (if any) the adoption of presidential term limits should have on the analysis (insofar as it creates the possibility of lame-duck nominations by Presidents who are no longer politically accountable to the electorate) and fail to consider what relevance, if any, the practice of many Presidents to defer making a nomination until after the intervening election should have on the analysis. The point here, again, is not that there is a precedent in support of the Senate's current obstruction. There is not. Instead, the point is far more modest—that there is no countervailing constitutional norm that could support a claim of constitutional obligation.

Any attempt to argue that there is a constitutional norm sufficient to create a constitutional obligation for the Senate to act to confirm an election year nomination is plagued by the problem that there are so few cases to examine. As already noted, the death of Justice Scalia created the first election-year vacancy in over fifty years. Skipping over the Fortas nomination, the last time a President made a nomination to fill an election year vacancy was in 1940, when the White House and Congress were aligned and there was no prospect of a confirmation altering the balance of the Court.

While there are relatively few instances in which the Senate considered a President's nominee to fill a Supreme Court vacancy that arose during an election year, there are numerous examples of the Senate refusing to confirm—indeed, even refusing to consider—a President's nominees to lower courts when the nominations were made during an election year. A few of these were discussed above. Kar and Mazzone discount the relevance of these nominations, however, arguing that the Supreme Court is different. They write:

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83 For a critique of this view, *see* White, *supra* note 13.

> Lower federal judges are not inferior officers and they have Article III protections. Thus, appointments related to lower federal judges might seem to provide an important counterexample to the previous argument. Still, lower courts are themselves created by legislation whereas the Supreme Court is established by the Constitution and cannot be extinguished by Congress. Hence, Congress's greater power to create or abolish lower federal courts through legislation arguably include the lesser power to implicitly consent to long-standing senatorial practices that allow for the transfer of some lower federal judicial appointments submitted late in a president's final term. Once again, however, no analogous legislative power exists with respect to the Supreme Court.[84]

Here Kar and Mazzone seek to manufacture a distinction that simply does not exist in the Constitution. As noted above, individual seats on the Supreme Court are as much a creature of "legislative act" as are lower federal courts. If Congress's power to extinguish seats on lower courts means the Senate may choose "to let certain late appointments to those courts lapse shortly before a presidential transition," there is no reason why this would not apply to the ninth seat on the Supreme Court.[85]

The long and short of this analysis is that there is no well-established tradition of successful nominations to fill judicial vacancies in election years. There are few such instances, and none in the modern era on all fours with the present. If anything, there is a tradition of seeking to avoid this scenario. Again, the claim is not that precedent supports the refusal to consider a replacement for Justice Scalia prior to the election. Rather, the claim is that there is no well-established precedent—and nothing remotely resembling a constitutional norm—to the contrary.

IV. ESCAPING THE DOWNWARD SPIRAL

Senate Majority Leader Mitch McConnell's announcement that he would refuse to consider any nomination to replace Justice Antonin Scalia prior to the 2016 election did not occur in a vacuum. Although unprecedented (and, in my view, unwarranted), it occurred against a backdrop of ever increasing polarization and conflict in the judicial nomination process.

Since the mid-1980s, the judicial confirmation process has been in a downward spiral of increasing obstruction and dysfunction.[86] Over this period, each side has engaged in an escalating game of tit-for-tat, using Senate

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84 *See* Kar & Mazzone, *supra* note 82, at 95 (citations omitted).

85 Professor Tillman would go farther and challenge the claim that Congress's power to control the size of the Court includes the "lesser" power to hold a seat open, as the two powers are exercised by different entities. *See* Seth Barrett Tillman, *Why Senate Inaction As a Response to a Presidential Nomination Is Constitutional,* NEW REFORM CLUB (Apr. 1, 2016), http://reformclub.blogspot.com/2016/04/part-4-why-senate-inaction-as-response.html. The bottom-line point remains the same, however, as this applies equally to the Supreme Court and the lower courts.

86 Credit for the characterization of the increasing politicization and obstruction goes to Larry Solum. *See* Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659,

majorities (and, sometimes, Senate minorities) to block the confirmation of highly qualified judicial nominees, including by refusing to consider nominations, particularly when such nominations occurred in election years. Senate Republicans may have been particularly obstructionist of President Obama's judicial nominees, retaliating for Democratic obstruction of Republican nominees, and then some. The same could be said of Senate Democrats' treatment of Bush nominees, Republican treatment of Clinton nominees and so on.

Asserting that the Senate has some form of constitutional obligation to act on a judicial nominee amounts to an effort to break the logjam by playing a trump card. It is as if to say that prior obstruction was acceptable (if regrettable) but this time—*this time*—a constitutional rule has been violated. If only it were so. As the above examination of text, structure, and historical precedent seeks to show, there is no constitutional obligation for the Senate to consider a presidential nomination to the Supreme Court. There are strong political and prudential arguments for prompt consideration of all nominees, but not particularly strong constitutional ones.

Ending the ever-worsening conflict over judicial nominations will not be achieved by playing an imaginary constitutional trump. Rather, it will occur when the competing sides of this conflict are willing to recognize the harm this conflict does to the judiciary, and the importance of a more regular and rational confirmation process. It will also likely occur only when each side is willing to engage in compromise. In short, the answer to the judicial confirmation mess lies in politics, and not in overstated appeals to constitutional principle.

661 (2005) ("Recent events, particularly the filibuster of several judicial nominees and the use of the recess appointments power to circumvent the filibusters, may constitute a downward spiral of politicization.").

JUDICIARY

How Big Can the Ninth Circuit Get?

The Judicial Conference is recommending additional judges for what is already the largest

JONATHAN H. ADLER |THE VOLOKH CONSPIRACY | 10.18.2020 4:50 PM

With 29 judges in active service, the U.S. Court of Appeals for the Ninth Circuit is already the nations largest federal appellate court. The court is so large that it does not sit as a full court when sitting en banc. Instead, en banc panels consist of the Chief Judge and ten other judges selected at random.

The Judicial Conference of the United States is recommending the addition of five additional seats to the Ninth Circuit, in addition to 73 district court judgeships around the country (eight of which are temporary judgeships that would be made permanent). These recommendations are based upon the Judicial Conference's assessment of court caseloads and administrative needs, and were the subject of a Senate Judiciary Committee hearing earlier this year.

The Conference is likely correct that the Ninth Circuit needs more judges to handle the volume of cases within the circuit. The same goes for their district court recommendations. The last time Congress significantly expanded the federal courts was in 1990, and court caseloads have increased substantially since then, particularly in federal district courts. Expanding lower courts to handle the nation's legal needs is overdue.

While I accept the Judicial Conference's claim that the nation needs more federal judges, I confess some reluctance to make the Ninth Circuit any larger. It is already an unwieldy court, far larger than any other circuit. While the Judicial Conference is recommending that the Ninth Circuit have over thirty judges, no other circuit court even has twenty—and no other circuit has adopted the Ninth Circuit's non-banc en banc process.

When Congress gets around to responding to the Judicial Conference's request, I hope it also gives consideration to splitting the Ninth Circuit into two, more normal-sized courts. In the past, such proposals have foundered on political concerns, such as that California's influence would overwhelm that of any other states in a newly constituted court. The alternatives of spitting California between two circuits or having a California-only circuit are also less-then desirable. Perhaps so, but it seems to me that a 30-plus judge circuit court is worse. Creating two circuit courts—a California-only court and another consisting of the remainder of the current Ninth—with 18 judges each, would satisfy the need for more judges and cut the current Ninth down to size.

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JUDICIARY JUDGES

JUDICIAL NOMINATIONS

Of Biden, Bush, and the History of Judicial Confirmation Fights

Imagine how things would be different had a 2002 Bush proposal to deescalate judicial nominations been adopted.

JONATHAN H. ADLER |THE VOLOKH CONSPIRACY | 10.10.2020 10:35 AM

There is no question that judicial confirmations have become more contentious over the past thirty years. Things were relatively peaceful from the mid-1970s until the mid-1980s. President Carter had no Supreme Court nominations, but saw a record number of lower court nominees confirmed, including one Stephen Breyer during 1980s lame-duck session.

The Reagan Administration sought to counter the influence of Carter's nominees (and the perceived progressive tilt of the federal judiciary generally) by emphasizing the judicial philosophy of prospective nominees. This led to the circuit nominations of folks like Antonin Scalia, Robert Bork, Frank Easterbrook, Douglas Ginsburg, Stephen Williams, J. Harvie Wilkinson, and Ken Starr, among others.

In 1985, some Senate Democrats began strategizing how to stall or block Reagan's judicial nominees, but they were wary of opposing Reagan's nominees on ideological grounds. "You get on awfully thin ground rejecting [judicial] nominees on an ideological basis," commented Senator Paul Simon in the *Washington Post* (11/12/1985). Thus they settled on a strategy of more careful scrutiny of nominees' records and, once they took the Senate in 1987, delaying confirmations.

In 1992, then-Senator Joe Biden suggested the Senate should not consider Supreme Court nominees once the "political season" began, particularly if the White House and Senate were in opposite hands. This was already his

practice with regard to key circuit court seats (e.g. Hope & Rymer in 1988; Roberts, BeVier & Boyle in 1991-92), and he wanted it to be the rule for the Supreme Court too. Senate Republicans returned the favor in 2000, holding up some of Clinton's nominees, including one Elena Kagan.

In May 2001, President George W. Bush put forward an impressive slate of circuit court nominees. The list included the likes of John Roberts, Miguel Estrada, and Jeff Sutton. It also included Roger Gregory, who Bill Clinton had recess nominated to the Fourth Circuit after Senate Republicans blocked him, and Barrington Parker for the Second Circuit, as a gesture to New York's Senate delegation. This was the most significant effort to de-escalate judicial confirmation fights of the past 35 years, but it did not bear fruit.

Hopes for rapid confirmations of Bush's nominees dimmed once control of the Senate flipped in June 2001 when Senator Jeffords switched parties. Boosted by Senator Schumer's call for explicit evaluation of judicial ideology, Senate Democrats slow-walked Bush's nominees, particularly those deemed too conservative.

Republicans sought to make the blockade of judicial nominations into an election issue in 2002. President Bush aided this effort by giving speeches in key battleground states. Shortly before the election, on October 30, he also gave an address on judicial confirmations in which he made the case against obstruction of judicial nominees.

We must have an evenhanded, predictable procedure from the day a vacancy is announced to the day a new judge is sworn in. This procedure should apply now and in the future, no matter who lives in this house or who controls the Senate. We must return fairness and dignity to the judicial confirmation process.

In this speech, Bush proposed a set of principles for judicial nominations that would guide the conduct of all three branches to ensure the orderly nomination and confirmation of federal judges.

First, I call on Federal judges on the courts of appeals and district courts to notify the President of their intention to retire at least a year in advance, whenever this is possible. Because the nomination and confirmation of a Federal judge is a lengthy process under the best of circumstances, judges who retire without advance notice can unintentionally create a judicial vacancy that can last for many months. The request for one year advance notice builds on existing policy of the judiciary and will help us work toward a system in which a new Federal judge is ready to take the bench on a day the sitting judge retires. That's the goal.

Second, I propose that Presidents submit a nomination to the Senate within 180 days of receiving notice of a Federal court vacancy or intended retirement. In other words, we have a responsibility as well to make sure the judiciary is sound and whole. This will speed up the sometimes time-consuming process of obtaining recommendations and evaluations from home-State Senators and Representatives and Governors and bar leaders, while leaving ample time for Presidents to vet and choose nominees of the highest quality.

Third, I call on the Senate Judiciary— Senate Judiciary Committee to commit to holding a hearing within 90 days of receiving a nomination. A strict deadline is the best way to ensure that judicial nominees are promptly and fairly considered, and 90 days is more than enough time for the committee to conduct necessary research before holding a hearing. That's plenty of time.

Finally, I call on the full Senate to commit to an up-or-down floor vote on each nominee no later than 180 days after the nomination is submitted. This is a very generous period of time that will allow all the Senators to evaluate nominees and have their votes counted.

The third and fourth principles could have been embodied in the Senate rules, much like the filibuster, to protect against opportunistic behavior by Senate majorities. Some Senate Democrats on the Judiciary Committee had endorsed similar principles in the late 1990s, even proposing legislative

language, but they had no interest in this approach now that the show was on the other foot.

President Bush's proposal was never adopted. Senate Republicans retook the Senate, and Senate Democrats responded with the first-ever filibusters of circuit court nominees. Prior to 2003, there had been no meaningful history of cloture votes, let alone filibusters, of judicial nominees. Five of Bush's circuit nominees were ultimately blocked this way (despite the Gang of 14 deal), and Senate Republicans returned the favor in 2009 (while also offering to eliminate judicial filibusters for both sides). After Senate Republicans used the filibuster to block five of Obama's appellate nominees, Senator Reid invoked the nuclear option. Republicans nuked the filibuster for Supreme Court nominees in 2016, and the rest is history.

Given this history, it is interesting to think how things might have been different had President Bush's 2002 proposal been adopted by the Senate. Among other things, Miguel Estrada would have been confirmed, and there would be far fewer judicial emergencies on federal district courts.

Note that had such rules been in place, the Senate would have considered President Obama's nomination of Merrick Garland to the Supreme Court, and he would likely have been confirmed. By the same token, it's unlikely the Senate would have rushed to confirm Judge Amy Coney Barrett to replace Justice Ruth Bader Ginsburg under a presumptive schedule that allowed for more time. But Bush's proposal, like his effort to de-escalate the judicial confirmation fights by re-nominating a blocked Clinton nominee (even though his party had Senate control), was rebuffed. And so we descended further in the downward spiral of judicial confirmations.

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JUDICIAL NOMINATIONS

Judgeship Appointments by President

President	Supreme Court	Regional Court of Appeals	USCAFC[1]	USCFC[1]	District Courts	Territorial Courts[2]	Court of International Trade[3]	TOTAL[4]
Roosevelt (1933-45)	9	52	-	-	136	3	7	207
Truman (1945-52)	4	27	-	-	102	3	4	140
Eisenhower (1953-60)	5	45	-	-	127	2	3	182
Kennedy (1961-63)	2	20	-	-	102	1	0	125
Johnson (1963-68)	2	41	-	-	125	0	8	176
Nixon (1969-74)	4	45	-	-	182	3	1	235
Ford (1974-76)	1	12	-	-	50	0	0	63
Carter (1977-80)	0	56	-	-	203	3	0	262
Reagan (1981-88)	3	78	5	18	290	2	6	402
Bush (1989-92)	2	37	5	2	148	2	1	197
Clinton (1993-00)	2	62	4	7	305	2	5	387
Bush (2001-08)	2	61	2	9	261	3	2	340
Obama (2009-16)	2	49	6	3	268	2	4	334
Trump* (2017-)	2	50	0	3	133	0	2	190

**Appointments made by the current President are as of December 31, 2019.*

[1] The U.S. Court of Appeals for the Federal Circuit (USCAFC) and the U.S. Court of Federal Claims (USCFC) were established in 1982. The USCFC was named the U.S. Court of Claims until 1992.

[2] The three territorial courts are: the district courts of Guam, the Northern Mariana Islands, and the Virgin Islands. Judges of these courts are appointed for a fixed term and exercise the jurisdiction of a district court of the United States, as well as local jurisdiction.

[3] Originally was designated the U.S. Customs Court; became the U.S. Court of International Trade in 1980.

[4] The total represents the overall number of confirmations rather than judges. As a result, individual judges may be counted more than once. For example, President Reagan appointed Antonin Scalia to the U.S. Court of Appeals in 1982 and to the Supreme Court in 1986. Both appointments are included in the confirmations totals. In addition, the counts for the USCFC and the territorial courts include judges reappointed after their terms expired.

Current Judicial Vacancies

This table contains a listing of current judicial vacancies by court. The name of the incumbent, the reason for the vacancy, the vacancy date, the nominee (if applicable), and the nomination date.

Vacancies in the Federal Judiciary
116th Congress
Last updated on 10/15/2020
Total Vacancies: 64
Total Nominees Pending: 40

Court	Incumbent	Vacancy Reason	Vacancy Date	Nominee	Nomination Date
01 - MA	O'Toole Jr.,George A.	Senior	01/01/2018		
01 - MA	Woodlock,Douglas P.	Senior	06/01/2015		
02 - CT	Thompson,Alvin W.	Senior	08/31/2018	Jongbloed,Barbara Bailey	10/15/2019
02 - NY-E	Cogan,Brian M.	Senior	06/12/2020	Gonzalez,Hector	09/08/2020
02 - NY-E	Bianco,Joseph F.	Elevated	05/08/2019	Komatireddy,Saritha	05/04/2020
02 - NY-E	Irizarry,Dora L.	Senior	01/26/2020	Woll Jr.,David Carey	09/08/2020
02 - NY-N	Sharpe,Gary L.	Senior	01/01/2016	McAllister,Ryan Thomas	09/08/2020
02 - NY-S	Forrest,Katherine B.	Resigned	09/11/2018	Lan,Iris	05/04/2020
02 - NY-S	Sullivan,Richard J.	Elevated	10/11/2018	Rearden,Jennifer H.	05/04/2020
03 - NJ	Sheridan,Peter G.	Senior	06/14/2018		
03 - NJ	Hochberg,Faith S.	Retired	03/06/2015		
03 - NJ	Simandle,Jerome B.	Senior	05/31/2017		
03 - NJ	Martini,William J.	Senior	02/10/2015		
03 - NJ	Kugler,Robert B.	Senior	11/02/2018		
03 - NJ	Linares,Jose L.	Retired	05/16/2019		
03 - PA-E	Stengel,Lawrence F.	Retired	08/31/2018		
04 - SC	Wooten,Terry L.	Senior	02/28/2019		
04 - VA-E	O'Grady,Liam	Senior	05/01/2020		

Court	Incumbent	Vacancy Reason	Vacancy Date	Nominee	Nomination Date
05 - MS-S	Starrett,Keith	Senior	04/30/2019	Johnson,Kristi Haskins	05/04/2020
05 - MS-S	Guirola Jr.,Louis	Senior	03/23/2018	McNeel,Taylor B.	07/02/2020
06 - KY-W	Walker,Justin R.	Elevated	06/18/2020	Beaton,Benjamin Joel	09/08/2020
06 - OH-N	Boyko,Christopher A.	Senior	01/06/2020	Calabrese,J. Philip	03/03/2020
06 - OH-N	Zouhary,Jack	Senior	07/01/2019	Knepp II,James Ray	03/03/2020
06 - OH-S	Barrett,Michael R.	Senior	02/15/2019	Newman,Michael Jay	03/03/2020
06 - TN-E	Mattice Jr.,Harry S.	Senior	03/10/2020	Atchley Jr.,Charles Edward	09/22/2020
06 - TN-E	Reeves,Pamela L.	Deceased	09/10/2020	Crytzer,Katherine A.	09/22/2020
07 - WI-E	Griesbach,William C.	Senior	12/31/2019		
08 - MN	Ericksen,Joan N.	Senior	10/15/2019		
09 - CA-C	Selna,James V.	Senior	03/03/2020		
09 - CA-C	Guilford,Andrew J.	Senior	07/05/2019		
09 - CA-C	Otero,S. James	Senior	12/30/2018	Aenlle-Rocha,Fernando L.	01/09/2020
09 - CA-C	O'Connell,Beverly Reid	Deceased	10/08/2017	Kim,Steve	02/13/2020
09 - CA-C	Snyder,Christina A.	Senior	11/23/2016	Leal,Sandy Nunes	02/13/2020
09 - CA-C	Real,Manuel L.	Senior	11/04/2018	Richmond,Rick Lloyd	02/13/2020
09 - CA-C	Morrow,Margaret M.	Senior	10/29/2015	Rosen,Jeremy Brooks	02/13/2020
09 - CA-E	O'Neill,Lawrence J.	Senior	02/02/2020	Arguelles,James P.	06/18/2020
09 - CA-E	England Jr.,Morrison C.	Senior	12/17/2019	Paloutzian,Dirk B.	05/21/2020
09 - CA-S	Benitez,Roger T.	Senior	12/31/2017	Braverman,Adam L.	02/13/2020
09 - CA-S	Houston,John A.	Senior	02/06/2018	Johnson,Knut Sveinbjorn	02/13/2020
09 - CA-S	Moskowitz,Barry Ted	Senior	01/23/2019	Matthews,R. Shireen	02/13/2020
09 - CA-S	Anello,Michael M.	Senior	10/31/2018	Pettit,Michelle M.	02/13/2020
09 - NV	Jones,Robert Clive	Senior	02/01/2016		
09 - NV	Mahan,James C.	Senior	06/29/2018	Togliatti,Jennifer P.	02/13/2020
09 - WA-W	Pechman,Marsha J.	Senior	02/06/2016		

Court	Incumbent	Vacancy Reason	Vacancy Date	Nominee	Nomination Date
09 - WA-W	Robart,James L.	Senior	06/28/2016		
09 - WA-W	Lasnik,Robert S.	Senior	01/27/2016		
09 - WA-W	Settle,Benjamin Hale	Senior	01/01/2020		
09 - WA-W	Leighton,Ronald B.	Senior	02/28/2019		
10 - CO	Krieger,Marcia S.	Senior	03/03/2019		
10 - KS	Murguia,Carlos	Resigned	04/01/2020	Crouse,Toby	05/21/2020
10 - NM	Brack,Robert	Senior	07/25/2018	Frederici III,Fred Joseph	06/18/2020
10 - NM	Herrera,Judith C.	Senior	07/01/2019	Saiz,Brenda M.	06/18/2020
11 - AL-M	Brasher,Andrew Lynn	Elevated	02/11/2020	LaCour Jr.,Edmund G.	06/02/2020
11 - FL-M	Covington,Virginia M. Hernandez	Senior	07/12/2020	Mizelle,Kathryn Kimball	09/08/2020
11 - FL-S	Moreno,Federico A.	Senior	07/17/2020		
11 - FL-S	Marra,Kenneth A.	Senior	08/01/2017	Cannon,Aileen Mercedes	05/21/2020
CL	Lettow,Charles Frederick	Senior	07/13/2018	Davis,Kathryn C.	02/04/2020
CL	Wolski,Victor J.	Senior	07/13/2018	Dietz,Thompson Michael	07/02/2020
CL	Damich,Edward J.	Senior	10/21/2013	Epstein,David Z.	02/04/2020
CL	Braden,Susan G.	Senior	07/13/2018	Obermann,Grace Karaffa	01/09/2020
CL	Horn,Marian Blank	Senior	03/09/2018	Schwartz,Stephen Sidney	01/09/2020
IT	Gordon,Leo M.	Senior	03/22/2019		
IT	Ridgway,Delissa A.	Senior	01/31/2019	Vaden,Stephen A.	01/03/2020
SC	Ginsburg,Ruth Bader	Deceased	09/18/2020	Barrett,Amy Coney	09/29/2020

Total Vacancies: 64

Total Nominees Pending: 40

DEMOCRATIZING THE SUPREME COURT

Ryan D. Doerfler & Samuel Moyn

109 CAL. L. REV. __ (forthcoming 2021)

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DEMOCRATIZING THE SUPREME COURT

Ryan D. Doerfler[*] *& Samuel Moyn*[**]

Progressives are taking Supreme Court reform seriously for the first time in almost a century. Owing to the rise of the political and academic left following the 2008 financial crisis and the hotly contested appointments of Neil Gorsuch and Brett Kavanaugh, progressives increasingly view the Supreme Court as posing a serious challenge to the successful implementation of ambitious legislation like the "Green New Deal."

Despite this once-in-a-lifetime energy around the idea of court reform, the popular and academic discussion of how *to reform the Supreme Court has been unduly constrained and is now at risk of closing prematurely. This is the case with regard to its mechanism and its purpose alike. On the left, historical memory has limited debate almost entirely to "court packing." Meanwhile the center has occupied itself with how to restore the Supreme Court's legitimacy, rescuing the institution from its regrettable slide into partisanship. And now with the Court appearing to moderate in an effort to preempt legislative reform of the institution, the concern is that progressives will drop their demands for change, satisfied with a few modest judicial concessions.*

This Article aims to keep the discussion of court reform alive and, just as importantly, to significantly expand its bounds. It does so, first, by urging progressives to reject the legitimacy *frame of the issue, which treats the problem with the Supreme Court as one of politicization, in favor of an openly* progressive *frame in which the question is how to enable democracy within our constitutional scheme.*

Second, the Article introduces a distinction between two fundamentally different mechanisms of reform. The first type of reform, which we call personnel *reforms, includes both aggressive proposals like court packing and more modest (or politically moderate) reforms such as partisan balance requirements or panel systems. All of these reforms take for granted the tremendous power the Supreme Court wields. What these proposals do is change the partisan or ideological character of the individuals who wield it. The second type, which we call* disempowering

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reforms, include things like jurisdiction stripping and a supermajority requirement for judicial review. These reforms take power away from the Court, redirecting it to the political branches instead. As we argue, personnel reforms are mostly addressed to the legitimacy frame that progressives would do well to reject. More still, to the extent such reforms advance progressive ends, they do so only contingently and threaten to do as much harm as good over time. By contrast, disempowering reforms, we argue, advance progressive values systematically. While such reforms would not guarantee advances in social democracy, they would ensure that the battle for such advances takes place in the democratic arena, which for progressives is where they have to occur now—and should occur—if they take place anywhere.

INTRODUCTION

Supreme Court reform is on the progressive agenda, but the debate about how to conceptualize and therefore to pursue it has barely begun. The obstruction of President Barack Obama's nomination of Judge Merrick Garland to replace Justice Antonin Scalia, and then President Donald Trump's appointments of Neil Gorsuch and Brett Kavanaugh to seats on the highest bench, have created the conditions for an expert and public discussion about the Supreme Court's institutional viability without parallel since the 1920s and 1930s.

Though only in early stages, our era's discussion now risks brevity and error. Historical memories have favored "court-packing" or personnel expansion of the institution as practically the only imaginable reform.[1] Meanwhile, the end of the Supreme Court's 2019 term in July 2020 strongly indicated that the explosive possibilities of reform have already begun to affect judicial behavior.[2] In tandem with the ascendancy of Joseph Biden among Democratic politicians, the big risk is that, either because of quick settlement on one kind of reform or the complacent relief of a few non-disastrous outcomes, a pivotal moment to clarify our options has been missed, never to return except in an emergency that breeds mistakes.

The basic purpose of this article is to counteract this risk. It reconsiders the criteria of reform, not with the assumption that the goal is relegitimating the

[1] For example, in winter 2019 Ian Millhiser, now *Vox*'s Supreme Court reporter (and author of a book detailing the right-wing decision-making of the Supreme Court for decades), wrote a defense of court-packing as a credible threat—an essay that, he acknowledged, would have been "extraordinary radical" only "two years ago." Though he presented court packing as the "least bad option," no other institutional reform possibilities were mentioned. Ian Millhiser, *Let's Think about Court-Packing,* DEMOCRACY, Winter 2019, https://democracyjournal.org/magazine/51/lets-think-about-court-packing-2/ and MILLHISER, INJUSTICES: THE SUPREME COURT'S HISTORY OF COMFORTING THE COMFORTABLE AND AFFLICTING THE AFFLICTED (2015)

[2] Henry Olsen, *Is John Roberts Trying to Save the Supreme Court from Democratic Packing?*, WASH. POST (June 30, 2020), https://www.washingtonpost.com/opinions/2020/06/30/is-john-roberts-trying-save-supreme-court-democratic-packing/.

Supreme Court, but with the necessity of progressive transformation of the country in mind. What conditions would have to obtain for that political development to occur is the question that matters, and answers about the Supreme Court follow from it. In reaching those answers, progressives should ignore criteria that preserve national stasis that they understandably reject, and avoid old errors in their relationship to judicial power that they tried at their last moment of political opportunity and should find wanting now.

This Article engages in more serious comparison and contrast of the widest range of imaginable statutory reforms under our current constitutional regime.[3] These include balancing the Supreme Court between parties, turning to expert or merit selection, using lotteries to compose decision-making panels from larger pools, passing jurisdiction stripping statutes (potentially ones introducing alternative executive branch adjudication), institutionalizing higher voting thresholds for judicial decisions, or opening the possibility of their legislative override—by classifying them according to the ends they might advance. Our fundamental goal is to gain clarity on the disparate *ends* of reform and to offer a fundamental distinction among two kinds of imaginable *means*. Canvassing criteria for reform more explicitly than in prior scholarship, the Article also distinguishes between two fundamentally different reform options: mechanisms that alter personnel and mechanisms that disempower the institution. Deprivileging court packing, while also avoiding the elaboration of some uniquely virtuous alternative, our proposal is that examination of two very different basic models of Supreme Court reform is the most essential preliminary task.

The last discussion of Supreme Court reform, climaxing in the emergency of the 1930s, is a cautionary tale more than an inspiring precedent.[4] Formally, Franklin Roosevelt *failed* in court reform, even while leaving a memory of his own solution—court packing—as if it were the most viable choice now. But even more important, to the extent Roosevelt succeeded in shifting doctrine and personnel on the Supreme Court indirectly, it cast the die for long-term outcomes and raised need for our own bout of reform. The lesson of the last reform era for our own is that we must democratize the Supreme Court.

For a while, judges empowered by traditions of judicial review resolved never to abuse their might, after the "switch in time" in 1937 away from

[3] For feasibility reasons detailed *infra*, Part IV(b)(1), this Article surveys statutory reforms of the Supreme Court, rather than Article V amendments.

[4] Todd Tucker, *In Defense of Court-Packing*, JACOBIN (June 28, 2018), https://jacobinmag.com/2018/06/supreme-court-packing-fdr-justices-appointments. A separate essay could be written on false and true memories of court-packing in U.S. public discourse since 2018. *See infra* note 262.

obstructing majority rule at the federal and state level.[5] But in the 1940s they began to reclaim judicial power for the sake of fundamental rights protection. The informal promise by judges of the 1930s to get the Constitution out of the way of progressive majorities, so long as their acts were not irrational, began to be broken, sometimes with the best of intentions.[6] Notwithstanding the good work done by constitutionally empowered judges since, it should surprise no one that, as the Court has drifted inexorably right, it has exercised its institutional heft on behalf of the powerful and wealthy minorities progressives once hoped to put in their place.[7] Worse, it remains armed with weapons to oppose any progressive movement as it seeks power to overcome legacies of economic and racial division, not to mention confront looming environmental catastrophe.

The problem is not just that Republican presidents, as a result of a series of contingencies since Richard Nixon's appointments first began the Supreme Court's move right, have gotten more than their share of high court judges.[8] Democrats, when they had their chance, replaced progressive jurists with centrist liberals, who often agreed over core economic and regulatory issues with their conservative opposite numbers, even as topics like abortion or affirmative action divided them.[9] Both parties, and the rival sets of judges, concurred more than they differed, above all about elevating the Supreme Court, even at the price of making judicial appointments national politics by other means. As neoliberal centrism waxed and progressive coalitions waned, it seemed acceptable for a while. But by the standards of progressive ends, the Supreme Court never became much more than a sideshow about the avoidance of the most reactionary moves and preservation of the modestly beneficial precedents of the past. Sometimes it was coupled with a dream that someday the Supreme Court would return to a trajectory arrested decades before, without much

[5] See WILLIAM E. LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995).

[6] *See* Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Samuel Moyn, *On Human Rights and Majority Politics: Felix Frankfurter's Democratic Theory,* 52 VAND. J. OF TRANSNAT'L L. 1135 (2019).

[7] See such accounts as ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA (2020) or DAVID A. KAPLAN, THE MOST DANGEROUS BRANCH: INSIDE THE SUPREME COURT'S ASSAULT ON THE CONSTITUTION (2018).

[8] As further detailed below, Republicans made ten appointments between 1969 and 1992 to none by Democrats, and then three since compared to four by the Democrats. If anything, the slide right has been surprisingly delayed, depending on the choices of select Republican appointees like David Souter and John Paul Stevens. Brandon Bartels, *It Took Conservatives Fifty Years to Get a Reliable Majority on the Supreme Court,* WASH. POST (June 29, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/29/it-took-conservatives-50-years-to-get-a-reliable-majority-on-the-supreme-court-here-are-3-reasons-why/.

[9] *See, e.g.,* Lee Epstein et al., *When It Comes to Business, the Right and Left Sides of the Court Agree*, 54 WASH. U. J. L. & POL. 33 (2017).

reflection on why its contribution had been strictly limited in the first place. But events since the financial crisis of 2008, and a generational revolt against the compromises of their elders, have provided our latest reminder that progress occurs through democratic victory, and democratic victory alone.

The consequence for the discussion of Supreme Court alternatives is straightforward. It must begin with how to diminish the institution's power in favor of popular majorities. Asking "how to save the Supreme Court" is asking the wrong question.[10] For saving it is not a desirable goal; getting it out of the way of progressive reform is. The New Deal court reform had the chance to counteract the assumption that judicial power is hardwired out of necessity or in principle into American politics, only to see it canonized instead. The entire point of Supreme Court reform ought to be to avoid repeating that mistake.

Before launching into the discussion, it is worth clarifying the scope of our inquiry, which bears specifically on *the Supreme Court's authority to invalidate federal statutes on constitutional grounds*. Whether the arguments for reform that we survey apply at all, or apply differently, in lower courts or to executive action,[11] state law,[12] or ordinary statutory interpretation[13] is left open, considered only to imagine how different answers to these questions might affect the design of different reform proposals.[14] For now, however, our arguments for an analytical distinction between two basic types of proposal, and in support of the goal of disempowering the Supreme Court on democratic grounds, are developed for the paradigm case of the institution's heaviest weaponry of constitutional invalidation of federal legislation—the weaponry most dangerous to the making of a progressive future.

This article begins in Part I with a defense of a progressive political frame for Supreme Court reform, rather than the goal of restoring the status quo ante Gorsuch and Kavanaugh as if it were defensible or tolerable. Part II offers the central distinction of the article, between personnel reforms, which confirm Supreme Court power while pursuing ends like institutional legitimacy rather than progressive change, and disempowering reforms that meet the contemporary need. Part III considers examples how the imaginable suite of reforms work, and whether they plausibly advance potential ends of reform. After examining their desirability, Part IV turns to the legality and political

[10] Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J 148 (2019).

[11] *See, e.g.*, Aziz Huq, *Revive Congressional Authority over Courts*, 39 DEMOCRACY (Winter 2016).

[12] *See, e.g.*, OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295–296 (1921) ("I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as the laws of the several States.").

[13] *See, e.g.*, Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676 (2007).

[14] As we will see, some discussion of lower courts will prove necessary to evaluate disempowering reforms.

feasibility of the reforms. Our conclusion is that disempowering reforms are not just normatively superior, but no less feasible to imagine putting into practice or surviving legal challenge.

I. POLITICAL REFORM AND THE SUPREME COURT

The context for considering Supreme Court reform is a broader agenda of progressive change in the United States that emerged in the last decade, and especially after the financial crisis of 2008-9.[15] Over these years, a larger body of progressives than at any point since the New Deal have begun to conclude that their ideals are on collision course with institutional constraints of the existing political system. And that includes the Supreme Court as final arbiter of vast swathes of policy. As a result, more and more insist, the power of the Supreme Court to constrain and set policymaking requires a second look.[16]

Upset by past judicial defeats, progressives are also anticipating their own chance to control the political branches in the near future, and have begun to worry even more about future Supreme Court rulings than past ones. In particular, much of the legislative agenda associated with the "Green New Deal" looks like it is vulnerable to various kinds of challenge in the courts, especially now that conservatives have accumulated five votes at the Supreme Court and stocked the bench as part of a longstanding project to entrench power in the federal judiciary.[17] Notwithstanding the considerable body of scholarship on the political foundations of judicial authority,[18] progressives are not wrong to fear that the threat of delay or obstruction that an empowered and reactionary Supreme Court will pose to their designs is very real.

For most of post-World War II history, progressives united around Supreme Court empowerment.[19] The idea of Supreme Court reform found support, if anywhere, on the political right.[20] The novelty of our situation is that,

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[15] *See, e.g.*, Peter Beinart, *Will the Left Go Too Far?*, ATLANTIC (Dec. 2018), https://www.theatlantic.com/magazine/archive/2018/12/democratic-party-moves-left/573946/.

[16] Larry Kramer, *The Supreme Court's Power Has Become Excessive*, N.Y. TIMES (Jul. 6, 2015), https://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/the-supreme-courts-power-has-become-excessive; Doug Bandow, *Liberals Discover the Dangers of a Powerful Supreme Court*, AM. SPECTATOR (Oct. 16, 2018), https://spectator.org/liberals-discover-the-dangers-of-a-powerful-supreme-court/.

[17] *See, e.g.*, Matt Ford, *Would the Green New Deal Survive the Supreme Court?*, NEW REPUBLIC (Mar. 18, 2019), https://newrepublic.com/article/153334/green-new-deal-survive-supreme-court.

[18] *See infra* note 253 for examples.

[19] *See, e.g.*, LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996), Part I.

[20] The most prominent example of right-wing denunciation of the Supreme Court is the Southern Manifesto in response to desegregation. *See* Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L.R. 1053 (2014). Another well-known example is the notorious *First Things*

as both the Supreme Court and the federal judiciary have become more conservative, arguments for Supreme Court reform once almost entirely restricted to the right have slowly been abandoned there, and have begun to be adopted by the left. If anything, the surprise is how long it has taken.

The reasons for the prioritization of a progressive Supreme Court reform agenda are anything but internal to the institution itself. According to an alternative view, the institution is merely weathering a period of declining legitimacy, which it is worth shoring up in response.[21] By comparison, the progressive reform frame for evaluating the Supreme Court holds that the problem is not, or not only, institutional capture by the right, which needs to be corrected for the Supreme Court to play a foreordained role. Rather, the problem is that the institution is undemocratic in role and output. Objections of contemporary progressives go to the heart of the function of a constitutional court in a democracy — and in contemporary American democracy in particular, which progressives diagnose as beset by deep ills for which Supreme Court power is no part of a cure.

How to characterize the situation has profound implications for what to do about it. Casting the emerging crisis as one of descriptive or "sociological" legitimacy or a normative legitimacy afforded it as neutral arbiter putatively soaring about partisan conflict suggests the remedy of *institutional relegitimation*.[22] But if it is a crisis brought on by its role or output, as the Court functions consistently within its long-term empowerment, then the remedy is not relegitimation but *institutional redefinition*. The choice of frame determines whether to put things back the way they were, or to question the way they have consistently been.

To put it in another fashion, the framework for Supreme Court reform has to reflect a concern not so much for descriptive as for democratic

magazine symposium in response to continuing abortion protection. *The End of Democracy?: The Judicial Usurpation Politics*, FIRST THINGS, Nov. 1996.

[21] Amelia Thompson-DeVeaux & Oliver Roeder, *Is the Supreme Court Facing a Legitimacy Crisis?,* FIVETHIRTYEIGHT (Oct. 1, 2018), https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis/; Lawrence Weschler, *How the US Supreme Court Lost Its Legitimacy*, THE NATION (Sept. 17, 2018), https://www.thenation.com/article/archive/how-the-us-supreme-court-lost-its-legitimacy/; Paul Waldman, *Yes, the Supreme Court Is Facing a Legitimacy Crisis,* WASH. POST (Sept. 24, 2018), https://www.washingtonpost.com/blogs/plum-line/wp/2018/09/24/yes-the-supreme-court-is-facing-a-legitimacy-crisis-and-we-know-exactly-whose-fault-it-is/.

[22] Our distinction between descriptive or "sociological" legitimacy and democratic legitimacy in particular and moral or normative legitimacy in particular is standard in the literature. *See, e.g.*, ARTHUR ISAK APPLBAUM, LEGITIMACY: THE RIGHT TO RULE IN A WANTON WORLD (2019). Richard Fallon has done most to bring these concepts to bear on the Supreme Court and its jurisprudence. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) and RICHARD FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018).

legitimacy—the kind that matters most.[23] From this perspective, Supreme Court reform might matter even if its institutional standing were not eroding as a sociological matter, or if its output were not increasingly regarded as normatively illegitimate—a betrayal of its role as neutral guardian of constitutional values and the rule of law. After all, democratic self-government is the coin of the realm in a democracy. If that is the standard that counts, the role of any institution—including an apex court in a democratic system—is necessarily left open. Indeed, for the progressive agenda to be enacted by democratic forces may require further undermining the legitimacy of existing norms, practices, and institutions—the Supreme Court prominently among them—rather than shoring it up.

A. Present Discontents

The blocked nomination of Merrick Garland and the confirmation of Neil Gorsuch after the death of Justice Antonin Scalia in February 2016 —and then Brett Kavanaugh's divisive confirmation in early fall 2018—mainstreamed Supreme Court reform among progressive activists.[24] The earlier breakdown of the confirmation process after the failed appointment of Robert Bork in the 1980s raised intermittent calls for term limitation to avoid the repeated national dramas of Senate hearings and mobilization prior to votes.[25] But only the new events — and evolution of the Republican party and the election of Donald Trump with which they were bound up — made these calls begin to seem less theoretical, and inspired an expansion of reform proposals beyond the tried and true one of term limitation. They played a significant role in the Democratic party presidential nomination process.[26]

But there is no doubt that the biggest factor in the emergence of progressive skepticism towards Supreme Court lay elsewhere. It was not just retrospective; rather, the emergence of a progressive left on the national stage with the breakthrough candidacy of Bernie Sanders for the Democratic party

[23] While we mostly reserve the term "legitimacy" for proponents of judicial neutrality, our argument is fairly characterized as an attempted redefinition of that concept. For sake of clarity, though, we mostly concede this language to those who have dominated its use up to now.

[24] Fix the Court, a moderate advocacy group, dates to late 2014; Aaron Belkin launched what is now Take Back the Court (on the advisory board of which numerous law professors serve, including one author of the present article) in October 2018. *See* Matthew Choi, *Meet the Man Trying to Convince America to Swell the Supreme Court*, POLITICO (Oct. 27, 2018), https://www.politico.com/story/2018/10/27/supreme-court-packing-2020-election-943111.

[25] *See infra* note 82 for examples.

[26] Pema Levy, *How Court-Packing Went from a Fringe Idea to a Serious Democratic Proposal*, MOTHER JONES (Mar. 22, 2019), https://www.motherjones.com/politics/2019/03/court-packing-2020/.

nomination in 2016 and the unexpected victory in a New York congressional race of Alexandra Ocasio-Cortez as generational icon in 2018 opened up expectations of a progressive moment at the end of Donald Trump's term in office like no other in a half century or more.[27] Progressive activists accused the American politics system as sclerotic and vowed to overturn it, not least in view of pressing economic and environmental demands on hold for their lifetimes.[28]

As progressives gained strength in the country and Congress, and calling for a "Green New Deal" to integrate new priorities connecting environmental to working class politics, it was easy to foresee that the Supreme Court might stand in the way. American progressives had to think back not to the 1960s—the last great era of progressive legislation, but when the Supreme Court worked in reformist tandem with the political branches—but to the 1930s for the situation they believed they faced. How would they respond if the Supreme Court blocked the Green New Deal, beginning with H.R. 1 (the much debated first congressional bill of a Democratic party majority in Congress and perhaps even with a friendly president)?[29]

Under the prior Democratic administration of Barack Obama, no one on his side of the political aisle had anticipated the threat the Supreme Court posed to the signature domestic legislative reform, health care reform. Indeed, it was shocking to most when that threat emerged, modest though it was.[30] This fact redoubled the fears of the role the Supreme Court might play if even more ambitious legislative enactments were attempted.

It also mattered enormously that the academic left followed the reawakening of the political left in the country. For decades, the almost universal consensus of progressives had been to treat the Supreme Court as a pivotal actor in progressive change. Nostalgia for a moment of judicial activism for some progressive causes remained orthodox far longer than the moment itself lasted. A reawakened academic left, by contrast to earlier ones, prioritized economic and environmental structural justice.[31] Given their priorities, it seemed decreasingly plausible to justify Supreme Court power, since its jurisprudence

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[27] *See, e.g.*, Ben Judah, *The Millennial Left Is Tired of Waiting*, ATLANTIC, (July 25, 2019), https://www.theatlantic.com/ideas/archive/2019/07/democrats-are-experiencing-clash-generations/594808/.

[28] *See, e.g.*, KATE ARONOFF ET AL., A PLANET TO WIN: WHY WE NEED A GREEN NEW DEAL (2019).

[29] *See, e.g.*, Take Back the Court, *The Supreme Court May Invalidate H.R. 1*, (Mar. 2019), https://www.takebackthecourt.today/supreme-court-may-invalidate-hr1.

[30] Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/.

[31] The Law and Political Economy network, formally launched in late 2017, is the best known such venture. *See generally* Jedediah Britton-Purdy, et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis,* 129 YALE L. J. 1784 (2020).

mostly adhered to economically neoliberal or socially conservative outcomes, even integrating them into the time-honored protection of rights like freedom of speech or of religious exercise.[32] The very rights protection academic liberals had been most identified with defending now turned out to be the doctrinal Trojan horse for the structural empowerment of the wealthy. New voices rose to challenge the Supreme Court's doctrines in areas like First Amendment, as well as to reemphasize traditional liberal complaints in areas like campaign finance and voting rights.

These developments scrambled the traditional picture in which the Supreme Court was treated idealistically by the left and skeptically by the right. Conservative skepticism towards the Supreme Court was a familiar fixture of American history since World War II, in response to decisions like *Brown v. Board of Education*[33] and *Roe v. Wade*,[34] reaching an apex when *Roe* failed to be overturned in the 1990s.[35] Conservative projects like originalism and textualism were the most notable conservative ventures to constrain constitutional interpretation as a mode of liberal power. Some went further. Indeed, many of the institutional reforms this Article will survey, though initially proposed by progressives close to workers' movements in the late nineteenth and early twentieth centuries, were reintroduced by conservatives before and after World War II.[36]

Ironically, the decades since Richard Nixon's presidency, during which both the federal judiciary and the Supreme Court moved right, did not flip the sides. Though they did expand the federal judiciary under President Jimmy Carter, Democrats did not support Supreme Court reform initiatives, even as Republicans enjoyed greater and greater success in appointing judicial personnel,

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[32] Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. R. F. 165 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L REV. 133 (2016); Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment,* 118 COLUM. L. REV. 2161 (2018); Amy Kapczynski, *Free Speech, Incorporated*, BOS. REV., Summer 2019; Genevieve Lakier, *The First Amendment's* Real *Lochner Problem,* 87 U. CHI. L.R. 1241 (2020).

[33] 347 U.S. 483 (1954).

[34] 410 U.S. 113 (1973).

[35] Planned Parenthood of Southeastern Pennsylvania. v. Casey, 505 U.S. 833 (1992).

[36] Though it is not our purpose here to provide a full-scale survey of Supreme Court reform between the early twentieth and early twenty-first centuries, examples of earlier democratizing proposals from both left and right include Idaho Senator William Borah's proposal of a supermajority rule on the Supreme Court, and Wisconsin Senator Robert LaFollette's legislative override scheme, in addition to Franklin Roosevelt's courtpacking attempt; more recently, there were two dozen conservative jurisdiction stripping bills in the 1970s and 1980s. On progressives in the early twentieth century, *see* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937 193-32 (1994). On jurisdiction stripping precedents, *see* Travis Christopher Barham, *Congress Gave and Congress Hath Taken Away: Jurisdiction Withdrawal and the Constitution*, 62 WASH. & LEE L. REV. 1139, 1143-44 (2005).

especially at the level of the Supreme Court.[37] By our calculation, Republicans have held the presidency since Richard Nixon's election in 1968 eight of twelve terms, and filled a whopping fifteen of nineteen openings on the court. Only the climactic appointment of Neil Gorsuch, followed quickly by Brett Kavanaugh's confirmation to replace Anthony Kennedy after a monumental partisan contest, were catalytic. A profusion of progressive voices emerged to challenge the Supreme Court and worry about its future work.

B. The "Legitimacy" Frame

According to the most popular scholarly frame for coming to grips with the situation, the problem with the Supreme Court is that it is suffering from a bout of institutional delegitimation. Not surprisingly, across the period constitutional theory discovered the concept of legitimacy, which it deployed not principally to evaluate the longstanding role of the Supreme Court in the American political system, but the recent if slow erosion of its standing—not least among progressive legal elites themselves. Whether for the American people or scholarly observers, the legitimation frame is about restoration of the Supreme Court to prior high regard for fair-dealing neutrality.

It is true, of course, that the Supreme Court earns decreasing respect from the American people, as historical polling suggests.[38] In 2014, Gallup polls suggested that popular confidence in the Supreme Court had reached an all-time low. Some data suggest that those who say they have a "great deal" or "quite a lot" of confidence in the Supreme Court has been cut nearly in half in the last quarter-century.[39]

Others focus on the angry politics of judicial nomination as an index of a crisis of legitimation around the federal judiciary in general or the Supreme Court in particular. While raucous nomination fights were by no means absent from earlier American history, the conventional story has it that the 1987 treatment of Robert Bork to fill Lewis Powell's seat vastly transformed practice, making each—particularly when liberals perceived the Court to be on the brink of right-wing capture—come nearer and nearer armageddon.[40] And to add Machiavellianism to the melodrama of each confirmation struggle, Senate

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[37] Jess Bravin, *Conservative-Dominated Supreme Court Fulfills Nixon-Era Dream*, WALL ST. J. (Oct. 9, 2018), https://www.wsj.com/articles/conservative-dominated-supreme-court-fulfills-nixon-era-dream-1539077401.

[38] For a useful survey, *see* Daniel J. Hemel, *Reforming a Court in 'Crisis,'* __ J. OF ECON. PERSP. __.

[39] *Id.*

[40] *See* STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994); CARL HULSE, CONFIRMATION BIAS: INSIDE WASHINGTON'S WAR OVER THE SUPREME COURT, FROM SCALIA'S DEATH TO JUSTICE KAVANAUGH (2019).

majority leader Mitch McConnell's decision *not* to consider Obama's nomination of Garland in the president's lameduck final year was widely seen as an affront to applicable norms, denying Democrats a seat that "should have" been theirs.[41] Cast as anomalous and singular, that event, in turn, cried out for restitution.

In other accounts, the general or specific skullduggery around appointments reflects a broader patter of partisanship from which the Supreme Court ought to remain entirely immune or more insulated. One of the most influential assessments for why popular trust in the Supreme Court is falling, or combat over appointment is more intense, is that it is becoming a partisan institution.[42]

Data do overwhelmingly indicate that partisan voting across the federal judiciary has increased, especially on nationally contentious matters.[43] The assortment of justices in divided cases and the rising number of 5-4 decisions are taken to symbolize the unfortunate conversion of prior neutral "umpiring" into partisan choice. Conservatives, far more regularly than they have invoked the need for Supreme Court reform, have treated Republican appointees from David Souter to Neil Gorsuch as traitors, even as liberals take their heresies as proof of impartiality,[44] only to wonder why their own perceived allies like Elena Kagan might be playing a dangerous game in joining opinions authored by conservative justices.[45] And the grooming of candidates for judicial and Supreme Court appointment, most notoriously on the right but also on the left, has increased the sense that judges are on teams and courts just another arena for partisan encounter.

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[41] *See, e.g.*, Carl Hulse, *The Shifting Standards of Mitch McConnell*, N.Y. TIMES (May 29, 2019), https://www.nytimes.com/2019/05/29/us/politics/mitch-mcconnell-supreme-court-trump.html; Ryan Bort, *Of Course Mitch McConnell Is Full of Shit*, ROLLING STONE (May 29, 2019), https://www.rollingstone.com/politics/politics-news/mitch-mcconnell-senate-supreme-court-confirmation-merrick-garland-841366/; Robert Schlesinger, *Donald Trump Has Done Less to Destroy Democratic Norms Than Mitch McConnell*, NBC NEWS (May 29, 2019), https://www.nbcnews.com/think/opinion/donald-trump-has-done-less-destroy-democratic-norms-mitch-mcconnell-ncna1011451.

[42] Carl Hulse, *Political Polarization Takes Hold of the Supreme Court,* N.Y. TIMES (July 5, 2018), https://www.nytimes.com/2018/07/05/us/politics/political-polarization-supreme-court.html; John Fabian Witt, *How the Republican Party Took Over the Supreme Court*, NEW REPUBLIC, (Apr. 7, 2020), https://newrepublic.com/article/156855/republican-party-took-supreme-court.

[43] Lawrence Baum & Neal E. Devins, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court,* 2016 SUP. CT REV. 301 (2017); BAUM & DEVINS, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT (2019).

[44] *See, e.g.*, Ezra Ishmael Young, *Bostock Is a Textualist Triumph*, JURIST (June 25, 2020), https://www.jurist.org/commentary/2020/06/ezra-young-bostock-textualist-triumph/; Matt Ford, *Neil Gorsuch Just Upended the Conservative Legal Project*, NEW REPUBLIC (June 15, 2020), https://newrepublic.com/article/157418/neil-gorsuch-lgbtq-rights-conservatives.

[45] *See, e.g.,* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271 (2020).

Analysts have added to the polarization of the judiciary the factor of its increasing age to account for what has gone wrong in the declining respect in which it was once held.[46] Extensions of the lifespan have driven not only calls for term limitation in particular,[47] but the sense that the cyclical replacement of personnel is more and more fraught precisely because it is so rare, intensifying partisan engagement with the judiciary.[48] Furthermore, as the average age of the judiciary rises, accusations that decisions are "out of touch," or even represent a form of gerontocratic rule, multiply.[49]

The trouble with the different forms of the legitimation frame is that they assume that some form of judicial empowerment to decide major issues of national policy ought to be a given, and that *something else* has gone wrong. They lead to worries of a "legitimacy dilemma" in which justices tasked to say what the law is have to play politics to restore a lost standing.[50] Indeed, the relegitimation frame suggests a restoration of the status quo ante lost because of some combination of aging justices, bloody confirmation fights, or polarized decision-making. The progressive frame increasingly insists that it is the undemocratic credentials and the undemocratic output of the Supreme Court, or both, that need to be placed in question.

C. The Progressive Frame

The progressive frame begins with a sense that the Supreme Court is not a separate problem from the crisis and deadlock of the American political system, in view of the fact of a rising majority abetted by demographic and

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[46] *See* David J. Garrow, *Mental Decrepitude on the Supreme Court: The Historical Case for a 28th Amendment,* 67 U. CHI. L. REV. 995 (2000); David J. Garrow, *Four Supreme Court Justices Are Older than 75. Is That a Problem?*, L.A. TIMES (Feb. 2, 2016), https://www.latimes.com/opinion/op-ed/la-oe-0202-garrow-aging-judiciary-20160202-story.html.

[47] For earlier examples, *see infra*, note 82. For recent examples see Norm Ornstein, *Why the Supreme Court Needs Term Limits*, ATLANTIC (May 22, 2014), https://www.theatlantic.com/politics/archive/2014/05/its-time-for-term-limits-for-the-supreme-court/371415/; Ben Feuer, *Why the Supreme Court Needs 18-Year Term Limits*, L.A. TIMES (July 18, 2017), https://www.latimes.com/opinion/op-ed/la-oe-feuer-supreme-court-term-limits-anthony-kennedy-20170718-story.html; Commission on the Practice of Democratic Citizenship, *Our Common Purpose: Reinventing American Democracy for the Twenty-First Century* (2020), https://www.amacad.org/ourcommonpurpose/report.

[48] *See* Linda Greenhouse, *How Long Is Too Long for the Court's Justice?*, N.Y. TIMES (Jan. 16, 2005), https://www.nytimes.com/2005/01/16/weekinreview/how-long-is-too-long-for-the-courts-justices.html.

[49] Steven G. Calabresi & James Lindgren, *Supreme Gerontocracy,* WALL ST. J. (Apr. 8, 2005), https://www.wsj.com/articles/SB111292087188301557.

[50] Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019).

generational change and more and more open to national renovation.[51] It is part of crisis and deadlock, to be reevaluated rather than restored in its basic functions if progressive reform is to occur.

Progressive politics necessarily sweep the basic institutional role of the Supreme Court into play. Not surprisingly, historians have shown that the last progressive wave in American politics starting in the late nineteenth century comparably eroded the institutional standing of the U.S. Supreme Court, and generated essentially all of the Supreme Court institutional reform proposals currently under discussion.[52] (That wave also generated more basic skepticism towards the Constitution itself, leading to waves of amendment proposals, and democracy-friendly doctrinal suggestions, quite apart from the institutional ones under consideration here.)[53]

One reason the progressive frame is not focused separately on Supreme Court reform as if the erosion of its legitimacy were a standalone or technical problem is that it is obvious that the only pathway for the Green New Deal and other economic and environmental policy change is legislative rather than judicial. Progressives have registered that the central reason for critique is a rising tendency of judicial obstruction of legislative ends, and a reinvention of constitutional rights and constitutional equal protection to mount that obstruction.[54] In particular, progressives have begun regularly complaining that the Court has transformed the First Amendment, if it ever was a shield for vulnerable minorities, into a sword for powerful interests to challenge popular legislation, in areas like campaign finance and labor law.[55] The commercial speech doctrine coupled with the protection of money as speech in electioneering[56] and opt-out rights from unionization[57] as speech are prominent examples of what Justice Kagan dubbed the Amendment's "weaponization."[58] Aside from the "Lochnerized" First Amendment, invocations of the Equal

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[51] *See, e.g.,* Niall Ferguson & Eyck Freymann, *The Coming Generation War*, ATLANTIC (May 6, 2019),https://www.theatlantic.com/ideas/archive/2019/05/coming-generation-war/588670/; David Byler, *Millennials Could Push American Politics to the Left—or Totally Upend Them*, WASH. POST (May 22, 2019), https://www.washingtonpost.com/opinions/2019/05/22/millennials-could-push-american-politics-left-or-totally-upend-them/; Paul Waldman, *Is the Emerging Democratic Majority Finally Coming to Pass?*, AM. PROSPECT (Aug. 11, 2019), https://prospect.org/power/emerging-democratic-majority-finally-coming-pass/.

[52] AZIZ RANA, THE RISE OF THE CONSTITUTION (forthcoming).

[53] *Id.*

[54] Kim Phillips-Fein, *Fear and Loathing of the Green New Deal*, NEW REPUBLIC (May 29, 2019), https://newrepublic.com/article/153966/fear-loathing-green-new-deal.

[55] *See supra* note 32.

[56] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[57] Janus v. American Federation of State, County, and Municipal Employees, 585 U.S. __ (2018).

[58] *Id.* at __ (Kagan, J., dissenting).

Protection Clause to protect the powerful rather than the weak[59] and increasing skepticism about the regulatory state both under Congress's power to delegate in general[60] and agency rulemaking discretion in particular[61] have become par for the course.

Even more important, it is easy to anticipate that this syndrome would only worsen, if – as expected and hoped – the political branches diverged further and further from the judicial branch, which in turn became a stronghold of resistance against progressive legislative ambition. This scenario is hardly guaranteed, of course. But the fact that it has seemed more and more plausible as 2018 changed control of the House of Representatives and 2020 loomed (with hopes for a Democrat in the White House and perhaps even the Senate in new hands) has been the single most important driver of Supreme Court reform debate. Readiness for confronting existing Court doctrine and likely obstructionism of new law has been the watchword of progressives who understood the threat the federal judiciary would pose to any of their legislative ends.[62]

Compared to the aging and polarization of the federal judiciary, or its contingent capture by the conservative movement due to one appointment, then, the fundamental reason progressives have identified for taking a second look at the Supreme Court is that it increasingly poses a threat to their legislative agenda, recent and prospective. Even the stress on polarization as a reason for Supreme Court reform failed to capture the deeper fear of the judiciary as a check on progressive legislation, for which the remedy was not obviously less polarization on the bench (and potentially involved more in the country).[63]

Finally, the progressive frame revisited the allocation of power away from the more democratically legitimate political branches in the first place, rather than merely identifying causes for its increasing abuse. Beyond the speculation about the erosion of descriptive legitimacy of the Supreme Court,

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[59] *See, e.g.,* Theodore R. Johnson, *How Conservatives Turned the 'Color-Blind Constitution' Against Racial Progress*, ATLANTIC (Nov. 19, 2019), https://www.theatlantic.com/ideas/archive/2019/11/colorblind-constitution/602221/.

[60] Gundy v. United States, 588 U.S. __ (2019).

[61] Kisor v. Willkie, 588 U.S. __ (2019), and the developments described in Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L.R. 393 (2015) and Sunstein & Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2016 SUP. CT. REV. 41 (2016). On the specific threat of the abandonment of *Chevron* deference, see Peireira v. Sessions, 585 U.S. __ (2018) and Craig Green, *Chevron Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654 (2020).

[62] *See, e.g.,* Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), http://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy.

[63] *See, e.g., See, e.g.,* Samuel Moyn, *Stop Worrying about Kavanaugh, Liberals; Start Winning the Political Argument*, WASH. POST (Aug. 8, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/08/08/stop-worrying-about-kavanaugh-liberals-start-winning-the-political-argument/.

the progressive frame challenges the background assumption that the Supreme Court achieves normative legitimacy when it engages in apolitical or neutral exercise of its power, rather than the amount of power consistent with democratic values. Its frame points in the direction not of relegitimating but reallocating judicial power.

Though (as we will see) there always were various ways at least to attempt to reconcile the judicial power of earlier decades with democratic legitimation, it was hard to miss that conservative justices—in a series of high-profile dissents in areas like abortion rights and same-sex marriage—were allowed to associate themselves with the normative value of democratic choice, at least when they did not have enough votes on the bench.

More important, progressives increasingly wanted to adopt the case for the democratic legitimation of policymaking for intrinsic reasons, and not merely for the instrumental ones that they risked ceding the aura of popular legitimation to their political enemies. Of course, it was no accident that demographic and generational change left progressives more optimistic about political change through the political branches, even as conservatives who had made the case for democratic self-rule were happier and happier to embrace judicial power now that they could exercise it. But this very development promised to save progressives from the very uncomfortable posture of seeking outcomes not by arguing before fellow citizens and winning elections, but by judicial means they then had to struggle to legitimate democratically. A progressive frame for Supreme Court reform augured plans to achieve progressive outcomes by democratic means, and appeal to democratic legitimation not to save the Supreme Court, but to put it in its place.

II. TWO TYPES OF REFORM

As Part I describes, progressives increasingly view the Supreme Court as a serious problem. Progressive activists and scholars have proposed a host of reforms in recent years, from court packing to jurisdiction stripping to term limits. As this Part explains, these various proposals can, despite their apparent heterogeneity, be sorted into one of two types. These types reflect two fundamentally different ways of understanding the problem that is being addressed.

The first type, which we call "personnel" reforms, propose to alter the Supreme Court's partisan or ideological composition. Such reforms seemingly promote different and potentially incompatible values – court packing, for instance, advances majoritarianism (at least in the short term), whereas partisan-balance requirements aim at moderation or depoliticization. All these reforms nonetheless try to improve our situation by adjusting the Supreme Court's membership, either immediately or across time, though they intervene in

different ways (to regulate the source of members, the composition of courts or panels, or length of service, etc.). Attending only to *who* sits on the bench, personnel reforms take for granted that the Supreme Court wields tremendous policymaking authority. The goal of such reforms is thus, for progressives, to wrest that authority away from conservatives.

By contrast, the second type of proposal, what we call "disempowering" reforms, take aim at what the Supreme Court is permitted to do. Reforms like jurisdiction stripping or supermajority voting rules for judicial review, for example, limit the Supreme Court's ability to make policy to varying degrees. In so doing, disempowering reforms effectively reassign power away from the judiciary and to the political branches. Unlike their membership analogues, these 'small-d' democratic reforms have no obvious ideological valence – initially, a 'large-D' Democratic Congress and President would enjoy greater latitude, but, over time, partisan advantage would be tied directly—and evenly—to electoral outcomes. Such reforms thus amount to mutual judicial disarmament, lowering the stakes of judicial appointments and increasing (or at least evening) the stakes of congressional and presidential elections.

A. Personnel Reforms

Owing to its boldness and historical pedigree, court reform discourse has revolved substantially around the slogan "pack the courts."[64] Invoking Franklin Delano Roosevelt's infamous proposal from the mid-1930s, proponents of court packing insist that Democrats, upon gaining control of both chambers of Congress and White House, increase by statute the size of the Supreme Court and the federal judiciary more generally. After creating sufficiently many vacancies, Democrats are then to fill those vacancies with ideologically aligned appointees.[65] In so doing, Democrats would thereby achieve effective control of the judiciary, both at the Supreme Court and below.

Among reform proposals, court packing is uniquely polarizing because it is so nakedly partisan. Within our broader political culture, the judiciary is understood, at least aspirationally, as insulated from partisan politics. By, in

[64] *See, e.g.*, Jamelle Bouie, *Mad About Kavanaugh and Gorsuch? The Best Way to Get Even Is to Pack the Court*, N.Y. TIMES (Sep. 17, 2019), https://www.nytimes.com/2019/09/17/opinion/kavanaugh-trump-packing-court.html; Moira Donegan, *Enough Playing Nice. It's Time to Pack the Courts*, THE GUARDIAN (Apr. 19, 2019), https://www.theguardian.com/commentisfree/2019/apr/19/pack-the-courts-democrats-2020; Pema Levy, *How Court-Packing Went from a Fringe Idea to a Serious Democratic Proposal*, MOTHER JONES (Mar. 22, 2019), https://www.motherjones.com/politics/2019/03/court-packing-2020/.

[65] *See, e.g.*, Millhiser, *supra* note 1.

effect, proposing to determine legal outcomes by changing the judge, court packing is thus scandalous to many, blatantly "politiciz[ing]" a branch whose role is to identify law.[66] Less idealistically (or naively), court packing is perceived as a "nuclear" option the exercise of which would set off a devastating partisan war.[67] As we explain in Parts III and IV, both of these objections to court packing are contestable. For now, the claim is just that packing the court is a transparently partisan and so controversial proposal.

The aim of the "pack the courts" movement, then, is to "take the courts *back*" from conservatives.[68] Accordingly, the problem that the Supreme Court poses is, for these reformers, that it is under conservative control. As we explain in Part III, there are various explanations as to *why* conservative control of the Supreme Court, and federal courts generally, might be a problem, ranging from unlawful or otherwise illegitimate acquisition to crudely pragmatic calculation. Regardless of motivation, however, the situation that court packing proposals seek to remedy is that there are too many conservatives on the bench.

While calls to "pack the courts" increase the temperature, the diagnosis of the problem is roughly the same for several more modest reforms. Consider, for example, proposals to implement some type of Supreme Court panel system.[69] Following these proposals, the pool of Supreme Court justices would be expanded dramatically, typically by appointing federal court of appeals judges also as associate justices. The Supreme Court would then divide its caseload across multiple sittings, with a panel of justices selected from the broader pool, preparing for each sitting, hearing oral argument, and issuing opinions for the assigned batch of cases.

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[66] Walter Shapiro, *The Case Against Court-Packing, Brennan Center for Justice* (June 24, 2019), https://www.brennancenter.org/our-work/analysis-opinion/case-against-court-packing; Shoshana Weissmann & Anthony Marcum, *Packing the Supreme Court Won't Work. Confirmation Hearings Are Already Highly Politicized.*, U.S.A. TODAY (Apr. 4, 2019), https://www.usatoday.com/story/opinion/2019/04/04/packing-supreme-court-would-further-politicize-column/3339783002/(arguing that court packing would "only subject nominees to a further politicized process lacking focus on what matters: How they see law").

[67] Dylan Matthews, *Court-packing, Democrats' Nuclear Option for the Supreme Court, Explained*, VOX (Oct. 5, 2018), https://www.vox.com/2018/7/2/17513520/court-packing-explained-fdr-roosevelt-new-deal-democrats-supreme-court; *see also* Josh Blackman, *Don't Try to Expand the Number of Supreme Court Justices*, NAT. REV. (July, 5, 2018), https://www.nationalreview.com/2018/07/supreme-court-nominee-court-packing-not-feasible/ (warning that court packing could "trigger a downward spiral that irreparably alters how our polity views the judiciary").

[68] Elie Mystal, *If We Don't Reform the Supreme Court, Nothing Else Will Matter*, NATION (Feb. 28, 2020), https://www.thenation.com/article/politics/reform-supreme-court/("We have too long tried to take on the court with the tools of law, but if the court is in fact a political branch, then instead of using the tools of law, you need to use the tools of politics." (quoting Sean McElwee, the director of research and polling for Take Back the Court)).

[69] *See* Epps & Sitaraman, *supra* note 10, at 181-84; Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1442 (2009).

Beyond these basic features, details of panel system proposals vary. For some, selection of individual panels would be truly random.[70] Others would impose partisan balance. One moderate variant envisions a one-time "court balancing" on the Supreme Court in particular, which corrects McConnell's overreach while avoiding overreach of its own and the spiral of "court packing."[71] Another proposes that on a panel of nine justices, no more than five have been appointed by a President of the same political party.[72] Apart from selection, some proposals would treat panel decisions as final while others would allow for en banc review; for the latter, a significantly larger panel of justices could be called to review especially contentious or noteworthy cases.[73]

Unlike court packing, proposals to implement a panel system have enjoyed meaningful institutional support. During the 2020 Democratic Presidential Primary, for instance, Bernie Sanders voiced enthusiasm for such a system.[74] Despite potential legal hurdles to implementation, panel systems are thus regarded by many as a more sensible, more "legitimate" approach to reform.[75] Notice, however, that the remedy – and, in turn, the problem – identified by panel reforms is roughly the same as with court packing. In both cases, the proposals in question would alter the partisan composition of the Supreme Court bench, thereby achieving judicial outcomes consistent with the new, preferred ideological distribution. Again, details vary as to which specific distribution is preferred – insofar as panels are selected at random, the ideological makeup of the Supreme Court would, across cases, mirror that of the federal appellate bench; by contrast, a partisan balance approach would ensure ideological moderation regardless of the composition below. Either way, though, it is implicit in such proposals that the problem with the Supreme Court has nothing to do with what the Supreme Court *does*, and everything to do with the attitudes of the individuals who compose it.

Partisan balance requirements work the same way. Separate from panel systems, several scholars have called for partisan balance on the Supreme Court

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[70] *See* George & Guthrie, *supra* note 69.

[71] See Ian Ayres & John Fabian Witt, *Democrats Need a Plan B for the Supreme Court*, WASH. POST (July 27, 2018), https://www.washingtonpost.com/opinions/democrats-need-a-plan-b-for-the-supreme-court-heres-one-option/2018/07/27/4c77fd4e-91a6-11e8-b769-e3fff17f0689_story.html (proposing one-time appointment of a "liberal" justice and a "moderate" justice on a eighteen-year basis as "a temporary intervention tailored to rectify the Senate's prior dereliction").

[72] *See* Epps & Sitaraman, *supra* note 10, at 181.

[73] *See* George & Guthrie, *supra* note 69, at 1465-68.

[74] Ian Millhiser, *Bernie Sanders's Radical Plan to Fix the Supreme Court*, VOX (Feb. 11, 2020), https://www.vox.com/2020/2/11/21131583/bernie-sanders-supreme-court-rotation-lottery.

[75] *Id.* (quoting Sanders).

in one form or other.[76] Sometimes the suggestion is, as mentioned above, that no more than five of nine justices be appointed by a president of the same party.[77] Other, more ambitious proposals call for an ideologically balanced court, reducing the Supreme Court to eight seats, for example, and assigning four of those seats to each major political party.[78] Whatever the form, partisan balance reforms plainly seek to impose on the Supreme Court a preferred ideological composition. As we discuss in Parts III and IV, the motivations for proposals of this sort vary somewhat, as do the criteria for determining what ideological composition is to be preferred. Still, will all partisan balance reforms, what the Supreme Court does stays the same. What changes is the ideology of the individuals who sit on the bench.

Proposals that some or all justices be selected by bipartisan or nonpartisan entities are remarkably similar. Daniel Epps and Ganesh Sitaraman, for example, propose a scheme pursuant to which each major political party would be allocated five seats on the Supreme Court, with those ten justices, in turn, selecting on a unanimous basis an additional five justices.[79] Setting aside obvious constitutional concerns, the aim of the unanimous appointment component of the proposal is openly to add an ideologically "centris[t]" block to the Supreme Court.[80] Similarly, suggestions that Presidents assent to "merit selection" of justices by a non-partisan commission aim at a more ideologically moderate or nonideological Court.[81] Here as before, the solution is to select justices who think the right way.

Last, consider judicial term limits.[82] Among the reforms described thus far, terms limit for Supreme Court justices enjoy the most popular support.[83] According to the most prominent version of this proposal, each of the nine justices would serve for a term of 18 years, after which justices would either take "senior" status or become judges on the courts of appeals.[84] Pursuant to this

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[76] *See* Epps & Sitaraman, *supra* note 10, at 181; Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547 (2018).
[77] *See* Epps & Sitaraman, *supra* note 10, at 181.
[78] *See* Segall, *supra* note 76, at 553-56.
[79] *See* Epps & Sitaraman, *supra* note 10, at 193-200.
[80] *Id.* at 193.
[81] *See* Theodore Voorhees, *It's Time for Merit Selection of Supreme Court Justices*, 61 AM. BAR ASSOC. J. 705 (1975).
[82] *See, e.g.*, Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006); Roger C. Cramton, *Reforming the Supreme Court*, 95 CAL. L. REV. 1313, 1323-24 (2007); Roger C. Cramton & Paul D. Carrington, *The Supreme Court Renewal Act: A Return to Basic Principles*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT Justices 467 (Roger C. Cramton & Paul D. Carrington eds., 2006); John O. McGinnis, *Justice without Justices*, 16 CONST. COMMENT. 541 (1999).
[83] *See New Poll Shows SCOTUS Term Limits Still Popular Across Party Lines, Fix the Court* (June 10, 2020), https://fixthecourt.com/2020/06/latest-scotus-term-limits-poll/ (finding that 77% of Americans support restrictions on length of service for Supreme Court justices).
[84] *See* Cramton & Carrington, *supra* note 82.

scheme, every President would have the opportunity to appoint two justices during his or her term (four if reelected). As a result, the influence of individual Presidents would, we are told, no longer fluctuate depending upon the timing of retirements or deaths.[85] Presidents would also lose the ability to entrench their preferences disproportionately by appointing justices who are especially young.[86] Unlike court packing, partisan-balance requirements, or bipartisan or nonpartisan selection, judicial term limits would not promote any *specific* ideological spread. Rather, somewhat like panel systems, term limits would tether the Supreme Court's partisan composition more directly and more evenly to electoral outcomes. For proponents of term limits, then, the problem with the Supreme Court is not that it has too many conservatives per se, but rather that that conservative tilt is disproportionate given electoral outcomes over the relevant period. In this respect, term limits are, unlike other personnel reforms, similar in spirit to the disempowering reforms we discuss below.[87]

B. Disempowering Reforms

Proposals to strip courts of authority to hear certain cases are similar to court packing in terms of aggressiveness. Such proposals vary mostly in scope. Some advocates recommend that Congress insulate specific legislation (e.g., the Green New Deal, Medicare for All, etc.) from judicial review.[88] Others urge that Congress strip courts of jurisdiction over hot-button issues such as abortion, affirmative action, or gun control.[89] Others still call for a much more sweeping ban, prohibiting courts from reviewing federal legislation for constitutionality at

[85] *See* Crampton, *supra* note 82, at 1322.

[86] *See id.*

[87] The other partial exception is a partisan balance requirement coupled with an even number of Supreme Court justices. *See* Segall, *supra* note 76. This form of partisan balance would systematically produce indecision owed to the possibility of an evenly divided Court. *See id.* at 568. As a result, the Supreme Court would be prevented from deciding some "major questions," though, without further reform, that power would be redistributed to the courts of appeals rather than the political branches. *See id.* Regardless, such a reform would disempower the Supreme Court mostly because it would increase the margin needed for decision from one to two. This *voting rule* component of the reform is, however, obviously separable from the partisan balance component. *See infra* notes 133-135 and accompanying text (discussing voting rule reforms under the rubric of disempowering reforms). Related but separate, partisan balance is also sometimes defended on the ground that, even with an odd number of justices, such balance encourages judicial minimalism and so disempower the judiciary in effect. Based on recent historical examples, we are skeptical of this justification. *See infra* notes 139-142 and accompanying text.

[88] *See* Barham, *supra* note 36, at 1143-47 (2005) (listing recent historical examples).

[89] *See id.* at 1143-44 (noting proposals during the 1970s and 1980s to strip federal courts of jurisdiction over school prayer, abortion, and busing cases).

all.[90] In all of these cases, there is also the choice whether to strip jurisdiction from the U.S. Supreme Court, all federal courts, or state and federal courts alike.[91] As these options suggest, disempowering the Court through jurisdiction stripping could be brought about in piecemeal fashion or though comprehensive standalone legislation. While doing so, it could also channel jurisdiction to exclusive executive branch adjudication, as in the World War II price controls legislation that the Supreme Court blessed in *Yakus v. United States*.[92]

As we discuss in Parts III and IV, jurisdiction-stripping proposals are both legally and politically controversial. Conceptually, though, such proposals illustrate the contrast with personnel reforms cleanly. Take some controversial congressional action: authorizing an agency to promulgate sweeping climate change regulations or a federal ban on handguns. The personnel reforms discussed above would all leave courts, in particular the Supreme Court, the final word as to whether that action was constitutionally permissible. The change would be that, under different reforms, different answers would be more likely or less: court packing, for instance, would make climate legislation safe and a handgun ban plausible, while a panel system would, assuming usual appointments practice, upgrade climate legislation to reasonably safe and a handgun ban to incredibly doubtful.

With jurisdiction stripping, by contrast, the fate of such controversial legislation would be determined by Congress and the President in September or April, and not by the Supreme Court in June.[93] By removing the judiciary from the process, jurisdiction-stripping legislation would thus tie policy outcomes exclusively to the most recent congressional and presidential elections. More still, the ideological makeup of policymaking officials would, at least with legislation, be determined by the electorate directly rather than being mediated in part by other elected officials. Assuming it were implemented by a progressive Congress and President, stripping courts of jurisdiction would favor progressive outcomes immediately. Over time, though, such reforms would have no

[90] Excepting textually grounded external constraints such as the Suspension Clause. *See* Boumediene v. Bush, 553 U.S. 723 (2008).

[91] Though Congress has rarely stripped both state and federal courts of jurisdiction over constitutional claims, the Port-to-Portal Act is a famous exception, as is § 7 of the Military Commissions Act of 2006, which the Supreme Court declared in violation of the Suspension Clause in *Boumediene*, 553 U.S., at 733.

[92] 331 U.S. 414 (1944). *Yakus* dealt *inter alia* with the validity of a jurisdiction strip from the federal courts to protect administrative price fixing, redirecting any challenges to an Emergency Court of Appeals within the executive branch, with appeal possible, but leaving the Supreme Court the option to exercise certiorari. Congress's manipulation of the labor injunction in the early twentieth century offers a kindred example. *Yakus* did not resolve whether Congress could strip jurisdiction over constitutional challenges; see *infra* notes 229-232 and accompanying text.

[93] Here we assume that both state and federal courts are stripped of jurisdiction. The picture becomes more complicated if only the Supreme Court or only federal courts are stripped, as we discuss below. *See infra* note 131.

predictable ideological valence – results would depend entirely and predictably upon elections.

While jurisdiction stripping is the most familiar example, other reforms would also change the Supreme Court's authority rather than its partisan composition. Proposals to require a super majority to declare federal legislation invalid would, for instance, preserve but severely constrain the Supreme Court's ability to intervene in federal policymaking.[94] Barring an unusually lopsided bench, the Supreme Court would remain able to step in in cases of uncontroversial constitutional violation. In more closely contested cases, though, it would fall upon members of Congress and the president to decide what the Constitution permits. In this way, a supermajority rule for judicial review would effectively implement a Thayerian "clear error" standard for judicial review.[95] As with jurisdiction stripping, a super-majority requirement for judicial review would leave the ideological composition of the judiciary unchanged. A supermajority requirement would similarly have no apparent long-term partisan implications. Instead, such a requirement would transfer power from the judiciary to the political branches in uncertain constitutional space.[96] Here again, Congress would face the choice of whether to limit specific legislation to "clear error" review, or whether to insulate all federal legislation in a single go.

Finally, some disempowering reformers have proposed letting Congress override the Supreme Court's judgment[97] that federal legislation is unconstitutional with a majority or supermajority vote.[98] In its weaker form, a legislative override would leave contrary judicial judgments in place but treat

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[94] *See* Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 894 (2003); Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73 (2003). Notably, Epps and Sitaraman also recommend a supermajority requirement alongside their various personnel reform proposals. *See* Epps & Sitaraman, *note* 10, at 190.

[95] *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); *cf.* Gersen & Vermeule, *supra* note 13 (proposing an analogous rule for review of administrative action for statutory compliance). As we explain below, supermajority rules are only a rough proxy for legal "clarity," but we think the ease of implementation justifies the rule, especially when "clarity" determinations will be predictably contested. *See infra*, note 127 and accompanying text.

[96] As with jurisdiction stripping, complementary reforms for state courts and lower federal courts would be needed to ensure that power is redirected entirely to the political branches. One could, for example, limit lower courts to forms of relief that expire upon Supreme Court review regardless of outcome (thanks to Jed Shugerman for this suggestion).

[97] Or a lower court judgment in the event the Supreme Court declines to review.

[98] *See* Mark Tushnet, *Dialogic Judicial Review*, 61 ARK. L. REV. 205 (2008); Christine Bateup, *The Dialogic Promise Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109 (2006); Nicholas Stephanopoulos, *The Case for the Legislative Override*, 10 UCLA J. INT'L L. & FOREIGN AFF. 250 (2005).

those judgments as limited to the parties involved. In its stronger form, an override would negate contrary judicial judgments or at least preclude such judgments going forward. Over time, this reform has enjoyed support from figures as disparate as 1920s Progressives[99] and Robert Bork.[100] Setting aside its debatable constitutionality, a legislative override would, like other disempowering reforms, transfer power from the judiciary to the other branches without apparent partisan consequence. Of the disempowering reforms considered here, a legislative override would transfer the least amount of power (especially in its supermajoritarian form since the Supreme Court rarely invalidates massively popular legislation). Structurally, though, it is the same as the other disempowering reforms, leaving the attitudes of the justices unaffected but constraining however somewhat their ability to give those attitudes legal effect.

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As we explain in Parts III and IV, reasons for and against adopting specific reforms vary, even within the types identified here. The aim of this Part has been to show merely that the various proposals offered operate in one of two ways: by altering the Supreme Court's partisan makeup or by constraining its ability to act. In turn, each proposal understands the problem that the Supreme Court poses as to do either with its ideologic composition or instead with the power it wields.

III. DESIRABILITY

While reforms can be divided between personnel and disempowering, the justifications for both types of proposals vary widely. In this Part, we canvas the various normative arguments advanced by proponents of both personnel and disempowering reforms. As we show, both groups express concern with the Supreme Court's legitimacy, though how to conceive of legitimacy proves a fundamental source of dispute. Beyond that ideal, both personnel and disempowering reformers attend to the basic functionality of the Supreme Court and, more specifically, the process of appointing Supreme Court justices. Here again we see disagreement, though this disagreement is more strategic than philosophical. Lastly, we take up arguments for reforms that are wholly pragmatic, which is to say, about which proposals would yield the best

[99] See *supra* note 36.
[100] *See* Robert H. Bork, *The End of Democracy? Our Judicial Oligarchy*, FIRST THINGS (Nov. 1996).

outcomes. In this instance, contestation is owed largely to conflicting views of the possible as well as about how bad the current situation is.

A. Neutrality

Within academic circles especially, the alleged legitimacy "crisis" confronting the Court is attributed to the increasingly partisan nature of judicial appointments and of judging itself.[101]

Citing most frequently the defeat of Merrick Garland's nomination through "hardball" tactics,[102] Democratic-leaning commentators argue that the appointments process has become unduly "politicized."[103] These complaints are bolstered by appeal to the elimination of the judicial filibuster and the resulting pattern of nominee approval by party-line vote.[104] These critics similarly lament the collapse of the Senate "blue-slip" tradition, which facilitates single-party approval of district court and court of appeals nominees within the Senate Judiciary Committee.[105]

Moving from appointments to judging, Lee Epstein and Eric Posner, for example, question "whether a Supreme Court that has come to be rigidly divided by both ideology and party can sustain public confidence for much

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[101] *See, e.g.*, Epps & Sitaraman, *supra* note 10, at 151; Michael Tomasey, *The Supreme Court's Legitimacy Crisis*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html; Waldman, *supra*, note 21.

[102] Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004) (defining "constitutional hardball" as political tactics "that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings").

[103] *See, e.g.*, Dan Balz, *The Kavanaugh Nomination Is Another Big Step in the Politicization of the Supreme Court*, WASH. POST (Sep. 22, 2018), https://www.washingtonpost.com/politics/the-kavanaugh-nomination-is-another-big-step-in-the-politicization-of-the-supreme-court/2018/09/22/1a13b5c4-be78-11e8-b7d2-0773aa1e33da_story.html; David Leonhardt, *How to End the Politicization of the Courts*, N.Y. TIMES (Apr. 4, 2017), https://www.nytimes.com/2017/04/04/opinion/how-to-end-the-politicization-of-the-courts.html.

[104] *See* Burgess Everett, *Republicans Trigger 'Nuclear Option' to Speed Trump Nominees*, POLITICO (Mar. 3, 2019), https://www.politico.com/story/2019/04/03/senate-republicans-trigger-nuclear-option-to-speed-trump-nominees-1253118; Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html.

[105] *See* Joseph P. Williams, *McConnell to End Senate's 'Blue Slip' Tradition*, U.S. NEWS (Oct. 11, 2017), https://www.usnews.com/news/politics/articles/2017-10-11/mcconnell-to-end-senates-blue-slip-tradition.

longer."[106] Observing the increasing predictability of a justice's behavior based upon the partisan identification of the President who appoints them, Epstein and Posner warn that "[f]or the first time in living memory, the [Supreme C]ourt will be seen by the public as a party-dominated institution, one whose votes on controversial issues are essentially determined by … party affiliation."[107] In turn, "[a]ssaults on judicial independence" such as (in their view) court packing will be "made easier when the public comes to view the judiciary as a political body."[108]

In both instances, the concern expressed is that, insofar as the Supreme Court is seen as a 'partisan' or 'political' actor, it (rightly) loses legitimacy in the eyes of the public. From this, we can infer that the normative ideal for the Supreme Court, and for courts generally, is to be a neutral arbiter of the law. In other words, the Supreme Court is supposed to be, according to these critics, an apolitical or nonpartisan institution.[109]

Many of the personnel reforms discussed in Part II try to restore or preserve the Supreme Court's perceived role as an apolitical decisionmaker. Most obviously, reliance on merit selection of Supreme Court nominees by a bipartisan or nonpartisan entity would sever the ideological connection between justices and the Presidents who (either otherwise or nominally) appoint them. Calling to mind the ideal of the technocratic decisionmaker, merit selection would assign to a panel of experts the determination of which judicial candidate is most "qualified."[110] Merit selection is, for that reason, most plainly intended to remove judicial selection from "politics," minimizing partisan identification of individual justices in turn.[111]

Somewhat different, partisan balance requirements would reduce or eliminate opportunities for political branch actors to alter the Supreme Court's ideological – or at least partisan – makeup. Guaranteeing either an even or slightly uneven partisan split, senators and the President could conspire to give their party at most a minor appointment advantage. Such requirements would thus minimize incidents like "stole[n]" Supreme Court seats – acts of naked partisanship that, we are told, are the most damaging to the Court's reputation.[112]

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[106] Lee Epstein & Eric Posner, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html.

[107] *Id.*

[108] *Id.*

[109] *See* Epps & Sitaraman, *supra* note 10, at 151 ("[I]n the United States, public confidence in the Supreme Court is impossible to disentangle from public confidence in the very idea of law itself, as an enterprise separate from politics.").

[110] Voorhees, *supra* note 81, at 708.

[111] *Id.* at 75.

[112] *E.g.*, Claudia Dreifus, *'The Right Stole the Court': An Interview with Russ Feingold*, N.Y. REV. BOOKS (July 14, 2020), https://www.nybooks.com/daily/2020/07/14/the-right-stole-the-court-an-interview-with-russ-feingold/ (citing current director of the American Constitution

Both partisan balance and merit selection also promote substantively 'moderate' or 'centrist' judicial decisions. Merit selection proposals, for instance, assign judicial appointments to ideologically diverse bodies and require broad consensus for an appointment to issue.[113] Given these constraints, one would expect appointed justices to be moderates or centrists, ideologically speaking. Similarly, partisan balance requirements would ensure that the Supreme Court not become too ideologically lopsided. With more ambitious versions of such reforms, some degree of bipartisan consensus would be required for the Court to issue precedential decisions.[114] And even under less ambitious versions, at least some degree of bipartisan agreement would be necessary absent a lockstep five justice majority.[115]

Immediately, however, this shift from *non*ideological to ideological *moderation* or *centrism* should set off alarms. Insofar as the Court is supposed to be a neutral arbiter of the law, reforms that conduce to ideological moderation are fundamentally of the wrong type. The neutral arbiter ideal is essentially what Chief Justice Roberts invoked with his in/famous judges as "umpires" metaphor.[116] That image of judging, of course, assumes a sharp distinction between politics and law. And, while we expand upon this below, it is enough to observe here that it makes no sense to insulate judging from politics by imposing *moderate* or *centrist* politics as opposed to politics that are far left or far right.

Returning to the influence of political branch actors, judicial term limits similarly attempt to regularize judicial appointments and thus insulate them from partisan fights.[117] The same is true for Supreme Court panel systems, which disperse the impact of judicial appointments in the hopes of avoiding political standoffs.[118] In each case, the idea in relation to legitimacy seems to be that open partisan conflict over judicial appointments call into question the Supreme

Society referring to the Garland's fate as "a theft of the Supreme Court. The right stole the Supreme Court. They stole it.").

[113] *See* Epps & Sitaraman, *supra* note 10, at 193 (assigning appointment power to a bipartisan panel of justices); Voorhees, *supra* note 81, at 707 (calling for a "representative committee" to propose nominees).

[114] *See* Segall, *supra* note 76, at 553-56.

[115] *See* Epps & Sitaraman, *supra* note 10, at 181

[116] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*: *Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) ("Judges are like umpires. Umpires don't make the rules, they apply them.").

[117] *See, e.g.*, Kermit Roosevelt & Ruth-Helen Vassilas, *Supreme Court Justices Should Have Term Limits*, CNN (Sep. 30, 2019), https://www.cnn.com/2019/09/30/opinions/supreme-court-term-limits-law-roosevelt-vassilas/index.html (claiming that term limits would "bring predictability and fairness to a broken appointment process").

[118] *See* Epps & Sitaraman, *supra* note 10, at 182 (claiming a panel system would "significantly de-politicize the appointments process by making confirmations more numerous and less consequential").

Court's nonpartisan, nonideological character.[119] So long as the appointment process remains harmonious, the thought continues, the public will continue to believe that the Supreme Court deals mostly not in politics but in law.

So, what then are we to make of these attempts to preserve or restore the Supreme Court's status as a nonideological institution?

Accepting the ideal of the Supreme Court as a neutral arbiter, the immediate question is whether any of the reforms just mentioned might help the Court fulfil that ideal. Assume for sake of charity that many of the questions the Supreme Court presently takes up admit of distinctly legal answers. Given that assumption, we can ask whether one would anticipate any of the proposed shifts in the Supreme Court's personnel to improve its fidelity to law.

To start, justices today have far more distinctly legal experience than those from previous eras. Whereas, for instance, politicians with meaningful legal experience used to be appointed to the Supreme Court with some regularity, contemporary justices are specialized in the legal profession, either as career attorneys or, increasingly, as lower court judges.[120] Given this trend, it is hard to imagine that any of the reforms above would yield justices with more lawyerly skill. In terms of technical competence, justices today are as adept as one could plausibly ask in terms of identifying what the law is.[121]

Turning to ideology, few if any would argue that the Supreme Court's legal analysis goes uninfluenced by willfulness or motivated reasoning. Especially in politically significant cases, the consensus among scholars and other legal observers is that the Supreme Court's decisions are, to the contrary, driven substantially by ideological commitment. The question is, then, whether implementation of the considered reforms would lessen ideological influence.

As mentioned above, the principal ideological effect of some of these reforms would be to impose upon the Supreme Court a more moderate or more centrist ideology. Merit selection, for example, would likely produce swing justices who behave more like Justice Kennedy than Chief Justice Roberts, let alone Justices Thomas or Sotomayor. Again, though, to impose a moderate or centrist ideology is not to remove ideology from the equation. Just as those on the far left or the far right are susceptible to motivated reasoning or willfulness, those in the political center have substantive preferences that can lead them astray if those preferences do not align with the law. Put more simply, it is hard

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[119] *See* Grove, *supra* note 50 at 2273 (noting the "partisan squabbling that has damaged the [Supreme] Court's reputation").

[120] *See* Robert Alleman & Jason Mazzone, *The Case for Returning Politicians to the Supreme Court*, 61 HASTINGS L.J. 1353, 1355 (2010) (observing that "prior service in the federal judiciary has become an increasingly important qualification for appointment to the Supreme Court").

[121] *But see* Adrian Vermeule, *Should We Have Lay Justices*?, 59 STAN. L. REV. 1569, 1571 (2007) (arguing a Supreme Court with "at least some lay Justices will reach more right answers across the total set of cases").

to see how merely *changing* the Court's ideology would make the Court less ideologically motivated.

Worse still, insofar as the reforms above would "depoliticize" the appointment of justices, such reforms might work only to obscure the role ideology plays on the Supreme Court.[122] Assuming, for instance, that political fights over judicial appointments alert the public to the fact that judicial appointments have significant political stakes, laundering appointments through a panel of experts might suggest falsely that the justices are nonpartisan actors. Similarly, partisan balance requirements might serve to naturalize a preferred ideological distribution, implying that ideological moderation or centrism is the same as nonideological. Even term limits or panel systems, to the extent they reduce partisan contestation, might indicate to the public, again falsely, that ideology plays little role in the way the justices exercise power. With all of these reforms, then, although the Court's sociological legitimacy might increase, it would do so based only on false pretense.

The problem of obfuscation only gets worse, of course, the fewer of the Supreme Court's questions admit of identifiable legal answers. At the logical limit, if the Supreme Court operates as an unelected "super-legislature," casting it as an apolitical institution would be both hugely problematic and deeply absurd.[123] And even if the Supreme Court's practice is less ideological than Legal Realists suggest, ideology still plays a meaningful role, through motivated reasoning if nothing else. Current battles over Supreme Court appointments would make no sense otherwise.

If none of these reforms work to make the Supreme Court less ideological, however, why do proponents insist that they would? The cynical answer is that said proponents hope to promote unwarranted sociological legitimacy of the sort just cautioned against. More charitably, though, those proponents may be confusing partisanship with ideology owed to the historically recent correlation between the two. As Daniel Hemel has argued, the Court over time exhibits relatively clear ideological fissures; the justices are, Hemel

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[122] We classify Thomas Keck's argument that court packing might forestall "democratic erosion" in the spirit of legitimacy rather than democracy. The idea is that institutional change is needed because, without it, Republicans will use the court to depart from democratic fundamentals—but whether or not this is plausible, it is based on a notion of democracy in terms of regime type rather than popular decision-making. *See* Thomas Keck, *Court-Packing and Democratic Erosion,* (Feb. 19, 2020), available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476889; *see also* Aaron Belkin*, Court Expansion and Constitutional Hardball*, 2019 PEPP. L. REV. 19 (2019).

[123] Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature,* 66 HASTINGS L.J. 1601 (2015); David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. __ (forthcoming 2021) (arguing that the norm against transparently political arguments in constitutional adjudication inevitably results in the distortion of "distinctly legal" arguments to accommodate political concerns) .

observes, no more "polarized" now than at most points in the past century.[124] What is new, however, is that the justices' ideological clustering today correlates tightly with partisan affiliation. In other words, whereas predictably "liberal" or "conservative" justices used to be appointed by Presidents of each party, an appointing President's partisan affiliation has newly become a reliable predictor of a justice's ideological leanings.[125]

At least plausibly, the recent emergence of a ready proxy for judicial ideology has misled some into believing that the justices have suddenly become ideological. Pursuant to that confusion, one might thus believe that the way to make the Supreme Court less ideological is to make partisanship, including partisan disputes, less salient. In reality, such reforms would at best (or worst) make ideology less visible, persuading some, in turn, that the Court is less ideological than it actually is.

Whereas personnel reforms try to make the Supreme Court less ideological by changing the Court's ideology, disempowering reforms do so by restricting the questions the Court has to answer. Stripping courts of jurisdiction over controversial issues like affirmative action or gun control would, for example, remove from the Supreme Court's docket cases where motivated reasoning is especially likely. Similarly, prohibiting courts from reviewing federal legislation for constitutionality would prevent the Supreme Court from having to expound upon the Constitution, which, compared to legislation, is famously vague.[126]

Somewhat different, a supermajority requirement for judicial review would make it more plausible that the Supreme Court is identifying law when declaring a federal statute invalid. Although imperfect, broad consensus across ideological division is at least an indication that the constitutional violation in question is "clear."[127] By limiting the Court's constitutional jurisprudence to such uncontroversial cases, a supermajority requirement would thus lend credence to the thought that the justices work not only in politics but also in law.

B. Democracy

[124] Hemel, *supra* note 38.

[125] *See id.*

[126] *See* M'Culloch v. Maryland, 17 U.S. 316, 407 (1819) ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.").

[127] *Compare* Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 GEO. L.J. 159, 159 (2016) (arguing that judicial disagreement is evidence of legal unclarity); Gersen & Vermeule, *supra* note 105 (same); *with* William Baude & Ryan D. Doerfler, *Arguing with Friends*, 117 MICH. L. REV. 319 (2018) (arguing that judicial disagreement only indicates unclarity under certain conditions).

The push for democratic legitimacy starts from the observation that much of the Supreme Court's work is inherently political. Especially in constitutional cases, many of the claims the Court is asked to evaluate are legally underdetermined or, at a minimum, epistemically opaque. As a result, Supreme Court justices inevitably rely upon policy inclinations in deciding what the Constitution requires or permits. The question for small-d democratic reformers, then, is how to reconcile the ideological nature of these determinations with a commitment to democratic self-rule.

For proponents of disempowering reforms, the way to address the apparent tension is to redirect decision-making authority away from the democratically unaccountable judiciary and toward the political branches. Take a statute that would strip state and federal courts of jurisdiction over constitutional challenges to the Green New Deal. Such legislation would take from courts final authority over whether Congress may delegate expansive rulemaking authority to the Environmental Protection Agency or render the extraction and refinement of fossil fuels unprofitable through aggressive environmental regulation. Instead, those decisions would be made by Congress and the President and, in turn, voters, to whom those officials are accountable, however imperfectly.

As a class, disempowering reforms reject the goal of restoring the sociological or normative legitimacy of the Supreme Court as an apolitical or neutral institution, allegedly lost through accident or mistake. Instead of safeguarding the extant power of the Supreme Court, disempowering reforms saps the institution of some of that power and transfers it to the political branches of government. It proposes to do so on the most straightforward definition of the democratic premise: that, all else equal, the people themselves should directly determine their arrangements.[128]

The rationale for institutional disempowerment is the standard one that, in modern times, no one is entitled to rule the people than the people themselves. As David Grewal and Jedediah Purdy have shown, this commitment stood at the very origin of modern constitutionalism, and of modern politics more broadly.[129] This by no means settles, of course, how far a constitution can or should erect one or another set of institutions to represent the people. And for all its commitment to democratic self-rule, modern politics preserved and refashioned an older, premodern commitment to aristocracy. The U.S. Constitution in particular is celebrated in many quarters (and is notorious in

[128] As we detail below, over the latter half of the twentieth century, academic defenses of the Supreme Court's role in American life shifted from openly anti-democratic to pro-democratic, as if the shift had no implications for its institutional power. See *infra* note 176.

[129] David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664 (2018) (reviewing RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY (2016)).

others) for reconciling the modern novelty of popular government with continuing elite control.[130]

Even to the extent that reconciliation is plausible, however, it says nothing in particular about how much power an apex court like the Supreme Court should enjoy—something that Americans have differed about throughout their history. Conversely, criticisms of the undemocratic empowerment of the Supreme Court have risen and fallen in tandem with the empowerment and disempowerment of the institution.

In the current discussion of the politics of Supreme Court reform, democratic legitimacy is distinctive from and indeed at odds with the most routinely voiced aspiration of restoring the apolitical and non-partisan neutrality of the institution. It leads, again, to relatively more insistence that partisanship goes all the way down, even when transferred to allegedly neutral institutions. It also disputes the availability—especially on nationally contentious issues that divide the Supreme Court most regularly—of distinctively legal outcomes as opposed to resolution through political contest and deliberation. For progressives in particular, the ideal of democratic legitimacy thus challenges decades of mistaking the contestably moderate for the ideally neutral. For all these reasons, democratizing the Supreme Court is an openly political project to be judged based on the democratic character of both institutional means of reform and progressive output of policy results.

Returning to the specific example of jurisdiction stripping, the extent to which jurisdiction stripping legislation would be democratizing would depend upon the scope of the strip. Stripping only the Supreme Court of jurisdiction over challenges to the Green New Deal would, for instance, leave both lower federal courts and state courts a say in the ultimate fate of that legislation. Such a reform would still be democratizing in that it would require greater judicial coordination to negate Congress's decision in full.[131] Still, compared to a comprehensive strip of the sort described above, the democratizing effect of a Supreme Court strip would be limited. Similarly, stripping courts of jurisdiction over only a small set of constitutional cases would leave courts with tremendous authority outside that limited space. A total or near total strip over constitutional cases would, by contrast, dramatically reallocate decision-making authority within our constitutional scheme.

We take no position as to what scope jurisdiction stripping should have or, for that matter, whether jurisdiction stripping legislation should be preferred

[130] For a refreshingly explicit recent defense of the Constitution's commitment to elite rule *rather than* democracy, see ERIC A. POSNER, THE DEMAGOGUE'S PLAYBOOK: THE BATTLE FOR AMERICAN DEMOCRACY FROM THE FOUNDERS TO TRUMP 17-54 (2020).

[131] Though, importantly, even partial negation would be hugely consequential for policy choices such as climate legislation that rely heavily on uniform compliance.

to other disempowering reforms.[132] Voting rules like a supermajority rule for declaring federal legislation invalid would, for instance, similarly disempower the Supreme Court in contestable constitutional cases at least. By requiring a higher threshold of consensus for the exercise of judicial authority, such a rule would functionally reallocate decision-making authority to the democratically legitimate branches of government in cases in which a countermajoritarian faction on the Court enjoys only a simple majority. Such a reform might be more palatable than jurisdiction stripping for those who believe, for example, that the Supreme Court is a critical protector of rights.[133] This is because, under a supermajority rule, "clear" constitutional violations would continue to be identified and declared, even as disputable cases would be left to majority will.[134] As with jurisdiction stripping, voting rule proposals vary in terms of scope and, in turn, democratizing effect. One could, for example, apply a supermajority rule to only the Supreme Court or to all courts with jurisdiction over constitutional challenges to federal statutes.[135]

Similarly, some form of legislative override would transfer significant authority from the judiciary to Congress (and, potentially, the President). Like a supermajority rule, a legislative override would leave the Supreme Court with a meaningful say as to the constitutionality of congressional action, requiring an affirmative step from Congress *beyond* initial enactment in the event of constitutional disagreement. In this respect, a legislative override facilitates, at least in principle, a "dialogic" approach to constitutional interpretation, facilitating an extended exchange between the political branches and the judiciary.[136] As Canada's experience suggests, however, the dialogic, and, in turn, democratic, benefits of an override mechanism may be more theoretical than real.[137]

Whereas disempowering reforms promote democracy by reallocating decision-making authority to the democratically accountable branches, personnel reforms might at least seem to do so by aligning judicial ideology more closely with that of the masses. Court packing, most obviously, is intended to reshape the judiciary such that it will get out of the way of progressive majorities. And, in this way, would promote democracy *in the short term*. Over time, though, for it to be consistent with democracy, court packing would have to be an

132 *See infra* Parts IV.A.2 & IV.B.3 (describing legal and political considerations relevant to the choice).

133 *But see infra* Part III.A.3.

134 *See supra* note 95 and accompanying text.

135 Here again, one would also have to decide whether to, for example, limit the relief available to lower courts to prevent disuniformity in the event that a bare majority of justices vote in favor of unconstitutionality. *See supra* note 96.

136 Tushnet, *supra* note 98, at 208-09.

137 The Canadian parliament has yet to invoke this authority, and regional governments have done so only sparingly. The same is true in Israel, which also has a legislative override option.

iterative process, with each newly elected majority adding new justices and judges of their own. For this reason, court packing proposals are either redundant or risky with respect to democracy: Either they require a lot of work to extend legislative control already achieved through popular victory, or they threaten that control by delegating power from democratic principals to less accountable agents.

Supreme Court term limits are more promising. Unlike court packing, term limit reforms are intended to link Supreme Court appointments more consistently and more evenly to electoral outcomes over time. As we discuss below, there are reasons to doubt that term limits would achieve this aim to the degree advertised. More still, the democratizing effect of term limits would be incredibly modest both because justices would remain democratically unaccountable upon appointment and because elections from almost two decades ago would have policy ramifications today – one could imagine a President Alexandria Ocasio-Cortez, for example, frustrated by the relative conservatism of Biden-era Democratic appointees. Term limits are, nonetheless, distinct among personnel reforms in that their democratizing effect is systematic.

Other personnel reforms make no serious effort at promoting democracy. Merit selection proposals, for example, are intended to *limit* democratic flux by entrenching a more moderate, more centrist judiciary. Beyond that ideological entrenchment, such proposals would have no predictable democratizing effect. Rather, these reforms would merely lead to the dynamics observers of judicial politics have observed for decades: the debate about the proper deployment of judicial power, with different schools pointing to the Constitution or law in general, or institutional or professional ethics, as properly guiding the deployment of power.

At first blush, partisan balance requirements operate the same way, ensuring at most a limited partisan skew and so more ideologically moderate outcomes.[138] Some, however, advocate partisan balance on the theory that such an arrangement would necessitate ideological compromise, which, these advocates insist, would take the form of less sweeping judicial holdings.[139] Such judicial minimalism[140] would, in turn, leave more space in which for Congress to act. While attractive in theory, this minimalist prediction fits poorly with recent historical practice. The narrowly divided Roberts Court, for example, has opted for horse trading rather than incrementalism in some of the most politically

[138] *But see supra* note 87 (discussing partisan balance on an evenly divided Supreme Court).

[139] *See* Segall, *supra* note 76, at 550 (arguing that partisan balance would result in "narrower" decisions).

[140] *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

significant cases.[141] And even in areas like abortion where the Court has taken a more incrementalist approach, the ultimate effect looks to be a more significant shift in constitutional law than would result from more dramatic rulings followed by predictable backlash.[142]

C. Rights

The most common objection to disempowering reforms to the Supreme Court is the need for it to protect important rights, especially minority rights against hostile majorities. For many, rights protection is a leading criterion for assessing not just judicial reform, but the basic purposes of a judiciary in the first place.[143] We need not review the gargantuan literature on the plausibility of the familiar claim that judiciaries are empowered precisely to protect rights--as Justice Robert Jackson immortally put it, "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts"[144]--in the abstract. But a few targeted responses to it from the perspective of Supreme Court reform are indispensable.

We will argue that (1) disempowering reforms open the possibility of much superior rights protection precisely because of the progressive legislative agenda withdraws unjustifiable protection for the powerful and allows for or improves upon rights protection for both majorities and minorities alike; (2) disempowering reforms leave a range of plausible judicial mechanisms for rights-protection in necessary cases; and (3) even to the extent that disempowering reforms imaginably threaten rights, it is not clear that personnel reforms have better credentials for ensuring their protection.

(1) The progressive frame disputes that majority rule and rights protection are in a situation of endemic conflict, for the historical record clearly demonstrates that legislatures are the chief historical source of rights, while judicially-enforced rights protections can easily devolve into technologies of minority rule.[145] If that is so, as a general matter it is quite possible that

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141 *See* Joan Biskupic, *The Inside Story of How John Roberts Negotiated to Save Obamacare* (Mar. 25, 2019) CNN.COM, https://www.cnn.com/2019/03/21/politics/john-roberts-obamacare-the-chief/index.html (describing a "deal" struck between conservative and liberal justices to uphold the Affordable Care Act's individual mandate but invalidate its expansion of Medicaid).

142 *See* Leah Litman, June Medical *as the New* Casey (June 29, 2020), TAKE CARE BLOG, https://takecareblog.com/blog/june-medical-as-the-new-casey (arguing that the "victory" for reproductive rights this Term was "likely pyrrhic").

143 *See, e.g.,* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

144 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

145 *See, e.g.,* HENRY STEELE COMMAGER, MAJORITY RULE AND MINORITY RIGHTS (1943).

disempowering leads to superior rights protection, not worse. On the one hand, it subjects to majority rule the powerful and wealthy minorities claiming and getting the protection of the courts.[146] On the other, progressive reform through the political branches of government can potentially lead to superior legislative protection of the rights of majorities from those powerful and wealthy minorities, as well as superior legislative protection of the rights of vulnerable or weak minorities.

The American (and, even more, global) progressive default was long, not the absence of rights as a political goal, but "legislated rights."[147] The privilege of the judiciary led to the *Lochner* era—for there is no doubt that if that case is anticanonical in American memory it is so precisely as a form of illicit rights protection, cast aside to achieve better rights protection through legislative means. As FDR accurately explained, "the Bill of Rights was put into the Constitution not only to protect minorities against intolerance of majorities, but to protect majorities against the enthronement of minorities"[148]—which sometimes requires putting courts in their place in order to privilege legislatures pursuing rights for all and balancing the claims of majorities and minorities alike.

In this spirit, the legislature can be seen as the first and most important defender and propagator of rights, and majority rule the default source of legitimacy for assessing the scope of rights and resolving conflicts among rights and between rights and other priorities. Roosevelt's "Second Bill of Rights" envisioned a suite of economic and social entitlements of modern citizenship, but not one that judicial authority would enforce, and whose scope remained to be determined in light of other interests and values.[149] And though they did not enact it, Americans have remained within a legislated rights frame in propounding civil rights acts that effectively did more than any judicial decision to confront exclusions based on race, gender, or disability.[150]

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[146] We leave aside here large debates about whether the results are different outside an American context, in which rights-protecting judicial review occurs against the backdrop of a practically unamendable constitutional text prioritizing so-called negative liberties, with traditions that have singled out property, contract, and due process in the deprivation of "liberty" for special treatment (however they are interpreted), and without economic and social entitlements. For conflicting impulses about judicially enforced rights protection globally, *see, e.g.*, Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 AM. J. POL. SCI. 575 (2016) and Versteeg, C*an Rights Combat Economic Inequality?* 133 HARV. L. REV. 2017 (2020).

[147] GRÉGOIRE WEBBER ET AL, LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION (2018).

[148] President Franklin D. Roosevelt, *Address on Constitution Day*, (Sep. 17, 1937).

[149] Samuel Moyn, *The Second Bill of Rights: A Reconsideration*, *in* HUMAN RIGHTS, DEMOCRACY, AND LEGITIMACY IN A WORLD OF DISORDER (Silja Vöneky & Gerald L. Neuman eds., 2018).

[150] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended in scattered sections of 42 U.S.C.); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

Consider again from this perspective the current baseline of rights protection in American constitutional law and what the Green New Deal would do in supplementing it. As noted above, illicit forms of rights protection associated with the Lochner era and our own neo-Lochnerian one foil prospective reform absent Supreme Court renovation.[151] Americans can boast strong judicial protection of core forms of speech, along with other protections of religion that are no doubt defensible in some form (even when used to limit the scope of other constitutional rights or even allow the Supreme Court to expand statutory antidiscrimination protections to sexual orientation, in expectation that those requesting religious accommodations and exemption will be provided them).[152] By the same token, however, Americans do not have other basic rights under the U.S. Constitution, whether rights to basic provision (of food or housing or sanitation or water, all familiar in other national settings and international law).[153] In the case of health care, not only do Americans not have a right to but the judicial power the Constitution establishes has been deadly to the initial attempt to take some steps towards it under the star-crossed Affordable Coverage Act.[154] A right to education is often protected in state constitutions but has been explicitly rejected by the Supreme Court.[155] More generally, even with respect to the rights for which constitutional law provides robust protection, it is not class sensitive, and not only are material insufficiencies not understood as rights violations under judicially elaborated frameworks, material inequality is not either.[156] A right to work, or labor rights to organize and strike, have never been significant features of America's constitutional law.

By contrast, while not everything a Green New Deal or other progressive legislative reform would involve should be conceived as the elaboration or substantiation of a right, much of it is easy to understand that way. Many of its key planks – job guarantees vindicating the right to work, high-quality food, health care, housing, or water correlating with well-known rights, promises for high-quality education not only at the primary but secondary level

151 *See supra* Part I(a).

152 *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n 584 U.S. __ (2018), Bostock v. Clayton Cty., __ U.S. __ (2020).

153 *See, e.g.,* International Covenant for Economic, Social and Cultural Rights (1966).

154 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. __ (2012).

155 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

156 Frank I. Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (calling for judicial protection under the Equal Protection Clause for basic human needs); Dandridge v. Williams, 397 U.S. 471 (1970) (rejecting such judicial enforcement of sufficient provision); SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018) (on the disjuncture between sufficient provision and distributive equality in our time).

– fit.[157] Even its "green" part can be seen as rights-protective, and the more general rhetoric of facing down inequality after decades of its expansion bears not only on basic rights but also can be conceived to involve rights beyond sufficient provision to an entitlement to rough equality in life chances.

Ronald Dworkin has epitomized a stereotypical view judicial authority was absolutely required to invoke rights as principled "trumps" against aggregating legislatures.[158] Missing from this picture entirely was whether legislatures might be fora of principle equal or even superior to defending extent rights commitments, and propagating new ones. (Dworkin did acknowledge that "fit" with American traditions forbade any very expansive understanding of our constitutional rights.)[159] Shifting away from recent Dworkinian assumptions is especially pertinent when it comes to so-called positive rights, none of which are protected under the U.S. Constitution and few of which have ever been sought – even at the zenith of liberal power on the Supreme Court – through judicial interpretation. As Dworkin's assumptions more or less accurately reflect, Americans boast a small number of rights that they protect in absolutist ways through judicial intervention. Other countries proceed differently, by propounding a much wider variety of rights, which are protected less robustly through proportionality balancing against other interests, and through distributed institutional control over rights.[160]

It is, of course, true, that judge-led interpretation of the Constitution's rights applied most of them to the states in the middle of the twentieth century, and by doing so revolutionized protections in criminal procedure. It also extended individual rights not mentioned in the constitutional text across the century—in the phase since the 1960s, mostly under the Due Process Clause's promise of liberty, freed from the constitutional protection of freedom of contract as a right. In this vein, rights like freedom from compulsory sterilization,[161] and to choose to abort pregnancy or marry a spouse of different race[162] or the same sex[163] were protected. And the equal protection clause was used to ban formal apartheid, and especially formal segregation of races in schools.[164] These results account for the familiar anxiety that Supreme Court disempowerment would threaten rights protection. And no one should pretend that a legislated rights regime would match the set of entitlements achieved

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[157] *See* Recognizing the Duty of the Federal Government to Create a Green New Deal, H.R. Res. 109, 116th Cong. (2019).
[158] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).
[159] RONALD DWORKIN, LAW'S EMPIRE 114-50 (1986).
[160] JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021).
[161] Skinner v. Oklahoma ex rel Williamson, 316 U.S. 535 (1942).
[162] Loving v. Virginia, 388 U.S. 1 (1967).
[163] Obergefell v. Hodges, 576 U.S. __ (2015).
[164] *Brown*, *supra* note 33.

through judicial interpretation precisely. Even if a legislated regime provides for many rights on its own, or more of them, it may miss others.

Our threshold contention, however, is that we are not comparing exclusive principled defense of rights in judiciaries against unprincipled majoritarian action, but instead some schedule of rights and some modicum of protection on both sides of the line. Minimally, rights concerns do not cut against legislative empowerment *per se*. And more maximally, the progressive assumption is that rights protection may well be available in superior form through political branches as agents of national transformation—even as judicial empowerment to achieve the current spotty and weak protection of rights generally serves debatable ends, and is strong mainly for the rights of powerful and wealthy interests. It is not just that legislatures can protect rights for majorities and minorities, but that judiciaries can convert rights protection into illicit minority rule. Indeed, if existing entitlements for those most in need are weak and for the powerful are strong, judicial empowerment can at least as plausibly be construed as a project of rights violation as of protection, and disempowering as instrumental for the sake of rights themselves.

Sometimes progressives may rely on accounts of the comparative institutional bias of judiciaries (relative to legislatures) towards views of elites[165] and outcomes favoring them.[166] Sometimes they may even—as in Karl Marx's early writings[167] and in the critical legal studies movement[168]—claim that individual rights are especially susceptible to the production of those same outcomes. And those suggestions deserve careful scrutiny. But even if neither kind of account is persuasive, disempowering reform can be construed as a project of rights expansion and vindication, beyond the narrow list and weak protection of Supreme Court doctrine, currently and even historically.

The question then is whether the unimpressive baseline of Supreme Court protection of the rights of the vulnerable and weak, even as it has come to systematically favor neoliberal outcomes in First Amendment jurisprudence and beats back at legislative protection in areas like affirmative action or voting rights, suffices to justify its empowerment as guardian of basic entitlements. When we consider the likely obstacle it would pose to rights expansion as a progressive agenda, the answer to that question is not hard. Disempowering

165 Lawrence Baum & Neal Devins, *Why the Supreme Court Cares about Elites, Not the American People*, 98 GEO. L.J. 1515 (2010).

166 *See, e.g.*, Paul Kens, *The United States Supreme Court and Business Elites: Gilded Age Origins of Modern American Liberalism*, 2013 TRANSATLANTICA 1 (2013); J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1544 (2018).

167 Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER (Robert C. Tucker ed., 1978)

168 For a survey *see* Duncan Kennedy, *The Critique of Rights in the Critical Legal Studies Movement*, *in* LEFT LEGALISM/LEFT CRITIQUE (Janet Halley & Wendy Brown eds., 2002).

reforms would count as a far greater victory for rights than an empowered victory could ever deliver.

(2) Furthermore, while the functional effect of disempowering reforms like jurisdiction stripping and supermajority rules on the Supreme Court is to reduce the significance of judicial review, it is not a matter of either/or. Functional disempowerment of the Supreme Court leaves a series of stopping points short of full negation of judicial review through some institutional reform, which only a persistent but tiny minority of followers of Thomas Jefferson in American life supports.[169]

Indeed, there have been many proposed stopping points to manage judicial rights protection already tried. If they have generally failed—leaving too many protections for the undeserving and too few for those in need—it by no means obviates a new compromise leaving some crucial judicial rights protection intact. James Bradley Thayer's proposal merely to subject majority legislation to rationality rule left room for policing irrational results.[170] More boldly, the original move in the 1930s, originally defended in the fourth footnote of the *Carolene Products* opinion[171] and canonically justified by John Hart Ely,[172] to "bifurcated review"—which subjected economic legislation to rationality review after the abandonment of the old substantive due process while protecting some schedule of rights and some kinds of minorities—was another such compromise. Where personnel reforms do not react to the general failures of past compromises either to deal with underenforcement of rights or "juristocratic" excesses, disempowering reforms hardly abandon the possibility of a more successful one. Relative democratization hardly means total disempowerment of judiciaries to protect rights. The same is true of Ely's defense of judicial review to remedy participatory exclusions and failures. While there is no reason on its recent track record to believe that the Supreme Court will pursue his vision, [173] attractive in theory but dead in practice for several decades, nothing forbids a disempowered judiciary from doing so.

If properly calibrated, jurisdiction stripping statutes, for example, could insulate precisely the attempted expansion of legislative rights from judicial limitation in the name of various provisions of the Constitution weaponized by the right (notably, the free exercise and free speech clauses), while leaving judges power to protect other rights from unsuspected majoritarian excess. Similarly, supermajority rules have a distinctive capacity compared to personnel reforms for counteracting the reality that controversial minoritarian tyranny today very

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169 *See, e.g.,* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

170 *See* James B. Thayer, *Constitutionality of Legislation: The Precise Question for a Court*, NATION, Apr. 10, 1884, at 314-5; Thayer, *supra* note 95.

171 United States v. Carolene Products Co., 304 U.S. 144, 155 n. 4 (1938).

172 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

173 See, most recently, Rucho v. Common Cause, ___ U.S. ___ (2018).

much works through the Supreme Court, while leaving room for justices to intervene in the case of genuine majoritarian tyranny when enough justice agree it is real, rather than a smokescreen for illicit capture.

It should also be added that, in stark contrast to personnel reforms, disempowering reforms do not rely on judicial self-restraint as a mechanism to ensure democratic choice. Thayer did, and *Carolene* followed suit insofar as it ultimately consecrated a judicial determination, and no one else's, when to cross the line from rationality review to heightened forms of scrutiny. The result was, arguably, a Supreme Court in which both sides of a partisan split exercised judicial authority selectively and opportunistically—allowing democratic will-formation contingently and intervening to stop it (sometimes for better, regularly for worse) based on their own evolving doctrines of intervention. What all of them shared was a rejection of Thayerianism *de facto*, and an expansion of judicial authority uncontemplated and undesired in the middle of the twentieth century.[174] "A lesson that some will take from today's decision," one conservative justice remarked bitterly at the end of the day, "is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means."[175] If he was right, however, it was because judicial self-restraint failed even more thoroughly to ensure conservative self-policing. Any bench no matter how constituted will face the same temptation to overstep, where disempowering reforms specifically deprive them of the temptation. It limits their power to act or abstain from acting in the first place.

(3) Finally, even to the extent disempowering Supreme Court reforms hypothetically threaten rights, personnel reforms do not plausibly provide superior protection, if it is not worse.

Generally, the goal of relegitimation of the Supreme Court is orthogonal to rights protection. There is no reason to believe a court with comparable powers as now but improved legitimacy, either sociological or normative, would improve rights protection absolutely, let alone relative to disempowering reforms. To make out a case that it would, one would have to correlate legitimation with rights-protection, and it seems churlish to suggest credibly doing so. As we suggested above, more approaches to legitimacy define it in terms of partisan neutrality, not rights protection (let alone greater and greater rights protection). To be sure, there are some accounts of normative legitimacy of apex judiciaries that may be less about centrist neutrality than most, and may even put rights-protection at the very heart of what a normatively justified

[174] For a classic barometer of change between the 1930s and the 1950s, see LEARNED HAND, THE BILL OF RIGHTS (1958).
[175] *Obergefell*, *supra* note 163, at ___ (Alito, J., dissenting).

Supreme Court would do.[176] The trouble is that none of the personnel reforms credibly advance *that* form of legitimacy. It is, alas, unclear that any reforms of the Supreme Court we can imagine would do so.

Of course, reforms like court packing or partisan balance might plausibly stave off the threat posed by the current conservative majority on the Supreme Court in the short term, though evidence suggests that the most extreme fears of its consequences for abortion and other rights have proved premature. Our point is that, even conceding this possibility, relegitimation is hardly well-designed to achieve this end exclusively and narrowly. On the contrary, given recent baselines before the need to "save" the Supreme Court became apparent, relegitimation involves far greater risk for confirming the endemic judicial underenforcement of rights of the vulnerable and weak, and potentially even overenforcement of those of the powerful and wealthy.

And if the suggestion is that personnel reforms achieve short-term democratic legitimacy by updating the bench to match the popular will, then any improvement they might achieve in rights protection is also available legislatively.

Either way, there is no way to conclude that disempowering reforms would lead to more abuse of rights than others, and may well lead to their greater vindication.

D. Regularity

A separate aim of many reforms is to regularize the appointment of Supreme Court justices.[177] According to the standard narrative, the Supreme

[176] Such accounts were admittedly pervasive at midcentury. Even among "conservatives" like Alexander Bickel, it was commonsense that "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess…. Their insulation and the marvelous mystery of time gives courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have bene forgotten in the moment's hue and cry." ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 26-27 (1962), Such innocence was overthrown by what Jürgen Habermas called "the dissolution of the liberal paradigm of law" — a paradigm that had empowered judiciaries in terms of basic values such as moral rights. Its overthrow then required the most prominent cases for judicial review to be more democratic in rationale, as in John Hart Ely's or Habermas's own elaborate case for it. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 240-53 (William Rehg trans., 1996).

[177] Sometimes it is other forms of regularity, as in Bruce Ackerman's intervention in the court reform debate with a proposal to import the German bifurcation of its highest courts into statutory and constitutional bodies (to which he adds the proposal to expand the overall number of personnel) in the name of "uniform law." Bruce Ackerman, *Trust in the Justices of the Supreme Court Is Waning*, L.A. TIMES, (Dec. 20, 2018), https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html. In the text, we focus on input regularity as opposed to the output regularity Ackerman prioritizes.

Court appointment process has grown increasingly fractious since the Senate rejected Robert Bork's nomination in 1987.[178] Today, it is popular to insist that the appointment process is "dysfunctional,"[179] "broken,"[180] or otherwise in disrepair.

Complaints about the dysfunction of the appointment process are typically coupled with worries about undue "politicization."[181] As discussed above, worries about politicization go to the Supreme Court's legitimacy. Apart from legitimacy, however, several reformers allege concern with the functionality of the appointment process. According to these scholars and advocates, increased "polarization" and the stakes of judicial appointments have resulted in a system burdened by gridlock and that encourages destabilizing political tactics.[182]

Most of the contestation over Supreme Court appointments is tied directly to important normative disputes within our political community. As such, so long as Supreme Court justices continue to wield tremendous authority, it is, we argue, both predictable and *appropriate* that political actors will fight aggressively for control of the Court. Given the stakes, efforts to regularize the appointment process through mere shifts in personnel will predictably fail.

To see why, take the proposal to impose term limits on Supreme Court justices. As described above, this proposal would, in its most popular form, allot one Supreme Court appointment per congressional term, with each justice permitted to serve for a period of 18 years.[183] One of the supposed advantages of this reform is that it would help regularize the appointment process by lowering the stakes of individual appointments.[184] Because each president "gets two appointments per term," the motivation to contest specific appointments is, we are told, substantially less.[185]

Notice, however, that each president "get[ting]" two appointments is more hope than promise under this scheme. Because its advice and consent function would remain the same, an opposition Senate would retain incentive to reject nominations, thereby helping to accrue partisan advantage on the

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178 As Hemel observes, this narrative is questionable. Hemel, *supra* note 38.

179 Randy E. Barnett & Josh Blackman, *Restoring the Lost Confirmation*, 29 NAT. AFFAIRS (2016), https://www.nationalaffairs.com/publications/detail/restoring-the-lost-confirmation.

180 Judicial Nominations: A Broken Process, Am. Const. Soc. (2018).

181 *See supra* notes 109-122 and accompanying text.

182 *E.g.*, Steven Levitsky & Daniel Ziblatt, *How Wobbly Is Our Democracy?*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/01/27/opinion/sunday/democracy-polarization.html; *but see* Hemel, *supra* note 38 (questioning claims of increased polarization).

183 *See, e.g.*, Cramton, *supra* note 82.

184 *See, e.g.*, Ornstein, *supra* note 47 ("It would to some degree lower the temperature on confirmation battles by making the stakes a bit lower.").

185 *America's Highest Court Needs Term Limits*, ECONOMIST (Sep. 15, 2018), https://www.economist.com/leaders/2018/09/15/americas-highest-court-needs-term-limits.

Supreme Court over time. Even if quorum and vacancy rules would eventually force the choice of confirming a nominee or rendering the Supreme Court incapable of issuing binding judgments,[186] a strategic opposition might easily prefer to effectively empower the courts of appeals, building partisan advantage at that level through similar tactics.

The point here is that Supreme Court term limits would do little to deter an opposition party from engaging in constitutional hardball. While true that the stakes of an 18-year appointment would be low*er* than an appointment of an indefinite tenure, determining the ideological character of the Supreme Court would remain an enormously high-stakes affair. If the fate of climate or healthcare legislation, say, were to continue to rest with that institution, it would be malpractice for progressives *not* to do everything within their power to ensure that the Supreme Court was progressively inclined.

Other purportedly regularizing reforms suffer from similar defects. Partisan-balance requirements, for example, would present an opposition Senate with the same opportunity to refuse to confirm nominees to seats assigned to the President's party. Again, an opposition Senate might be left with the choice of confirming a nominee or depriving the Supreme Court of a quorum, but as our current politics shows, such aggressive tactics are sometimes appealing.[187] Merit selection presents similar issues, though this time with both the President and the Senate. Barring constitutional amendment, any potential nominees chosen by a nonpartisan or bipartisan panel would have to be nominated by the President formally.[188] Given a cooperative Senate, a boldly progressive or conservative President would have little reason to assent to the sort of centrist or moderate candidate such panels are designed to produce. The same would be true for a stridently progressive or conservative Senate. Why settle for a 'compromise' nominee when one has the leverage to demand more?

The complication with lottery systems is slightly different. As described above, such proposals would replace our system of permanent Supreme Court justices with panels composed of randomly selected judges from the federal courts of appeals or permanent associate justices drawn from an enlarged pool. Pursuant to this reform, although the Supreme Court as such would retain its authority, the authority of the individual judges who make up the Court would be substantially reduced. Individual judicial appointments would, on this

[186] Some proposals, for example, allow for an additional appointment in a given congressional term only in case of "retirement, death, or removal," and provide that six justices constitute a quorum. Carrington & Cramton, *supra* note 82.

[187] The Federal Elections Commission, for example, has lacked a quorum for significant stretches in recent years. *See* Brian Naylor, *As FEC Nears Shutdown, Priorities Such As Stopping Election Interference On Hold*, NPR (Aug. 30, 2019), https://www.npr.org/2019/08/30/755523088/as-fec-nears-shutdown-priorities-such-as-stopping-election-interference-on-hold.

[188] *See infra* notes 225-228 and accompanying text.

scheme, thus be less significant than the appointment of justices today.[189] Still, because this proposal would make every federal court of appeals judge a potential Supreme Court justice, the stakes of filling court of appeals vacancies would increase accordingly. Given the already rising level of contestation over such nominations, it is hence easy to imagine a panel system causing appointment "dysfunction" merely to spread.

Again and again, we see the same basic issue. Under our constitutional scheme, both the President and Senate have a say in the appointment of justices.[190] Because justices wield tremendous authority and because ideology determines in part how they wield it, those two parties are going to be disposed to fight in the event that their ideologies differ. The intensity of that disposition will depend, of course, on the strength of their ideological disagreement. In a country racked with intense political disagreement, however, that disposition is going to be incredibly strong at least some of the time. Given the intensity of that disposition, then, comparatively small adjustments like the imposition of term limits would barely affect, say, an opposition Senate's decision-making calculus. With the stakes of appointments so incredibly high, such modest adjustments, even if salutary, are not at the requisite scale.

By comparison, more aggressive disempowering reforms might at least register with a President or opposition Senate. Stripping courts of jurisdiction over constitutional cases or requiring a supermajority to declare federal legislation invalid, for example, would meaningfully reduce the stakes for Supreme Court appointments and judicial appointments more generally. Even with its authority so limited, the Court's ideological character would continue to matter – the law/politics divide remains hazy even outside of constitutional or politically significant cases. Still, pursuant to those reforms, the appointment of justices would, in term of stakes, be more akin to the appointment of agency officials. To be sure, the appointment of such officials is *also* increasingly contested, as one would expect in polarized times. In terms of regularization, then, even aggressive disempowering reforms can only promise modest benefits.

E. Pragmatism

A less conceptually ambitious but equally commonplace framework for evaluating a reform scheme is pragmatic: it will lead to good enough results case by case. This criterion is not oriented to the legitimacy of the Supreme Court either as an institution saved for apolitical neutrality or as one made safe for

[189] *See* Epps & Sitaraman, *supra* note 10, at 184 (touting as an advantage of this proposal that it "reduc[es] the stakes of individual nominations").
[190] *See* U.S. CONST. art. II, § 2, cl. 2.

democratic life. It could be said to appeal to a narrower kind of legitimacy: one of output. Are the results of Supreme Court decision-making good (enough), or at least not bad (enough)? But the truth is that, as our parentheticals indicate, such a criterion is overwhelmingly oriented to a criterion of harm avoidance, pointing not to good results but to ones that are a tolerable mix or—even more modestly—do not incur grievous enough harm.[191]

As an example of pragmatism in action, consider the reception last term of June Medical Services v. Russo,[192] the Court's latest consideration of an already whittled-away abortion right. The case might have constrained that right yet further, reducing the number of Louisiana clinics where women can seek abortions from four to one. In the hours after the decision, liberal outlets responded with a palpable relief. In an early narrative, in tune with his vote two weeks earlier to extend statutory civil rights protection to sexual orientation,[193] Chief Justice Roberts had "betrayed" his conservative movement in failing to grasp a long-sought prize.[194] In a second round of commentary, it was seen that his majority decision, clearly hedged in outcome in response to erosion of the sociological legitimacy of the Supreme Court (which the chief justice cares much about), also opened the way to less brazen legislative curtailments of abortion rights in the future.[195] Though not the dire outcome long feared, Roberts's controlling opinion was widely recognized as a terrible blow for the very right it preserved. Still, it could have been worse.

Routinely, pragmatism really amounts to what one might call a Supreme Court liberalism of fear.[196] It greets the fact that justices have not eroded past progressive gains, while also restraining the conservative majority from experiments that are too perilous, as if such triangulation were a worthy cause. This pragmatic sensibility surges in real time at the end of each Supreme Court term as observers, though far from celebrating the institution's annual output, still welcome the results in individual cases as examples of the institution not

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191 Interpreted not as actual proposals but as credible threats, of course, not only might any distinction between personnel and disempowering reforms melt away, but their feasibility as threats would increase with their legality no longer relevant—but absent some sort of climactic confrontation as in the 1930s, such threats would merely produce inadequate pragmatic betterment, in particular by shifting Roberts' vote in high-profile cases.

192 June Med. Servs. v. Russo, 591 U.S. __ (2020).

193 Bostock v. Clayton Cty., __ U.S. __ (2020).

194 *See, e.g.,* Jane Coaston, *Social Conservatives Feel Betrayed by the Supreme Court—and the GOP That Appointed It*, VOX, (July 1, 2020), https://www.vox.com/2020/7/1/21293370/supreme-court-conservatism-bostock-lgbtq-republicans.

195 *See, e.g.*, David S. Cohen, *The Narrow Victory of June Medical Might Pave the Way for Future Abortion Restrictions*, BILL OF HEALTH, (July 15, 2020), https://blog.petrieflom.law.harvard.edu/2020/07/15/june-medical-abortion-restrictions-john-roberts/.

196 *Cf.* Judith N. Shklar, *The Liberalism of Fear*, *in* LIBERALISM AND THE MORAL LIFE (Nancy Rosenblum ed., 1989).

doing its worst. Chief Justice John Roberts has, over the last decade, become the icon for this approach,[197] sometimes abetted by due respect for Justice Elena Kagan as a master strategist of harm avoidance that liberals can achieve if they compromise with conservatives rather than dissent.[198]

Assuming it really does minimize harm in the absence of a possibility of help—both prongs of which are easy to dispute—the pragmatic rationale could succeed on its own terms. For many, however, it tolerates the enormous harm it says it avoids while foreclosing help through institutional creativity backed by political action. Worse, its price is a set of unacceptable baselines it merely resolves to defend. The basic objection to this outlook, then, is that it is not very pragmatic. What is pragmatic, one might ask, about accepting the continuing erosion of current baselines that leave cherished liberal policies like abortion rights[199] and affirmative action[200] hanging by a thread, even as a multi-decade conservative inroads in so many areas of doctrine—including edging up to the deconstruction of the administrative state[201]—continue accruing? Such "pragmatism" treats existing doctrines and caselaw as good enough to entrench for a while longer, on the rationale that the Supreme Court could make them even worse. For progressives, by contrast, the current baselines are the problem. And progressives reasonably fear the damage a Supreme Court, even one saved from doing its worst, will visit on their legislative proposals to make the country better. The pragmatic framework rests content with the existing baseline of stunted left-wing policy, as if a right-wing adventurism blocked by John Roberts justified the threat a powerful Supreme Court—and John Roberts himself—would pose to genuine progressive reform were it to emerge.

In fairness, one sometimes senses in pragmatism a smokescreen for the utopian hope that someday the Supreme Court will return to its predestined role institutionalizing justice in the country, and pragmatism is a recipe for now to shelter that hope for later. That maximalism can take refuge in minimalism does not mean the permanent replacement of the one by the other. Indeed, pragmatists often feel that depression about outlooks — acceptance of bad

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197 For recent instances in an infinite commentary to this effect, *see, e.g.,* Jeffrey Rosen, *John Roberts Is Just Who the Supreme Court Needed*, ATLANTIC, (July 13, 2020), https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court-needed/614053/; *Hail to the Chief: Justice John Roberts Joins the Supreme Court's Liberal Wing in Some Key Rulings*, ECONOMIST, (July 4, 2020), https://www.economist.com/united-states/2020/07/04/justice-john-roberts-joins-the-supreme-courts-liberal-wing-in-some-key-rulings.

198 *See, e.g.,* Margaret Talbot, *Is the Supreme Court in Elena Kagan's Hands?*, NEW YORKER, (Nov. 11, 2019), https://www.newyorker.com/magazine/2019/11/18/is-the-supreme-courts-fate-in-elena-kagans-hands.

199 Most recently, *June Med. Servs.*, *supra* note 192.

200 Fisher v. Texas, 570 U.S. 297 (2013).

201 Gundy v. United States, 588 U.S. __ (2019).

outcomes because they could be worse – is in fact justified solely because the alternative is to attack the Supreme Court itself, to which they profess independent allegiance. "The Roberts court, against all expectations, has made this battered country a better, safer place," wrote senior courtwatcher Linda Greenhouse in response to the recent abortion case, epitomizing the pragmatic stance. "For now," she clarified — adding that, while she "breathed a sigh of relief," it was not just for the Louisiana women affected but also "for the Supreme Court itself, for having avoided plunging along with Justices Clarence Thomas, Samuel Alito, Neil Gorsuch and Brett Kavanaugh into an institutional abyss."[202] In other words, the pragmatist acceptance of an unacceptable baseline comes together with some other justification than pragmatism itself. If it were plausible that keeping the Supreme Court from the abyss for now would allow it to ascend to the empyrean later, "pragmatism" might make sense. But it's not, which reveals pragmatism to be a kind of utopianism.

The limitations of pragmatism—normally deployed by those uninterested in or wary of institutional reform debates—make it a weak candidate for justifying Supreme Court reform. As a potential rationale for it, pragmatism faces the threshold worry that it is the default stance of those who complacently accept the institution the way it already is. It is hard to imagine a compelling justification for institutional reform that appeals to slightly better outcomes without shifting major baselines. Nor, if pragmatists were led to call for reform out of exasperation with enough bad news, does their framework obviously help select among reforms.

Of course, there is no denying that Supreme Court reform in the name of pragmatic output legitimacy could make sense on its own terms—a slightly less scary nightmare is worthwhile if waking up is not an option—even if it entrenches the low expectations for output that already prevail. It might face a constituency problem: If those interested in Supreme Court reform at all move to put pressure on the mainstream acceptance of the institution in current form, it is because they are dissatisfied with how little pragmatism currently boasts. If they adopted a pragmatic rationale for evaluating their prospects, advocates of Supreme Court reform would have to explain why to embark on an agenda that will be decried as radical when their ends are merely to reinstate low expectations at a somewhat higher level. And if it is true in some basic sense that the Supreme Court could indeed get even worse either in the abandonment of favorite precedents of progressives or in the minting of novel conservative doctrines, pragmatic reform would not necessarily change this.

That same reservation about a pragmatic defense of low expectations means that the framework provides little help for selecting *among* imaginable

[202] Linda Greenhouse, *How Chief Justice Roberts Solved His Abortion Dilemma*, N.Y. TIMES, (July 2, 2020), https://www.nytimes.com/2020/07/02/opinion/supreme-court-abortion-roberts.html.

reforms, especially compared to a democracy criterion for evaluating them. Once again, contrast a partisan balance scheme with a jurisdiction stripping one. The first might well involve the goal of "reset" for the current lopsided ideological configuration of the Supreme Court by repopulating the justices and depriving conservatives of their current majority. But this scheme is a pragmatic choice to reset the Supreme Court to a stage prior to Neil Gorsuch, though a Merrick Garland on the bench would have resulted in modest doctrinal variation at best (especially now that it is clear that John Roberts acts often to police his right).[203] Such reform, ambitious in adopting some institutional intervention, does nothing to reverse decades-long drift, nor to prepare the ground for progressive legislative reform, which in fact it leaves almost as endangered as before.

It is only fair to acknowledge that Supreme Court personnel reforms on pragmatist terms might achieve slightly better outputs than before. But the same, minimally, is true of disempowering reforms. At worst, jurisdiction stripping simply leaves things the way they are, made no worse by Supreme Court intervention—this time because it is disempowered to act. The same is true of a supermajority rule. At worst, it would stabilize current doctrine, because not enough of votes are available for a conservative majority to erode past progressive victories or to set off in radical new directions of its own. In short, whatever modest improvement of current baselines that personnel reforms justified pragmatically can achieve, those justified in a democracy vein can approximate, or reach even more dependably. And of course, those latter reforms, at best, can make more room for political branches to alter existing baselines, by passing legislation that an empowered Supreme Court can no longer block as easily.

From a progressive point of view contesting a pragmatic one, personnel reform sounds like a choice to rest content with the Roberts court in current guise or turn it back into the one in which Roberts could indulge his priors while allowing Anthony Kennedy to control the right instead of him. By contrast, disempowering reforms, by sidelining the institution altogether, far more plausibly allows a potential shift away from a pragmatism of harm avoidance and reduction to make room for progressive reform if the political branches settle on it. That may, in the end, be the only durably pragmatic hope Americans have in the future.

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[203] *See, e.g.,* Adam Liptak, *Where Merrick Garland Stands: A Close Look at His Judicial Record*, N.Y. TIMES, (Mar. 17, 2016), https://www.nytimes.com/2016/03/18/us/politics/merrick-garlands-record-and-style-hint-at-his-appeal.html (noting that Garland's "most charged cases, involving national security and campaign finance, were as likely to disappoint liberals as to please them").

IV. FEASIBILITY

Part III assessed reform proposals in terms of desirability. Here, we turn to feasibility, asking which reforms stand a chance at successful implementation. To do so, we evaluate the various proposals according to two criteria. First, we consider whether a given proposal would be *legal*, which is to say consistent with the Constitution without amendment. Second, we look at *political* feasibility, examining whether a stable coalition might emerge in support of a reform.

As we show below, both personnel and disempowering reforms are subject to legal objection. In most cases, however, those objections admit of rejoinders, leaving the two approaches roughly on par. Similarly, while any reform faces an uphill political battle, we argue that disempowering reforms have at least as plausible supporting coalitions as personnel reforms and very possibly more.

A. Legal

The legality of different reform proposals has been covered exhaustively by existing scholarship. In this brief survey, we suggest that, broadly speaking, most reforms under consideration , whether personnel or disempowering, are fairly characterized as legally *plausible*. Because both types of reforms are vulnerable to judicial obstruction, the fate of either would depend on the willingness of the political branches to push back in support.

1. Personnel Reforms

Among personnel reforms, court packing is probably the most uncontroversially legal. As others have documented, the number of seats on the Supreme Court has been set since its inception by statute,[204] and Congress has adjusted the size of the Court – from six to seven,[205] to nine,[206] to ten,[207] back to nine[208] – numerous times.[209] This longstanding congressional practice couples with relative constitutional textual silence. While Article III assumes the

[204] Judiciary Act 1789, ch.20, § 1, 1 Stat. 73 (establishing a Supreme Court consisting of a chief justice and five associate justices).
[205] Seventh Circuit Act of 1807, § 5, 2 Stat. 420.
[206] Eight and Ninth Circuits Act of 1837, 5 Stat. 176.
[207] Tenth Circuit Act of 1863, 12 Stat. 794.
[208] Circuit Judges Act of 1869, § 1, 16. Stat. 44.
[209] *See also* Judiciary Act of 1801, ch.4, § 3, 2 Stat. 89 (reducing the number of associate justices on the Supreme Court to five upon the next vacancy); Judiciary Act of 1802, 2 Stat. 156 (negating the "midnight judges" act).

existence of a Supreme Court and Article I, section 3 that there will be a Chief Justice, nothing else in the text seems to bear on how large or small the Court must be.[210]

Such historical and textual evidence notwithstanding, court packing has been and continues to be subject to legal objection.[211] For instance, the 1937 Senate Judiciary Committee declared Roosevelt's proposal unconstitutional. According to the Committee, the apparent purpose of the reform was to "appl[y] force to the judiciary," coercing it to adopt a "line of decision" that it otherwise would not.[212] The proposal, the Committee continued, was "an invasion of the judicial power such as has never been attempted" before, alleging that prior adjustments to the Court's size were not intended to "influence decisions."[213]

After court packing, the legality of personnel reforms gets murkier. Panel systems, for example, typically require individuals to be appointed both as a federal circuit court judge and as an associate justice. As Epps and Sitaraman concede, one could argue that such dual appointments would be unconstitutional, reasoning that both Article III[214] and the Appointments Clause[215] understand those two offices as distinct and so not to be combined or jointly held by some individual.[216] Maybe more worrisome, transitioning to a panel system could be characterized as effectively removing sitting justices from office in violation of Article III.[217]

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[210] Article III's grant of life tenure and salary protection probably does, however, prohibit reducing the size of the Supreme Court by eliminating the seat of a sitting justice. *See* U.S. CONST. art. III, § 1. This is relevant to proposals that would designate sitting justices either "senior" justices or judges on the courts of appeals. *See infra* notes 218-219 and accompanying text.

[211] *See, e.g.*, Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 269-87 (2017) (discussing and expressing sympathy for constitutional objections to Roosevelt's failed proposal).

[212] At 8 (treating the "constitutional impropriety" of such motivates as obvious).

[213] *Id.* at 12; Bradley & Siegel, *supra* note 211, at 271-72 (suggesting that prior changes were politically motivated).

[214] *See* U.S. CONST. art. III, § 1 (referring to "Judges, both of the supreme and inferior Courts").

[215] *See* U.S. CONST. art. I, § 2, cl. 2 (granting the President the power to appoint "Judges of the supreme Court" as well as "other Officers of the United States … which shall be established by Law").

[216] See Epps & Sitaraman, *supra* note 10, at 186; *see also* McGinnis, *supra* note 82, at 545 ("The most natural reading [of this language] may require (and the Framers certainly expected) judges to be appointed to a distinct Supreme Court.") Epps and Sitaraman argue that the historical practice of Supreme Court justices "riding circuit" undercuts this objection. *Id.* at 187; *see also* Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1122 (1994) (observing that whereas the Constitution expressly bars members of Congress from holding other constitutional office, there is no analogous provision for judges or justices).

[217] *See* U.S. CONST. art. III, § 1 (providing that judges "shall hold their Offices during good Behaviour"); *but see* Epps & Sitaraman, *supra* note 10, at 185 (arguing that sitting justices "would

Term limits for Supreme Court justices are vulnerable to analogous objections. Imposing term limits on all federal judges would plainly require constitutional amendment. For the Supreme Court, the proposed workaround is for appointees to serve as active justices for a fixed term, after which those individuals would transition either to "senior" status, sitting only in event of recusal or temporary disability, or to acting as judges on the federal courts of appeals.[218] The senior status proposal invites charges of effective removal from office. Rotating justices to circuit court judges is more promising (though not without concern[219]). And even that approach leaves the issue of sitting justices, who would either have to be removed without being "removed" or allowed to depart the Supreme Court over time.

Partisan balance reforms are open to challenge as well. Partisan balance is a familiar feature of agency design and has generally been upheld by courts, though we lack a definitive endorsement along the lines of *Humphrey's Executor*.[220] Partisan balance on courts, however, raises distinctive questions. For one, the Supreme Court is, unlike the Federal Elections Commission or the Securities and Exchange Commission, a creature of the Constitution,.[221] suggesting that Congress may have less discretion in setting qualifications for the office of Supreme Court justice. More still, depending on the formulation, conditioning appointment to the Court upon the party affiliation of the appointee or the appointing President or on the approval of some congressional block[222] would present either First Amendment[223] or Appointments Clause concerns.[224]

Last, merit selection presents obvious Appointments Clause worries insofar as the recommendations of the selection committee are binding.[225] Epps and Sitaraman cleverly try to avoid this worry by assigning appointment of a subset of justices to the other, regularly appointed justices, and then limiting the pool of potential additional justices to judges previously appointed to lower

simply enter the lottery" along with the 171 newly appointed justices). This concern applies equally to panel systems that expand the number of permanent justices, insofar as sitting justices would, under such proposals, effectively be demoted to part time.

[218] *E.g.*, Roosevelt & Vassilas, *supra* note 117; Cramton, *supra* note 82, at 1324.

[219] *See supra* notes 214-217 and accompanying text.

[220] *See, e.g.*, Fed. Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821, 824-25 (D.C. Cir. 1993) (avoiding the issue on standing grounds).

[221] *See* U.S. CONST. art. III, § 1 (vesting the judicial power in "one supreme Court").

[222] *See* Epps & Sitaraman, *supra* note 10, at 204 (suggesting that presidents be required to choose nominees for from a list prepared by Senate leadership of the relevant party).

[223] *See* Adams v. Governor of Delaware, 914 F.3d 827, 843 (3d Cir. 2019) (holding that state supreme court partisan affiliation requirement infringed upon freedom of association for unaffiliated state residents).

[224] *See* Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J. F. 93, 99 (2019) (arguing that limiting the President's choices to a congressionally approved list would "seize" the President's Appointment Clause power).

[225] *Id.* at 99

federal courts.[226] In so doing, Epps and Sitaraman attempt to mirror the widely accepted practice of federal judges sitting "by designation" in different jurisdictions and at different levels of the judicial hierarchy.[227] Even here, though, the Supreme Court's current hostility to institutional innovation poses a serious challenge,[228] as no lower court judge has ever sat by designation on the Supreme Court.

2. Disempowering Reforms

Disempowering reforms are also contestable, legally speaking. Jurisdiction stripping is perhaps the most aggressive reform and famously raises numerous constitutional questions—questions that become more difficult the more comprehensive the strip. In particular, the Supreme Court has remarked repeatedly that "serious" concerns "would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."[229] Such worries apply to specific constitutional issues, let alone to broad categories of claims.

Despite this controversy, stripping courts of jurisdiction, even over constitutional challenges, has strong textual footing. As numerous scholars have observed, Article III's grant of authority to Congress to "make … Exceptions" to the Supreme Court's appellate jurisdiction while at the same time placing the existing of "inferior" federal courts entirely within congressional control suggests that Congress enjoys sweeping authority concerning which cases federal courts are permitted to hear.[230] And as to state courts, both the Supremacy Clause and the Necessary and Proper Clause appear to provide Congress substantial discretion there as well.[231] Taken together, Christopher Sprigman argues that these features indicate the Constitution "gives to Congress the power to choose whether it must answer, in a particular instance, to judges

[226] *See* Epps & Sitaraman, *supra* note 10, at 201-02.
[227] *Id.* at 201.
[228] *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, No. 19-7, 2020 WL 3492641, at *18 (U.S. June 29, 2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496 (2010); *but see* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017) (describing and criticizing this trend).
[229] 486 U.S. 592, 603 (1988); *see also* Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986) (same); Weinberger v. Salfi, 422 U.S. 749, 762 (1975) (same).
[230] *See* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1065 (2010) (calling this the "traditional" view)
[231] *See* Michael C. Dorf, *Congressional Power to Strip State Courts of Jurisdiction*, 97 TEX. L. REV. 1, 13-15, 22-27 (2018); Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. __ (forthcoming 2021).

or to voters," relying in some instances on political rather than judicial checks to enforce constitutional constraints.[232]

Voting rules present different issues. Sachs, for instance, argues that a supermajority rule for constitutional invalidation would amount to Congress "pick[ing] and choos[ing] among different substantive holdings," requiring a "supermajority to express one legal conclusion," but allowing a "minority of Justices" to uphold another.[233] Similarly, Evan Caminker worries that "Article III implicitly mandates that the Supreme Court decide cases by bare-majority rule."[234] And likewise, Epps and Sitaraman acknowledge that some read Article III as granting the Court exclusive or final authority to "decide how to resolve its own cases."[235]

Jed Shugerman has offered the most comprehensive response to these objections. He begins by noting that the Court already makes various decision pursuant to non-majority rules—whether to grant certiorari, for example.[236] In addition, Shugerman observes, Congress already exercises authority over how the Court operates, defining by statute, for example, how many justices constitute a quorum.[237] Last, as to the concern about Congress dictating substantive holdings, Shugerman argues, channeling Frank Easterbrook,[238] that a supermajority rule should be conceived as a constraint on the Court's jurisdiction, depriving it of jurisdiction to pass on a constitutional question if only a bare majority of justices vote in favor of unconstitutionality.[239]

Finally, proposals for a legislative override raise fundamental questions about the constitutional basis of judicial review. In its weaker form, judicial override would amount to an assertion of constitutional departmentalism, respecting individual judicial judgments but reserving to Congress the right to interpret the Constitution independently. Departmentalism has a strong legal[240] and historical[241] pedigree. At the same time, this sort of limited override would leave the Supreme Court as the final arbiter on most constitutional matters, especially in areas such as climate change in which only a single judgment could

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232 Sprigman, *supra* note 231, at *8.
233 Sachs, *supra* note 224, at 97.
234 Caminker, *supra* note 94, at 77 n.12.
235 Epps & Sitaraman, *supra* note 10, at 190-91.
236 Shugerman, *supra* note 94 at 894 (observing that the Supreme Court has adopted non-majority rules for granting both certiorari and holds).
237 *Id.* at 910.
238 *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) (arguing in the statutory context that courts should construe statutes of depriving them of jurisdiction in the event that interpretive questions fail to admit of "clear" answers).
239 Shugerman, *supra* note 94, at 990-91.
240 *See, e.g.*, Richard H. Fallon, Jr., J*udicial Supremacy, Departmentalism, and the Rule of Law in A Populist Age*, 96 TEX. L. REV. 487, 489 (2018) (observing that both Thomas Jefferson and James Madison held departmentalist views).
241 *See* Maggie Blackhawk, *Legislative Constitutionalism* (forthcoming).

substantially undermine federal policy.[242] By contrast, allowing for legislative override that displaces or precludes future contrary judicial judgments requires, by definition, a rejection of what Mark Tushnet calls "strong-form" judicial review.[243] It is widely (though not universally) accepted that the Constitution provides for that form of review with respect to individuals judgments, making displacement of judgments an uphill constitutional battle.[244] With respect to future contrary judgments, however, one could fashion a legislative override as a forward-looking strip of jurisdiction, depriving courts of the opportunity to issue analogous judgments going forward. Such an override would, of course, inherit the constitutional questions surrounding jurisdiction stripping more generally.[245]

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In sum, both personnel and democratic reforms are vulnerable to constitutional objection. Few if any of those objections are knockdown, however, which is to say that both types of reform are, broadly speaking, legally plausible. To call both types of reform plausible, of course, is not to say that the current Court would rule in their favor. Especially given its hostility to institutional innovation, a Court protective of its present character and authority would be presumptively hostile most any of these proposals. As we see today, though, the Court is also acutely aware of its relative institutional power. Ultimately, then, whether any of these plausible *legal* theories would succeed likely depend upon the *political* support in their favor.

B. Political

A separate question is how the different types of reform fare in terms of political feasibility, whether or not they are legally available. By "political feasibility," we mean the range of non-legal constraints and possibilities that might make enacting one reform rather than another less or more likely.

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[242] For example, a suit by major fossil fuel companies questioning the constitutionality of the Green New Deal.

[243] Mark Tushnet, *Dialogic Judicial Review*, 61 ARK. L. REV. 205, 208-09 (2008).

[244] *See, e.g.*, Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1541 (2005). Here we set aside legislative 'overrides' that would not preclude future contrary judicial judgments. Such overrides would amount to an assertion of constitutional departmentalism.

[245] *See supra* notes 229-232 and accompanying text.

Of course, the legal and political feasibility are related: in the litigious real world, legality may turn out to loom large in the political feasibility of any reform. Still, separating the criteria is useful. There is no point in pursuing one reform, however legally plausible, if it is wholly infeasible on other grounds. Conversely, the ease of forming a coalition or gathering momentum for a given reform might offset the longer odds a specific reform might face legally. Also serious enough to warrant separate treatment is the worry that institutional intervention will cause "spirals" of tit-for-tat partisan response, a destructive cycle of vengeance to be avoided at all costs. And as with feasibility generally, the risk of spiraling specifically varies tremendously.

As with our earlier consideration of legality, our essential contention is that personnel reforms are no more politically feasible and often less so than disempowering reforms—in part because the latter are not a plausibly subject to the risk of spiraling out of control. If legality is no bar to more desirable proposals for Supreme Court reform, neither is political feasibility.

1. In General

Political feasibility, of course, is often treated as a hard constraint, forbidding Supreme Court reform of any kind.[246] And to the extent the suggestion is that any institutional intervention is unavailable, it affects both personnel and disempowering reforms alike. It makes sense to begin, therefore, with the argument that a progressive frame makes more plausible – if not necessary – a lifting of the usual marginalization of reform of the Supreme Court as we know it. Dispute about which reform is feasible, after all, pales beside the consensus that none is.

But the very erosion of that belief in the last few years means its grounds are no longer what they once were. It is only fair to admit that Supreme Court reform was once a fringe notion. As different a pair of figures as Earl Warren and Adrian Vermeule concur that it is condemned to be so forever. Warren reflected in 1974 that reformers had not only "consistently fallen under the weight of their own ineptitude," but the Supreme Court itself "has remained steadfast as an institution," and "prevailed … over those who would destroy its function and its symbol as the chief architect of our constitutional way of life."[247] A quarter-century later, as minor proposals to impose term limitations on Supreme Court justices were percolating, Vermeule offered an elaborate rationale for while Supreme Court reform could never happen. While he grudgingly acknowledged that "structural reform is not always impossible," the

[246] *See, e.g.,* Adrian Vermeule, *Political Constraints on Supreme Court Reform,* 90 MINN. L.R. 1154 (2006).

[247] Earl Warren, *Let's Not Weaken the Supreme Court*, 6 A.B.A. J. 677, 677-80 (1974).

hard truth is that "it is systematically unlikely to occur."[248] But there is no doubt that it has become much more mainstream than in nearly a century. As Roberto Unger once remarked in another context, "The distance between the unthinkable and the familiar may be short in the history of politics and law."[249]

One might reply — and the end of the 2019 term substantiates it — that the chief justice or an alliance of conservatives and liberals on the court will always make it their first order of business to decrease the feasibility of reform precisely by avoiding sufficiently outrageous outcomes. And it is clear that there is currently an alliance of sentiment between "pragmatists" who operate with a harm reduction philosophy while never challenging the institutional foundations of Supreme Court partisanship or power, on the one hand, and those justices who rank sociological legitimacy over other concerns, on the other — even when it means that conservatives deny themselves the disruptive outcomes they may have spent a career preparing to reach.[250] If this is happening, it suggests that Supreme Court reform can never become feasible: to the extent it looms, steps to postpone it will be taken.

There are two responses to such a hypothesis. The first is that it is hardly guaranteed that the line of feasibility is set in stone, however assiduously managed by those who wish to draw it just far enough so that it is never reached. On the contrary, it is widely recognized that, with the Supreme Court now far further right already after Kennedy was replaced by Roberts as median justice, the line has been eroded to a remarkable extent. And the events of the late *Lochner* era prove that there certainly are conditions for it to be erased altogether. The "four horsemen" before the switch in time aroused sufficient political rage to prompt open national debate about the role of the Court in the constitutional order. Judicial intransigence has occurred, and the politics of its overcoming too, albeit with the results of doctrinal rather than institutional reform.[251] It is hard to understand what arguments could acknowledge the feasibility of the first but deny the second. So, the basic answer along to the premise that there is no way Supreme Court reform could ever become feasible is that of the Georgia deacon

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[248] Vermeule, *supra* note 246, at 1154. We respond to Vermeule's main reason for his conclusion *infra*.

[249] ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 86 (1996).

[250] *See supra* Part III(c).

[251] In her exhaustive survey of jurisdiction stripping, for example, Tara Leigh Grove shows that minorities in Congress have successfully blocked proposals of all kinds, while presidents have often opposed efforts to strip jurisdiction over constitutional claims in particular. But constitutional confrontation has occurred, and the fact that a doctrinal shift (ultimately temporary) occurred in 1937 suggests that an institutional one could substitute next time. Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 870-74, 884-86, 888-940 (2011) (describing legislative history of jurisdiction-stripping measures); Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction,* 112 COLUM. L. REV. 250, 251-55, 268-86, 307-12 (2012) (discussing presidential attitudes and noting exceptions).

asked if he believes in baptism by total immersion. "Believe in it?" he replies. "I've seen it done!"[252]

Far more important, it takes two to tango, and the variable of popular mobilization is the central one for the feasibility of Supreme Court reform — a variable a progressive frame considers in the process of moving from a period of quiescence to one of radicalization, and for good reason. If so, no amount of management of institutional credibility inside and outside the court can avoid answering to changing — sometimes rapidly changing — demands of mobilized populations. And the popular will in a progressive frame is one that not only can but should outstrip any amount of flexibility on the part of court self-management, even on the most generous scenario. Of course, we can embroil ourselves in a debate between followers of Robert Dahl[253] who contend that the Supreme Court just follows popular opinion and those of Franklin Roosevelt who reply that, even if "ultimately the people and the Congress have had their way" in the long run, "that word 'ultimately' covers a terrible cost."[254] Our point is merely that it is foreseeable that, even assuming maximum political feasibility concerns deployed to keep Supreme Court's current institutional form stable, its need to engage in doctrinal management will increasingly fail—making reform more and more plausible.

It also worth noting that it will not work to turn feasibility concerns against our exploration of Supreme Court reform from an opposite perspective, moving from denial of the feasibility of any reform to the claim that if statutory reform is available then better options like constitutional amendment or revision make more sense. There is, after all, some amount of distance—probably a great deal—between an institutional reform threshold by statute and a constitutional amendment threshold, even to pass Congress, let alone to win approval from the requisite states.[255] In fact, due to well-rehearsed reasons, proceeding by constitutional amendment through Congress (to say nothing of a convention, whether for amending or replacing the original text) is practically unthinkable

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[252] For lawyers, the best source of the anecdote is Abram Chayes, *in The Authority of the United States Executive to Interpret, Articular, or Violate the Norms of International Law*, *in* 80 PROC. OF THE ANNUAL MEETING OF THE AM. ASSN. OF INT'L LAW 297 at 297 (1986).

[253] We refer to Robert Dahl, *Decision-Making in a Democracy*, 6 J. PUB. L. 279 (1957), and a vast successor literature prominently including BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009), KEITH WHITTINGTON, THE POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007, and WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT (2019).

[254] Roosevelt, *supra* note 148.

[255] The statutory reforms we survey here would require a majority of both houses of Congress where, per the Constitution, art. V, any amendments would require, by the most plausible path, a two-thirds supermajority at the congressional stage and a whopping three-quarters of the states.

for the moment, even compared to the currently narrowly likelihood of statutory intervention. The bolder ideas are, of course, themselves increasingly familiar in American constitutional thought after a long absence, associated with commentators such as Sandy Levinson[256] and Lawrence Lessig.[257] But no matter the desirability of constitutional reform on its own terms, there can be no doubt that the statutory alteration of the Supreme Court within the existing constitutional framework is more feasible. One need not claim that amendments are not feasible at all to conclude, easily and rapidly, that the reforms we categorize and compare in this Article are far more so.

2. Personnel Reforms

Personnel changes have to be disaggregated in order to assess their political feasibility. Not only because it is more or less clearly legal compared to other personnel reforms, but also because it has received the huge lion's share of attention in the debates that followed the blocked confirmation of Judge Garland, court packing or personnel expansion might seem like the most politically feasible reform too. And it is true that, currently, it is one of two reforms – the other being term limitation[258] – that has generated a contemporary advocacy group of its own. Its early familiarity, like its historical prominence, has made expansion the go-to reform. To take one prominent example, Mark Tushnet, while mentioning that "it's important to keep in mind the background concern about structural reform more generally," has oriented his historic challenge to Supreme Court conservatism to court-packing alone in recent writings (and chairs the academic advisory board of Pack the Court, the advocacy group favoring this reform). It is this reform, rather than other ones, that has become "thinkable again."[259]

But familiarity can breed contempt, not just feasibility. The very prominence of court-packing, far from bolstering the feasibility of court expansion, could undercut it. Its uses in Eastern Europe in a wave of attacks on

[256] *See generally* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW THE PEOPLE CAN CORRECT IT) (2006).

[257] For Lessig's endorsement on the hitherto unused Art. V option of conventions for amending the Constitution, *see* Lawrence Lessig, *A Real Step to Fix Democracy*, ATLANTIC, (May 30, 2014) https://www.theatlantic.com/politics/archive/2014/05/a-real-step-to-fix-democracy/371898/ or *Should We Convene?*, N.Y. REVIEW OF BOOKS, (July 9, 2015) https://www.nybooks.com/articles/2015/07/09/should-we-convene/.

[258] Fix the Court also advocates media and public access to oral argument, ethics code to fill the gap in coverage that the Supreme Court is not covered by the Code of Conduct for U.S. Judges, and clearer financial disclosure and recusal rules. *See* https://fixthecourt.com/the-fixes/.

[259] Mark Tushnet, *Court-Packing on the Table in the United States?*, VERFASSUNGSBLOG, (Apr. 3, 2019) https://verfassungsblog.de/court-packing-on-the-table-in-the-united-states/.

judicial independence are another strike against it. [260] More Democrats—including Joe Biden—are now on record opposing it than any other reform, and its meteoric rise in recent debate means it elicited unique pushback.[261] While FDR proved its use as a threat, at least on most accounts of Supreme Court's switch in time in the 1930s, the episode left bad enough memories in some quarters as to raise its prominence only to undermine its feasibility now.[262] Not least, court packing is the reform most imaginably subject to tit-for-tat acts of repeated expansion without an institutional brake other than durable electoral dominance—a risk we treat separately below. For now, our point is just that the early prominence of court packing and the somewhat radioactive associations it acquired in the 1930s —and even more of recent rereadings of the 1930s—are an enormous strike against its political feasibility.

As for the other personnel reforms, they fall naturally into two sets, with deadly if opposite political feasibility concerns. One set is politically infeasible because utopian: its proposals presuppose restoration of the status quo ante of a pre-polarized judiciary against the background of endemic polarization that rules such restoration out. The other set is feasible because trivial: term limitation may well be the most plausibly available of the reforms, but only because—much like judicial strategizing inside the Supreme Court to soften the blow of ongoing doctrinal change right—it would not solve the problem that justifies reform in the first place.

Take merit selection or partisan balance to begin with. Their common feature in any of their imaginable or proposed versions is a utopian desire for bracketing the very political breakdown (and opportunity) of contemporary American politics, to wish it away in favor of centrist partisan agreement that

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[260] Without considering other reform options or how to classify them, Bojan Bugaric and Mark Tushnet respond by insulating *some uses* of court-packing, namely those by American progressives, on the grounds that they do not reflect the right-wing sources of populism in the Polish case. Our rejoinder is that—independently of our main critique of court-packing on democratic grounds—foreign associations and experiences may lead us to prefer other versions of reform. *See* Bojan Bugaric & Mark Tushnet, *Court-Packing, Judicial Independence, and Populism: Why Poland and the United States Are Different*, VERFASSUNGSBLOG (July 11, 2020) https://verfassungsblog.de/court-packing-judicial-independence-and-populism/; *cf.* Bugaric & Tushnet, *Populism and Constitutionalism: An Essay on Definitions and Their Implications* (June 12, 2020), available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3581660.

[261] "I would not get into court-packing," Biden remarked in the Ohio debate of Democratic presidential hopefuls in October 2019. *The October Democratic Debate Transcript*, WASH. POST (Oct. 16, 2019), https://www.washingtonpost.com/politics/2019/10/15/october-democratic-debate-transcript/.

[262] Julian Zelizer, *Packing the Supreme Court Is a Terrible Idea*, N.Y. TIMES (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/opinion/supreme-court-packing-democrats-.html; Gillian Brockell, *Dear Democrats, FDR's Court-Packing Scheme Was a 'Humiliating' Defeat*, WASH. POST (Mar. 12, 2019), https://www.washingtonpost.com/history/2019/03/12/dear-democrats-fdrs-court-packing-scheme-was-humiliating-defeat/.

has evaporated in the very years that Supreme Court reform has become plausible.

And besides this sort of infeasibility, many personnel changes also suffer from mismatch between their technocratic or wonkish character and the progressive coalition that alone has prioritized Supreme Court reform in recent years. The Epps/Sitaraman hybrid proposal is characteristic and its endorsement by Buttigieg—celebrated and reviled as centrist technocrat—is revealing (much like his deference to "smarter legal minds than mine" and to the *Yale Law Journal* by name onstage at the October 15 debate of Democratic candidates for president).[263] The point is not so much that obscurity afflicts personnel alternatives to court-packing, since disempowering reforms currently have the same problem. It is that over-complication of some proposals, which depends on belief that experts can find the formula to exit political crisis and stalemate, dooms any case for its feasibility. What only law professors can understand, a popular movement will never demand.

On the other side of the mismatch between such personnel reforms and the rising progressive coalition, even if they were available the reforms would fall badly short of progressive aspirations in an emergency. Progressives, to put it bluntly, are not rallying increasingly around the cause of Supreme Court reform to make the centrist ACA compromise invalidation-proof, or to postpone carbon neutrality to 2050 in hopes that massive concession in advance will save it from the gutting the ACA has suffered in the past decade. Nor, to face expanding inequality, do progressives expect to avoid targeting wealth through direct taxes out of fear of a return to nineteenth century jurisprudence.[264] A progressive coalition that will support Supreme Court reform at all will do so, in plausible political reality, in order to make progressive legislation viable, and nothing short of it. That merit selection or partisan balance for the sake of a Supreme Court in centrist equipoise would surge in the quest to protect such legislation is even more of a fantasy than the feasibility of such reforms against the background of a polarized political class.

If such personnel reforms fail the test of political feasibility because they are utopian, by contrast, term limitation might well work because it makes so little difference. Indeed, it is probably for this reason that this reform has been constantly before the American people for decades, while bolder steps were still considered out of bounds. As we've discussed throughout, the goal of term

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[263] "Smarter legal minds than mine are discussing this in the *Yale Law Journal* and how this could be done without a constitutional amendment," Buttigieg remarked. "But the point is that not everybody arrives on a partisan basis." *The October Democratic Debate Transcript*, *supra* note 260.

[264] *Compare* Peter J. Reilly, *Wealth Tax: That Pesky Constitution Might Get in the Way,* FORBES (June 25, 2019), https://www.forbes.com/sites/peterjreilly/2019/06/25/wealth-tax-that-pesky-constitution-might-get-in-the-way/#452bf189779c, *with* Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 INDIANA L.J. 111 (2018).

limitations is to ensure that opportunities to appoint Supreme Court justices are distributed evenly according to electoral outcomes. While such reforms would work less well than is often suggested – as explained above, Congress cannot simply legislate away an obstructionist Senate – they would lower the stakes of Supreme Court appointments slightly and, accordingly, make it slightly or even modestly more likely that winning a presidential election would more reliably come with the chance to shape the Court's ideological character.

Laudable as such a reform might be, the imposition of Supreme Court term limits would give progressives little reason for solace. Under the standard proposal, Supreme Court justices would serve for terms of almost two decades, meaning that the dead hand of the recent past would continue to shape judicial policymaking in present day. To ensure judicial approval of an ambitious legislative agenda, progressives would need to capture the presidency and different chambers of Congress not once but repeatedly, replacing justices from both conservative and more moderate periods. Given the difficulty of achieving sufficiently large legislative majorities to enact Green New Deal-type legislation, the additional burden of appointing sympathetic justices over years if not decades is one that progressives plainly ought to reject.

3. Disempowering Reforms

Given these concerns with personnel reforms, it seems natural to conclude that disempowering reforms would be no less politically feasible. And there are reasons to believe they would be more so.

Jurisdiction stripping, aside from the formidable legal objections it faces especially where constitutional rights are concerned, may be different. Its erosion of the subject-matter jurisdiction of the courts might well feel radioactive to some audiences.[265] One possibility to exploit, on the approve model of the World War II price controls regime, is to couple stripping with reallocation of jurisdiction, almost certainly the more politically palatable move.[266] Either way, there is no reason to believe that jurisdiction stripping would be less feasible on grounds of this kind than other aggressive moves like court-packing, which in fact East European analogues in recent years more closely resemble than they do jurisdiction stripping.

As noted above, some though not all of the personnel reforms suffer feasibility concerns because of their technocratic complication. In contrast, all

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[265] *See, e.g.*, Mark Agrast, *Judge Roberts and the Court-Stripping Movement*, CENTER FOR AMERICAN PROGRESS (Sep. 2, 2005), https://www.americanprogress.org/issues/courts/news/2005/09/02/1622/judge-roberts-and-the-court-stripping-movement/.

[266] *Yakus*, *supra*, note 92, with the proviso that this move would not satisfy those who insist that Article III courts retain jurisdiction over constitutional claims.

three of the main disempowering reforms under consideration here—jurisdiction stripping, legislative override, and supermajority rule—have an inverse superiority, compared to reforms that are harder for a general public to evaluate or even understand. Like both personnel reforms that have gained popular traction historically or recently, court expansion and term limitation, the disempowering reforms are clear and simple.[267]

One enormous advantage that disempowering reforms boast even relative to clear and simple personnel reforms lies elsewhere. Since they do not aim directly at direct partisan advancement, the disempowering reforms can cut across existing partisan configuration. Disempowering reforms have a unique advantage in making possible conservative buy-in or even creative new coalition-building. Precisely because disempowering strategies simply redirect partisan strife to other arenas, without themselves favoring any partisan tilt, they have broader coalitional possibilities.

Court-packing exemplifies a personnel reform guaranteed to attract fierce and immediate resistance for serving Democrats, rather than democracy. But disempowering reforms favor electoral winners generally. True, not all personnel reforms seem as naked an attempt to secure momentary partisan advantage as others. But, as we have already argued, the broader constituency for term limitations could prompt buy-in from a much wider array of supporters mainly because its effect is likely to be so minimal. And where other personnel reforms like the balanced bench or merit selection will look, to conservatives who enjoy current preponderance in the federal courts, like Democratic partisan moves, the disempowering moves improve no one's position, except those who go on to win elections at various levels.

As noted earlier, the critique of the Supreme Court and a number of its recent doctrines as antidemocratic—including in a number of dissents accusing the majority of elite power grabs[268]—has tended to be conservative in the last several generations rather than liberal, even after the conservative ascendancy in court output began in the 1970s. Correspondingly, over the decades since the early twentieth century, disempowering institutional reforms to the Supreme

[267] Of course, there are many dilemmas to face and fights to be had over the form and scope of such reforms, for example, how selectively to strip jurisdiction or what decisions to require supermajority threshold. But it is not as if (for example) whether to require a supermajority for all constitutional invalidation or only that of federal law changes the clarity of the supermajority threshold *per se*.

[268] The most famous examples are Justice Scalia's dissents in gay rights cases, *see* Romer v. Evans, 517 U.S. 620 (1996) or Lawrence v. Texas, 539 U.S. 558 (2003), *but see also Obergefell, supra* note 163, at ___ (Roberts, C.J.) (characterizing the case as one about "whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers").

Court, including the supermajority rule proposal, have tended to be initiated by conservatives.[269]

It would probably go too far to suggest that calls for democracy, so familiar in conservative responses to some Supreme Court doctrine, would raise the feasibility of disempowering reforms by themselves. Right-wing commentators and judges who have spent decades calling for more democracy and less judicial authority are hardly locked into their rhetoric in virtue of that fact, not least since the judges have felt free to deploy their authority to their own ends. But it would be hard for those who have called for more democracy rather than judicial control to refuse its introduction now. By the same token, left-wing disempowering has some past commitments of its own to live down, since progressives have been fair-weather friends of democratic empowerment themselves. For both reasons, it would make more sense to treat disempowering reforms as invitation for coalition-building now—with potentially more chance of success than personnel reforms boast.

In particular, disempowering reforms avoid what Vermeule penetratingly calls the "paradox of impartiality and motivation,"[270] one of his reasons that he infers dooms Supreme Court reform altogether. On his account, attempts at institutional innovation that do not obviously favor one side in a partisan split lose the very short-term benefit that justifies and grounds support for reform in the first place. (His example is term-limitations proposals that grandfather in extant justices so that no serving justice is deprived of life tenure).[271] But while disempowering proposals, which Vermeule does not consider *per se*, may suffer other problems, they escape this one. That is, disempowering the court serves whatever majority can now take more security in the immunity of its lawmaking to invalidation. Abstractly, because of the institutional separation disempowering proposals rely on between a site of disempowerment (the court) and a site of contestation (the rest of politics), they can proceed neutrally in the first while retaining heated partiality in the second.

Indeed, since disempowering reforms have no direct implications for partisan empowerment – in the short term, instead, favoring whoever can muster majorities[272] – there is reason to believe that they can therefore boast unique feasibility benefits in coalitional politics. Unlike personnel reforms, they even harmonize with the partisan realignment event that many are anticipating or even consider necessary for a progressive movement beyond the limitations

[269] See *supra* note 36.

[270] Vermeule, *supra* note 246, at 1166-69.

[271] *Id.* at 1168.

[272] Our line of argument here, admittedly, looks a bit worse insofar as progressives introduce democratizing reforms that do not purport to lessen federal judicial control over states—for example, a supermajority rule raising the threshold of Supreme Court decision-making solely for cases involving the constitutionality of federal law—which is certainly a factor to debate in proposal design.

of the current partisan configuration, for example, to create a multiracial working-class party with broader appeal.[273]

In some quarters, the fact that progressives might come to agreement with (some of) their usual enemies over disempowering reforms might seem like a strike against them. Actually, in most imaginable scenarios a compromise to shift partisan contention from the Supreme Court to political contest (where it belongs) would benefit rather than hurt progressives on the national level. It is even necessary in almost all the areas progressives care about, where the Supreme Court hasn't delivered—from labor rights to partisan gerrymandering to racial justice—whether or not the threat it poses to their legislative agenda crystallizes. And framing disempowering reform as a compromise that cuts across other ideological disputes would counteract the frequent anxiety that anything less than full engagement in partisan contention through the courts would amount to "unilateral disarmament."[274] A better and fairer way to conceive of disempowering reforms of the courts is as a weapons control regime within one arena in order to concentrate fully on the fight in democratic arenas.

Of course, the greater political feasibility of disempowering reforms that this argument implies is not necessarily costless. Though our point is that judicial empowerment has not favored progressive victories lately if ever, no one thinks that democratic processes ever guarantee them either. But as with rights above, it is hard to imagine that disempowering reforms would incur less constitutional supervision of the states than now, for one of two reasons. Either the reforms are calibrated to democratize power at the federal level without returning it to states, as in a supermajority requirement only for constitutional challenges to federal law. Or, even if such a reform were extended to challenges the constitutionality of state law, it would require even more votes to overturn cases from *Brown*[275] to *Obergefell v. Hodges*,[276] and plausibly it would never happen. In any event, what passes for federal supervision of outlying states is at its weakest in at least a half century, compatible with current outcomes like restricted abortion rights[277] and the unconstitutionality of Medicaid expansion to populations that most need it.[278] Nor is strengthening it through any reform of the judiciary an option.

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[273] *See, e.g.,* George Packer, *Is America Undergoing a Political Realignment?*, ATLANTIC (Apr. 8, 2019), https://www.theatlantic.com/ideas/archive/2019/04/will-2020-bring-realignment-left/586624/; Corey Robin, *The Politics Trump Makes*, N+1 (Jan. 11, 2017), https://nplusonemag.com/online-only/online-only/the-politics-trump-makes/.

[274] *See, e.g.*, Richard Price, *Movement Litigation and Unilateral Disarmament: Abortion and the Right to Die*, 40 LAW & SOC. INQUIRY 880 (2015).

[275] Brown, *supra* note 33.

[276] *Obergefell, supra* note 163.

[277] *June Med. Servs.*, *supra* note 192.

[278] *NFIB*, *supra* note 154.

But progressive victory in the political branches of the federal government with an opportunity to restart progressive reform is. For the best answer to the fear that the very feasibility of disempowering reforms would indulge intolerable new risks is that, while there is no doubt local autonomy would increase, and thus risk conservative rather than progressive gains, even greater rewards would plausibly accrue. Even if the expectation that disempowering would benefit conservatives rather than progressives in some places were well-founded, it would enhance the feasibility of disempowering reforms, allowing different and perhaps more buy-in than reforms that sought a rebalanced stalemate on the federal level. And in exchange, it would allow for a progressive breakthrough on the federal level that the current Supreme Court, or even one with adjusted personnel, is unlikely to tolerate.

4. Spiraling

One of the most common responses to early proposals to "pack the court" has been a debate about "constitutional hardball" in Tushnet's language[279]—the risk of spiraling tit-for tat that any reform could prompt. But not all reforms are created equal in this regard either, and disempowering reforms boast the virtue of generally escaping the risk. Ironically, the political branches that can go to war repeatedly over some reforms to the "least dangerous branch"[280] can forestall escalation of reform merely by making it less dangerous. Not only do disempowering reforms work by a one-time fix rather than a repeatable move, but they disincentive further reform of the court precisely by making it less powerful.

Tushnet coined the notion of "constitutional hardball" in 2004 to refer to a variety of high-stakes political interventions with the common feature that winners take all and losers suffer the consequences quasi-permanently.[281] Not that all such interventions succeed, and they may prompt reciprocal hardball when they get going (to stave off the results) or when they fail (in punishment for the attempt). Debates have raged about whether hardball has generally been asymmetric, with the frequent conclusion that Democrats have for ideological and structural reasons willing to play by the rules and Republicans more likely to break them and more successful in doing so.[282]

Whether or not this is true, Tushnet's concept matters here because, very quickly on the reawakening of Supreme Court reform discussions, the very

[279] Tushnet, *supra* note 102.
[280] Bickel, *supra* note 176.
[281] Tushnet, *supra* note 102.
[282] Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018).

idea was identified as a species of constitutional hardball.[283] In some quarters, the susceptibility of court-packing schemes to spiraling was taken a delegitimize the whole enterprise, as if the concern were generalizable across all imaginable reforms. And it was asked: would court-packing, in particular, actually advance Democratic control of the Supreme Court through personnel change (even if justified as a matter of retroactive justice) or spark a civil war? Some feared it would spiral out of control, as it became normal for victorious parties simply to try to lock in more transient control by adding Supreme Court justices. It is even imaginable that such spirals could tighten further, for example if losing parties on the way out attempted to expand the Supreme Court *in advance* of electoral victors doing the same. Indeed, as constitutional scholars know, something not far from this scenario was the predicate for the establishment of judicial supremacy itself in *Marbury v. Madison*,[284] after the Federalist appointment of "midnight judges" throughout the judiciary—including John Marshall as chief justice—after Jefferson's Democratic-Republicans won in 1800.

How spiraling affects feasibility is a question requiring disaggregation of reform, risk tolerance, and sober judgments. Engaging court-packing almost exclusively in the absence of a wider menu of options, observers facing terrified responses and favoring the move have replied in two ways. Either they have expressed simple tolerance of the disorderly threat of tit-for-tat expansion, or they have claimed it has now become a necessary risk. The daring embrace the risk with equanimity, while the risk-averse do so as a matter of melancholy duty. Relegitimation, on this account, depends on norm-breaking, and if there is a risk of tolerating more norm-breaking in response, it is tragic but unavoidable now.[285] *New York Times* columnist Jamelle Bouie, in a high-profile court-packing endorsement, writes: "Yes, there's the risk of escalation, the chance that Republicans respond in turn when they have the opportunity. There's also the risk to legitimacy, to the idea of the courts as a neutral arbiter. But Trump and McConnell have already done that damage. Democrats might mitigate it, if they play hardball in return."[286]

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[283] *Compare* Jonathan Bernstein, *Don't Pack the Court, Fix it*, BLOOMBERG (Sept. 18, 2019), https://www.bloomberg.com/opinion/articles/2019-09-18/democrats-shouldn-t-pack-the-supreme-court-they-should-fix-it (rejecting courtpacking as dangerous "hardball"), *with* Belkin, *supra* note 122 (defending court-packing as "hardball"); David Scharfenberg, *Republicans Have Been Playing Hardball for Decades, Will Democrats Push Back?*, BOSTON GLOBE, (Jan. 3, 2020), https://www.bostonglobe.com/2020/01/03/opinion/will-democrats-break-democracy-bid-fix-it/(same).

[284] 5 U.S. (1 Cranch) 137 (1803).

[285] David Faris, *Democrats Must Consider Court-packing When They Regain Power: Saving the Court's Legitimacy Requires Breaking Some Norms*, WASH. POST (July 10, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/07/10/democrats-must-consider-court-packing-when-they-regain-power-its-the-only-way-to-save-democracy/.

[286] Bouie, *supra* note 64.

Of course, fears of spiral are less serious to the extent one anticipates a durable electoral coalition, since the empire cannot strike back for a long time, and the chance that it will do so falls in the long-run, as an expanded bench becomes normal. Many changes, even radical ones, have been baked into American politics and placed beyond contention through the blessings of time. But in a stalemated and unrealigned country, it hardly seems plausible to count on electoral durability to quiet fears of spiral sooner rather than later.

And it really does depend on whether all other reforms are as subject to it as court-packing clearly is. David Pozen has argued that, all other things being equal, reforms that cool the temperature of politics—"anti-hardball"—are preferable to those that heat it up.[287] And progressives have no trouble preferring reform that avoids the threat of overheated contention over the judiciary. They are committed to intensified partisan struggle, certainly, but this is anything but reducible to the pursuit of tit-for-tit over Supreme Court control. Indeed, their call for partisanship and even polarization in the country and in the exercise of power through the political branches is mainly premised on the need to marginalize Supreme Court through reform. Disempowering reform may make the Supreme Court's political role more apt to fluctuate depending on elections, but not to spiral. With this understanding, our supplement to Pozen's point is that it is disempowering reforms that are systematically more likely to achieve their ends while also managing the risk of spiral. In fact, confronting the possibility of spiral, even if the risks involved do not justify "end times worries,"[288] is a decisive reason to prefer disempowering reforms, which incur no comparable risk.

True, not all personnel reforms are as subject to the dynamic as spiraling as court-packing is. But if this is so, it is because they are faulty on other grounds. As we have discussed above, merit selection or partisan balance schemes strive to impose a permanent, centrist settlement between warring factions of American governance. If these proposals are more feasible in view of spiraling concerns in particular, it is only because they are less feasible in general. And even these personnel reforms are imaginably subject to repetition. Aside from term-limitation, other personnel changes are face the objection that the other side can do them, interpreting institutional restoration in self-serving ways. Pozen's example of an "anti-hardball" reform is making judicial nomination to the Supreme Court more regular and shifting long-serving justices to senior status.[289] But as with other personnel reforms that preserve the power of the institution itself, it is open for the next electoral victors to proclaim the need for

[287] David Pozen, *Hardball and/as Anti-Hardball*, 21 N.Y.U. J. OF LEGIS. & PUB. POL'Y 949 (2019).
[288] Tim Burns, *Court Packing Is Not a Threat to American Democracy*, NEW REPUBLIC (Mar. 15, 2019), https://newrepublic.com/article/153325/court-packing-not-threat-american-democracy-its-constitutional.
[289] Pozen, *supra* note 287.

a further tweak. A shift to one set of experts to pick judges is apt to elicit the response that another might hypothetically serve better. And so forth. Term limitation by itself imposes no great risk of spiral (except that it could theoretically prompt a proposal for another adjustment of terms upwards or downwards) but, as we have argued above, it is a personnel reform that escapes the risk of spiral at the high price of minimal effects on judicial output.

By contrast, disempowering reforms are much more clearly immune to the risk of spiral, especially relative to the clear potential of personnel expansion to incur it. Depending on the jurisdiction-stripping statute terms, of course, a selective attempt to wrest some kinds of constitutional challenges from the Supreme Court or federal judiciary could invite the escalatory response of restoring those exclusions and swapping in new ones. For example, where Democrats attempted to immunize voting rights laws, Republicans might restore constitutional invalidation of those achievements only to strip jurisdiction over suits contesting religious establishment by local communities (as in the proposed Constitution Restoration Act of 2005).[290] A universal strip that disempowered the Supreme Court from overturning federal legislation generally, however, is not subject to spiral in this way, for there is nowhere further to go.[291] All that would remain is the fight over legislation itself, and the idea that legislators would subsequently choose to reestablish judicial review seems hardly likely.

A supermajority rule is even more exemplary of the non-spiraling virtue of disempowering reform.[292] One could, of course, imagine spiraling proposals to adjust the voting threshold for decision up or down. But because the reform itself would have the effect of transferring power away from the Supreme Court to the legislature, the incentives to return to tweak are far less than in cases of personnel reform. The reason, once again, is that personnel reforms leave judicial power to capture, by any plausible or implausible argument that reform

[290] Constitution Restoration Act of 2005, S. 520, 109th Cong. (2005).

[291] Note also that were selective stripping to set off a spiral, the end result would be an otherwise desirable universal strip.

[292] Even Jennifer Rubin, *Washington Post* columnist, recognizes its superiority on precisely this ground, after speaking with Laurence Tribe and citing his concerns about court-packing spiraling: "I'm not in favor of trying what FDR sought to do — and was rebuffed by the Democratic Senate for attempting," Tribe told Rubin. "Obviously partisan Court-expansion to negate the votes of justices whose views a party detests and whose legitimacy the party doubts could trigger a tit-for-tat spiral that would endanger the Supreme Court's vital role in stabilizing the national political and legal system." Jennifer Rubin, *Why Court-Packing Is a Really Bad Idea*, WASH. POST (Mar. 19, 2019), https://www.washingtonpost.com/opinions/2019/03/19/why-court-packing-is-really-bad-idea/.

has not taken far enough, where disempowering ones resituate ongoing political struggle elsewhere.

CONCLUSION

Court reform is a debate about both means and ends. The conventional prevailing view that we should use non-neutral means of reform that correct distortions in membership on the bench in order to achieve the neutral end of an apolitical Supreme Court. In opposition to this view, our argument has favored the neutral means of democratization—which shifts power to whoever wins elections to determine the fate of the country—as the most plausible way to achieve non-neutral ends.

Of course, somebody else than progressives could win those elections, and constitute the political majorities to come. But if right-wing nationalists win, the country is already lost. And if a centrist coalition in either party prevails, they establish the outcome many court reformers hope to achieve through personnel reforms.

But the rightist and centrist outcomes are not the only possibilities. If a progressive coalition wins, it could take advantage of the power reassigned from the Court to allow politics to redeem the country—something that no court, let alone our Supreme Court, will ever do.

THE YALE LAW JOURNAL

DANIEL EPPS & GANESH SITARAMAN

How to Save the Supreme Court

ABSTRACT. The consequences of Justice Brett Kavanaugh's Supreme Court confirmation are seismic. Justice Kavanaugh, replacing Justice Anthony Kennedy, completes a new conservative majority and represents a stunning Republican victory after decades of increasingly partisan battles over control of the Court. The result is a Supreme Court whose Justices are likely to vote along party lines more consistently than ever before in American history. That development gravely threatens the Court's legitimacy. If in the future roughly half of Americans lack confidence in the Supreme Court's ability to render impartial justice, the Court's power to settle important questions of law will be in serious jeopardy. Moreover, many Democrats are already calling for changes like court-packing to prevent the new conservative majority from blocking progressive reforms. Even if justified, such moves could provoke further escalation that would leave the Court's image and the rule of law badly damaged.

The coming crisis can be stopped. But saving the Court's legitimacy as an institution above politics will require a radical rethinking of how the Court has operated for more than two centuries. In this Feature, we outline a new framework for Supreme Court reform. Specifically, we argue for reforms that are plausibly constitutional (and thus implementable by statute) and that are capable of creating a stable equilibrium even if initially implemented using "hardball" tactics. Under this framework, we evaluate existing proposals and offer two of our own: the Supreme Court Lottery and the Balanced Bench. Whether policymakers adopt these precise proposals or not, our framework can guide their much-needed search for reform. We can save what is good about the Court—but only if we are willing to transform the Court.

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INTRODUCTION

Justice Brett Kavanaugh's confirmation to replace Justice Anthony Kennedy on the Supreme Court was a seismic event for constitutional law and for the American political system. The new conservative majority that Justice Kavanaugh completes represented a stunning victory for the Republican Party after decades of effort by the conservative legal movement—and, by the same token, a significant defeat for Democrats and the American left. But although Republicans look like the short-term winners, the ultimate loser here isn't just their Democratic opponents. It's the Supreme Court itself—and, eventually, the American people as a whole.

Recent events have already taken a toll on perceptions of the Court's legitimacy. Justice Kavanaugh's 50-48 confirmation vote was one of the closest in American history.[1] The vote came after a process that deeply divided the country, when Republicans stuck with their nominee after serious accusations of sexual misconduct—and even after Justice Kavanaugh gave testimony to the Senate Judiciary Committee that many viewed as "nakedly partisan."[2] President Trump's first nominee, Justice Neil Gorsuch, joined the Court only after unprecedented tactics by Senate Majority Leader Mitch McConnell to stonewall President Obama's nominee, Judge Merrick Garland, and leave the seat open. But these debacles were only the latest in an increasingly politicized fight over Justices. The predictable result is a Supreme Court whose Justices—on both sides—are more likely to vote along party lines than ever before in American history. Soon, Lee Epstein and Eric Posner warn, "it will become impossible to regard the [C]ourt as anything but a partisan institution."[3]

1. One senator abstained, for a final vote of 50-48-1. Chris Keller, *Senate Vote on Kavanaugh Was Historically Close*, L.A. TIMES (Oct. 6, 2018, 5:35 PM), https://www.latimes.com/nation/la-pol-scotus-confirmation-votes-over-the-years-20181005-htmlstory.html [https://perma.cc/EB85-Q4JE]. The closest margin in history was 24-23, in the 1881 confirmation of Justice Matthews, under a cloud of suspected nepotism. *See* Sheldon Gilbert, *A Look at the Closest Court Confirmation Ever*, NAT'L CONST. CTR.: CONST. DAILY (Oct. 6, 2018), https://constitutioncenter.org/blog/a-look-at-the-closest-court-confirmation-ever [https://perma.cc/LT64-Z75L].

2. Zack Beauchamp, *The Supreme Court's Legitimacy Crisis Is Here*, VOX (Oct. 6, 2018, 4:02 PM EDT), https://www.vox.com/policy-and-politics/2018/10/6/17915854/brett-kavanaugh-senate-confirmed-supreme-court-legitimacy [https://perma.cc/3LNL-YZV7].

3. Lee Epstein & Eric Posner, Opinion, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html [https://perma.cc/L497-C3VE].

That development presents a grave threat to the Court's legitimacy—that is, the degree to which it is perceived as legitimate by the American people.[4] If Americans lose their faith in the Supreme Court's ability to render impartial justice, the Court might lose its power to resolve important questions in ways that all Americans can live with. Raising the stakes even higher, many Democrats are already calling for reprisals like court-packing,[5] which, even if justified, could provoke further escalation that would tarnish the Court's image and damage the rule of law.

Can this coming crisis be stopped? Or, more starkly: can the Supreme Court be saved? We think so. But preserving the Court's legitimacy as an institution above politics will require a complete rethinking of how the Court works and how the Justices are chosen. To save what is good about the Court, we must reject and rethink much of how the Court has operated for more than two centuries.

And the Court is, we think, worth saving. American democracy could likely still function if the Supreme Court had too little capital to stand up to the political branches. But there are good reasons to want to have an institution like the Court that can check the political process and hold us to our deepest commitments. More importantly, in the United States, public confidence in the Supreme Court is impossible to disentangle from public confidence in the very idea of law itself, as an enterprise separate from politics. And a democracy that loses its confidence in law may not long survive.

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4. The term "legitimacy," when applied to the Supreme Court, can have several meanings. Richard Fallon has distinguished between "sociological, moral, and legal concepts of legitimacy." RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21 (2018). Our focus here is squarely on questions of sociological legitimacy, which as defined by Fallon "involves prevailing public attitudes toward governments, institutions, or decisions. It depends on what factually is the case about how people think or respond—not on what their thinking ought to be." *Id.* Yet questions of sociological legitimacy may have important implications for other forms of legal legitimacy. For a fascinating argument about the tension between different kinds of legitimacy, see Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2245 (2019) (reviewing FALLON, *supra*, and arguing that "in politically charged moments, the Justices may feel pressure to sacrifice the legal legitimacy of their judicial decisions in order to preserve the sociological legitimacy of the Court as a whole").

5. *See, e.g.*, Aaron Blake, *Pack the Supreme Court? Why We May Be Getting Closer*, WASH. POST (Oct. 9, 2018), https://www.washingtonpost.com/politics/2018/10/09/pack-supreme-court-why-we-may-be-getting-closer [https://perma.cc/2MS9-JPY4]; Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE BLOG (Oct. 15, 2018), https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court [https://perma.cc/62LV-PBNH]; Ian Samuel, *Kavanaugh Will Be on the US Supreme Court for Life. Here's How We Fight Back*, GUARDIAN (Oct. 9, 2018, 4:00 PM EDT), https://www.theguardian.com/commentisfree/2018/oct/09/kavanaugh-us-supreme-court-fight-back-court-packing [https://perma.cc/5ZUG-LZE8].

In this Feature, we offer a framework for thinking about saving the Supreme Court. We explain how only Supreme Court reforms—and only the right kinds of reform—can preserve the Court's role as a neutral arbiter of important questions of law. We begin in Part I by discussing why the Court's legitimacy faces significant peril in the near term. Several factors—such as increased polarization in society, the development of polarized schools of legal interpretation aligned with political affiliations, and greater interest-group attention to the Supreme Court nomination process—have conspired to create a system in which the Court has become a political football, and in which each nominee can be expected to predictably vote along ideological lines that track partisan affiliation. Justice Kennedy—even though he was mostly a reliable conservative—may well be the last Justice to vote against his partisan affiliation in some of the highest-profile cases. With his replacement, the notion of the Court as an institution above the political fray might soon vanish.

Next, in Part II, we consider what kinds of reforms would best protect the Court's perceived role as a legitimate, nonpartisan arbiter of important legal questions. Any solution must have at least three components. First, it must be constitutionally plausible, even if not bulletproof. Second, it must be capable of implementation via statute, given the near impossibility of a constitutional amendment in an age of severe polarization. Finally, even though overwhelming bipartisan support might not be possible at the time of reform, the proposal needs to be stable going forward. That is, it has to be something that both sides might be able to live with in the long term, leading to a fair equilibrium. Unfortunately, some of the most prominent reform proposals do not satisfy these criteria; and in some cases, they would make the Court's politicization even worse.

Most importantly, in Part III, we offer two reforms of our own. We call these the Supreme Court Lottery and the Balanced Bench. We offer these alternative approaches because policymakers might have different views about their viability, if and when Congress takes up Supreme Court reform. For each, we discuss the plan and its benefits and then assess its constitutionality. We think either would be an excellent framework for reform. Though neither would perfectly solve *all* the problems we identify with the Supreme Court, both would be a marked improvement over the status quo.

Whether policymakers adopt these precise proposals or not, it is imperative that they search for reforms along these lines. Doing nothing means that the Court's legitimacy will continue to suffer in the eyes of the public. The Court risks being gravely damaged by clashes between the conservative majority and progressive politicians, if and when Democrats regain power in the political branches. But nakedly political reforms like court-packing—even if a justified response to Republican escalation—may not lead to a stable equilibrium and

could end up damaging the rule of law. The best way to save the Court is to transform the Court.

I. THE LOOMING THREAT

As many observers have noted, the Supreme Court is facing an unprecedented legitimacy crisis in the wake of Justice Kennedy's retirement and Justice Kavanaugh's confirmation.[6] Commentators identify several serious dangers facing the Court going forward. First is the seemingly undeniable fact that the Court will be more polarized along *party* lines than at any point in recent history. As Epstein and Posner explain, Justice Kennedy was the last Supreme Court appointee to vote "with any regularity" against the ideology of the President who named him to the Court.[7] Every subsequent appointee has hewn more closely to party ideology; and Justice Kennedy's replacement, Justice Kavanaugh, is by all accounts a reliable conservative who is unlikely to break this new trend.[8] Thus, "[f]or the first time in living memory, the [C]ourt will be seen by the public as a party-dominated institution, one whose votes on controversial issues are essentially determined by the party affiliation of recent presidents."[9]

Indeed, even when Democratic President Franklin Roosevelt proposed his famous court-packing plan in the 1930s, his antagonists on the Supreme Court were not all of the opposing party. One of the "four horsemen," Justice James McReynolds, had been appointed by Democratic President Woodrow Wilson.[10] Another, Justice Pierce Butler, was also a Democrat (although one appointed by Republican President Warren G. Harding).[11] Moreover, four of the five Justices who ultimately "broke the logjam" in favor of President Roosevelt's policies were Republicans.[12]

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6. *See* Beauchamp, *supra* note 2.

7. Epstein & Posner, *supra* note 3.

8. *Id.*

9. *Id.*

10. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 214 (1993).

11. *See* David R. Stras, *Pierce Butler: A Supreme Technician*, 62 VAND. L. REV. 695, 712 (2009) (explaining how President Harding chose Justice Butler because political expediency counseled in favor of choosing a Catholic Democrat). Interestingly, Justice Butler's selection was motivated partly by concerns about public legitimacy. *See* HENRY L. ABRAHAM, JUSTICES, PRESIDENTS AND SENATORS 149 (5th ed. 2008) (noting that Chief Justice Taft "persuaded the president that the Court had become 'too Republican' in the public eye and that, consequently, the new appointee ought to be a congenial Democrat").

12. Richard Primus, *The Republic in Long-Term Perspective*, 117 MICH. L. REV. ONLINE 1, 10 (2018).

Similar observations could be made about other points of particular controversy in the Court's history. *Brown v. Board of Education*[13] ignited a political firestorm. Southern politicians engaged in a campaign of "massive resistance" to the Court's efforts to force desegregation.[14] Yet as controversial as *Brown* and subsequent desegregation decisions were, it was hard to paint the conflict as primarily a partisan clash between Democrats and Republicans. *Brown* was written by Chief Justice Warren, a Republican appointee, and was joined unanimously by the eight Democratic-appointed Justices. Meanwhile, most of the Southern opposition was led by conservative Democratic politicians.

So too with other conflicts. *Roe v. Wade*[15] generated a significant backlash among conservatives; but the decision was written by a Republican-appointed Justice and joined by four more. A Democratic-appointed Justice was one of the two dissenters. *Citizens United v. Federal Election Commission*[16] is perhaps the most politically controversial decision of the last decade; but both the majority and the lead dissent were written by Republican-appointed Justices.

Perhaps the greatest threat to the Court's legitimacy in recent years was *Bush v. Gore*,[17] which involved five Republican-appointed Justices effectively delivering a contested presidential election to the Republican candidate. In the short term, the decision generated sharply polarized responses from the American people.[18] Yet "the initial polarization toward the Court evaporated within a year of the decision."[19] Within less than a decade, the Court was *more* popular among Democrats than Republicans in opinion polls.[20] Social scientists have explained the public's quick acceptance of *Bush v. Gore* by suggesting that "because the Court enjoyed such a deep reservoir of good will, most Americans were predisposed to view the Court's involvement as appropriate."[21] Other factors likely played a role as well. Vice President Al Gore accepted the Court's decision as

13. 347 U.S. 483 (1954).

14. *See* Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82 (1994).

15. 410 U.S. 113 (1973).

16. 558 U.S. 310 (2010).

17. 531 U.S. 98 (2000).

18. *See* Jeffrey L. Yates & Andrew B. Whitford, *The Presidency and the Supreme Court After* Bush v. Gore*: Implications for Institutional Legitimacy and Effectiveness*, 13 STAN. L. & POL'Y REV. 101, 112 (2002).

19. Nathaniel Persily, *Foreword: The Legacy of* Bush v. Gore *in Public Opinion and American Law*, 23 ST. THOMAS L. REV. 325, 325 (2011).

20. *See id.*

21. James L. Gibson et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 555 (2003).

final;[22] and in the years after the decision, the Court—due to "swing" votes by Justices O'Connor and Kennedy—offered up a number of high-profile decisions amenable to Democrats and progressives.[23] Today, by contrast, the Republican-appointed majority appears more reliably conservative, and Democratic politicians seem much more willing to challenge the Court as partisan.

Thus, while the Court has come under political assault at this and other points in history, we think the rise of a Court polarized on party lines makes the present moment particularly dangerous. There is uncertainty as to what exactly the rise of a partisan Court portends, but it is hard to imagine that the Court will continue to enjoy public confidence if half the country sees the majority of Justices as political agents working for the other team.

It might not be an overstatement to say that *Dred Scott v. Sandford*[24] and its surrounding politics presents the most useful analogue to the present period. While we do not contend that the country is headed for civil war, *Dred Scott* provides lessons about what can happen when the country sees the Supreme Court as beholden to one side in a contentious public debate. In the run-up to the Civil War, the country was bitterly divided over the issue of slavery along regional lines. In *Dred Scott*, Americans perceived the Court as handing one side total victory in that highly divisive conflict. Political rhetoric around the decision was fiery; Abraham Lincoln famously charged that the decision was the result of "a conspiracy to make slavery national."[25]

The national rift that *Dred Scott* widened was the regional conflict between the free North and slaveholding South. Today, by contrast, our political system is increasingly divided on *party* lines.[26] And now, the Supreme Court is perfectly

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22. *See Text of Gore's Concession Speech*, N.Y. TIMES (Dec. 13, 2000), https://www.nytimes.com/2000/12/13/politics/text-of-goreacutes-concession-speech.html [https://perma.cc/UEW5-3VJG] ("[W]hile I strongly disagree with the [C]ourt's decision, I accept it. I accept the finality of this outcome . . . .").

23. Examples include *Lawrence v. Texas*, 539 U.S. 558 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Boumediene v. Bush*, 553 U.S. 723 (2008).

24. 60 U.S. (19 How.) 393 (1857).

25. Abraham Lincoln, Sixth Debate with Stephen A. Douglas, at Quincy, Illinois (Oct. 13, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 282 (Roy P. Basler ed., 1953).

26. Social-science research has demonstrated how, over recent decades, Americans who identify with the two major political parties have become much more polarized in their views. Some of the more recent studies of this shift include MARC J. HETHERINGTON & THOMAS J. RANDOLPH, WHY WASHINGTON WON'T WORK 15-21 (2015); LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY 3-4 (2018); and NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 12-13 (2d ed. 2016).

polarized on party lines as well—for the first time, all Democrat-appointed Justices are reliably liberal and all Republican-appointed Justices are reliably conservative.[27] The reasons why this is happening now are complex, but a significant part of the story, as Neal Devins and Lawrence Baum argue, is the rise of distinct and polarized groups of legal elites with different approaches to legal interpretation.[28]

The Court today raises other legitimacy concerns beyond party domination. One distinct problem is the Supreme Court's lack of democratic pedigree. Of course, the "countermajoritarian difficulty" posed by the Court has been the subject of decades of debate among constitutional theorists.[29] Today, though, the Court has become *particularly* countermajoritarian. The problem is not just that the Justices themselves are insulated from politics through life tenure; it is also that the political actors selecting them suffer from serious democratic deficits. As Michael Tomasky notes, the two most recent additions to the Court were selected "by a president and a Senate who represent the will of a minority of the American people."[30] In fact, only three of the current Justices (Justices Thomas, Sotomayor, and Kagan) were nominated by a President who entered office after winning the majority of the national popular vote.[31]

These more general concerns are exacerbated by the circumstances of how the two newest Justices joined the Court. As noted, Justice Gorsuch only was able to become a Justice after Senate Republicans' unprecedented blockade of President Obama's nominee, Judge Garland. The Court was left with eight Justices for more than a year after Justice Scalia's death; and Senate Republicans refused to even hold a hearing for Judge Garland, despite his incontrovertible

27. *See* NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 5 (2019) (noting that "never before [in the Court's history] were there competing ideological blocs that coincided with party lines").

28. *See generally id.*

29. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

30. Michael Tomasky, Opinion, *The Supreme Court's Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018), https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html [https://perma.cc/P4RY-8RL4] (noting that President Trump lost the popular vote and that the fifty Senators who confirmed Justice Kavanaugh "collectively won fewer votes in their last election" than the Senators who opposed him).

31. *Id.*

qualifications, relative centrism, and majority support among the American people.[32]

Then, after Donald Trump assumed office and the Presidency passed into Republican control, the Senate moved swiftly to consider and confirm Justice Gorsuch. After Senate Democrats filibustered the nomination, Senate Republicans invoked the so-called "nuclear option," changing longstanding rules to lower the voting threshold for cloture on Supreme Court nominees from sixty votes to a simple majority[33] (which Senate Democrats had themselves exercised when they were in power four years earlier, for nominees to the lower courts and executive offices).[34] The Senate's handling of the vacancy generated significant outrage on the left, with some going so far as to argue that Justice Gorsuch should be considered illegitimate.[35]

The inescapable conclusion from these events is that the party affiliation of Supreme Court Justices matters—and that politicians will go to great lengths to control the Court. Indeed, politicians today openly admit that raw power is the name of the game when it comes to Supreme Court nominations. Recently, Senator McConnell made clear that if another Supreme Court vacancy occurred in

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32. *See Supreme Court*, GALLUP, https://news.gallup.com/poll/4732/supreme-court.aspx [https://perma.cc/UE2T-R6BB] (noting results of a March 2016 survey showing 52% support for Garland's confirmation, with 29% opposed and 19% having no opinion).

33. *See* Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html [https://perma.cc/267Z-9MA2].

34. *See* Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line -vote-that-would-alter-centuries-of-precedent /2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html [https://perma.cc/HK97-T98L].

35. *See, e.g.*, David Faris, *How Democrats Can Make Republicans Pay for Justice Gorsuch*, THE WEEK (Mar. 20, 2017), https://theweek.com/articles/681352/how-democrats-make-republicans-pay-justice-gorsuch [https://perma.cc/R7V3-J9SU] ("Gorsuch's seat was stolen by a craven act of democratic sabotage, and he will always be sitting in a chair reserved for the nominee of a Democratic president. He is illegitimate today, and he will be illegitimate 20 years from now."); Lawrence Weschler, *How the US Supreme Court Lost Its Legitimacy*, NATION (Sept. 17, 2018), https://www.thenation.com/article/how-the-us-supreme-court-lost-its-legitimacy [https://perma.cc/TQ9F-BGYF] ("Between the kabuki theater of Gorsuch's confirmation hearing and the circumstances that allowed for his nomination in the first place, his tenure on the Court will always have an asterisk next to it. For as long as he presides, Gorsuch's will need to be considered a 'bastard' vote in all future 5-4 decisions.").

2020, he would allow President Trump to fill the seat—thus shredding any conceivably neutral justification for refusing to permit President Obama to appoint a Justice in an election year.[36]

One might have hoped that Justice Kavanaugh's confirmation process would be less damaging to perceptions of judicial legitimacy than the Garland-Gorsuch debacle had been. To be sure, the nomination was high-stakes; Justice Kennedy had been the "swing" Justice for many years, and the chance to replace him with a more reliable conservative gave Republicans a chance to reshape the law. Yet Justice Kennedy's seat couldn't be considered "stolen." Under pre-Garland norms, the vacancy was President Trump's to fill by right, given that it became open during his presidency. Many expected a swift, relatively uneventful confirmation process.[37]

That was not to be. Days before the Senate Judiciary Committee was to vote on the nomination, Dr. Christine Blasey Ford came forward to allege a sexual assault by Justice Kavanaugh during high school.[38] More allegations emerged, capturing public attention and forcing the Judiciary Committee to delay its vote until both Dr. Ford and Justice Kavanaugh could testify. At that hearing, Justice Kavanaugh offered testimony that shocked many.[39] He lambasted the "two-

36. *See* Ted Barrett, *In Reversal From 2016, McConnell Says He Would Fill a Potential Supreme Court Vacancy in 2020*, CNN (May 29, 2019, 7:01 AM), https://www.cnn.com/2019/05/28/politics/mitch-mcconnell-supreme-court-2020 [https://perma.cc/T8QJ-KZ3N].

37. Bret Stephens, Opinion, *Just Confirm Kavanaugh*, N.Y. TIMES (July 12, 2018), https://www.nytimes.com/2018/07/12/opinion/kavanaugh-supreme-court-confirm.html [https://perma.cc/397T-ZZA4] ("*Kavanaugh will almost certainly be confirmed*. . . . Republican moderates . . . spoke[] approvingly of his nomination.").

38. *See* Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, WASH. POST (Sept. 16, 2018), https://www.washingtonpost.com /investigations /california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html [https://perma.cc/K3EZ-ZLBU].

39. *See, e.g.*, Benjamin Wittes, *I Know Brett Kavanaugh, but I Wouldn't Confirm Him*, ATLANTIC (Oct. 2, 2018), https://www.theatlantic.com/ideas/archive/2018/10/why-i-wouldnt-confirm-brett-kavanaugh/571936 [https://perma.cc/452A-BZFT] ("The allegations against [Kavanaugh] shocked me very deeply, but not quite so deeply as did his presentation."); Richard Wolffe, *Brett Kavanaugh's Credibility Has Not Survived This Devastating Hearing*, THE GUARDIAN (Sept. 27, 2018), https://www.theguardian.com/commentisfree/2018/sep/27/brett-kavanaugh-credibility-devastating-hearing [https://perma.cc/68Z7-GUS3] ("As a federal appeals court judge, Kavanaugh's performance was jarringly unbalanced and at times unhinged.").

week effort" surrounding the allegations as "a calculated and orchestrated political hit," a form of "[r]evenge on behalf of the Clintons."[40] He went on to address Democratic committee members with contempt and disrespect.[41] Observers condemned his performance as highly improper for a judge, with many saying that his testimony disqualified him for the Supreme Court regardless of the truth of the underlying allegations.[42] Some even alleged that he lied under oath.[43] As a result, it will be hard for many Americans to see Justice Kavanaugh as fair and impartial.

Given this course of events, many believe the Court's legitimacy now faces a daunting challenge.[44] These concerns are by no means limited to the liberal commentariat, but have been voiced by mainstream political figures. Former Attorney General Eric Holder, for example, suggested that "[w]ith the confirmation of Kavanaugh and the process which led to it, (and the treatment of Garland), the legitimacy of the Supreme Court can justifiably be questioned."[45] Even a sitting member of the Supreme Court, Justice Elena Kagan, recently warned that it was "a dangerous time for the Court" because "people increasingly look at us

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40. *Kavanaugh Hearing: Transcript*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript [https://perma.cc/F9X5-R2F7].

41. *See, e.g.*, *id.* ("[D]o you like beer, Senator, or not?").

42. *See, e.g.*, Laurence H. Tribe, Opinion, *All the Ways a Justice Kavanaugh Would Have to Recuse Himself*, N.Y. TIMES (Oct. 1, 2018), https://www.nytimes.com/2018/10/01/opinion/justice-kavanaugh-recuse-himself.html [https://perma.cc/NV98-6JJY] (describing Justice Kavanaugh's "intemperate personal attacks" and "his partisan tirades" as "display[ing] a strikingly injudicious temperament"); Wittes, *supra* note 39.

43. *See, e.g.*, James Roche, *I Was Brett Kavanaugh's College Roommate*, SLATE (Oct. 3, 2018), https://slate.com/news-and-politics/2018/10/brett-kavanaugh-college-roommate-jamie-roche.html [https://perma.cc/76TW-2B43] ("Brett Kavanaugh stood up under oath and lied about his drinking . . . .").

44. *See, e.g.*, Bruce Ackerman, Opinion, *Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018, 3:15 AM), https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html [https://perma.cc/8Y4W-TXQQ]; Erwin Chemerinsky, Opinion, *Court's Legitimacy Is in Question*, HERALD & REV. (Oct. 2, 2018), https://herald-review.com/opinion/columnists/erwin-chemerinsky-court-s-legitimacy-is-in-question/article_d90aec75-ffe0-51c7-8cc0-3d9f5c19982b.html [https://perma.cc/YX9X-LXN7]; *see also* Grove, *supra* note 4, at 2240 (noting that "it is striking how many commentators . . . have recently questioned the legitimacy of the United States Supreme Court").

45. Eric Holder (@EricHolder), TWITTER (Oct. 6, 2018, 1:10 PM), https://twitter.com/EricHolder/status/1048666766677876738 [https://perma.cc/2ZGR-QRHC].

and say 'this is just an extension of the political process.'"[46] Indeed, polling data provides some evidence that much of the public sees the Justices as political actors—and also that this perception worsened in the wake of the Kavanaugh confirmation.[47] A recent analysis of perceptions of the Court's legitimacy concluded that the Court as of late 2018 was in "a weaker position now than at nearly any point in modern history."[48]

And of course, we haven't even discussed the legitimacy concerns that will be raised by the actual decisions the Supreme Court will render in the coming years. There is good reason to expect the new conservative majority to assert its power in high-profile, controversial cases. Most obvious is the possibility—though not the certainty—that the Court will overturn *Roe v. Wade*[49] and thereby permit state legislatures to criminalize abortion (a possibility that a number of state legislatures seem to be eagerly anticipating).[50] Many people throughout

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46. Ian Millhiser, *Kagan Warns That the Supreme Court's Legitimacy Is in Danger*, THINKPROGRESS (Sept. 17, 2018, 8:00 AM), https://thinkprogress.org/justice-kagan-warns-that-the-supreme-courts-legitimacy-is-in-danger-2de1192d5636 [https://perma.cc/9XNA-72UT].

47. One national poll asked Americans: "In general, do you think that the Supreme Court is mainly motivated by politics or mainly motivated by the law?" In July 2018, 50% of respondents answered "mainly politics." Press Release, Quinnipiac Univ. Poll, U.S. Voter Support for Abortion Is High, Quinnipiac University National Poll Finds; 94 Percent Back Universal Gun Background Checks 3 (May 22, 2019), https://poll.qu.edu/images/polling/us/us05222019_usch361.pdf [https://perma.cc/NFS9-E9U2]. By May 2019, after the Kavanaugh confirmation battle, that number (which already seems quite high) had risen to 55%. *See id.*

48. Amelia Thomson-DeVeaux & Oliver Roeder, *Is The Supreme Court Facing a Legitimacy Crisis?*, FIVETHIRTYEIGHT (Oct. 1, 2018, 6:00 AM), https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis [https://perma.cc/R6X4-HCTW].

49. 410 U.S. 113 (1973).

50. In recent months, a number of states have passed, or considered passing, measures that appear impossible to reconcile with *Roe* and its progeny. Most notably, Alabama passed a law banning abortion entirely, except when necessary to save the mother's life—making no exceptions for rape or incest. *See* Emily Wax-Thibodeaux & Chip Brownlee, *Alabama Senate Passes Nation's Most Restrictive Abortion Ban, Which Makes No Exceptions for Victims of Rape and Incest*, WASH. POST (May 14, 2019), https://www.washingtonpost.com/national/alabama-senate-passes-nations-most-restrictive-abortion-law-which-makes-no-exceptions-for-victims-of-rape-and-incest/2019/05/14/e3022376-7665-11e9-b3f5-5673edf2d127_story.html [https://perma.cc/5VYD-55GZ]. Georgia, Louisiana, Mississippi, Missouri, and Ohio all recently passed measures banning abortions at a very early point in pregnancy. *See* Tara Law, *Here Are the Details of the Abortion Legislation in Alabama, Georgia, Louisiana and Elsewhere*, TIME (July 2, 2019, 5:21 PM ET), https://time.com/5591166/state-abortion-laws-explained [https://perma.cc/5K9D-UGE3]. Texas recently considered, though did not pass, a bill that could have exposed women and doctors involved in abortions to the death penalty. *See* Julia Jacobs, *Failed Texas Bill Would Have Made Death Penalty Possible in Abortion Cases*, N.Y. TIMES (Apr. 10, 2019), https://www.nytimes.com/2019/04/10/us/texas-abortion-death-penalty.html [https://perma.cc/9QKC-FGJA]. These laws' supporters often explicitly state that the laws'

American society object to abortion, and commentators across the political spectrum have criticized the Court's work in *Roe* on various grounds.[51] Nonetheless, many Americans have come to take *Roe* and the right it recognized for granted; and some two-thirds wish to see it preserved, according to polling.[52] Its explicit rejection by the Court would be an avulsive change—one that would generate massive outrage among much of the country (even if it elated others). Such a development would make the Court even more of a political focal point than it is now.

Even if the Court declines to revisit *Roe*, there is little doubt that the Justices will wade into many other divisive areas over the coming years: the intersection of gay rights and religious liberty, the rights of corporations, the constitutionality of affirmative-action programs, the scope of presidential power, challenges to federal legislation under the Commerce Clause, thorny issues of free speech, and more. There is good reason to expect that, in at least some instances, the Court

purpose is to provoke the Supreme Court into overturning, or at least cutting back, on the *Roe* right. *See, e.g.*, Wax-Thibodeaux & Brownlee, *supra* ("Those who backed the new [Alabama] law said they don't expect it to take effect, instead intending its passage to be part of a broader strategy by antiabortion activists to persuade the U.S. Supreme Court to reconsider [*Roe*] . . . .").

51. *See, e.g.*, Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 809 (1973) ("*Roe v. Wade* is in the worst tradition of a tragic judicial aberration that periodically wounds American jurisprudence and, in the process, irreparably harms untold numbers of human beings."); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973) (arguing that *Roe* was "a very bad decision . . . . because it is *not* constitutional law and gives almost no sense of an obligation to try to be"); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381 (1985) (arguing that "*Roe* ventured too far in the change it ordered"); Gerald Gunther, *Commentary—Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 WASH. U. L.Q. 817, 819 ("I have not yet found a satisfying rationale to justify *Roe* . . . on the basis of modes of constitutional interpretation I consider legitimate."); John T. Noonan Jr., *The Root and Branch of* Roe v. Wade, 63 NEB. L. REV. 668, 679 (1984) (arguing that in *Roe* and its progeny the Court has failed to "perceive the reality of the extraordinary beauty of each human being put to death in the name of the abortion liberty and concealed from legal recognition by a jurisprudence that substitutes a judge's fiat for the truth").

52. In adhering to the core of *Roe*'s holding, the joint opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), stressed that "people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion" in light of *Roe*. *Id.* at 856. One recent opinion poll found that sixty-seven percent of Americans said they did not want *Roe* to be overturned. *See* Press Release, Henry J. Kaiser Family Foundation, Poll: Two-Thirds of Americans Don't Want the Supreme Court to Overturn *Roe v. Wade* (June 29, 2018), https://www.kff.org/health-reform/press-release/poll-two-thirds-of-americans-dont-want-the-supreme-court-to-overturn-roe-v-wade [https://perma.cc/49M8-EJWS].

will opt not for Thayerian deference[53] to political decision-makers, but will instead aggressively impose its will. Last Term's decision in *Janus v. American Federation of State, County, and Municipal Employees*,[54] which dealt a crippling blow to public-sector unions, may provide a blueprint for how an emboldened majority might advance conservative interests using aggressive new doctrines—including the "weaponiz[ed]" First Amendment, as Justice Kagan put it in dissent.[55]

To be sure, it is easy to overstate the likely pace and scope of legal change. Among the conservative Justices, Chief Justice Roberts has displayed institutionalist leanings that seem in some cases to push back against his ideological conservatism.[56] He famously voted to uphold the individual mandate of the Affordable Care Act against a constitutional challenge in *National Federation of Independent Business v. Sebelius*[57] under the taxing power—in some accounts, switching his vote after initially siding with his conservative colleagues to overturn the law on Commerce Clause grounds.[58] His decision may be partly explained by a desire to avoid exhausting the Court's political capital by striking down a Democratic President's signature legislative accomplishment.[59] Even if

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53. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

54. 138 S. Ct. 2448 (2018).

55. *Id.* at 2501 (Kagan, J., dissenting).

56. *See, e.g.*, Henry Gass, *Why Chief Justice Roberts Is Moving to the Center of the Court*, CHRISTIAN SCI. MONITOR (Mar. 26, 2019), https://www.csmonitor.com/USA/Justice/2019/0326/Why-Chief-Justice-Roberts-is-moving-to-the-center-of-the-court [https://perma.cc/VA5B-SVR2] (arguing that Chief Justice Roberts "has been consistently conservative" on important issues, but that he also "has oscillated in a few recent cases, and appears more mindful of the [C]ourt's institutional role in American democracy"); Michael O'Donnell, *John Roberts's Biggest Test Is Yet to Come*, ATLANTIC (Mar. 2019), https://www.theatlantic.com/magazine/archive/2019/03/john-roberts-biography-review/580453 [https://perma.cc/Z8BS-29US] ("More than 13 years into his tenure as [C]hief [J]ustice, Roberts remains a serious man and a person of brilliance who struggles, under increasing criticism from all sides, to balance his loyalty to an institution with his commitment to an ideology.").

57. 567 U.S. 519 (2012).

58. *See* JOAN BISKUPIC, THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS 232-40 (2019); Joan Biskupic, *The Inside Story of How John Roberts Negotiated to Save Obamacare*, CNN (Mar. 25, 2019, 4:35 PM ET), https://www.cnn.com/2019/03/21/politics/john-roberts-obamacare-the-chief/index.html [https://perma.cc/AH8Z-V4JC].

59. To be sure, inside accounts do not make clear that Chief Justice Roberts actually changed his views on any legal questions. In Biskupic's account, the Justices did actually vote on the taxing power issue initially in the case. *See* BISKUPIC, *supra* note 58, at 234. For an argument that Chief Justice Roberts may not have actually changed his vote, see Mark Tushnet, *"The Chief"—What It Actually Tells Us About John Roberts's Vote in the Initial ACA Case*, BALKINIZATION (Mar. 30,

this is not the best account of what actually happened in *NFIB*, the story is plausible because the Chief Justice seems to care about the Court's institutional perception. And it is possible that the Chief Justice's institutionalism could cause him to avoid, or at least delay, the most radical changes the Court could pursue. That said, the Chief Justice has not shied away from broad, aggressive rulings in some highly ideological cases—such as *Janus*, mentioned above, or *Shelby County v. Holder*,[60] which rendered Section 5 of the Voting Rights Act inoperable. Thus, while Chief Justice Roberts might not move as aggressively as some of his colleagues, there is no reason to assume he will ultimately stand in the way of the Court's rightward shift.

In a world where the public had great confidence in the Supreme Court's fairness and impartiality, many Americans might accept controversial decisions even if they did not agree with the results. Indeed, social-science research has found some evidence for the proposition that the Supreme Court is more effective than other institutions at legitimizing unpopular decisions.[61] Yet in a world where much of the public has lost faith in the idea that the Justices are fair and impartial—and increasingly see them as politicians in robes—it is doubtful that the public will accept unpopular decisions. Though the point is contested, there is support for the view that the Supreme Court's legitimacy is strongly tied up with perceptions of *how* the Court makes decisions—particularly, whether the public believes the Court uses fair procedures and is impartial in its decision-making.[62] Moreover, if the Court's most salient decisions are almost universally victories for one party, the Court's legitimacy may be affected much more than if its controversial rulings sometimes favored the other party.[63] That is especially

2019), https://www.balkin.blogspot.com/2019/03/the-chief-what-it-actually-tells-us.html [https://perma.cc/6TEX-8F46].

60. 133 S. Ct. 2612 (2013).

61. *See* James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC'Y REV. 469, 480-81 (1989) (finding, based on responses to surveys, "some evidence of the Court's capacity to engender compliance with unpopular political decisions").

62. *See* Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV. 621, 627 (1991) (concluding that the "legitimacy of the U.S. Supreme Court is based on the belief that it makes decisions in fair ways, not on agreement with its decisions"). For legitimacy purposes, of course, what matters is not whether the Court is *actually* impartial or using fair procedures, but whether the public perceives that to be the case.

63. *Cf.* James L. Gibson & Michael J. Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 209 (2014) (noting that "[l]ack of polarization [in perceptions of Supreme Court legitimacy] may also reflect the fact that the Supreme Court is currently making about 50% of its decisions in a conservative direction and 50% in a liberal direction").

so where the most high-profile cases are likely to be decided along party lines, with Republican-appointed Justices in the majority and Democratic-appointed Justices in dissent.

The Court's legitimacy also faces threats from potential Democratic responses to Republicans' aggressive tactics. Facing the prospect that the conservative majority could block progressive legislative efforts, many on the left are already trying to identify strategies that would reduce the Court's power or disrupt Republican control of its decision-making.

Perhaps most prominently, court-packing is under serious discussion after being seen as beyond the pale for decades.[64] Although Congress has enlarged and decreased the Court's size at various points in history, often for nakedly political reasons,[65] the Court's membership has been set at nine for over a century. Famously, President Roosevelt advanced a plan to add Justices to the Court after facing prominent losses for his New Deal agenda at the hands of a 5-4 conservative majority. Although the threat of court-packing alone may have been sufficient to deter the Court from striking down more New Deal programs, President Roosevelt's plan was defeated.[66] That defeat was politically costly; as Richard Pildes has observed, "FDR's legislative assault on the Court destroyed his political coalition, in Congress and nationally, and ended his ability to enact major domestic policy legislation, despite his huge electoral triumph in 1936."[67] In the near century since, court-packing has been treated as a political third rail—making the Court's current size look like an entrenched, quasiconstitutional norm.[68]

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64. *See, e.g.*, Blake, *supra* note 5; Klarman, *supra* note 5; Samuel, *supra* note 5.

65. In 1863, in the midst of the Civil War, Congress expanded the size of the Court from nine to ten Justices, a move that helped shore up support for Republican, pro-Union interests on the Court. Timothy Huebner, *The First Court-packing Plan*, SCOTUSBLOG (July 3, 2013), http://www.scotusblog.com/2013/07/the-first-court-packing-plan [https://perma.cc/G7SR-W2ZB]. Then, during the presidency of Andrew Johnson, Congress reduced the Court's membership to seven—preventing President Johnson from appointing any Justices—before expanding it back to nine after he left office. *Id.* The size of the Court has remained at nine since then. *Id.*

66. For a fascinating history of this episode, see JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010).

67. Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 132.

68. *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 276-78 (2017); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 505 (2018).

Now, progressives are questioning that conventional wisdom, arguing that adding seats to the Court would be a justified response to Senate Republicans' theft of a Supreme Court seat from President Obama.[69]

Alternatives to court-packing are also under active discussion. Samuel Moyn has argued that the left should "stand up for reforms that will take the last word from [the Court]."[70] He points to jurisdiction-stripping statutes as well as "[o]ther changes in customs and precedent" that could "weaken judicial supremacy," and push the Court to "evolve into an advisory body, especially when the [J]ustices disagree."[71] Mark Tushnet has been advancing arguments for abolishing judicial review for a number of years,[72] and his proposals are receiving renewed interest.[73]

The idea of court-packing is no mere academic fantasy. A number of Democratic presidential candidates have indicated support for expanding the Court's size,[74] or for other reforms.[75] There is no guarantee that Democrats will obtain the necessary control over Congress and the Presidency to make them possible. But the fact that people are discussing such ideas tells us how serious the situation is. The Court's legitimacy will be questioned in the coming years—perhaps

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69. *See*, *e.g.*, Klarman, *supra* note 5; *see also infra* Section III.B.3.

70. Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), http://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy [https://perma.cc/E4M6-6EP2].

71. *Id.*

72. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154-76 (2000).

73. *See* Sean Illing, *The Case for Abolishing the Supreme Court*, VOX (Oct. 12, 2018, 8:10 AM EDT), https://www.vox.com/2018/10/12/17950896/supreme-court-brett-kavanaugh-constitution [https://perma.cc/U6GM-N9QN].

74. *See* Burgess Everett & Marianne Levine, *2020 Dems Warm to Expanding Supreme Court*, POLITICO (Mar. 18, 2019, 5:04 AM EDT), https://www.politico.com/story/2019/03/18/2020-democrats-supreme-court-1223625 [https://perma.cc/BWG3-M495].

75. Some candidates have endorsed an eighteen-year term limit proposal. *See, e.g.*, *Voting Rights*, BETO FOR AM., https://betoorourke.com/votingrights [https://perma.cc/HD23-D7UC]. One candidate thus far has endorsed one of the proposals advanced in this article. *See* Josh Lederman, *Inside Pete Buttigieg's Plan to Overhaul the Supreme Court*, NBC NEWS (June 3, 2019, 6:03 AM EDT), https://www.nbcnews.com/politics/2020-election/inside-pete-buttigieg-s-plan-overhaul-supreme-court-n1012491 [https://perma.cc/Z97M-22J7] (discussing Buttigieg's support of the Balanced Bench). Another has suggested reforms that accord with the other proposal. *See* Justin Wise, *Bernie Sanders Says He Would Move to 'Rotate' Supreme Court Justices if Elected*, THE HILL (June 27, 2019, 10:45 PM), https://thehill.com/homenews/campaign/450800-bernie-sanders-says-he-would-move-to-rotate-supreme-court-justices-if [https://perma.cc/WAP2-U3FA] (mentioning a plan akin to the Supreme Court Lottery).

as never before. Indeed, even those who think the threat might be overblown still believe that coming challenges to the Court need to be taken seriously.[76]

II. WHY SAVE THE COURT?

There is clear cause for concern about the looming threat to the Supreme Court's legitimacy. A Supreme Court that is viewed as illegitimate by a significant portion of the American people will be less able to settle important questions, and particularly less able to exercise the power of judicial review. Of course, for many on the left today, that may seem like a desirable goal. Those who favor Moyn's critique of "juristocracy," for example, or who are drawn to Tushnet's arguments against judicial review, would likely welcome developments that would weaken the Court's ability to stand up to the other branches of government.

On one level, we have sympathy for some of these critiques. Judicial review is inescapably antidemocratic.[77] And while it has served important purposes at key moments in American history, it is also a power that the Court has abused. At a minimum, most observers would agree the Justices have sometimes taken on responsibility for resolving thorny questions that would have been better left to elected officials—even if there is little consensus about *which* uses of judicial review prove the point.[78]

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76. *See* Ilya Somin, *Is the Supreme Court Going to Suffer a Crisis of Legitimacy?*, VOLOKH CONSPIRACY (Oct. 10, 2018, 5:00 PM), https://reason.com/volokh/2018/10/10/is-the-supreme-court-going-to-suffer-a-c [https://perma.cc/UJ72-LNNR] (arguing that predictions of a legitimacy crisis "may well be overblown, as they often have been in the past" but that "[t]he deep anger of much of the left could lead to a stronger assault on the Court than has occurred in a long time").

77. This critique is most famously associated with Alexander Bickel. *See* BICKEL, *supra* note 29. Since Bickel posed the "countermajoritarian difficulty," constitutional theorists have gone to great lengths to try to reconcile judicial review with majority rule. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (offering a theory of "representation reinforcement" under which judicial review protects and enables democratic governance); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1014 (1984) (noting that the countermajoritarian difficulty is "the starting point for contemporary analysis of judicial review"); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 71 (1989) ("Most constitutional scholars for the past quarter-century have accepted Bickel's definition of the problem and have seen the task of constitutional theory as defining a role for the Court that is consistent with majoritarian principles.").

78. Liberals might point to *The Civil Rights Cases*, 109 U.S. 3 (1883); *Lochner v. New York*, 198 U.S. 45 (1905); and, more recently, *Citizens United v. FEC*, 558 U.S. 310 (2010); and *Shelby County v. Holder*, 570 U.S. 529 (2013). Conservatives might point to cases like *Roe v. Wade*, 410 U.S. 113 (1973); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); and

Nonetheless, we have deep reservations about the long-term consequences of a powerless Supreme Court. First, if the Supreme Court suddenly became unable to exercise judicial review, the American constitutional system would look significantly different. Such a development would not spell the *end* of American democracy. Indeed, countries like England, the Netherlands, and Canada either lack written constitutions, do not permit courts to enforce their written constitutions through judicial review, or have mechanisms by which the legislature can (at least in theory) reenact laws that the courts have struck down.[79] These examples suggest that it is possible to have a well-functioning democracy that respects individual rights without giving courts the final word over the constitutionality of legislation. Moreover, the Supreme Court itself barely exercised judicial review of federal statutes during the nation's early years, doing so only twice before the Civil War.[80]

But even if other democracies function well without judicial review, it doesn't follow that our own system would function equally well if the Court's power to check the political branches were abolished or significantly curtailed. Whatever its merits, judicial review has been a longstanding and integral part of the American constitutional system. No one can know what would happen if it disappeared tomorrow. Perhaps the political branches would, more or less, safeguard basic rights, the way legislatures do in other democracies. But perhaps political actors have become so accustomed to being reined in by courts that, once set free, they would trample important rights. On this point, it bears note that in some of the cases where the Supreme Court is thought to have erred most grievously, it is because the Court failed to exercise the power of judicial review and defend individual rights from political actors.[81]

Ultimately, however, the implications for judicial review are secondary concerns when it comes to the Supreme Court's legitimacy. The larger problem is this: the Supreme Court plays a significant role in the public imagination as a

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Obergefell v. Hodges, 135 S. Ct. 2584 (2015). There are some examples which could command agreement across the political spectrum—most obviously, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). For an argument that *Dred Scott* may have been correctly decided as a purely *legal* (but certainly not a moral) matter, see MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006).

79. For a discussion, see Mark Tushnet, *Dialogic Judicial Review*, 61 ARK. L. REV. 205 (2009); and Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003).

80. The cases were *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803); and *Dred Scott*, 60 U.S. (19 How.) 393.

81. As Jamal Greene has observed, the constitutional "anticanon" includes *Plessy v. Ferguson*, 163 U.S. 537 (1896); and *Korematsu v. United States*, 323 U.S. 214 (1944)—two cases where the Court declined to stop the government from engaging in racial discrimination. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 378, 387 (2011).

citadel of justice. For many Americans, given the Supreme Court's salience, faith in the Court may be deeply intertwined with feelings about the very idea of law.[82] In a world where the Supreme Court is widely seen as just another political institution, how will people think about law itself? Our fear is that in such a world, the very idea of law as an enterprise separate from politics will evaporate.

The rule of law is a critical element of a healthy democracy. If it erodes, our fears for democracy become more concrete. Can a democratic society long survive if the citizenry loses faith in law? Will the notion of the rule of law survive if people stop believing that judges are doing something other than exercising political will when deciding cases? Will political actors cease to give credence to the results of any legal proceeding that does not validate their preexisting beliefs? We do not know the answers to these questions. But we are not eager to run the experiment required to answer them. Instead, we think it is imperative to save the Supreme Court as an institution above the political fray.

Saving the Court, however, will require *changing* the Court. Our current system is deeply flawed, and events since 2016 have only exposed problems that were long lurking below the surface. The consequences of individual Supreme Court appointments are so significant that political actors will naturally fight for them tooth and nail. These flaws were less apparent in an age when the leading political parties were less polarized. But now, given extreme ideological sorting, politicians of both parties realize the stakes of Supreme Court appointments and are firmly committed to staffing the Court with ideological comrades.[83]

A number of observers will no doubt argue that the solution to this legitimacy crisis is to simply reject the challenge and treat the Court as legitimate. Yet things are not so simple. The new Supreme Court majority is arguably the most reliably conservative in history, and there is reason to believe it will strike down laws that progressives favor using doctrinal theories that are at least open to serious question—as the Court has already done in cases like *Shelby County*[84] and *Janus*.[85] And given that Democrats have a reasonable argument that the conservative majority was earned using underhanded tactics,[86] it is not clear why they should feel compelled to let the Court block their favored policies for a generation or more in deference to the Court's institutional legitimacy. Instead, given these high stakes, it seems to us inevitable that the Court's legitimacy will

82. *Cf.* Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2242 (1997) (noting that the Supreme Court is "the most salient symbol of the rule of law in our society").

83. *See supra* notes 32-36 and accompanying text.

84. Shelby Cty. v. Holder, 570 U.S. 529 (2013).

85. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448 (2018).

86. *See id*.

be challenged head-on. To avoid that collision, we need to change course—radically.

The next two Parts explain what we think that course change should—and should not—look like. Before doing so, though, we must stress one point. At this moment, Supreme Court reform unquestionably feels most pressing to those on the ideological left, given conservative control of the Court. By the same token, conservatives might feel no urgency, given the major victories they anticipate the Court handing down. We think, however, that whoever benefits immediately, the right kind of Supreme Court reform is ultimately in both sides' long-term interests. Preserving a Supreme Court that is not merely a partisan institution is more important than winning on policy issues in the short term.

III. HOW (NOT) TO SAVE THE COURT

Saving what is good about the Court will require significant reform to how the Court operates and how the Justices are selected. But not just any reform will do. In this Part, we first develop a framework for successful Supreme Court reform. We then discuss how previous reform proposals fall short and could even exacerbate the problems reform should seek to resolve.

A. Desiderata for Reform

The reform that we envision would have multiple, overlapping goals. At the outset, however, we should clearly define the problem. As we see it, a key problem with how the Supreme Court works today is that its design makes it possible for political parties to capture control over the institution using bare-knuckle tactics, leading to the apocalyptic confirmation battles we have seen in recent years. Such conflicts were not foreseen at the Founding—perhaps because no one envisioned just how powerful the Court would become, but certainly because the Founders did not anticipate how political parties would shape appointments to the Court.[87] Even well after the rise of political parties, the problems with the Court's structure were not fully apparent because judicial ideology did not consistently track party affiliation. Today, however, with the rise of polarized schools

87. *See* ABRAHAM, *supra* note 11, at 20 ("[T]he Founding Fathers . . . did not foresee the role political parties would soon come to play in the appointment process."); BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS (2005); *see also* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006) (arguing that "[t]he Framers had not anticipated the nature of the democratic competition that would emerge in government and in the electorate" because they did not foresee the role political parties would play).

of legal interpretation, polarized elite communities of lawyers, and a polarized political culture, party domination of the Court has become an attainable goal—and thus one that politicians will fight hard to achieve. And that, in turn, increasingly distorts our politics, as voters make decisions in presidential elections in order to shape the composition of the Supreme Court.[88]

Reform that would change this dynamic has several components. First, it would be designed to preserve the Court as an institution that is not partisan—or, at the very least, as an institution that is *less* partisan than other branches. That means structuring the system so that partisan politicians are less able to capture the Court by stacking it with ideological fellow travelers. It is precisely because the Court is able to be captured that battles for control have become so damaging and toxic as our politics have become more polarized.

Second (and related to that goal), reform would significantly reduce the political stakes of nominating individual Justices, to avoid spectacles like those of recent years. That also means significantly lessening the importance of individual Justices. In our current system, far too much turns on essentially random events. Any one Justice's death or retirement can have massive consequences for the law and thus for American society, depending on when the vacancy occurs and which party controls the Senate. This is not a sensible way to run a constitutional democracy. Whatever one's views on abortion, free speech, gay marriage, or the powers of Congress, important governmental decisions on these matters should not depend on the health of individual octogenarians. No one would design such a system from scratch, and any good set of reforms would endeavor to make the Court less sensitive to the choices and health of individual Justices. A positive byproduct of this reform is that it would reduce the cult of personality around the Justices, which may currently be pushing them to become even more partisan.[89]

Third, a better system would preserve some ability for the Justices to strike down laws while also nudging them in the direction of deference to the political branches. In our view, some role for judicial review is important, so that the Court can hold the nation to its deepest commitments and check its worst injustices. But there are good arguments that Justices on both sides of the ideological

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88. *See* Jane Coaston, *Polling Data Shows Republicans Turned out for Trump in 2016 Because of the Supreme Court*, VOX (June 29, 2018, 10:00 AM EDT), https://www.vox.com/2018/6/29/17511088/scotus-2016-election-poll-trump-republicans-kennedy-retire [https://perma.cc/8YZF-NEPX] ("One of the most underappreciated reasons that Donald Trump won the 2016 election was voters motivated by a vacancy on the Supreme Court. One in five voters told CNN in an exit poll that the Supreme Court was one reason they had cast a ballot.").

89. *See* Suzanna Sherry, Our Kardashian Court (and How to Fix It) (July 24, 2019) (unpublished manuscript), https://ssrn.com/abstract=3425998.

divide have become too eager to exercise this power in recent decades.[90] A sensible reform would provide a thumb on the scale in the direction of deference.

These are the goals we have designed our proposed reforms to satisfy. But sensible reforms would satisfy other practical criteria as well. Any significant change to the way the Supreme Court works will create immediate winners and losers. Given that Republicans are currently enjoying the benefits of a conservative Supreme Court, they are unlikely to support efforts to significantly reform the Court. For this reason, any reform proposal should be capable of implementation via statute, rather than constitutional amendment, in the event that Democrats are able to capture control of Congress and the White House. That limitation is significant but necessary. Given the polarization of society, the stakes of control over the Supreme Court, and the relative distribution of partisan affiliation within and across the United States, it is very hard to imagine that a constitutional amendment changing the structure of the Supreme Court could pass in the near term.[91]

Related to that point, any statutory reform proposal should also be *plausibly* constitutional. Not obviously or undebatably constitutional, but at least plausibly so. Indeed, for the right kind of reform, we are willing to accept constitutional arguments that are less than bulletproof. There is, to be sure, a significant risk that the Supreme Court itself would strike down reform on constitutional grounds, and for that reason one might think only the constitutionally soundest proposals should be put forward. The conservative majority on the Court would likely be skeptical of reforms that would reduce the Court's power, especially if such efforts lacked bipartisan support. Yet this argument ignores the fact that if the Supreme Court rejects moderate reform, more serious threats to its power and legitimacy will be lurking in the background—jurisdiction-stripping, court-packing, and perhaps even outright defiance of Court judgments by the political branches. Such threats could be implicit or explicit. For example, a reform statute might contain a severability clause stating that the Court would be packed with five new Justices, or that its jurisdiction would be removed, in the event that the reform proposal were struck down. Under such circumstances, the Court might blink before striking down a reform measure as unconstitutional.[92]

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90. *See, e.g.*, TUSHNET, *supra* note 72.

91. We recognize that even a statutory proposal may be difficult to pass politically, but it remains far easier than a constitutional amendment. For discussion, see Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154 (2006).

92. This analysis presupposes that the *current* Supreme Court would hear a constitutional challenge to a reform measure, but that is not obvious; if the reform were put into place, and new Justices seated, it is unclear exactly which Court—the current or reformed—would hear the challenge.

In addition, it is not obvious that the Court would accept supposedly "rock-solid" constitutional arguments. One strength of the case for Court expansion, for example, is its constitutionality; but there are commentators who believe even it would be unconstitutional.[93] The Court's conservatives might side with the skeptics, given the desire to retain their majority.

Finally, the resulting system must be at least potentially stable—it must be an arrangement that both political parties could live with going forward. This might seem inconsistent with what we have said thus far: that reform would need to be enacted via statute, largely along party lines, and potentially using aggressive tactics in order to dissuade the Supreme Court from declaring it unconstitutional. How could such a reform lead to any kind of stable equilibrium going forward?

Here, we can distinguish between means and ends. As David Pozen has explained, it is possible to imagine "hardball" tactics (defined as conduct that "violates or strains constitutional conventions for partisan ends" or that "attempts to shift settled understandings of the Constitution in an unusually aggressive or self-entrenching manner") to accomplish what he calls *anti*-hardball goals.[94] "Anti-hardball policies" in Pozen's account "forestall or foreclose tit-for-tat cycles and lower the temperature of political disputes."[95] Even if aggressive hardball tactics are used, it is at least possible to imagine them creating a system that has no obvious ideological valence going forward and which both sides could live with. Necessarily, though, such reforms must reflect "'good-government' rules that both sides would prefer to adopt, if they had to write the rules under a veil of ignorance."[96] Properly designed reforms could satisfy this criterion—even if they were initially adopted by hardball, party-line tactics.

B. How Existing Proposals Shape Up

On the criteria identified above, prior proposals to reform the Supreme Court or the nomination process fall short. This Section considers several in turn.

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93. For a discussion, see *infra* Section III.B.3.

94. David Pozen, *Hardball and/as Anti-Hardball*, BALKINIZATION (Oct. 11, 2018), https://balkin.blogspot.com/2018/10/hardball-andas-anti-hardball.html [https://perma.cc/UKE5-RCM9].

95. *Id.*

96. *Id.*

1. Term Limits

Perhaps the most popular reform proposal involves setting term limits for Supreme Court Justices. In the best-known variation, Justices would serve an eighteen-year term.[97]

First proposed in a student note,[98] the plan is most famously associated with Roger Cramton and Paul Carrington.[99] Under this proposal, every President would make two appointments to the Court during each four-year presidential term. The plan would make appointments more predictable, removing the pressure to stack the Court with younger and younger Justices.

This is a well-intentioned proposal. But it does not satisfy our criteria for reform—most importantly because it is unlikely to depoliticize the Court or turn down the temperature of the nominations process. Indeed, if anything, it will make the politicization of the Court even worse by increasing the Court's prominence in every election cycle.

An initial problem, though, is that it may not be possible to implement term limits via statute alone. Constitutional scholars—even some who wish to eliminate lifetime tenure—have argued that the clause in Article III giving Justices a term for "good behavior" indicates a lifetime appointment.[100] While there are arguments that "good behavior" can coexist with a term-of-years appointment, they rest on comparatively weak grounds.[101] For these reasons, the plan's origi-

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97. *See* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006); Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313, 1323-24 (2007); Roger C. Cramton & Paul D. Carrington, *The Supreme Court Renewal Act: A Return to Basic Principles*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467 (Roger C. Cramton & Paul D. Carrington eds., 2006); James E. DiTullio & John B. Schochet, Note, *Saving this Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093 (2004); *see also* Linda Greenhouse, *New Focus on the Effects of Life Tenure*, N.Y. TIMES (Sept. 10, 2007), https://www.nytimes.com/2007/09/10/washington/10scotus.html [https://perma.cc/H2Q8-8KHJ].

98. *See* DiTullio & Schochet, *supra* note 97.

99. *See* Cramton & Carrington, *supra* note 97.

100. *See* Calabresi & Lindgren, *supra* note 97, at 824; Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 90 (2006) ("[B]y the end of the eighteenth century, a simple grant of good-behavior tenure might also be considered 'tenure for life' or 'life tenure.'"); David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a Golden Parachute*, 83 WASH. U. L.Q. 1397, 1404-08 (2005).

101. Stras & Scott, *supra* note 100, at 1405 (addressing this argument).

nal proponents, James DiTullio and John Schochet, explicitly framed their proposal as requiring a constitutional amendment.[102] That path would need significant Republican support, which seems highly unlikely for the foreseeable future.

Cramton and Carrington, though, offer a version of the plan that they contend could be implemented via statute. In their proposal, Congress would pass a statute giving each President one Supreme Court appointment after each federal election. Justices who served longer than eighteen years would not lose their commissions, but would instead effectively serve in a senior-status role, sitting only when one of the nine most junior Justices (i.e., those appointed within the last eighteen years) was unable to participate in a case.[103] This version of the proposal strikes us as more constitutionally plausible (i.e., capable of implementation by statute) than a true term-limit requirement, though some would certainly argue it does not pass muster.

Constitutional issues aside, however, the deeper problem is that the proposal would likely make the Supreme Court *more* political. The proposal guarantees that the Supreme Court will be a campaign issue in every presidential election because voters would know with certainty that the next President would get to shape the Court with two nominees. It would also be a campaign issue in every midterm election, so long as control of the Senate is within striking distance for either party. Given the stakes, partisans and their deep-pocketed allies would make Court appointments an especially salient issue in battleground Senate races. And even with this plan, activists on both sides would still jockey to make sure only the purest ideologues were appointed.

Then, once on the bench, the Justices themselves might become *more* political. A term-limited Justice might see the Court as the perfect jumping-off point for a presidential run, decide cases in hopes of retiring into a lucrative lobbying gig, or play to the public to secure a future on Fox News or MSNBC.[104] As David Stras and Ryan Scott argue, "fixed, nonrenewable terms . . . introduce incentives for Supreme Court Justices to cast votes in a way that improves their prospects

102. DiTullio & Schochet, *supra* note 97, at 1097 ("Ending life tenure would require a constitutional amendment.").

103. Cramton & Carrington, *supra* note 97, at 471.

104. Cramton and Carrington's proposal would not solve this problem, because even if effectively term-limited Justices were entitled to remain on the Court, they might well choose not to.

for future employment outside the judiciary."[105] This is a major, underappreciated drawback to the eighteen-year-term proposal.[106]

2. Panels

Another proposal, from Tracey George and Chris Guthrie, is to expand the Supreme Court to the size of a court of appeals, and then have Justices hear cases in panels with the opportunity for en banc review.[107] George and Guthrie's stated aim is to expand the Court's docket in order to solve the problem of it hearing too few cases.[108] This proposal could potentially tamp down the politicization of the Court, in that the Court would have many more Justices and panels would be randomly selected.

One problem, though, is that Court appointments—particularly in the transition period to this system—would remain highly politicized. Moreover, there is a risk that the Court would simply vote to take all the politically charged cases en banc. If so, the proposal would provide no benefits in terms of reduced politicization. Indeed, there is a chance the Court could become more political as well: a Court that is able to take on a larger docket would have more opportunities for ideological activism.

3. Court-Packing

There has been a surprising degree of interest in expanding the size of the Court to include additional Justices. One of the virtues of this proposal is that it is almost certainly implementable by statute, as the size of the Supreme Court is not specified in the Constitution and has always been set by statute. Congress has changed the size of the Court at various times, sometimes for nakedly partisan reasons.[109]

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105. Stras & Scott, *supra* note 100, at 1425.

106. The only possible solution (one suggested to us by Richard Primus) would be to introduce a legal requirement forbidding retired Justices from being employed, or otherwise earning income, in any other position, in government or in the private sector, after their judicial service. Such a broad prohibition would raise a number of issues we cannot address here.

107. Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1442 (2009).

108. *Id.*

109. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 353-55 (2012); RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 318 (7th ed. 2015).

The Court's size has, however, remained at nine members since 1870.[110] President Roosevelt's failed attempt to expand the Court in the 1930s has led many to conclude that the Court's size is now a settled constitutional norm.[111] For example, Richard Primus (responding to a proposal for Republicans to pack the lower courts for nakedly political reasons)[112] argues that such measures are "not constitutional in the small-c sense of the term" because they "depart[] from long-settled norms and understandings about how American government is conducted."[113]

Yet, from another perspective, court-packing could be the appropriate response by Democrats to Republicans' violation of norms. Michael Klarman recently argued the case for court-packing, stressing not only the circumstances of the last two nominations, but also the fact that Republicans are systemically "abrogat[ing] a basic principle of democracy—when you lose in politics, sometimes you have to just admit defeat."[114] Instead, Klarman argues, they are changing the rules of politics—from voter suppression to restricting the powers of Democratic governors.[115] Klarman thus contends that Democrats should not "unilateral[ly] disarm[]," but instead need to pack the courts in order to restore and protect the basic infrastructure of democracy.[116]

At first glance, court-packing plans appear to be the kind of reform that might lead to greater politicization and delegitimization of the Court. If Democrats pack the Court, the argument goes, Republicans will return the favor when they are next in power and pack the Court further in response. On this approach, court-packing is politically inflammatory and unstable. Yet as Tushnet has ob-

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110. AMAR, *supra* note 109, at 353.

111. Bradley and Siegel, for example, suggest that court-packing might violate a norm derived from historical practice. *See* Bradley & Siegel, *supra* note 68; Grove, *supra* note 68. Others think that court-packing violates a separation-of-powers convention. David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 34 (2014). Some, however, are not convinced: Amar concludes that changing the Court's size would be constitutional if done for good-government reasons. AMAR, *supra* note 109, at 353-55.

112. *See* Memorandum from Steven G. Calabresi & Shams Hirji to the Senate and House of Representatives (Nov. 7, 2017), https://thinkprogress.org/wp-content/uploads/2017/11/calabresi-court-packing-memo.pdf [https://perma.cc/M4FR-UT3R].

113. Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal [https://perma.cc/3YLS-XEV2].

114. Klarman, *supra* note 5.

115. *Id.*

116. *Id.*

served, "there are numerous difficulties with this informal game-theoretic argument."[117] It is difficult to determine what the different "rounds" of the game are, and "[w]hen rounds of play are separated by long periods of time, the actual people who play against each other can be quite different . . . ."[118] More concretely, we can imagine conditions under which court-packing could lead to a stable equilibrium, without an ever-escalating cycle of political retaliation. Throughout American history, there have been moments in which major upheavals have realigned politics (and constitutional politics) to a new equilibrium.[119] If Democrats engaged in court-packing and were able to hold power for long enough to implement policies to revive basic principles of democracy—such as voter-access and anti-gerrymandering reforms—perhaps this polarized era would give way to a new progressive equilibrium.

That said, it is certainly conceivable that no such new equilibrium would emerge, and instead each party would expand the Court whenever it had unified control of the political branches. If court-packing produced that result, it would almost certainly delegitimize the Court—and possibly the entire enterprise of law. Thus, while court-packing's great strength is that it is almost certainly constitutional, it could worsen our predicament. Moreover, even if successful, the battle to pack the Court, if resting on purely partisan grounds, could prove a pyrrhic victory. As noted, President Roosevelt's failed court-packing plan essentially destroyed his ability to pass progressive legislation afterward.[120] While any attempt to reform the Supreme Court will require significant political capital, nakedly partisan court-packing might be especially costly.

4. Jurisdiction-Stripping

Another possible reform to curb the Supreme Court's power is jurisdiction-stripping. Moyn, for example, has suggested that a future Democratic-controlled

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117. Mark Tushnet, , 45 PEPP. L. REV. 481, 500 (2018).

118. *Id.* at 500-01.

119. The classic account comes from Bruce Ackerman. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (2000). Drawing on his idea of constitutional time, Jack Balkin has argued that President Trump represents the end of one era of politics and that a new era could be on the horizon. Jack Balkin, *What Kind of President Will Trump Become*, *Part II—Donald Trump and the Politics of Disjunction*, BALKINIZATION (Nov. 14, 2016), https://balkin.blogspot.com/2016/11/what-kind-of-president-will-trump.html [https://perma.cc/2HTR-ACJ5].

120. *See supra* notes 66-67 and accompanying text.

Congress should seek to "bar the judiciary from considering cases on certain topics such as abortion or affirmative action."[121] This approach could produce short-term benefits for one side, by preventing the courts from striking down laws in areas where a Democratic-controlled Congress prefers the status quo.[122] Congress could also introduce specific jurisdiction-stripping provisions as part of policy reforms. Congress might, say, insulate a health-care-reform bill from judicial challenge by including a provision stripping the federal courts of jurisdiction over constitutional challenges to the new law.

Yet jurisdiction-stripping poses a number of problems. First, it seems unlikely to create a stable equilibrium. As Gregory Koger argues, this strategy "would legitimize similar actions by the other party when the political pendulum swings. A Republican Congress could, for example, pass a law banning abortion that excluded constitutional challenges to the bill from the Court's jurisdiction."[123] Such escalation might ultimately result in a Court with little formal power or public legitimacy.

Moreover, jurisdiction-stripping proposals also lack what is often thought of as the leading advantage of court-packing: a strong claim to constitutionality. Indeed, the constitutionality of jurisdiction-stripping proposals remains one of the most significant unanswered questions in the field of federal courts.[124] A jurisdiction-stripping bill could thus provoke an unprecedented showdown between the political branches and the judiciary, where the courts would get to weigh in on whether their jurisdiction had permissibly been stripped. At least in terms of public opinion, the judiciary might well have the upper hand in such a conflict. Given the Supreme Court's perceived role as a protector of rights in

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121. Moyn, *supra* note 70.

122. It is not clear how limiting the judiciary's ability to hear cases involving abortion would be in Democrats' interest, given that under the status quo courts step in to protect abortion rights from state laws. Jurisdiction-stripping seems like a more effective strategy when applied to subject areas where courts threaten to *limit* progressive government action (such as affirmative action).

123. Gregory Koger, *How a Democratic Congress Can Push Back Against the Supreme Court*, VOX (Nov. 12, 2018, 9:30 AM EDT), https://www.vox.com/mischiefs-of-faction/2018/11/12/18080622/democratic-congress-against-supreme-court [https://perma.cc/KTM8-JMCN].

124. *See, e.g.*, Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1045 (2010) ("For better or for worse, many of the most mooted of those questions [about jurisdiction-stripping proposals] remain unanswered."); Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV 839, 839-40 (2012) ("[T]here is one [question] in particular that has puzzled scholars unlike any other: whether Congress can withhold all federal jurisdiction . . . in a case raising a federal constitutional claim.").

American society, many Americans might feel uneasy about a law that sought to shut the courthouse doors entirely for an important class of cases.

5. Senate-Based Reform

One final set of proposals revolves around the Senate. Changes to the Senate's rules, as well as to norms for how nominations are handled, could avoid the damaging partisan battles of recent years, some argue. One common proposal is to restore the filibuster for Supreme Court nominees in the wake of Senate Republicans' use of the "nuclear option" in 2017. This would, supposedly, "encourage bipartisan consensus and . . . prod [P]residents to nominate broadly acceptable candidates."[125] Senate Democrats themselves have suggested restoring the filibuster for Supreme Court nominees if they returned to power.[126]

The appeal of such proposals is easy to understand. The nomination process has significantly deteriorated in recent years and reached a new low point in 2017—after Senate Republicans eliminated the filibuster for Supreme Court nominations and enabled President Trump to pick two committed conservatives. Perhaps restoring the filibuster is the key to getting Presidents to pick moderates who could earn broad support.

Yet Senate-based reform presents a number of problems. First, such reform would be difficult to make permanent. One writer suggested reimplementing a sixty-vote threshold based solely on an agreement by a group of moderate senators,[127] but such a handshake agreement would not be guaranteed to last past the next election. The Senate could vote to change its own rules to reinstate the

125. Editorial, *Brett Kavanaugh Will Be Our Next Supreme Court Justice for All the Wrong Reasons*, L.A. TIMES (Sept. 7, 2018), https://www.latimes.com/opinion/editorials/la-ed-kavanaugh-hearings-20180907-story.html [https://perma.cc/28ZK-XSGS]; *see also* Jennifer Rubin, Opinion, *How to Fix the Supreme Court Without Packing It*, WASH. POST (July 5, 2018), https://www.washingtonpost.com /blogs/right-turn/wp/2018/07 /05/the-case-against-court-packing [https://perma.cc/BNW3-47L3] ("Polls show voters overwhelmingly want to use a 60-vote minimum—one that forces a nomination of someone with widespread or at least wider-spread acceptance.").

126. *See* Jordain Carney, *Dem Senator Says His Party Will Restore 60-Vote Supreme Court Filibuster*, THE HILL (Apr. 10, 2017, 3:57 PM EDT), https://thehill.com/blogs/floor-action/senate/328161-dem-senator-democrats-will-restore-60-vote-supreme-court-filibuster [https://perma.cc/WEA2-9XJ9]; Sam Stein & Amanda Terkel, *Democrats Contemplate How to Forfeit Their Power upon Regaining the Senate*, HUFFPOST (Apr. 10, 2017, 4:42 PM ET), https://www.huffpost.com/entry/democrats-discuss-restoring-filibuster_n_58eb-dfa3e4b0ca64d91848e4 [https://perma.cc/X2LF-N37B].

127. *See* Rubin, *supra* note 125.

filibuster, but the next Senate could just change the rules back once more. Perhaps Congress could pass a statute requiring the Senate to use a supermajority voting rule to end debate on Supreme Court nominations. A statute would be harder to change, given that doing so would require assent of both Houses of Congress; but it would raise serious constitutional concerns.[128]

Moreover, even if restoring the filibuster actually caused Presidents to select moderate nominees, additional changes would be needed to fix a broken process. Judge Garland was exactly the kind of moderate candidate who in normal circumstances might have been expected to earn support from enough senators to overcome a filibuster.[129] But Senate Republicans would not even give him a hearing. Thus, restoring the filibuster would also have to be accompanied by some kind of rule change entitling nominees to actual consideration.[130] Even that might not be sufficient, however, to fix the problem of partisan escalation; Senate Republicans presumably would have voted down Judge Garland even if they had held a hearing.

More fundamentally, proposals for restoring the filibuster mistake a symptom for the disease. The elimination of the filibuster is not the *source* of what is wrong with the Supreme Court nominations process. Instead, deeper problems led to the demise of the filibuster: the increasing polarization of the parties, the breakdown of norms and the use of constitutional hardball, the high stakes of individual appointments, and so on. Simply bringing the filibuster back, or making other changes to Senate rules, does nothing to address the underlying problem.

In sum, none of the proposals currently on offer satisfy the desiderata for reform we have identified. In the next Part, we offer two proposals that would satisfy our criteria.

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128. For the leading treatment of the issues, see Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345 (2003).

129. *See* Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NAT'L PUB. RADIO (June 28, 2018), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now [https://perma.cc/Z5HU-3PBT] ("Widely regarded as a moderate, Garland had been praised in the past by many Republicans.").

130. *Cf.* Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940 (2013) (arguing that Senate inaction on executive-branch nominees could be treated as consent, entitling the nominee to take office without a confirmation vote).

IV. SAVING THE COURT: TWO PROPOSALS

Comprehensive reform is the key to saving the Supreme Court. We offer two distinct proposals to illustrate how reform might be accomplished. In Section IV.A, we propose the "Supreme Court Lottery," a plan in which the Court would sit in panels selected at random from a large pool of potential Justices who would also serve as judges on the U.S. courts of appeals. In Section IV.B, we propose the "Balanced Bench," in which the Supreme Court would be composed of an equal number of Democratic- and Republican-selected Justices, plus additional Justices drawn from the circuit courts on whom the "partisan" Justices would have to agree unanimously. While neither proposal eliminates every problem we have identified, either would be a major improvement over the status quo. Significantly, and unlike many other proposals, our two sets of reforms meet the criteria we have outlined: they secure the Court's role as an institution that is not merely partisan; they lower the temperature of particular nominations; and they expand deference to the political branches of government.

A. The Supreme Court Lottery

1. The Plan and Its Benefits

We call our first proposal the Supreme Court Lottery. Under this reform, every judge on the federal courts of appeals would also be appointed as an Associate Justice of the Supreme Court. The Supreme Court would hear cases as a panel of nine, randomly selected from all the Justices. Once selected, the Justices would research and prepare cases from their home chambers before traveling to Washington to hear oral arguments for two weeks, after which another set of judges would replace them.[131] The panel members would then return to their home chambers to complete their opinions. By law, each panel would be prohibited from having more than five Justices nominated by a President of a single political party (that is, no more than five Republicans or Democrats at a time).

131. Our proposal is similar to that offered in John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541 (1999). McGinnis calls his proposal "Supreme Court riding," and it differs from ours in a few important ways. First, McGinnis imagines abolishing the office of Supreme Court Justice overall (a proposal that requires a constitutional amendment). *Id.* at 541. We instead propose expanding the number of Associate Justices, a reform that we think is constitutional because it is simply deciding the size of the Court. Second, McGinnis suggests that the term of service for "riding" be six months to one year. *Id.* We propose two weeks, to further amplify the benefits of a short rotation on the Court. Finally, we propose a supermajority requirement and note that no more than five Justices on any panel can have been nominated by a President of a single political party.

In addition, only a 6-3 supermajority[132] of the Court, rather than a simple majority, could hold a federal statute (and possibly state statutes,[133] depending on how one weighs federalism values) unconstitutional.[134]

This reform would have significant benefits. First, it would significantly depoliticize the appointments process by making confirmations more numerous and less consequential. New Justices would primarily serve on the courts of appeals, with only occasional elevation to a Supreme Court panel. More broadly, contentious issues of public importance would no longer depend on unexpected deaths, and Justices would no longer have the ability to shape constitutional law for a generation by strategically timing their retirement. This would also free up the President and Congress to do the work of governing instead of occasionally putting that work aside for protracted confirmation battles.

The Supreme Court Lottery would, however, make appointments to the federal courts of appeals more significant, as these judges would constitute the "minor leagues" for the Supreme Court. But we think the concern that our reform would overly politicize those appointments is relatively limited. Appointments to the federal courts of appeals are already polarized, with Senate Republicans

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132. A supermajority rule would reduce the likelihood of one particularly unrepresentative panel made up of five ideological extremists getting to set policy for the entire country. Even with a 6-3 supermajority requirement, however, there is still some chance of skewed panels. But our prohibition on more than five judges having been appointed by a President of a single political party should mitigate this concern even with a nine-Justice panel, because bipartisan support would be a prerequisite for overturning a statute. For those particularly worried about this problem, the supermajority requirement could be increased to 7-2 or panel size could be increased to, say, fifteen, with an eleven- or even twelve-Justice supermajority required to declare a statute unconstitutional. For those concerned about adopting a partisan-balance requirement, that component could be removed, though it would increase the risk of instability from ideological panels.

133. We do not express a firm view on whether the supermajority requirement should apply to decisions declaring state statutes unconstitutional. Given that federal statutes necessarily apply to the whole country, there are greater dangers in making it too easy for a skewed panel to declare a federal statute unconstitutional. We also think that the Court should be more deferential to the political branches of government, particularly when issues divide along a partisan axis. With respect to state laws, this latter concern is less applicable; though at the same time, a central proposition of our constitutional system is the supremacy of federal constitutional law over state statutes.

134. This last change would also require establishing that if a lower court strikes down a federal statute, the Supreme Court would have to hear the case. It would take a 6-3 vote for the statute to be deemed unconstitutional, regardless of the lower court's decision. This would solve the problem of a federal court of appeals striking down a statute and the Supreme Court needing only a bare majority to affirm that ruling when it would otherwise need a 6-3 margin to overturn the statute itself. Without this change, the proposal would perversely aggrandize the power of lower courts. For a discussion, see Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 957 (2003).

currently working at high speed to fill vacancies with young, ideological appointees.[135] This is precisely because they understand the importance of the courts of appeals. Both sides, we expect, would engage in this behavior. Nonetheless, the lower salience and higher volume of these appointments, in addition to the prohibition of more than five Justices nominated by a President of a single political party, means they are less likely to become central to public debate. This would be a positive development, as it would make the courts less of a political football in elections and prevent the creation of cults of personality around the Justices. Instead, the Court would be what it should be—a relatively anonymous group of skilled, thoughtful jurists.[136]

Second, we expect this approach would also decrease the ideological and idiosyncratic nature of Court decisions. No Justice would be able to advance an ideological agenda over decades of service, and no Justice would be the single swing voter over a period of years (and thus targeted by the lion's share of advocacy).[137] In addition, it would be very difficult for a Justice to be too activist on any given case because the next panel—arriving two weeks later—might have a different composition and take a different tack. This would push Justices to more minimalistic, narrow, deferential decisions.[138]

Cases would also be chosen behind a veil of ignorance. While serving their two weeks, the Justices would consider petitions for Supreme Court review. But with such short terms of service, the Justices could not pick cases with an agenda in mind; another slate of Justices would hear them.[139] Activist lawyers would not be able to game the system by bringing cases based on their prediction of which

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135. *See* Charlie Savage, *Trump Is Rapidly Reshaping the Judiciary. Here's How.*, N.Y. TIMES (Nov. 11, 2017), https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html [https://perma.cc/Z625-93G8]; *cf.* Joseph Fiskin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018) (noting that polarization is largely a Republican phenomenon on issues of constitutional hardball).

136. *Cf.* McGinnis, *supra* note 131, at 542 ("Vested for life with the awesome power to make final decisions with wide-ranging consequences for the nation, Supreme Court Justices generally cannot help but come to see themselves as statesmen rather than as humble arbitrators of legal disputes.").

137. *See* Ilya Shapiro, *Justice Kennedy: The Once and Future Swing Vote*, CATO (Nov. 13, 2016), https://www.cato.org/publications/commentary/justice-kennedy-once-future-swing-vote [https://perma.cc/Q3PT-5J7R].

138. *See* McGinnis, *supra* note 131, at 544 ("Supreme Court riders would have been less able to instantiate their political vision and would therefore be more likely to follow precedent. Moreover, because the riders would have come from inferior courts, which operate under the threat of reversal, they would have had more practice in following precedent.").

139. *See id.* at 545; *see also* Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 424 (2001) (noting briefly McGinnis's proposal).

way the Court would likely decide the issue. The Court's decisions would likely be less aggressive in overturning congressional judgments and more tightly linked to precedent.

There is some chance that randomly selecting appellate judges might lead to radical swings between different panels, but we think a variety of factors mitigate this concern. First, assuming a roughly even split between liberal and conservative judges on the courts of appeals, the 6-3 supermajority requirement—combined with the limitation on partisan composition of panels—prevents a lottery from generating wild swings between ideological majorities. Second, because we expect a decrease in strategic litigation due to cases being chosen from behind a veil of ignorance, we think that the Court would hear fewer ideologically motivated cases designed to change the law. Third, we believe the judges themselves would be a check on radical swings. Most of the panel's work would take place from a judge's home chambers rather than in Washington, so the culture of ordinary appellate decision-making would infuse the judge's work. A judge who spends her life on the court of appeals may develop habits of narrower decision-making, and may be less likely to envision herself as the grand maker of constitutional law.[140] Equally important, judges who spend their lives on the courts of appeals will chafe at a Supreme Court whose jurisprudence swings wildly back and forth. Seeking clarity in order to decide future cases, judges selected for a Supreme Court panel could very well value narrow decisions and stare decisis more than our current Justices do.

Most importantly, however, the Supreme Court Lottery approach meets the desiderata for reform. It would preserve the Court as an institution that isn't defined by partisanship, in part by reducing the stakes of individual nominations to the Court. And it would give a nudge of deference to the political branches. That combination, we think, offers a strong case for the Lottery approach.

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140. A number of scholars have noted that there are cultural pathologies to service on the Supreme Court. *See, e.g.*, McGinnis, *supra* note 131, at 542 (observing that judges who spend their careers primarily on the courts of appeals "would [be] more likely to treat constitutional issues and other momentous decisions more like the other quotidian matters that they were accustomed to resolving in their courts"); Sherry, *supra* note 89 (noting that Justices have become "celebrities" who play to their fan bases). We agree with these observations and think that the Court's culture is fundamentally different from that of the courts of appeals, and that primary service on the latter would shape the Justices' actions during their occasional service on the Supreme Court. At the same time, there are tradeoffs in shifting toward the culture of court of appeals judges. Court of appeals judges might, for example, be more deferential to amici, parties, and the Solicitor General than are the current Supreme Court Justices. They also would have less expertise in constitutional cases specifically.

2. The Constitutionality of the Supreme Court Lottery

We think the Supreme Court Lottery could be implemented by statute, without a constitutional amendment. It is generally uncontested that Congress has the power to change the size of the Supreme Court and to set its basic procedures. Congress has utilized those powers, too. It has grown and shrunk the Court over the centuries,[141] and it has defined many basic provisions of the Court's operation. For example, statutes have granted powers to the Chief Justice, required Justices to "ride circuit" for more than a century, and organized the Court in a variety of other ways.[142]

Our reform works from that constitutional baseline. The proposal formally expands the size of the Court to some 180 judges,[143] then provides for how the Court would hear cases. The President would still nominate every Justice, and the Senate would still confirm them. The Justices would serve for life, assuming good behavior, as is current practice. The sitting Supreme Court Justices would not lose their positions or their lifetime appointments; they would simply enter the lottery, like all the other Associate Justices.[144] If they wanted, they could also be appointed to the federal courts of appeals, as the other Associate Justices would be. And the current Chief Justice would retain his lifetime position and additional duties, including his constitutionally-prescribed role to preside over the Senate in an impeachment trial of the President.[145]

Still, the proposal raises a variety of constitutional questions, especially for those working within the highly formalistic methodology favored by the current conservative majority. While we think we have solid responses, we stress again

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141. *See, e.g.*, Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J.L. & LIBERTY 18, 64 (2016) ("Nothing in the Constitution specifies the size of the membership of the Supreme Court . . . . The size and details of the Supreme Court's membership are up to Congress . . . ."). Indeed, the proof of the point is that the most notable arguments against altering the size of the Court state that there is "a strong norm" or "convention" against reforms for "'packing' the Supreme Court" by changing its size, not that any change is manifestly unconstitutional. Grove, *supra* note 68, at 505.

142. *See, e.g.*, 50 U.S.C. § 1803(a)(1) (2018) (vesting the Chief Justice with authority to designate members of the FISA Court); Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74-75 (providing for circuit riding).

143. There are 179 authorized federal court of appeals judgeships. *See Judicial Vacancies*, U.S. CTS. (Apr. 4, 2019), http://www.uscourts.gov/judges-judgeships/judicial-vacancies [https://perma.cc/9VHF-33L5].

144. Note that this proposal does not run afoul of arguments that the Constitution mandates life tenure for federal judges. For a discussion of Article III's Good Behavior Clause, see Prakash & Smith, *supra* note 100.

145. U.S. CONST. art. I, § 3.

that our goal is plausibility. Given that these reforms would likely be advanced against a complex political backdrop of popular sentiment directed against the Court—and the threat of more radical reform—slam-dunk constitutional arguments may not be necessary.

a. Dual Appointments

Some might argue that it is unconstitutional for a judge to effectively have two appointments—as a federal court of appeals judge and as an Associate Justice on the Supreme Court. Article III of the Constitution contemplates the existence of a Supreme Court and additional inferior courts. The Appointments Clause also recognizes that the President can appoint Justices of the Supreme Court, treating that as a distinct position from other, inferior, appointments.

This argument, however, is not persuasive. Unlike other proposals that do away with the Court, Justices in the Supreme Court Lottery would be appointed and confirmed to their position on the Supreme Court, in full accordance with the Appointments Clause.[146] More importantly, the text of the Constitution does not have any bar on judges serving in two judicial positions, or two commissioned positions of any kind, at the same time. In fact, the Constitution is naturally read to allow it. Article I specifically bans members of Congress from serving in another role under the Constitution.[147] Thus, as Steven Calabresi and Joan Larsen have noted, "the Constitution contains an express legislative Incompatibility Clause but no comparable provision exists to bar joint service in the judicial and executive departments."[148] The Framers of the Constitution understood

146. For a discussion, see Calabresi & Lindgren, *supra* note 97, at 859-63. All new judges would of course be appointed to both positions specifically, and for those who are particularly concerned on this front, the President could renominate and secure confirmation of all existing court of appeals judges as Associate Justices. While doing so might seem politically complicated, it would require only a majority vote in the Senate—and, of course, the hypothetical concern already assumes that the Senate would have voted in favor of the reform statute.

147. U.S. CONST. art. I, § 6 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."). There are, in fact, two other similar clauses. Article I, § 9 prohibits holding "any Office" while also "accept[ing] any [other] office" from foreign states, and Article II, § 1 prohibits "Senator[s] or Representative[s], or Person[s] holding an Office of Trust or Profit . . . [from being] appointed an Elector." The omission in Article III is thus particularly notable.

148. Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1122 (1994). The Founding generation was also aware of this omission. The Virginia Ratifying Convention urged the First Congress to adopt an amendment stating: "The Judges of the federal Court shall be incapable of holding any other Office, or of receiving the Profits of any other Office, or Emolument under the United States

the possibility of conflicts arising from holding multiple posts. They accounted for it in one part of the Constitution, but chose not to provide such a bar for Justices on the Supreme Court.

In addition, historical and contemporary practice suggests that judges can have multiple roles at once. Foremost, the Judiciary Act of 1789 created federal circuit courts, but not circuit judgeships. Instead, it required Supreme Court Justices to "ride circuit," acting as judges on the nascent federal courts.[149] The first Congress thus *directed* Supreme Court Justices to effectively serve on two courts at once. This practice was upheld in the 1803 case *Stuart v. Laird*,[150] even though the Justices had not been separately appointed to the lower federal courts, and it persisted throughout the nineteenth century.[151]

In addition, some judges have had multiple commissions simultaneously. Chief Justice John Marshall was, for a time, simultaneously commissioned as Secretary of State and Chief Justice.[152] Judge Claria Horn Boom currently serves as a federal district judge for both the Eastern and Western Districts of Kentucky.[153] Supreme Court Justices have also taken on additional roles, apparently without concern. Chief Justice John Jay was dispatched to negotiate a peace treaty with Britain in 1794.[154] Justice Robert Jackson took a leave of absence from

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or any of them." *Id.* at 1125 (quoting PAPERS OF GEORGE MASON: 1787-1972, at 1057 (Robert Rutland ed., 1970)). It was not adopted. *Id.*

149. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74-75 ("[T]he before mentioned districts . . . shall be divided into three circuits, and . . . there shall be held annually in each district of said circuits, two courts, which shall be called Circuit Courts, and shall consist of any two justices of the Supreme Court, and the district judge of such districts, any two of whom shall constitute a quorum . . . ."). *See generally* Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003) (discussing the history of Supreme Court Justices riding circuit).

150. 5 U.S. (1 Cranch) 299, 309 (1803).

151. *See* Glick, *supra* note 149, at 1754.

152. The Senate confirmed Marshall's appointment as Chief Justice on January 27, 1801, yet he did not resign his position as Secretary of State until March 4 of that year. *See* 2 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 558-59 (1916); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 178, 184-85, 200-01 (1922).

153. *See Roll Call Vote 115th Congress—2nd Session*, U.S. SENATE (Apr. 10, 2018), https://www.senate.gov /legislative/LIS/roll_call_lists /roll_call_vote_cfm.cfm?congress =115&session=2&vote=00065 [https://perma.cc/CAX8-LBFQ].

154. *See* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 243-45 (Maeva Marcus et al. eds., 1992) (discussing the controversy over Chief Justice Jay's appointment).

the Court to serve as Chief Prosecutor at Nuremberg after World War II.[155] Chief Justice Earl Warren chaired the commission tasked with investigating the assassination of President Kennedy.[156] Other examples abound.[157]

Judges also serve on separately constituted courts from those to which they were initially confirmed. Some federal district court judges serve a seven-year term on the Foreign Intelligence Surveillance Court, while simultaneously fulfilling their district court duties.[158] Judges serve on the U.S. Sentencing Commission, a practice upheld by the Supreme Court.[159] And, as discussed in more detail below, judges and Justices sit by designation on inferior courts, lateral courts (i.e., a different circuit or district), and superior courts.[160] While each of these examples differs from holding a dual appointment, they suggest that as a matter of historical and contemporary practice, judges have had multiple roles simultaneously. Americans have accepted that variation as legitimate, and often desirable.

b. The Vesting Clause and "One Supreme Court"

Article III of the Constitution vests the judicial power in "one Supreme Court." Some contend that this provision mandates that the Supreme Court be comprised of a single set of persons rather than a rotating group of Justices.[161]

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155. *See* Brian R. Gallini, *Nuremberg Lives On: How Justice Jackson's International Experience Continues to Shape Domestic Criminal Procedure*, 46 LOY. U. CHI. L.J. 1, 20 (2014); *see also id.* at 34 n.254 (noting that some of Justice Jackson's colleagues objected to his appointment).

156. *See* Calabresi & Larsen, *supra* note 148, at 1137.

157. *See* Jonathan Lippman, *The Judge and Extrajudicial Conduct: Challenges, Lessons Learned, and a Proposed Framework for Assessing the Propriety of Pursuing Activities Beyond the Bench*, 33 CARDOZO L. REV. 1341, 1343 (2012) (enumerating examples).

158. 50 U.S.C. § 1803 (2018).

159. *See* Mistretta v. United States, 488 U.S. 361 (1989).

160. For example, retired Supreme Court Justices sit on the courts of appeals. Cramton, *supra* note 97, at 1327. For a brief discussion of "upward designation," see Stras & Scott, *supra* note 100, at 1417-19. For a broad discussion of judges on other courts, see Marin K. Levy, *Visiting Judges*, 107 CALIF. L. REV. 67 (2019).

161. *See, e.g.*, STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 1.1 (10th ed. 2013) (arguing that "the fact that the Constitution vests the judicial power 'in only one Supreme Court . . . does not permit Supreme Court action by committees, panels, or sections'" (quoting William J. Brennan, Jr., *State Court Decisions and the Supreme Court*, 31 PA. B. ASS'N Q. 393, 406 (1960) (alteration in original))). The authors cite a letter from Chief Justice Hughes and articles by Justices Harlan, Brennan, and Field to support the idea that the Court cannot hear cases as a panel. *Id.* They also argue that the rejection of an 1890 proposal for creating panels within the Supreme Court supports this position. *Id.* But it is not clear why that inference is reasonable. First, inferences from legislative inaction should be disfavored. Second, the 1890 moment was

But this argument suffers from serious infirmities. First, Article III's Vesting Clause was partly drafted and designed to address a variety of concerns on the balance between federalism and nationalism. The government of the Articles of Confederation did not have a national judiciary; the Vesting Clause established clearly that the new government would.[162] In addition, during the debates at the Constitutional Convention, much of the discussion over the creation of the federal courts was about whether there would be *any* lower federal courts. Some members of the Convention preferred establishing lower federal courts in the Constitution, while others feared that lower federal courts would take power from the states. The compromise was to establish a Supreme Court and permit (but not require) Congress to create lower federal courts.[163] The drafting history of the Vesting Clause was tied to these debates more than to some theoretical sense of oneness.

Moreover, as Klarman has shown, the debate over the Court was tied to the broader question of "enforcing federal supremacy."[164] The Convention rejected the option of a federal veto over state laws in favor of the Supremacy Clause and the creation of a Supreme Court.[165] In *Federalist No. 22*, Alexander Hamilton pointed out that one of the core benefits of a single institution—which would still apply if personnel fluctuated—is finality amid a federal system of multiple courts:

> To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations

one of radical change in any event. The idea of panels within the Court, with full Court review, had been considered at least as early as 1869, gained the support of a number of prominent commentators and elected officials, and was one leading option on the table. The other option, which was ultimately chosen, was the creation of intermediate courts, which brought the eventual end of the century-long tradition of circuit riding. For a brief discussion of this proposal, see Tracey E. George & Chris Guthrie, *"The Threes": Re-Imagining Supreme Court Decisionmaking*, 61 VAND. L. REV. 1825 (2008). On circuit riding, see Glick, *supra* note 149.

162. *See* THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("A circumstance which crowns the defects of the Confederation remains yet to be mentioned—the want of a judiciary power.").

163. MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 164-67 (2016).

164. *Id.* at 164.

165. *Id.*

> have found it necessary to establish one court paramount to the rest, possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice.[166]

Second, the Vesting Clause argument mistakenly assumes that a singular institution—which the Supreme Court would continue to be under this proposal—cannot be composed of multiple people in rotation. There is a difference between having a single *institution*, which the Vesting Clause clearly requires, and having that institution with fixed rather than variable membership. Singular institutions—including the current Court—always have a fluctuating membership. At present, Justices recuse themselves from cases, quorum requirements contemplate that fewer than a full complement of Justices will hear cases, and intertemporally, the Court as an institution changes its personnel with regularity. Institutions can be singular, even if their membership fluctuates. Textually, the Clause itself does not specify the number of Justices, nor that Court membership be fixed rather than rotational. When combined with Congress's power in the Necessary and Proper Clause to "carry[] into Execution" "all other Powers vested" in the federal government,[167] the Article III Vesting Clause gives Congress authority to make rules for the creation, composition, and terms of the judiciary—including the Supreme Court.[168] This includes deciding that the Court's membership should rotate.

c. Supermajority Voting Requirements

There also are a number of plausible constitutional challenges to a supermajority voting requirement for striking down federal (and possibly state) statutes. One set of arguments is that Article III implicitly either requires majority rule or

166. THE FEDERALIST NO. 22, *supra* note 162, at 150; *see also* THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.").

167. U.S. CONST. art. I, § 8, cl. 18.

168. The classic article on the general claim of the scope of the Necessary and Proper Clause is William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS. 102 (1976). For more recent takes, see John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1 (2014); and John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014).

gives the Court the power to decide how to resolve its own cases.[169] Both suffer from an absence of textual support.[170] A second set of arguments is structural: that supermajority rules would aggrandize congressional power or effectively determine the outcomes of cases.[171] These arguments, too, are unmoored from any textual provisions and are effectively a version of "free-form structural" constitutional arguments.[172] It is worth noting, moreover, that whatever normative strength such arguments have, there are prominent constitutional thinkers who have questioned the case for simple-majority decisions at the Supreme Court on normative grounds and noted that values like expertise, respect for constitutional structure, and fairness cut in favor of supermajority requirements.[173]

The constitutional case for setting supermajority requirements starts from the premise that Congress has the power to structure the judiciary. The source of this power is a combination of the Necessary and Proper Clause, which gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution,"[174] and the Exceptions Clause, which states that the Supreme Court has jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[175] From the Judiciary Act of 1789 onward, Congress has exercised these powers. The First Congress not only established the size of the Supreme Court, but also required that "any four of [the Justices] shall be a quorum."[176] In terms of potentially dictating judicial outcomes, a supermajority requirement is not so different from a quorum requirement. Both are restrictions on how many Justices are needed for a judicial determination to be binding.

Supermajority requirements also have a long history within debates over reforming the Supreme Court. They were proposed at least as early as the 1820s,

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169. For an overview of these challenges, see Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 77 n.12 (2003).

170. For example, there might be an argument that Article I gives Congress the power to structure its own rules and operations and that this approach should be applied to Article III as well. But the opposite argument—that the Constitution contemplates such a provision but excludes it from Article III—seems at least equally persuasive.

171. *See* Caminker, *supra* note 169, at 77 n.12.

172. Manning, *supra* note 168, at 32; *see also id.* at 48-67 (criticizing the use of free-form structural constitutional arguments).

173. *See, e.g.*, Shugerman, *supra* note 134; Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692 (2014).

174. U.S. CONST. art. I, § 8, cl. 18.

175. U.S. CONST. art III, § 2, cl. 2. For an extensive discussion making this argument, see Shugerman, *supra* note 134, at 972-81.

176. Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73.

with another sixty proposals being offered between then and the early 1980s.[177] And some states, including Nebraska and North Dakota, have adopted supermajority requirements.[178] The fact that these provisions have been discussed over almost two centuries certainly does not establish their constitutionality, but it is worth noting that many have thought such proposals would be constitutional if adopted.[179]

d. Historical Practice

Another possible counterargument is that reforms along these lines should be seen as unconstitutional, or violative of some kind of unwritten convention, due to the longstanding historical practice of having a single set of Supreme Court Justices rather than a panel system.[180] Both the Supreme Court and commentators have recognized that historical practice can inform constitutional meaning.[181] At the same time, however, taking historical practice too far prevents democratic experimentation. Adherents to the historical-practice school can fall into the trap of arguing that Congress always legislates to its maximal authorities and that it always explores and implements every possible strategy.[182] In our constitutional system, Congress has been granted significant powers under Article I, and there is no provision anywhere in the Constitution that suggests that Congress loses those powers if it chooses not to exercise them for a period of time. Indeed, the idea that Congress's Article I powers disappear if Congress chooses not to use them flies in the face of both Article I's Vesting Clause and the separation of powers, which give legislative powers to Congress whether or not they are exercised at any given moment.

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177. Caminker, *supra* note 169, at 88.

178. NEB. CONST. art V, § 2 (requiring five of the seven justices to hold a law unconstitutional); N.D. CONST. art. VI, § 4 (requiring four of the five justices to hold a law unconstitutional); *see also* Caminker, *supra* note 169, at 91-94.

179. *See* Caminker, *supra* note 169, at 88-94 (discussing proposals and justifications throughout history).

180. *Cf.* Pozen, *supra* note 111, at 34 (suggesting that court-packing violates "the convention of judicial supremacy over constitutional interpretation"). *See generally* Bradley & Siegel, *supra* note 68 (considering arguments for the impermissibility of court-packing based on historical practice).

181. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (articulating a theory of how post-Founding practice can answer constitutional questions); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012) (addressing the proper role of historical practice in the context of the separation of powers and discussing Supreme Court cases that use historical practice).

182. *See* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017).

B. The Balanced Bench

1. The Plan and Its Benefits

Our second proposal, the Balanced Bench, looks quite different from the Supreme Court Lottery but addresses similar concerns. The proposal has several components. First, the Supreme Court would start with ten Justices. Five would be affiliated with the Democratic Party, and five with the Republican Party. These ten Justices would then select five additional Justices chosen from current circuit (or possibly district) court judges. The catch? The ten partisan-affiliated Justices would need to select the additional five Justices unanimously (or at least by a strong supermajority requirement). These additional Justices would be chosen two years in advance, for one-year terms. And if the Justices failed to agree on a slate of additional colleagues, the Supreme Court would lack a quorum and could not hear any cases for that year.

The idea behind this proposal is that it provides a mechanism to restore the notion that Supreme Court Justices are deciding questions of law, in ways that don't invariably line up with their political preferences in the biggest cases. That was once true—even during periods of the most serious political conflict over the Supreme Court, the Justices were not strictly following party lines. As noted above,[183] during the infamous court-packing drama in the 1930s, the Justices were closely divided along *ideological* lines but not *party* lines.

Today, however, it seems like a quaint notion that Presidents would ever choose Supreme Court Justices who would vote against their party's interests in big cases. The Republicans made this mistake (if it is a mistake) in recent decades, which led them to vow to appoint "no more Souters."[184] Democrats, despite having had far fewer opportunities to appoint Justices in recent decades, have done a reasonably good job of identifying ideologically reliable nominees. Given that both sides seem to realize the stakes of Supreme Court nominations, it is hard to imagine that there will be many more Justices like Justice Kennedy, who would sometimes vote "against party" in the biggest cases.

This proposal brings back the possibility of a Supreme Court that is not wholly partisan. The permanent, partisan-affiliated Justices would have to agree on colleagues who have a reputation for fairness, independence, and centrism, and who have views that do not strictly track partisan affiliation: in short, the kind of judges who have a minimal chance of being appointed to the Supreme Court today. The permanent Justices would pick such colleagues not for public-

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183. *See supra* notes 10-12 and accompanying text.

184. *See, e.g.*, *No More Souters*, WALL ST. J. (July 19, 2005, 12:01 AM), https://www.wsj.com/articles/SB112173866457289093 [https://perma.cc/JR43-SWUJ].

regarding reasons, but out of self-interest. Assuming that those Justices want their own views to prevail on the Court, they would have an incentive to veto committed partisans on the other side. But each side might be willing to compromise (really, to gamble) on other judges who seem open-minded and persuadable.

Requiring unanimity among the permanent Justices — or at least a strong supermajority[185] — is key to the selection mechanism. Even if one or two of the Justices ended up voting against ideological "type," requiring all or most of them to agree would help ensure that committed partisans are not selected for the final five slots on the Court. We recognize that the Justices might not pick independent-minded Justices for all five of the visiting slots. Perhaps the two sides would compromise on a couple of more ideologically reliable Justices. But requiring the permanent Justices to pick an odd number of Justices means that, at the very least, they would likely want to pick *one* moderate (or at least ideologically unpredictable) Justice whose vote could break ties.[186] Our hope, though, is that they would pick more than one.[187]

The permanent Justices would select their visiting colleagues with two years of lead time. This would reduce the risk of the Justices brokering deals during

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185. A supermajority requirement, rather than a unanimity rule, would reduce the risk of a persistent holdout who refused to select any Justices, thus making the Court unable to sit. Although one might hope that the permanent Justices would have some incentives not to make the Court powerless, that cannot be taken for granted. *See generally* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005) (arguing that political actors do not inevitably seek to maximize the power of their own institutions). In some instances, one or more of the permanent Justices might conclude that maintaining the status quo by rendering the Court powerless would be preferable to selecting any visiting Justices. But there are other considerations cutting in the opposite direction. Given asymmetric polarization in the political and constitutional process, it is possible that the Democratic Justices might systematically be more likely to compromise on choices by their Republican counterparts. *See* Fishkin & Pozen, *supra* note 135, at 940-42 (summarizing political-science findings on asymmetric polarization). With that backdrop, the case for unanimity looks stronger: it would only take one Justice to ensure that all are choosing fairly. Still, we identify the option of a supermajority requirement for those who are particularly concerned about putting effective veto power in any one Justice.

186. That outcome might seem to recreate the dynamics of recent decades, with well-known "swing" Justices like Justices Powell, O'Connor, and Kennedy at the center of the Court. Yet the Balanced Bench would still create an improvement over the status quo. For one, any swing Justice among the visiting Justices would only be on the Court for a year, thus making it impossible for that Justice to have a sweeping impact on American law and a related cult of personality. Moreover, the larger size of the Court makes it somewhat less likely that any one Justice would be the swing Justice on most issues.

187. *See supra* Section III.A (outlining one reform criterion as lessening the importance of individual Justices).

the selection process to pick colleagues based on their expectations about individual cases or issues. For example, knowing that a gay marriage case was on the docket, perhaps the Democratic Justices would accept a generally conservative judge who had a reputation for voting in more liberal directions on important social issues (like, say, Justice Kennedy). Even assuming the permanent Justices had such granular information about their potential colleagues, we think delaying the start date of the new Justices would reduce this risk.

Once chosen, the independent Justices would serve for one-year, nonrenewable terms. Although the prospect of renewal might serve as a powerful incentive for centrism, we think the threat of nonrenewal would undermine the Justices' independence and damage the internal dynamics of Supreme Court decision-making. Moreover, we think there are good reasons to have some Justices with shorter tenures. As discussed above, the modern Court, with its nine life-tenured members, is too dominated by cults of personality (think of the "Notorious RBG") and too focused on particular Justices' idiosyncratic views (think of the emphasis on "Kennedy briefs" in recent years).[188] Adding some less well-known, shorter-term Justices to the Court would significantly reduce this problem. These Justices also could introduce a helpful perspective to the bench, with their greater diversity of educational, professional, and geographic backgrounds, and their in-the-trenches experience on the lower courts.[189] To the extent that long-term service on the Supreme Court changes one's perspective,[190] these Justices also would not be affected by that bias.

Finally, the visiting Justices—and the explicit partisan-balance requirements—would significantly reduce the stakes of Supreme Court nominations.

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188. *See id.* For an example of the cult of personality surrounding Justice Ginsburg, see IRIN CARMON & SHANA KNIZHNIK, NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG (2015). On Kennedy briefs, see Shapiro, *supra* note 137 (noting that the Supreme Court Bar writes briefs "that cite his greatest hits" in order to target Justice Kennedy's vote). Suzanna Sherry has recently argued that the problem with the Court is the fact that Justices have become celebrities who "play to their fan base." Her solution is to prohibit concurrences, dissents, and signed opinions. Opinions would simply stand for the Court, without even reference to the number of Justices who voted for the decision. Sherry, *supra* note 89, at 1.

189. *Cf.* Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1412-15 (2006) (arguing that Supreme Court Justices should be once again required to ride circuit in order to get them more exposed to "American grassroots opinion" and the work of the lower courts).

190. There are many reasons why long service on the Court might distort a Justice's perspective. One mechanism that a number of commentators have identified is the so-called "Greenhouse effect," by which Supreme Court Justices shift their ideology over time in response to criticism and praise from the media. For a discussion, see Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1574-79 (2010).

Because each political party would hold a set number of seats, and because additional Justices would join the Court no matter what, the fate of issues like abortion would never turn on any one confirmation battle. This proposal might exacerbate the politicization of lower-court nominations because the visiting Justices would be drawn from the lower courts. But as discussed above, that phenomenon is already happening on its own and is less cause for alarm.[191] Moreover, given the need for independent-minded Justices who could temporarily join the Supreme Court, the system might actually incentivize Presidents to appoint some moderates on the lower courts.

In order to replicate some of the veil-of-ignorance benefits provided by the first proposal with respect to the case-selection process, the Court's internal processes could minimize the visiting Justices' ability to pick their own cases. For example, the visiting Justices could join the Court immediately *after* the "long conference," in which the Court votes on a significant number of certiorari petitions that have built up over the summer.

A Court designed as we propose would, we hope, issue rulings in big cases that would not be predictable based solely on party affiliation. Those rulings would have a greater chance of being seen as legitimate by the public. Thus, this plan has a chance of saving the image of the Supreme Court as an institution above politics—and of preserving the image of law as a distinct enterprise.

Given our interest in divorcing the Court from partisan politics, it is a fair question why we would want to explicitly build in partisan affiliation to the selection of Justices. First of all, *someone* has to select the visiting Justices. If we could identify some actor in government who could be reliably trusted to always select Justices without regard to partisan affiliation, we could simply put that person on the Supreme Court. Given our inability to identify such a person, however, the best solution is to design a system that creates incentives for partisan government actors to select for nonpartisan (or, perhaps more accurately, *less* partisan) Justices.

But there are other arguments for building in some form of partisan balance. Indeed, Eric Segall has argued for the institution of a Court permanently and evenly divided along partisan and ideological lines.[192] He contends that such a Court would produce narrower, more consensus-based decisions; would "re-

191. *See supra* Section IV.A.1 (noting also that the greater number and lower press coverage of circuit-court nominations make individual nominations less crucial).

192. Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547 (2018).

duce the opportunities for five or more Justices to impose rigid ideological agendas over long periods of time;" and would eliminate the problem of the Court's ideology turning on unpredictable deaths or strategically timed retirements.[193]

Indeed, our brief experiment with a Court evenly divided along partisan and ideological lines showed that there was something to Segall's idea. While the Court was understaffed for more than a year after Justice Scalia's death, the Justices generally strove to reach consensus where possible, often deciding cases on narrower grounds. In fact, the October 2016 Term—in which the Court was down a Justice for almost the entire Term—displayed the most consensus among the Justices in more than seventy years.[194] That said, the experiment also revealed downsides of the arrangement. Where the Justices were unable to reach agreement—in the most ideological cases with the highest stakes—the Court was left powerless to make law, and the courts of appeals effectively became the Supreme Court.[195] For this reason, a proposal for a permanent, equally divided Court would need to be accompanied by a set of other wide-ranging reforms, such as different rules about the consequences of a deadlock.[196]

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193. *Id*. at 550.

194. *See* Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, N.Y. TIMES (June 27, 2017), https://www.nytimes.com/2017/06/27/us/politics/supreme-court-term-consensus.html [https://perma.cc/26ME-HWVK].

195. This happened in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam), regarding the constitutionality of President Obama's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program—which granted temporary work authorizations to certain undocumented immigrants who were the parents of U.S. citizens or legal permanent residents. There, the Justices' even split allowed the Fifth Circuit's enjoinment of the program to stand. A similar result with the opposite ideological valence occurred in *Friedrichs v. California Teachers Ass'n*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *aff'd by an equally divided court*, 136 S. Ct. 1083 (2016) (mem.) (per curiam), which involved a constitutional challenge to rules requiring nonunion members to pay for collective-bargaining expenses by unions designated as the exclusive bargaining representative. The Ninth Circuit, relying on Supreme Court precedent, had rejected the challenge. The Supreme Court split 4-4, leaving the Ninth Circuit's ruling in place. Two years later, when Justice Gorsuch had joined the Court, the Justices overturned precedent and declared such arrangements unconstitutional. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448 (2018).

196. Whereas current law gives lower courts the power to set the status quo—an equally divided Court results in automatic affirmance of the judgment below—one could imagine setting different default rules. For example, the law might provide that an equally divided Court has the effect of overturning any judgment that strikes down an act of Congress, as a way to build in slightly more deference. Another variant might provide that if the Supreme Court cannot reach a supermajority, the act of Congress stands, regardless of the lower court decision. Depending on the design of these rules, a proposal for a permanent eight-member Court might need to be accompanied by limits on the ability of lower courts to issue so-called "nationwide" or "universal" injunctions, as they let individual circuits effectively set the law for the entire

But even if implemented appropriately, an evenly divided Court would not solve one of the most significant problems we hope to address: the widespread perception that the Supreme Court is simply one more political institution, where votes in the biggest cases turn on party affiliation. Indeed, adopting explicit partisan-balance requirements without making additional changes would only exacerbate this perception. For this reason, having the permanent Justices select additional Justices to join the Court is critical to the proposal's success.

While having Justices choose their colleagues might initially seem strange, this proposal resembles the way civil arbitration often works. Under many bilateral arbitration agreements, the two sides each select one arbitrator. The two party-chosen arbitrators then agree collectively on a third, neutral arbitrator. Indeed, such provisions date back to at least the late eighteenth century.[197] Their continued and widespread use likely reflects the view that this method is effective at procuring unbiased and fair decision-makers — or, perhaps better stated, decision-makers who will *appear* unbiased and fair to both sides.

Commercial arbitration has many disanalogies with democratic politics, to be sure. Even so, there are important reasons to care about designing procedures that the eventual losers can live with. A concern for appearance is an important reason why we think it is necessary to incorporate partisan-affiliated Justices into the decision-making process. Their presence ensures that both sides' best arguments will be aired and considered. Thus, they will help ensure that the losing side feels that the decision-making process was fair, even if it did not yield its desired outcome.[198] The result would be a Court that did not always vote along strictly partisan lines, but also one in which both sides' interests were well represented in decision-making. We think such a Court would have an excellent chance of preserving public legitimacy.

One other objection concerns our proposal's emphasis on partisan balance. Why should the Court's design evenly balance the two parties (and thus their

country. For a recent discussion of nationwide injunctions, see Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

197. *See* Brian Winn & Earl Davis, *Arbitration of Reinsurance Disputes: Is There a Better Way?*, DISP. RESOL. J., Aug.-Oct. 2004, at 22 (noting a 1793 insurance contract which provided that "if any Dispute should arise relating to the Loss on this Policy; it shall be referred to two indifferent Persons, one to be chosen by the Assured, the other by the Assurer, who shall have full Power to adjust the same; but in case they cannot agree, then such two persons shall choose a third; and any two of them agreeing, shall be obligatory to both parties").

198. *Cf.* Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PA. J. INT'L L. 431, 443 (2014) ("For the parties [to an arbitration], having a say in deciding their case [by choosing one of the arbitrators] is both appealing and reassuring, and strengthens their support to the entire process.").

respective judicial ideologies) no matter what, instead of allowing for more variability based on the results of the political process? We have a couple responses. First, as a comparative matter, we think our proposal would be an improvement over the status quo. Over the last half-century, Democrats have controlled the Presidency for twenty out of fifty years, but have appointed only four Justices; Republicans have appointed fourteen (fifteen if you count moving William Rehnquist from Associate Justice to Chief Justice).[199] That skew has been the result of deaths, strategically timed retirements, and other factors. The Balanced Bench would make each party's power over the Court more regular and predictable, and make the Court's membership much less contested in electoral politics.

Our proposal would not, however, take into consideration a long string of political victories. Democrats controlled the Presidency from 1933 to 1949; during this time, Presidents Franklin Roosevelt and Harry Truman appointed *thirteen* Justices to the Court. Under the Balanced Bench, the Court's partisan composition would have looked exactly the same at the beginning of their tenure as it did at the end. Would it be fair to have an evenly divided Supreme Court after so many years of control by one party?

We offer a few points in response. First, regardless of which party wins presidential elections, it is still possible that the country as a whole might be close-to-evenly divided along partisan lines. If so, a partisan-balance requirement would be more democratic than it might appear. Indeed, given all the forces that shape the results of presidential elections, it is far from clear why the party identification of the President alone is the best proxy for the democratic preferences of the country when it comes to the Supreme Court. Second, to the extent there is concern about unfairness, lower-court judges would be selected by presidents under the ordinary procedures; in a Roosevelt-Truman scenario, the pool from which the visiting Justices are selected would skew considerably toward the Democratic side.

Moreover, our proposal is focused on public perception, and an evenly divided Court has the best chance of solving a crisis that has bitterly divided the country. While such a proposal might seem inconsistent with basic democratic principles, there is a long tradition of deviating from simple majoritarianism in designing how power will be distributed in governmental institutions. In our own constitutional system, the Senate and Electoral College were necessary compromises to satisfy smaller states during the drafting of the Constitution.[200] Many other countries have adopted forms of "consociationalism," in which the

199. *Supreme Court Nominations, Present-1789,* U.S. SENATE, https://www.senate.gov/pagelayout/reference/nominations/Nominations.shtml [https://perma.cc/FDW9-RPBX].

200. *See* KLARMAN, *supra* note 163, at 182-205, 230-32.

constitution is explicitly designed to share power among religious, regional, or ethnic interests in order to protect minority groups and to create stability.[201] Dividing power on the Supreme Court along *party* lines would be a way to implement this strategy in order to keep "red America" and "blue America" from tearing each other apart.

Finally, to the extent that critics might have concern over this proposal's seeming tendency to permit the minority to govern the majority (with the help of the visiting Justices), one solution would be to pair this reform with the supermajority voting role considered above.

2. *The Constitutionality of the Balanced Bench*

As with the Supreme Court Lottery, this proposal would be subject to some significant constitutional objections. Again, we think there are plausible responses. Some of the objections overlap with constitutional arguments against the Supreme Court Lottery—in particular, the argument that it would be impermissible for judges to serve both as circuit court judges and as Supreme Court Justices[202]—so we do not repeat them here.

a. Appointments Clause Challenges

The Appointments Clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[203]

Under our proposal, some of the Justices would be selected by *other Justices*, an arrangement that is permissible for "inferior Officers" but not for so-called "principal" officers—and explicitly not for "Judges of the supreme Court." Under a straightforward reading of the Clause, this proposal thus seems unconstitutional.

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201. *See* AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION (1977).

202. *See supra* Section IV.A.2.a.

203. U.S. CONST. art. II, § 2, cl. 2.

As it happens, however, existing law and practice permit significant flexibility in the movement of Article III judges within the federal judiciary. District judges regularly sit by designation on circuit courts; circuit judges regularly sit by designation on district courts or other circuits;[204] and retired Supreme Court Justices regularly sit by designation on courts of appeals.[205] Justice Souter, for example, often sits with the First Circuit, on which he briefly served as a judge before joining the Supreme Court.[206] When judges sit by designation on different Article III courts, they are not newly nominated by the President and confirmed by the Senate. Instead, they are designated by the chief judge of the circuit in which they are visiting, or in some instances the Chief Justice.[207] Their initial President-and-Senate appointment seems to be sufficient.[208]

Our proposal functions similarly, letting Supreme Court Justices invite lower court judges to sit with them for limited periods. If there is a problem with our proposal, then there are serious problems with these widespread practices in the lower courts. Some have, to be sure, criticized the status quo. Stras and Scott,

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204. *See* Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2415 (2014) (noting the regularity of the participation of visiting judges in the courts of appeals). For an in-depth analysis of the use of visiting judges, see Levy, *supra* note 160.

205. *See* E. Jon A. Gryskiewicz, *The Semi-Retirement of Senior Supreme Court Justices: Examining Their Service on the Courts of Appeals*, 11 SETON HALL CIR. REV. 285, 287 (2015) ("Eleven of the thirty-eight [Justices who became eligible to retire from the Supreme Court and sit by designation on lower courts] have done so.").

206. Michelle Olson, *Justice Souter: Working in Reverse, by Choice*, APP. DAILY (Feb. 27, 2013, 8:22 AM), http://www.appellatedaily.blogspot.com/2013/02/justice-souter-working-in-reverse-by.html [https://perma.cc/NP8C-5GJ2].

207. *See* 28 U.S.C. § 291(a) (2018) ("The Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request by the chief judge or circuit justice of such circuit."); *id.* § 291(b) ("The chief judge of a circuit or the circuit justice may, in the public interest, designate and assign temporarily any circuit judge within the circuit, including a judge designated and assigned to temporary duty therein, to hold a district court in any district within the circuit."); *id.* § 292(a) ("The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires."). Designations also require the consent of the chief judge of the visiting judge's home circuit. *See id.* § 295 ("No designation and assignment of a circuit or district judge in active service shall be made without the consent of the chief judge or judicial council of the circuit from which the judge is to be designated and assigned.").

208. Although the constitutional text does not make it explicit, it has long been thought that lower-court judges are also principal officers requiring presidential nomination and Senate confirmation. *See* Weiss v. United States, 510 U.S. 163, 191 n.7 (1994) (Souter, J., concurring) (observing that "from the early days of the Republic '[t]he practical construction has uniformly been that [judges of the inferior courts] are not . . . inferior officers,' and I doubt many today would disagree" (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 456 n.1 (1833) (alterations in original)).

for example, argue that senior judges—who regularly sit by designation on other courts—violate the Appointments Clause, and must instead be separately appointed and confirmed to the distinct office of "senior judge."[209] Thus far, such arguments seem to have fallen on deaf ears in both the judiciary and Congress.

There is even precedent for a court being entirely comprised of judges chosen by a Supreme Court Justice. Under the Foreign Intelligence Surveillance Act of 1978, the Chief Justice of the United States designates:

> 11 district court judges from at least seven of the United States judicial circuits of whom no fewer than 3 shall reside within 20 miles of the District of Columbia who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States . . . .[210]

The judges of this court—the Foreign Intelligence Surveillance Court (FISC)—are Article III judges, but they are not formally nominated by the President or confirmed by the Senate to serve in their dual roles as FISC judges. Appointment by the Chief Justice is apparently sufficient. The Chief Justice has similar power to choose three judges to constitute an appellate court that reviews the decisions of the FISC.[211]

We think it would be similarly permissible for the Justices to choose additional Article III judges to visit the Supreme Court. We also note that the Appointments Clause challenge could further be reduced by adopting the strategy endorsed in our first proposal—formally appoint *all* circuit judges as Supreme Court Justices. That approach would eliminate the objection that the additional Justices needed to be nominated and confirmed as Justices of the Supreme Court.

b. Partisan-Balance Requirements

Another objection could be raised to our proposal's explicit inclusion of partisan-balance requirements. Would requiring that the President appoint Justices of particular parties unconstitutionally limit her appointment power or otherwise violate the Constitution? If so, a wide range of well-established practices

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209. David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 516-18 (2007).

210. 50 U.S.C. § 1803(a)(1) (2018).

211. *Id.* § 1803(b) ("The Chief Justice shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, from the United States district courts or courts of appeals who together shall comprise a court of review which shall have jurisdiction to review the denial of any application made under this chapter.").

would be called into question. Similar requirements first appeared in the nineteenth century.[212] There are now dozens of agencies with some form of partisan-balance requirement.[213] Presidents have largely acquiesced to such requirements for many decades, and the courts have never held that they are unconstitutional.[214]

Typical partisan-balance requirements do not explicitly state that particular seats belong to Democrats or Republicans, but instead state that no more than a set number of members can come from the same political party—effectively forcing the President to choose members of the other party (or independents) for the remaining positions. Brian Feinstein and Daniel Hemel argue that such requirements have more "bite" today than they once did, as increasing partisan polarization has meant that cross-party appointees are more likely to have ideologies that strongly diverge from their appointing President's.[215] While in earlier periods it was easier for Presidents to find more moderate opposite party members to appoint, that is less true today.

When it comes to appointing Supreme Court Justices, it is not clear that a mere limit on the number of same-party appointees on the Court would be sufficient. Given the stakes, one might expect some number of qualified but highly ideological judicial nominees to simply change their party allegiance to independent (or say, Libertarian) in order to improve their chances of being selected. A related piece of gamesmanship occurred in the early 2000s on the U.S. Commission on Civil Rights, "when two Republican members of the Commission changed their registration to independent. Their switches allowed President George W. Bush to name two additional Republicans to the commission, bringing the number of Republican or recently Republican members of the panel to six [out of eight members]."[216]

For this reason, it might be necessary to impose further constraints on presidential decision-making. One could imagine drafting the statute to explicitly specify that particular seats must be filled by members of particular parties. That might not be enough to prevent gamesmanship, however, as some potential nominees might just officially join the opposing party in order to maintain eligibility. Federal judges or candidates for judgeships often also refuse party membership in order to retain the perception of neutrality; requiring membership

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212. Brian D. Feinstein & Daniel Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 17 (2018).

213. *See* Ronald J. Krotoszynski et al., *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 1009-15 tbl.1 (2015).

214. *See* Feinstein & Hemel, *supra* note 212, at 21-22.

215. *See id.* at 14.

216. *Id.* at 21.

would undermine that norm. Moreover, this approach might even raise constitutional concerns. Recently, the Third Circuit struck down a Delaware constitutional provision which required partisan balance in the state court system.[217] The court found that the provision violated the First Amendment because it precluded state residents who were not members of the two major political parties from becoming candidates for judicial office, thereby limiting their associational freedom.[218] While the Third Circuit's decision is not self-evidently correct, it suggests that a system that explicitly mandated membership in particular parties would be problematic.

There are, however, other solutions that might accomplish the same goal without requiring that the nominees themselves be party members. One option would be to require the President to choose nominees for some of the seats from a list prepared by Senate leadership of the opposite party or by some kind of bipartisan commission. Such a restriction on presidential power would no doubt be subject to challenge, but there are some analogies in existing practice. Under District of Columbia law, the President must select judicial nominees to the D.C. court system from a list prepared by the multimember District of Columbia Judicial Nomination Commission.[219] Despite significant grounds for possible constitutional objection,[220] Presidents of both parties have generally abided by this system's requirements rather than picking a legal fight.[221]

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217. Adams v. Governor of Del., 914 F.3d 827 (3d Cir. 2019). The relevant constitutional provision governing the Delaware Supreme Court dictated that "three of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party." DEL. CONST. art. IV, § 3. For an argument anticipating the Third Circuit's decision, see Joel Edan Friedlander, *Is Delaware's "Other Major Political Party" Really Entitled to Half of Delaware's Judiciary?*, 58 ARIZ. L. REV. 1139, 1139 (2016).

218. *Adams*, 914 F.3d at 843.

219. D.C. CODE ANN. § 1-204.33 (West 2001).

220. The most obvious objection concerns the Appointments Clause. By limiting the President's power to nominate whomever she wishes to a federal office, such a law might impermissibly encroach on the separation of powers. *See, e.g.*, Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1919 (2007) (suggesting that "there is strong evidence that the original understanding of the Appointments Clause grants the President plenary appointment power contingent only on Senate confirmation").

221. President Trump recently selected a nominee for the D.C. Court of Appeals, Joshua Deahl, from a list prepared by the Commission. *See JNC Recommends Candidates for DC Court of Appeals Vacancy*, JUD. NOMINATION COMMISSION (May 10, 2017), https://jnc.dc.gov/release/jnc-recommends-candidates-dc-court-appeals-vacancy [https://perma.cc/GY2X-L5EP]; *Seven Nominations Sent to the Senate*, WHITE HOUSE (May 2, 2019), https://www.whitehouse.gov/presidential-actions/seven-nominations-sent-senate-2 [https://perma.cc/NP4H-ZZ7A].

The stakes are higher here, and thus there is surely a greater chance that these kinds of restrictions would be challenged. The example proves, however, that it is at least possible to reach a settlement that both sides can live with even in the face of some constitutional objections. Moreover, despite the occasional gamesmanship discussed above, the partisan-balance requirements used by federal agencies seem to be largely honored by Presidents of both parties—even though the rules could be manipulated more frequently. Both sides can abide by a system that benefits them equally over time, rather than fighting tooth and nail in the short term. It is our hope that such a settlement is possible here, if both sides could be convinced that this system is better than the open partisan warfare into which our current system is degenerating.

Indeed, the most constitutionally practical solution would be one that did not depend on formally enshrining partisan balance, but which depended solely on informal agreements and unwritten norms among party leaders. Imagine, for example, a system in which the Senate Majority and Minority Leaders informally had to agree on which nominees would be acceptable for the ten permanent seats. One example is presented by the Federal Election Commission (FEC), whose statute mandates that no more than three of its six commissioners may come from the same political party.[222] In practice, "the majority and minority party leaders in both chambers of Congress take turns sending to the President the names of candidates that they want appointed to the FEC."[223] This example suggests the possibility of some informal agreement about the partisan breakdown of Justices. Of course, the FEC itself may not present a good model to emulate, as it is an institution that has been subject to fierce partisan contestation and dysfunction in recent years.[224] As this example shows, informal norms can break down in the face of partisan conflict. Recent experience suggests that is certainly true when it comes to the Supreme Court nominations process.

CONCLUSION

The Supreme Court may soon face a profound legitimacy crisis. In this Feature, we have offered two different proposals that could save the Supreme Court from that fate. Neither is perfect; each would fail to address some of the problems with the way the Supreme Court currently operates. We are confident,

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222. 52 U.S.C. § 30106 (2018) ("No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.").

223. Jamin B. Raskin, *"A Complicated and Indirect Encroachment": Is the Federal Election Commission Unconstitutionally Composed?*, 52 ADMIN. L. REV. 609, 615 (2000).

224. *See, e.g.*, Daniel I. Weiner, *Fixing the FEC: An Agenda for Reform*, BRENNAN CTR. FOR JUST. 3-6 (2019), https://www.brennancenter.org/sites/default/files/publications/2019_04_FECV_Final.pdf [https://perma.cc/VA22-X9AM] (discussing partisan gridlock at the FEC).

however, that either proposal would be an improvement over the status quo—especially given how we expect our already-broken system to deteriorate even further in the near term. These proposals have the potential to help clean up the toxic confirmation process and reduce the temperature of Supreme Court politics. And they have a chance of preventing a profound legitimacy crisis that could undermine public confidence in the enterprise of law.

Either proposal could be taken as a blueprint for reform on its own, or components of each could be combined in some way as a model for change. But whether our particular proposals are adopted, in whole or in part, is less important than recognizing the *need* for some kind of reform to the Court's structure—and the *goals* that reform must meet to be successful and stable. Reform that doesn't address the core legitimacy challenges the Court faces will, like the status quo, become increasingly untenable. Radically changing the Supreme Court is necessary if we hope to preserve what is good about the Court.

Partisanship, Norms, and Federal Judicial Appointments

KEITH E. WHITTINGTON*

ABSTRACT

Nominations to the U.S. Supreme Court have sometimes been contentious, but nominations to seats on the lower federal courts were once routinely confirmed with little controversy. That is no longer the case. For nearly a quarter century, nominations to the federal circuit courts have been hotly contested. The result has been an extended period of Senate obstruction in which presidents of both parties have found it difficult to place judges on the federal circuit courts. The Senate has recently responded to this persistent gridlock by modifying its own institutional rules to facilitate a more streamlined, majoritarian confirmation process. This has not, however, solved the problem of Senate obstruction of circuit-court nominees during periods of divided government. In an era of heightened ideological conflicts, partisans might be tempted to take advantage of moments of unified control of the Senate and the White House to go further than streamlining confirmations to expanding the number of available judicial seats to fill. Rather than moving into a new era of routine judicial confirmations, the long period of confirmation gridlock could give way to escalating efforts at court-packing.

The politics of federal judicial appointments is as heated and as high-profile now as it has ever been in American history. For an important segment of both political parties, the federal courts have become a critical policymaking institution, and as a result both parties have been pushed to treat judicial appointments as an important political battleground.[1] It is worth pausing to assess descriptively just how difficult it has become to place judges on the federal bench in the current age of party polarization and how the White House and the Senate have responded to the gridlock by seeking to ease the possibility of judicial appointments on a simple majority basis. In an era of heightened ideological conflict, partisans might be tempted to go further and take extraordinary measures to construct a politically pliable judiciary, a risky step in a climate of close partisan competition.

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1. MARK SILVERSTEIN, JUDICIOUS CHOICES (2d ed. 2007); LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT 1–6 (2005).

Political scientists have long argued that courts are inevitably political institutions.[2] They decide important questions of public policy, and they are constituted by political means. Federal judges might sit one step removed from electoral politics, but that is not enough to place them outside of politics. Voters, interest groups, and elected officials have not always been deeply motivated to focus their attention and energy on the courts, but courts have periodically taken the center stage of American politics.[3]

The courts are the third branch of government laid out in the U.S. Constitution. While individual judges are made independent from the elected branches of government, the judiciary as a whole is largely made dependent on the goodwill of the legislature and the executive.[4] The courts have been a political prize to be won and a lagging indicator of political success.[5] Through that political influence, the effective constitutional rules of the political system itself are ultimately responsive to political currents. As Jack Balkin has noted, a party that can win the "constitutional trifecta" and control all three branches of government has enormous opportunities to reshape the political landscape.[6] On the other hand, political coalitions that cannot win control of all three branches can find their policy ambitions frustrated by the many veto points in the American system.

Political parties can most directly shape the federal judiciary by placing judges on the bench. They can do that through the familiar process of selecting like-minded judges to fill vacancies, but they can also do that through the less-familiar process of increasing the number of vacancies to be filled by expanding the bench. The American political parties have periodically sought to create a friendly federal judiciary by creating more judgeships. As Justin Crowe has detailed, partisan and policy calculations have rarely been absent from congressional decision making on whether to expand or reorganize the federal courts.[7] President Franklin Roosevelt's ill-fated proposal for "judicial reorganization," or less euphemistically "Court-packing," like the Federalist Party's lame-duck

2. *See, e.g.*, Martin Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294, 295–301 (1963); Keith E. Whittington, R. Daniel Kelemen, & Gregory A. Caldeira, *Introduction, in* OXFORD HANDBOOK OF LAW AND POLITICS 1–7 (Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira eds., 2010).

3. DONALD GRIER STEPHENSON, JR., CAMPAIGNS AND THE COURTS 3–15 (1999).

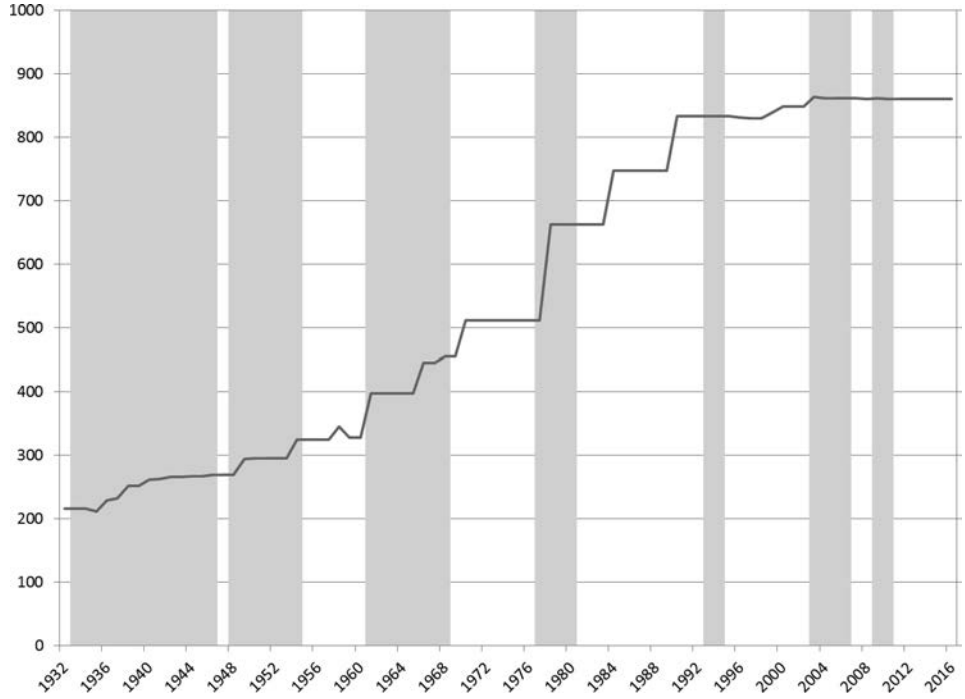
4. John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 357–60 (1999).

5. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284–286 (1957).

6. Jack M. Balkin, Bush v. Gore *and the Boundary between Law and Politics*, 110 YALE L. J. 1407, 1455 (2001).

7. JUSTIN CROWE, BUILDING THE JUDICIARY 2–17 (2012). *See also*, John M. De Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435 (1996); Gary Zuk, Gerard S. Gryski, & Deborah J. Barrow, *Partisan Transformation of the Federal Judiciary, 1869-1992*, 21 AM POL. RES. 439 (1993).

FIGURE 1. Total Federal Article III Judgeships, 1932–2016[10]



Note: Shaded areas are periods of unified government.

judicial reform of 1801, became an infamous case of political overreach.[8] The reaction to those efforts to manipulate the federal judiciary for partisan ends helped construct our "small-c constitution," the norms and practices that bolster and extend the rules formally entrenched in our textual Constitution.[9] We have taken the lesson of the Court-packing plan to be that elected officials should not push too hard to reshape the courts.

But what counts as "too hard"? In the summer of 1968, Chief Justice Earl Warren and President Lyndon Johnson tried to ensure that a Democratic appointee would succeed Warren, even as the Democratic presidential hopes in 1968 looked increasingly dim. Warren's strategically timed retirement was called

8. William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, a Second Death*, 1985 DUKE L. J. 673, 674–77 (1985); Kathryn Turner, *Midnight Judges*, 109 U. PENN. L. REV. 494, 521–23 (1961).

9. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 40–71 (1999); Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal/ [https://perma.cc/4YWZ-27MF].

10. *Authorized Judgeships*, USCOURTS.GOV, http://www.uscourts.gov/sites/default/files/allauth.pdf [https://perma.cc/4BRQ-7FN5].

out for the political ploy that it was, and even a Democratic-controlled Senate balked at confirming Abe Fortas as chief justice on the eve of the election, and so the seat fell to the Republican Richard Nixon to fill after the inauguration.[11] On the other hand, the Democratic Party took advantage of their return to unified control of Congress and the presidency after Watergate to reorganize and expand the federal judiciary. President Jimmy Carter was somewhat unlucky in not seeing a Supreme Court vacancy during his one term of office, but thanks to Congress he was able to fill an unusually large number of seats on the federal circuit courts.[12] As Figure 1 illustrates, the size of the federal judiciary has been increased in a series of steps over the decades since the New Deal. The most notable jump came when the Democrats unified government control with the election of Jimmy Carter. Since the 1980s, Republicans have been routinely charged with trying to "pack the courts," not because they have been manipulating the number of available judgeships but because they have been unusually focused on the judicial philosophy of their nominees when filling routine vacancies.[13]

The current political era has been remarkable not only because both parties have been focused on winning the constitutional trifecta and shaping the courts, but also because neither party has been particularly successful in doing so. In the past, these partisan battles over the federal judiciary have usually been decisively won by one side or the other. The Repeal Act of 1802 put an end to the Federalists' "midnight appointments."[14] The Jacksonian reorganization of the courts gave the South a working majority on the bench.[15] The Republican reorganization of the courts during the Civil War put the Court in a Northern hammerlock.[16] The electoral success of the New Deal coalition smashed conservative obstruction in the federal courts.[17]

Since the crack-up of the Democratic coalition in the 1960s, however, American politics has mostly been characterized by stalemate and gridlock.

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11. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 465–84 (2000).

12. Keith E. Whittington, *The President's Nominee: Robert Bork and the Modern Judicial Confirmation Process*, 42 BAKER CENTER J. APPLIED PUB. POL. 85, 87–88 (2012); John M. de Figueiredo, Gerald S. Gryski, Emerson H. Tiller & Gary Zuk, *Congress and the Political Expansion of the U.S. District Courts*, 2 AMER. L. & ECON. REV. 107, 112 n.9 (2000).

13. David M. O'Brien, *Packing the Supreme Court*, 62 VA. Q. REV. 189 (1986); HERMAN SCHWARTZ, PACKING THE COURTS (1988); Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111 (1994); Vivian Salama, *Trump Begins Effort to Pack Courts with Conservatives*, BOSTON GLOBE, May 9, 2017, https://www.bostonglobe.com/news/nation/2017/05/08/trump-begins-effort-pack-courts-with-conservatives/tUMiwYUaAZn5QX74qPMmLL/story.html.

14. William S. Carpenter, *Repeal of the Judiciary Act of 1801*, 9 AMER. POL. SCI. REV. 519 (1915); RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS 36–52 (1971); WHITTINGTON, *supra* note 10, at 40–50.

15. Crowe, *supra* note 8, at 115–130; HOWARD GILLMAN, MARK A. GRABER, AND KEITH E. WHITTINGTON, 1 AMERICAN CONSTITUTIONALISM 191–192 (2d ed. 2017).

16. Crowe, *supra* note 8, at 132–170; GILLMAN, GRABER, AND WHITTINGTON, *supra* note 16, at 248–251.

17. Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT (Ken Kersch and Ronald Kahn eds., 2006); KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE 127–34 (2004).

Partisan rotation, divided government and happenstance have extended the fighting over the courts rather than allowing one side to simply claim victory. Republicans have been able to push the courts in a more conservative direction, but their relationship with the U.S. Supreme Court has been as much one of frustration as cooperation. Justice Antonin Scalia's departure from the Court at the tail end of Barack Obama's Administration and the likely prospects of a Hillary Clinton electoral victory might have been expected to finally tilt the balance of the Court and create a stable liberal majority, but late-term Republican control of the Senate and Clinton's improbable defeat wound up extending the impasse.

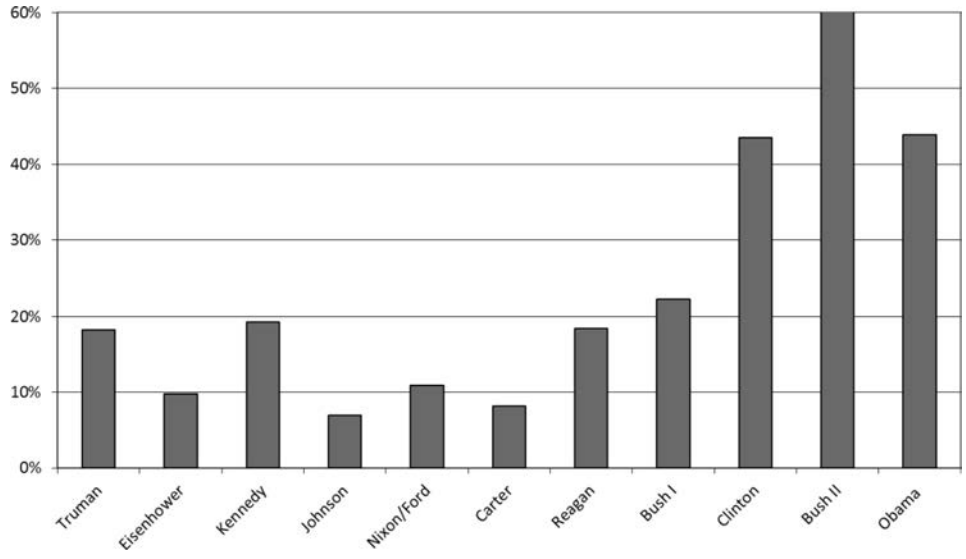
With the Supreme Court in limbo, partisans turned their attention to the federal circuit courts. Presidential nominations to the lower federal courts had long been routinely confirmed. Circuit court nominations only occasionally found themselves mired in controversy. That has changed, and the change is no longer recent.[18] Figure 2 lays bare the transformation, simply observing the percentage of nominations to the circuit courts made by each president that never resulted in a confirmed judge assuming a seat on the bench. The Senate obstructs presidential appointments to the lower federal courts primarily by refusing to act on those nominations rather than through up-or-down votes on the Senate floor. Nominations to the Supreme Court have traditionally been high enough profile to require active consideration by the Senate, but the lower profile nominations to the district and circuit courts can simply be ignored and allowed to languish.

Ever since the Monica Lewinsky scandal consumed the latter portion of Bill Clinton's presidency, Senate obstruction of circuit court nominations has been at a record high. Before that, regardless of the administration or the partisan composition of the Senate, presidential nominations to fill circuit court vacancies would have been expected to end with Senate confirmation. Since the late 1990s, the odds of a circuit court nomination being confirmed have been little better than a coin flip.

For over a quarter century, the Senate has obstructed circuit-court nominations at a historically unprecedented rate. The new obstructionism reflects a shift in both presidential and Senate behavior. Figure 3 breaks down the nominations and confirmations by year of nomination from the Reagan administration through the Obama administration, showing that there has been substantial variation across presidential terms and also over time and presidencies. Beginning in the summer of 1991, the Democratic-controlled Senate dramatically slowed the pace of confirmations. With more than a year left in his presidency, George H.W. Bush found his ability to place judges on the circuit courts to be significantly reduced. No similar slowdown can be seen at a comparable point during Ronald Reagan's second term of office, when he also had to deal with a Senate under the control of the opposite party. When the Republicans seized control of the Senate during the midterm election of President Bill Clinton's first term of office, they initiated a similar

18. AMY STEIGERWALT, BATTLE OVER THE BENCH (2010); Scott Basinger and Maxwell Mak, *The Changing Politics of Federal Judicial Nominations*, 37 CONG. & PRESIDENCY 157 (2010).

FIGURE 2. Percentage of Federal Circuit Court Nominations Not Confirmed, 1945–2016[19]

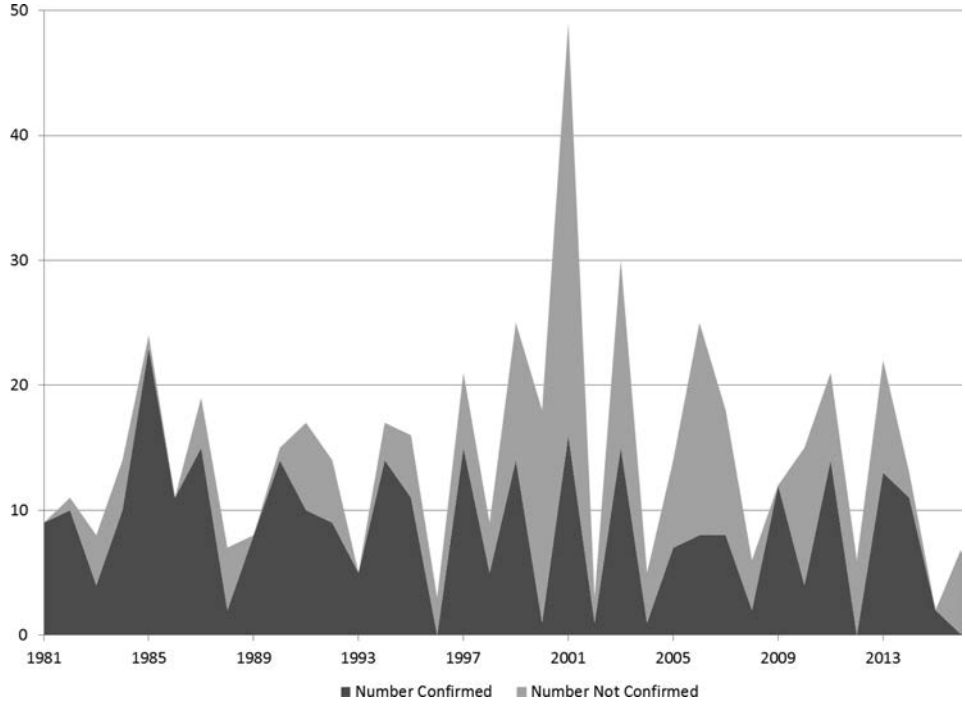


slowdown of the President's circuit-court confirmations a year before he faced reelection. The Republicans allowed the pace of confirmations to pick up again after the President won reelection, but when confirmations again began to slow as a new election loomed, Clinton took the unusual step of blitzing the Senate with an unprecedented number of election-year and lame-duck circuit-court nominees. Although such a maneuver might have been expected to succeed if the same party controlled both the White House and the Senate, it was doomed to failure when the Senate was in the opposition's hands, and the rate of failed nominations spiked. President George W. Bush entered office unusually prepared to send judicial nominations to the Senate, and sent many judicial nominations to the Senate relatively quickly. The Senate had traditionally been very accommodating to presidential nominations at the opening of a presidential term, but the newly Democrat-controlled Senate in this case was unusually obstructionist.[20] The rate of confirmation has never recovered, and the remainder of both Bush's and Barack Obama's presidencies were characterized by high rates of failures. The number of unconfirmed nominations grew, and the number of confirmed judges shrank.

19. GILLMAN, GRABER & WHITTINGTON, *supra* note 16, at 604.

20. For a somewhat different measure of Senate obstruction with similar results, see Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, 86 JUDICATURE 251 (2003).

FIGURE 3. Outcomes of Circuit Court Nominations, 1981–2016[21]

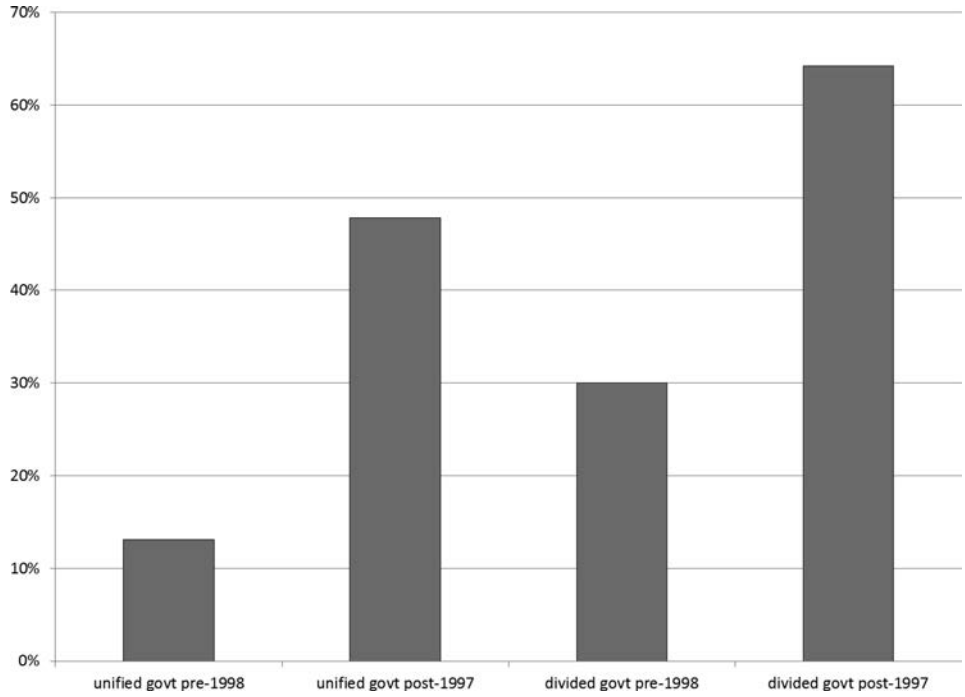


Because of this unusual level of Senate obstruction, George H.W. Bush left a surprisingly small mark on the circuit courts. During his single term as President and aided by the 1978 judicial expansion, Jimmy Carter filled 50 percent more circuit court seats than did Bush. But Clinton, George W. Bush, and Obama also appointed fewer circuit court judges than would have been expected for two-term Presidents. The degree of Senate obstruction during this period is inflated a bit by the aggressiveness of the Presidents in making nominations (e.g., George W. Bush sent 50 percent more nominations to the Senate than did Ronald Reagan), but the overall effect has been to leave the courts understaffed and to reduce the number of judges that either Democratic or Republican Presidents could put into service.

The story of Senate obstruction of circuit-court nominations over the last several presidencies is only partly a story of divided government. The Senate and the White House have been controlled by different parties for a significant portion of the time since the final years of the Reagan Administration, but there have also been several periods of unified government. George H.W. Bush did not see a

21. Library of Congress, THOMAS. The Congress.gov website provides a record of every presidential nomination to a seat on a circuit court and the actions taken on that nomination. The graphs tracks those nominations that were eventually confirmed by a Senate vote and those that were not.

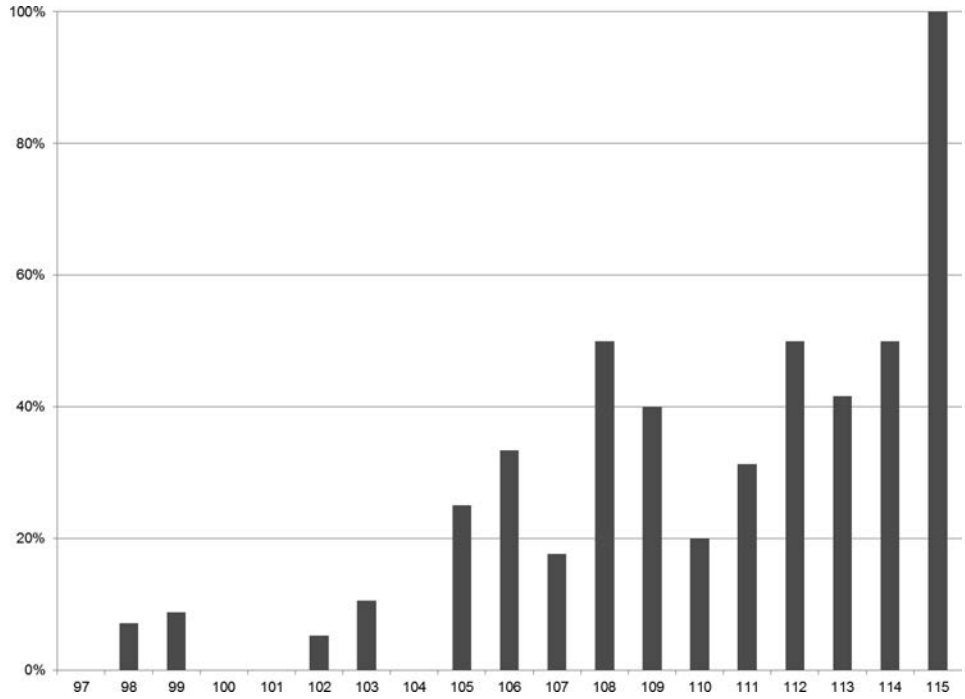
FIGURE 4. Percentage of Circuit Court Nominations Not Confirmed by Divided Government and Pre- and Post-Lewinsky



unified government during his single term of office, but Bill Clinton, George W. Bush, and Barack Obama all enjoyed years of same-party control of the Senate. Unlike the modern U.S. House of Representatives, the U.S. Senate has traditionally allowed many avenues for obstruction by the minority party.[22] Figure 4 emphasizes that while Senate obstructionism is greater during periods of divided government, there have also been some significant changes in these patterns. Prior to the Monica Lewinsky scandal and President Bill Clinton's impeachment, senators mostly had not blocked opposite-party presidents when it came to circuit court nominations. Divided party control dampened the rate of Senate confirmations, but prior to 1998 even opposite-party Senates were relatively willing to confirm circuit court nominations. Since 1998, however, even same-party Senates have found themselves unable to confirm judges. When presidents have faced opposition-controlled Senates since 1998, circuit-court confirmations have been at a near standstill.

22. SARAH A. BINDER, MINORITY RIGHTS, MAJORITY RULE 68–85 (1997); GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER 6–13 (2007).

FIGURE 5. Percent of Floor Votes on Circuit Court Nominations with Recorded Nays[24]



The growing willingness of senators to obstruct circuit court nominations has mirrored their willingness to express opposition to nominees in floor votes. Figure 5 tracks the percentage of floor votes on circuit court nominations that included votes cast against the nominee from the opening of the Reagan Administration through the first year of the Trump Administration. Although there were occasional controversies over judicial appointments during the Reagan presidency, most circuit court confirmations were mere voice votes without any recorded dissents. By the Clinton Administration, roll call votes became more common. Those roll calls allowed supporters to go on record with their support, but more importantly they allowed opponents to go on record with their opposition. Such negative votes have no practical consequence, but they can be valuable position-taking for constituents, interest groups, and donors.[23] The growing number of negative votes cast during successful confirmation roll calls indicate that senators are under increasing pressure to demonstrate their opposition, to "vote the right way" even when they are unable to block a nominee.

23. On position-taking, see DAVID R. MAYHEW, CONGRESS 61–91 (2d ed. 2004).
24. Library of Congress, THOMAS.

Forced to go on record in a roll call, conservative senators feel obliged to vote against a liberal nominee, and liberal senators feel equally obliged to vote against a conservative nominee. It was not long ago that such votes only needed to be cast in the case of the occasional "controversial" nominee. But the number of apparently "controversial" nominees has been increasing with political polarization and the elevated salience of circuit court appointments. During much of the Bush and Obama Administrations, nearly half of the confirmed circuit court judges assumed the bench over the explicit objections of some of the senators. During the first year of the Trump Administration, *every* confirmation vote included votes cast in opposition. Moreover, during the last two presidencies, the opposition party has not simply mounted token opposition to nominees from the ideological wings. If some senators go on record in opposition to a nominee, nearly every member of that party's caucus will similarly cast a nay vote. Notably, the heightened drama surrounding confirmation votes came primarily during periods of unified government, when the majority was capable of ushering judges through the Senate despite opposition. During divided government, the opposition has simply refused to allow nominees to reach the floor for a vote.

Entering the twenty-first century, the Senate had become increasingly dysfunctional on the question of circuit-court confirmations. The increased political salience of lower-court judicial appointments intersected with growing political polarization in the Senate (as well as in the House).[25] Minority obstruction of judicial confirmations through withholding blue slips and threatening filibusters might not have had much staying power if a significant component of the two parties overlapped ideologically.[26] Finding a path to 60 votes for cloture might have been manageable if the more liberal wing of the Republican Party and the more conservative wing of the Democrat Party were largely in agreement and shared a similar perspective and electorate. That is no longer the case. The distribution of senators is now distinctly bimodal. The gap between the Republicans and the Democrats is substantial. Moreover, the ideological distance that would need to be travelled to get to 60 votes is now very large. The 115th Congress elected in 2016 is representative of the recent ideological polarization in Congress, and as Figure 6 shows there is a yawning gap between the Republicans and Democrats. If senators vote their sincere preferences on judicial nominees, there is little possibility of any notable judicial candidate winning bipartisan support.

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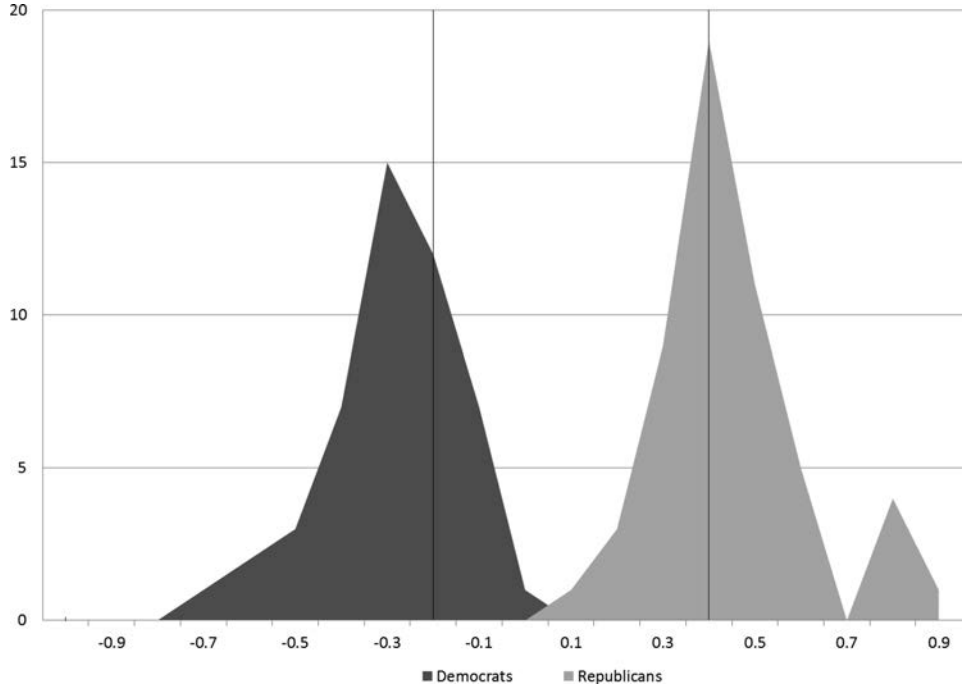
25. Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees* 117 POL. SCI. Q. 259, 272–76 (2002); Nancy Scherer, Brandon L. Bartels, and Amy Steigerwalt, *Sounding the Fire Alarm: The Role of Interest Groups in the Lower Federal Court Confirmation Process*, 70 J. POL. 1026, 1036–37 (2009); NANCY SCHERER, SCORING POINTS 108–180 (2005); Barry C. Burden, *Polarization, Obstruction, and Governing in the Senate*, 9 THE FORUM (2011), https://doi.org/10.2202/1540-8884.1480 [https://perma.cc/6H9N-FFX2].

26. Ryan C. Black, Anthony J. Madonna, & Ryan J. Owens, *Obstructing Agenda-Setting: Examining Blue Slip Behavior in the Senate*, 9 THE FORUM (2011), https://doi.org/10.2202/1540-8884.1476 [https://perma.cc/X5SW-D7H7]; David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEGAL ISSUES 51, 91–103 (2006).

FIGURE 6. Ideological Distribution of U.S. Senators, 115th Congress[27]



Note: The figure shows the number of Republican and Democratic senators occupying a given point on an ideological spectrum ranging from very liberal on the left to very conservative on the right. Vertical lines represent 60th member needed for cloture vote from right and left ends of the ideological spectrum. For Democrats to put together 60 votes in the Senate, for example, they would need to sway senators near the ideological center of the Republican caucus.

For either party in the current Senate, constructing a filibuster-proof majority requires reaching far into the ideological center of the opposite party. That is simply a bridge too far. It is possible that the threat of minority obstruction might lead the President to moderate his judicial nominations and seek compromise candidates who could command 60 votes, but in the current environment it is not clear that any such compromise candidates exist. Requiring presidents to sell a judicial candidate to something close to the median senator of the opposition party would risk losing significant numbers from their own party and would negate

27. *See* VOTEVIEW.COM, https://voteview.com/congress/senate/text [https://perma.cc/D6CW-UDUZ]. Ideology of senators illustrated by DW-NOMINATE scores, based on the propensity of individual senators to vote with one another across all roll call votes.

much of the significance of winning either the White House or majority control of the Senate.

Given that political reality, it is no surprise that the Senate has instead moved to rein in the ability of the minority party to obstruct judicial confirmations.[28] In 2013, the Senate Democrats under the leadership of Harry Reid nuked the filibuster option on circuit court nominees in order to facilitate the ability of President Obama to fill judicial vacancies when his own party controlled the Senate, and the President swiftly took advantage of the new rules.[29] When the Democrats lost the chamber as a result of the 2014 elections, judicial confirmations largely ground to a halt. The current Republican move to curtail the ability of individual senators to use the blue slip to hold up nominees is the natural follow-up to Reid's effort to streamline the confirmation process. The Senate is now able to confirm circuit-court judges on a primarily majoritarian basis, which largely eliminates the need for appealing to the minority party and should effectively return judicial confirmations to the operational norms that held sway until the last decade of the twentieth century—at least when the same party controls both the White House and the Senate.

The question now is what comes next? The Senate is presently able to confirm judicial nominees when the same party controls both the White House and the Senate, returning us to an efficiency that would have been familiar for most of the twentieth century. President Donald Trump has benefitted from the new rules under Majority Leader Mitch McConnell in much the same way that Barack Obama did under Majority Leader Harry Reid. Judicial nominees made with the same party controlling the Senate have been confirmed, at least until a presidential election year. But election years were a difficult time to move judicial nominees through the Senate even before the 1990s.

There is no reason to think, however, that the Senate will be able to return to twentieth-century norms when we have a return to divided government. The recent rule changes have allowed the Senate majority to work around obstructionist minorities, but party polarization will mean that few judicial nominees will be satisfactory to a Senate controlled by the opposition party. Senators might be moved by a desire to have a fully functional federal judiciary, an expectation that their own party will benefit in the long-run if Senate majorities are willing to confirm judges nominated by opposition presidents, or a renewed sense that partisan differences in judicial philosophy are not so consequential in the lower courts. But recent experience is not encouraging. Will a Senate controlled by the opposition party refuse to seat circuit-court nominees at the beginning of a presidential term in the same way that it has recently refused to seat those nominees at the end

28. Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 97–110 (2017).

29. Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1677–81 (2015).

of a presidential term, or will presidents be able to enjoy a brief honeymoon even when working with the opposition party? Would a Senate willing to allow vacancies to accumulate in the lower federal courts rather than confirm a judicial candidate advanced by the other party's President be similarly willing to allow a vacancy to sit on the U.S. Supreme Court, not just for a period of months but for a period of years?[30] Presidents have sometimes had difficulty filling a Supreme Court vacancy near the end of their term, but the Senate has not completely blocked the President from filling seats on the Supreme Court since Andrew Johnson fell out with congressional Republicans over Reconstruction. Will a party with unified control of Congress and the White House eventually take the advice of their most zealous partisans and create additional judgeships to maximize their temporary advantage, and perhaps even expand the size of the Supreme Court itself? If so, battles over control of the federal courts could reach extremes not seen since the Civil War.

Over the past several presidencies, both parties have escalated the conflict over appointments to seats on the circuit courts. Each side has blamed the other, while taking an additional step of its own not merely to continue the fight but to compound it. Conflict that could once be expected on extreme occasions has become routinized. For the majority, delay became a standard means for killing nominations. For the minority, filibusters and the refusal to return blue slips became normalized measures for obstructing even the most mainstream of presidential nominations. When Senators in the minority were not able to quash a nominee entirely, they have been expected to cast symbolic votes against the nominee. While obstruction and dissent could once be expected at the end of a presidential administration, it can now be expected throughout an administration. Both parties feel justified in doing whatever is necessary to advance their favored nominees and block their disfavored nominees, not only because they can point to a history of grievances in which the other side did the same but also because every nominee in an age of polarization seems like an extremist to the opposite party. Both sides are convinced any steps taken to ratchet down the conflict will only result in unilateral disarmament and reward the other party for its bad behavior.

The norms and practices of the small-c constitution are ultimately sustained and enforced by political means.[31] If extreme obstruction in the Senate proves to be a winning electoral strategy, then senators will engage in more of it. If presidents are able to hold senators accountable to the electorate and voters are willing to punish senators for obstructing judicial nominees, then senators might return to the old ways and once again vote to confirm judges nominated by the other party. If proposals to manipulate the size of the federal judiciary so as to create more

30. Jack Holmes, *What If the Senate Refused to Confirm Supreme Court Justices . . . Forever?*, ESQUIRE, Apr. 13, 2016, https://www.esquire.com/news-politics/news/a43819/merrick-garland-senate-hypothetical/ [https://perma.cc/KBG7-SGN9].

31. Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. OF ILL. L. REV. 1847, 1860–64.

seats for a friendly president to fill are electorally costless at worst, then the courts will be made into a partisan plaything. Thus far, it would appear that senators are politically rewarded for going to the mat on circuit-court confirmations. Their electoral base and activist supporters expect nothing less.

It will be difficult enough to preserve the independence and authority of the courts in the current politically polarized environment. It will be far more difficult if senators cannot find a way to allow judicial selections favored by their opponents to take a seat on the bench and insist that the only acceptable court is a partisan court. Political leaders on both sides of the partisan aisle need to recognize that the escalation of partisan conflict over the judiciary will ultimately only serve to damage the courts.[32] Proposals to pack the courts by altering the size of the judiciary and suggestions that Senate majorities should deny opposition presidents the ability to appoint judges are subversive of basic constitutional norms that have worked over time to prevent a constitutional crisis.[33]

In the absence of a decisive electoral victory that would allow one side to claim the spoils of the judiciary, the country might be better served by Congress exploring how to deescalate the conflict rather than ratchet it up. For example, rather than expanding the size of the federal judiciary so as to temporarily pack the courts with allies, Congress could institutionalize bipartisanship on the circuit courts by creating an expectation that each circuit contain an equal number of Republican and Democratic judges and allow each side to fill its half of the bench with its own favorites. If there are no consensus nominees, there could at least be a consensus institutional design that gives each party half a loaf and allows the judiciary to function.

Senators have the capacity to paralyze the government and allow the judiciary to sink into ineffectiveness if they resolve to hobble rather than cooperate with presidents with whom they disagree. Perhaps in extreme cases such refusal to cooperate on the basic functioning of the government is justified, as when Congress and the President battled over the fate of the nation in the 1860s. It is rather more difficult to imagine justifying crippling conduct when the disagreements are less severe and the stakes less monumental. The constitutional system functions best if the formal rules are supplemented by a robust set of norms and practices that deter government officials from using all the political weapons at

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32. Lexington, *Conservative Lawyers are among the President's Biggest Enablers*, ECONOMIST, Nov. 23, 2017, https://www.economist.com/news/united-states/21731639-they-will-come-regret-it-conservative-lawyers-are-among-presidents-biggest-enablers.

33. Dahlia Lithwick, *Judges over Principles*, SLATE (Nov. 22, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/11/the_never_trump_legal_movement_has_morphed_into_a_plan_to_pack_the_courts.html [https://perma.cc/YNQ6-JTYU?type=image]; Mark Tushnet, *Expanding the Judiciary, the Senate Rules, and the Small-c Constitution*, BALKINIZATION (Nov. 25, 2017), https://balkin.blogspot.com/2017/11/expanding-judiciary-senate-rules-and.html [https://perma.cc/GA8V-A5YK]; Ilya Somin, Opinion, *The Case Against Court-Packing*, WASHINGTON POST, Nov. 27, 2017, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/27/the-case-against-court-packing/?utm_term=.877b7b434349 [https://perma.cc/PQ43-UCWJ]; Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093 (2002).

their disposal.[34] We should be cautious not to allow the prospect of short-term political gain to lead us into actions that could threaten the long-term blessings of constitutional order.

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