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## 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.<sup>1</sup> 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.”<sup>2</sup> 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.”<sup>3</sup>

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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.<sup>4</sup> 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,<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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."<sup>9</sup>

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.<sup>10</sup> Another, Justice Pierce Butler, was also a Democrat (although one appointed by Republican President Warren G. Harding).<sup>11</sup> Moreover, four of the five Justices who ultimately "broke the logjam" in favor of President Roosevelt's policies were Republicans.<sup>12</sup>

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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*<sup>13</sup> ignited a political firestorm. Southern politicians engaged in a campaign of "massive resistance" to the Court's efforts to force desegregation.<sup>14</sup> 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*<sup>15</sup> 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*<sup>16</sup> 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*,<sup>17</sup> 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.<sup>18</sup> Yet "the initial polarization toward the Court evaporated within a year of the decision."<sup>19</sup> Within less than a decade, the Court was *more* popular among Democrats than Republicans in opinion polls.<sup>20</sup> 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."<sup>21</sup> Other factors likely played a role as well. Vice President Al Gore accepted the Court's decision as

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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;<sup>22</sup> 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.<sup>23</sup> 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*<sup>24</sup> 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.”<sup>25</sup>

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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup> 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."<sup>30</sup> 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.<sup>31</sup>

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

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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.<sup>32</sup>

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<sup>33</sup> (which Senate Democrats had themselves exercised when they were in power four years earlier, for nominees to the lower courts and executive offices).<sup>34</sup> 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.<sup>35</sup>

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/267Z9MA2>].
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/do65cfe8-52b6-11e3-9feo-fd2ca728e67c\\_story.html](https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/do65cfe8-52b6-11e3-9feo-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.<sup>36</sup>

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.<sup>37</sup>

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.<sup>38</sup> 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.<sup>39</sup> He lambasted the “two-

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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://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.”<sup>40</sup> He went on to address Democratic committee members with contempt and disrespect.<sup>41</sup> 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.<sup>42</sup> Some even alleged that he lied under oath.<sup>43</sup> 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.<sup>44</sup> 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.”<sup>45</sup> 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-ffe0-51c7-8cco-3d9f5c19982b.html](https://herald-review.com/opinion/columnists/erwin-chemerinsky-court-s-legitimacy-is-in-question/article_d90aec75-ffe0-51c7-8cco-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.’”<sup>46</sup> 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.<sup>47</sup> 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.”<sup>48</sup>

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*<sup>49</sup> and thereby permit state legislatures to criminalize abortion (a possibility that a number of state legislatures seem to be eagerly anticipating).<sup>50</sup> 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://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://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.<sup>51</sup> 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.<sup>52</sup> 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

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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<sup>53</sup> 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*,<sup>54</sup> 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.<sup>55</sup>

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 institutional leanings that seem in some cases to push back against his ideological conservatism.<sup>56</sup> 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*<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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*,<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> That is especially

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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.<sup>64</sup> Although Congress has enlarged and decreased the Court's size at various points in history, often for nakedly political reasons,<sup>65</sup> 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.<sup>66</sup> 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."<sup>67</sup> 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.<sup>68</sup>

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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.<sup>69</sup>

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].”<sup>70</sup> 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.”<sup>71</sup> Mark Tushnet has been advancing arguments for abolishing judicial review for a number of years,<sup>72</sup> and his proposals are receiving renewed interest.<sup>73</sup>

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,<sup>74</sup> or for other reforms.<sup>75</sup> 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.<sup>76</sup>

## 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.<sup>77</sup> 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.<sup>78</sup>

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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.<sup>79</sup> 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.<sup>80</sup>

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.<sup>81</sup>

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.<sup>82</sup> 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.<sup>83</sup>

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*<sup>84</sup> and *Janus*.<sup>85</sup> And given that Democrats have a reasonable argument that the conservative majority was earned using underhanded tactics,<sup>86</sup> 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

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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.<sup>87</sup> 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

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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.<sup>88</sup>

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.<sup>89</sup>

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.<sup>90</sup> 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.<sup>91</sup>

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.<sup>92</sup>

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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.<sup>93</sup> 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.<sup>94</sup> “Anti-hardball policies” in Pozen’s account “forestall or foreclose tit-for-tat cycles and lower the temperature of political disputes.”<sup>95</sup> 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.”<sup>96</sup> 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-and-as-anti-hardball.html> [https://perma.cc/UKES-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.<sup>97</sup>

First proposed in a student note,<sup>98</sup> the plan is most famously associated with Roger Cramton and Paul Carrington.<sup>99</sup> 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.<sup>100</sup> While there are arguments that “good behavior” can coexist with a term-of-years appointment, they rest on comparatively weak grounds.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup> 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

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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.”<sup>105</sup> This is a major, underappreciated drawback to the eighteen-year-term proposal.<sup>106</sup>

## 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.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup>

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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.<sup>110</sup> 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.<sup>111</sup> For example, Richard Primus (responding to a proposal for Republicans to pack the lower courts for nakedly political reasons)<sup>112</sup> 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."<sup>113</sup>

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."<sup>114</sup> Instead, Klarman argues, they are changing the rules of politics – from voter suppression to restricting the powers of Democratic governors.<sup>115</sup> 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.<sup>116</sup>

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.”<sup>117</sup> 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 . . . .”<sup>118</sup> 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.<sup>119</sup> 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.<sup>120</sup> 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.”<sup>121</sup> 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.<sup>122</sup> 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.”<sup>123</sup> 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.<sup>124</sup> 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."<sup>125</sup> Senate Democrats themselves have suggested restoring the filibuster for Supreme Court nominees if they returned to power.<sup>126</sup>

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,<sup>127</sup> 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

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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-dfa3e4boca64d91848e4](https://www.huffpost.com/entry/democrats-discuss-restoring-filibuster_n_58eb-dfa3e4boca64d91848e4) [<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.<sup>128</sup>

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.<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup> 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).

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<sup>131</sup>. 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<sup>132</sup> of the Court, rather than a simple majority, could hold a federal statute (and possibly state statutes,<sup>133</sup> depending on how one weighs federalism values) unconstitutional.<sup>134</sup>

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.<sup>135</sup> 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.<sup>136</sup>

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).<sup>137</sup> 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.<sup>138</sup>

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.<sup>139</sup> 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.<sup>140</sup> 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,<sup>141</sup> 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.<sup>142</sup>

Our reform works from that constitutional baseline. The proposal formally expands the size of the Court to some 180 judges,<sup>143</sup> 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.<sup>144</sup> 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.<sup>145</sup>

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.<sup>146</sup> 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.<sup>147</sup> 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.”<sup>148</sup> The Framers of the Constitution understood

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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.<sup>149</sup> 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*,<sup>150</sup> even though the Justices had not been separately appointed to the lower federal courts, and it persisted throughout the nineteenth century.<sup>151</sup>

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.<sup>152</sup> Judge Claria Horn Boom currently serves as a federal district judge for both the Eastern and Western Districts of Kentucky.<sup>153</sup> 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.<sup>154</sup> 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://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.<sup>155</sup> Chief Justice Earl Warren chaired the commission tasked with investigating the assassination of President Kennedy.<sup>156</sup> Other examples abound.<sup>157</sup>

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.<sup>158</sup> Judges serve on the U.S. Sentencing Commission, a practice upheld by the Supreme Court.<sup>159</sup> 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.<sup>160</sup> 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.<sup>161</sup>

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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.<sup>162</sup> 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.<sup>163</sup> 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.”<sup>164</sup> 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.<sup>165</sup> 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

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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.<sup>166</sup>

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,<sup>167</sup> the Article III Vesting Clause gives Congress authority to make rules for the creation, composition, and terms of the judiciary – including the Supreme Court.<sup>168</sup> 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

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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.<sup>169</sup> Both suffer from an absence of textual support.<sup>170</sup> A second set of arguments is structural: that supermajority rules would aggrandize congressional power or effectively determine the outcomes of cases.<sup>171</sup> These arguments, too, are unmoored from any textual provisions and are effectively a version of “free-form structural” constitutional arguments.<sup>172</sup> 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.<sup>173</sup>

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,”<sup>174</sup> and the Exceptions Clause, which states that the Supreme Court has jurisdiction “with such Exceptions, and under such Regulations as the Congress shall make.”<sup>175</sup> 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.”<sup>176</sup> 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.<sup>177</sup> And some states, including Nebraska and North Dakota, have adopted supermajority requirements.<sup>178</sup> 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.<sup>179</sup>

*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.<sup>180</sup> Both the Supreme Court and commentators have recognized that historical practice can inform constitutional meaning.<sup>181</sup> 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.<sup>182</sup> 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,<sup>183</sup> 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.”<sup>184</sup> 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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<sup>183</sup>. See *supra* notes 10-12 and accompanying text.

<sup>184</sup>. 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<sup>185</sup> – 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.<sup>186</sup> Our hope, though, is that they would pick more than one.<sup>187</sup>

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).<sup>188</sup> 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.<sup>189</sup> To the extent that long-term service on the Supreme Court changes one's perspective,<sup>190</sup> 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.<sup>191</sup> 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.<sup>192</sup> He contends that such a Court would produce narrower, more consensus-based decisions; would "re-

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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.<sup>193</sup>

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.<sup>194</sup> 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.<sup>195</sup> 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.<sup>196</sup>

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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 enjoinder 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.<sup>197</sup> 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.<sup>198</sup> 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

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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).<sup>199</sup> 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.<sup>200</sup> Many other countries have adopted forms of "consociationalism," in which the

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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.<sup>201</sup> 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<sup>202</sup> – 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.<sup>203</sup>

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;<sup>204</sup> and retired Supreme Court Justices regularly sit by designation on courts of appeals.<sup>205</sup> Justice Souter, for example, often sits with the First Circuit, on which he briefly served as a judge before joining the Supreme Court.<sup>206</sup> 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.<sup>207</sup> Their initial President-and-Senate appointment seems to be sufficient.<sup>208</sup>

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.appelatedaily.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.”<sup>209</sup> 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 . . . .<sup>210</sup>

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.<sup>211</sup>

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.<sup>212</sup> There are now dozens of agencies with some form of partisan-balance requirement.<sup>213</sup> Presidents have largely acquiesced to such requirements for many decades, and the courts have never held that they are unconstitutional.<sup>214</sup>

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.<sup>215</sup> 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].”<sup>216</sup>

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.<sup>217</sup> 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.<sup>218</sup> 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.<sup>219</sup> Despite significant grounds for possible constitutional objection,<sup>220</sup> Presidents of both parties have generally abided by this system's requirements rather than picking a legal fight.<sup>221</sup>

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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.<sup>222</sup> 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.”<sup>223</sup> 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.<sup>224</sup> 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://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.