

# Democratizing the Supreme Court

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*Progressives are taking Supreme Court reform seriously for the first time in almost a century. Owing to the rise of the political and academic left following the 2008 financial crisis and the hotly contested appointments of Justices Neil Gorsuch and Brett Kavanaugh, progressives increasingly view the Supreme Court as posing a serious challenge to the successful implementation of ambitious legislation. Amy Coney Barrett's confirmation to take Justice Ruth Bader Ginsburg's seat after her death in fall 2020 brought these once-marginal concerns to the forefront of American political debate, prompting a promise from now-President Joseph Biden, on the eve of his election, to form a national commission for court reform.*

*Despite this once-in-a-lifetime energy around the idea of court reform, the popular and academic discussion of how to reform the Supreme Court has been unduly constrained. Even if the commission proves to be a ploy to postpone reform, it is crucial to clarify the debate around possible ends and means of reform, for the debate is unlikely to die out. This is the case with regard to the mechanism and the purpose of reform alike. On the left, historical memory has limited debate almost entirely to "court-packing." Meanwhile, the center has occupied itself with how to restore the Supreme Court's legitimacy by rescuing the institution from its regrettable slide into partisanship. And now, as the Court appears to moderate itself in an effort to preempt legislative reform of the institution, the concern is that progressives will drop their demands for change, satisfied with a few modest judicial concessions.*

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

*Second, the Article introduces a distinction between two fundamentally different mechanisms of reform. The first type of reform, which we call personnel reforms, includes both aggressive proposals like court-packing and more modest (or politically moderate) reforms such as partisan balance requirements or panel systems. All of these reforms take for granted the tremendous power the Supreme Court wields. What these proposals do is change the partisan or ideological character of the individuals who wield it. The second type of reform, which we call disempowering reforms, includes proposals like jurisdiction stripping and a supermajority requirement for judicial review. These reforms take power away from the Court and redirect it to the political branches instead. As we argue, personnel reforms are mostly addressed to the legitimacy frame that progressives would do well to reject. More still, to the extent such reforms advance progressive ends, they do so only contingently and threaten to do as much harm as good over time. By contrast, disempowering reforms, we argue, advance progressive values systematically. While such reforms would not guarantee advances in social democracy, they would ensure that the battle for such advances takes place in the democratic arena. For progressives, this is where such reforms have to occur now—and should occur if they take place anywhere.*

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## INTRODUCTION

On September 18, 2020, Justice Ruth Bader Ginsburg died. Less than two months later, on the eve of the presidential election he would win, and after recriminations around the liberal Ginsburg’s replacement by right-wing jurist Amy Coney Barrett, Joseph Biden promised to create a bipartisan commission to contemplate reform of a Supreme Court now “out of whack.”<sup>1</sup>

Calls for such reform had already begun percolating in the prior half decade in response to the obstruction of President Barack Obama’s nomination of Judge Merrick Garland to replace Justice Antonin Scalia in 2015. President Donald Trump’s appointments during his term of Neil Gorsuch and Brett Kavanaugh to seats on the highest bench then furthered such calls for reform. But the events after Ginsburg’s death created the conditions for an expert and public discussion about the Supreme Court’s institutional viability without parallel since the 1920s and 1930s. It is likely that Biden’s proposal of the commission was a punt and that its work will come to naught.<sup>2</sup> But progressives remain wary of a Supreme Court with a 6-3 majority. Given even mainstream legislative ambitions and the threat the Supreme Court poses through the power of interpretive fiat across the spectrum of legal disputes, the return of the reform debate to political centrality is not a matter of if, but of when.

Yet the debate about how to conceptualize and therefore to pursue reform has barely begun. Though only in early stages, and waiting for different circumstances for mobilization and legislation, our era’s discussion now risks brevity and error. Since 2016, historical memories have favored “court-packing” or personnel expansion of the institution as practically the only imaginable reform.<sup>3</sup> Meanwhile, the end of the Supreme Court’s 2019 term in July 2020

1. Sam Gringlas, *Asked About Court Packing, Biden Says He Will Convene Commission to Study Reforms*, NPR (Oct. 22, 2020), <https://www.npr.org/2020/10/22/926607920/asked-about-court-packing-biden-says-he-will-convene-commission-to-study-reforms> [https://perma.cc/MG7S-P29H].

2. Samuel Moyn, *Change the Court, for Good: For Starters, the Oldest Justice Should Retire While There’s a Democratic President and Senate*, N.Y. DAILY NEWS (Jan. 30, 2021), <https://www.nydailynews.com/opinion/ny-oped-change-the-court-for-good-20210130-hcqwoq4nhzedtapuhxyhhuzpj4-story.html> [https://perma.cc/4UJY-VV3L].

3. For example, in winter 2019, Ian Millhiser, now *Vox*’s Supreme Court reporter and author of a book detailing the right-wing decision-making of the Supreme Court for decades, wrote a defense

strongly indicated that the explosive possibilities of reform have already begun to affect judicial behavior.<sup>4</sup> Even as the court reform discussion no longer occupies center stage in American political debate, the big risk is that progressives will fail to further clarify options, either because of quick settlement on one kind of reform or the complacent relief of a few non-disastrous outcomes. But an emergency that breeds mistakes could require them to choose.

The basic purpose of this Article is to counteract this risk. It reconsiders the criteria of reform, not with the assumption that the goal is relegitimizing the Supreme Court, but with the necessity of progressive transformation of the country in mind. What conditions would the country have to obtain for that political development to occur is the question that matters, and answers about the Supreme Court follow from it. In reaching those answers, progressives should ignore criteria that preserve national stasis, which they understandably reject, and avoid old errors in their relationship to judicial power, which they tried at their last moment of political opportunity in the 1930s.

This Article engages in a more serious comparison and contrast of the widest range of imaginable statutory reforms under our current constitutional regime.<sup>5</sup> These include balancing the Supreme Court between parties, turning to expert or merit selection, using lotteries to compose decision-making panels from larger pools, passing jurisdiction-stripping statutes (potentially ones introducing alternative executive branch adjudication), institutionalizing higher voting thresholds for judicial decisions, or opening the possibility of their legislative override—by classifying them according to the ends they might advance. Our fundamental goal is to gain clarity on the disparate *ends* of reform and to offer a fundamental distinction among two kinds of imaginable *means*. Canvassing criteria for reform more explicitly than in prior scholarship, the Article also distinguishes between two fundamentally different reform options: mechanisms that alter personnel and mechanisms that disempower the institution. Deprivileging court-packing, while also avoiding the elaboration of some uniquely virtuous alternative, our proposal is that examination of two very different basic models of Supreme Court reform is the most essential task for the moment.

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of court-packing as a credible threat. He acknowledged that the essay would have been “extraordinarily radical” only “two years ago.” Though he presented court-packing as the “least-bad option,” he mentioned no other institutional reform possibilities. Ian Millhiser, *Let’s Think About Court-Packing*, DEMOCRACY, Winter 2019, <https://democracyjournal.org/magazine/51/lets-think-about-court-packing-2/> [<https://perma.cc/5FUV-M478>]; see, e.g., IAN MILLHISER, INJUSTICES: THE SUPREME COURT’S HISTORY OF COMFORTING THE COMFORTABLE AND AFFLICING THE AFFLICTED (2015).

4. Henry Olsen, *Is John Roberts Trying to Save the Supreme Court from Democratic Packing?*, WASH. POST (June 30, 2020), <https://www.washingtonpost.com/opinions/2020/06/30/is-john-roberts-trying-save-supreme-court-democratic-packing/> [<https://perma.cc/R94N-ELEW>].

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

The last discussion of Supreme Court reform, climaxing in the emergency of the 1930s, is a cautionary tale more than an inspiring precedent.<sup>6</sup> Formally, Franklin Roosevelt *failed* in court reform, even while leaving a memory of his own solution—court-packing—as if it were the most viable choice now. But even more important, to the extent Roosevelt succeeded in shifting doctrine and personnel on the Supreme Court indirectly, he cast the die for long-term outcomes and raised the need for our own bout of reform. The lesson of the last reform era for our own is that we must democratize the Supreme Court.

For a while, judges empowered by traditions of judicial review resolved never to abuse their might, after the Supreme Court’s “switch in time” in 1937 removed it as an obstruction to majority rule.<sup>7</sup> But in the 1940s, judges returned to the fray of invalidating popular legislation for the sake of fundamental rights protection.<sup>8</sup> Justices began to break, sometimes with the best of intentions, their informal promise of the 1930s to get the Constitution out of the way of progressive majorities, so long as their acts were not irrational.<sup>9</sup> Notwithstanding the good work done by constitutionally empowered justices since, it should surprise no one that, as the Court has drifted inexorably right, it has exercised its institutional heft on behalf of the powerful and wealthy minorities progressives once hoped to put in their place.<sup>10</sup> Worse, the Court remains armed with weapons to oppose any progressive movement that seeks power to overcome legacies of economic and racial division, not to mention confront looming environmental catastrophe.

The problem is not just that Republican presidents, as a result of a series of contingencies since Richard Nixon’s appointments first began the Supreme Court’s move right, have gotten more than their share of high court justices.<sup>11</sup> Democrats, when they had their chance, replaced progressive jurists with centrist

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6. Todd N. Tucker, *In Defense of Court-Packing*, JACOBIN MAG. (June 28, 2018), <https://jacobinmag.com/2018/06/supreme-court-packing-fdr-justices-appointments> [<https://perma.cc/C3TD-ALBA>]. A separate essay could be written on false and true memories of court-packing in U.S. public discourse since 2018. See *infra* note 285.

7. See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 177–78* (1995).

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

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

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

11. As further detailed below, Republicans made ten appointments between 1969 and 1992 to none by Democrats, and then three since compared to four by the Democrats. If anything, the slide right has been surprisingly delayed, depending on the choices of select Republican appointees like David Souter and John Paul Stevens. Brandon Bartels, *It Took Conservatives Fifty Years to Get a Reliable Majority on the Supreme Court. Here Are 3 Reasons Why*, WASH. POST (June 29, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/29/it-took-conservatives-50-years-to-get-a-reliable-majority-on-the-supreme-court-here-are-3-reasons-why/> [<https://perma.cc/6KAL-3HNC>].

liberals, who often agreed over core economic and regulatory issues with their conservative opposite numbers, even as topics like abortion or affirmative action divided them.<sup>12</sup> Both parties, and the rival sets of judges, concurred more than they differed, above all about elevating the Supreme Court, even at the price of making judicial appointments national politics by other means.<sup>13</sup> As neoliberal centrism waxed and progressive coalitions waned, these developments seemed acceptable for a while. But by the standards of progressive ends, the Supreme Court never became much more than a sideshow about the avoidance of the most reactionary moves and preservation of the modestly beneficial precedents of the past. Sometimes it was coupled with a dream that someday the Supreme Court would return to a trajectory arrested decades before, without much reflection on why its contribution had been strictly limited in the first place.<sup>14</sup> But events since the financial crisis of 2008, and a generational revolt against the compromises of their elders, have provided our latest reminder that progress occurs through democratic victory, and democratic victory alone.

The consequence for the discussion of Supreme Court alternatives is straightforward. It must begin with how to diminish the institution's power in favor of popular majorities. Asking "how to save the Supreme Court" is asking the wrong question.<sup>15</sup> Saving the Supreme Court is not a desirable goal; getting it out of the way of progressive reform is. The New Deal court reform had the chance to counteract the assumption that judicial power is hardwired out of necessity or in principle into American politics, but the reform canonized it instead. The entire point of Supreme Court reform ought to be to avoid repeating that mistake.

Before launching into the discussion, it is worth clarifying the scope of our inquiry, which bears specifically on the Supreme Court's authority to invalidate federal statutes on constitutional grounds. We leave open whether the arguments for reform that we survey apply at all, or apply differently, in lower courts or to executive action,<sup>16</sup> state law,<sup>17</sup> or ordinary statutory interpretation.<sup>18</sup> We consider these only to imagine how different answers to these questions might

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12. See, e.g., Lee Epstein, William M. Landes & Richard A. Posner, *When It Comes to Business, the Right and Left Sides of the Court Agree*, 54 WASH. U. J. L. & POL'Y 33 (2017).

13. See *infra* Section I.A.

14. See, e.g., THE CONSTITUTION IN 2020 (Jack M. Balkin & Reva B. Siegel eds., 2012).

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

16. See, e.g., Aziz Huq, *Revive Congressional Authority over Courts*, DEMOCRACY, Winter 2016, <https://democracyjournal.org/magazine/39/revive-congressional-authority-over-courts/> [<https://perma.cc/M3R4-EHML>] (emphasizing the importance of judicial implementation of the "constitutional rights of particular citizens").

17. See, e.g., OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295–96 (1921) ("I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as the laws of the several States.").

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

affect the design of different reform proposals.<sup>19</sup> For now, however, we develop our arguments for an analytical distinction between two basic types of proposals in support of the goal of disempowering the Supreme Court on democratic grounds and for the paradigm case of the institution's heaviest weaponry of constitutional invalidation of federal legislation—the weaponry most dangerous to the making of a progressive future.

This Article begins in Part I with a defense of a progressive political frame for Supreme Court reform, rather than with the goal of restoring the status quo ante Justices Barrett, Gorsuch, and Kavanaugh as if it were defensible or tolerable. Part II offers the central distinction between personnel reforms, which confirm Supreme Court power while pursuing ends like institutional legitimacy, rather than progressive change, and disempowering reforms that meet the contemporary need. Part III considers examples of how the imaginable suite of reforms work and whether they plausibly advance potential ends of reform. After examining their desirability, Part IV turns to the legality and political feasibility of the reforms. We conclude that disempowering reforms are not just normatively superior, but no less feasible to imagine putting into practice or surviving legal challenge.

## I.

### POLITICAL REFORM AND THE SUPREME COURT

The immediate context for the Supreme Court reform debate was a series of successful confirmations of President Donald Trump nominations over 2016 to 2020—most gallingly for Democrats, Barrett's replacement of Ginsburg, which shifted the conservative majority on the bench in an even more conservative direction. And of course, these events only capped a longstanding project to entrench power in the federal judiciary.<sup>20</sup> But the larger and long-term context for considering Supreme Court reform is a broader agenda of progressive change in the United States that emerged in the last decade, especially after the financial crisis of 2008 to 2009.<sup>21</sup> Over these years, a larger body of progressives than at any point since the New Deal have begun to conclude that their ideals are on a collision course with institutional constraints of the existing political system.<sup>22</sup> And that includes the Supreme Court as final arbiter of vast swathes of policy. As a result, more and more insist, the power of the Supreme Court to constrain and set policymaking requires a second look.<sup>23</sup>

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

20. See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

21. See, e.g., Peter Beinart, *Will the Left Go Too Far?*, ATLANTIC (Dec. 2018), <https://www.theatlantic.com/magazine/archive/2018/12/democratic-party-moves-left/573946/> [<https://perma.cc/VS5X-YGHC>].

22. See *infra* Part I.A.

23. See Larry Kramer, *The Supreme Court's Power Has Become Excessive*, N.Y. TIMES (July 6, 2015), <https://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/the->

The 6-3 conservative majority at the end of Trump's presidency crystallized the fear among liberals that the Supreme Court not only actively threatens democratic participation already, but would endanger any democratizing agenda in the future.<sup>24</sup> The situation required a fundamental reckoning. As for progressive legislation associated with the "Green New Deal," while there is not yet support in Congress for the agenda, fears are even more intense of various kinds of challenge in the courts, especially now that conservatives have accumulated six votes at the Supreme Court and stacked the bench as part of a longstanding project to entrench power in the federal judiciary.<sup>25</sup> Notwithstanding the considerable body of scholarship on the political foundations of judicial authority,<sup>26</sup> progressives are not wrong to fear that the threat of delay or obstruction that an empowered and reactionary Supreme Court will pose to their democratizing and other legislative designs is very real.

For most of post-World War II history, progressives united around Supreme Court empowerment.<sup>27</sup> The idea of Supreme Court reform found support, if anywhere, on the political right.<sup>28</sup> The novelty of our current situation is that, as both the Supreme Court and the federal judiciary have become more conservative, arguments for Supreme Court reform once almost entirely restricted to the right have slowly been abandoned there and have begun to be adopted by the left. If anything, the surprise is how long the shift has taken.

The reasons for the prioritization of a progressive Supreme Court reform agenda are anything but internal to the institution itself. According to an alternative view, the institution is merely weathering a period of declining legitimacy, which it is worth shoring up in response.<sup>29</sup> By comparison, the

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supreme-courts-power-has-become-excessive [https://perma.cc/CQK5-ZCJU]; Doug Bandow, *Liberals Discover the Dangers of a Powerful Supreme Court*, AM. SPECTATOR (Oct. 16, 2018), <https://spectator.org/liberals-discover-the-dangers-of-a-powerful-supreme-court/> [https://perma.cc/T59B-E3HA].

24. See Michael J. Klarman, *The Degradation of Democracy—And the Court*, 134 HARV. L. REV. 1 (2020).

25. See, e.g., Matt Ford, *Would the Green New Deal Survive the Supreme Court?*, NEW REPUBLIC (Mar. 18, 2019), <https://newrepublic.com/article/153334/green-new-deal-survive-supreme-court> [https://perma.cc/2JLF-P4NU].

26. See *infra* note 276 for examples.

27. See, e.g., LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 13–164 (1996).

28. The most prominent example of right-wing denunciation of the Supreme Court is the Southern Manifesto in response to desegregation. See Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053 (2014). Another well-known example is the notorious *First Things* magazine symposium in response to continuing abortion protection. See *The End of Democracy?: The Judicial Usurpation of Politics*, FIRST THINGS, Nov. 1996, <https://www.firstthings.com/article/1996/11/the-end-of-democracy-the-judicial-usurpation-of-politics> [https://perma.cc/872R-DUSD].

29. See Amelia Thompson-DeVeaux & Oliver Roeder, *Is the Supreme Court Facing a Legitimacy Crisis?*, FIVETHIRTYEIGHT (Oct. 1, 2018), <https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis/> [https://perma.cc/NS9H-L9BJ]; Lawrence Weschler, *How the US Supreme Court Lost Its Legitimacy*, THE NATION (Sept. 17, 2018), <https://www.thenation.com/article/archive/how-the-us-supreme-court-lost-its-legitimacy/> [https://perma.cc/F9VP-CYK3]; Paul Waldman, *Yes, the Supreme Court Is Facing a Legitimacy Crisis. And We Know Exactly Whose Fault It Is*, WASH. POST (Sept. 24, 2018),



progressive reform frame for evaluating the Supreme Court holds that the problem is not, or not only, institutional capture by the right, which needs to be corrected for the Supreme Court to play a foreordained role. Rather, the problem is that the institution is undemocratic in role and output. Objections of contemporary progressives go to the heart of the function of a constitutional court in a democracy—and in contemporary American democracy in particular—which many progressives diagnose as beset by deep ills for which Supreme Court power is not set to be part of a cure.

How to characterize the situation has profound implications for what to do about it. Casting the emerging crisis as one of descriptive or “sociological” legitimacy, or a normative legitimacy afforded it as neutral arbiter putatively soaring about partisan conflict, suggests the remedy of *institutional relegitimation*.<sup>30</sup> But if it is a crisis brought on by its role or output, as the Court functions consistently within its long-term empowerment, then the remedy is not relegitimation but *institutional redefinition*. The choice of frame determines whether to put things back the way they were or to question the way they have consistently been.

To put it in another fashion, the framework for Supreme Court reform has to reflect a concern not so much for *descriptive* as for *democratic* legitimacy—the kind that matters most.<sup>31</sup> From this perspective, Supreme Court reform might matter even if its institutional standing were not eroding as a sociological matter, or if its output were not increasingly regarded as normatively illegitimate—a betrayal of its role as neutral guardian of constitutional values and the rule of law. After all, democratic self-government is the coin of the realm in a democracy. If that is the standard that counts, the role of any institution—including an apex court in a democratic system—is necessarily left open. Indeed, for the progressive agenda to be enacted by democratic forces, it may require further undermining the legitimacy of existing norms, practices, and institutions—the Supreme Court prominently among them—rather than shoring it up.

#### A. Present Discontents

The blocked nomination of Merrick Garland and the confirmation of Neil Gorsuch after the death of Justice Antonin Scalia in February 2016—and then

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<https://www.washingtonpost.com/blogs/plum-line/wp/2018/09/24/yes-the-supreme-court-is-facing-a-legitimacy-crisis-and-we-know-exactly-whose-fault-it-is/> [https://perma.cc/PA5Q-7VDG].

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

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

Brett Kavanaugh's divisive confirmation in early fall 2018—mainstreamed Supreme Court reform among progressive activists.<sup>32</sup> Even so, it was no comparison to the centrality of Supreme Court reform discourse during the time between Ruth Bader Ginsburg's death in September 2020 and the presidential election seven weeks later.<sup>33</sup> The earlier breakdown of the confirmation process after the failed appointment of Robert Bork in the 1980s raised intermittent calls for term limitation to avoid the repeated national dramas of Senate hearings and mobilization prior to votes.<sup>34</sup> But only the new events—and evolution of the Republican Party and the election of Donald Trump with which they were bound up—made these calls begin to seem less theoretical and inspired an expansion of reform proposals beyond the tried and true initiative of term limitation. Such schemes played a significant role in the Democratic party presidential nomination process.<sup>35</sup>

But there is no doubt that the biggest factor in the emergence of progressive skepticism towards the Supreme Court lay elsewhere. The skepticism was not just retrospective; rather, the emergence of a progressive left on the national stage with the breakthrough candidacy of Bernie Sanders for the Democratic party nomination in 2016 and the unexpected victory in a New York congressional race of Alexandria Ocasio-Cortez as a generational icon in 2018 opened up expectations of a progressive moment—however premature and postponed they now seem—at the end of Donald Trump's term in office like no other in a half century or more.<sup>36</sup> Progressive activists accused the American political system as sclerotic and vowed to overturn it, not least in view of pressing economic and environmental demands on hold for their lifetimes.<sup>37</sup>

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32. Fix the Court, a moderate advocacy group, dates to late 2014; Aaron Belkin launched what is now Take Back the Court (on the advisory board of which numerous law professors serve, including one author of the present Article) in October 2018. See Matthew Choi, *Meet the Man Trying to Convince America to Swell the Supreme Court*, POLITICO (Oct. 27, 2018), <https://www.politico.com/story/2018/10/27/supreme-court-packing-2020-election-943111> [<https://perma.cc/9DX7-BHXX>].

33. The intensity of debate during this pivotal seven-week period, capped by Biden's promise of the creation of commission to study the Supreme Court, will receive further analysis in our future publications, and is abbreviated here. For our contribution, see Ryan D. Doerfler & Samuel Moyn, *Making the Supreme Court Safe for Democracy*, NEW REPUBLIC (Oct. 13, 2020), <https://newrepublic.com/article/159710/supreme-court-reform-court-packing-diminish-power> [<https://perma.cc/7SJZ-BPTF>]. See also Ryan Doerfler, *The Supreme Court Rules Us. Here's How to Curb Its Power*, WASH. POST. (Sept. 29, 2020), <https://www.washingtonpost.com/outlook/2020/09/29/supreme-court-reform-packing-jurisdiction-democracy/> [<https://perma.cc/M7C3-QTCJ>].

34. See *infra* note 101 for examples.

35. See Pema Levy, *How Court-Packing Went from a Fringe Idea to a Serious Democratic Proposal*, MOTHER JONES (Mar. 22, 2019), <https://www.motherjones.com/politics/2019/03/court-packing-2020/> [<https://perma.cc/9TKP-2KUG>].

36. See, e.g., Ben Judah, *The Millennial Left Is Tired of Waiting*, ATLANTIC (July 25, 2019), <https://www.theatlantic.com/ideas/archive/2019/07/democrats-are-experiencing-clash-generations/594808/> [<https://perma.cc/T7HV-Y4EY>].

37. See, e.g., KATE ARONOFF, ALYSSA BATTISTONI, DANIEL ALDANA COHEN & THEA RIOFRANCOS, *A PLANET TO WIN: WHY WE NEED A GREEN NEW DEAL* (2019).

As progressives gained strength in the country and in Congress and called for a “Green New Deal” to integrate new priorities connecting environmental to working-class politics, it was easy to foresee that the Supreme Court might stand in the way. American progressives had to think back, not to the 1960s—the last great era of progressive legislation, but when the Supreme Court worked in reformist tandem with the political branches—but to the 1930s for the situation they believed they faced. How would they respond if the Supreme Court blocked a democratizing congressional bill popularly known as H.R. 1 or a Green New Deal statute?<sup>38</sup>

Under the prior Democratic administration of Barack Obama, no one on his side of the political aisle anticipated the threat the Supreme Court posed to the signature domestic legislative reform, health care reform. Indeed, it was shocking to most when that threat emerged, modest though it was.<sup>39</sup> This fact redoubled the fears of the role the Supreme Court might play if Congress attempted even more ambitious legislative enactments.

It also mattered enormously that the academic left followed the reawakening of the political left in the country. For decades, the almost universal consensus of progressives had been to treat the Supreme Court as a pivotal actor in progressive change. Nostalgia for a moment of judicial activism for some progressive causes remained orthodox far longer than the moment itself lasted. A reawakened academic left, by contrast to earlier ones, prioritized economic and environmental structural justice.<sup>40</sup> Given their priorities, it seemed decreasingly plausible to justify Supreme Court power, since its jurisprudence mostly adhered to economically neoliberal or socially conservative outcomes, even integrating them into the time-honored protection of rights like freedom of speech or of religious exercise.<sup>41</sup> The very rights protection academic liberals had been most identified with defending now turned out to be the doctrinal Trojan horse for the structural empowerment of the wealthy. New voices rose to

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38. See, e.g., TAKE BACK THE COURT, THE SUPREME COURT WOULD LIKELY INVALIDATE H.R. 1 (2019), <https://static1.squarespace.com/static/5ce33e8da6bbec0001ea9543/t/5f61650a91030a588e451c88/1600218382757/Supreme+Court+Would+Likely+Invalidate+H.R.1.pdf> [https://perma.cc/N782-9J6R].

39. Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), <https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/> [https://perma.cc/X6LJ-Z4KG].

40. The Law and Political Economy network, formally launched in late 2017, is the best known such venture. See generally Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020).

41. See, e.g., Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016); Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161 (2018); Amy Kapczynski, *Free Speech, Incorporated*, BOS. REV. (Dec. 5, 2019), <http://bostonreview.net/law-justice/amy-kapczynski-free-speech-incorporated> [https://perma.cc/KLL8-9DHR]; Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241 (2020).

challenge the Supreme Court's doctrines in areas like First Amendment, as well as to reemphasize traditional liberal complaints in areas like campaign finance and voting rights.<sup>42</sup>

These developments scrambled the traditional picture in which the Supreme Court was treated idealistically by the left and skeptically by the right. Conservative skepticism towards the Supreme Court was a familiar fixture of American history since World War II, in response to decisions like *Brown v. Board of Education*<sup>43</sup> and *Roe v. Wade*<sup>44</sup> and reaching an apex when *Roe* failed to be overturned in the 1990s.<sup>45</sup> Conservative projects like originalism and textualism were the most notable conservative ventures to constrain constitutional interpretation as a mode of liberal power.<sup>46</sup> Some went further. Indeed, before and after World War II, conservatives reintroduced many of the institutional reforms this Article will survey, though progressives close to workers' movements in the late nineteenth and early twentieth centuries had initially proposed them.<sup>47</sup>

Ironically, the decades since Richard Nixon's presidency, during which both the federal judiciary and the Supreme Court moved right, did not incite Democrats to embrace institutional reform. Though they did expand the federal judiciary under President Jimmy Carter, Democrats did not support Supreme Court reform initiatives, even as Republicans enjoyed greater and greater success in appointing judicial personnel, especially at the level of the Supreme Court.<sup>48</sup> By our calculation, Republicans have held the presidency since Richard Nixon's election in 1968 eight of fourteen terms, and they filled a whopping sixteen of twenty openings on the Court. Before the events following Ruth Bader Ginsburg's death and the rushed confirmation of Amy Coney Barret to replace her, however, only the climactic appointment of Neil Gorsuch, followed quickly by Brett Kavanaugh's confirmation to replace Anthony Kennedy after a

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42. See Kapczynski, *supra* note 41; Purdy, *supra* note 41; Shanor, *supra* note 41.

43. 347 U.S. 483 (1954).

44. 410 U.S. 113 (1973).

45. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (declining to overrule *Roe* though altering its framework to allow more state regulation of abortion).

46. See, e.g., Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009).

47. Though it is not our purpose here to provide a full-scale survey of Supreme Court reform between the early twentieth and early twenty-first centuries, examples of earlier democratizing proposals from both left and right include Idaho Senator William Borah's proposal of a supermajority rule on the Supreme Court, and Wisconsin Senator Robert LaFollette's legislative override scheme, in addition to Franklin Roosevelt's court-packing attempt; more recently, there were two dozen conservative jurisdiction stripping bills in the 1970s and 1980s. On progressives in the early twentieth century, see WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937*, at 193–232 (1994). On jurisdiction stripping precedents, see Travis Christopher Barham, *Congress Gave and Congress Hath Taken Away: Jurisdiction Withdrawal and the Constitution*, 62 WASH. & LEE L. REV. 1139, 1143–44 (2005).

48. Jess Bravin, *Conservative-Dominated Supreme Court Fulfills Nixon-Era Dream*, WALL ST. J. (Oct. 9, 2018), <https://www.wsj.com/articles/conservative-dominated-supreme-court-fulfills-nixon-era-dream-1539077401> [<https://perma.cc/CRB8-F4D3>].

monumental partisan contest, catalyzed a significant Supreme Court reform debate.

### B. The “Legitimacy” Frame

According to the most popular scholarly frame for coming to grips with the situation, the problem with the Supreme Court is that it is suffering from a bout of institutional delegitimation.<sup>49</sup> Not surprisingly, across the period, constitutional theory discovered the concept of legitimacy. It deployed this concept to evaluate not the longstanding role of the Supreme Court in the American political system, but rather the recent if slow erosion of its standing—not least among progressive legal elites themselves. Whether for the American people or scholarly observers, the legitimacy frame is about restoration of the Supreme Court to its prior high regard for fair-dealing neutrality.

It is true, of course, that the Supreme Court earns decreasing respect from the American people, as historical polling suggests.<sup>50</sup> In 2014, Gallup polls suggested that popular confidence in the Supreme Court had reached an all-time low.<sup>51</sup> Some data suggest that those who say they have a “great deal” or “quite a lot” of confidence in the Supreme Court have been cut nearly in half in the last quarter-century.<sup>52</sup>

Others focus on the angry politics of judicial nomination as an index of a crisis of legitimation around the federal judiciary in general or the Supreme Court in particular.<sup>53</sup> While raucous nomination fights were by no means absent from earlier American history, the conventional story is that the 1987 treatment of Robert Bork to fill Lewis Powell’s seat vastly transformed practice, making each nomination—particularly when liberals perceived the Court to be on the brink of right-wing capture—come nearer and nearer to Armageddon.<sup>54</sup> And to add Machiavellianism to the melodrama of each confirmation struggle, Senate majority leader Mitch McConnell’s decision *not* to consider President Obama’s

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49. See, e.g., Dawn E. Johnsen, *The Supreme Court’s Legitimacy Crisis and Constitutional Democracy’s Future*, in *DEMOCRACY UNCHAINED: HOW TO REBUILD GOVERNMENT FOR THE PEOPLE* 196 (2020); Michael Tomasky, *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/27UV-E6LD>].

50. For a useful survey, see Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. ECON. PERSPS. 119, 121–22 (2021).

51. Justin McCarthy, *Americans Losing Confidence in All Branches of U.S. Gov’t*, GALLUP (June 30, 2014), <https://news.gallup.com/poll/171992/americans-losing-confidence-branches-gov.aspx> [<https://perma.cc/L4LM-UEQM>].

52. *Id.*

53. See, e.g., STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994).

54. See, e.g., Nina Totenberg, *Robert Bork’s Supreme Court Nomination ‘Changed Everything, Maybe Forever,’* NPR (Dec. 19, 2012), <https://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever> [<https://perma.cc/H37M-3RME>]; CARL HULSE, *CONFIRMATION BIAS: INSIDE WASHINGTON’S WAR OVER THE SUPREME COURT, FROM SCALIA’S DEATH TO JUSTICE KAVANAUGH* (2019).

nomination of Judge Garland in the President's lame-duck year was widely seen as an affront to applicable norms, denying Democrats a seat that should have been theirs.<sup>55</sup> That event, cast as anomalous and singular, cried out for restitution.

In other accounts, the general or specific skullduggery around appointments reflects a broader pattern of partisanship from which the Supreme Court ought to remain entirely immune or more insulated. One of the most influential assessments for why popular trust in the Supreme Court is falling, or combat over appointment is more intense, is that the Court is becoming a partisan institution.<sup>56</sup>

Data do overwhelmingly indicate that partisan voting across the federal judiciary has increased, especially on nationally contentious matters.<sup>57</sup> The assortment of justices in divided cases and the rising number of 5-4 decisions are taken to symbolize the unfortunate conversion of prior neutral "umpiring" into partisan choice. Conservatives, far more regularly than they have invoked the need for Supreme Court reform, have treated Republican appointees from Justice David Souter to Justice Neil Gorsuch as traitors—even as liberals take their heresies as proof of impartiality,<sup>58</sup> only to wonder why their own perceived allies like Justice Elena Kagan might be playing a dangerous game in joining opinions authored by conservative justices.<sup>59</sup> Further, the grooming of candidates for judicial and Supreme Court appointment, most notoriously on the right but also

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55. See, e.g., Carl Hulse, *The Shifting Standards of Mitch McConnell*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/2019/05/29/us/politics/mitch-mcconnell-supreme-court-trump.html> [https://perma.cc/N9N3-YUT6]; Ryan Bort, *Of Course Mitch McConnell Is Full of Shit*, ROLLING STONE (May 29, 2019), <https://www.rollingstone.com/politics/politics-news/mitch-mcconnell-senate-supreme-court-confirmation-merrick-garland-841366/> [https://perma.cc/S3C3-ZUJP]; Robert Schlesinger, *Donald Trump Has Done Less to Destroy Democratic Norms Than Mitch McConnell*, NBC NEWS (May 29, 2019), <https://www.nbcnews.com/think/opinion/donald-trump-has-done-less-destroy-democratic-norms-mitch-mcconnell-ncna1011451> [https://perma.cc/PZ29-9HFX].

56. See, e.g., Carl Hulse, *Political Polarization Takes Hold of the Supreme Court*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/us/politics/political-polarization-supreme-court.html> [https://perma.cc/B8VD-4Q2W]; John Fabian Witt, *How the Republican Party Took Over the Supreme Court*, NEW REPUBLIC (Apr. 7, 2020), <https://newrepublic.com/article/156855/republican-party-took-supreme-court> [https://perma.cc/7HCY-NXAW].

57. See, e.g., Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301 (2017) (measuring voting patterns in Supreme Court justices and finding empirical increases in polarization); NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* (2019) (mounting data to tell the story of how party polarization turned the Supreme Court into a partisan institution).

58. See, e.g., Ezra Ishmael Young, *Bostock Is a Textualist Triumph*, JURIST (June 25, 2020), <https://www.jurist.org/commentary/2020/06/ezra-young-bostock-textualist-triumph/> [https://perma.cc/XS58-6SEY] (noting that some on the right "decr[ie]d Gorsuch as a turncoat"); Matt Ford, *Neil Gorsuch Just Upended the Conservative Legal Project*, NEW REPUBLIC (June 15, 2020), <https://newrepublic.com/article/157418/neil-gorsuch-lgbtq-rights-conservatives> [https://perma.cc/EB4H-RA2B].

59. See, e.g., Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271 (2020) (analyzing and criticizing a pattern of more centrist justices joining right-wing majorities in one doctrinal area).

on the left, has increased the sense that judges are on teams and courts just another arena for partisan encounter.<sup>60</sup>

Analysts have added to the polarization of the Supreme Court the factor of an aging judiciary to explain its declining respect.<sup>61</sup> Extensions of the lifespan have driven not only calls for term limitation in particular,<sup>62</sup> but the sense that the cyclical replacement of personnel is more and more fraught precisely because it is so rare, intensifying partisan engagement with the judiciary.<sup>63</sup> Furthermore, as the average age of the judiciary rises, accusations that decisions are out of touch, or even represent a form of gerontocratic rule, multiply.<sup>64</sup>

The trouble with the different forms of the legitimacy frame is that they assume that some form of judicial empowerment to decide major issues of national policy ought to be a given and that *something else* has gone wrong. They lead to worries of a “legitimacy dilemma” in which justices tasked to say what the law is have to play politics to restore a lost standing.<sup>65</sup> Indeed, the legitimacy frame suggests a restoration of the status quo ante lost because of some combination of aging justices, bloody confirmation fights, or polarized decision-making. The progressive frame increasingly insists that it is the undemocratic credentials and the undemocratic output of the Supreme Court, or both, that need to be placed in question.

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60. See Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> [<https://perma.cc/63J4-8BNQ>]; Carl Hulse, *Liberals Begin Lining up Young Judges for a Post-Trump Surge*, N.Y. TIMES (June 8, 2019), <https://www.nytimes.com/2019/06/08/us/politics/liberals-courts-trump.html> [<https://perma.cc/8MK4-242L>].

61. See David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000); David J. Garrow, *Four Supreme Court Justices Are Older than 75. Is That a Problem?*, L.A. TIMES (Feb. 2, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-0202-garrow-aging-judiciary-20160202-story.html> [<https://perma.cc/C9KP-29B4>].

62. For earlier examples, see *infra*, note 101. For recent examples, see Norm Ornstein, *Why the Supreme Court Needs Term Limits*, ATLANTIC (May 22, 2014), <https://www.theatlantic.com/politics/archive/2014/05/its-time-for-term-limits-for-the-supreme-court/371415/> [<https://perma.cc/TA2B-H33U>]; Ben Feuer, *Why the Supreme Court Needs 18-Year Term Limits*, L.A. TIMES (July 18, 2017), <https://www.latimes.com/opinion/op-ed/la-oe-feuer-supreme-court-term-limits-anthony-kennedy-20170718-story.html> [<https://perma.cc/6AAZ-XRU4>]; COMM’N ON THE PRAC. OF DEMOCRATIC CITIZENSHIP, OUR COMMON PURPOSE: REINVENTING AMERICAN DEMOCRACY FOR THE 21ST CENTURY 6 (2020), [https://www.amacad.org/sites/default/files/publication/downloads/2020-Democratic-Citizenship\\_Our-Common-Purpose\\_0.pdf](https://www.amacad.org/sites/default/files/publication/downloads/2020-Democratic-Citizenship_Our-Common-Purpose_0.pdf) [<https://perma.cc/28ZC-ARJ7>] (recommending eighteen-year terms of Supreme Court justices with staggered appointments to allow one nomination every two years).

63. See Linda Greenhouse, *How Long Is Too Long for the Court’s Justices?*, N.Y. TIMES (Jan. 16, 2005), <https://www.nytimes.com/2005/01/16/weekinreview/how-long-is-too-long-for-the-courts-justices.html> [<https://perma.cc/L5B5-KP6T>].

64. Steven G. Calabresi & James Lindgren, *Supreme Gerontocracy*, WALL ST. J. (Apr. 8, 2005), <https://www.wsj.com/articles/SB111292087188301557> [<https://perma.cc/PT6S-GFXT>].

65. Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)).

### C. *The Progressive Frame*

The progressive frame begins with a sense that the Supreme Court is not a separate problem from the crisis and deadlock of the American political system. This is especially in view of a rising majority abetted by demographic and generational change—with more and more Americans open to national renovation.<sup>66</sup> The Supreme Court is part of the crisis and deadlock, to be reevaluated rather than restored in its basic functions if progressive reform is to occur.

Progressive politics necessarily sweep the basic institutional role of the Supreme Court into play. Not surprisingly, historians have shown that the last progressive wave in American politics starting in the late nineteenth century comparably eroded the institutional standing of the Supreme Court and generated essentially all of the institutional reform proposals currently under discussion.<sup>67</sup> That wave also generated more basic skepticism towards the Constitution itself, leading to waves of amendment proposals, and democracy-friendly doctrinal suggestions, quite apart from the institutional ones under consideration here.<sup>68</sup>

The progressive frame is not focused separately on Supreme Court reform as if the erosion of its legitimacy were a standalone or technical problem. It is obvious that the only pathway for democratizing reforms, as well as the Green New Deal and other economic and environmental policy change, is legislative rather than judicial. Progressives have registered that the central reason for critique is a rising tendency of countermobilization by business interests, reminiscent of the backlash against the New Deal.<sup>69</sup> And it is easily foreseeable that this countermobilization will continue to turn to judicial obstruction of legislative ends and a reinvention of constitutional rights and constitutional equal protection to justify that obstruction legally. In particular, progressives have begun regularly complaining that the Court has transformed the First Amendment, if it ever was a shield for vulnerable minorities, into a sword for powerful interests to challenge popular legislation in areas like campaign finance and labor law.<sup>70</sup> The commercial speech doctrine coupled with the protection of

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66. See, e.g., Niall Ferguson & Eyck Freyermann, *The Coming Generation War*, ATLANTIC (May 6, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/coming-generation-war/588670/> [<https://perma.cc/HC2A-QGX7>]; David Byler, *Millennials Could Push American Politics to the Left—or Totally Upend Them*, WASH. POST (May 22, 2019), <https://www.washingtonpost.com/opinions/2019/05/22/millennials-could-push-american-politics-left-or-totally-upend-them/> [<https://perma.cc/KBR9-HE8B>]; Paul Waldman, *Is the Emerging Democratic Majority Finally Coming to Pass?*, AM. PROSPECT (Aug. 11, 2019), <https://prospect.org/power/emerging-democratic-majority-finally-coming-pass/> [<https://perma.cc/6PYT-E9VC>].

67. See Aziz Rana, *The Rise of the Constitution* (unpublished manuscript) (on file with authors).

68. *Id.*

69. See Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); Kim Phillips-Fein, *Fear and Loathing of the Green New Deal*, NEW REPUBLIC (May 29, 2019), <https://newrepublic.com/article/153966/fear-loathing-green-new-deal> [<https://perma.cc/47RG-3ZSF>].

70. See *supra* note 41.



money as speech in electioneering<sup>71</sup> and opt-out rights from unionization<sup>72</sup> as speech are prominent examples of what Justice Kagan dubbed a “weaponizing” of the Amendment.<sup>73</sup> Aside from the “Lochnerized” First Amendment, invocations of the Equal Protection Clause to protect the powerful rather than the weak<sup>74</sup> and increasing skepticism about the regulatory state, both under Congress’s power to delegate in general<sup>75</sup> and agency rulemaking discretion in particular,<sup>76</sup> have become par for the course.

Even more important, it is easy to anticipate that this syndrome would only worsen, if—as expected and hoped—the political branches diverged further and further from the judicial branch, which in turn became a stronghold of resistance against progressive legislative ambition. This scenario is hardly guaranteed, of course. But the fact that it has seemed more and more plausible as 2018 changed control of the House of Representatives and 2020 loomed (with hopes for a Democrat in the White House and perhaps even the Senate in new hands) has been the single most important driver of Supreme Court reform debate. The likely obstructionism that new law might face understandably alerts progressives to the threat the federal judiciary would pose to any of their legislative ends.<sup>77</sup>

Rather than the aging and polarization of the federal judiciary, or conservative capture, then, the fundamental reason progressives have for Supreme Court reform is that the judiciary increasingly poses a threat to their legislative agenda. Even the stress on polarization as a reason for Supreme Court reform fails to capture the deeper fear of the judiciary as a check on progressive legislation, for which the remedy was not obviously less polarization on the bench.<sup>78</sup>

Finally, the progressive frame revisits the allocation of power away from the more democratically legitimate political branches in the first place, rather

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71. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

72. See *Janus v. Am. Fed’n of State, Cnty., and Mun. Emps.*, 138 S. Ct. 2448 (2018).

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

74. See, e.g., Theodore R. Johnson, *How Conservatives Turned the ‘Color-Blind Constitution’ Against Racial Progress*, ATLANTIC (Nov. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/colorblind-constitution/602221/> [<https://perma.cc/245W-TZRH>].

75. See *Gundy v. United States*, 139 S. Ct. 2116 (2019).

76. See *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), and the developments described in Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015) and Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2016 SUP. CT. REV. 41 (2016). On the specific threat of the abandonment of *Chevron* deference, see *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), and Craig Green, *Chevron Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654 (2020).

77. See, e.g., Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), <http://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy> [<https://perma.cc/6V66-R7JB>].

78. See, e.g., Samuel Moyn, *Stop Worrying About Kavanaugh, Liberals. Start Winning the Political Argument*, WASH. POST (Aug. 8, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2018/08/08/stop-worrying-about-kavanaugh-liberals-start-winning-the-political-argument/> [<https://perma.cc/J76A-LNGQ>].

than merely identifying causes for its increasing abuse.<sup>79</sup> Beyond the speculation about the erosion of descriptive legitimacy of the Supreme Court, the progressive frame challenges the background assumption that the Supreme Court achieves normative legitimacy when it engages in apolitical or neutral exercise of its power, rather than the amount of power consistent with democratic values. Its frame points in the direction not of relegitimizing but reallocating judicial power.

It was hard to miss that conservative justices—in a series of high-profile dissents in areas like abortion rights<sup>80</sup> and same-sex marriage<sup>81</sup>—were allowed to associate themselves with the normative value of democratic choice, at least when they did not have enough votes on the bench. More important, progressives increasingly wanted to adopt the case for the democratic legitimation of policymaking for intrinsic reasons, and not merely for the instrumental ones that they risked ceding the aura of popular legitimation to their political enemies.

Of course, it was no accident that demographic and generational change left progressives more optimistic about change through the political branches, even as conservatives who had made the case for democratic self-rule were happier and happier to embrace judicial power now that they could exercise it. But this very development promised to save progressives from the very uncomfortable posture of seeking outcomes not by arguing before fellow citizens and winning elections, but by judicial means they then had to struggle to legitimate democratically. A progressive frame for Supreme Court reform augurs plans to achieve progressive outcomes by democratic means, and appeals to democratic legitimation not to save the Supreme Court, but to put it in its place.

## II.

### TWO TYPES OF REFORM

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

The first type, which we call “personnel” reforms, propose to alter the Supreme Court’s partisan or ideological composition. Such reforms seemingly promote different and potentially incompatible values—court-packing, for instance, advances majoritarianism (at least in the short term), whereas partisan balance requirements aim at moderation or depoliticization. All these reforms

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79. See, e.g., Lawrence Goldstone, *How to Fix the Supreme Court: Weaken It*, NEW REPUBLIC (Oct. 16, 2018), <https://newrepublic.com/article/151728/fix-supreme-court-weaken> [<https://perma.cc/MB85-DY2D>]; Doerfler, *supra* note 33.

80. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part and dissenting in part).

81. See *Obergefell v. Hodges*, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting).

nonetheless try to improve our situation by adjusting the Supreme Court's membership, either immediately or across time, though they intervene in different ways (to regulate the source of members, the composition of courts or panels, or the length of service, etc.). Attending only to *who* sits on the bench, personnel reforms take for granted that the Supreme Court wields tremendous policymaking authority. The goal of such reforms is thus, for progressives, to wrest that authority away from conservatives.

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

#### A. Personnel Reforms

Court reform discourse has revolved substantially around the slogan “pack the courts” owing to its boldness and historical pedigree.<sup>82</sup> Invoking President Franklin Roosevelt's infamous proposal from the mid-1930s, proponents of court-packing insist that Democrats, upon gaining control of both chambers of Congress and the White House, increase by statute the size of the Supreme Court and the federal judiciary more generally. After creating sufficiently many vacancies, Democrats are then to fill those vacancies with ideologically aligned appointees.<sup>83</sup> In so doing, Democrats would thereby achieve effective control of the judiciary, both at the Supreme Court and below.

Among reform proposals, court-packing is uniquely polarizing because it is so nakedly partisan. Within our broader political culture, the judiciary is understood, at least aspirationally, as insulated from partisan politics. By, in effect, proposing to determine legal outcomes by changing the judge, court-packing is thus scandalous to many, blatantly “politiciz[ing]” a branch whose

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82. See, e.g., Jamelle Bouie, *Mad About Kavanaugh and Gorsuch? The Best Way to Get Even Is to Pack the Court*, N.Y. TIMES (Sept. 17, 2019), <https://www.nytimes.com/2019/09/17/opinion/kavanaugh-trump-packing-court.html> [<https://perma.cc/SJ9F-YUY7>]; Moira Donegan, *Enough Playing Nice. It's Time to Pack the Courts*, GUARDIAN (Apr. 19, 2019), <https://www.theguardian.com/commentisfree/2019/apr/19/pack-the-courts-democrats-2020> [<https://perma.cc/8CS3-NUPC>]; Levy, *supra* note 35.

83. See, e.g., Millhiser, *supra* note 3.

role is to identify law.<sup>84</sup> Less idealistically (or naively), court-packing is perceived as a “nuclear” option, the exercise of which would set off a devastating partisan war.<sup>85</sup> As we explain in Parts III and IV, both of these objections to court-packing are contestable. For now, the claim is just that packing the court is a transparently partisan and hence controversial proposal.

The aim of the “pack the courts” movement, then, is to “take the courts back” from conservatives.<sup>86</sup> Accordingly, the problem that the Supreme Court poses, for these reformers, is that it is under conservative control. As we explain in Part III, there are various explanations as to *why* conservative control of the Supreme Court, and federal courts generally, might be a problem, ranging from unlawful or otherwise illegitimate acquisition to crudely pragmatic calculation. Regardless of motivation, however, the situation that court-packing proposals seek to remedy is that there are too many conservatives on the bench.

While calls to “pack the courts” increase the temperature, the diagnosis of the problem is roughly the same for several more modest reforms. Consider, for example, proposals to implement some type of Supreme Court panel system.<sup>87</sup> Following these proposals, the pool of Supreme Court justices would be expanded dramatically, typically by appointing federal court of appeals judges also as associate justices. The Supreme Court would then divide its caseload across multiple sittings, with a panel of justices selected from the broader pool, preparing for each sitting, hearing oral argument, and issuing opinions for the assigned batch of cases.

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84. Walter Shapiro, *The Case Against Court-Packing*, BRENNAN CTR. FOR JUST. (June 24, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/case-against-court-packing> [https://perma.cc/NSR3-LXQ2] (arguing that “if there is any hope to restore a less politicized judiciary,” it will not be achieved through the use of “bully tactics” like court-packing); see also Shoshana Weissmann & Anthony Marcum, *Packing the Supreme Court Won’t Work. Confirmation Hearings Are Already Highly Politicized*, USA TODAY (Apr. 4, 2019), <https://www.usatoday.com/story/opinion/2019/04/04/packing-supreme-court-would-further-politicize-column/3339783002/> [https://perma.cc/49Y3-BQ9D] (arguing that court-packing would “only subject nominees to a further politicized process lacking focus on what matters: How they see law”).

85. Dylan Matthews, *Court-Packing, Democrats’ Nuclear Option for the Supreme Court, Explained*, VOX (Sept. 22, 2020), <https://www.vox.com/2018/7/2/17513520/court-packing-explained-fdr-roosevelt-new-deal-democrats-supreme-court> [https://perma.cc/YT6L-WHFM]; see also Josh Blackman, *Don’t Try to Expand the Number of Supreme Court Justices*, NAT’L REV. (July 5, 2018), <https://www.nationalreview.com/2018/07/supreme-court-nominee-court-packing-not-feasible/> [https://perma.cc/FAK6-LB5V] (warning that court-packing could “trigger a downward spiral that irreparably alters how our polity views the judiciary”).

86. See Elie Mystal, *If We Don’t Reform the Supreme Court, Nothing Else Will Matter*, THE NATION (Feb. 28, 2020), <https://www.thenation.com/article/politics/reform-supreme-court/> [https://perma.cc/P2NA-XTUJ] (“We have too long tried to take on the court with the tools of law, but if the court is in fact a political branch, then instead of using the tools of law, you need to use the tools of politics.” (quoting Sean McElwee, the director of research and polling for Take Back the Court)).

87. See Epps & Sitaraman, *supra* note 15, at 181–84; Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts’ of Appeals Image*, 58 DUKE L.J. 1439, 1442 (2009).

Beyond these basic features, details of panel system proposals vary. For some, selection of individual panels would be truly random.<sup>88</sup> Others would impose partisan balance. One moderate variant envisions a one-time “court balancing” on the Supreme Court in particular, which corrects McConnell’s overreach while avoiding overreach of its own and the spiral of “court-packing.”<sup>89</sup> Another proposes that on a panel of nine justices, no more than five have been appointed by a president of the same political party.<sup>90</sup> Apart from selection, some proposals would treat panel decisions as final while others would allow for en banc review; for the latter, a significantly larger panel of justices could be called to review especially contentious or noteworthy cases.<sup>91</sup>

Unlike court-packing, proposals to implement a panel system have enjoyed meaningful institutional support. During the 2020 Democratic Presidential Primary, for instance, Bernie Sanders voiced enthusiasm for such a system.<sup>92</sup> Despite potential legal hurdles to implementation, panel systems are thus regarded by many as a more sensible, more legitimate approach to reform.<sup>93</sup> Notice, however, that the remedy—and, in turn, the problem—identified by panel reforms is roughly the same as with court-packing reforms. In both cases, the proposals in question would alter the partisan composition of the Supreme Court bench, thereby achieving judicial outcomes consistent with the new, preferred ideological distribution. Again, details vary as to which specific distribution is preferred—insofar as panels are selected at random, the ideological makeup of the Supreme Court would, across cases, mirror that of the federal appellate bench; by contrast, a partisan balance approach would ensure ideological moderation regardless of the composition below. Either way, though, it is implicit in such proposals that the problem with the Supreme Court has nothing to do with what the Supreme Court *does* and everything to do with the attitudes of the individuals who compose it.<sup>94</sup>

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88. See, e.g., Epps & Sitaraman, *supra* note 15, at 181–84.

89. See Ian Ayres & John Fabian Witt, *Democrats Need a Plan B for the Supreme Court. Here’s One Option*, WASH. POST (July 27, 2018), [https://www.washingtonpost.com/opinions/democrats-need-a-plan-b-for-the-supreme-court-heres-one-option/2018/07/27/4c77fd4e-91a6-11e8-b769-e3fff17f0689\\_story.html](https://www.washingtonpost.com/opinions/democrats-need-a-plan-b-for-the-supreme-court-heres-one-option/2018/07/27/4c77fd4e-91a6-11e8-b769-e3fff17f0689_story.html) [<https://perma.cc/QXE8-NTA4>] (proposing one-time appointment of a “liberal” justice and a “moderate” justice on an eighteen-year basis as “a temporary intervention tailored to rectify the Senate’s prior dereliction”).

90. See Epps & Sitaraman, *supra* note 15, at 181.

91. See George & Guthrie, *supra* note 87, at 1465–68.

92. See Ian Millhiser, *Bernie Sanders’s Radical Plan to Fix the Supreme Court*, VOX (Feb. 11, 2020), <https://www.vox.com/2020/2/11/21131583/bernie-sanders-supreme-court-rotation-lottery> [<https://perma.cc/P3XB-GA26>] (suggesting altering lifetime appointments by “rotat[ing] judges” off of the Supreme Court and onto lower federal courts).

93. See *id.*

94. More modestly, some have proposed using panel systems for components of the Supreme Court’s process. Melody Wang, for example, has advocated assigning the Court’s case selection to a panel of randomly selected appellate judges. See Melody Wang, *Don’t Let the Court Choose Its Cases*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-cases-certiorari.html> [<https://perma.cc/UF2K-DZCD>]. By taking docket control away from the justices, Wang reasons, those justices will be less able to carry out their preferred ideological agenda because they will less reliably hear cases that are useful vehicles. See *id.*

Partisan balance requirements work the same way. Separate from panel systems, several scholars have called for partisan balance on the Supreme Court in one form or other.<sup>95</sup> Sometimes the suggestion is, as mentioned above, that no more than five of nine justices be appointed by a president of the same party.<sup>96</sup> Other, more ambitious proposals call for an ideologically balanced court, reducing the Supreme Court to eight seats, for example, and assigning four of those seats to each major political party.<sup>97</sup> Whatever the form, partisan balance reforms plainly seek to impose on the Supreme Court a preferred ideological composition. As we discuss in Parts III and IV, the motivations for proposals of this sort vary somewhat, as do the criteria for determining what ideological composition is preferred. Still, with all partisan balance reforms, what the Supreme Court does stays the same. What changes is the ideology of the individuals who sit on the bench.

Proposals that some or all justices be selected by bipartisan or nonpartisan entities are remarkably similar. Daniel Epps and Ganesh Sitaraman, for example, propose a scheme in which each major political party would be allocated five seats on the Supreme Court, with those ten justices, in turn, selecting on a unanimous basis an additional five justices.<sup>98</sup> Setting aside obvious constitutional concerns, the aim of the unanimous appointment component of the proposal is openly to add an ideologically “centris[t]” block to the Supreme Court.<sup>99</sup> Similarly, suggestions that the President assent to “merit selection” of justices by a nonpartisan commission aim at a more ideologically moderate or nonideological Court.<sup>100</sup> Here as before, the solution is to select justices who think the right way.

Last, consider judicial term limits.<sup>101</sup> Among the reforms described thus far, term limits for Supreme Court justices enjoy the most popular support.<sup>102</sup> According to the most prominent version of this proposal, each of the nine justices would serve for a term of eighteen years, after which justices would

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95. See Epps & Sitaraman, *supra* note 15, at 181; Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547 (2018).

96. See Epps & Sitaraman, *supra* note 15, at 181.

97. See Segall, *supra* note 95, at 553–56.

98. See Epps & Sitaraman, *supra* note 15, at 193–200.

99. *Id.* at 193 (“The permanent, partisan-affiliated Justices would have to agree on colleagues who have a reputation for fairness, independence, and centrism . . .”).

100. See Theodore Voorhees, *It’s Time for Merit Selection of Supreme Court Justices*, 61 ABA J. 705 (1975).

101. See, e.g., Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769 (2006); Roger C. Cramton, *Reforming the Supreme Court*, 95 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); John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541 (1999).

102. See *New Poll Shows SCOTUS Term Limits Still Popular Across Party Lines*, FIX THE COURT (June 10, 2020), <https://fixthecourt.com/2020/06/latest-scotus-term-limits-poll/> [<https://perma.cc/BR4G-VE7R>] (finding that 77% of Americans support term limits for Supreme Court justices).

either take “senior” status or become judges on the courts of appeals.<sup>103</sup> Pursuant to this scheme, every president would have the opportunity to appoint two justices during his or her term (four if reelected). As a result, the influence of individual presidents would, we are told, no longer fluctuate depending upon the timing of retirements or deaths.<sup>104</sup> Presidents would also lose the ability to disproportionately entrench their preferences by appointing justices who are especially young.<sup>105</sup> Unlike court-packing, partisan balance requirements, or bipartisan or nonpartisan selection, judicial term limits would not promote any *specific* ideological spread. Rather, somewhat like panel systems, term limits would tether the Supreme Court’s partisan composition more directly and more evenly to electoral outcomes. For proponents of term limits, then, the problem with the Supreme Court is not that it has too many conservatives per se, but rather that that conservative tilt is disproportionate given electoral outcomes over the relevant period. In this respect, term limits are, unlike other personnel reforms, similar in spirit to the disempowering reforms we discuss below.<sup>106</sup>

### B. Disempowering Reforms

Proposals to strip courts of authority to hear certain cases are similar to court-packing in terms of aggressiveness. Such proposals vary mostly in scope. Some advocates recommend that Congress insulate specific legislation (e.g., the Green New Deal, H.R. 1, etc.) from judicial review.<sup>107</sup> Others urge that Congress strip courts of jurisdiction over hot-button issues such as abortion, affirmative action, or gun control.<sup>108</sup> Others still call for a much more sweeping ban, prohibiting courts from reviewing federal legislation for constitutionality at all.<sup>109</sup> In all of these cases, there is also the choice whether to strip jurisdiction from the U.S. Supreme Court, all federal courts, or state and federal courts

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103. See Cramton & Carrington, *supra* note 101, at 469.

104. See Cramton, *supra* note 101, at 1322.

105. See *id.*

106. The other partial exception is a partisan balance requirement coupled with an even number of Supreme Court justices. See Segall, *supra* note 95. This form of partisan balance would systematically produce indecision owed to the possibility of an evenly divided Court. See *id.* at 568. As a result, the Supreme Court would be prevented from deciding some “major questions,” though, without further reform, that power would be redistributed to the courts of appeals rather than the political branches. See *id.* Regardless, such a reform would disempower the Supreme Court mostly because it would increase the margin needed for a decision from one to two. This *voting rule* component of the reform is, however, obviously separable from the partisan balance component. See *infra* notes 156–158 and accompanying text (discussing voting rule reforms under the rubric of disempowering reforms). Related but separate, partisan balance is also sometimes defended on the ground that, even with an odd number of justices, such balance encourages judicial minimalism and so disempower the judiciary in effect. Based on recent historical examples, we are skeptical of this justification. See *infra* notes 162–165 and accompanying text.

107. See Barham, *supra* note 47, at 1143–47 (2005) (listing recent historical examples of jurisdiction-limiting bills).

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

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

alike.<sup>110</sup> As these options suggest, disempowering the Court through jurisdiction stripping could be brought about in piecemeal fashion or through comprehensive standalone legislation. While doing so, it could also channel jurisdiction to other Article III fora (as in the World War II price controls legislation that the Supreme Court blessed in *Yakus v. United States*)<sup>111</sup> or non-Article III fora (under powers implied in *Crowell v. Benson*).<sup>112</sup>

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

With jurisdiction stripping, by contrast, the fate of such controversial legislation would be determined by Congress and the President in September or April, and not by the Supreme Court in June.<sup>113</sup> By removing the judiciary from the process, jurisdiction-stripping legislation would thus tie policy outcomes exclusively to the most recent congressional and presidential elections. More still, the ideological makeup of policymaking officials would, at least with legislation, be determined by the electorate directly rather than being mediated in part by other elected officials. Assuming it were implemented by a progressive Congress and president, stripping courts of jurisdiction would favor progressive outcomes immediately. Over time, though, such reforms would have no predictable ideological valence—results would depend entirely and predictably upon elections.

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

111. 321 U.S. 414 (1944). *Yakus* dealt *inter alia* with the validity of a jurisdiction strip from the federal courts to protect administrative price fixing. The jurisdiction strip redirected any challenges to an Emergency Court of Appeals within the executive branch, with appeal possible, but leaving the Supreme Court the option to exercise certiorari. Congress's manipulation of the labor injunction in the early twentieth century offers a kindred example. *Yakus* did not resolve whether Congress could strip jurisdiction over constitutional challenges; see *infra* notes 252–255 and accompanying text.

112. 285 U.S. 22 (1932). Henry Hart famously dismissed as “simple mistake[.]” reading *Crowell* and only noting “what [the Court] said Congress could *not* do.” Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1374–75 (1953).

113. Here we assume that both state and federal courts are stripped of jurisdiction. The picture becomes more complicated if only the Supreme Court or only federal courts are stripped, as we discuss below. See *infra* note 154.



While jurisdiction stripping is the most familiar example, other reforms would also change the Supreme Court's authority rather than its partisan composition. Proposals to require a supermajority to declare federal legislation invalid would, for instance, preserve but severely constrain the Supreme Court's ability to intervene in federal policymaking.<sup>114</sup> Barring an unusually lopsided bench, the Supreme Court would remain able to intervene in cases of uncontroversial constitutional violation. In more closely contested cases, though, it would fall upon members of Congress and the President to decide what the Constitution permits. In this way, a supermajority rule for judicial review would effectively implement a Thayerian "clear error" standard for judicial review.<sup>115</sup> As with jurisdiction stripping, a supermajority requirement for judicial review would leave the ideological composition of the judiciary unchanged. A supermajority requirement would similarly have no apparent long-term partisan implications. Instead, such a requirement would transfer power from the judiciary to the political branches in uncertain constitutional space.<sup>116</sup> Here again, Congress would face the choice of whether to limit specific legislation to "clear error" review, or whether to insulate all federal legislation in a single go.

Finally, some disempowering reformers have proposed letting Congress override the Supreme Court's judgment<sup>117</sup> that federal legislation is unconstitutional with a majority or supermajority vote.<sup>118</sup> In its weaker form, a legislative override would leave contrary judicial judgments in place but treat those judgments as limited to the parties involved. In its stronger form, an override would negate contrary judicial judgments or at least preclude such judgments going forward. Over time, this reform has enjoyed support from

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114. See Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 894 (2003); Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73 (2003). Notably, Epps and Sitaraman also recommend a supermajority requirement alongside their various personnel reform proposals. See Epps & Sitaraman, note 15, at 190.

115. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); cf. Gersen & Vermeule, *supra* note 18 (proposing an analogous rule for review of administrative action for statutory compliance). As we explain below, supermajority rules are only a rough proxy for legal "clarity," but we think the ease of implementation justifies the rule, especially when "clarity" determinations will be predictably contested. See *infra*, note 149 and accompanying text.

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

117. Or, in the event the Supreme Court declines to review, Congress could override a lower court judgment.

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

figures as disparate as 1920s Progressives<sup>119</sup> and Robert Bork.<sup>120</sup> Setting aside its debatable constitutionality,<sup>121</sup> a legislative override would, like other disempowering reforms, transfer power from the judiciary to the other branches without apparent partisan consequence. Of the disempowering reforms considered here, a legislative override would transfer the least amount of power (especially in its supermajoritarian form since the Supreme Court rarely invalidates massively popular legislation). Structurally, though, it is the same as the other disempowering reforms, leaving the attitudes of the justices unaffected but constraining somewhat their ability to give those attitudes legal effect.<sup>122</sup>

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

### III.

#### DESIRABILITY

While reforms can be divided between personnel and disempowering, the justifications for both types of proposals vary widely. In this Section, we canvas the various normative arguments advanced by proponents of each type. As we show, both groups express concern with the Supreme Court's legitimacy, though

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119. See *supra* note 47.

120. See Robert H. Bork, *The End of Democracy? Our Judicial Oligarchy*, FIRST THINGS, Nov. 1996, <https://www.firstthings.com/article/1996/11/the-end-of-democracy-our-judicial-oligarchy> [<https://perma.cc/DNJ3-XF2Z>].

121. See *infra* notes 263–268 (noting potential conflict with Article III's grant of the “judicial power” to the federal judiciary).

122. More recently, some scholars have proposed reforms that are intended to function as disempowering reforms without formally withdrawing judicial authority. Aziz Huq and Darrell Miller, for example, have suggested including “poison pills” within controversial legislation that would trigger unacceptable policy changes if the legislation were declared unconstitutional. See Aziz Huq & Darrell A.H. Miller, *How to Safeguard Progressive Legislation Against the Supreme Court: Poison Pills*, WASH. POST (Oct. 26, 2020), <https://www.washingtonpost.com/outlook/2020/10/26/supreme-court-conservative-barrett-progressive-poison-pill> [<https://perma.cc/8AF7-WZKA>]; see also G. Michael Parsons, *Contingent Design & The Court Reform Debate*, 23 U. PA. J. CONST. L. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3770204](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3770204) [<https://perma.cc/P7KL-3V2L>] (similar); Keshav Poddar, *How Democrats Can Keep Their Policies Safe From This Supreme Court*, SLATE (Jan. 26, 2021), <https://slate.com/news-and-politics/2021/01/democrats-supreme-court-progressive-policies-protection.html> [<https://perma.cc/NN2F-66PH>] (recommending that progressives insulate legislation with fallback provisions that would trigger “more disruptive but clearly constitutional alternative polic[ies]”). While such proposals are intriguing, history shows that assessments of unacceptability are not always reliable. See Charles M. Blow, *Poison Pill Politics*, N.Y. TIMES (Mar. 1, 2013), <https://www.nytimes.com/2013/03/02/opinion/blow-the-sequester-poison-pill-politics.html> [<https://perma.cc/XYG3-ZNAC>] (“The ridiculous bill was designed as a poison pill, but Republicans popped it like a Pez.”).

how to conceive of legitimacy proves a fundamental source of dispute. Beyond that ideal, both personnel and disempowering reformers attend to the basic functionality of the Supreme Court and, more specifically, the process of appointing justices. Here again, we see disagreement, though this disagreement is more strategic than philosophical. Lastly, we take up arguments for reforms that are wholly pragmatic, which is to say, about which proposals would yield the best outcomes. In this instance, contestation largely arises over what is possible as well as how bad the current situation is.

#### A. Neutrality

Within academic circles especially, the alleged legitimacy “crisis” confronting the Court is attributed to the increasingly partisan nature of judicial appointments and of judging itself.<sup>123</sup>

Citing most frequently the defeat of Merrick Garland’s nomination through “hardball” tactics,<sup>124</sup> Democratic-leaning commentators argue that the appointments process has become unduly “politicized.”<sup>125</sup> These complaints are bolstered by appeal to the elimination of the judicial filibuster and the resulting pattern of nominee approval by party-line vote.<sup>126</sup> These critics similarly lament the collapse of the Senate “blue-slip” tradition, which facilitates single-party approval of district court and court of appeals nominees within the Senate Judiciary Committee.<sup>127</sup>

Moving from appointments to judging, Lee Epstein and Eric Posner, for example, question “whether a Supreme Court that has come to be rigidly divided

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123. See, e.g., Epps & Sitaraman, *supra* note 15, at 151; Tomasky, *supra* note 49; Waldman, *supra* note 29.

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

125. See, e.g., Dan Balz, *The Kavanaugh Nomination Is Another Big Step in the Politicization of the Supreme Court*, WASH. POST (Sept. 22, 2018), [https://www.washingtonpost.com/politics/the-kavanaugh-nomination-is-another-big-step-in-the-politicization-of-the-supreme-court/2018/09/22/1a13b5c4-be78-11e8-b7d2-0773aa1e33da\\_story.html](https://www.washingtonpost.com/politics/the-kavanaugh-nomination-is-another-big-step-in-the-politicization-of-the-supreme-court/2018/09/22/1a13b5c4-be78-11e8-b7d2-0773aa1e33da_story.html) [https://perma.cc/828G-H5B9]; David Leonhardt, *How to End the Politicization of the Courts*, N.Y. TIMES (Apr. 4, 2017), <https://www.nytimes.com/2017/04/04/opinion/how-to-end-the-politicization-of-the-courts.html> [https://perma.cc/9P84-ZQR4].

126. See Burgess Everett, *Republicans Trigger ‘Nuclear Option’ to Speed Trump Nominees*, POLITICO (Apr. 3, 2019), <https://www.politico.com/story/2019/04/03/senate-republicans-trigger-nuclear-option-to-speed-trump-nominees-1253118> [https://perma.cc/WH6S-AVLZ]; Paul Kane, *Reid, Democrats Trigger ‘Nuclear’ Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), [https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c\\_story.html](https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html) [https://perma.cc/GWA2-WVGC].

127. See Joseph P. Williams, *McConnell to End Senate’s ‘Blue Slip’ Tradition*, U.S. NEWS (Oct. 11, 2017), <https://www.usnews.com/news/politics/articles/2017-10-11/mcconnell-to-end-senates-blue-slip-tradition> [https://perma.cc/2QQV-9DFX].

by both ideology and party can sustain public confidence for much longer.”<sup>128</sup> Observing the increasing predictability of a justice’s behavior based upon the partisan identification of the President who appoints them, Epstein and Posner warn that “[f]or the first time in living memory, the [Supreme C]ourt will be seen by the public as a party-dominated institution, one whose votes on controversial issues are essentially determined by . . . party affiliation.”<sup>129</sup> In turn, “[a]ssaults on judicial independence” such as (in their view) court-packing will be “made easier when the public comes to view the judiciary as a political body.”<sup>130</sup>

In both instances, the concern expressed is that, insofar as the Supreme Court is seen as a “partisan” or “political” actor, it (rightly) loses legitimacy in the eyes of the public. From this, we can infer that the normative ideal for the Supreme Court, and for courts generally, is to be a neutral arbiter of the law. In other words, the Supreme Court is supposed to be, according to these critics, an apolitical or nonpartisan institution.<sup>131</sup>

Many of the personnel reforms discussed in Part II try to restore or preserve the Supreme Court’s perceived role as an apolitical decisionmaker. Most obviously, reliance on merit selection of Supreme Court nominees by a bipartisan or nonpartisan entity would sever the ideological connection between justices and the presidents who (either otherwise or nominally) appoint them. Calling to mind the ideal of the technocratic decisionmaker, merit selection would assign to a panel of experts the determination of which judicial candidate is most “qualified.”<sup>132</sup> Merit selection is, for that reason, most plainly intended to remove judicial selection from “politics,” minimizing partisan identification of individual justices in turn.<sup>133</sup>

Somewhat different, partisan balance requirements would reduce or eliminate opportunities for political branch actors to alter the Supreme Court’s ideological—or at least partisan—makeup. Guaranteeing either an even or slightly uneven partisan split, senators and the President could conspire to give their party at most a minor appointment advantage. Such requirements would, thus, minimize incidents like “stole[n]” Supreme Court seats—acts of naked partisanship that, we are told, are the most damaging to the Court’s reputation.<sup>134</sup>

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128. Lee Epstein & Eric Posner, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html> [<https://perma.cc/PZ9Y-NM96>].

129. *Id.*

130. *Id.*

131. See Epps & Sitaraman, *supra* note 15, at 151 (“[I]n the United States, public confidence in the Supreme Court is impossible to disentangle from public confidence in the very idea of law itself, as an enterprise separate from politics.”).

132. Voorhees, *supra* note 100, at 708.

133. See *id.* at 705.

134. E.g., Claudia Dreifus, *The Right Stole the Court: An Interview with Russ Feingold*, N.Y. REV. BOOKS (July 14, 2020), <https://www.nybooks.com/daily/2020/07/14/the-right-stole-the-court-an-interview-with-russ-feingold/> [<https://perma.cc/J4WV-P9PD>] (citing current director of the American Constitution Society referring to Garland’s fate as “a theft of the Supreme Court [by t]he right”).

Both partisan balance and merit selection also promote substantively “moderate” or “centrist” judicial decisions. Merit selection proposals, for instance, assign judicial appointments to ideologically diverse bodies and require broad consensus for an appointment to issue.<sup>135</sup> Given these constraints, one would expect appointed justices to be ideological moderates or centrists. Similarly, partisan balance requirements would ensure that the Supreme Court not become too ideologically lopsided. More ambitious versions of such reforms would require the Court to achieve bipartisan consensus before issuing precedential decisions.<sup>136</sup> And even under less ambitious versions, at least some degree of bipartisan agreement would be necessary absent a lockstep five-justice majority.<sup>137</sup>

Immediately, however, this shift from *nonideological* to ideological *moderation* or *centrism* should set off alarms. Insofar as the Court is supposed to act as a neutral arbiter of the law, reforms that conduce to ideological moderation are fundamentally of the wrong type. The neutral arbiter ideal is essentially what Chief Justice Roberts described with his famous or infamous judges as “umpires” metaphor.<sup>138</sup> That image of judging, of course, assumes a sharp distinction between politics and law. And, while we expand upon this below, we observe, here, that it makes no sense to insulate judging from politics by imposing *moderate* or *centrist* politics as opposed to politics that are far left or far right.

Returning to the influence of political branch actors, judicial term limits similarly attempt to regularize judicial appointments and thus insulate them from partisan fights.<sup>139</sup> The same is true of Supreme Court panel systems, which disperse the impact of judicial appointments in the hopes of avoiding political standoffs.<sup>140</sup> In each case, the idea in relation to legitimacy seems to be that open partisan conflict over judicial appointments calls into question the Supreme Court’s nonpartisan, nonideological character.<sup>141</sup> So long as the appointment

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135. See Epps & Sitaraman, *supra* note 15, at 193 (assigning appointment power to a bipartisan panel of justices); Voorhees, *supra* note 100, at 707 (calling for a “representative commission” to propose nominees).

136. See Segall, *supra* note 95, at 553–56.

137. See Epps & Sitaraman, *supra* note 15, at 181.

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

139. See, e.g., Kermit Roosevelt & Ruth-Helen Vassilas, *Supreme Court Justices Should Have Term Limits*, CNN (Sept. 30, 2019), <https://www.cnn.com/2019/09/30/opinions/supreme-court-term-limits-law-roosevelt-vassilas/index.html> [<https://perma.cc/83MG-BPZX>] (claiming that term limits would “bring predictability and fairness to a broken appointment process”).

140. See Epps & Sitaraman, *supra* note 15, at 182 (claiming a panel system would “significantly de-politicize the appointments process by making confirmations more numerous and less consequential”); see also Wang, *supra* note 94 (arguing that panel systems encourage litigants to develop legal arguments with “broad” appeal, which she contrasts with arguments serving an “ideological agenda”).

141. See Grove, *supra* note 65, at 2273 (noting the “partisan squabbling that has damaged the [Supreme] Court’s reputation”).

process remains harmonious, the thought continues, the public will continue to believe that the Supreme Court deals mostly not in politics but in law.

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

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

To start, justices today have far more distinctly legal experience than those from previous eras. Whereas, for instance, politicians with meaningful legal experience used to be appointed to the Supreme Court with some regularity, contemporary justices are specialized in the legal profession, either as career attorneys or, increasingly, as lower court judges.<sup>142</sup> Given this trend, it is hard to imagine that any of the reforms above would yield justices with more lawyerly skill. In terms of technical competence, justices today are as adept as one could plausibly ask in terms of identifying what the law is.<sup>143</sup>

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

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

Worse still, insofar as the reforms above would "depoliticize" the appointment of justices, such reforms might work only to obscure the role

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

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

ideology plays on the Supreme Court.<sup>144</sup> Assuming, for instance, that political fights over judicial appointments alert the public to the fact that judicial appointments have significant political stakes, laundering appointments through a panel of experts might suggest falsely that the justices are nonpartisan actors. Similarly, partisan balance requirements might serve to naturalize a preferred ideological distribution, implying that ideological moderation or centrism is the same as nonideological. Even term limits or panel systems, to the extent they reduce partisan contestation, might suggest to the public, again falsely, that ideology plays little role in the way the justices exercise power. With all of these reforms, then, although the Court's sociological legitimacy might increase, it would do so based only on false pretense.

The problem of obfuscation only gets worse, of course, the fewer of the Supreme Court's questions admit of identifiable legal answers. At the logical limit, if the Supreme Court operates as an unelected "super-legislature," casting it as an apolitical institution would be both hugely problematic and deeply absurd.<sup>145</sup> And even if Supreme Court decisions are less ideological than Legal Realists suggest, ideology still plays a meaningful role, through motivated reasoning if nothing else. Current battles over Supreme Court appointments would make no sense otherwise.

If none of these reforms work to make the Supreme Court less ideological, however, why do proponents insist that they would? The cynical answer is that said proponents hope to promote unwarranted sociological legitimacy of the sort just cautioned against. More charitably, though, those proponents may be confusing partisanship with ideology owed to the historically recent correlation between the two. As Daniel Hemel has argued, the Court over time exhibits relatively clear ideological fissures; the justices are, Hemel observes, no more "polarized" now than at most points in the past century.<sup>146</sup> What is new, however, is that the justices' ideological clustering today correlates tightly with partisan affiliation. In other words, whereas predictably "liberal" or "conservative" justices used to be appointed by presidents of each party, an appointing

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144. We classify Thomas Keck's argument that court-packing might forestall "democratic erosion" in the spirit of legitimacy rather than democracy. The idea is that institutional change is needed because, without it, Republicans will use the court to depart from democratic fundamentals—but whether or not this is plausible, it is based on a notion of democracy in terms of regime type rather than popular decision-making. See Thomas M. Keck, *Court-Packing and Democratic Erosion*, in *DEMOCRATIC RESILIENCE: CAN THE UNITED STATES WITHSTAND RISING POLARIZATION?* (Robert C. Lieberman, Suzanne Mettler & Kenneth M. Roberts eds., forthcoming Nov. 2021); see also Aaron Belkin, *Court Expansion and the Restoration of Democracy: The Case for Constitutional Hardball*, 2019 PEPP. L. REV. 19, 19 (2019) (arguing that court-packing is "[t]he only viable path for restoring the United States political system").

145. See Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601 (2015); David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729 (2021) (arguing that the norm against transparently political arguments in constitutional adjudication inevitably results in the distortion of distinctively legal arguments to accommodate political concerns).

146. See Hemel, *supra* note 50, at 125–26.

president's partisan affiliation has newly become a reliable predictor of a justice's ideological leanings.<sup>147</sup>

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

Whereas personnel reforms try to make the Supreme Court less ideological by changing the Court's ideology, disempowering reforms do so by restricting the questions the Court has to answer. Stripping courts of jurisdiction over controversial issues like affirmative action or gun control would, for example, remove from the Supreme Court's docket cases where motivated reasoning is especially likely. Similarly, prohibiting courts from reviewing federal legislation for constitutionality would prevent the Supreme Court from having to expound upon the Constitution, which, compared to legislation, is famously vague.<sup>148</sup>

Somewhat different, a supermajority requirement for judicial review would make it more plausible that the Supreme Court is identifying law when declaring a federal statute invalid. Although imperfect, broad consensus across ideological division is at least an indication that the constitutional violation in question is "clear."<sup>149</sup> By limiting the Court's constitutional jurisprudence to such uncontroversial cases, a supermajority requirement would thus lend credence to the thought that the justices work not only in politics but also in law.

### B. Democracy

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

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147. See *id.* at 125.

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

149. Compare Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 GEO. L.J. 159, 163 (2016) (arguing that judicial disagreement is evidence of legal unclarity), and Gersen & Vermeule, *supra* note 18 (same), with William Baude & Ryan D. Doerfler, *Arguing with Friends*, 117 MICH. L. REV. 319 (2018) (arguing that judicial disagreement only indicates unclarity under certain conditions).



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

As a class, disempowering reforms reject the goal of restoring the sociological or normative legitimacy of the Supreme Court as an apolitical or neutral institution, allegedly lost through accident or mistake. Instead of safeguarding the extant power of the Supreme Court, disempowering reforms saps the institution of some of that power and transfers it to the political branches. It proposes to do so on the most straightforward definition of the democratic premise: that, all else equal, the people themselves should directly determine their arrangements.<sup>150</sup>

The standard rationale for institutional disempowerment states that, in modern times, no one is entitled to rule the people other than the people themselves. As David Grewal and Jedediah Purdy have shown, this commitment stood at the very origin of modern constitutionalism and of modern politics more broadly.<sup>151</sup> This rationale by no means settles how far a constitution can or should erect one or another set of institutions to represent the people. And for all its commitment to democratic self-rule, modern politics preserved and refashioned an older, premodern commitment to aristocracy. The U.S. Constitution in particular is celebrated in many quarters (and is notorious in others) for reconciling the modern novelty of popular government with continuing elite control.<sup>152</sup>

Even to the extent that reconciliation remains plausible, however, it says nothing in particular about how much power an apex court like the Supreme Court should enjoy—something that Americans have differed about throughout their history.<sup>153</sup> Conversely, criticisms of the undemocratic empowerment of the

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150. As we detail below, over the latter half of the twentieth century, academic defenses of the Supreme Court's role in American life shifted from openly anti-democratic to pro-democratic, as if the shift had no implications for its institutional power. *See infra* note 199.

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

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

153. *See* Rana, *supra* note 67 (documenting profound contestation over Supreme Court power across U.S. history before the rise of veneration in recent decades).

Supreme Court have risen and fallen in tandem with the empowerment and disempowerment of the institution.

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

Returning to the specific example of jurisdiction stripping, the extent to which jurisdiction stripping legislation would be democratizing would depend upon the scope of the strip. Stripping only the Supreme Court of jurisdiction over challenges to the Green New Deal would, for instance, leave both lower federal courts and state courts a say in the ultimate fate of that legislation. Such a reform would still be democratizing because it would require greater judicial coordination to negate Congress's decision in full.<sup>154</sup> Still, compared to a comprehensive strip of the sort described above, the democratizing effect of a Supreme Court strip would be limited. Similarly, stripping courts of jurisdiction over only a small set of constitutional cases would leave courts with tremendous authority outside that limited space. A total or near-total strip over constitutional cases would, by contrast, dramatically reallocate decision-making authority within our constitutional scheme.

We take no position as to what scope jurisdiction stripping should have or, for that matter, whether jurisdiction stripping legislation should be preferred to other disempowering reforms.<sup>155</sup> Voting rules like a supermajority rule for declaring federal legislation invalid would, for instance, similarly disempower the Supreme Court in contestable constitutional cases at least. By requiring a higher threshold of consensus for the exercise of judicial authority, such a rule would functionally reallocate decision-making authority to the democratically legitimate branches of government in cases in which a counter-majoritarian faction on the Court enjoys only a simple majority. Such a reform might be more palatable than jurisdiction stripping for those who believe, for example, that the Supreme Court is a critical protector of rights.<sup>156</sup> This result happens because,

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

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

156. But see *infra* Part III.C.

under a supermajority rule, “clear” constitutional violations would continue to be identified and declared, even as disputable cases would be left to majority will.<sup>157</sup> As with jurisdiction stripping, voting rule proposals vary in terms of scope and, in turn, democratizing effect. One could, for example, apply a supermajority rule to only the Supreme Court or to all courts with jurisdiction over constitutional challenges to federal statutes.<sup>158</sup>

Similarly, some form of legislative override would transfer significant authority from the judiciary to Congress (and, potentially, the President). Like a supermajority rule, a legislative override would leave the Supreme Court with a meaningful say as to the constitutionality of congressional action, requiring an affirmative step from Congress *beyond* initial enactment in the event of constitutional disagreement. In this respect, a legislative override facilitates, at least in principle, a “dialogic” approach to constitutional interpretation, encouraging an extended exchange between the political branches and the judiciary.<sup>159</sup> As Canada’s experience suggests, however, the dialogic, and, in turn, democratic, benefits of an override mechanism may be more theoretical than real.<sup>160</sup>

Whereas disempowering reforms promote democracy by reallocating decision-making authority to the democratically accountable branches, personnel reforms might achieve this result by aligning judicial ideology more closely with that of democratic majorities. Reformers intend court-packing, most obviously, to reshape the judiciary such that it will get out of the way of progressive majorities. And, in this way, it would promote democracy *in the short term*. Over time, though, for it to be consistent with democracy, court-packing would have to be an iterative process, with each newly elected majority adding new justices and judges of their own. For this reason, court-packing proposals will result in either democratic redundancy or new risks to democratic control. Either these proposals require extra steps to extend legislative control already achieved through popular victory, or they threaten that control by delegating power from democratic principals to less accountable agents.

Supreme Court term limits are more promising. Unlike court-packing, term limit reforms intend to link Supreme Court appointments more consistently and more evenly to electoral outcomes over time. As we discuss below, there are reasons to doubt that term limits would achieve this aim to the degree advertised. More still, term limits would lead to incredibly modest democratizing effects

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157. See *supra* note 115 and accompanying text (arguing that supermajority rules are the functional equivalent of a “clear error” standard intended to pick out manifest constitutional violations).

158. Here again, one would also have to decide whether to, for example, limit the relief available to lower courts to prevent disuniformity if a bare majority of justices vote in favor of unconstitutionality. See *supra* note 116.

159. Tushnet, *Dialogic Judicial Review*, *supra* note 118, at 208.

160. The Canadian parliament has yet to invoke this authority, and regional governments have done so only sparingly. A similar option has been nationally debated in Israel. See, e.g., Adam Dodek, *The Canadian Override: Constitutional Model or Bête Noire of Constitutional Politics?*, 49 *ISR. L. REV.* 45 (2016) (discussing Canadian model and Israeli debates).

because justices would remain democratically unaccountable upon appointment and because elections from almost two decades ago would have policy ramifications today. One could imagine a President Alexandria Ocasio-Cortez, for example, frustrated by the relative conservatism of Biden-era Democratic appointees. Term limits remain, nonetheless, distinct among personnel reforms because they result in systematic democratizing effects.

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

At first blush, partisan balance requirements operate the same way, ensuring at most a limited partisan skew and more ideologically moderate outcomes.<sup>161</sup> Some, however, advocate partisan balance on the theory that such an arrangement would necessitate ideological compromise, which, these advocates insist, would take the form of less sweeping judicial holdings.<sup>162</sup> Such judicial minimalism<sup>163</sup> would, in turn, leave more space for Congress to act. While attractive in theory, this minimalist prediction fits poorly with recent historical practice. The narrowly divided Roberts Court, for example, has opted for horse trading rather than incrementalism in some of the most politically significant cases.<sup>164</sup> And even in areas like abortion where the Court has taken a more incrementalist approach, the ultimate effect looks to be a more significant shift in constitutional law than would result from more dramatic rulings followed by predictable backlash.<sup>165</sup>

### C. Rights

The most common objection to disempowering reforms to the Supreme Court focuses on the need for it to protect important rights, especially minority

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161. *But see supra* note 106 (discussing partisan balance on an evenly divided Supreme Court).

162. *See Segall, supra* note 95, at 550 (arguing that partisan balance would result in “narrower” decisions).

163. *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (defending a “minimalist” mode of intervention that avoids grand theory and large-scale departure from precedent).

164. *See* Joan Biskupic, *The Inside Story of How John Roberts Negotiated to Save Obamacare*, CNN (Mar. 25, 2019), <https://www.cnn.com/2019/03/21/politics/john-roberts-obamacare-the-chief/index.html> [<https://perma.cc/SRE2-GF47>] (describing a “deal” struck between conservative and liberal justices to uphold the Affordable Care Act’s individual mandate but invalidate its expansion of Medicaid).

165. *See* Leah Litman, *June Medical as the New Casey*, TAKE CARE BLOG (June 29, 2020), <https://takecareblog.com/blog/june-medical-as-the-new-casey> [<https://perma.cc/4PCT-TA9Z>] (arguing that the “victory” for reproductive rights this Term was “likely pyrrhic”).

rights against hostile majorities. For many, rights protection is the leading criterion for assessing not just judicial reform, but the basic purposes of a judiciary in the first place.<sup>166</sup> We need not review the gargantuan literature on the plausibility of the familiar claim that democracies empower judiciaries precisely to protect rights. As Justice Robert Jackson immortally put it, the goal is “to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”<sup>167</sup> But a few targeted responses to that conventional wisdom from the perspective of Supreme Court reform are indispensable.

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

(1) The progressive frame disputes that majority rule endemically conflicts with rights protection. On the contrary, the historical record clearly demonstrates that legislatures serve as the chief historical source of rights, while judicially-enforced rights protections can easily devolve into technologies of minority rule.<sup>168</sup> If true, as a general matter it is quite possible that disempowering leads to superior rights protection, not worse. On the one hand, it subjects to majority rule the powerful and wealthy minorities claiming and getting the protection of the courts.<sup>169</sup> On the other, progressive reform through the political branches of government can potentially lead to superior legislative protection of the rights of majorities from those powerful and wealthy minorities, as well as superior legislative protection of the rights of vulnerable or weak minorities.

The American (and, even more, global) progressive default was long, not the absence of rights as a political goal, but “legislated rights.”<sup>170</sup> The privilege

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166. See, e.g., Cover, *supra* note 8.

167. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

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

169. We leave aside here large debates about whether the results are different outside an American context, in which rights-protecting judicial review occurs against the backdrop of a practically unamendable constitutional text prioritizing so-called negative liberties, with traditions that have singled out property, contract, and due process in the deprivation of “liberty” for special treatment (however they are interpreted), and without economic and social entitlements. For conflicting impulses about judicially enforced rights protection globally, see, for example, Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 AM. J. POL. SCI. 575 (2016) and Mila Versteeg, *Can Rights Combat Economic Inequality?* 133 HARV. L. REV. 2017 (2020) (reviewing SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* (2018)).

170. See GRÉGOIRE WEBBER, PAUL YOWELL, RICHARD EKINS, MARIS KÖPCKE, BRADLEY W. MILLER & FRANCISCO J. URBINA, *LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION* (2018).

of the judiciary led to the *Lochner* era. No doubt, if that case is anticanonical in American memory, it is so precisely as a form of illicit rights protection and was cast aside to achieve better rights protection through legislative means. As Roosevelt accurately explained, “the Bill of Rights was put into the Constitution not only to protect minorities against intolerance of majorities, but to protect majorities against the enthronement of minorities.”<sup>171</sup> This sometimes requires putting courts in their place in order to privilege legislatures pursuing rights for all and balancing the claims of majorities and minorities alike.

In this spirit, the legislature can be seen as the first and most important defender and propagator of rights, and majority rule the default source of legitimacy for assessing the scope of rights and resolving conflicts among rights and between rights and other priorities. Roosevelt’s “Second Bill of Rights” envisioned a suite of economic and social entitlements of modern citizenship, but not one that judicial authority would enforce and whose scope remained to be determined in light of other interests and values.<sup>172</sup> And though they did not enact it, Americans have remained within a legislated rights frame in propounding civil rights acts that effectively did more than any judicial decision to confront exclusions based on race, gender, or disability.<sup>173</sup>

Consider again from this perspective the current baseline of rights protection in American constitutional law and what the Green New Deal would do in supplementing it. As noted above, illicit forms of rights protection associated with the *Lochner* era and our own neo-*Lochnerian* one foil prospective reform absent Supreme Court renovation.<sup>174</sup> Americans can boast strong judicial protection of core forms of speech, along with other protections of religion. These decisions have their defenders even when used to limit the scope of other constitutional rights or even allow the Supreme Court to expand statutory antidiscrimination protections to sexual orientation, in expectation that those requesting religious accommodations and exemption will be provided them.<sup>175</sup> By the same token, however, Americans do not have other basic rights under the U.S. Constitution, whether rights to basic provision (of food, housing, sanitation, or water, all familiar in other national settings and international law).<sup>176</sup> In the case of health care, not only do Americans not have a right to it, but the Constitution’s established judicial power weakened the initial attempt to

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171. President Franklin D. Roosevelt, Address on Constitution Day (Sept. 17, 1937).

172. See generally Samuel Moyn, *The Second Bill of Rights: A Reconsideration*, in HUMAN RIGHTS, DEMOCRACY, AND LEGITIMACY IN A WORLD OF DISORDER 111 (Silja Voeneke & Gerald L. Neuman eds., 2018).

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

174. See *supra* Part I.A.

175. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719 (2018); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

176. See, e.g., International Covenant for Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1966).

take some steps towards it under the star-crossed Affordable Care Act (ACA).<sup>177</sup> State constitutions often protect the right to education, but the Supreme Court explicitly rejected it.<sup>178</sup> More generally, even with respect to the rights for which constitutional law provides robust protection, they are not class sensitive, and not only are material insufficiencies not understood as rights violations under judicially elaborated frameworks, material inequality is not either.<sup>179</sup> A right to work, or labor rights to organize and strike, have never been significant features of America's constitutional law.

By contrast, while not everything an H.R. 1 democratizing statute, Green New Deal law, or other progressive legislative reform should be conceived as the elaboration or substantiation of a right, much of it is easy to understand that way. Many of their key planks—access to the polls and other voting entitlements, job guarantees vindicating the right to work, high-quality food, health care, housing, or water correlating with well-known rights, promises for high-quality education not only at the primary but secondary level—fit.<sup>180</sup> Even its “green” part can be seen as rights protective. The more general rhetoric of facing down inequality after decades of its expansion bears not only on basic rights, but also can be conceived to involve rights beyond sufficient provision to an entitlement to rough equality in life chances.

Ronald Dworkin has epitomized a stereotypical view of judicial authority that was absolutely required for rights to be invoked as principled “trumps” against aggregating legislatures.<sup>181</sup> This picture entirely missed whether legislatures might be fora of principle equal or even superior to defending extant rights commitments and propagating new ones. (Dworkin did acknowledge that “fit” with American traditions forbade any very expansive understanding of our constitutional rights.)<sup>182</sup> Shifting away from recent Dworkinian assumptions is especially pertinent when it comes to so-called positive rights, none of which are protected under the U.S. Constitution and few of which have ever been sought—even at the zenith of liberal power on the Supreme Court—through judicial interpretation. As Dworkin's assumptions more or less accurately reflect, Americans boast a small number of rights that they protect in absolutist ways through judicial intervention. Other countries proceed differently by propounding a much wider variety of rights, which their legal systems protect

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177. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

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

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

180. See Recognizing the Duty of the Federal Government to Create a Green New Deal, H.R. Res. 109, 116th Cong. (2019).

181. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY XI* (1977).

182. See RONALD DWORKIN, *LAW'S EMPIRE* 114–50 (1986).

less robustly through proportionality balancing against other interests and distributed institutional control over rights.<sup>183</sup>

It is, of course, true that judge-led interpretation of the Constitution's rights applied most of them to the states in the middle of the twentieth century, and in doing so revolutionized protections in criminal procedure. It also extended individual rights not mentioned in the constitutional text across the century—in the phase since the 1960s, mostly under the Due Process Clause's promise of liberty, freed from the constitutional protection of freedom of contract as a right. In this vein, the Court protected rights like freedom from compulsory sterilization,<sup>184</sup> and to choose to abort a pregnancy or marry a spouse of a different race<sup>185</sup> or the same sex.<sup>186</sup> And the Equal Protection Clause banned formal apartheid, and especially formal segregation of races in schools.<sup>187</sup> These results account for the familiar anxiety that Supreme Court disempowerment would threaten rights protection. And no one should pretend that a legislated rights regime would match the set of entitlements achieved through judicial interpretation precisely. Even if a legislated regime provides for many rights on its own, or more of them, it may miss others.

But it is pivotal to any genuine comparison that it is not a matter of exclusive principled defense of rights in judiciaries on one side against unprincipled majoritarian action on the other. Instead, it is a comparison of some schedule of rights and some modicum of protection on both sides of the line. Minimally, rights concerns do not cut against legislative empowerment *per se*. And more maximally, progressives assume that rights protection may well be available in superior form through political branches as agents of national transformation. However, judicial empowerment to achieve the current spotty and weak protection of rights generally serves debatable ends, and primarily protects the rights of powerful and wealthy interests. Not only can legislatures protect rights for majorities and minorities, but judiciaries can convert rights protection into illicit minority rule. Indeed, if existing entitlements for the needy are weak and for the powerful are strong, judicial empowerment can at least as plausibly be construed as a project of rights violation as of protection and disempowering as instrumental for the sake of rights themselves.

Sometimes progressives may rely on accounts of the comparative institutional bias of judiciaries (relative to legislatures) towards views of elites<sup>188</sup>

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183. JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* (2021).

184. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

185. *Loving v. Virginia*, 388 U.S. 1 (1967).

186. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

187. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

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



and outcomes favoring them.<sup>189</sup> Sometimes they may even—as in Karl Marx’s early writings<sup>190</sup> and in the critical legal studies movement<sup>191</sup>—claim that individual rights are especially susceptible to the production of those same outcomes. And those suggestions deserve careful scrutiny. But even if neither kind of account is persuasive, disempowering reform can be construed as a project of rights expansion and vindication, beyond the narrow list and weak protection of Supreme Court doctrine, currently and even historically.

One should question whether the Supreme Court’s unimpressive baseline protection of the rights of vulnerable minorities, even as it has come to systematically favor neoliberal outcomes in First Amendment jurisprudence and beats back at legislative protection in areas like affirmative action or voting rights, suffices to justify its empowerment as guardian of basic entitlements. When we consider the likely obstacle the Court would pose to rights expansion as a progressive agenda, the answer to that question is not hard. Disempowering reforms would count as a far greater victory for rights than an empowered victory could ever deliver.

(2) Furthermore, while the functional effect of disempowering reforms like jurisdiction stripping and supermajority rules on the Supreme Court reduces the significance of judicial review, it is not a matter of either-or. Functional disempowerment of the Supreme Court leaves a series of stopping points short of full negation of judicial review through some institutional reform, which only a persistent but tiny minority of followers of Thomas Jefferson in American life supports.<sup>192</sup>

Indeed, many proponents of weakening judiciaries have offered stopping points to *manage* judicial rights protection. If they have generally failed—leaving too many protections for the undeserving and too few for those in need—it by no means obviates a new compromise leaving some crucial judicial rights protection intact. James Bradley Thayer’s proposal merely to subject majority legislation to rationality rule left room for policing irrational results.<sup>193</sup> More boldly, the original move in the 1930s, first defended in the fourth footnote of the *Carolene Products* opinion<sup>194</sup> and canonically justified by John Hart Ely,<sup>195</sup> was to “bifurcated review.” This framework subjected economic legislation to

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189. See, e.g., Paul Kens, *The United States Supreme Court and Business Elites: Gilded Age Origins of Modern American Liberalism*, TRANSATLANTICA, 2013; J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543 (2018).

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

191. For a survey, see Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002).

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

193. See James B. Thayer, *Constitutionality of Legislation: The Precise Question for a Court*, NATION, Apr. 10, 1884, at 314–15; Thayer, *supra* note 115.

194. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

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

rationality review after the abandonment of the old substantive due process while protecting some schedule of rights and some kinds of minorities. Where personnel reforms do not react to the general failures of past compromises either to deal with underenforcement of rights or “juristocratic” excesses, disempowering reforms hardly abandon the possibility of a more successful one. Relative democratization hardly means total disempowerment of judiciaries to protect rights. The same verdict applies to Ely’s defense of judicial review to remedy participatory exclusions and failures. While there is no reason on its recent track record to believe that the Supreme Court will pursue his vision,<sup>196</sup> attractive in theory but dead in practice for several decades, nothing forbids a disempowered judiciary from doing so.

If properly calibrated, jurisdiction stripping statutes, for example, could insulate precisely the attempted expansion of legislative rights from judicial limitation in the name of various provisions of the Constitution weaponized by the right (notably, the Free Exercise and Free Speech Clauses), while leaving judges power to protect other rights from unsuspected majoritarian excess. Similarly, supermajority rules have a distinctive capacity compared to personnel reforms for counteracting the reality that controversial minoritarian tyranny today very much works through the Supreme Court, while leaving room for justices to intervene in the case of genuine majoritarian tyranny when enough justice agree it is real, rather than a smokescreen for illicit capture.

Finally, unlike personnel reforms, disempowering reforms do not rely on judicial self-restraint as a mechanism to ensure democratic choice. Thayer’s proposal relied on judicial self-restraint, and *Carolene* followed suit insofar as it ultimately consecrated a purely judicial determination as to when to cross the line from rationality review to heightened forms of scrutiny. The result was, arguably, a Supreme Court in which both sides of a partisan split exercised judicial authority selectively and opportunistically. Judges allowed democratic will-formation, blocking it contingently (sometimes for better, regularly for worse) based on their own evolving doctrines of intervention. What all of these reforms shared was a rejection of Thayerian deference de facto, and an expansion of judicial authority un contemplated and undesired in the middle of the twentieth century.<sup>197</sup> “A lesson that some will take from today’s decision,” one conservative justice remarked bitterly at the end of the day, “is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means.”<sup>198</sup> If he was right, however, it was because judicial self-restraint failed to ensure conservative (not just liberal) self-policing. Even with personnel reforms, any bench will face the

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196. See, most recently, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

197. For a classic barometer of change between the 1930s and the 1950s, see *LEARNED HAND, THE BILL OF RIGHTS* (1958).

198. *Obergefell v. Hodges*, 576 U.S. 644, 742 (2015) (Alito, J., dissenting).

temptation to overstep, whereas disempowering reforms specifically deprive them of the temptation. Disempowering reforms limit the Court's power to act or abstain from acting in the first place.

(3) Finally, even to the extent disempowering reforms hypothetically threaten rights, personnel reforms do not plausibly provide superior protection.

Generally, the goal of relegitimation of the Supreme Court—the rationale for many proposed reforms today, as discussed above—is orthogonal to rights protection. There is no reason to believe a court with comparable powers as now, but with improved legitimacy, would improve rights protection. To make out a case that it would, one would have to correlate legitimation with rights protection, and it seems churlish to suggest credibly doing so. As we suggested above, most approaches to legitimacy define it in terms of partisan neutrality rather than rights protection. To be sure, there are some accounts of normative legitimacy of apex judiciaries that may be less about nonpartisan neutrality than most, and may even put rights protection at the very heart of what a normatively justified Supreme Court would do.<sup>199</sup> The trouble is that none of the personnel reforms credibly advance *that* form of legitimacy. It is, alas, unclear that any reforms of the Supreme Court we can imagine would do so—thus it cannot be an argument against disempowering reforms that they fail to do so.

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

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

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199. Such accounts were admittedly pervasive at midcentury. Even among “conservatives” like Alexander Bickel, it was commonsense that “courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess . . . . Their insulation and the marvelous mystery of time gives courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 25–26 (1962). Such innocence was overthrown by what Jürgen Habermas called “the dissolution of the liberal paradigm of law” — a paradigm that had empowered judiciaries in terms of basic values such as moral rights. Its overthrow then required the most prominent cases for judicial review to be more democratic in rationale, as in John Hart Ely's or Habermas's own elaborate case for it. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 240–53 (William Rehg trans., 1996).

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

#### D. Regularity

A separate aim of many reforms is to regularize the appointment of Supreme Court justices.<sup>200</sup> According to the standard narrative, the Supreme Court appointment process has grown increasingly fractious since the Senate rejected Robert Bork's nomination in 1987.<sup>201</sup> Today, it is popular to insist that the appointment process is "dysfunctional[.]"<sup>202</sup> "broken,"<sup>203</sup> or otherwise in disrepair.

Complaints about the dysfunction of the appointment process are typically coupled with worries about undue "politicization."<sup>204</sup> As discussed above, worries about politicization go to the Supreme Court's legitimacy. Apart from legitimacy, however, several reformers allege concern with the functionality of the appointment process. According to these scholars and advocates, increased "polarization" and the stakes of judicial appointments have resulted in a system burdened by gridlock and that encourages destabilizing political tactics.<sup>205</sup>

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

To see why, take the proposal to impose term limits on Supreme Court justices. As described above, this proposal would, in its most popular form, allot one Supreme Court appointment per congressional term, with each justice

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200. Sometimes it is other forms of regularity, as in Bruce Ackerman's intervention in the court reform debate with a proposal to import the German bifurcation of its highest courts into statutory and constitutional bodies (to which he adds the proposal to expand the overall number of personnel) in the name of "uniform law." Bruce Ackerman, *Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018), <https://www.latimes.com/opinion/oped/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html> [<https://perma.cc/BVK5-TP5X>]. In the text, we focus on input regularity as opposed to the output regularity Ackerman prioritizes.

201. As Hemel observes, this narrative is questionable. Hemel, *supra* note 50.

202. Randy E. Barnett & Josh Blackman, *Restoring the Lost Confirmation*, NAT'L AFFS., Fall 2016, <https://www.nationalaffairs.com/publications/detail/restoring-the-lost-confirmation> [<https://perma.cc/LYX4-HQB4>].

203. AM. CONST. SOC'Y, JUDICIAL NOMINATIONS: A BROKEN PROCESS (2018), <https://www.acslaw.org/wp-content/uploads/2018/10/Judicial-Nominations-A-Broken-Process-1.pdf> [<https://perma.cc/DW3V-UTTE>].

204. See *supra* notes 131–144 and accompanying text.

205. E.g., Steven Levitsky & Daniel Ziblatt, *How Wobbly Is Our Democracy?*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/2018/01/27/opinion/sunday/democracy-polarization.html> [<https://perma.cc/37BC-H83B>]. But see Hemel, *supra* note 50 (questioning claims of increased polarization).

permitted to serve for a period of eighteen years.<sup>206</sup> One of the supposed advantages of this reform is that it would help regularize the appointment process by lowering the stakes of individual appointments.<sup>207</sup> Because each president “gets two appointments per term,” the motivation to contest specific appointments is, we are told, substantially less.<sup>208</sup>

Notice, however, that each president “get[ting]” two appointments is more hope than promise under this scheme. Because its advice and consent function would remain the same, an opposition Senate would retain the incentive to reject nominations, thereby helping to accrue partisan advantage on the Supreme Court over time. Even if quorum and vacancy rules would eventually force the choice of confirming a nominee or rendering the Supreme Court incapable of issuing binding judgments,<sup>209</sup> a strategic opposition might easily prefer to effectively empower the courts of appeals, building partisan advantage at that level through similar tactics.

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

Other purportedly regularizing personnel reforms suffer from similar defects. Partisan-balance requirements, for example, would present an opposition Senate with the same opportunity to refuse to confirm nominees to seats assigned to the President’s party. Again, an opposition Senate might be left with the choice of confirming a nominee or depriving the Supreme Court of a quorum, but as our current politics shows, such aggressive tactics are sometimes appealing.<sup>210</sup> Merit selection presents similar issues, though this time with both the President and the Senate. Barring constitutional amendment, any potential nominees chosen by a nonpartisan or bipartisan panel would have to be

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206. See, e.g., Cramton, *supra* note 101, at 1323.

207. See, e.g., Ornstein, *supra* note 62 (“It would to some degree lower the temperature on confirmation battles by making the stakes a bit lower.”).

208. *America’s Highest Court Needs Term Limits*, ECONOMIST (Sept. 15, 2018), <https://www.economist.com/leaders/2018/09/15/americas-highest-court-needs-term-limits> [<https://perma.cc/4GAX-M2JU>].

209. Some proposals, for example, allow for an additional appointment in a given congressional term only in case of “retirement, death or removal,” and provide that six justices constitute a quorum. Carrington & Cramton, *supra* note 101.

210. The Federal Elections Commission, for example, has lacked a quorum for significant stretches in recent years. See Brian Naylor, *As FEC Nears Shutdown, Priorities Such as Stopping Election Interference on Hold*, NPR (Aug. 30, 2019), <https://www.npr.org/2019/08/30/755523088/as-fec-nears-shutdown-priorities-such-as-stopping-election-interference-on-hold> [<https://perma.cc/STF5-PPJ2>].

nominated by the President formally.<sup>211</sup> Given a cooperative Senate, a boldly progressive or conservative President would have little reason to assent to the sort of centrist or moderate candidate such panels are designed to produce. The same would be true for a stridently progressive or conservative Senate. Why settle for a “compromise” nominee when one has the leverage to demand more?

The complication with lottery systems is slightly different. As described above, such proposals would replace our system of permanent Supreme Court justices with panels composed of randomly selected judges from the federal courts of appeals or permanent associate justices drawn from an enlarged pool. Pursuant to this reform, although the Supreme Court as such would retain its authority, the authority of the individual judges who make up the Court would be substantially reduced. On this scheme, individual judicial appointments would be less significant than the appointment of justices today.<sup>212</sup> Still, because this proposal would make every federal court of appeals judge a potential Supreme Court justice, the stakes of filling court of appeals vacancies would increase accordingly. Given the already rising level of contestation over such nominations, it is hence easy to imagine a panel system causing appointment “dysfunction” merely to spread.

Again and again, we see the same basic issue. Under our constitutional scheme, both the President and Senate have a say in the appointment of justices.<sup>213</sup> Because Supreme Court justices wield tremendous authority and because ideology determines in part how they wield it, those two parties will be disposed to fight should their ideologies differ. The intensity of that disposition will depend, of course, on the strength of their ideological disagreement. In a country racked with intense political disagreement, however, that disposition is going to be incredibly strong at least some of the time. Given the intensity of that disposition, comparatively small adjustments like the imposition of term limits would barely affect, say, an opposition Senate’s decision-making calculus. With the stakes of appointments so incredibly high, such modest if salutary reforms are not at the requisite scale.

By comparison, more aggressive disempowering reforms might at least register with a president or opposition Senate. Stripping courts of jurisdiction over constitutional cases or requiring a supermajority to declare federal legislation invalid, for example, would meaningfully reduce the stakes for Supreme Court appointments and judicial appointments more generally. Even with its authority so limited, the Court’s ideological character would continue to matter even outside of constitutional or politically significant cases. Still, in terms of stakes, disempowering reforms would make the appointment of justices more akin to the appointment of agency officials. To be sure, the appointment of

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211. See *infra* notes 248–251 and accompanying text.

212. See Epps & Sitaraman, *supra* note 15, at 184 (touting as an advantage of this proposal that it “reduc[es] the stakes of individual nominations”).

213. See U.S. CONST. art. II, § 2, cl. 2.

such officials is *also* increasingly contested, as should be expected in polarized times. In terms of regularization, then, even aggressive disempowering reforms can only promise modest benefits.

### E. Pragmatism

A less conceptually ambitious but equally commonplace framework for evaluating a reform scheme is pragmatism: case-by-case consideration of the reform's outcomes. This criterion is not oriented to the legitimacy of the Supreme Court either as an apolitical, neutral institution or as one made safe for democratic life. Pragmatism appeals to a narrower kind of legitimacy: one of output. Are the results of Supreme Court decision-making good (enough), or at least not bad (enough)? But the truth is that, as our parentheticals indicate, such a criterion is overwhelmingly oriented to harm avoidance, pointing not to good results but to ones that are a tolerable mix of outcomes, or—even more modestly—do not incur grievous enough harm.<sup>214</sup>

As an example of pragmatism in action, consider *June Medical Services v. Russo*,<sup>215</sup> the Court's latest consideration of an already whittled-away abortion right. The case might have constrained that right further, reducing the number of Louisiana clinics where women can seek abortions from four to one, but instead protected the right. In the hours after the decision, liberal outlets responded with a palpable relief. Early narratives said Chief Justice Roberts had "betrayed" his conservative movement in failing to grasp a long-sought prize here, and in his vote two weeks earlier to extend statutory civil rights protection to sexual orientation.<sup>216</sup> Yet commenters also noted that Roberts' majority decision, clearly in response to the erosion of the Supreme Court's sociological legitimacy, also opened the way to less brazen legislative curtailments of abortion rights in the future.<sup>217</sup> Though not the dire outcome long feared, Roberts's controlling opinion was widely recognized as a terrible blow for the very right it purported to preserve.

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

215. 140 S. Ct. 2103 (2020).

216. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020); Jane Coaston, *Social Conservatives Feel Betrayed by the Supreme Court—and the GOP that Appointed It*, VOX (July 1, 2020), <https://www.vox.com/2020/7/1/21293370/supreme-court-conservatism-bostock-lgbtq-republicans> [<https://perma.cc/7U9F-799X>].

217. See, e.g., David S. Cohen, *The Narrow Victory of June Medical Might Pave the Way for Future Abortion Restrictions*, HARV. L. PETRIE-FLOM CTR.: BILL OF HEALTH (July 15, 2020), <https://blog.petrieflom.law.harvard.edu/2020/07/15/june-medical-abortion-restrictions-john-roberts/> [<https://perma.cc/Q7T6-5RT6>].

Routinely, pragmatism really amounts to what one might call a Supreme Court liberalism of fear.<sup>218</sup> It greets the fact that justices have not eroded past progressive gains, while also restraining the conservative majority from experiments that are too perilous—as if such triangulation were a worthy cause. This pragmatic sensibility surges in real time at the end of each Supreme Court term as observers, though far from celebration, welcome individual case results as examples of the institution not doing its worst. Chief Justice John Roberts has, over the last decade, become the icon for this approach,<sup>219</sup> sometimes abetted by due respect for Justice Elena Kagan as a master strategist of achieving harm avoidance through compromise with conservatives.<sup>220</sup>

Assuming the pragmatic rationale really does minimize harm in the absence of a possibility of help—both prongs of which are easy to dispute—it could succeed on its own terms. For many, however, it tolerates the enormous harm it says it avoids while foreclosing help through institutional creativity backed by political action. Worse, the rationale’s price is a set of unacceptable baselines that it defends. The basic objection to this outlook, then, is that it is not very pragmatic. What is pragmatic about accepting the continued erosion of current baselines that leave cherished liberal policies like abortion rights<sup>221</sup> and affirmative action<sup>222</sup> hanging by a thread, even as multi-decade conservative inroads in many doctrines—including edging up to the deconstruction of the administrative state<sup>223</sup>—continue accruing? Such “pragmatism” allows existing doctrines and case law to remain entrenched, on the rationale that the Supreme Court could worsen them. For progressives, by contrast, the current baselines are the problem and could allow a Supreme Court, even one saved from doing its worst, to damage their legislative proposals. The pragmatic framework rests content with the existing baseline of stunted left-wing policy, as if a right-wing adventurism blocked by John Roberts justified the threat a powerful Supreme Court—and John Roberts himself—would pose to genuine progressive reform were it to emerge.

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218. Cf. Judith N. Shklar, *The Liberalism of Fear*, in LIBERALISM AND THE MORAL LIFE 21 (Nancy L. Rosenblum ed., 1989).

219. For recent instances in an infinite commentary to this effect, see, for example, Jeffrey Rosen, *John Roberts Is Just Who the Supreme Court Needed*, ATLANTIC (July 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court-needed/614053/> [<https://perma.cc/43UR-PF3J>]; *Hail to the Chief: Justice John Roberts Joins the Supreme Court’s Liberal Wing in Some Key Rulings*, ECONOMIST (July 2, 2020), <https://www.economist.com/united-states/2020/07/04/justice-john-roberts-joins-the-supreme-courts-liberal-wing-in-some-key-rulings> [<https://perma.cc/ER3G-H34Q>].

220. See, e.g., Margaret Talbot, *Is the Supreme Court’s Fate in Elena Kagan’s Hands?*, NEW YORKER (Nov. 11, 2019), <https://www.newyorker.com/magazine/2019/11/18/is-the-supreme-courts-fate-in-elena-kagans-hands> [<https://perma.cc/YU5Y-NK57>].

221. Most recently, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

222. See *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013).

223. See *Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring in the judgment, and Gorsuch, J., dissenting) (anticipating reexamination of the non-delegation doctrine in future cases).



In fairness, one sometimes senses that pragmatism shelters the utopian hope that someday the Supreme Court will return to its predestined role institutionalizing justice in the country. That maximalism can take refuge in minimalism does not mean the permanent replacement of the one by the other. Indeed, pragmatists often feel that depression about outlooks—acceptance of bad outcomes because they could be worse—is in fact justified solely because the alternative is to attack the Supreme Court itself, to which they profess independent allegiance. “The Roberts court, against all expectations, has made this battered country a better, safer place[,]” wrote senior courtwatcher Linda Greenhouse in response to the recent abortion case, epitomizing the pragmatic stance.<sup>224</sup> “For now[,]” she clarified—adding that, while she “breathed a deep sigh of relief,” it was not just for the Louisiana women affected but also “for the Supreme Court itself, for having avoided plunging along with Justices Clarence Thomas, Samuel Alito, Neil Gorsuch and Brett Kavanaugh into an institutional abyss.”<sup>225</sup> In other words, the pragmatist acceptance of an unacceptable baseline requires some justification other than pragmatism itself. If it were plausible that keeping the Supreme Court from the abyss for now would allow it to ascend to the empyrean later, “pragmatism” might make sense. But it’s not, which reveals pragmatism to be a kind of utopianism.

The limitations of pragmatism—normally deployed by those uninterested in or wary of institutional reform debates—make it a weak candidate for justifying Supreme Court reform. As a potential rationale for reform, pragmatism faces the threshold worry that it is the default stance of those who complacently accept the institution as it is. It is hard to imagine a compelling justification for institutional reform that appeals to slightly better outcomes and does not shift major baselines. Nor, if pragmatists called for reform out of exasperation with enough bad news, does their framework obviously help select among reforms.

There is no denying that Supreme Court reform in the name of pragmatic output legitimacy could make sense on its own terms—a slightly less scary nightmare is worthwhile if waking up is not an option—even if it entrenches the prevailing low expectations for output. It might face a constituency problem: if those interested in Supreme Court reform at all move to put pressure on the mainstream acceptance of the institution in current form, it is because they are dissatisfied with how little pragmatism currently boasts. If they adopted a pragmatic rationale for evaluating their prospects, advocates of Supreme Court reform would have to rationalize embarking on an agenda that will be decried as radical when their ends are merely to reinstate low expectations at a somewhat higher level. And if it is true that the Supreme Court could indeed get even worse

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224. Linda Greenhouse, *How Chief Justice Roberts Solved His Abortion Dilemma*, N.Y. TIMES (July 2, 2020), <https://www.nytimes.com/2020/07/02/opinion/supreme-court-abortion-roberts.html> [<https://perma.cc/D5QN-QNX5>].

225. *Id.*

either by abandoning favorite progressive precedents or minting novel conservative doctrines, pragmatic reform would not necessarily change this.

The framework also provides little help for selecting *among* imaginable reforms, especially compared to a democracy criterion for evaluating them. Once again, contrast a partisan balance scheme with a jurisdiction stripping one. The first might well aim to “reset” the current lopsided ideological configuration of the Supreme Court by repopulating the justices and depriving conservatives of their current majority. But while this scheme is a pragmatic choice to reset the Supreme Court to a stage prior to Justice Neil Gorsuch, a Justice Merrick Garland on the bench instead would have resulted in modest doctrinal variation at best.<sup>226</sup> Such reform does nothing to reverse decades-long drift or to prepare the ground for progressive legislative reform, which in fact it leaves almost as endangered as before.

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

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

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226. See, e.g., Adam Liptak, *Where Merrick Garland Stands: A Close Look at His Judicial Record*, N.Y. TIMES (Mar. 17, 2016), <https://www.nytimes.com/2016/03/18/us/politics/merrick-garlands-record-and-style-hint-at-his-appeal.html> [<https://perma.cc/7VVD-EWVY>] (noting that Garland’s “most charged cases, involving national security and campaign finance, were as likely to disappoint liberals as to please them”).

#### IV. FEASIBILITY

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

As we show below, both personnel and disempowering reforms are subject to legal objection. In most cases, however, those objections admit of rejoinders, leaving the two approaches roughly on par. Similarly, while any reform faces an uphill political battle, we argue that disempowering reforms have at least as good a chance as personnel reforms at garnering coalitional support.

##### A. *Legal*

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

##### 1. *Personnel Reforms*

Among personnel reforms, court-packing is probably the most uncontroversially legal. As others have documented, the number of seats on the Supreme Court has been set since its inception by statute,<sup>227</sup> and Congress has adjusted the size of the Court—from six to seven,<sup>228</sup> to nine,<sup>229</sup> to ten,<sup>230</sup> back to nine<sup>231</sup>—numerous times.<sup>232</sup> This longstanding congressional practice couples with relative constitutional textual silence. While Article III assumes the existence of a Supreme Court and Article I, section 3 that there will be a Chief Justice, nothing else in the text seems to bear on how large or small the Court must be.<sup>233</sup>

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227. Judiciary Act 1789, ch. 20, § 1, 1 Stat. 73 (establishing a Supreme Court consisting of a chief justice and five associate justices).

228. Seventh Circuit Act of 1807, § 5, 2 Stat. 420.

229. Eighth and Ninth Circuits Act of 1837, 5 Stat. 176.

230. Tenth Circuit Act of 1863, 12 Stat. 794.

231. Circuit Judges Act of 1869, § 1, 16 Stat. 44.

232. See also Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89 (reducing the number of associate justices on the Supreme Court to five upon the next vacancy); Judiciary Act of 1802, 2 Stat. 156 (negating the “midnight judges” act).

233. Article III’s grant of life tenure and salary protection probably does, however, prohibit reducing the size of the Supreme Court by eliminating the seat of a sitting justice. See U.S. CONST. art. III, § 1. This is relevant to proposals that would designate sitting justices either “senior” justices or judges on the courts of appeals. See *infra* notes 241–242 and accompanying text.

Such historical and textual evidence notwithstanding, court-packing has been and continues to be subject to legal objection.<sup>234</sup> For instance, the 1937 Senate Judiciary Committee declared President Franklin Roosevelt's court-packing proposal unconstitutional. According to the Committee, the apparent purpose of the reform was to "appl[y] force to the judiciary," coercing it to adopt a "line of decision" that it otherwise would not.<sup>235</sup> The proposal, the Committee continued, was "an invasion of the judicial power such as has never been attempted" before, alleging that prior adjustments to the Court's size were not intended to "influence . . . decisions."<sup>236</sup>

After court-packing, the legality of personnel reforms gets murkier. Panel systems, for example, typically require individuals to be appointed both as a federal circuit court judge and as an associate justice. As Epps and Sitaraman concede, one could argue that such dual appointments would be unconstitutional, reasoning that both Article III<sup>237</sup> and the Appointments Clause<sup>238</sup> understand those two offices as distinct and so not to be combined or jointly held by some individual.<sup>239</sup> Maybe more worrisome, transitioning to a panel system could be characterized as effectively removing sitting justices from office in violation of Article III.<sup>240</sup>

Term limits for Supreme Court justices are vulnerable to analogous objections. Imposing term limits on all federal judges would plainly require constitutional amendment. For the Supreme Court, the proposed workaround is for appointees to serve as active justices for a fixed term, after which those individuals would transition either to "senior" status, sitting only in the event of recusal or temporary disability, or to acting as judges on the federal courts of

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234. See, e.g., Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 269–87 (2017) (discussing and expressing sympathy for constitutional objections to Roosevelt's failed proposal); see also Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. (forthcoming 2022) (examining claims around putative constitutional norms like the one against personnel expansion).

235. S. REP. NO. 711, at 8 (1937) (treating the "constitutional impropriety" of such motivates as obvious).

236. *Id.* at 12; Bradley & Siegel, *supra* note 234, at 274 & n.107 (suggesting that prior changes were politically motivated).

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

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

239. See Epps & Sitaraman, *supra* note 15, at 186; see also McGinnis, *supra* note 101, at 545 ("The most natural reading [of this language] may require (and the Framers certainly expected) judges to be appointed to a distinct Supreme Court . . ."). Epps and Sitaraman argue that the historical practice of Supreme Court justices "riding circuit" undercuts this objection. Epps & Sitaraman, *supra* note 15, at 187; see also Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1122 (1994) (observing that whereas the Constitution expressly bars members of Congress from holding other constitutional offices, there is no analogous provision for judges or justices).

240. See U.S. CONST. art. III, § 1 (providing that judges "shall hold their Offices during good Behaviour"). *But see* Epps & Sitaraman, *supra* note 15, at 185 (arguing that sitting justices "would simply enter the lottery" along with the 171 newly appointed justices). This concern applies equally to panel systems that expand the number of permanent justices, insofar as sitting justices would, under such proposals, effectively be demoted to part time.

appeals.<sup>241</sup> The senior status proposal invites charges of effective removal from office. Rotating justices to circuit court judges is more promising (though not without concern<sup>242</sup>). And even that approach leaves the issue of sitting justices, who would either have to be removed without being “removed” or allowed to depart the Supreme Court over time.

Partisan balance reforms are open to challenge as well. Partisan balance is a familiar feature of agency design and has generally been upheld by courts, though we lack a definitive endorsement along the lines of *Humphrey’s Executor*.<sup>243</sup> Partisan balance on courts, however, raises distinctive questions. For one, the Supreme Court is, unlike the Federal Elections Commission or the Securities and Exchange Commission, a creature of the Constitution,<sup>244</sup> suggesting that Congress may have less discretion in setting qualifications for Supreme Court justices. More still, depending on the formulation, conditioning appointment to the Court upon the party affiliation of the appointee or the appointing president or on the approval of some congressional block<sup>245</sup> would present either First Amendment<sup>246</sup> or Appointments Clause concerns.<sup>247</sup>

Last, merit selection presents obvious Appointments Clause worries insofar as the recommendations of the selection committee are binding.<sup>248</sup> Epps and Sitaraman cleverly try to avoid this worry by assigning appointment of a subset of justices to the other, regularly appointed justices and then limiting the pool of potential Supreme Court justices to judges previously appointed to lower federal courts.<sup>249</sup> In so doing, Epps and Sitaraman attempt to mirror the widely accepted practice of federal judges sitting “by designation” in different jurisdictions and at different levels of the judicial hierarchy.<sup>250</sup> Even here, though, the Supreme Court’s current hostility to institutional innovation poses a serious challenge,<sup>251</sup> as no lower court judge has ever sat by designation on the Supreme Court.

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241. *E.g.*, Roosevelt & Vassilas, *supra* note 139; Cramton, *supra* note 101, at 1324.

242. *See supra* notes 137–240 and accompanying text.

243. *See, e.g.*, Fed. Election Comm’n v. NRA Pol. Victory Fund, 6 F.3d 821, 824–25 (D.C. Cir. 1993) (avoiding the issue on standing grounds).

244. *See* U.S. CONST. art. III, § 1 (vesting the judicial power in “one supreme Court”).

245. *See* Epps & Sitaraman, *supra* note 15, at 204 (suggesting that presidents be required to choose nominees from a list prepared by Senate leadership of the relevant party).

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

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

248. *See id.* at 99.

249. *See* Epps & Sitaraman, *supra* note 15, at 201–02.

250. *See id.* at 201.

251. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2207 (2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496 (2010). *But see* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017) (describing and criticizing this trend).

## 2. *Disempowering Reforms*

Disempowering reforms are also legally contestable. Jurisdiction stripping is perhaps the most aggressive reform and famously raises numerous constitutional questions—questions that become more difficult the more comprehensive the strip. In particular, the Supreme Court has remarked repeatedly that “serious” concerns “would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.”<sup>252</sup> Such worries apply to specific constitutional issues, let alone to broad categories of claims.

Despite this controversy, stripping courts of jurisdiction, even over constitutional challenges, has strong textual footing. As numerous scholars have observed, Article III’s grant of authority to Congress to “make . . . Exceptions” to the Supreme Court’s appellate jurisdiction while at the same time placing the existence of “inferior” federal courts entirely within congressional control suggests that Congress enjoys sweeping authority concerning federal jurisdiction.<sup>253</sup> And as to state courts, both the Supremacy Clause and the Necessary and Proper Clause appear to provide Congress substantial discretion there as well.<sup>254</sup> Taken together, Christopher Sprigman argues that these features indicate the Constitution “gives to Congress the power to choose whether it must answer, in a particular instance, to judges or to voters,” relying in some instances on political rather than judicial checks to enforce constitutional constraints.<sup>255</sup>

Voting rules present different issues. Sachs, for instance, argues that a supermajority rule for constitutional invalidation would amount to Congress “pick[ing] and choos[ing] among different substantive holdings,” requiring a “supermajority to express one legal conclusion,” but allowing a “minority of Justices” to uphold another.<sup>256</sup> Similarly, Evan Caminker worries that “Article III implicitly mandates that the Supreme Court decide cases by bare-majority rule.”<sup>257</sup> And likewise, Epps and Sitaraman acknowledge that some read Article III as granting the Court exclusive or final authority to “decide how to resolve its own cases.”<sup>258</sup>

Jed Shugerman has offered the most comprehensive response to these objections. He begins by noting that the Court already makes various decisions

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252. *Webster v. Doe*, 486 U.S. 592, 603 (1988); *see also* *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 681 n.12 (1986) (same); *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975) (same).

253. U.S. CONST. art. III; *see* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1065–68 (2010) (calling this the “traditional” view).

254. *See* Michael C. Dorf, *Congressional Power to Strip State Courts of Jurisdiction*, 97 TEX. L. REV. 1, 13–15, 22–27 (2018); Christopher Jon Sprigman, *Congress’s Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778 (2020).

255. Sprigman, *supra* note 254, at 1786.

256. Sachs, *supra* note 247, at 97.

257. Caminker, *supra* note 114, at 77 n.12.

258. Epps & Sitaraman, *supra* note 15, at 190–91.

pursuant to non-majority rules—whether to grant certiorari, for example.<sup>259</sup> In addition, Shugerman observes, Congress already exercises authority over how the Court operates, defining by statute, for example, how many justices constitute a quorum.<sup>260</sup> Last, as to the concern about Congress dictating substantive holdings, Shugerman argues, channeling Frank Easterbrook,<sup>261</sup> that supermajority rule should be conceived as a constraint on the Court’s jurisdiction, depriving it of jurisdiction to pass on a constitutional question if only a bare majority of justices vote in favor of unconstitutionality.<sup>262</sup>

Finally, proposals for a legislative override raise fundamental questions about the constitutional basis of judicial review. In its weaker form, a legislative override would amount to an assertion of constitutional departmentalism, respecting individual judicial judgments but reserving to Congress the right to interpret the Constitution independently. Departmentalism has a strong legal<sup>263</sup> and historical<sup>264</sup> pedigree. At the same time, this sort of limited override would leave the Supreme Court as the final arbiter on most constitutional matters, especially in areas such as climate change in which only a single judgment could substantially undermine federal policy.<sup>265</sup> By contrast, allowing for a legislative override that displaces or precludes future contrary judicial judgments requires, by definition, a rejection of what Mark Tushnet calls “[s]trong-form” judicial review.<sup>266</sup> It is widely (though not universally) accepted that the Constitution provides for that form of review with respect to individual judgments, making displacement of judgments an uphill constitutional battle.<sup>267</sup> With respect to future contrary judgments, however, one could fashion a legislative override as a forward-looking strip of jurisdiction, depriving courts of the opportunity to issue analogous judgments going forward. Such an override would, of course, inherit the constitutional questions surrounding jurisdiction stripping more generally.<sup>268</sup>

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259. See Shugerman, *supra* note 114, at 894 (observing that the Supreme Court has adopted non-majority rules for granting both certiorari and holds).

260. See *id.* at 910.

261. See Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983) (arguing in the statutory context that courts should construe statutes of depriving them of jurisdiction in the event that interpretive questions fail to admit of “clear” answers).

262. See Shugerman, *supra* note 114, at 990–91.

263. See, e.g., Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 489 (2018) (observing that both Thomas Jefferson and James Madison held departmentalist views).

264. See Maggie Blackhawk, *Legislative Constitutionalism* (unpublished manuscript) (on file with authors) (describing Congress’s longstanding practice of developing constitutional meaning apart from the judiciary).

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

266. Tushnet, *Dialogic Judicial Review*, *supra* note 118, at 208.

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

268. See *supra* notes 252–255 and accompanying text.

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In sum, both personnel and democratic reforms are vulnerable to constitutional objection. Few if any of those objections are knockdown. Both types of reform are, broadly speaking, legally plausible. Nonetheless, to call both types of reform plausible is not to say that the current Court would rule in their favor. The Court has been hostile to institutional innovation, as well as protective of its present character and authority. It would be presumptively hostile to almost any of these proposals. As we see today, though, the Court is also acutely aware of its relative institutional power. Ultimately, the likelihood of success for any of these plausible *legal* theories depends upon the *political* support in their favor.

### B. *Political*

A separate question from the legal availability of these reforms concerns their political feasibility. By “political feasibility,” we mean the range of non-legal constraints and possibilities that might make enacting one reform rather than another less or more likely.

In the litigious real world, legality may loom large in the political feasibility of any reform. Still, separating the criteria is useful. There is no point in pursuing one reform, however legally plausible, if it is wholly infeasible on other grounds. Conversely, the ease of forming a coalition or gathering momentum for a given reform might offset its legal challenges. The worry that institutional intervention will cause “spirals” of tit-for-tat partisan response is also serious enough to warrant separate treatment; such a destructive cycle of vengeance is to be avoided, other things being equal. As with feasibility generally, this specific risk of spiraling varies across different reforms tremendously.

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

#### 1. *In General*

Political feasibility is often treated as a hard constraint, forbidding Supreme Court reform of any kind.<sup>269</sup> And the suggestion that any institutional intervention is unavailable affects personnel and disempowering reforms alike. It makes sense to begin, therefore, with the argument that a progressive frame makes more plausible—if not necessary—a lifting of the usual marginalization of reform of the Supreme Court. Dispute about which reform is feasible, after all, pales beside the consensus that none is.

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269. See, e.g., Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154 (2006).



But the erosion of that belief in the last few years means its grounds are no longer what they once were. Supreme Court reform was once a fringe notion, and figures as different as Earl Warren and Adrian Vermeule have concurred that it would remain so forever. In 1974, Warren reflected that reformers had not only “consistently fallen under the weight of their own ineptitude,” but the Supreme Court itself “has remained steadfast as an institution,” and “prevailed . . . over those who would destroy its function and its symbol as the chief architect of our constitutional way of life.”<sup>270</sup> A quarter-century later, as minor proposals to impose term limitations on Supreme Court justices were percolating, Vermeule offered an elaborate rationale for why Supreme Court reform could never happen. While he grudgingly acknowledged that it is not that “structural reform is impossible,” the hard truth is that “it is systematically unlikely to occur.”<sup>271</sup> But there is no doubt that it has become more mainstream today than in nearly a century. As Roberto Unger once remarked in another context, “The distance between the unthinkable and the familiar may be short in the history of politics and of law.”<sup>272</sup>

One might reply—and the end of the 2019 term substantiates it—that the Chief Justice or an alliance of liberals and conservatives on the court will always prioritize decreasing the feasibility of reform by avoiding sufficiently outrageous outcomes. On one hand, there is currently an alliance of sentiment between “pragmatists,” who operate with a harm reduction philosophy while never challenging the institutional foundations of Supreme Court partisanship or power. On the other hand, there are justices who rank sociological legitimacy over other concerns, even when it means that conservatives deny themselves the disruptive outcomes they may have spent a career preparing to reach.<sup>273</sup> This suggests that Supreme Court reform can never become feasible; to the extent it looms, steps to postpone it will be taken.

There are two responses to such a hypothesis. The first is that it is hardly guaranteed that the line of feasibility is set in stone, however assiduously managed by those who wish to draw it just far enough so that it is never reached. On the contrary, it is widely recognized that, with the Supreme Court moving further right after Kennedy was replaced by Roberts as median justice, the line of feasibility has been eroded to a remarkable extent. And the events of the late *Lochner* era prove that there certainly are conditions for it to be erased altogether. The “four horsemen” before the switch in time aroused sufficient political rage to prompt open national debate about the role of the Court in the constitutional order. Judicial intransigence has occurred, and the politics of its overcoming too,

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270. Earl Warren, *Let's Not Weaken the Supreme Court*, 6 A.B.A. J. 677, 677–80 (1974).

271. Vermeule, *supra* note 269, at 1154. We respond to Vermeule's main reason for his conclusion *infra*.

272. ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 86 (1996).

273. *See supra* Part III.C.

albeit with the results of doctrinal rather than institutional reform.<sup>274</sup> It is hard to understand what arguments could acknowledge the feasibility of the first but deny the second. The basic answer to the premise that Supreme Court reform could never be feasible is captured by the Georgia deacon when asked if he believes in baptism by total immersion. “Believe in it?” he replies. “I’ve seen it done!”<sup>275</sup>

Far more important, it takes two to tango. The variable of popular mobilization is central to the feasibility of Supreme Court reform. In a progressive frame, America looks to be moving from a period of quiescence to one of radicalization, and for good reason. If so, no amount of management of institutional credibility inside and outside the Court can avoid answering to the changing—sometimes rapidly changing—demands of mobilized populations. This popular will can and should outstrip any amount of flexibility in Court self-management, even in the most generous scenario. Of course, we can embroil ourselves in a debate between followers of Robert Dahl,<sup>276</sup> who contend that the Supreme Court just follows popular opinion, and those of President Franklin Roosevelt, who reply that, even if “ultimately the people and the Congress have had their way” in the long run, “that word ‘ultimately’ covers a terrible cost.”<sup>277</sup> Our point is merely that even if maximum political feasibility concerns are deployed to keep the Supreme Court’s current institutional form stable, its need to engage in doctrinal management to keep the threat of reform at bay could increasingly fail—making such reform more and more plausible.

It is also worth noting that the opposite perspective, which turns feasibility concerns against our exploration of Supreme Court reform, will not work either. On this view, opponents of any reform might claim that, if statutory reform is available, then options like constitutional amendment or revision make more sense. Our response is that there is a great deal of distance between the threshold

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

275. For lawyers, the best source of the anecdote is Abram Chayes, *The Authority of the United States Executive to Interpret, Articulate, or Violate the Norms of International Law*, 80 PROC. ANN. MEETING AM. ASS’N INT’L L. 297 (1986).

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

277. Roosevelt, *supra* note 171.

for institutional reform by statute and the threshold for a constitutional amendment to pass Congress and win approval from the requisite states.<sup>278</sup> In fact, due to well-rehearsed reasons, proceeding by constitutional amendment through Congress (to say nothing of a convention, whether for amending or replacing the original text) is practically unthinkable for the moment, even compared to the currently narrow likelihood of statutory intervention. The bolder ideas are increasingly familiar in American constitutional thought after a long absence, associated with commentators such as Sandy Levinson<sup>279</sup> and Lawrence Lessig.<sup>280</sup> But no matter the desirability of constitutional reform on its own terms, there can be no doubt that the statutory alteration of the Supreme Court within the existing constitutional framework is more feasible. One need not claim that amendments are wholly infeasible to easily conclude that the reforms we categorize and compare in this Article are far more so.

## 2. Personnel Reforms

Personnel changes have to be disaggregated in order to assess their political feasibility. This is not only because court-packing is more or less clearly legal compared to other more contestable personnel reforms, but also because it has received the huge lion's share of attention in the debates that followed the blocked confirmation of then-Judge Garland. Court-packing or personnel expansion might seem like the most politically feasible reform. And it is true that, currently, it is one of two reforms—the other being term limitation<sup>281</sup>—that has generated a contemporary advocacy group of its own. Its early familiarity and historical prominence have made expansion the go-to reform. To take one prominent example, Mark Tushnet, while mentioning that “it’s important to keep in mind the background concern about structural reform more generally[,]” has recently oriented his historic challenge to Supreme Court conservatism to court-packing (and chairs the academic advisory board of Pack the Court, the advocacy

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

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

280. For Lessig's endorsement on the hitherto unused Article V option of conventions for amending the Constitution, see Lawrence Lessig, *A Real Step to Fix Democracy*, ATLANTIC (May 30, 2014), <https://www.theatlantic.com/politics/archive/2014/05/a-real-step-to-fix-democracy/371898/> [<https://perma.cc/FLH7-TJQQ>], or Lawrence Lessig & Elizabeth Drew, *Should We Convene?*, N.Y. REV. BOOKS (July 9, 2015), <https://www.nybooks.com/articles/2015/07/09/should-we-convene/> [<https://perma.cc/M4LH-XHTR>].

281. Fix the Court also advocates for media and public access to oral argument, ethics code to fill the gap in coverage since the Supreme Court is not covered by the Code of Conduct for U.S. Judges, and clearer financial disclosure and recusal rules. See *The Fixes*, FIX THE COURT, <https://fixthecourt.com/the-fixes/> [<https://perma.cc/CCH9-BG9M>].

group favoring this reform). It is this reform, rather than other ones, that has become “thinkable again.”<sup>282</sup>

But familiarity can breed contempt, not just feasibility. The very prominence of court-packing, far from bolstering the feasibility of court expansion, could undercut it. Its uses in Eastern Europe in a wave of attacks on judicial independence are another strike against it.<sup>283</sup> More Democrats—including Joseph Biden during his campaign to become Democratic Party nominee for president—are now on record opposing it more than any other reform, and its meteoric rise in recent debate means it elicited unique pushback.<sup>284</sup> While President Franklin Roosevelt proved its use as a threat, at least on most accounts of the Supreme Court’s switch in time in the 1930s, the episode left bad enough memories in some quarters, raising its prominence only to undermine its feasibility now.<sup>285</sup> Not least, court-packing is the reform most imaginably subject to tit-for-tat acts of repeated expansion without an institutional brake other than durable electoral dominance—a risk we treat separately below. For now, our point is just that the early prominence of court-packing, and the somewhat radioactive associations it acquired in the 1930s (and, even more, in some recent re-readings of that era), are an enormous strike against its political feasibility.

As for the other personnel reforms, they fall naturally into two sets, with deadly if opposite political feasibility concerns. One set is politically infeasible because it is utopian. Its proposals presuppose restoration of the status quo ante of a pre-polarized judiciary, against the background of endemic polarization that rules such restoration out. The other set is feasible but trivial. Term limitation

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282. Mark Tushnet, *Court-Packing on the Table in the United States?*, VERFASSUNGSBLOG (Apr. 3, 2019), <https://verfassungsblog.de/court-packing-on-the-table-in-the-united-states/> [<https://perma.cc/DPZ7-P3FC>].

283. Without considering other reform options or how to classify them, Bojan Bugarcic and Mark Tushnet respond by insulating *some uses* of court-packing, namely those by American progressives, on the grounds that they do not reflect the right-wing sources of populism in the Polish case. Our rejoinder is that—independently of our main critique of court-packing on democratic grounds—foreign associations and experiences may lead us to prefer other versions of reform. See Bojan Bugarcic & Mark Tushnet, *Court-Packing, Judicial Independence, and Populism: Why Poland and the United States Are Different*, VERFASSUNGSBLOG (July 11, 2020), <https://verfassungsblog.de/court-packing-judicial-independence-and-populism/> [<https://perma.cc/3YCR-9E25>]; cf. Mark Tushnet & Bojan Bugarcic, *Populism and Constitutionalism: An Essay on Definitions and Their Implications* (Harv. Pub. L. Working Paper No. 20-17, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3581666](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3581666) [<https://perma.cc/3JMW-328E>].

284. “I would not get into court packing,” Biden remarked in the Ohio debate of Democratic presidential hopefuls in October 2019. *The October Democratic Debate Transcript*, WASH. POST (Oct. 15, 2019), <https://www.washingtonpost.com/politics/2019/10/15/october-democratic-debate-transcript/> [<https://perma.cc/3HCN-XAF3>].

285. See Julian E. Zelizer, *Packing the Supreme Court Is a Terrible Idea*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/opinion/supreme-court-packing-democrats.html> [<https://perma.cc/39MQ-JXGE>]; Gillian Brockell, *Dear Democrats: FDR’s Court-Packing Scheme Was a ‘Humiliating’ Defeat*, WASH. POST (Mar. 12, 2019), <https://www.washingtonpost.com/history/2019/03/12/dear-democrats-fdrs-court-packing-scheme-was-humiliating-defeat/> [<https://perma.cc/VL8N-X6Q5>].

may well be the most plausibly available of the reforms, but only because it would not solve the problem that justifies reform in the first place.

Take merit selection or partisan balance to begin with. All of their imaginable or proposed versions reflect a utopian aspiration to bracket the very political breakdown (and opportunity) of contemporary American politics. They want to wish it away in favor of centrist partisan agreement that has evaporated in the very years that Supreme Court reform has become plausible. The framing of the problem these solutions presuppose rules them out in practice.

And besides this sort of infeasibility, many personnel changes also suffer from the mismatch between their technocratic or wonkish character and the progressive coalition that alone has prioritized Supreme Court reform in recent years. The Epps-Sitaraman hybrid proposal is exemplary in this regard. Its endorsement by Buttigieg—celebrated and reviled as a centrist technocrat—is revealing (much like his deference to “smarter legal minds than mine” and to the *Yale Law Journal* by name onstage at the October 15, 2019 debate of Democratic candidates for president).<sup>286</sup> The point is not so much that obscurity afflicts personnel alternatives to court-packing, since disempowering reforms currently have the same problem. It is that the over-complication of some proposals depends on the belief that experts can find the formula to exit political crisis and stalemate. This dooms any case for their feasibility. What only law professors can understand, a popular movement will never demand.

On the other side of the mismatch between such personnel reforms and the rising progressive coalition, the reforms would fall badly short of progressive aspirations in an emergency, even if they were available. Progressives, to put it bluntly, are not rallying increasingly around the cause of Supreme Court reform to make the centrist ACA compromise invalidation-proof, or to postpone carbon neutrality to 2050 in hopes that massive concession in advance will save it from the kind of gutting the ACA has suffered in the past decade. Nor, to face expanding inequality, do progressives expect to avoid targeting wealth through direct taxes out of fear of a return to nineteenth-century jurisprudence.<sup>287</sup> In a plausible political reality, a progressive coalition will support Supreme Court reform to make progressive legislation viable, and nothing short of it. That merit selection or partisan balance, for the sake of a Supreme Court in centrist equipoise, would surge in the quest to protect such legislation is even more of a fantasy than the feasibility of such reforms against the background of a polarized political class.

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286. “Smarter legal minds than mine are discussing this in the *Yale Law Journal* and how this could be done without a constitutional amendment,” Buttigieg remarked. “But the point is that not everybody arrives on a partisan basis.” *The October Democratic Debate Transcript*, *supra* note 284.

287. Compare Peter J. Reilly, *Wealth Tax—That Pesky Constitution Might Get in the Way*, *FORBES* (June 25, 2019), <https://www.forbes.com/sites/peterjreilly/2019/06/25/wealth-tax-that-pesky-constitution-might-get-in-the-way/#452bf189779> [<https://perma.cc/7LYM-B2HQ>] (arguing for a constitutional basis for blocking any wealth tax), with Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 *IND. L.J.* 111 (2018) (defending constitutionality).

If such personnel reforms fail the test of political feasibility because they are utopian, by contrast, term limitation might well work because it makes so little difference. Indeed, it is probably for this reason that the American people have considered this reform for decades, while disregarding bolder steps as out of bounds. As we've discussed throughout, the goal of term limitations is to ensure that opportunities to appoint Supreme Court justices are distributed evenly according to electoral outcomes. Such reforms would work less well than is often suggested since Congress cannot simply legislate away an obstructionist Senate. They would slightly lower the stakes of Supreme Court appointments and make it more likely that winning a presidential election would mean more chance to shape the Court's ideological character. But that is all.

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

### 3. *Disempowering Reforms*

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

Jurisdiction stripping may be different. The formidable legal objections it faces, especially where constitutional rights are concerned, affect its political feasibility. Its erosion of the subject-matter jurisdiction of the courts might well feel especially radioactive to some audiences.<sup>288</sup> One possibility to exploit, on the model of the World War II price controls regime, is to couple stripping with reallocation of jurisdiction. This is almost certainly the more politically palatable move.<sup>289</sup> Either way, there is no reason to believe that jurisdiction stripping would be less feasible on grounds of this kind other than aggressive moves like court-packing, which resemble East European analogues more closely than jurisdiction stripping does.

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288. See, e.g., Mark Agrast, *Judge Roberts and the Court-Stripping Movement*, CTR. FOR AM. PROGRESS (Sept. 2, 2005), <https://www.americanprogress.org/issues/courts/news/2005/09/02/1622/judge-roberts-and-the-court-stripping-movement/> [<https://perma.cc/F6GA-B3ED>] (reminding that it was once the right, including Roberts before his judicial career, pushing boundaries on jurisdiction stripping).

289. *Yakus*, *supra* note 111, with the proviso that this move would not satisfy those who insist that the federal judiciary retain jurisdiction over constitutional claims.

As noted above, some of the personnel reforms suffer feasibility concerns because of their technocratic complication. In contrast, all three of the main disempowering reforms considered—jurisdiction stripping, legislative override, and supermajority rule—have an inverse superiority because they are easier for a general public to understand and evaluate. Like the personnel reforms that have ever gained popularity, court expansion and term limitation, the disempowering reforms are clear and simple.<sup>290</sup>

One enormous advantage that disempowering reforms have over even clear and simple personnel reforms is that they can cut across existing partisan configuration by not aiming at direct partisan advancement. Disempowering reforms have a unique advantage in making possible conservative buy-in or even creative new coalition building. They have broader coalitional possibilities by redirecting partisan strife to other arenas, without favoring any direct partisan tilt themselves.

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

As noted earlier, the critique of the Supreme Court and a number of its recent doctrines as antidemocratic—including in a number of dissents accusing the majority of elite power grabs<sup>291</sup>—has tended to be conservative in the last several generations, rather than liberal. This trend continued even after the conservative ascendancy in court output began in the 1970s. Since the early twentieth century, conservatives have tended to initiate disempowering institutional reforms to the Supreme Court, including the supermajority rule proposal.<sup>292</sup>

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290. Of course, there are many dilemmas to face and fights to be had over the form and scope of such reforms: for example, how selectively to strip jurisdiction or what decisions should require supermajority threshold. But it is not as if resolving whether to require a supermajority for all constitutional invalidation or only that of federal law would change the clarity of the supermajority threshold per se.

291. The most famous examples are Justice Scalia's dissents in gay rights cases. *See Romer v. Evans*, 517 U.S. 620, 636 (1996); *Lawrence v. Texas*, 539 U.S. 558, 586 (2003); *see also Obergefell v. Hodges*, 576 U.S. 644, 688 (2015) (Roberts, C.J., dissenting) (characterizing the case as one about "whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers").

292. *See supra* note 47.

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

In particular, disempowering reforms avoid what Vermeule penetratingly calls the “trade-off between impartiality and motivation,”<sup>293</sup> one of his reasons that he infers dooms Supreme Court reform altogether. On his account, nonpartisan attempts at institutional innovation lose the very short-term benefit that justifies and grounds support for reform in the first place. His example is term-limitations proposals that grandfather in extant justices so that no serving justice is deprived of life tenure.<sup>294</sup> Disempowering proposals, which Vermeule does not consider *per se*, may suffer other problems but escape this one. That is, disempowering the court serves whatever majority can now take more security in the immunity of its lawmaking to invalidation. Abstractly, because of the institutional separation disempowering proposals rely on between a site of disempowerment (the court) and a site of contestation (the rest of politics), they can proceed neutrally in the first while retaining heated partiality in the second.

Indeed, since disempowering reforms have no direct implications for partisan empowerment in the short term, but instead favor whoever can muster majorities,<sup>295</sup> there is reason to believe they can boast unique feasibility benefits in coalitional politics. Unlike personnel reforms, they harmonize with the partisan realignment that many anticipate or even consider necessary for a progressive movement beyond the limits of the country’s current partisan configuration—for example, to create a multiracial working-class party with broader appeal.<sup>296</sup>

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293. Vermeule, *supra* note 269, at 1166–69.

294. *See id.* at 1168.

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

296. *See, e.g.*, George Packer, *Is America Undergoing a Political Realignment?*, ATLANTIC (Apr. 8, 2019), <https://www.theatlantic.com/ideas/archive/2019/04/will-2020-bring-realignment-left/586624/> [<https://perma.cc/36HD-PNFF>]; Corey Robin, *The Politics Trump Makes: Is Trump, Like Carter, a Disjunctive President?*, N+1 (Jan. 11, 2017), <https://nplusonemag.com/online-only/online-only/the-politics-trump-makes/> [<https://perma.cc/PC96-3MDG>].



In some quarters, the fact that progressives might come to agreement with (some of) their usual enemies over disempowering reforms might seem like a strike against them. But in most imaginable scenarios, a compromise to shift partisan contention from the Supreme Court to political contest (where it belongs) would benefit, rather than hurt, progressives on the national level. Almost all the areas progressives care about, where the Supreme Court hasn't delivered—from labor rights to partisan gerrymandering to racial justice—would benefit from democratization, whether or not the threat the Supreme Court poses to their legislative agenda crystallizes. And framing disempowering reform as a compromise that cuts across other ideological disputes would counteract the frequent anxiety that anything less than full engagement in partisan contention through the courts would amount to “unilateral disarmament.”<sup>297</sup> A better and fairer way to conceive of disempowering reforms is as a weapons control regime within one arena, in order to concentrate fully on the fight in democratic arenas.

Of course, the greater political feasibility of disempowering reforms that this argument implies is not necessarily costless. Though our point is that judicial empowerment has not favored progressive victories lately, if ever, no one thinks that democratic processes ever guarantee them either. But as with rights above, it is hard to imagine that disempowering reforms would incur less constitutional supervision of the states, in either of two alternative scenarios. The first is that the reforms are calibrated to democratize power at the federal level without returning it to states, as in a supermajority requirement only for constitutional challenges to federal law. The second is that, even if such a reform were extended to challenges of the constitutionality of state law, it would require even more votes to overturn cases from *Brown*<sup>298</sup> to *Obergefell v. Hodges*,<sup>299</sup> and plausibly would never happen. In any event, what passes for federal supervision of outlying states is at its weakest in at least a half century, compatible with current outcomes like restricted abortion rights<sup>300</sup> and the unconstitutionality of Medicaid expansion to populations that most need it.<sup>301</sup> Nor is strengthening it through any reform of the judiciary an option.

But progressive victory in the political branches of the federal government with an opportunity to restart progressive reform is. The best answer to the fear that the feasibility of disempowering reforms would indulge intolerable new risks is that, while local autonomy would increase, and thus risk conservative rather than progressive gains, even greater rewards would plausibly accrue. Even if the expectation that disempowering would benefit conservatives rather than

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297. See Richard S. Price & Thomas M. Keck, *Movement Litigation and Unilateral Disarmament: Abortion and the Right to Die*, 40 LAW & SOC. INQUIRY 880, 881 (2015) (“[B]acklash critique amounts to a call for social movements to engage in unilateral disarmament by abandoning a significant venue for achieving policy change while their opponents continue to exploit that venue.”).

298. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

299. 576 U.S. 644 (2015).

300. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

301. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

progressives in some places were well-founded, it would enhance the feasibility of disempowering reforms, allowing different and perhaps more buy-in than reforms that sought a rebalanced stalemate on the federal level would. And in exchange, it would allow for a progressive breakthrough on the federal level that the current Supreme Court, or even one with adjusted personnel, is unlikely to tolerate.

#### 4. *Spiraling*

One of the most common responses to early court-packing proposals has been a debate about “constitutional hardball” in Tushnet’s language<sup>302</sup>—the risk of spiraling tit-for-tat that any reform could prompt. But not all reforms are created equal in this regard either, and disempowering reforms boast the virtue of generally escaping the risk. Ironically, the political branches that can go to war repeatedly over some reforms to the “least dangerous branch”<sup>303</sup> can forestall the escalation of reform merely by making it less dangerous. Not only do disempowering reforms work by a one-time fix rather than a repeatable move, but they disincentivize further reform of the court precisely by making it less powerful.

Tushnet coined the notion of “constitutional hardball” in 2004 to refer to a variety of high-stakes political interventions with the common feature that winners take all and losers suffer the consequences quasi-permanently.<sup>304</sup> Not all such interventions succeed, and they may prompt reciprocal hardball when they get going (to stave off the results) or when they fail (in punishment for the attempt). Debates have raged about whether hardball has generally been asymmetric, with the frequent conclusion that Democrats have, for ideological and structural reasons, been willing to play by the rules and Republicans more likely to break them and more successfully so.<sup>305</sup>

Whether or not this is true, Tushnet’s concept matters here because, very quickly on the reawakening of Supreme Court reform discussions, the idea was identified as a species of constitutional hardball.<sup>306</sup> In some quarters, the susceptibility of court-packing schemes to spiraling was taken to delegitimize the whole enterprise, as if the concern were generalizable across all imaginable reforms. And it was asked: would court-packing actually advance Democratic

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302. Tushnet, *supra* note 124, at 523.

303. BICKEL, *supra* note 199.

304. Tushnet, *supra* note 124, at 523.

305. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018).

306. Compare Jonathan Bernstein, *Don’t Pack the Court. Fix It*, BLOOMBERG (Sept. 18, 2019), <https://www.bloomberg.com/opinion/articles/2019-09-18/democrats-shouldn-t-pack-the-supreme-court-they-should-fix-it> [<https://perma.cc/RLS9-84H8>] (rejecting court-packing as dangerous “hardball”), with Belkin, *supra* note 144 (defending court-packing as “hardball”), and David Scharfenberg, *Republicans Have Been Playing Hardball for Decades, Will Democrats Push Back?*, BOS. GLOBE (Jan. 3, 2020), <https://www.bostonglobe.com/2020/01/03/opinion/will-democrats-break-democracy-bid-fix-it/> [<https://perma.cc/M875-ML72>] (same).

control of the Supreme Court through personnel change (even if justified as a matter of retroactive justice) or spark a civil war? Some feared it would spiral out of control, as it became normal for victorious parties simply to try to lock in more transient control by adding Supreme Court justices. It is even imaginable that such spirals could tighten further if losing parties on the way out attempted to expand the Supreme Court *in advance* of electoral victors doing the same. Indeed, as constitutional scholars know, a not too dissimilar scenario was the predicate for the establishment of judicial review itself in *Marbury v. Madison*.<sup>307</sup> After Jefferson's Democratic-Republicans won in 1800, the Federalists appointed "midnight judges" throughout the judiciary—and John Marshall as Chief Justice.

How spiraling affects feasibility is a question requiring disaggregation of reform, risk tolerance, and sober judgments. Observers favoring the move to exclusive court-packing, while facing terrified responses, have replied in two ways. They have either expressed simple tolerance of the disorderly threat of tit-for-tat expansion or claimed it has now become a necessary risk. The daring embrace the risk with equanimity, while the risk-averse do so as a matter of melancholy duty. Relegitimation, on this account, depends on norm breaking. If there is a risk of tolerating more norm breaking in response, it is tragic but unavoidable now.<sup>308</sup> *New York Times* columnist Jamelle Bouie, in a high-profile court-packing endorsement, writes: "Yes, there's the risk of escalation, the chance that Republicans respond in turn when they have the opportunity. There's also the risk to legitimacy, to the idea of the courts as a neutral arbiter. But Trump and McConnell have already done that damage. Democrats might mitigate it, if they play hardball in return."<sup>309</sup>

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

And it really does depend on whether all other reforms are as subject to escalatory spiral as court-packing clearly is. David Pozen has argued that, all other things being equal, reforms that cool the temperature of politics—"anti-

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307. 5 U.S. 137 (1803).

308. David Faris, *Democrats Must Consider Court-Packing When They Regain Power. It's the Only Way to Save Democracy*, WASH. POST (July 10, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/07/10/democrats-must-consider-court-packing-when-they-regain-power-its-the-only-way-to-save-democracy/> [https://perma.cc/A2PK-P5GZ].

309. Bouie, *supra* note 82.

hardball”—are preferable to those that heat it up.<sup>310</sup> And progressives have no trouble preferring reform that avoids the threat of overheated contention over the judiciary. They are committed to intensified partisan struggle, certainly, but this is anything but reducible to the pursuit of tit-for-tat over Supreme Court control. Indeed, their call for partisanship and even polarization in the country, in the exercise of power through the political branches, is mainly premised on the need to marginalize Supreme Court through reform. Disempowering reform may make the Supreme Court’s political role more apt to fluctuate, depending on elections, but not to spiral. With this understanding, our supplement to Pozen’s point is that disempowering reforms are systematically more likely to achieve their ends while also managing the risk of spiral. In fact, confronting the possibility of spiral, even if the risks involved do not justify “end-time worries,”<sup>311</sup> is a decisive reason to prefer disempowering reforms, since they involve no such risks at all.

True, not all personnel reforms are as subject to spiraling as court-packing is. But if this is so, it is because they are faulty on other grounds. As we have discussed above, merit selection or partisan balance schemes strive to impose a permanent, centrist settlement between warring factions of American governance. If these proposals are more feasible in view of spiraling concerns, it is only because they are less feasible in general. And even these personnel reforms are imaginably subject to repetition. Aside from term-limitation, other personnel changes are faced with the objection that the other side can do them, interpreting institutional restoration in self-serving ways. Pozen’s example of an “anti-hardball” reform is making judicial nomination to the Supreme Court more regular and shifting long-serving justices to senior status.<sup>312</sup> But as with other personnel reforms that preserve the power of the institution itself, it is open for the next electoral victors to proclaim the need for a further tweak. A shift to one set of experts to pick judges is apt to elicit the response that another might hypothetically serve better, and so forth. Term limitation by itself imposes no great risk of spiral (except that it could theoretically prompt a proposal for another adjustment of terms upwards or downwards). But, as we have argued above, it is a personnel reform that escapes the risk of spiral at the high price of minimal effects on judicial output.

By contrast, disempowering reforms are much more clearly immune to the risk of spiral, especially relative to the clear potential of personnel expansion to incur it. Depending on the jurisdiction-stripping statute terms, of course, a selective attempt to wrest some kinds of constitutional challenges from the Supreme Court or federal judiciary could invite the escalatory response of

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310. See David E. Pozen, *Hardball and/as Anti-Hardball*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 949 (2019).

311. Tim Burns, *Court Packing Is Not a Threat to American Democracy. It’s Constitutional*, NEW REPUBLIC (Mar. 15, 2019), <https://newrepublic.com/article/153325/court-packing-not-threat-american-democracy-its-constitutional> [<https://perma.cc/NMC8-HG3R>].

312. See Pozen, *supra* note 310.

restoring those exclusions and swapping in new ones. For example, where Democrats attempted to immunize voting rights laws, Republicans might restore constitutional invalidation of those achievements only to strip jurisdiction over suits contesting religious establishment by local communities (as in the proposed Constitution Restoration Act of 2005).<sup>313</sup> A universal strip that disempowered the Supreme Court from overturning federal legislation generally, however, is not subject to spiral in this way, for there is nowhere further to go.<sup>314</sup> All that would remain is the fight over legislation itself, and the idea that legislators would subsequently choose to reestablish judicial review seems hardly likely.

A supermajority rule is even more exemplary of the non-spiraling virtue of disempowering reform.<sup>315</sup> One could, of course, imagine spiraling proposals to adjust the voting threshold for decision up or down. But because the reform itself would have the effect of transferring power away from the Supreme Court to the legislature, the incentives to return to tweak are far less than in cases of personnel reform. Personnel reforms leave judicial power to capture, by any plausible or implausible argument that reform has not taken far enough, while disempowering ones resituate ongoing political struggle elsewhere.

#### CONCLUSION

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

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

But the rightist and centrist outcomes are not the only possibilities. If a progressive coalition wins, it could take advantage of the power reassigned from

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313. See Constitution Restoration Act of 2005, S. 520, 109th Cong. (2005).

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

315. Even Jennifer Rubin, *Washington Post* columnist, recognizes its superiority on precisely this ground, after speaking with Laurence Tribe and citing his concerns about court-packing spiraling: “I’m not in favor of trying what FDR sought to do—and was rebuffed by the Democratic Senate for attempting,” Tribe told Rubin. “Obviously partisan Court-expansion to negate the votes of justices whose views a party detests and whose legitimacy the party doubts could trigger a tit-for-tat spiral that would endanger the Supreme Court’s vital role in stabilizing the national political and legal system.” Jennifer Rubin, *Why Court-Packing Is a Really Bad Idea*, WASH. POST (Mar. 19, 2019), <https://www.washingtonpost.com/opinions/2019/03/19/why-court-packing-is-really-bad-idea/> [<https://perma.cc/Y59G-KAJ6>].

the Court to allow politics to redeem the country—something that no court, let alone our Supreme Court, will ever do.