Our Partisan Supreme Court and An Essential First Step Toward Reclaiming What's Been Lost

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Abstract: *Partisan decision-making by even only one Supreme Court Justice in a single case is not a trivial matter. The ill effects are greatly compounded when five or more Justices of a similar partisan bent regularly deliberate about, and decide, cases in a partisan way. At that point, we've got what can fairly be described as a partisan Supreme Court.*

I argue in this Article that, to all of our great misfortune, a partisan Supreme Court is very much what we've got today. On a more hopeful note, though, I also argue that although reforming the Court to be a much less partisan institution won't be easy, it's not an insuperable task if given the priority it deserves.

I begin in Part I by underlining the perils of having a partisan Supreme Court. Those perils may seem rather abstract and theoretical during times in our nation's history when the various parts of our federal system are functioning reasonably effectively and working together in a reasonably harmonious way. Today, however, surely isn't one of those times. Most obviously, we have a President who claims to have a popular mandate to use the full powers of the presidency to put into effect a radical political agenda, who takes as a given that members of his party in Congress must bend to his will, and who seems intent on testing the resolve of the federal courts in general and the Supreme Court in particular to keep him within constitutional bounds.

In Part II, I contend that today's Court is not only partisan, but extremely partisan. Its decision-making is driven by, and reflects, a radically conservative political ideology that makes its partisanship especially dangerous and harmful. To lay the groundwork for my proposal of a necessary first step to a much less partisan Court, I discuss in Part III

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two developments that were instrumental in making the Court as partisan as it has become.

With the lessons from those two developments in mind, I offer in Part IV a simple, though perhaps counterintuitive, proposal for reform of the Supreme Court appointment process that I believe is essential to substantially defuse, and keep defused, the partisanship that plagues the Court. In Part V, I briefly discuss the two most prominent proposals for Supreme Court reform in recent years – proposals not addressed to the appointment process – and explain why neither has anything like the potential of mine to make the Court a much less partisan institution.

INTRODUCTION

You may be thrilled about the Supreme Court's decisions in recent years or perhaps you're barely able to hold back your tears, but we *all* have a big problem, and it's called a partisan Supreme Court. Obviously, if the framers of the Constitution intended for the Justices to be wholly divorced from politics, they wouldn't have provided for the Justices to be appointed by politically accountable actors.[1] There's a big difference, though, between having Justices not entirely divorced from politics and having ones who, consciously or unconsciously, decide cases much as if they were legislators free to vote their policy preferences into law.

Partisan decision-making by even only one Justice in a single case is not a trivial matter. The Justice's vote may prove decisive in the case, and even if it doesn't, the Justice's participation with a legislative mindset in the Court's collective decision-making process in the case compromises the process and casts doubt on the validity of the result. The ill effects are greatly compounded when five or more Justices of a similar partisan bent regularly deliberate about, and decide, cases in a partisan way. At that point, we've got what can fairly be described as a partisan Supreme Court. Although many of the cases decided by a partisan Court won't implicate partisan preferences and may well be decided unanimously or nearly unanimously,[2]

[1] U.S. Const. art. II, § 2, cl. 2 ("The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . . .").

[2] The statistics on unanimity are indicative of the many politically uncontroversial cases the Court decides each term. Over the past thirty years, the proportion of cases decided each term without any dissenting votes generally has been in the range of roughly two-fifths to one-half. See, e.g., Robert J.

a partisan Court will show its true colors in the politically controversial minority of cases on its docket, and that's enough to seriously undermine the system as a whole.

I argue in this Article that, to all of our great misfortune, a partisan Supreme Court is very much what we've got today. However, on a more hopeful note, I also argue that although reforming the Court to be a much less partisan institution won't be easy, it's not an insuperable task if given the priority it deserves.

I begin in Part I by underlining the perils of having a partisan Supreme Court. Those perils may seem rather abstract and theoretical during times in our nation's history when the various parts of our federal system are functioning reasonably effectively and working together in a reasonably harmonious way. Today, however, surely isn't one of those times. Both houses of Congress are sharply divided in membership and ideology along partisan lines, with the result that broad bipartisan agreement on legislation is a near-impossibility no matter how much the legislation may be needed.[3] The great majority of states are dominated by one or the other of the two major political parties, and the roughly equal number of states dominated by each party are often pulling in opposite directions across a gaping ideological divide.[4] And most troubling of all, we have a president who claims to have a popular mandate to press the outer boundaries of presidential power to put into effect a radical political agenda,[5] who takes as

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Jackson, Jr. & Thiruvendran Vignarajah, Nine Justices, Ten Years: A Statistical Retrospective, 118 Harv. L. Rev. 510, 520 (2004) (collecting statistics for the 1994–2003 terms—"the first time in history [that] nine Justices celebrated a full decade presiding together"—during which an average of 43.3% were decided by unanimous opinion or without unanimous opinion but with unanimity in judgment); The Supreme Court, 2012 Term—The Statistics, 127 Harv. L. Rev. 408, 413 (2013) (48.7%); The Supreme Court, 2020 Term—The Statistics, 135 Harv. L. Rev. 491, 496 (2021) (43.6%); The Supreme Court, 2023 Term—The Statistics, 138 Harv. L. Rev. 446, 451 (2024) (44.6%).

[3] See Dave Davies, 'Mad House' Exposes Congressional Dysfunction, from Petty Feuds to Physical Threats, NPR (Mar. 25, 2025, 1:56 PM), https://www.npr.org/2025/03/25/nx-s1-5338729/mad-house-congress-maga-annie-karni-luke-broadwater; Catie Edmondson, The Next Congress, N.Y. Times (Jan. 7, 2025), https://www.nytimes.com/2025/01/07/briefing/republican-congress-trump-mike-johnson.html.

[4] See American States Are Now Petri Dishes of Polarization, Economist (Sept. 1, 2022), https://www.economist.com/leaders/2022/09/01/american-states-are-now-petri-dishes-of-polarisation; David Dayen, The Cold Civil War, Am. Prospect (Oct. 7, 2024), https://prospect.org/politics/2024-10-07-cold-civil-war/; Gabrielle Gurley, Falling into Climate Disaster, Am. Prospect (Oct. 16, 2024), https://prospect.org/environment/2024-10-16-falling-into-climate-disaster/.

[5] See Domenico Montanaro, Trump Is Making Many Moves, and He Says He Has a Mandate that Justifies Them, NPR (Mar. 26, 2025, 4:36 AM), https://www.npr.org/2025/03/26/nx-s1-5336728/trump-is-making-many-moves-and-he-says-he-has-a-mandate-that-justifies-them; Charlie Savage, Trump's Maximalist Assertion of Presidential Power Tests the Rule of Law, N.Y. Times (Apr. 30, 2025), https://www.nytimes.com/2025/04/30/us/politics/trump-100-days-president-power-law.html.

a given that members of his party in Congress must bend to his will,[6] and who seems intent on testing the resolve of the federal courts in general and the Supreme Court in particular to keep him within constitutional bounds.[7]

In Part II, I contend that today's Court is not only partisan, but *extremely* partisan. Its decision-making is dominated by a six-Justice majority whose radically conservative political ideology makes the Court's partisanship especially dangerous and harmful. To lay the groundwork for my proposal of a necessary first step toward ultimately having a much less partisan Court, I discuss in Part III two developments that were instrumental in making the Court as partisan as it has become. With the lessons from those developments in mind, I offer in Part IV a simple, though perhaps counterintuitive, proposal for reform of the Supreme Court appointment process that I believe is essential to substantially defuse, and keep defused, the partisanship that plagues the Court. In Part V, I briefly discuss the two most prominent proposals for Supreme Court reform in recent years—proposals not addressed to the appointment process—and explain why neither has anything like the potential of mine to make the Court a much less partisan institution.

To avoid possible misunderstanding, I should note at the outset one limitation that I've placed on the scope of this Article and my reason for doing so. I make no attempt to address whether the Court's three more liberal Justices behave in as partisan a manner as their six radically conservative colleagues. I don't do so because my concern in this Article is remedying the partisanship that now dominates the Court and threatens its legitimacy and effectiveness and because that partisanship is the partisanship that the bloc of six bring to the Court. If my proposed remedy, discussed in Part IV, is adopted, the likelihood that future appointments will result in a Court dominated by any partisan bias, liberal or conservative, will be greatly diminished. Nominees' ideology will play a much less significant role in their selection, and factors, like open-mindedness and objectivity, that militate against a partisan mindset in decision-making will play a much more significant role.

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[6] See Carl Hulse & Catie Edmondson, Under G.O.P., Congress Cedes Power to Trump, Eroding Its Influence, N.Y. Times (Mar. 14, 2025), https://www.nytimes.com/2025/03/14/us/politics/trump-republicans-congress-power.html; Annie Karni & Jonathan Swan, Trump, with More Honey Than Vinegar, Cements an Iron Grip on Republicans, N.Y. Times (Mar. 10, 2025), https://www.nytimes.com/2025/03/10/us/politics/trump-republicans-congress.html.

[7] See infra text accompanying notes 14–21.

I. THE PERILS OF A PARTISAN SUPREME COURT

A partisan Supreme Court is inconsistent with at least four fundamental principles of our Constitution and system of government. Those inconsistencies are important not only from a theoretical perspective, but from a practical perspective as well, because they may have devastating real-world effects.

First, a partisan Supreme Court is inconsistent with the constitutional commitment to separation of powers. It usurps decision-making authority that the Constitution allocates to the political branches. The result may be friction between the Court and the other branches that undermines the effectiveness of each and the smooth working of the federal government as a whole. A partisan Court may provoke the other branches to defy, or retaliate against, the Court for overstepping its bounds. In the interest of simplicity and clarity, I'll frame my discussion in terms of Congress, but it should be understood as applying to the executive branch as well.

In interpreting and applying the Constitution and federal statutes, the Justices should engage in a very different kind of reasoning process than the one that legislators use in deciding whether to support particular legislation. It's entirely appropriate for legislators, as the people's elected representatives, to vote one or another way on proposed legislation for any of a variety of policy reasons. They may vote a particular way, for example, because in their view it is the optimal response to interest-group pressures or perhaps because in their considered judgment it best serves the interests of the people they represent.[8] However, as unelected officials with no mandate from the people to put their policy preferences into law, the Justices shouldn't seek to effectuate those preferences when they decide what the Constitution or a federal statute means or how it should be applied. Instead, they should strive to interpret and apply those sources as objectively and impartially as they can.

Of course, in interpreting and applying the Constitution and federal statutes, the Justices can't help but be influenced to some extent by their policy preferences and other personal values. The Justices are people, and people can't and don't make decisions as if they were blank slates. Nevertheless, as unelected decision-makers ruling on the meaning and constitutionality of acts of the people's elected representatives, the Justices can fairly be expected to do their best to keep their personal preferences in check and to put aside whatever thoughts they may have about the wisdom

[8] See Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 31–35 (1985).

of the law under review. To do otherwise disrespects the principle of legislative supremacy that is a key ingredient of the separation of powers.

Second, a partisan Supreme Court is inconsistent with basic principles of federalism. The Constitution limits states' authority to provide for their citizens' general welfare only insofar as an exercise of state authority oversteps constitutional limitations or conflicts with a legitimate exercise of federal lawmaking authority. If the Justices strike down state law for reasons only superficially based on the Constitution but actually based on the Justices' personal preferences, they deny states the range of authority that the states are constitutionally entitled to exercise. The result may be friction between the Court (or the federal government more broadly) and individual states that detracts from the effectiveness of each and the smooth working of the federal system as a whole. States may go as far as refusing to obey Court orders on the view that the Court has exercised authority beyond its constitutional bounds.

Third, a partisan Supreme Court is inconsistent with the commitment to democratic government that lies at the heart of our constitutional scheme. It's the epitome of undemocratic for the Justices, a group of unelected officials, to interpret the Constitution to conform to their personal preferences and invoke it to overturn laws enacted by the people's elected representatives. By the same token, democracy is the loser any time the Justices pay lip service to a federal statute by construing it to give effect to their personal preferences instead of the purposes that the people's representatives in Congress had in mind.

In acting contrary to democratic principles, a partisan Supreme Court undermines public confidence in its work—something that it can ill afford to do.[9] The president, Congress, and Supreme Court all depend for their effectiveness on public confidence in their decisions, but the Court is especially dependent on it. As Alexander Hamilton memorably explained in

[9] A widely shared perception that the Court is deciding cases in accordance with partisan political ideology isn't the only reason the public may lack the necessary confidence in the Court. Another perception that may play an important role is that some Justices are insensitive to financial and other conflicts of interest that appear to compromise their ability to decide cases objectively and impartially. For commentary expressing concern that Justices Thomas and Alito have been especially insensitive in this regard and that it has seriously undermined public confidence in the Court, see Linda Greenhouse, How John Roberts Lost His Court, N.Y. Times (June 16, 2024), https://www.nytimes.com/2024/06/16/opinion/alito-ethics-clarence-thomas.html; Philip Allen Lacovara, The Case for Alito's Recusal, Bulwark (June 13, 2024), https://www.thebulwark.com/p/the-case-for-justice-samuel-alito-recusal; Gary J. Simson, How *Not* to Restore Public Confidence in the Supreme Court, Verdict (Apr. 12, 2024), https://verdict.justia.com/2024/04/12/how-not-to-restore-public-confidence-in-the-supreme-court. Other factors affecting public confidence in the Court are discussed in Gary J. Simson, Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees, 7 Const. Comment. 283, 296–98 (1990).

The Federalist, the executive and legislative branches can enforce their decisions by the "sword" and the "purse," but the judiciary must depend upon the "aid of the executive arm even for the efficacy of its judgments."[10] To help ensure that the other branches, as well as the states, honor its decisions, the Court must rely on the electorate to deter noncompliance.[11]

If the electorate become persuaded that the Court is partisan, they aren't apt to be as much of a check on the other branches and the states.[12] Most obviously, when a Court widely perceived as partisan predictably decides a politically controversial case along partisan lines, public confidence in the fairness and justice of that decision will be low, and the other branches and the states will have little reason to fear being punished at the ballot box for halfheartedly complying with, if not outright defying, the decision. Furthermore, even when a Court widely perceived as partisan doesn't decide a politically controversial case along the usual partisan lines, the other branches and the states are apt to feel at least somewhat less constrained to fully respect the Court's decision than they would if public confidence in the Court hadn't been depleted by the perceived partisan taint.

In light of the current state of affairs in this country, it seems anomalous to state the above principles only in the abstract. Shortly after Donald Trump was reelected president, Georgetown Law Professor Stephen Vladeck maintained that it would be "much harder" for the Court to "push back" against him than during his first term because of the "sharp decline" in public confidence in the Court.[13] Vladeck posed a question that, as he observed, had previously "seemed largely unthinkable": "Without that public support, what would happen if Mr. Trump simply ignored a decision by the nation's highest court that he doesn't like?"[14]

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[10] The Federalist No. 78, at 227 (Alexander Hamilton) (Roy P. Fairfield 2d ed. 1966).

[11] In the words of Justice Frankfurter, "[T]he confidence of the people is the ultimate reliance of the Court as an institution." Felix Frankfurter, The Supreme Court in the Mirror of Justices, 105 U. Pa. L. Rev. 781, 796 (1957).

[12] See Matthew Hall & Joseph Daniel Ura, Loss of Supreme Court Legitimacy Can Lead to Political Violence, Conversation (July 1, 2024, 8:17 AM), https://theconversation.com/loss-of-supreme-court-legitimacy-can-lead-to-political-violence-233316 ("What's referred to by experts as the problem of 'judicial legitimacy' may seem abstract, but [the Supreme Court's] faltering public support is about more than popularity. Eroding legitimacy means that government officials and ordinary people become increasingly unlikely to accept public policies with which they disagree."); Mark A. Lemley, The Imperial Supreme Court, 136 Harv. L. Rev. F. 97, 117–18 (2022) ("The Court ultimately exists on the credibility of its judgments, and if it damages that credibility enough, the federal or state governments may decide that they can simply ignore it. The Court has always walked a bit of a tightrope when it comes to public approval and government obedience to its mandates.") (footnotes omitted).

[13] Stephen I. Vladeck, Will the Supreme Court Stand Up to Trump? Can It?, N.Y. Times (Nov. 12, 2024), https://www.nytimes.com/2024/11/12/opinion/donald-trump-supreme-court.html.

[14] Id.

By the end of President Trump's first full month back in the White House, that question had become far from "unthinkable." The new administration had issued numerous orders seemingly inconsistent with federal statutes or the Constitution, and when the lower federal courts prevented various of them from taking effect pending final determinations of their legality,[15] Vice President Vance and other administration officials had expressed doubts about the lower courts', and even the Supreme Court's, authority to do so.[16] Maintaining that "Mr. Trump is clearly well aware that [the Supreme Court] is unpopular and no longer commands the reverence that long protected it from attacks," historian Jeff Shesol contended in late February 2025 that the question no longer was "whether Mr. Trump will defy the Court, but how soon and to what extent."[17]

Although the Trump administration in subsequent months has been no more, and probably less, restrained in testing the Court's willingness to rein it in,[18] the confrontation that Shesol predicted has not yet come to pass. Writing in July 2025, Harvard Law Professor Noah Feldman observed that, in its recently completed term, the Court had "picked its battles" and "worked hard to avoid a direct confrontation in which Trump might overtly declare his intention to ignore" a ruling by the Court.[19] Particularly in light of the Court's stunningly long list of pro-administration decisions in 2025 of cases on its emergency docket (often referred to as its "shadow" docket),[20] I

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[15] See, e.g., Anthony Izaguirre, Federal Judge Blocks Musk's Doge from Accessing Sensitive Treasury Material, Associated Press (Feb. 8, 2025, 1:35 AM), https://apnews.com/article/elon-musk-doge-lawsuit-attorneys-general-5733f8985e4cf7ad5b233fddefef4d01.

[16] See Isaac Chotiner, What Happens if Trump Defies the Courts, New Yorker (Feb. 11, 2025), https://www.newyorker.com/news/q-and-a/what-happens-if-trump-defies-the-courts; Jill Colvin, Vance and Musk Attack Judicial Authority as Trump's Agenda Gets Pushback from Courts, PBS (Feb. 9, 2025, 6:42 PM), https://www.pbs.org/newshour/politics/vance-and-musk-attack-judicial-authority-as-trumps-agenda-gets-pushback-from-courts; Adam Liptak, Trump's Actions Have Created a Constitutional Crisis, Scholars Say, N.Y. Times (Feb. 12, 2025), https://www.nytimes.com/2025/02/10/us/politics/trump-constitutional-crisis.html.

[17] Jeff Shesol, John Roberts Is on a Collision Course with Trump, N.Y. Times (Feb. 23, 2025), https://www.nytimes.com/2025/02/23/opinion/john-roberts-trump-supreme-court.html.

[18] See, e.g., Thomas A. Berry, Trump's Targeting of Law Firms Is Unconstitutional, Cato Inst. (Apr. 3, 2025, 12:43 PM), https://www.cato.org/blog/trumps-targeting-law-firms-unconstitutional; Jacob Knutson, Trump Dismantling Education Department Violated Constitution, Lawsuits Say, Democracy Docket (Mar. 24, 2025), https://www.democracydocket.com/news-alerts/trump-education-department-order-violated-constitution/.

[19] Noah Feldman, The Supreme Court's Majority Is Playing the Long Game, Bloomberg (July 2, 2025, 6:30 AM), https://www.bloomberg.com/opinion/articles/2025-07-02/the-supreme-court-s-majority-is-playing-the-long-game.

[20] As a noted Supreme Court analyst has succinctly explained, cases on the Court's emergency docket typically are decided "without full briefing or oral argument, and without any written opinion" and involve a request by a party "who has lost in the lower courts . . . [and] is now asking the Supreme Court to block the lower court order while the case proceeds through the lower court appeals process." Nina Totenberg, The Supreme Court and 'The Shadow Docket,' NPR (May 22, 2023, 5:00 AM),

suggest that the Court worked *too* hard to avoid such a confrontation. Ultimately, if and when the Court is faced with an instance of President Trump defying one of its decisions, it's hard to overstate the importance, in terms of generating strong public pressure on the president to comply with the decision, of the Court's ordering compliance by a unanimous or near-unanimous vote.[21]

Public confidence in the Court doesn't mean confidence that the Court always hands down the right decisions. It does mean confidence, though, that the Court is deciding cases in a fundamentally trustworthy way. It also means confidence that the cause of justice and our needs as a nation are best served by respecting the finality and binding effect of decisions even when we disagree with them. A public that becomes persuaded that the Justices are in business for themselves and not striving to do their job objectively and impartially will be more ready to disrespect, and act contrary to, Court judgments that impact their lives.[22] Although very, very few people are ever

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https://www.npr.org/2023/05/22/1177228505/supreme-court-shadow-docket. Supreme Court emergency docket decisions were "quite rare" prior to the first Trump Administration. Id. Notably, "[d]uring the 16 years of the Bush and Obama administrations, the federal government, the most frequent litigant in the Supreme Court, only asked the justices for emergency relief eight times," but in the next four years, it requested such relief "an astounding 41 times," and its requests were granted in whole or part 28 times. Id. In Trump's second term, the Justice Department has picked up the pace and been rewarded by the Court with an even higher rate of success. See Stephanie Bai, The Power of the Supreme Court's Shadow Docket, Atlantic (July 17, 2025), https://www.theatlantic.com/newsletters/archive/2025/07/supreme-court-education-department-shadow-docket/683588/; Kim Lane Scheppele, The Supreme Court Orders Fish Soup, Contrarian (July 15, 2025), https://contrarian.substack.com/p/the-supreme-court-orders-fish-soup; Mattathias Schwartz & Zach Montague, Federal Judges, Warning of 'Judicial Crisis,' Fault Supreme Court's Emergency Orders, N.Y. Times (Oct. 11, 2025), https://www.nytimes.com/2025/10/11/us/politics/judicial-crisis-supreme-court-trump.html. In Stephen Vladeck, The Shadow Docket (2023), Professor Vladeck attributes the term "shadow docket" to University of Chicago Law Professor Will Baude, id. at xii, but Professor Vladeck's excellent study of the Court's emergency docket plainly gets credit for today's widespread use of the term.

[21] The Justices at times clearly have worked hard for unanimity on the view that it sends a message to the public and government actors that can be crucial in ensuring compliance with a controversial decision. See, e.g., Richard Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality 681–702 (rev. ed. 2004) (discussing Chief Justice Warren's unanimous opinion in Brown v. Bd. of Educ., 347 U.S. 483 (1954)); Paul J. Mishkin, Great Cases and Soft Law: A Comment on *United States v. Nixon*, 22 UCLA L. Rev. 76, 86–90 (1974) (discussing Chief Justice Burger's unanimous opinion in the Nixon Tapes Case, United States v. Nixon, 418 U.S. 683 (1974)).

[22] See Peter Coy, The Politicization of the Supreme Court Is Eroding Its Legitimacy, N.Y. Times (June 27, 2022), https://www.nytimes.com/2022/06/27/opinion/dobbs-supreme-court-legitimacy.html ("[T]he losing side—whether the decision is made by a basketball referee or the Supreme Court—will accept defeat only if they believe the decision was made fairly and by the book. That's why the politicization of the U.S. Supreme Court is so alarming. People on the losing end of Supreme Court decisions increasingly feel that justice is not being served. That's a scary situation for the high court, and for American democracy in general."); Daniel Epps & Ganesh Sitaraman, How to Save the Supreme Court, 129 Yale L.J. 148, 163 (2019) ("In a world where the public had great confidence in the Supreme Court's fairness and impartiality, many Americans might accept controversial decisions even if they did not agree with the results. . . . Yet in a world where much of the public has lost faith in the idea that the

a party in a case that makes its way to the Court, you don't need to be in order to feel the effects of the Court's decisions in areas such as school desegregation, gun rights, sex discrimination, and more.

Furthermore, it's not only public respect for, and obedience to, the judgments of the Supreme Court that are at stake when the public loses confidence that the highest court in the land is doing its job in a fundamentally trustworthy way. There is good reason for concern that many people will no longer give the rule of law in general the respect that it deserves. A widely shared perception that the Court itself doesn't feel bound by the rule of law has destabilizing and divisive effects throughout the system as a whole.[23]

The fourth and final principle that I'll mention substantially overlaps with the other three, but warrants separate mention nonetheless: A partisan Supreme Court is inconsistent with the obligation to "support this Constitution" that Article VI requires the Justices to take an oath to fulfill.[24] In interpreting the Constitution to advance the Justices' personal preferences, rather than the principles prioritized by those who drafted and ratified the Constitution, a partisan Court supports its own agenda and not the Constitution itself. In so doing, it undermines the Court's claim to legitimacy in any constitutional decision, whether upholding or striking down the government action at hand. The toll on public confidence in the Court and the strain on all parts of the federal system can't help but be profound.

Justices are fair and impartial—and increasingly see them as politicians in robes—it is doubtful that the public will accept unpopular decisions.").

[23] In an interview not long after the Court in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), completely transformed the law of abortion by overruling *Roe v. Wade*, 410 U.S. 113 (1973), Harvard Law Professor Laurence Tribe responded as follows to the question of what the current "historic low" in public confidence in the Court means for the Court's role in society:

> It's very scary. If we get very far down that line, what happens is chaos. I do think it's vital that we preserve order. The rule of law. That we do have, for the time being, a final answer to certain questions. . . . [P]eople have to feel an obligation to obey a court decree. . . .
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> And yet the danger, when the Court becomes so headstrong and so out of touch with modern reality and so unwilling to listen effectively to counterargument and so agenda-driven and so committed to its, really, alternative facts, is that at some point, people will start defying what it says. I think we're getting closer to the point where there is no outside independent force to call us to a halt. . . .

KK Ottesen, Current Supreme Court Is Damaging to the Country, Law Scholar Warns, Wash. Post Mag. (Aug. 16, 2022), https://www.washingtonpost.com/magazine/2022/08/16/supreme-court-roe-vs-wade-clarence-thomas/.

[24] U.S. Const. art. VI, cl. 3.

II. TODAY'S ALL-TOO-REAL REALITY OF A PARTISAN SUPREME COURT

For years I've told my students that it's simplistic to explain Supreme Court decisions as being all about politics. I've maintained that the great majority of cases that get to the Court raise questions of statutory or constitutional interpretation on which reasonable people may disagree, and I've said that we shouldn't assume that the Justices must simply be reading their personal preferences into law any time they hand down a decision we find unconvincing. After all, the Justices all come to the Court with different values and perspectives shaped by their different backgrounds and life experiences. Even Justices who scrupulously seek to ensure that their decisions are as objective and impartial as possible can't reasonably be expected to expunge everything distinctive about themselves from their decisions. They will see things differently, and as long as they are doing their jobs thoughtfully and conscientiously, we shouldn't be accusing them of deciding cases with partisan considerations foremost in mind.

In retrospect, perhaps I was being kinder to some who have sat on the Court than they deserved, but on balance I don't think I was far off base. But things change, sometimes by quite a lot, and that's what has happened here. Today's Supreme Court is different in kind from the Court our nation knew for so many years, and the difference is one that bodes very badly for the Court and the nation as a whole.

Today's Court is governed by an extremely partisan six-member majority that is intent on putting in place interpretations of the Constitution and federal statutes that conform to a radically conservative—essentially, reactionary[25]—political ideology. To say that they are all appointees of Republican presidents barely scratches the surface of their partisanship. One is a George H.W. Bush appointee, two are George W. Bush appointees, and three are Trump appointees,[26] but all six seem to be guided by the kind of

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[25] I use "reactionary" in the ordinary sense of "opposed to political or social change or new ideas," see Reactionary, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/reactionary, and in a way very much in keeping with the way it was used by the late Harvard Law Professor Charles Fried, a longtime Republican, when he characterized the Court in 2020 as having a "reactionary majority." Charles Fried, I Was Reagan's Solicitor General. Here's What Biden Should Do with the Court, N.Y. Times (Oct. 19, 2020), https://www.nytimes.com/2020/10/19/opinion/biden-supreme-court.html. "I write reactionary, not conservative," Fried explained, "because true conservative judges like John Marshall Harlan are incrementalists, not averse to change, respectful of precedent and unlikely to come into the grips of radical fantasies like eliminating or remaking the modern regulatory-administrative state." Id.

[26] I refer, respectively, to: Justice Thomas; Chief Justice Roberts and Justice Alito; and Justices Gorsuch, Kavanaugh, and Barrett. About the Court: Current Members, U.S. Sup. Ct., https://www.supremecourt.gov/about/biographies.aspx.

fervent desire to turn back the clock that's characteristic of Trump-style Republicanism. The Trump campaign slogan, "Make America Great Again,"[27] could just as well be theirs. It captures what appears to be a firm conviction on their part that the America of decades ago—an America in which, for example, women couldn't legally have abortions and racial minorities weren't the beneficiaries of affirmative action—was a much better place.[28]

It would be bad enough if the Court's six Republican appointees were reading Bush I or Bush II Republican orthodoxy into their decisions. That surely would qualify as partisan behavior too. But by reading into their decisions the much more hard-edged and divisive Trump Republican orthodoxy, the six-member majority has infused its decisions with a degree of partisanship that's especially perilous.

Since 2018, when Justice Anthony Kennedy retired and was replaced by Justice Brett Kavanaugh, there have been numerous decisions in politically high-stakes cases in which a majority consisting exclusively of Republican appointees cast votes that conformed to prevailing Republican Party orthodoxy.[29] That retirement of a Reagan appointee and his replacement by

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[27] See Karen Tumulty, How Donald Trump Came Up with 'Make America Great Again,' Wash. Post (Jan. 18, 2017), https://www.washingtonpost.com/politics/how-donald-trump-came-up-with-make-america-great-again/2017/01/17/fb6acf5e-dbf7-11e6-ad42-f3375f271c9c_story.html.

[28] Jennifer Rubin, a frequent commentator on the Court, made the point well in an impassioned critique shortly after *Dobbs.* Jennifer Rubin, The Supreme Court Declares War on Modern America, Wash. Post (June 26, 2022), https://www.washingtonpost.com/opinions/2022/06/26/supreme-court-attack-midterms/. The "broader picture," Rubin explained, "is about much more than abortion." The Court "wants to lock 21st-century America into the Founders' world or, at the latest, the late 19th century . . . . Women, minorities, gay people and others once had little political, economic or social power. And so they will again, if the court gets its way." Id.

[29] Among the best-known decisions meeting that description are the four discussed at some length in the remainder of Part II; Rucho v. Common Cause, 588 U.S. 684 (2019) (holding that partisan gerrymandering claims present political questions and cannot be decided by federal courts); Espinoza v. Montana Dep't of Revenue, 591 U.S. 464 (2020) (holding that the First Amendment's Free Exercise Clause overrides a state constitutional prohibition on aid to religious schools); Brnovich v. Democratic Nat'l Comm., 594 U.S. 647 (2021) (rejecting challenges under Section 2 of the Voting Rights Act and the Fifteenth Amendment to state voting restrictions disproportionately disadvantaging racial minorities); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022) (invalidating under the Second Amendment a state law limiting the right to carry a concealed gun outside the home); 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (holding that the First Amendment's Free Speech Clause prevents a state from enforcing its antidiscrimination law to require a business to design a website for a same-sex wedding); Trump v. United States, 603 U.S. 593 (2024) (holding that the Constitution's separation of powers absolutely immunizes a former president from criminal prosecution for actions within a president's conclusive and preclusive constitutional authority and provides at least presumptive immunity for any official act); Mahmoud v. Taylor, 606 U.S. 522 (2025) (holding that parents of public elementary school children have a right under the Free Exercise Clause to have their children excused from class when any of several storybooks featuring one or more LGBTQ+ characters is being discussed).

The great majority of decisions meeting the description in the text are featured in the following annual surveys of the Court's term: Adam Liptak & Jason Kao, The Supreme Court's Biggest Decisions

a Trump appointee didn't change the number of Republican appointees on the Court. It stood at five before and after.[30] However, it did mean replacing a Justice who in recent years had broken ranks with his Republican cohorts on the Court in several major individual rights cases[31] with one who has voted with them in such cases much more consistently.[32] When Justice Ruth Bader Ginsburg, a Clinton appointee, died in the fall of 2020 and President Trump named Justice Amy Coney Barrett to succeed her, the Court's Republican-appointed membership grew from five to six.[33] It didn't take long to become apparent that the upward trend in the number and stakes of cases decided by an all Republican-appointed majority that began with Justice Kavanaugh's replacement of Justice Kennedy had sharply increased. As Adam Liptak, principal reporter for *The New York Times* on the Supreme Court, wrote at the close of the Court's 2021 term, "The Supreme Court moved relentlessly to the right in its first full term with a six-justice conservative majority, issuing far-reaching decisions that will transform American life . . . . By one standard measurement used by political scientists, the term that ended on Thursday was the most conservative since 1931."[34]

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in 2019, N.Y. Times (June 27, 2019), https://www.nytimes.com/interactive/2019/06/21/us/supreme-court-key-cases-2019.html; Adam Liptak & Alicia Parlapiano, The Supreme Court Aligned with Public Opinion in Most Major Cases This Term, N.Y. Times (July 9, 2020), https://www.nytimes.com/interactive/2020/06/15/us/supreme-court-major-cases-2020.html; Adam Liptak & Alicia Parlapiano, Tracking the Major Supreme Court Decisions This Term, N.Y. Times (July 1, 2021), https://www.nytimes.com/interactive/2021/06/01/us/major-supreme-court-cases-2021.html; Adam Liptak & Jason Kao, The Major Supreme Court Decisions in 2022, N.Y. Times (June 30, 2022), https://www.nytimes.com/interactive/2022/06/21/us/major-supreme-court-cases-2022.html; Adam Liptak & Eli Murray, The Major Supreme Court Decisions in 2023, N.Y. Times (June 29, 2023), https://www.nytimes.com/interactive/2023/06/07/us/major-supreme-court-cases-2023.html; Adam Liptak, Abbie VanSickle & Alicia Parlapiano, The Major Supreme Court Decisions in 2024, N.Y. Times (July 2, 2024), https://www.nytimes.com/interactive/2024/05/09/us/supreme-court-major-cases-2024.html; Adam Liptak, Abbie VanSickle & Alicia Parlapiano, The Major Supreme Court Decisions in 2025, N.Y. Times (June 27, 2025), https://www.nytimes.com/interactive/2025/05/15/us/supreme-court-major-cases-2025.html.

[30] Supreme Court Nominations (1789–Present), U.S. Senate, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm.

[31] See, e.g., Fisher v. Univ. of Tex., 579 U.S. 365 (2016) (upholding university affirmative action plan for admissions); Obergefell v. Hodges, 576 U.S. 644 (2015) (invalidating prohibitions on same-sex marriage).

[32] See Liptak & Kao, The Supreme Court's Biggest Decisions in 2019, supra note 29 (describing the Court as having been "transformed this term by the departure of Justice Anthony M. Kennedy, its longtime swing vote, and the arrival of his more conservative successor").

[33] Supreme Court Nominations, supra note 30.

[34] Adam Liptak, A Transformative Term at the Most Conservative Supreme Court in Nearly a Century, N.Y. Times (July 1, 2022), https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html. See also Liptak & Parlapiano, Tracking the Major Supreme Court Decisions This Term, supra note 29 (noting in a survey of the 2020 term that Justice Barrett's "arrival this

I readily concede that, taken individually, many of those decisions can be reasonably understood, even if not *most* reasonably understood, in terms other than that the Justices in the majority were consciously or unconsciously acting like legislators and voting their policy preferences into law. It's much more sensible and realistic, however, to think about all the decisions from a broader perspective—not individually in isolation, but as parts of a whole. If you do, you don't exactly have to be Sherlock Holmes to see a pattern strongly suggesting that the Court's Republican appointees were casting votes highly reflective of their policy preferences.

In my view, it's sufficiently clear that today's Court is partisan that it would be a needless detour and distraction for me to make a sustained effort here to prove it. I recognize, however, that some readers may be more skeptical. As a compromise of sorts, I'll discuss four opinions of the Court that, taken together, provide such powerful evidence of partisanship that the conclusion that we indeed have a very partisan Court seems to me virtually impossible to avoid.

The four opinions I'll discuss—the majority opinions in *Dobbs v. Jackson Women's Health Organization*,[35] *Kennedy v. Bremerton School District*,[36] *Students for Fair Admissions*, *Inc. v. President and Fellows of Harvard College*,[37] and *Loper Bright Enterprises v. Raimondo*[38]—were joined only by Republican appointees[39] and expressly or implicitly overruled longstanding precedents that, by almost any measure, qualified as landmark cases. The four opinions are so very indicative of a highly partisan mindset for a combination of reasons. First, each opinion showed breathtaking disregard for a cornerstone principle of judicial restraint: the doctrine of stare decisis—a strong, though not entirely unyielding, command to respect precedent (literally, to "stand by things decided").[40] Second, each opinion

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term . . . has transformed a Supreme Court with a slight conservative majority into one that tilted right by a 6-to-3 margin").

[35] 597 U.S. 215 (2022).

[36] 597 U.S. 507 (2022).

[37] 600 U.S. 181 (2023).

[38] 603 U.S. 369 (2024).

[39] With the exception of *Dobbs*, the opinions were joined by all six Republican appointees. In *Dobbs*, Chief Justice Roberts joined the Court's judgment upholding Mississippi's almost complete ban on abortions after fifteen weeks of pregnancy despite its inconsistency with *Roe v. Wade*, but he didn't join the opinion of the Court overruling *Roe*. Roberts's vote not to overrule, however, was hardly an endorsement of *Roe*. It's difficult to read his opinion as anything more than an endorsement of staying *Roe*'s execution for another few years.

[40] Stare decisis, Black's Law Dictionary (Bryan A. Garner ed., 10th ed. 2014). Important considerations informing the doctrine include the protection of settled expectations, institutional and system-wide stability, optimal use of limited judicial resources, and the need to avoid fostering an unduly political conception of the court. See, e.g., Lewis F. Powell, Jr., Stare Decisis and Judicial Restraint, 47 Wash. & Lee L. Rev. 281 (1990); Jeremy Waldron, Stare Decisis and the Rule of Law: A Layered

discarded a constitutional or statutory principle of great societal importance staunchly opposed by Trump-era Republicans. Third, the four opinions were handed down in the remarkably short span of two years—between June 2022 and June 2024. If four opinions within two years so heedless of judicial restraint and so heedful of contemporary Republican ideology don't constitute a pattern of highly partisan judicial behavior, nothing does.[41]

The Court in *Dobbs*, *Kennedy*, *Students for Fair Admissions*, and *Loper Bright* jettisoned, respectively: the holding in 1973 in *Roe v. Wade*[42] that the Due Process Clause guarantees women a right to abortion until the point of fetal viability;[43] the three-part test for Establishment Clause violations that the Court had announced in 1971 in *Lemon v. Kurtzman*,[44] and the ban on government endorsement of religion that constituted a subset of that test;[45] the interpretation in 1978 in *Regents of University of California v. Bakke*[46] of the Equal Protection Clause as allowing affirmative action in admissions by public colleges and universities; [47] and the principle of statutory interpretation adopted in 1984 in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[48] calling for substantial judicial deference to federal

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Approach*,* 111 Mich. L. Rev. 1 (2012). In his insightful and moving memoir, retired federal appellate judge David Tatel underlined the centrality of stare decisis and other principles of judicial restraint to responsible judging. "Above all," he explained, "the principles of judicial restraint protect the separation of powers enshrined in our Constitution by keeping unelected judges from meddling in the work of policymakers elected by the people." David S. Tatel, Vision: A Memoir of Blindness and Justice 217 (2024). In addition to stare decisis, the principles that he cited include "[d]rafting narrow opinions, avoiding broad rulings except when necessary, and proceeding slowly and with caution," as well as "[d]eference to the judgments of elected officials, the fact-finding performed by district judges, and the opinions of subject-matter experts." Id. at 216.

[41] In the opening pages of his recent memoir, Judge Tatel emphasized that he was "concerned about the Supreme Court's apparent disregard for the principles of judicial restraint that distinguish the unelected judiciary from the two elected branches of government—and about what that might mean for our planet and our democracy." Tatel, supra note 40, at 12. He returned to that theme several times in the book, culminating in the closing pages with his tying it to his decision to retire. "It was one thing," he explained, "to follow [Supreme Court] rulings I believed were wrong when they resulted from a judicial process I respected. It was quite another to be bound by the decisions of an institution I barely recognized . . . ." Id. at 297. See also Katherine Fung, Judges Rebel Against the Supreme Court, Newsweek (June 26, 2024, 6:00 AM), https://www.newsweek.com/2024/07/05/judges-rebel-against-supreme-court-1915747.html ("There is a growing chorus of Supreme Court critics coming from within the judiciary. Judges on both sides of the ideological spectrum have been increasingly willing to speak out . . . .").

[42] 410 U.S. 113 (1973).

[43] Id. at 164-65.

[44] 403 U.S. 602, 612–13 (1971).

[45] Allegheny County v. ACLU, 492 U.S. 573, 592–94 (1989).

[46] 438 U.S. 265 (1978).

[47] Id. at 320 (opinion of Powell, J., joined as to Part V.C by Brennan, White, Marshall, & Blackmun, JJ.).

[48] 467 U.S. 837 (1984).

agencies' interpretation of ambiguous language in the statutes they are charged with administering.[49]

The Court, of course, never came right out and said in any of its four recent decisions casting aside longstanding precedent that it can't be bothered by things like stare decisis. In every one of those opinions, however, the unspoken message was, "We have important business that can't wait, and we're not going to let some old case stand in the way." The basic holdings in the four cases so clearly correspond to MAGA principles that it seems sufficient for me to confine my proof of that correspondence to the footnotes.[50]

In applying the doctrine of stare decisis, the Court over the years has paid particular attention to such factors as the quality of the Court's reasoning in the case in question,[51] workability of the holding,[52] subsequent legal or factual changes of significance,[53] and reliance interests.[54] The dissenters in *Dobbs*, *Kennedy*, *Students for Fair Admissions*, and *Loper Bright* provide good accounts of the inadequacy of the Court's stare decisis analysis in those cases.[55] I'd simply like to call attention to a few highlights—or, more accurately, lowlights—from the Court's opinions that illustrate the palpable contempt that it showed for stare decisis.[56]

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[49] Id. at 842–45.

[50] See infra notes 57, 65, 71 & 77. As my source of MAGA principles, I will use the Republican Party Platforms for the last three presidential elections. Because the Republican National Committee, in response to constraints placed on the 2020 national convention's size and scope by the Covid pandemic, resolved not to do a new platform in 2020, the party's 2016 platform remained in effect until a new one was adopted in 2024. See Republican Party Platforms, Resolution Regarding the Republican Party Platform, Am. Presidency Project (Aug. 24, 2020), https://www.presidency.ucsb.edu/documents/resolution-regarding-the-republican-party-platform. I therefore will only be referring to the party's 2016 and 2024 platforms in documenting the correspondence between MAGA principles and the results achieved by the four overrulings.

[51] See, e.g., Janus v. AFSCME, 585 U.S. 878, 917–18 (2018).

[52] See, e.g., Dickerson v. United States, 530 U.S. 428, 444 (2000).

[53] See, e.g., Vasquez v. Hillery, 474 U.S. 254, 266 (1986).

[54] See, e.g., Hilton v. S.C. Pub. Ry. Comm'n, 502 U.S. 197, 202 (1991).

[55] See Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 387–414 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting); *Kennedy*, 597 U.S. at 560–62, 569–73 (Sotomayor, J., joined by Breyer & Kagan, JJ., dissenting); Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 600 U.S. 181, 341–42, 352–53, 358–59, 376–77 (2023) (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting); Loper Bright Enters. v. Raimondo, 603 U.S. 369, 470–78 (2024) (Kagan, J., joined by Sotomayor & Jackson, JJ., dissenting).

[56] In his memoir, Judge Tatel described stare decisis as "indispensable to the art of judging" and maintained that "[o]f all the principles of judicial restraint, stare decisis is perhaps the most important." Tatel, supra note 40, at 217, 294. His explanation bears repetition not only because it is especially illuminating but also because it evidences an attitude on his part toward stare decisis and the role of the judge in general that contrasts sharply with the attitude exhibited by the Court's partisan majority in the four cases I'll discuss:

> Hand and Powell were the kind of jurists I wanted to be. They played it straight. They strove to identify, and then ignore, their own predispositions. Above all, they believed in judicial restraint. . . .

The Court's opinion in *Dobbs*[57] is probably the most dutiful of the four in terms of discussing the factors generally thought to militate in favor of abiding by precedent, but that's not saying much. The dissent's characterization of the Court's approach to stare decisis as "cavalier"[58] was itself an illustration of judicial restraint. In an opinion by Justice Alito, the *Dobbs* Court served warning in the opening pages that anyone looking for a reasonably thoughtful and objective assessment of stare decisis factors would do well to look somewhere else. Previewing the stare decisis analysis to come later in the opinion, the Court stated that stare decisis "does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start."[59]

[Stare decisis] means adhering to prior rulings . . . . Those prior rulings have the force of law and, much like statutes, demand judicial respect. . . . [Stare decisis] often came in quite handy. The best way to deal with tricky questions, I quickly found, was to closely review older opinions dealing with similar issues. And it seemed to me most important in cases with a political valence. When judges appointed by a president from one party adhere to a decision made by judges appointed by a president from another, that sends a powerful signal to the public that judging is not just politics. . . .

[O]ur Constitution is not a lengthy document, and it is very, very hard to amend. The Constitution sets out guiding principles . . . , but the Supreme Court must fill in the details . . . . As a result, constitutional law consists primarily of centuries of Supreme Court rulings, each building on the last, that every judge in the country is bound to follow. The Supreme Court alone has the power to deviate from *stare decisis* and overrule its precedents, but it should do so only in the rarest and most carefully defined circumstances. . . . [B]ecause each decision the Court issues depends on earlier ones, *stare decisis* is the foundation stone of the entire constitutional structure. Pull the wrong block, and the whole tower might crumble. Pull that foundation stone, and it most certainly will.

Id. at 216–17, 294.

[57] As to the correspondence between the holding in *Dobbs* and MAGA principles: The 2016 Republican Party Platform was explicit in its ambition for a Republican president to win election and appoint enough Justices "to reverse the long line of activist decisions—including *Roe* . . . —that have usurped Congress's and states' lawmaking authority." 2016 Republican Party Platform, A Rebirth of Constitutional Government—The Judiciary, Am. Presidency Project (July 18, 2016), https://www.presidency.ucsb.edu/documents/2016-republican-party-platform. In addition, the 2016 platform went beyond seeking the demise of *Roe* and "affirm[ed] that the unborn child has a fundamental right to life which cannot be infringed" and "support[ed] a human life amendment to the Constitution and legislation to make clear that the Fourteenth Amendment's protections apply to children before birth." Id., The Fifth Amendment: Protecting Human Life. In response, however, to the strong opposition to the Court's overruling *Roe* in *Dobbs*—opposition that appears to have manifested itself in poorer-than-expected results for Republican candidates in the 2022 midterms, see Zack Beauchamp, The Supreme Court Lost Republicans the Midterms: A Leading Democratic Data Analyst Explains What Happened in 2022—and Why Abortion Proved to be the Decisive Issue, Vox (Nov. 10, 2022, 12:40 PM), https://www.vox.com/policy-and-politics/23451103/2022-midterms-results-data-analysis-abortion-dobbs-shor—the 2024 Republican Party Platform was content to celebrate the overruling of *Roe* and call on states to pass pro-life legislation. 2024 Republican Party Platform ch. 9, § 8, Am. Presidency Project (July 8, 2024), https://www.presidency.ucsb.edu/documents/2024-republican-party-platform.

[58] *Dobbs*, 597 U.S. at 363 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

[59] Id. at 231. For insightful critiques of the Court's stare decisis analysis in *Dobbs*, see Melissa Murray & Katherine Shaw, *Dobbs* and Democracy, 137 Harv. L. Rev. 728, 749–60 (2024); Nina Varsava, Precedent, Reliance, and *Dobbs*, 136 Harv. L. Rev. 1845, 1863–84 (2023).

If the Court's calling *Roe* an "abuse of judicial authority" wasn't enough to convince you that its later analysis of stare decisis factors would be "analysis" in name only, its calling *Roe* "egregiously wrong" surely should have erased any doubt. If I were in the Court's shoes in *Dobbs*, there are a lot of words that I might have thought to use to express my dissatisfaction with the Court's opinion for the 7-2 majority in *Roe*. I can say for certain, though, that "egregiously wrong" wouldn't have been one of them unless I were eager to make clear that I had much less respect for the seven Justices in the majority than the doctrine of stare decisis generally presupposes that judges will have for their predecessors.[60]

Perhaps most eye-opening of all in the *Dobbs* Court's discussion of stare decisis was its treatment of *Planned Parenthood v. Casey.*[61] In deciding in 1992 whether *Roe* should be overruled, the *Casey* Court had discussed at length the relevant stare decisis factors and ultimately concluded that stare decisis weighed heavily in favor of not overruling *Roe*.[62] The great importance of stare decisis in the minds of the *Casey* majority couldn't be missed. By all indications, one or more of the Justices in the five-Justice majority would have voted to overrule *Roe* but for stare decisis.[63]

When the Court in *Dobbs* revisited the question of the weight that stare decisis should be given in deciding whether to overrule *Roe*, it was only reasonable to expect that the Court would feel obliged to give great weight to the *Casey* Court's answer to that question. After all, the Court was obliged under stare decisis to have a certain measure of respect not only toward *Roe* but also toward *Casey,* including *Casey*'s answer to the question of the weight that stare decisis should be given in deciding whether to overrule *Roe*. Moreover, the fact that *Roe* was three decades older at the time of *Dobbs* than it was at the time of *Casey* couldn't help but make stare decisis militate even more strongly in favor of upholding *Roe.* Under the circumstances, the *Dobbs* Court's refusal to afford the reasoning in *Casey*

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[60] The Court's palpable disrespect in *Dobbs* for the Justices in the *Roe* majority might be more understandable, even though no more excusable, if *Roe* had been handed down a decade earlier during the heyday of the Warren Court. After all, it's not hard to imagine that today's radically conservative majority doesn't look back appreciatively on the members of the most progressive Court in our nation's history. However, three of the seven Justices in the *Roe* majority—Chief Justice Burger and Justices Blackmun and Powell—were appointed to the Court by a conservative Republican president (Nixon) after the end of the Warren Court, and one of the remaining four—Justice Stewart—was appointed by another conservative Republican president (Eisenhower) in the early years of the Warren Court and was a frequenter dissenter on that Court. See About the Court: Justices 1789 to Present, U.S. Sup. Ct., https://www.supremecourt.gov/about/members_text.aspx.

[61] 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[62] Id. at 854–69.

[63] See Gary J. Simson & Rosalind S. Simson, Rescuing *Roe*, 24 N.Y.U. J. Legis. & Pub. Pol'y 313, 314–16, 315 n.5 (2022).

anything remotely resembling respect was really something special—and not at all in a good way.[64]

The Court's disrespect for precedent in *Kennedy*[65] was so flagrant that it would be amusing if the repercussions of that disrespect weren't so serious. The case squarely posed the question of whether, as the Court had held in *Lemon* fifty years earlier, government endorsement of religion constitutes an Establishment Clause violation[66] or whether the clause is only violated by government coercion to engage in religious practices.[67] In an opinion by Justice Gorsuch, the Court dispensed with the need to discuss whether overruling *Lemon* and the endorsement test could be justified in light of principles of stare decisis by the remarkably disingenuous move of claiming that they were already ancient history.

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[64] As Harvard Law Professor Noah Feldman put it, the Court in *Dobbs* "didn't just overrule *Roe.* By overturning *Casey*, it called into question the core idea that the justices follow precedent. *Casey* stood for the idea that the Court would uphold its past decisions absent a major, transformative reason to do so. . . . That norm is now gone." Noah Feldman, Ending *Roe* Is Institutional Suicide for the Supreme Court*,* Bloomberg (June 24, 2022, 12:29 PM), https://www.bloomberg.com/opinion/articles/2022-06-24/supreme-court-abortion-ruling-in-dobbs-is-institutional-suicide.

[65] As to the correspondence between the holding in *Kennedy* and MAGA principles: The 2016 and 2024 Republican Party Platforms make clear that the party's concern is minimizing any possible interference by government with individuals' freedom to practice their religion as they wish and that government endorsement of religion is a non-issue in its mind. The discussion of religious liberty in the 2016 platform states in part:

> [W]e strongly support the freedom of Americans to act in accordance with their religious beliefs, not only in their houses of worship, but also in their everyday lives. . . .
>
> We support the public display of the Ten Commandments as a reflection of our history and our country's Judeo-Christian heritage and further affirm the rights of religious students to engage in voluntary prayer at public school events and to have equal access to school facilities. . . .

2016 Republican Party Platform, supra note 57, A Rebirth of Constitutional Government—The First Amendment: Religious Liberty. The 2024 platform reaffirms almost verbatim the first sentence quoted above, 2024 Republican Party Platform, supra note 57, ch. 9, § 3, and ratchets up the commitment to prayer in school for grades K–12, id., ch. 7, § 8 ("Republicans will champion the First Amendment Right to Pray and Read the Bible in school."). In addition, dispelling any possible misunderstanding that protection of minority religions from the ill effects of government support of majoritarian beliefs is on the party's mind, the platform includes a statement of support for "a new Federal Task Force on Fighting Anti-Christian Bias that will investigate all forms of illegal discrimination, harassment, and persecutions against Christians in America." Id*.,* ch. 9, § 3.

[66] See Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (maintaining that "[i]n the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection," and identifying "sponsorship" (i.e., endorsement) of religion as one of those three evils); Gary J. Simson, The Establishment Clause in the Supreme Court: Rethinking the Court's Approach, 72 Cornell L. Rev. 905, 911–12, 915–16 (1987) (discussing the Court's implicit incorporation of a prohibition on government endorsement of religion into the *Lemon* test's purpose and effect prongs).

[67] Leading cases prior to *Kennedy* in which the Justices took opposite sides in the endorsement/coercion debate include *Lee v. Weisman*, 505 U.S. 577 (1992) and *Town of Greece v. Galloway*, 572 U.S. 565 (2014). For commentary in support of an endorsement test, see Gary J. Simson, Endangering Religious Liberty*,* 84 Calif. L. Rev. 441, 462–81 (1996), and for commentary urging its abandonment in favor of a coercion test, see Jesse H. Choper, Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses 27–34, 100–03, 140–58 (1995).

According to the Court, it "long ago abandoned *Lemon* and its endorsement test offshoot," and in finding a violation of the Establishment Clause, the federal district court and court of appeals had "overlooked" that development.[68] I'm sorry, but it's one thing to claim that federal district and appellate judges sometimes make mistakes; it's quite another to claim that four of them—the district judge and three appellate judges in the courts below—could be so incredibly remiss as to fail to notice that the Court had long since overruled a leading Establishment Clause precedent and its well-known endorsement test.

For good measure, the Court then cited a prior *plurality* opinion as having done the overruling,[69] even though, as any first-year law student quickly learns, a Supreme Court precedent isn't overruled unless and until a *majority* of the Court votes to overrule it. Furthermore, in this instance, the cited plurality opinion hadn't even contended that *Lemon* and the endorsement test *should* be overruled.[70] The Court's sleight of hand in *Kennedy* can be faulted for many things, but not for lack of nerve.

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[68] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534 (2022).

[69] Id. The Court in *Kennedy* cited a portion of Justice Alito's opinion in *American Legion v. American Humanist Ass'n*, 588 U.S. 29, 48–52 (2019), that was joined only by Chief Justice Roberts and Justices Breyer and Kavanaugh. To its credit, the Court included "(plurality opinion)" as part of the citation, *Kennedy*, 597 U.S. at 534, so it can't fairly be charged with trying to *completely* hide the ball. I should note that the Court in *Kennedy* didn't cite only *American Legion* for authority for the long-ago abandonment of *Lemon* and the endorsement test. Immediately after that citation, id., it included a "*see also*" cite to *Town of Greece v. Galloway*, 572 U.S. 565, 575–77 (2014). The pages in *Town of Greece* that the *Kennedy* Court cited, unlike those in *American Legion* that it cited, were part of an opinion of the Court and therefore bore a majority's stamp of approval. The *Kennedy* Court's citing them for authority for the demise of *Lemon* and the endorsement test was very unsatisfactory nonetheless, because those pages say nothing that casts any real doubt on the vitality of *Lemon* and the endorsement test. The Court in *Town of Greece* didn't even mention *Lemon* and the endorsement test by name on the cited pages. It appeared to be alluding to them when it explained why *Marsh v. Chambers*, 463 U.S. 783 (1983), in upholding the practice of legislative prayer, did not apply "any of the formal 'tests' " *Town of Greece*, 572 U.S. at 575, that the Court traditionally applied in Establishment Clause cases. According to the Court in *Town of Greece*:

> The Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause. The First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time.

Id. To say the least, that explanation was hardly an indictment, no less an abandonment, of *Lemon* and the endorsement test.

[70] Although that opinion called attention to "the *Lemon* test's shortcomings," *Am. Legion*, 588 U.S. at 49, it plainly stopped short of saying that *Lemon* should be overruled:

> For at least four reasons, the *Lemon* test presents particularly daunting problems in cases, including the one now before us, that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations. Together, these considerations counsel against efforts to evaluate such cases under *Lemon* and toward application of a presumption of constitutionality for longstanding monuments, symbols, and practices.

Id. at 51–52. It's also quite a stretch to cite that opinion as overruling *Lemon* because Justice Breyer, one of the Justices who joined it, was one of the Justices in *Kennedy* who insisted that *Lemon* should not

In *Students for Fair Admissions*,[71] the Court used a somewhat different tactic to demonstrate its refusal to take seriously the demands of stare decisis. Instead of pretending, as it had done in *Kennedy*, that there was no need to discuss stare decisis because the precedent standing in the way had already been overruled, the Court in an opinion by Chief Justice Roberts just pretended that it wasn't overruling anything at all.[72] By any measure, the opinion is a masterpiece of obfuscation. It's sorely lacking in persuasive value, but purely as a smoke screen, it's hard to beat. Despite laying ruin to the principle adopted and applied in *Bakke* and reaffirmed in 2003 in *Grutter v. Bollinger*[73] and in 2016 in *University of Texas v. Fisher*,[74] the Court never uttered the word "overruled."

Remarkably, however, Justices Gorsuch and Thomas were so elated with the outcome that, in concurring opinions, they couldn't resist letting the cat out of the bag. "If the Court's post-*Bakke* higher-education precedents ever made sense," Justice Gorsuch wrote, "they are by now incoherent. Recognizing as much, the Court today cuts through the kudzu."[75] Similarly, noting his longtime insistence that "*Grutter* was wrongly decided and should be overruled," Justice Thomas declared that, "Today, and despite a lengthy interregnum, the Constitution prevails."[76]

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be overruled. See *Kennedy*, 597 U.S. at 546–47, 569–73 (Sotomayor, J., joined by Breyer & Kagan, JJ., dissenting).

[71] As to the correspondence between the holding in *Students for Fair Admissions* and MAGA principles: The 2016 Republican Party Platform disposed of affirmative action on the basis of race by subsuming it under the heading of "discrimination based on race." 2016 Republican Party Platform, supra note 57*,* A Rebirth of Constitutional Government—We the People. After affirming the party's opposition to racial discrimination, the platform declared that:

As the Party of Abraham Lincoln, we must continue to foster solutions to America's difficult challenges when it comes to race relations today. We continue to encourage equality for all citizens and access to the American Dream. Merit and hard work should determine advancement in our society, so we reject unfair preferences, quotas, and set-asides as forms of discrimination. . . .

Id. To similar effect, the 2024 platform affirmed that, for grades K-12, "Republicans will . . . enforce our Civil Rights Laws to stop schools from discriminating on the basis of race," 2024 Republican Party Platform, supra note 57, ch. 7, § 5, and for colleges and universities, "Republicans will fire Radical Left accreditors . . . and pursue Civil Rights cases against Schools that discriminate." Id., ch. 8, § 5.

[72] As Justice Sotomayor observed in dissent, "It is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis.* The Court simply moves the goalposts, upsetting settled expectations and throwing admissions programs nationwide into turmoil." Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181, 342 (2023) (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting).

[73] 539 U.S. 306 (2003).

[74] 579 U.S. 365 (2016).

[75] *Students for Fair Admissions*, 600 U.S. at 307 (Gorsuch, J., joined by Thomas, J., concurring).

[76] Id. at 232 (Thomas, J., concurring). Commenting on the significance of stare decisis to the proper resolution of *Students for Fair Admissions* and *Dobbs*, Judge Tatel offered a dramatically different perspective on the doctrine than the one implicit in the Court's opinions in those cases:

[T]he most important question in the *Students for Fair Admissions* cases wasn't whether affirmative action is constitutional. Nor was the most important question in *Dobbs* whether the Constitution protects

In *Loper Bright*,[77] as in *Dobbs*, the Court at least acknowledged that it was overruling precedent and offered something in the way of an explanation in terms of stare decisis factors. Also as in *Dobbs*, though, the explanation left a lot to be desired. The dissenters' exasperated characterization of that explanation—"the majority . . . barely tries to advance the usual factors this Court invokes for overruling precedent"[78]—rings all too true.[79]

In an opinion by the Chief Justice, the Court in *Loper Bright* professed to see no ambiguity in the question whether stare decisis "requires us to persist in the *Chevron* project."[80] "It does not," the Court unequivocally stated at the start of its discussion of stare decisis in the final few pages of the opinion. "[T]he *stare decisis* considerations most relevant here," the Court maintained, "all weigh in favor of letting *Chevron* go."[81] Characterizing

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reproductive autonomy. The Supreme Court had already answered those questions decades earlier. Instead, the most important question in both cases was whether the Court should adhere to its precedents or overrule them. And in both cases, the Roberts Court kicked precedent to the curb. . . . [T]he justices who voted to overrule the Court's affirmative action and abortion precedents may have had good reasons for doing so. No such reasons, however, are apparent from their opinions.

Tatel, supra note 40, at 294–95.

[77] As to the correspondence between the holding in *Loper Bright* and MAGA principles: The 2016 Republican Party Platform's antipathy to *Chevron* deference in particular and administrative agencies in general was hard to miss. After broadly asserting in the preamble that helping the people "take back their country . . . means removing the power from unelected, unaccountable government," 2016 Republican Party Platform, supra note 57, Preamble, and then lamenting that "[m]ore than 90 percent of federal requirements are now imposed by regulatory agencies," id., A Rebirth of Constitutional Government—We the People, the platform pointedly lowered the boom:

For more than a century . . . Congress has delegated increasing amounts of legislative authority to executive departments, agencies, and commissions, laying the foundation for today's vast administrative state. Unelected bureaucrats in the executive branch now write countless rules with the force of law and arbitrarily punish individuals who disobey those rules. . . . We call on Congress to begin reclaiming its constitutional powers from the bureaucratic state by requiring that major new federal regulations be approved by Congress before they can take effect. . . . We further affirm that courts should interpret laws as written by Congress rather than allowing executive agencies to rewrite those laws to suit administration priorities.

Id., Administrative Law. Less than two weeks before the 2024 Republican Party Platform was released, the Supreme Court handed down *Loper Bright* and spared the platform committee any need to include language calling for the elimination of *Chevron* deference. Instead, the committee could be content to call for "end[ing] Democrats' regulatory onslaught that disproportionately harms low- and middle-income households," 2024 Republican Party Platform, supra note 57, ch. 1, § 3, and "slash[ing] Regulations that stifle Jobs, Freedom, Innovation and make everything more expensive." Id., ch. 3, § 1.

[78] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 451 (2024) (Kagan, J., joined by Sotomayor & Jackson, JJ., dissenting).

[79] For a "brief but necessary funeral mass for the old regime, which the majority opinion dispatched with little ceremony and buried in an unmarked grave," see Adrian Vermeule, The Old Regime and the *Loper Bright* "Revolution," 2024 Sup. Ct. Rev. 235, 240 (2025).

[80] *Loper Bright*, 603 U.S. at 407. As to a key ingredient of the Court's opinion in *Loper Bright*, see Gary J. Simson, The Supreme Hubris of John Roberts, Fulcrum (June 27, 2024), https://thefulcrum.us/ethics-leadership/supreme-court-code-of-conduct.

[81] *Loper Bright*, 603 U.S. at 407.

Chevron as "fundamentally misguided,"[82] the Court laid blame for the *Chevron* Court's purported confusion to its not having "grappled with the APA—the statute that lays out how such review works."[83] According to the Court in *Loper Bright*, the *Chevron* Court had gone awry when it failed to recognize the obvious inconsistency between its holding and Section 706 of the Administrative Procedure Act. Quoting from Section 706, the Court insisted that the section makes clear that the kind of federal judicial deference to agency statutory interpretation that *Chevron* ordered was contrary to Congress's intent: "*Chevron* defies the command of the APA that 'the reviewing court'—not the agency whose action it reviews—is to 'decide *all* relevant questions of law' and 'interpret . . . statutory provisions.'" [84]

It's certainly true that Section 706 can be understood as the Court in *Loper Bright* claimed it should be, but it can be more easily understood as not addressing the deference-to-agencies issue at all.[85] The Court in *Chevron* probably never "grappled" with the language simply because, for purposes of the issue at hand, it regarded the language as beside the point. The Court in *Chevron* matter-of-factly observed at one point that "[t]he judiciary is the final authority on issues of statutory construction"[86]—language much like the language in Section 706 that the Court in *Loper Bright* found so probative. The Court in *Chevron* obviously saw no inconsistency between that observation and the judicial deference to agency statutory interpretation that it ordered. As is often the case in statutory interpretation, but as the Court in *Loper Bright* was determined to ignore, attention to the text alone can easily lead a court astray. Text hardly exhausts the range of what the Court has called "Congress's interpretive clues."[87]

The Court's insistence that the APA's text proves that *Chevron* got Congress's intent wrong is also difficult to take seriously for another reason. It's very, very likely that if *Chevron*—a high-visibility and high-impact decision if ever there was one—really got Congress's intent wrong,

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[82] Id.

[83] Id.

[84] Id. at 398. The full sentence from which the Court was quoting states: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.

[85] See *Loper Bright*, 603 U.S. at 462–66 (Kagan, J., joined by Sotomayor & Jackson, JJ., dissenting); Ronald M. Levin, The APA and the Assault on Deference, 106 Minn. L. Rev. 125, 183–90 (2021); Cass R. Sunstein, *Chevron* As Law, 107 Geo. L.J. 1613, 1641–57 (2019).

[86] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

[87] Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 586 (2004). As Chief Justice Marshall memorably put it, "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived." United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805).

Congress would have managed in the four decades since *Chevron* to amend the APA and set things straight. There's a doctrine in statutory interpretation called "legislative acquiescence,"[88] and this was an open-and-shut case for finding it dispositive.

III. LEARNING FROM THE PAST

The key to finding a way to make the Court a much less partisan institution lies in understanding how the Court became as very partisan as it is. I discuss below two developments that played a very large role in the Court's partisan evolution.

A. Leonard Leo and the Federalist Society's Pipeline to Partisanship

Five of the six Republican appointees sitting on today's Court—all but Justice Thomas—are the product of a judicial pipeline carefully designed, and just as carefully implemented, by Leonard Leo. By the early 1990s, Leo had become a major force in the Federalist Society, and he took on an even more dominant role in the organization in subsequent years.[89] Chastened by the Court's surprising refusal in 1992 in *Planned Parenthood v. Casey*[90] to overrule *Roe v. Wade*,[91] Leo developed an elaborate judicial pipeline plan. As several journalists explained in a lengthy investigative report on Leo:

> The three justices who wrote the majority opinion [in *Casey*]—Anthony Kennedy, Sandra Day O'Connor and David Souter—were all Republican appointees. Here was the greatest challenge to the movement: Even an ostensibly conservative nominee could disappoint. So Leo and his

[88] See Linda D. Jellum, Mastering Statutory Interpretation 242–48 (2d ed. 2013).

[89] Leo's tremendous influence within the Federalist Society and on the Supreme Court has been the subject of numerous writings. See, e.g., Andy Kroll, Andrea Bernstein & Ilya Marritz, We Don't Talk About Leonard: The Man Behind the Right's Supreme Court Supermajority, ProPublica (Oct. 11, 2023, 5:00 AM), https://www.propublica.org/article/we-dont-talk-about-leonard-leo-supreme-court-supermajority; Chris McGreal, Leonard Leo: The Secretive Rightwinger Using Billions to Reshape America, Guardian (Sept. 4, 2022, 3:00 AM), https://www.theguardian.com/us-news/2022/sep/04/leonard-leo-federalist-society-conservative-abortion; Jonaki Mehta & Courtney Dorning, One Man's Outsized Role in Shaping the Supreme Court and Overturning *Roe*, NPR (June 30, 2022, 5:00 AM), https://www.npr.org/2022/06/30/1108351562/roe-abortion-supreme-court-scotus-law; Peter Shamshiri, Rhiannon Hamam & Michael Liroff, How the Federalist Society Conquered the American Legal System, Balls & Strikes (Feb. 13, 2024), https://ballsandstrikes.org/qa/how-the-federalist-society-conquered-the-american-legal-system-5-4-podcast-fedsoc-amanda-hollis-brusky/.

[90] 505 U.S. 833 (1992).

[91] For discussion of *Casey*'s surprising reprieve for *Roe*, see Simson & Simson, supra note 63, at 314–16, 315 n.5.

> allies set out to solve this recurring problem. They needed to cultivate nominees who would not only start out loyal to the cause but remain stalwart through all countervailing mainstream pressures. Leo and his allies concluded that they needed to identify candidates while they were young and nurture them throughout their careers. What they needed was a pipeline.
>
> That meant finding young, talented minds when they were still in law school, advancing their careers, supporting them after setbacks and insulating them from ideological drift.[92]

When opportunities subsequently arose for Republican presidents to fill vacancies on the Supreme Court, Leo, along with some Federalist Society colleagues, was intimately involved in White House deliberations. Leo was instrumental in President George W. Bush's decisions in 2006 to nominate John Roberts as Chief Justice and Samuel Alito as an Associate Justice,[93] and Leo appeared to be even more influential in President Donald Trump's high court nominations. During Trump's 2016 election campaign, Leo presented him with a list of potential nominees, which Trump very publicly embraced. "We're going to have great judges, conservative, all picked by the Federalist Society," Trump proclaimed.[94] When Trump nominated Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett to fill the three vacancies that arose during his first term,[95] he drew from a running list of top prospects that Leo reportedly "personally curated."[96]

Like Leo, the two presidents who relied so heavily on his and the Federalist Society's recommendations were intent on avoiding ideological drift. As a leading commentator on the Court observed, Bush "was determined not to repeat his father's mistake with Souter."[97] All candidates were "exhaustively researched," with the objective of settling on a nominee who would be a "staunch judicial conservative."[98] When Bush nominated Roberts, he expressed to a confidant the fervent hope that "he's the same

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[92] Kroll, Bernstein & Marritz, supra note 89. The report was based on numerous interviews with people well-acquainted with Leo personally or very knowledgeable about his work.

[93] See id.

[94] Id.

[95] See Supreme Court Nominations, supra note 30.

[96] Mehta & Dorning, supra note 89.

[97] Jan Crawford Greenburg, Supreme Conflict 265 (2007).

[98] Id. at 313–14.

twenty years from now as he is today."[99] Trump was no less attuned to adding to the Court only Justices who would be steadfast in their conservative views. According to Leo, Trump's directive to him "in clear and certain terms from the very beginning was I want people who are 'not weak.'"[100] Furthermore, Trump's characterization of the ideal Supreme Court prospect as "in the mold of Justices Antonin Scalia, Clarence Thomas, and Samuel Alito"[101] should dispel any doubt that by "not weak" he meant judges who pose no danger of "ideological drift."

When Leo has been asked to describe the qualities that he looked for in identifying the prospects that he so successfully promoted to Presidents Bush and Trump, he typically has spoken in terms that, on their face, don't necessarily have all that much to do with conservative political ideology. One of the "most important things any prospective nominee to the bench can have," Leo said on one occasion, is "a demonstrable judicial record of embracing originalism, textualism, and the structural Constitution."[102] However, in the hands of Leo and other Federalist Society leaders, originalism, textualism, and concerns about structure have become vehicles for translating conservative political ideology into law. As one journalist has explained, in building its judicial pipeline, the Federalist Society "carefully selects ambitious young law students with conservative views, steeps them in 'originalist' and 'textualist' judicial philosophy, and shepherds them from law school to the bench."[103] Similarly, in the words of a prominent constitutional scholar, "What people in the Federalist Society mean when they talk about 'structure' is limiting the regulatory power of the state . . . . [They] have an activist agenda to peel back the power of

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[99] Id. at 211. Jan Crawford Greenburg's account of the failed nomination of Harriet Miers provides further evidence of the high value that Bush placed on the likelihood that nominees wouldn't change their views over time. When Bush nominated Miers for the vacancy ultimately filled by Alito, he "thought Miers was in the mold of Thomas and Scalia, and he could be sure she would stay that way." Id. at 266. When leading conservatives objected based on evidence showing some inconsistencies in the positions that Miers had taken, Bush, who had rejected some candidates based on their unpredictability (see id. at 257), relented and provided a face-saving means for Miers to withdraw from consideration. See id. at 284.

[100] Melissa Quinn, Inside the Mind of Leonard Leo, Trump's Supreme Court Right-Hand Man, Wash. Exam'r (Jan. 28, 2018, 5:01 AM), https://www.washingtonexaminer.com/news/1859796/inside-the-mind-of-leonard-leo-trumps-supreme-court-right-hand-man/; see also Mehta & Dorning, supra note 89 (noting Trump's description of his three appointees on the Court as "strong").

[101] Remarks by President Trump on Judicial Appointments, Law and Justice, Nat'l Archives (Sept. 9, 2020, 3:45 PM), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-judicial-appointments/.

[102] Quinn, supra note 100 (quoting Leo).

[103] The Hidden Architect of the Supreme Court, Week (July 29, 2023), https://theweek.com/leonard-leo/1025358/the-hidden-architect-of-the-supreme-court.

government."[104] More broadly, as a former president of the American Constitution Society—the liberal counterpart to the Federalist Society—has said with grudging admiration, the Federalist Society has been successful "in propagating an approach to understanding the Constitution that conveniently always led to conservative outcomes."[105]

It's not hard to see a strong connection between Leo's staunchly conservative political views and the legal positions adopted by the five Justices whom Leo has played a major role in selecting. He has made clear, for example, his adamant opposition to abortion[106] and his firm belief that religion is under siege and in need of protection from hostile elements in American society.[107]

The one Republican appointee on today's Court who isn't a graduate of Leo's judicial pipeline—Justice Thomas—was nominated prior to its creation, but he surely qualifies for an honorary degree. The Reagan administration recognized early on Thomas's potential as a deeply conservative Black attorney to rise quickly up the judicial career ladder, and they paved the way for his ascent to the Court, much as Leo would later do with his judicial pipeline for the Republican appointees who ultimately joined Thomas on the Court.[108] At the time of his nomination by the first President Bush, Thomas was easily one of the most predictable votes for conservative political causes in the history of the Court.[109] If the goal was to

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[104] 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, (quoting NYU Law Professor Samuel Issacharoff).

[105] Id. (quoting Caroline Fredrickson).

[106] See Kroll, Bernstein & Marritz, supra note 89.

[107] See id. In accepting an award in 2022 from the Catholic Information Center, Leo was especially vehement in describing those whom he sees as a threat to Catholicism, his own religion. See id. (quoting Leo's characterization of them as "vile and immoral current-day barbarians, secularists and bigots" and "the progressive Ku Klux Klan"); see also Shamshiri, Hamam & Liroff, supra note 89 (transcribing an interview with Professor Amanda Hollis-Brusky —author of the book, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*—in which she described Leo as having "what many on the Christian right have, which is sort of a missionary zeal about what he's doing and why he's doing it. It's a battle between good and evil. . . .").

[108] See Ken Foskett, Judging Thomas 148–62 (2004). Although Thomas wasn't a product of Leo's pipeline, he and Leo have been good friends since Leo helped Thomas defend himself in his confirmation hearings against Anita Hill's charges that Thomas had sexually harassed her when he was her supervisor. See The Hidden Architect, supra note 103. Among other things, Leo introduced his friend to the conservative billionaire Harlan Crow, see id., whose lavish gifts to Thomas and his family, which Thomas (in apparent disregard of federal law) largely failed to report, have prompted questions about Thomas's respect for judicial ethics. See Justin Elliott, Joshua Kaplan & Alex Mierjeski, Harlan Crow Provided Clarence Thomas at Least 3 Previously Undisclosed Private Jet Trips, Senate Probe Finds, ProPublica (June 13, 2024), https://www.propublica.org/article/clarence-thomas-harlan-crow-private-jet-flights-senate-investigation-scotus.

[109] As I argued in detail not long after Thomas joined the Court, Thomas's many speeches and writings during his years in the Reagan administration made eminently clear his firm opposition to

nominate a Justice who would be an unwavering warrior for those causes for years to come, Bush's nomination of Thomas, like his son's and Trump's nominations of the five other Republican appointees on today's Court, couldn't be beat.

B. Taking the Politicization of the Appointment Process to New Depths

In 2016 and again in 2020, then-Senate Majority Leader Mitch McConnell exploited the Senate confirmation process for Supreme Court nominees with the consummate skill of a chess grandmaster and with an equally remarkable lack of respect for the Court as an institution. In each instance, McConnell's machinations ultimately bore distinctly partisan fruit because Donald Trump was only too happy as president to complement McConnell's efforts by putting forward nominees who were as sure a bet to vote the party line as anyone to be found.

In mid-February of 2016, Justice Antonin Scalia suddenly died.[110] Shortly after, McConnell, whose Republicans held a 52-48 majority in the Senate, announced that the Senate wouldn't be holding hearings and voting on whomever President Obama might nominate to succeed Scalia.[111] Although more than eleven months remained in Obama's second and final term, McConnell maintained that, if a Supreme Court vacancy occurs in a presidential election year, respect for the voice of the American people requires holding open the seat so that it can be filled by the winner of the election.[112]

McConnell's claim that a special rule exists for election-year Supreme Court nominations can't be faulted for lack of boldness and originality. It can be faulted, though, for having no foundation in reality. It was nothing but a ploy to hold Scalia's seat open in the hope that a Republican would win the November 2016 presidential election and get to fill the seat. First of all, the Constitution's Appointments Clause says nothing even arguably intimating that the Senate owes Supreme Court nominations any less respect

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abortion and affirmative action, his strong support for expansive presidential power, and his allegiance altogether to constitutional positions that coincided almost perfectly with the administration's highly conservative political views. Gary J. Simson, Thomas's Supreme Unfitness—A Letter to the Senate on Advise and Consent, 78 Cornell L. Rev. 619, 620–24 (1993). He also gave every indication of having anything but an open mind to points of view different from his own. Id. at 638–39.

[110] Terri Langford & Jordan Rudner, Supreme Court Justice Antonin Scalia Found Dead in West Texas, Tex. Trib. (Feb. 13, 2016, 4:34 P.M), https://www.texastribune.org/2016/02/13/us-supreme-court-justice-antonin-scalia-found-dead/.

[111] Jason Silverstein, Here's What Mitch McConnell Said About Not Filling a Supreme Court Vacancy in an Election Year, CBS News (Sept. 19, 2020, 1:32 PM), https://www.cbsnews.com/news/mitch-mcconnell-supreme-court-vacancy-election-year-senate/.

[112] Id.

if they are made in the final year of a president's term (which is invariably an election year) than in any of the first three years. It simply says that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court."[113] Furthermore, the history of Supreme Court appointments belies the existence of any longtime understanding between the president and the Senate that the Senate needn't bother with any election-year Supreme Court nominations that the president may make.[114] Various Justices have been nominated and confirmed in the final year of a president's term.[115] Last but not least, McConnell's rationale for the purported election-year rule is simply illogical. If a president nominates someone in the final year of the president's term, the voice of the people is no less heard than if the nomination is left for whomever is elected president that year. The voice that's heard is simply the voice of the people as expressed by their election a few years earlier of the current president, rather than their voice as it will be expressed later that year by their election of the next president.

Various Senate Democrats and others vigorously disputed the reality and logic of the purported rule.[116] True to form, however, McConnell didn't flinch from applying it when Obama nominated Merrick Garland to fill the seat. Instead, he rallied his Republican colleagues to follow his lead and essentially ignore the nomination's existence.[117] For McConnell, it was irrelevant that Obama obviously had gone out of his way to name someone whom Senate Republicans couldn't reasonably regard as a provocative and partisan choice. At the time, Garland was chief judge of the U.S. Court of Appeals for the District of Columbia Circuit—a court commonly described as the second most important in the nation after the Supreme Court.[118] Since

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[113] U.S. Const. art. II, § 2, cl. 2.

[114] See Robin Bradley Kar & Jason Mazzone, The Garland Affair: What History and the Constitution *Really* Say About President Obama's Powers to Appoint a Replacement for Justice Scalia, 91 N.Y.U. L. Rev. Online 53, 76 (2016) ("[N]othing in the constitutional text or the history of senatorial practices supports a distinction between nominations made during an election year (but prior to the election of a presidential successor) and earlier nominations.").

[115] See Karen Sloan, Hundreds of Law Profs Call on Senate Leaders to Consider SCOTUS Nominee, Nat'l L.J. (Mar. 8, 2016), https://www.law.com/nationallawjournal/almID/1202751676313/ (quoting a letter signed by over 350 legal scholars that stated, "In fact, six justices have been confirmed in presidential-election years since 1900, including Louis Brandeis, Benjamin Cardozo and Republican-appointee Anthony Kennedy, who was confirmed by a Democratically-controlled Senate during President Ronald Reagan's last year in office.").

[116] See Marcia Coyle, Tony Mauro & Mike Sacks, Sparring Over Scalia's Seat, Law.com (Feb. 29, 2016), https://www.law.com/almID/1202750818566/; Kar & Mazzone, supra note 114; Sloan, supra note 115.

[117] Silverstein, supra note 111.

[118] See, e.g., C. Ryan Barber, DC Circuit Reminds Everyone the DC Court of Appeals Is Not the Same Court, Nat'l L.J. (Apr. 28, 2020), https://www.law.com/nationallawjournal/2020/04/28/dc-circuit-

joining the court in 1997, Garland had won broad respect as a very able, scrupulous, and altogether moderate judge.[119] In addition, when nominated to the Supreme Court, Garland was 63 years old[120]—an age that offered some assurance to Republicans that, if confirmed, he wasn't likely to serve on the Court for all that many years.

Ultimately, however, Senate Republicans followed McConnell's lead in lockstep, and Garland's nomination received no formal action for a record-setting 293 days.[121] At that point—January 3, 2016—it expired with the end of the term of Congress in which it had been made.

On January 31, 2017, less than two weeks after taking office, President Trump nominated Neil Gorsuch to fill the seat on the Supreme Court that, but for McConnell's machinations and his colleagues' sheeplike response, would've already been occupied by Garland.[122] In nominating Gorsuch, Trump was careful to name someone whose resume left no doubt that he was a very smart and accomplished nominee. A judge for the past decade on the U.S. Court of Appeals for the Tenth Circuit, Gorsuch, like Garland, had an array of elite professional credentials.[123] Above all, however, Trump was focused on adding someone to the Court who would be as certain as possible a vote for Trump Republican causes. Very much unlike Garland, Gorsuch had a career that, as a prominent observer of the Court described it at the time, "resembles a lab experiment synthesizing every trend in modern

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reminds-everyone-the-dc-court-of-appeals-is-not-the-same-court/?slreturn=20240820170758 (noting that the D.C. Circuit is "widely described as the second most important in the country"); Editorial, The Homogeneous Federal Bench, N.Y. Times (Feb. 6, 2014), https://www.nytimes.com/2014/02/07/opinion/the-homogeneous-federal-bench.html (characterizing the D.C. Circuit as "the second-most powerful court after the Supreme Court").

[119] See Editorial, Merrick Garland for the Supreme Court, N.Y. Times (Mar. 16, 2016), https://www.nytimes.com/2016/03/17/opinion/merrick-garland-for-the-supreme-court.html ("If you tried to create the ideal moderate Supreme Court nominee in a laboratory, it would be hard to do better than Judge Merrick Garland."); Carl Hulse, Supreme Court Showdown Could Shape Fall Elections, N.Y. Times (Mar. 17, 2016), https://www.nytimes.com/2016/03/17/us/politics/supreme-court-nomination-obama-congress.html (characterizing Garland as "a centrist jurist with proven appeal to Republicans").

[120] Juliet Eilperin & Mike DeBonis, President Obama Nominates Merrick Garland to the Supreme Court, Wash.

Post (Mar. 16, 2016), https://www.washingtonpost.com/world/national-security/president-obama-to-nominate-merrick-garland-to-the-supreme-court-sources-say/2016/03/16/3bc90bc8-eb7c-11e5-a6f3-21ccdbc5f74e_story.html.

[121] See Cristian Farias, Merrick Garland's Supreme Court Nomination Just Died with the Old Congress, HuffPost (Jan. 3, 2017), https://www.huffpost.com/entry/merrick-garland-supreme-court-nomination-dead_n_586be633e4b0de3a08f9a8f2.

[122] Robert Barnes, Trump Picks Colo. Appeals Court Judge Neil Gorsuch for Supreme Court, Wash.

Post (Jan. 31, 2017), https://www.washingtonpost.com/politics/trump-picks-colo-appeals-court-judge-neil-gorsuch-for-supreme-court/2017/01/31/2b08a226-e55e-11e6-a547-5fb9411d332c_story.html.

[123] See id. (noting, for example, Justice Gorsuch's "service in the administration of George W. Bush," "glittery Ivy League résumé," and clerkship with Justice Byron White).

conservative thought."[124] Furthermore, at 49 years old,[125] Gorsuch could be expected to be a dependably Trumpian vote on the Court for decades to come.

All too predictably, when the outnumbered Senate Democrats sought to retaliate for the Republicans' treatment of Garland by mounting a filibuster to block a vote on Gorsuch, McConnell was more than ready to complete the job he had begun. He instructed his Senate Republican colleagues to vote to reduce to fifty-one the longstanding Senate requirement of sixty votes to break a filibuster of a Supreme Court nominee. In short order, they dutifully obliged and then proceeded to vote to confirm Gorsuch to the Court.[126]

Though only a small piece of the entire story, the confirmation vote of 54-45, with all Republicans (except one too ill to attend) in favor and all but three Democrats against,[127] nicely captures the extreme partisanship that, from beginning to end, dominated the process to fill Scalia's seat. For some perspective, recall the many unanimous or near-unanimous Supreme Court confirmation votes over the course of the twentieth century. During those years, only six of sixty-one nominations failed, either being voted down or withdrawn,[128] and only three of the fifty-five successful nominations were confirmed by less than a two-thirds vote.[129] Justice Scalia himself—hardly a

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[124] Jeffrey Toobin, Behind Neil Gorsuch's Non-Answers, New Yorker (Mar. 26, 2017), https://www.newyorker.com/magazine/2017/04/03/behind-neil-gorsuchs-non-answers; see also Linda Greenhouse, Trump's Life-Tenured Judicial Avatar, N.Y. Times (July 6, 2017), https://www.nytimes.com/2017/07/06/opinion/gorsuch-trump-supreme-court.html ("So Neil M. Gorsuch, the aw-shucks humble servant of the law whom the country encountered during his mind-numbing confirmation hearing, turns out to be a hard-right conservative. No real surprise there . . . .").

[125] See Barnes, supra note 122.

[126] See Adam Liptak & Matt Flegenheimer, Neil Gorsuch Confirmed by Senate as Supreme Court Justice, N.Y. Times (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html.

[127] Roll Call Vote on the Nomination of Neil M. Gorsuch, of Colorado, to Be an Associate Justice of the Supreme Court, U.S. Senate (Apr. 7, 2017), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1151/vote_115_1_00111.htm.

[128] Four nominations—those of John Parker in 1930, Clement Haynsworth, Jr. in 1969, G. Harrold Carswell in 1970, and Robert H. Bork in 1987—were voted down by the Senate. Supreme Court Nominations, supra note 30. The two other unsuccessful nominations—those of Abe Fortas and Homer Thornberry in 1968—never came to a floor vote. Id. Faced with a Senate filibuster, President Johnson withdrew his nomination to elevate Fortas from Associate Justice to Chief Justice. Having withdrawn Fortas's nomination to be Chief Justice, Johnson had no choice but to withdraw Thornberry's nomination as well, because Fortas remained on the Court as an Associate Justice and the Associate Justice seat for which Thornberry had been nominated—Fortas's—failed to open up. See Andrew Hamm, Legal History Highlight: The Failed Election-Year Nomination of Abe Fortas, SCOTUSblog (Mar. 10, 2016), https://www.scotusblog.com/2016/03/legal-history-highlight-the-failed-election-year-nomination-of-abe-fortas/.

[129] Two of those three fell only one vote short of two-thirds. In 1986, President Reagan's nomination to elevate William H. Rehnquist from Associate Justice to Chief Justice was confirmed by a 65-33 vote; and in 1912, President Taft's nomination of Mahlon Pitney was confirmed by a 50-26 vote. See Supreme Court Nominations, supra note 30. The only successful nomination that produced a genuinely narrow

closet conservative at the time of his nomination by President Reagan—was unanimously confirmed in the 1980s,[130] as were two other Reagan nominees, Sandra Day O'Connor and Anthony Kennedy,[131] neither of whom would've ever landed on any Democratic president's short list of potential nominees. By the same token, in the following decade, President Clinton's two nominees, Ruth Bader Ginsburg and Stephen Breyer, were approved by 96-3 and 87-9 margins, respectively,[132] even though Senate Republicans hardly could have thought of either as a kindred soul.

On September 18, 2020, slightly more than four months before the final day of President Trump's term and less than two months before the 2020 presidential election, Justice Ginsburg passed away.[133] That evening, McConnell, still Senate Majority Leader, announced that the Senate would proceed promptly to confirm whomever Trump named to succeed her.[134] When asked how he could reconcile that approach with the election-year rule he had invoked only four years earlier to block the Garland nomination, McConnell matter-of-factly explained that the situations were very different:

> In the last midterm election before Justice Scalia's death in 2016, Americans elected a Republican Senate majority because we pledged to check and balance the last days of a lame-duck president's second term. We kept our promise. By contrast, Americans reelected our majority in 2016 and expanded it in 2018 because we pledged to work with President Trump and support his agenda, particularly his outstanding appointments to the federal judiciary. Once again, we will keep our promise.[135]

Now do you see the difference? I hope not. When Scalia died in mid-February of an election year with the election almost nine months away,

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confirmation vote (52-48) was the nomination of Clarence Thomas in 1991, see id.—a nomination that sparked strong opposition in and out of the Senate based in part on ideology but probably even more so on doubts about character and basic fitness for the job. See Simson, supra note 109, at 627–45 (discussing various kinds of evidence at the time of Thomas's confirmation vote prompting such doubts).

[130] See Supreme Court Nominations, supra note 30.

[131] See id.

[132] See id.

[133] Nina Totenberg, Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87, NPR (Sept. 18, 2020, 7:28 PM), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87.

[134] Grace Segers, McConnell Says Trump's Nominee to Replace Ruth Bader Ginsburg "Will Receive a Vote on the Floor" of Senate, CBS News (Sept. 19, 2020, 12:27 PM), https://www.cbsnews.com/news/mcconnell-trump-supreme-court-nominee-senate-ruth-bader-ginsburg/.

[135] See id. (quoting McConnell).

McConnell insisted that respect for the voice of the American people required leaving the seat to be filled by the president whom the people would elect that November. However, when Ginsburg died in mid-September of an election year with the election less than two months away, respect for the voice of the people suddenly had nothing to do with the results of the upcoming election. If that seems inconsistent, it's because it is. Even if you were willing at the time of Garland's nomination to believe that McConnell was blocking it out of a sincere belief in the existence of an election-year rule that didn't exist, McConnell's very different approach to filling Ginsburg's seat in an election year should have convinced you that he cynically follows only one rule: Might makes right, and party advantage is all that counts.

In nominating Barrett, Trump obviously was using the same basic template as he had used for Gorsuch (as well as for Brett Kavanaugh, whom he had nominated in 2018 when Justice Kennedy stepped down[136]). Like Gorsuch, Barrett was a sitting federal appellate judge at the time of her nomination, and her resume, like his, included a Supreme Court clerkship and other prestigious entries.[137] Also like Gorsuch, she gave every indication of being a sure bet to vote in ways that would thrill her nominator and Senate Republicans.[138] As Linda Greenhouse put it in her account of Justice Barrett's impact on the Court during Barrett's first year on the Court, Barrett's appointment "was the culmination of a project launched years before . . . . It was a project to take back the Supreme Court, and . . . [Barrett] was its instrument."[139] Nominated at much the same age as Gorsuch had been, she too could be expected to serve on the Court for many years to come.

Proceeding efficiently, if nothing else, McConnell steamrolled ahead, utterly heedless of the disservice done to the American people by his

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[136] For detailed discussion of the origins of the Kavanaugh nomination and the sexual-misconduct allegations and other formidable hurdles it faced, see Ruth Marcus, Supreme Ambition: Brett Kavanaugh and the Conservative Takeover (2019).

[137] See Amy Howe, Profile of a Potential Nominee: Amy Coney Barrett, SCOTUSblog (Sept. 21, 2020), https://www.scotusblog.com/2020/09/profile-of-a-potential-nominee-amy-coney-barrett/.

[138] See, e.g., Linda Greenhouse, Justice on the Brink: The Death of Ruth Bader Ginsburg, the Rise of Amy Coney Barrett, and Twelve Months That Transformed the Supreme Court xi–xxix (2021); Adam Liptak, Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right, N.Y. Times (Oct. 12, 2020), https://www.nytimes.com/2020/10/12/us/politics/barretts-record-a-conservative-who-would-push-the-supreme-court-to-the-right.html; Margaret Talbot, Amy Coney Barrett's Long Game, New Yorker (Feb. 7, 2022), https://www.newyorker.com/magazine/2022/02/14/amy-coney-barretts-long-game; Jeffrey Toobin, There Should Be No Doubt Why Trump Nominated Amy Coney Barrett, New Yorker (Sept. 26, 2020), https://www.newyorker.com/news/daily-comment/there-should-be-no-doubt-why-trump-will-nominate-amy-coney-barrett.

[139] Greenhouse, supra note 138, at xii.

complicity with Trump in fast-tracking a Supreme Court appointment in the midst of the chaos of election season.[140] If the goal is to help ensure the appointment of top-notch Justices, there is obviously a lot to be said for giving the Senate, the press, the American Bar Association,[141] and other investigating bodies adequate time and opportunity to carefully investigate any Supreme Court nominee. For McConnell and Trump, however, whose goal was simply to cement a radically conservative 6-3 majority on the Court, the less time and opportunity for careful investigation the better.

With McConnell dictating the timing behind the scenes and with an eye to wrapping up before election day (presumably to avoid any possible objection to Trump's getting to finalize the appointment if he had already failed in his reelection bid), the hearings began on October 12—only sixteen days after Barrett's nomination—and the Senate confirmation vote took place on October 26.[142] With the exception of a "no" vote by one Republican, Barrett was confirmed 52-48 in a straight party-line vote[143]—a vote that, like the 54-45 vote on Gorsuch, deviated dramatically from the twentieth-century norm and encapsulated the extreme partisanship that has come to dominate the Supreme Court appointment process.[144]

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[140] For data documenting the much greater restraint historically exercised by the president and Senate when Supreme Court vacancies arise in the several months prior to a presidential election, see Barry J. McMillion, Supreme Court Vacancies That Occurred During Presidential Election Years (1789–2020), CRS Insight (Oct. 1, 2020), https://sgp.fas.org/crs/misc/IN11514.pdf.

[141] For discussion of the role that the ABA Standing Committee on Federal Judiciary has played in the Supreme Court confirmation process since the 1950s, see Henry J. Abraham, Justices, Presidents, and Senators 27–30 (5th ed. 2008); Supreme Court Evaluation Process, A.B.A., https://www.americanbar.org/groups/committees/federal_judiciary/ratings/supreme-court-evaluation-process/ (last visited Nov. 15, 2025).

[142] Amy Coney Barrett Confirmation Hearings and Votes, Ballotpedia, https://ballotpedia.org/Amy_Coney_Barrett_confirmation_hearings_and_votes.

[143] Id.

[144] Having chronicled Senator McConnell's unprincipled performance of his role as Senate majority leader in ensuring the defeat of the Garland nomination and the success of the Gorsuch and Barrett ones, I would perhaps be remiss not to mention his willingness at times in 2025 to take what may be seen as stands on principle now that he has stepped down as the Senate Republicans' leader. To be sure, he has cast "no" votes on a few extraordinarily problematic (to put it mildly) nominees for high-level positions in the Trump Administration who won confirmation thanks to the unanimous or near-unanimous support of his fifty-two Republican colleagues in the Senate. In light of the outcomes, however, which an expert Senate vote-counter like McConnell surely had no doubt would turn out as they did, I don't think it's unfair to view those votes as much too little, too late. See Frank Bruni, Susan Collins and Her Cowardly Caucus Bow Down to Trump, N.Y. Times (Feb. 13, 2025), https://www.nytimes.com/2025/02/13/opinion/kennedy-trump-senate-republicans.html ("Senator Mitch McConnell was the lone Republican to oppose Kennedy and Gabbard, continuing his belated and meaningless rousing of a conscience that slumbered through Trump's first term in the presidency.").

IV. A CRUCIAL FIRST STEP TOWARD REVERSING THE COURT'S PARTISANSHIP

Today's highly partisan Supreme Court didn't happen overnight and won't easily be undone. A strong remedy is needed, and to be effective, it must either insulate the Supreme Court appointment process from the forces that made the Court so partisan or else make those forces much less potent.

As a practical matter, the latter possibility seems much more theoretical than real. Consider, for example, a prohibition on any groups, wherever they might be on the political spectrum, from creating or maintaining the kind of judicial pipeline the Federalist Society created and from lobbying presidents to draw from that pipeline in naming Supreme Court nominees. Surely, the First Amendment would preclude any such prohibition or even only a substantial limitation of that sort. By the same token, any legislative effort to bar presidents from making Supreme Court nominations with a single-minded focus on partisan advantage not only would be virtually impossible to enforce but also would undoubtedly overstep the boundaries, however vague, of the constitutional separation of powers; and although a measure to ensure that the Senate doesn't end up with majority leaders as Machiavellian as McConnell isn't apt to raise constitutional difficulties, it's hardly obvious what form an effective measure of that sort would take.

In contrast, there's a very simple and straightforward, though perhaps counterintuitive, means of reducing the Court's partisanship by insulating the appointment process from the forces that made the Court so partisan: Require a two-thirds, rather than simple-majority, vote in the Senate for any Supreme Court nominee to be confirmed.[145] After explaining below why a two-thirds vote requirement would effectively insulate the process from those forces, I'll turn to the form that such a requirement might take and its prospects for adoption.

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[145] UCLA Law Professor Stephen Gardbaum has observed that the system of judicial review in the United States deviates from several "global norms," including one of "appointment by supermajority vote of the legislature or independent, nonpolitical commissions." Stephen Gardbaum, What the World Can Teach Us About Supreme Court Reform, 70 UCLA L. Rev. Disc. 184, 190 (2023). Also, as noted by two NYU legal scholars with regard to the constitutional courts that many European nations have created since the end of World War II, "appointment to the courts is made mostly through supermajoritarian procedures," and they offer as an illustration the two-thirds vote requirement for appointment to the German constitutional court. John Ferejohn & Pasquale Pasquino, Constitutional Adjudication: Lessons from Europe, 82 Tex. L. Rev. 1671, 1678 & n.27 (2004).

A. A Two-Thirds Vote Requirement in Action

You may be wondering whether, in proposing adoption of a two-thirds vote requirement for Supreme Court nominees, I've lost sight of the context in which that change from the longstanding simple-majority vote requirement would have to operate. Isn't such a change apt to mean a much higher percentage of unsuccessful nominations than under the prevailing simple-majority confirmation requirement? After all, party-line voting on Supreme Court nominations has become so much the norm in recent years that the nominees of presidents whose party held a Senate majority have barely been able to get a simple majority of affirmative votes,[146] and as Merrick Garland had the misfortune of learning first-hand,[147] the nominee of a president whose party is in the Senate minority has almost no hope of getting a simple majority of votes.

Over the past fifty years, the number of Democrats and Republicans in the Senate has generally been around 50-50 and hasn't at any point been different enough that a party-line vote could produce a two-thirds majority.[148] Unless that changed dramatically, it would seem that a two-thirds vote requirement would bring the entire Supreme Court appointment process grinding to a halt. Vacancies would no longer get filled, and the Court as an institution would ultimately cease to exist.

Realistically, though, isn't that doomsday scenario extremely unlikely ever to come to pass? For reasons of self-preservation if nothing else, wouldn't senators feel obliged to rethink their approach and take a more expansive view of the range of nominees whom they are willing to support? Surely they would recognize that the public isn't apt to just passively watch as senators keep voting the party line, one after another nomination fails, and the Court withers away. They would very sensibly fear that the public would repay them for such doggedly partisan and destructive behavior by voting them out of office when they come up for reelection. Rather than bear the brunt of public discontent for such behavior, senators would almost certainly be proactive and seek to head it off by abandoning their ruinous practice of party-line voting on Supreme Court nominees.

To decide whether to vote to confirm a Supreme Court nominee, senators should be considering a wide variety of factors, including how the nominee

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[146] See Supreme Court Nominations, supra note 30 (listing confirmation votes for Justices Gorsuch, Kavanaugh, Barrett, and Jackson of 54-45, 50-48, 52-48, and 53-47, respectively).

[147] See supra text accompanying notes 116–121.

[148] Party Division, U.S. Senate, https://www.senate.gov/history/partydiv.htm (last visited Oct. 31, 2025).

is likely to vote on issues of major national importance.[149] As a practical matter, when senators engage in party-line voting on nominees, they are treating the nominating president's party affiliation as a rough proxy for the votes that the nominee is apt to cast. If the president belongs to their party, senators vote "yes" on the assumption that the nominee's likely votes are an asset and that no other factors matter. If the president doesn't belong to their party, they vote "no" on the assumption that the nominee's likely votes are a liability and that nothing else counts.

With a two-thirds majority confirmation requirement, senators are forced to abandon party-line voting on confirmation votes. If they don't, the requirement won't ever be met. Rather than treat the president's party affiliation as a shorthand for the nominee's likely votes, senators become obliged to focus directly on the individual nominee's likely votes. Depending on their individual political views, senators may regard a particular nominee's likely votes as a strong reason for voting for or against the nominee or perhaps as a reason only mildly militating for or against. Ultimately, with a two-thirds vote requirement in place, senators need to be prepared to compromise and take a broader view than they would otherwise take, if left entirely to their own devices, as to which nominees are acceptable to them based on the nominees' likely votes. A two-thirds requirement would similarly affect presidents' selection of nominees. To secure a two-thirds majority, presidents need to think more broadly than they otherwise would about which potential nominees merit nomination in light of their likely votes.

In making the Supreme Court appointment process much less of an opportunity for partisan advantage, a two-thirds vote requirement simultaneously invites substantially more attention to factors other than the nominee's likely votes. It encourages senators and presidents not to allow their consideration of a nominee's likely votes to crowd out consideration of the numerous more neutral and less politically charged factors that bear on a nominee's fitness for a seat on the nation's highest court—factors such as the nominee's integrity, objectivity, open-mindedness, candor, collegiality, and more.[150]

Today's broken appointment process is focused so myopically on likely votes that it gives other relevant factors far less attention than they deserve. Indeed, in the quest for Justices who will be a sure bet to vote one or another way, presidents and senators commonly treat some factors, like the

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[149] See Simson, Taking the Court Seriously, supra note 9, at 290–96.
[150] See id. at 296–300.

nominee's open-mindedness and objectivity, as liabilities that in a properly functioning appointment process would be considered assets. After all, if you're looking first and foremost for Justices who will predictably and reliably vote your way, the last thing you want is a highly open-minded and objective nominee.[151] The more closed-minded and incapable of objectivity the better! Requiring a two-thirds, rather than simple majority, vote to confirm would go a long way to set presidents' and senators' priorities straight.

B. Putting a Two-Thirds Vote Requirement in Place

In providing that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for,"[152] the Constitution's Appointments Clause doesn't specify the proportion of the Senate that must vote for a Supreme Court nominee (or a nominee to any of the other offices indicated) in order for the nominee to be confirmed. For two reasons, the Clause's silence on the matter is most reasonably understood as fixing the required proportion at a simple majority.

First, that silence actually speaks quite loudly when considered alongside the way in which other provisions in the Constitution indicate the required proportion of affirmative votes to authorize one or another type of collective decision. In several instances, the Constitution expressly calls for a two-thirds or three-fourths vote.[153] In other instances, it is conspicuously silent as to the required proportion.[154] The natural inference is that the Framers tacitly treated a simple majority vote as the norm and only specified a proportion when they wanted to deviate from that norm.

Second, the Appointments Clause has been understood from the very beginning as requiring only a simple majority vote. As the Court has acknowledged on various occasions,[155] the ways in which Congress

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[151] See id. at 294–95.

[152] U.S. Const. art. II, § 2, cl. 2.

[153] See, e.g., id. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present."); id. art. I, § 5, cl. 2 ("Each House may . . . with the Concurrence of two thirds, expel a Member.").

[154] See, e.g., id. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .); id. art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.").

[155] See, e.g., Myers v. United States, 272 U.S. 52, 136 (1926); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319–20 (1852).

exercised its powers in the years soon after the framing are good evidence of the intended scope of those powers because so many of those who served in the early Congresses were actively involved in the Constitution's framing.

Assuming, then, that the Appointments Clause is best understood as requiring only a simple majority vote to confirm a Supreme Court nominee, that implicit constitutional requirement, no less than any express constitutional requirement, remains as is unless and until the Constitution is amended, which can happen only if two super-majority requirements are met: two-thirds of both houses of Congress must vote to propose the amendment, and three-fourths of the states must vote to ratify it. The two super-majority requirements obviously were intended to make the Constitution very difficult to amend, and they plainly have achieved, if not overachieved, the desired effect. In the past fifty years, no amendment has been adopted other than the Twenty-Seventh,[156] which, bizarrely, won ratification 202 years after Congress proposed it and long after it had lost whatever controversiality it once had.[157]

In light of the high level of partisan disagreement in Congress today and the often enormous policy differences between states dominated by one or the other party, any amendment apt to provoke controversy along party lines faces a steep climb to adoption; and an amendment to require a two-thirds Senate vote to confirm a Supreme Court nominee surely would be one apt to provoke controversy along party lines. In and of itself, there is nothing inherently partisan about requiring a two-thirds Senate vote to confirm. It doesn't make a candidate nominated by a Democratic president any more or less likely to be confirmed than one nominated by a Republican president. However, changing now to a two-thirds Senate vote requirement would be designed—and, I believe, well-designed—to reduce the partisan nature of the Court, and that highly partisan nature has manifested itself in Supreme Court decisions that the great majority of Republicans now in Congress strongly favor and want the Court to preserve and that the great majority of Democrats now in Congress strongly disfavor and want the Court to modify or overrule.

In this era in which party-line voting in Congress has become routine for anything at all controversial, the prospects may seem bleak of getting two-thirds of both houses to support an amendment requiring a two-thirds Senate

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[156] U.S. Const. amend. XXVII ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.").

[157] See The Unconventional Journey to the 27th Amendment, Nat'l Arch. Found., https://archivesfoundation.org/newsletter/the-unconventional-journey-to-the-27th-amendment/ (last visited Oct. 31, 2025).

vote for Supreme Court nominees. The Democrats in Congress might well vote unanimously to propose the amendment to the states, but they number slightly less than half of each house. Even a strong showing by Democrats in the 2026 midterms is unlikely to boost the Democratic membership in Congress anywhere near two-thirds of each house. A two-thirds Senate confirmation vote amendment can't meet that two-thirds threshold unless a substantial minority of Republicans in each house—roughly one-third to two-fifths—deviate from party-line voting and vote in support, which would be quite a dramatic change from the tiny proportion that, during President Trump's second term, have dared to oppose his judicial and other nominations and legislative initiatives.[158]

Getting a substantial minority of Republicans in each house to support such an amendment, however, may not be as improbable as it initially appears. A few considerations that come into play with regard to this particular amendment give it some plausibility. To help frame the issue most clearly, I'll focus on the Senate.

Any senator, regardless of party, has good reason to support the suggested amendment as a matter of principle because of the protection that it would provide for the Senate as an important and independent voice in the appointments process. As I've argued elsewhere, the language of the Appointments Clause,[159] the history of the Clause's adoption,[160] and several background principles of the constitutional system as a whole[161] militate strongly in favor of interpreting the Clause as intended to provide the Senate with such a voice.[162] Furthermore, at the outset and for at least the next hundred years, the Senate exercised a voice in the appointments process much more consistent with that intent.[163]

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[158] See David Kirp, Trump Is Steamrolling Congressional Republicans. What's in It for Them?, Guardian (June 16, 2025, 6:00 AM), https://www.theguardian.com/commentisfree/2025/jun/16/trump-steamrolling-republicans.

[159] See Simson, Taking the Court Seriously, supra note 9, at 306–07.

[160] See id. at 308–12.

[161] See id. at 312–15 (discussing separation of powers and other "systemic considerations").

[162] Along similar lines, see Joseph P. Harris, The Advice and Consent of the Senate: A Study of the Confirmation of Appointments by the United States Senate 17–25 (1953); Laurence H. Tribe, God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History 132–37 (1985). On the importance more broadly of safeguarding Senate independence of the executive, see Leader's Lecture Address by [Senator] Robert C. Byrd, Sept. 15, 1998, U.S. Senate, https://www.senate.gov/artandhistory/history/video/LeaderLectureSeries_ByrdRobertC.htm.

[163] See Simson, Taking the Court Seriously, supra note 9, at 312 (discussing the Senate's rejection of President Washington's nomination of John Rutledge to be Chief Justice); id. at 324 ("The [Senate's] rejection rate for Supreme Court nominations was much more formidable prior to 1900 than since—roughly one out of four.").

If a Supreme Court nominee can be confirmed by a simple majority vote, and if, as is frequently the case, fifty or more senators belong to the president's party, the president has the capacity to render the Senate's voice in the process relatively inconsequential. As many presidents have demonstrated over the years, presidents have an array of means to exert a great deal of pressure on senators of their own party to vote to confirm nominees whom the senators, left to their own devices, would prefer not to confirm.[164]

If, however, a two-thirds vote were needed to confirm a Supreme Court nominee, the Senate's voice would take on much more importance and independence. The number of senators from the president's own party almost certainly would fall short—and often well short—of the two-thirds mark. As a result, presidents would virtually never be able to get a nominee confirmed simply by taking advantage of their special powers of persuasion over senators of their own party. Instead, they would be forced to set their sights more broadly and select nominees likely to meet the approval of enough senators from the other party—senators over whom they have substantially less sway—to reach the two-thirds mark.

Am I suggesting that enough Republican senators would be moved today by principle to support a two-thirds Senate confirmation vote amendment that the amendment would have the two-thirds Senate support needed (along with two-thirds House support) for proposing the amendment to the states? Though undoubtedly more idealistic than most, I'm not *that* idealistic! I recognize that, in deciding whether to support the amendment, the great majority of today's Republican senators—and, for that matter, the great majority of today's Democratic senators as well—are less likely to be influenced by principle than by their perception of whether supporting the amendment is apt to help or hurt their chances of winning reelection.

That's not to say that principle—in this instance, ensuring an important and independent voice for the Senate in the appointments process—might not play a significant, and even determinative, role in some Republican senators' decisions. Indeed, particularly because the principle is one grounded in original intent—a rallying cry for the Republican Party for

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[164] See Simson, supra note 109, at 645–49; Gary J. Simson, Mired in the Confirmation Mess, 143 U. Pa. L. Rev. 1035, 1043–46 (1995). There is a rich political science literature on presidents' means of influencing members of Congress. See, e.g., Rivals for Power: Presidential-Congressional Relations (James A. Thurber & Jordan Tama eds., 6th ed. 2017); Matthew N. Beckmann, The President's Playbook: White House Strategies for Lobbying Congress, 70 J. Pol. 407 (2008); Brandice Canes-Wrone, The President's Legislative Influence from Public Appeals, 45 Am. J. Pol. Sci. 313 (2001).

decades[165]—I'd hope that it might prompt a few Republican senators to support the amendment even if they thought that doing so would hurt their chances of reelection. Ultimately, however, the possibility that the amendment could muster enough Republican votes in the Senate to achieve a two-thirds majority almost certainly must rise or fall depending on Republican senators' rough calculation of the likely effect of their supporting the amendment on their chances of reelection, and it's to that calculation that I now turn.

Republican senators can expect to have to choose on one or more occasions in the next few years between (a) voting "yes" on a highly unqualified Supreme Court nominee whose confirmation may well come back to haunt them when they run for reelection and (b) voting "no" and incurring the wrath of a president fond of threatening to recruit and vigorously support primary challengers against Republican officeholders who dare to cross him.[166] Under the circumstances, if you were a Republican senator, the breathing room provided by a two-thirds confirmation vote requirement ought to look very inviting. Needing to secure some "yes" votes from across the aisle, the president would be obliged to put forward nominees more broadly acceptable than if only a simple majority of senators were needed to confirm. Republican senators would be able to vote for such a nominee with much more assurance that their vote wouldn't prove a liability for them when they are up for reelection.

If you're balking at my assumption that if only a simple majority of senators is needed to confirm, Trump will put forward highly unqualified Supreme Court nominees, think for a moment about the rogues' gallery of misfits whom he nominated at the start of his second term for various important nonjudicial positions in his administration and whom Senate

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[165] See Leah Litman, Lawless: How the Supreme Court Runs on Conservative Grievance, Fringe Theories, and Bad Vibes 21–23 (2025) ("[T]he Republican Party coalesced around originalism and cultivated it as a way to restore some of what it felt had been lost . . . . The concept of originalism took off in the 1980s . . . . Originalism had a natural symbiosis with a Republican Party that was looking to restore certain traditions such as gender roles related to the family. To this day, originalism fits the Republican Party's political project . . . ."); Logan Everett Sawyer III, Originalism and the Path to Partisan Jurisprudence: The Guidelines on Constitutional Litigation Inside the Reagan Administration, 3 J. Am. Const. Hist. 337, 337 (2025) ("For more than three decades, the public debate over the Constitution has been more than political. It has been partisan. Since the 1980s, nearly every Republican has embraced originalism, and nearly every Democrat has rejected it.").

[166] See Annie Karni et al., As Trump Threatened a Primary, a G.O.P. Holdout on Hegseth Flipped, N.Y. Times (Feb. 13, 2025), https://www.nytimes.com/2025/02/13/us/politics/hegseth-trump-tillis-senate.html; Marianne LeVine, Hannah Knowles & Liz Goodwin, Trump's Claims of a Mandate Run into Reality of Narrow Majorities, Wash. Post (Dec. 21, 2024), https://www.washingtonpost.com/politics/2024/12/20/trump-presidential-power-congress-legislature/.

Republicans virtually in lockstep voted to confirm.[167] Even if you, like I, weren't overly impressed by many of his Cabinet and other high-level appointments in his first term, you've got to admit that they look like all-star selections compared to this latest group. Whatever persons or considerations were reining in his nominations to some degree during his first term are gone from the scene or much diminished in importance. Partisan and personal loyalty seem to have become the be-all and end-all of almost every nomination.[168] No prior experience suggesting that the individual has a strong aptitude for, and likelihood of success in, the position? Beside the point! Ethical or legal skeletons in the closet? Probably just lies, and besides, no one's perfect!

I see no reason to believe that, left to his own devices, Trump will have a more enlightened set of priorities in nominating people for the Supreme Court. Instead, I suspect that he will find irresistible the temptation to name the most MAGA-minded lawyers to be found to lifetime seats on the nation's

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[167] Tulsi Gabbard, confirmed for Director of National Intelligence, Pete Hegseth, confirmed for Secretary of Defense, and Robert F. Kennedy, Jr., confirmed for Secretary of Health and Human Services, surely belong on any short list of Trump's most notorious 2025 nominees. For commentary on Gabbard, see Ruth Ben-Ghiat, Tulsi Gabbard Fits Right Into Trump's Vision for America, N.Y. Times (Jan. 30, 2025), https://www.nytimes.com/2025/01/30/opinion/tulsi-gabbard-trump-cabinet.html#; David Ignatius, The Three Strikes Against Tulsi Gabbard, Wash. Post (Jan. 29, 2025), https://www.washingtonpost.com/opinions/2025/01/29/tulsi-gabbard-dni-nominee-trump-vote/. For commentary on Hegseth, see David Brooks, We Deserve Pete Hegseth, N.Y. Times (Jan. 15, 2025), https://www.nytimes.com/2025/01/15/opinion/pete-hegseth-hearings-defense.html; George F. Will, There Were Ample Reasons, Not About His Personal Life, for Rejecting Hegseth, Wash. Post (Jan. 24, 2025), https://www.washingtonpost.com/opinions/2025/01/24/pete-hegseth-defense-department-unqualified/. And last but not least, for commentary on Kennedy, see Leana S. Wen, RFK Jr.'s Confirmation Hearings Were Even Worse Than Expected, Wash. Post (Jan. 31, 2025), https://www.washingtonpost.com/opinions/2025/01/31/robert-kennedy-senate-confirmation/; George F. Will, When Trust in Government Collapses, That's How You Get RFK Jr., Wash. Post (Jan. 29, 2025), https://www.washingtonpost.com/opinions/2025/01/29/robert-kennedy-hhs-confirmation-senate/. Although none of the three has come close to proving the critics of their nomination wrong, Kennedy may hold the distinction of falling the furthest short. See Jerome Adams, Richard Carmona, Joycelyn Elders, Vivek Murthy, Antonia Novello & David Satcher, Six Surgeons General: It's Our Duty to Warn the Nation About RFK Jr., Wash. Post (Oct. 7, 2025), https://www.washingtonpost.com/opinions/2025/10/07/surgeons-general-rfk-jr-robert-kennedy/.

[168] See Jeet Heer, Why We Got Kash Patel and a 'Gangster Government,' N.Y. Times (Jan. 30, 2025), https://www.nytimes.com/2025/01/30/opinion/kash-patel-fbi-trump.html ("In 2025, having been burned in his first term by what he saw as an overreliance on establishment Republicans like Mr. Sessions, Mr. Trump is now filling his administration with MAGA loyalists—an army of Roy Cohns. No one fits this pattern more than Mr. Trump's nominee to head the F.B.I., Kash Patel, a fierce partisan who shares the president's dream of using the federal government as an agency of personal retribution."); Theodore R. Johnson, To Check Trump's Ambitions, Others in Government Must Assert Their Own, Wash. Post (Jan. 29, 2025), https://www.washingtonpost.com/opinions/2025/01/29/trump-unchecked-orders-separation-powers/ ("[When] one party has the advantage in all three branches, it has too much latitude to pursue its agenda unchecked. This is the design flaw that Trump exploits. His executive actions aim to impose, fund and enforce his agenda. . . . Unlike the first time around, the most important qualification for this Trump administration is personal devotion.").

highest court. You, like I, may not be thrilled with his first-term appointments to the Court, but they are apt to look like the second coming of John Marshall if Trump has a free hand in his second term to put on the Court whomever he pleases.[169]

But will enough Republican senators be sufficiently troubled by the prospect of being strong-armed into voting for one or more abysmal Supreme Court nominees that my proposed amendment would garner the requisite two-thirds Senate support? Though hardly a sure bet, I believe it's at least a reasonable possibility. Although many Republican senators had to be gnashing their teeth when the president presented them with all those glaringly flawed nonjudicial nominees, it's not hard to imagine that they calculated that it was less risky to their political futures to vote for the nominees than to cross Trump by voting against them. After all, those nominees wouldn't be in office for more than the four years of Trump's term, and given the uncertain tenure of any Trump appointee,[170] they might be in office a lot less than that. And even though they might do a fair amount of damage during their time in office, it might not be all that apparent to the public how much harm they had done.

Those same senators, however, would have good reason to find the prospect of being pressured to vote to confirm one or more deeply flawed Supreme Court nominees much more problematic and unappealing. Voting to put such a nominee on the highest court in the land for life would be the risk that just keeps giving. It might be decades before a ruinous choice is off the Court. Because the Court decides so many matters of great national

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[169] Writing well before Trump's flurry of stunningly inauspicious high-level nominations—indeed, several months before Trump had even won election—journalist and former attorney Jay Willis pointed to another reason to expect that "for all that Justices Gorsuch, Kavanaugh and Barrett have done to push the law to the right, Mr. Trump's next nominees could push it much further." Jay Willis, Trump's Next Supreme Court Picks Would Break the Mold, N.Y. Times (July 9, 2024), https://www.nytimes.com/2024/07/09/opinion/trump-supreme-court.html. "Everything we know about Mr. Trump today," Willis maintained, "suggests that he will take his judicial cues not from the conservative legal establishment, as he did previously, but instead from the conservative legal movement's extreme fringes." Id. Noting Leonard Leo and the Federalist Society's key role in Trump's first-term appointments to the Court (discussed supra Section III.A), Willis reported that in the past several years Trump had "soured on the conservative legal establishment" as "insufficiently willing to help him overturn the 2020 election results," had come to see "Federalist Society credentials" as "a liability," and had "changed his inner circle of lawyers" to ones apt to encourage him to name to the Court people who would move it significantly more to the right. Id.

[170] See, e.g., Cecelia Smith-Schoenwalder, Trump Turnover 2.0: Who's Out of Trump's Second Term: The Trump Administration Is No Stranger to Rapid Comings and Goings, U.S. News (June 4, 2025), https://www.usnews.com/news/politics/articles/trump-turnover-2-0-tracking-whos-out-of-trumps-second-term; Sheryl Gay Stolberg, Apoorva Mandavilli & Christina Jewett, White House Says New C.D.C. Director Is Fired, but She Refuses to Leave, N.Y. Times (Aug. 27, 2025), https://www.nytimes.com/2025/08/27/health/cdc-monarez-kennedy-vaccines.html.

importance, and because a single Justice can make a great deal of difference over time, senators' confirmation of a seriously deficient nominee can easily have harmful effects that the senators' constituents aren't apt to miss. Voting to confirm such a nominee may not prove to be a senator's undoing right away, but the risk that it will prove so before long—perhaps especially after Trump is gone from the scene—hangs like the proverbial sword of Damocles[171] over the senator's head.

Of course, a Republican senator would have to weigh in the balance the costs of triggering presidential retaliation by casting a vote with which Trump disagrees. A president as eager as Trump to maximize presidential power at every turn[172] undoubtedly would disagree with a vote for an amendment that, in amplifying the role of the Senate, would have the effect of reducing presidential power to some extent. Trump's disagreement with such a vote, however, might not be all that intense. A vote for the amendment, unlike, for example, a vote against one of his nominees for high judicial or nonjudicial office, isn't a rejection of the president's judgment. Instead, it can very credibly be publicly explained and defended in terms of restoring the important and independent voice that the Senate once had, and was intended to have, in the appointments process.

The credibility of that public defense obviously is no guarantee that this president won't take offense at a Republican senator's vote for the amendment. It isn't easy to predict any president's behavior and particularly not this president's. However, the credibility of that defense does mean that the president would have some difficulty persuading the public that a Republican senator's vote for the amendment is some sort of attack on, or demonstration of disloyalty toward, him, and that ought to count for quite a bit in a senator's calculation of whether voting for the amendment ultimately would strengthen or weaken the senator's chances of reelection.

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[171] See Evan Andrews, What Was the Sword of Damocles?, History.com (May 27, 2025), https://www.history.com/news/what-was-the-sword-of-damocles.

[172] See, e.g., Jess Bidgood, Trump Is Building a Maximalist Government, N.Y. Times (Aug. 8, 2025), https://www.nytimes.com/2025/08/08/us/politics/trump-presidential-power.html; Justin Jouvenal, The Supreme Court Has Expanded Trump's Power. He's Seeking Much More., Wash. Post (Sept. 1, 2025), https://www.washingtonpost.com/politics/2025/09/01/trump-presidential-power-supreme-court-tariffs-federal-reserve/; Seung Min Kim, Trump Pushes Ahead with His Maximalist Immigration Campaign in Face of LA Protests, PBS (June 10, 2025, 12:14 PM), https://www.pbs.org/newshour/nation/trump-pushes-ahead-with-his-maximalist-immigration-campaign-in-face-of-la-protests; Gary J. Simson, The President's Orders Targeting Law Firms as Unconstitutional Bills of Attainder—Damning Lessons from the Past, Verdict (May 15, 2025), https://verdict.justia.com/2025/05/15/the-presidents-orders-targeting-law-firms-as-unconstitutional-bills-of-attainder-damning-lessons-from-the-past; Karen Yourish & Charlie Smart, How Trump Used 10 Emergency Declarations to Justify Hundreds of Actions, N.Y. Times (Aug. 22, 2025), https://www.nytimes.com/interactive/2025/08/22/us/politics/trump-emergency-immigration-tariffs-crime.html.

Lastly, the further removed a Republican senator is from having to run for reelection, the more ready he or she should be to discount the harm of displeasing Trump by voting for the amendment. Senators' calculations understandably would vary depending on how early or late they are in their six-year terms. A presidential threat to punish any Republican senator who votes for the amendment by enlisting, or at least throwing his support behind, a primary opponent may be hard to ignore for a senator who is up for reelection in the next national elections. It should give much less pause to a senator not up for reelection, for example, for three or four years.

Even if I'm right, though, that getting the necessary two-thirds Senate vote for the proposed amendment is a reasonable possibility, the process isn't complete unless and until two-thirds of the House votes likewise and three-fourths of the states vote to ratify. By any measure, securing those supermajorities of the House and the states is no small order. Given, however, that the amendment focuses exclusively on the Senate's behavior and doesn't directly impact the House or the states, the House and the states may be inclined to give substantial deference to a bipartisan two-thirds Senate vote resolving that the proportion of senators needed to confirm a Supreme Court nominee is best changed from a simple majority to two-thirds. If so, getting the necessary supermajorities of the House and the states may be within reach.

Ultimately, although the prospects for adoption of this hardly uncontroversial amendment in these contentious times may not be high, they are good enough to warrant a serious effort to win adoption, particularly because of the exceptionally important objective that it would serve. In light, however, of the uncertainties of winning adoption and the likelihood that a successful amendment process will take at least a couple of years,[173] I also propose an additional and parallel course of action: Seek adoption, as at least an interim measure, of a Senate rule providing that unless two-thirds of the Senate votes in favor of a Supreme Court nominee, that vote can't be certified and transmitted to the president for the president to finalize the

[173] Other than the Twenty-Seventh Amendment, which, as noted supra text accompanying notes 156–157, was ratified an astounding 202 years after Congress proposed it, the average time from a successful amendment's proposal by the requisite two-thirds of each house of Congress to its ratification by the requisite three-fourths of the states has been one year, eight months, and seven days. David C. Huckabee, Ratification of Amendments to the U.S. Constitution, Cong. Res. Serv. (Sept. 30, 1997), https://www.everycrsreport.com/files/19970930_97-922GOV_ebded0a0c9f961ffabb21b4364d260b76a0b8d11.pdf. Though usually quite a bit less than the time from proposal by Congress to ratification by the states, the time from the initial introduction of a successful amendment in Congress to its proposal by both houses can vary widely depending on a number of factors and is apt to be significant.

appointment.[174] Such a rule could be put in place by a simple majority vote of the Senate, and for the reasons I've suggested for believing that the required *super*majority of senators may exist to propose the constitutional amendment, a *simple* majority to adopt the proposed rule seems reasonably attainable, even though the Senate historically has been slow to deviate from the status quo as far as its governing rules.[175]

Of course, one liability of proceeding by Senate rule is that a Senate rule is considerably easier than a constitutional amendment to change. While a constitutional amendment can only be changed by adopting another amendment, a simple majority vote of the Senate would suffice to repeal the rule. Presumably, however, the Senate wouldn't lightly revisit a rule of obvious importance that it had only recently adopted.

But even if the Senate votes in the very near future to adopt such a rule, is the rule apt to make the Court significantly less partisan anytime soon? With the return to the presidency of the man who gave us Justices Gorsuch, Kavanaugh, and Barrett his first time around, it's tempting to wave the white flag and concede that, rule or no rule, nothing is going to change on the Court for the better until he is out of office and a president with a much less partisan set of priorities for Supreme Court appointments is at the helm. I suggest, though, that with the rule in place, the Supreme Court is apt to become significantly less partisan before, and perhaps well before, the end of President Trump's term.

Although it's not clear yet that any vacancies will arise during Trump's term, the odds are quite good that there will be two. Take a moment and ask yourself: Wouldn't it be very much *out* of character for Justices Thomas and Alito, now 77 and 75 years old, respectively, *not* to follow the path taken by various of their predecessors by stepping down before the next presidential election to ensure that their seats are filled by a president of the same party as the presidents who appointed them?[176] By their words and actions, the two of them haven't exactly made a mystery of whether they are guided by

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[174] The existing rules may be found in Standing Rules of the Senate, U.S. Senate, https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf.

[175] For a relatively recent illustration of that historic resistance to changing the rules, see infra note 190.

[176] Speculation about Justices Thomas's and Alito's retirement plans began almost immediately after Trump's election. See, e.g., John Fritze & Paula Reid, Trump's Election Sparks Speculation and Infighting over Future Supreme Court Vacancies, CNN (Nov. 9, 2024, 2:00 PM), https://www.cnn.com/2024/11/09/politics/supreme-court-alito-thomas-trump-retirement/index.html; Zach Schonfeld, Trump's Election Sparks Retirement Talk for Thomas, Alito, Sotomayor, Hill (Nov. 11, 2024, 2:51 PM), https://thehill.com/regulation/court-battles/4984208-supreme-court-justices-retirement-speculation/.

partisan loyalties and where those loyalties lie.[177] If they don't step down during Trump's term and the next president is a Democrat, they would have to stay on the Court until their mid-80s, if not longer, to have a Republican president name their successors—a predicament that there can't be much doubt they both dearly want to avoid.

If Justices Thomas and Alito in fact retire in the next few years, and if their successors can't be appointed without two-thirds of senators in support, a significantly less partisan Supreme Court is likely to be the result because, as I've argued, the two-thirds requirement almost inevitably will have a substantial moderating effect on who gets nominated and who gets confirmed. If President Trump were to follow his first-term practice of nominating people for the Court with little attention to anything other than who seems most likely to carry out his ideological agenda from the bench, the votes needed to confirm them simply wouldn't be there. In the November 2024 elections, his party did recapture a Senate majority but achieved only a 53-47 advantage, and that advantage isn't likely to grow much, if at all, in the 2026 midterm elections. Trump wouldn't be able to fill any Supreme Court vacancies unless he were to select nominees considerably less likely to vote his way on issues of major importance than he would otherwise prefer. In all probability, to win the Democratic votes needed to meet the two-thirds majority requirement, he would be forced to put forward nominees significantly more centrist in their ideological leanings, and significantly more impressive in terms of factors such as open-mindedness and objectivity, than the two Justices whom they would replace.

If Trump indeed were to take such an approach and his two nominees were confirmed, the Court's bloc of radical conservatives would shrink from a supermajority of six to merely a plurality of four. One or both of the two new appointees might well join with the four in various instances to constitute a majority but probably only if the majority opinion is more restrained and modest than the four others, left to their own devices, would prefer. In addition, the two new appointees would be apt to join at times with the Court's three more liberal Justices to make up a majority and relegate the four holdovers from today's six-Justice bloc to writing a dissent.

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[177] See Greenhouse, supra note 9; Lacovara, supra note 9; Simson, How *Not* to Restore Public Confidence, supra note 9.

V. A NOTE ON THE BIDEN COMMISSION REPORT

In April 2021, less than three months after taking office, President Biden fulfilled his campaign promise of creating a bipartisan commission to examine, and report back on, the need for Supreme Court reform.[178] In December 2021, the commission released a report that, in the words of two of the commission's many distinguished members, was the most "comprehensive and careful" study to date of "ways to reform the Supreme Court, the history and legality of various potential reforms, and the pluses and minuses of each." [179] In keeping with the president's charge to the commission, the report didn't endorse or reject any of the types of major reforms that scholars and practitioners had advocated in person or in writing to the commission.[180] There couldn't be any doubt, though, which types the commission took most seriously—ones calling for term limits of one or another sort, and ones calling for expansion of the Court by one or more seats. The commission devoted substantially more attention to each of those types than to any other.[181]

Term limits can reasonably be defended on a number of grounds—in particular, helping ensure that the Court's composition becomes and remains more reflective of the popular will,[182] making the timing of appointments

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[178] In his executive order creating the commission, President Biden charged it with providing (1) an "account of the contemporary commentary and debate" about the Court's role and the appointment process, (2) a history of "other periods" when the Court's role and the appointment process "were subject to critical assessment and prompted proposals for reform," and (3) an "analysis of the principal arguments" currently being made "for and against" the leading "reform proposals." Exec. Order No. 14,023, 86 Fed. Reg. 19569 (Apr. 9, 2021).

[179] Nancy Gertner & Laurence H. Tribe, The Supreme Court Isn't Well. The Only Hope for a Cure Is More Justices, Wash. Post (Dec. 9, 2021), https://www.washingtonpost.com/opinions/2021/12/09/expand-supreme-court-laurence-tribe-nancy-gertner/.

[180] See Presidential Commission on the Supreme Court of the United States, Final Report 67 (2021) ("[T]here is profound disagreement [among scholars] over whether Court expansion at this moment in time would be wise. We do not seek to evaluate or judge the weight of any of these arguments, and the Commission takes no position on the wisdom of expansion."); id. at 111 ("Consistent with its charge, the Commission does not take a position on whether or how term limits ought to be implemented but rather seeks to define and inform the debate over these questions.").

[181] See id. at 67–84, 95–106 (Court expansion); id. at 111–51 (term limits).

[182] See Roger C. Cramton, Reforming the Supreme Court, 95 Calif. L. Rev. 1313, 1321 (2007) ("The drastically decreased turnover of Justices since 1970 . . . has substantially reduced the effectiveness of the appointment process in keeping the Court in touch with popular will. . . . [D]ecisions having great moment for the nation's future are made by Justices whose appointments came many years before and who may not be influenced by, or even knowledgeable about, the views of those voters who are members of generations other than that of the most elderly."); David Firestone, Biden Is Right: End Lifetime Tenure on the Supreme Court, N.Y. Times (July 30, 2024), https://www.nytimes.com/2024/07/22/opinion/biden-supreme-court-term-limits.html ("[Term limits is] a good idea born of a mistake by the Constitution's

more predictable,[183] and limiting any one Justice's power over the course of his or her time in office.[184] Perhaps term limits warrant adoption on one or more of those grounds *in combination with* my two-thirds majority proposal. For present purposes, however, I express no opinion on the matter.[185] In my view, the problem most urgently in need of attention is remedying the Court's partisanship, and term limits are no substitute in that regard for my proposal. As far as making the Court less partisan in the short or long run, I very much doubt term limits would make any real difference.

Let's assume, for example, that the Justices' terms are limited to 18 years—the number that proponents of term limits appear to suggest most often.[186] Assume also that, as the president or as a senator, you treat Supreme Court appointments as essentially opportunities to put people on the bench

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drafters . . . . For one thing, life spans were shorter then. . . . The founders did not fully anticipate how a justice might become insulated from reality after serving on the court for many decades.").

[183] See Steven G. Calabresi & James Lindgren, Term Limits for the Supreme Court: Life Tenure Reconsidered, 29 Harv. J.L. & Pub. Pol'y 769, 832 (2006) (maintaining that "fixing terms of eighteen years" and "staggering them" would remedy the "increasingly irregular timing of vacancies by guaranteeing that a vacancy on the Court will occur like clockwork once every two years"); Ruth Marcus, How a Good Idea—Term Limits for Justices—Was Drowned in Bad Politics, Wash. Post (Aug. 3, 2024), https://www.washingtonpost.com/opinions/2024/08/03/term-limits-supreme-court/ ("[T]he absence of predictable turnover [with no term limits] means that some presidents may not get to name a single justice; others could fill three or more vacancies during a term. This haphazard arrangement is exacerbated by the now-standard practice in which justices try to time their retirements to guarantee that a successor will be chosen by a president of the same party.").

[184] See Cramton, supra note 182, at 1318, 1320 ("Supreme Court appointments have become politically contentious not only because Justices exercise great power, but because they exercise that power for so long. . . . The office of being a Justice of the Supreme Court is probably the most powerful office in the nation other than those of the President, the Speaker of the House, and the Senate Majority Leader. Only the Justices serve for an unlimited term.").

[185] Legal scholars have leveled a variety of criticisms at term limits. See, e.g., Stephen B. Burbank, Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices, 154 U. Pa. L. Rev. 1511, 1548 (2006) ("[I]n light of the evidence from political science that I have reviewed, frequent and predictable vacancies under a system of nonrenewable eighteen-year terms seem more likely to feed the disease of power politics than to cure it."); Ward Farnsworth, The Regulation of Turnover on the Supreme Court, 2005 U. Ill. L. Rev. 407, 416 ("A main consequence of the most common proposals for fixed terms—the proposals to have Justices serve for eighteen years apiece—is that they would guarantee every two-term president at least four appointments to the Court . . . . A two-term president may reflect a single national mood, and there may be value in a Court that cannot be remade by one such gust."); Arthur D. Hellman, Reining in the Supreme Court: Are Term Limits the Answer?, *in* Reforming the Court: Term Limits for the Supreme Court Justices 291, 303–08 (Roger C. Cramton & Paul D. Carrington eds., 2006) (describing the "pernicious consequences" that eighteen-year term limits would have for "management of the Court's docket" because of "the kinds of strategic behavior the justices would be tempted to engage in").

[186] See Sital Kalantry, The Unintended Consequences of Term Limits for Justices of the U.S. Supreme Court: Lessons from a Comparative Study of the Indian Supreme Court, 30 Tul. J. Int'l & Comp. L. 1, 6–10 (2022) (surveying proposals). In Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, Designing Supreme Court Term Limits, 95 S. Cal. L. Rev. 1 (2021), the authors propose a detailed "design framework" that "specifically outlines the key design features that any term-limits proposal must make." Id. at 5.

most likely to make decisions that conform to your partisan preferences. Would you conduct yourself in the appointment process in any less partisan a manner because the people who get confirmed will serve only eighteen years rather than as long as they wish?

Rationally, I'm hard-pressed to see why you would. The stakes are very high either way. A Justice can make an awfully big difference on the Court in eighteen years. It also would be very short-sighted to take a more laid-back approach to nominations by a president of the other party on the thought that, with Justices serving only eighteen years, a president of your party will be getting a chance to nominate people more to your liking before long. After all, it's not as if our system is set up to alternate between Democratic and Republican presidents. There have been long stretches in which the White House has been occupied almost exclusively by presidents of one party.[187]

Unlike term limits and like my proposal, Court expansion of the sort discussed in the Biden Commission's report was plainly designed with the Court's partisanship paramount in mind.[188] It very directly sought to dilute, if not eliminate, the partisan majority's dominance of the Court. If two seats could be added to the Court and filled with Justices of a substantially more liberal mindset, a 6-3 partisan majority would be reduced to a less threatening majority of 6-5; if four seats could be added and similarly filled, those previously in the majority would be outnumbered 7-6.

At least in theory, the Democratic majorities in both the House and Senate when Biden took office gave the Democrats all the votes they would need to pass a statute expanding the size of the Court, and the Democratic majority in the Senate sufficed to confirm any nominee that Biden would put forward. However, two Senate Democrats had made clear their firm opposition to Court expansion before Biden had even been sworn in,[189] and in an evenly divided Senate in which the Democrats constituted a majority only by virtue of the vice president's capacity to cast a tie-breaking vote, that was enough

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[187] For example, during the twenty-four years from Nixon's taking office in January 1969 to Bush I's leaving office in January 1993, a Democrat was in the White House for only the four years of Carter's one term. David Coleman, Presidential Inauguration Dates, Washington to Biden, History in Pieces, https://historyinpieces.com/research/presidential-inauguration-dates (last visited Oct. 31, 2025).

[188] See Presidential Commission, supra note 180, at 73–78.

[189] See Ronald J. Hansen & Yvonne Wingett Sanchez, Sen. Kyrsten Sinema Opposes 'Court-Packing,' As Some Democrats Would Like, AZCentral (Oct. 17, 2020, 5:33 PM), https://www.azcentral.com/story/news/politics/arizona/2020/10/14/sen-kyrsten-sinema-opposes-court-packing-some-democrats-want/3645042001/; Veronica Stracqualursi, Centrist Democrat Says He Won't Back Expanding Supreme Court, CNN (Nov. 10, 2020, 10:50 AM), https://www.cnn.com/2020/11/10/politics/joe-manchin-supreme-court-packing-cnntv/index.html (discussing then-West Virginia Senator Joe Manchin).

to doom any bill to expand the Court's size.[190] In the 2022 midterm elections, the Democrats gained one seat in the Senate—not enough to overcome the opposition to the proposal within their own ranks—and they fell into the minority in the House.[191] When the Democrats in 2024 lost the presidency and control of the Senate and failed to regain control of the House, Court expansion became the last thing they would want. All it would achieve would be more seats for Trump to fill and an even more lopsided conservative majority on the Court.

Let's assume, though, for purposes of argument, that the 2028 elections turn out very differently from 2024 and that in January 2029 we once again have a Democratic president and Democratic majorities in both houses. Assume also that a 6-3 conservative supermajority continues to dominate the Court. Should the Democrats seek in 2029 the Court expansion that many hoped, but failed, to enact in Biden's first two years?

As someone who strongly believes that, if not remedied, the Court's existing partisan slant will be its and our nation's undoing, I have no trouble seeing value in the proposal.[192] In addition, although I worry that an expansion of the Court by the Democrats to correct a perceived conservative bias may lead to a retaliatory expansion by Republicans when they are once

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[190] Even if those two senators could somehow have been persuaded to support a Court expansion bill and the other Democratic senators, some of whom plainly had reservations, had joined in, Senate Republicans were sure to filibuster it. Senate Democrats were far short of the supermajority needed to break the filibuster; and although a simple majority would suffice to abandon the filibuster rule, those two senators were unwavering supporters of the rule. See Sam Levine, Joanna Walters & Joan E Greve, Sinema Says No to Filibuster Reform to Scuttle Democrats' Voting Rights Hopes, Guardian (Jan. 13, 2022, 8:24 AM), https://www.theguardian.com/us-news/2022/jan/13/kyrsten-sinema-democrats-filibuster-voting-rights; Stracqualursi, supra note 189.

[191] See U.S. Senate Election Results: Democrats Win, N.Y. Times (Jan. 10, 2023), https://www.nytimes.com/interactive/2022/11/08/us/elections/results-senate.html; U.S. House Election Results: Republicans Win, N.Y. Times (Jan. 10, 2023), https://www.nytimes.com/interactive/2022/11/08/us/elections/results-house.html.

[192] See Gertner & Tribe, supra note 179 (expressing the authors' loss of confidence in the Court due to "the dubious legitimacy of the way some justices were appointed," "what Justice Sonia Sotomayor rightly called the 'stench' of politics hovering over [its] deliberations," and the "anti-democratic, anti-egalitarian direction of [its] decisions about matters such as voting rights, gerrymandering and the corrupting effects of dark money"; foreseeing that this Court "effectively packed by one party will remain packed into the indefinite future, with serious consequences [for] our democracy"; and resolving that "[t]his is a uniquely perilous moment that demands a unique response" in the form of expanding the size of the Court); Supreme Court Repeals the 20th Century, Take Back the Court 1, 4 (July 2022), https://static1.squarespace.com/static/60383088576eb25a150fab7f/t/62bf7efcf3e34c5a847863fc/1656717056152/Supreme+Court+Repeals+The+20th+Century.pdf ("In a matter of weeks, the Supreme Court has undermined, gutted, and outright reversed some of the most significant advancements of the 20th Century meant to protect Americans' rights and freedoms. . . . The Court's rulings are bound together by no coherent judicial philosophy . . . . We cannot allow [it] to continue stripping away all our rights and freedoms with impunity. We have a chance to rebalance our Court and ensure it once again serves the American people. It is time to expand the Court—before it's too late.").

again in a position to achieve it and that, over time, a pattern of retaliatory expansions may develop to the Court's great disadvantage,[193] I also can imagine that perhaps such retaliatory expansions won't emerge.[194] If the Democrats were able to expand the Court from nine to thirteen in 2029, I personally would be inclined to view it not as an effort by Democrats to game the system and achieve an unfair advantage but instead as an effort to rectify two indefensible departures from long-honored appointments norms.

As discussed in Part III, sitting on the Court today are two Justices who wouldn't be there but for Senate Majority Leader McConnell's cutthroat exercise of leadership, Senate Republicans' conscience-free acquiescence, and President Trump's unflinching readiness to make the most of whatever bare-fisted politics might bring. Justice Gorsuch sits there in a seat that was President Obama's to fill and that Obama was unable to fill only because he met with an exercise of brute political force. That exercise of brute force broke sharply with, and disrespected, longstanding Senate practices that provide necessary order and structure to the confirmation process and guard against its devolving into a political free-for-all that disserves us all. Joining Gorsuch on the Court and cementing a six-Justice supermajority of Republican appointees who have voted together with stunning regularity in the Court's most politically charged cases is Justice Barrett, the beneficiary of another, even more cynical and hypocritical, exercise of brute force. Throwing caution and any semblance of order to the winds, McConnell and his Republican colleagues relentlessly pressed ahead to achieve their political goal—securing another appointment for Trump—even though doing so meant a confirmation process with all the deliberateness of a runaway train. The kind of thorough investigation and serious reflection so obviously appropriate before giving anyone a lifetime of decision-making authority on the nation's highest and most powerful court was nowhere to be seen.

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[193] See Joshua Braver, Court-Packing: An American Tradition?, 61 B.C. L. Rev. 2747, 2748 (2020) (maintaining that the "distinct danger" of expanding the Court "primarily in order to alter [its] ideological balance" is that "it will lead to a tit-for-tat downward spiral of packing, ballooning the Court's size so large that its legitimacy pops"); Ezra Klein, What a Reckoning at the Supreme Court Could Look Like, N.Y. Times (July 10, 2022), https://www.nytimes.com/2022/07/10/opinion/supreme-court-biden-reform.html ("[Y]ou can't fix the court by adding justices. You're shifting the balance of power by contributing to the underlying problem: turning the court into an untrustworthy institution and setting off a cycle of reprisals with unknown consequences.").

[194] See Larry Kramer, How to Fix the Supreme Court: Pack the Courts, N.Y. Times (Oct. 27, 2020), https://www.nytimes.com/interactive/2020/10/27/opinion/pack-supreme-court.html ("Adding judges would be a political response to a political act. . . . [It is] the only way back to a less politicized process. This is a lesson we learned decades ago from economists and game theorists: Once cooperation breaks down, the only play to restore it is tit-for-tat. It's the only way both sides can learn that neither side wins unless they cooperate.").

The Gorsuch and Barrett appointments accomplished a four-seat swing in the number of Republican and Democratic appointees on the Court. At present, with Gorsuch and Barrett on the Court, there are six Justices appointed by Republican presidents and three appointed by Democratic ones. If McConnell had abided by longstanding Senate practices rather than taken his no-holds-barred partisan approach, the Court would consist of four, not six, Justices appointed by Republican presidents and five, not three, Justices appointed by Democratic presidents. From that perspective, if the Democrats were to add four seats to the Court for a Democratic president to fill, the expansion could reasonably be seen not as a partisan move for advantage inviting retaliation but instead as an effort simply to neutralize the marked increase in the Court's conservative slant unfairly achieved by the Gorsuch and Barrett appointments.[195]

However, much as I find that narrative appealing, I strongly suspect that I would have little company among Republican lawmakers and voters and that they would insist on expanding the Court to suit their ideological preferences when they next control the presidency and Congress. In addition, despite the attractions of expanding the Court in 2029 to correct, at least for the time being, the partisan slant so indefensibly achieved, I have misgivings about a means for accomplishing that correction that depends on the Democrats using the appointment process in as single-mindedly partisan a way as the Republicans had used it.[196] The Democratic president presumably would try to offset the partisan nature of the current Republican supermajority by nominating individuals who would be sure bets to vote the Democratic way. He or she also would pay little or no attention to factors like integrity and open-mindedness, particularly insofar as a focus on such factors might lead to less predictable nominees. Ultimately, although Court expansion in 2029 with a Democratic president and Congress would have its attractions, I believe the Court and the nation would be best served without it.[197]

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[195] See Daniel Epps, Nonpartisan Supreme Court Reform and the Biden Commission, 106 Minn. L. Rev. 2609, 2623 (2022) ("If one believes that Senate Republicans' handling of the Supreme Court vacancies in 2016 and 2020 was unprincipled and contrary to settled norms, it's hard to explain why a retaliatory escalation should be off the table."); Neil S. Siegel, The Trouble with Court-Packing, 72 Duke L.J. 71, 121 (2022) (arguing that "Court-packing is almost always a bad idea," but suggesting that it could be justified in certain instances as "a proportional response to a previous instance of unjustified Court-packing or similarly extreme partisan behavior").

[196] See Gary J. Simson, Should No Garland Mean No Gorsuch?, Nat'l L.J. (Mar. 20, 2017, 12:00 AM), https://www.law.com/nationallawjournal/almID/1202781576113/.

[197] Although I believe, as discussed above, that it would have been unwise in the first two years of the Biden Administration, when the Democrats controlled the House and Senate, to expand the Court's size in hopes of remedying the Court's partisan slant, I'm not at all wedded to keeping the Court's size

If the two-thirds Senate confirmation vote requirement I've been touting were in place, I would see the issue quite differently. Even if the Democratic president and Congress were intent on packing the Court with Justices who very predictably would vote their way, the two-thirds requirement would force them to take a less partisan approach. As a result, the four new Justices probably wouldn't neutralize the imbalance achieved by Trump and McConnell's machinations as fully as four Justices confirmed under a simple-majority vote requirement. However, that disadvantage would be more than offset, at least in my view, by the four new Justices' greater promise in terms of factors such as objectivity and open-mindedness and by the lesser temptation for Republicans to expand the Court further when they reclaim the presidency and a majority of both houses of Congress. With a two-thirds requirement in place, Democrats and Republicans alike would have much less reason to view Supreme Court vacancies as opportunities for partisan advantage, and I believe that would be a very good thing.

CONCLUSION

Early in its report, the Biden Commission noted that reform of the Supreme Court confirmation process was beyond its charge to consider. "We do not analyze at length the confirmation process or proposals for how the Senate might reform it," the commission explained. "[T]he Commission's charge was to address proposals for reforming the Court itself, not for reforming the confirmation process."[198]

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in perpetuity at nine—its size since 1869. See About the Court: The Court as an Institution, U.S. Sup. Ct., https://www.supremecourt.gov/about/institution.aspx#:~:text=The%20number%20of%20Justices%20on,an%20average%20of%2016%20years (last visited Mar. 29, 2025). In particular, in light of the nation's sizable growth geographically since the Court's size was set at nine in 1869, see USAFacts, Mapped: When Each State Joined the U.S., Visual Capitalist (Aug. 6, 2024), https://www.visualcapitalist.com/cp/when-each-state-joined-the-usa-map/, as well as the nation's increasingly diverse population over the years, see Martha Farnsworth Riche, America's Diversity and Growth: Signposts for the 21st Century, Population Bull. (June 2000), https://www.prb.org/wp-content/uploads/2000/06/Population-Bulletin-2000-55-2-US-diversity.pdf, expanding the Court would help make the Court's decision-making process fairer by enhancing the likelihood of a more broadly representative Court. On the relationship between the Court's representativeness of different groups in society and the fairness of its decision-making process, see Simson, Taking the Court Seriously, supra note 9, at 298–99.

If and when the Supreme Court appointment process is reformed to make it much less of an opportunity for partisan advantage, I would enthusiastically support increasing its size from nine to thirteen. Although a Court significantly larger than thirteen might well be even more broadly representative, any benefits of expanding much beyond thirteen are probably outweighed by the costs—in particular, the costs in terms of the efficiency with which the Court operates.

[198] Presidential Commission, supra note 180, at 21.

In light of the tumultuous history of the Supreme Court confirmation process in the years leading up to the report, it's rather remarkable that the commission's charge didn't include considering possible changes to the process. I've argued in this Article that one such change—requiring a two-thirds, rather than simple-majority, confirmation vote—is essential for there to be any real hope of our having a substantially less partisan Supreme Court.

To have the kind of Court that our nation needs and deserves, however, reform of the process must not stop with changing the required confirmation vote. More than thirty years ago, in the wake of an appointment that I believed then, and continue to believe now, "was so indefensible" that it proved that "the process must be fundamentally flawed,"[199] I advocated a number of reforms of the process. Those reforms included, for example, various basic changes to the Senate confirmation hearings to make them much more likely to provide the kind of information that senators need to cast votes mindful of our nation's best interests and that the public needs to hold presidents and senators responsible for the nominees they put forward and confirm.[200] In the absence of the kind of fundamental reforms of the process that I urged, the process has managed to become even less informative. Although the charge to the Biden Commission assumed otherwise, "reforming the Court itself" isn't going to happen in a meaningful and enduring way until "reforming the confirmation process" gets the attention it deserves.

[199] Simson, supra note 109, at 619.
[200] Id. at 651–60.