FIXING THE CONFIRMATION PROCESS, OR FIDDLING WHILE ROME BURNS

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This Symposium was designed to address the question of "controlling the Court through a broken confirmation process: 'how to fix it going forward?'" But before we can answer that question, we must answer: What is the problem to be addressed? Do we need to fix the confirmation process because it enables troubling outcomes or because the process itself raises concerns? My Essay will address both questions, suggesting that there is both a substantive problem and a normative one. Each of these questions could elicit different answers. The normative problem is that the confirmation process itself undermines rule of law and an independent judiciary (or at least its appearance). The substantive problem is that the Court's rulings are wrong, out of step with broadly held public views, and dangerous to democracy itself. I argue it is misguided to think we can defer fixing the substantive problem and address only the normative problem initially. This Court poses a direct threat to our democracy and thus we need an immediate response to that existential danger.

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I. CONTROLLING THE COURT THROUGH A BROKEN CONFIRMATION PROCESS: 'HOW TO FIX IT GOING FORWARD?'

In June 2022, in *Dobbs v. Jackson Women's Health Organization*,[1] a majority of the justices overturned *Roe v. Wade*,[2] granting states the ability to ban or strictly limit access to reproductive rights.

The radical Supreme Court that overturned *Roe* had already allowed a system of bounty hunting to impede women's access to abortion in Texas[3] and thwarted a myriad of efforts by federal and state governments to control the COVID-19 pandemic,[4] not to mention undermining voting rights[5] and efforts to control dark money in our political system.[6] And in many—if not most of these cases—the outcome was six-to-three.[7] As Justice Sonia Sotomayor has said, the Court is drenched in the "stench" of politics, both in how its members have been selected and the rulings it issues.[8]

What has become crystal clear is that, without some major changes to the Court, this math will govern American lives for at least three decades. Indeed, because of the Court's power, this math will also affect

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1. 142 S. Ct. 2228 (2022).

2. 410 U.S. 113 (1973).

3. Aimee Picchi, *Texas Abortion Ban Turns Citizens into "Bounty Hunters"*, CBS NEWS: MONEY WATCH (Sept. 3, 2021, 7:22 AM), https://www.cbsnews.com/news/texas-abortion-law-bounty-hunters-citizens [https://perma.cc/E42A-TFRG].

4. *See* Mark Sherman & Jessica Gresko, *Supreme Court Halts Covid-19 Vaccine Rule for U.S. Businesses*, STAT (Jan. 13, 2022), https://www.statnews.com/2022/01/13/supreme-court-halts-covid-19-vaccine-rule-businesses [https://perma.cc/LGN9-2Q5F]; Adam Liptak, *Splitting 5 to 4, Supreme Court Backs Religious Challenge to Cuomo's Virus Shutdown Order*, N.Y. TIMES, https://www.nytimes.com/2020/11/26/us/supreme-court-coronavirus-religion-new-york.html (Apr. 5, 2021); Mark Joseph Stern, *The Supreme Court Broke Its Own Rules to Radically Redefine Religious Liberty*, SLATE (Apr. 12, 2021, 2:51 PM), https://slate.com/news-and-politics/2021/04/supreme-court-religious-liberty-covid-california.html [https://perma.cc/MAU3-CW7X].

5. Sean Morales-Doyle, *The Supreme Court Clearly Won't Protect Voting Rights. But Congress Can.*, WASH. POST (July 3, 2021, 11:58 AM), https://www.washingtonpost.com/outlook/2021/07/03/brnovich-alito-roberts-supreme-court-vra.

6. Emily Jacobs, *Supreme Court Rules Against California in Dark Money Case*, N.Y. POST, https://nypost.com/2021/07/01/supreme-court-rules-against-california-in-dark-money-case [https://perma.cc/65UK-DZSY] (July 1, 2021, 2:32 PM).

7. *See supra* notes 3–6; *see also* Melissa Quinn, *Supreme Court Declines to Block Texas 6-Week Abortion Ban*, CBS NEWS, https://www.cbsnews.com/news/texas-abortion-ban-law-supreme-court [https://perma.cc/E8NM-FSYU] (Sept. 2, 2021, 7:08 AM).

8. Dareh Gregorian, *Sotomayor Suggests Supreme Court Won't 'Survive the Stench' of Overturning* Roe v. Wade, NBC NEWS (Dec. 1, 2021, 12:48 PM), https://www.nbcnews.com/politics/supreme-court/sotomayor-suggests-supreme-court-won-t-survive-stench-overturning-roe-n1285166 [https://perma.cc/HH93-MGET].

the state of the world as the Court issues decisions that may cripple efforts to address climate change, address cross-border criminality including arms trafficking, and interfere with congressional or presidential efforts to protect health worldwide. Based on the justices' age and estimated length of service, the U.S. will have a reactionary Supreme Court for more than a generation.

In response to the great concern of many scholars and activists about the direction in which the Court has moved our law, President Joseph Biden created a commission on the Supreme Court to examine how to address problems and controversies raised by the Court,.[9] The Commission, on which I served, examined the current debate as well as possible reforms that might address the perceived problems. The three most common interests underpinning reform proposals are (1) to address the Court's loss of legitimacy as it has come to be seen as more and more political; (2) to ensure the judiciary is not partisan but truly independent from the political branches or ideological movements; and (3) to prevent the Court from undercutting democracy.[10]

As for its legitimacy, a court system can only work in so far as the people respect its decisions and are willing to comply with orders and outcomes even to their detriment. As Alexander Hamilton stated in The Federalist, "[t]he judiciary . . . has no influence over either the sword or the purse . . . and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[11] This perception of legitimacy must reflect more than agreement with the particular outcome of a decision but also with the process of decision-making and deliberation. And recent polling indicates how serious the legitimacy crisis is regarding the Court. According to the Pew Research Center, the Court is seen negatively by nearly half of all Americans (49%)—the worst measure recorded by Pew since it began polling this topic approximately thirty years ago.[12] Other polls tell the same story, with

9. Establishment of the Presidential Commission on the Supreme Court of the United States, 86 Fed. Reg. 19,569 (Apr. 9, 2021).

10. *See Presidential Commission on the Supreme Court of the United States*, WHITE HOUSE, https://www.whitehouse.gov/pcscotus [https://perma.cc/ZF4V-Q5VE] (last visited Feb. 17, 2023); Nick Niedzwiadek, *Biden Signs Executive Order on Supreme Court Reform Commission*, POLITICO, https://www.politico.com/news/2021/04/09/biden-supreme-court-reform-commission-480582 [https://perma.cc/D8Z8-R6KA] (Apr. 9, 2021, 12:35 PM) (quoting President Biden stating that the Supreme Court should not be turned into "political football").

11. THE FEDERALIST NO. 78, at 656 (Alexander Hamilton) (Harold C. Syrett & Jacob E. Cooke eds., 1962).

12. *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RSCH. CTR. (Sept. 1, 2022), https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling [https://perma.cc/GN9W-MRKU] [hereinafter *Positive Views*, PEW RSCH. CTR.].

Gallup showing trust in the judiciary at 47%, also the worst performance since these polls were initiated in 1972.[13] And there is a wide division in partisan views, with almost three-quarters (73%) of Republicans approving of the Court versus only one quarter (28%) of Democrats.[14] Alarmingly, only about one-third of the American public thinks that the Court does a good or excellent job of limiting the influence of politics on their decisions.[15]

Any society that claims to adhere to rule of law will also need to have an independent judiciary. A judiciary is independent only where judges do not fear reprisal for issuing decisions based on their best understanding of the law and facts; in addition, it must be strictly illegal for judges to accept bribes or allow the influence of kinship or financial relationships to affect their rulings. While our federal judiciary has not been accused of bribe-taking, certain recent activities by Supreme Court Justices have come uncomfortably close to corrupt-adjacent behavior.[16] That is why many are calling loudly for recusal rules and limits on U.S. Supreme Court Justices' ability to accept gifts.

More complicated is the issue of the Court's role in undermining or supporting democracy. For a democracy truly to work, the judiciary must play a role in its proper functioning. For example, a system of checks and balances is supposed to ensure the judiciary does not overstep its role by countermanding the political branches unless there is a threat to democracy. That is, the judiciary should only step in when the political branches are seeking to deny democratic rights to minority or disfavored groups or use the political processes to deny fair and free elections. This ensures that a democratic nation's judiciary does not thwart the People's will, except to ensure that the People themselves are not undermining the democratic structure.

One reason our Court is now so out of alignment with the current day is due to the fact that Republican presidents have appointed fifteen of the last nineteen justices and six of the current nine justices. That is despite the fact that for sixteen of the last twenty-eight years, Democrats were in the White House and in six out of the last seven elections the

13. Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP, https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx [https://perma.cc/D5FU-SKZ7] (Oct. 6, 2022).

14. *Positive Views*, PEW RSCH. CTR., *supra* note 12.

15. Jones, *supra* note 13.

16. *See* Jodi Kantor & Jo Becker, *Former Anti-Abortion Leader Alleges Another Supreme Court Breach*, N.Y. TIMES (Nov. 19, 2022), https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html (discussing an individual learning the outcome of a 2014 Supreme Court case weeks before it was announced "because he had worked for years to exploit the court's permeability").

Democratic candidate won more votes.[17] President Trump, for example, appointed three justices in his single four-year term; his immediate Democratic predecessors, Presidents Obama, Clinton, and Carter, made a total of only four appointments in a combined twenty years in office.[18] Indeed, we now see the effect of this misalignment—the Court has been engaged recently in a radical effort to reverse longstanding precedents that are favored by a large segment of the public, such as on reproductive rights, guns, and regulation.

The fact that the Court fails to reflect the majority of Americans' views becomes even more significant when considered in tandem with another problematic aspect of the U.S. Constitution: the highly undemocratic Senate. In the Senate, each state has two senators, from North Dakota to California. Population shifts are making the big states even bigger, resulting in even greater lack of representation for those states' citizens (who tend also to be much more diverse demographically and more liberal than citizens of small states).[19] That means, the choice of judges is very much in the hands of the whitest, most rural Americans.[20] And the Electoral College, another malign aspect of the Constitution, also gives those states extra weight in selecting the president,[21] with the risk that candidates who do not secure the popular vote will nonetheless win the presidency and therefore the opportunity to appoint justices to the Court.

This leaves Americans with a conundrum. What can we actually do to control the Court or reel it back? How do we ensure that its decisions do not result in a nation none of us what to live in? There is too much at stake to allow the iron grip of a radical right to determine the future for such a long period of time. That is why I believe deeply that Americans must reform the Supreme Court and, most importantly, must add justices who can mitigate this sharp, right turn. For eight months, I served on the above-mentioned Presidential Commission on the Supreme Court where we heard testimony, engaged in deep analysis of proposals to change the court, argued amongst ourselves, and ultimately produced a lengthy and

17. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT 27 (Dec. 8, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [https://perma.cc/2PP2-Q3DC] [hereinafter PRESIDENTIAL COMM'N, FINAL REPORT].

18. *Id.*

19. Matthew Yglesias, *American Democracy's Senate Problem, Explained*, VOX (Dec. 17, 2019, 11:40 AM), https://www.vox.com/policy-and-politics/2019/12/17/21011079/senate-bias-2020-data-for-progress [https://perma.cc/LE46-HDWG].

20. *See id.* (citing data underpinning assertion that "today's Senate overrepresents white voters and significantly underrepresents nonwhite ones").

21. Denise Lu, *The Electoral College Misrepresents Every State, but Not as Much as You May Think*, WASH. POST (Dec. 6, 2016), https://www.washingtonpost.com/graphics/politics/how-fair-is-the-electoral-college.

dense report. By the time our work was over, I had come to agree with those who advocated a larger court. Initially skeptical, I was persuaded that we face a fraught future without this reform. While I remain a fan of term limits for justices as well, that reform will not have an impact soon enough to prevent constitutional tyranny by the Court. I will address all proposed reforms below, but court expansion is the most immediate and effective.

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My Essay will address both of these questions, suggesting that there is both a substantive problem and a normative one. Each of these questions could elicit different answers. The normative problem is that the confirmation process itself undermines rule of law and an independent judiciary (or at least its appearance). The substantive problem is that the Court's rulings are wrong, out of step with broadly held public views, and dangerous to democracy itself. I argue it is misguided to think we can defer fixing the substantive problem and address only the normative problem initially. This Court poses a direct threat to our democracy and thus we need an immediate response to that existential danger. Many reformers, including myself, believe we must enlarge the Court because no other approach will change the dangerous trajectory the current supermajority is following. Once done, however, I do support establishing fixed terms for justices (indeed, I believe we should do so for all federal judges). Any term-limit proposal will, by definition, require a reform of the nomination process, which would allow us to address the normative process. Below, I discuss the substantive problem, why it is so significant, and why Court expansion is necessary before focusing on the normative question and how term limits are the approach best designed to address it as well as other helpful reforms.

A. Troubling Outcomes

The substantive problem raised by our current selection process is that it increasingly favors ideological nominees rather than ones who are chosen for their commitment to legal reasoning and rule of law—*e.g.*, commitment to following precedent, stare decisis, and historical

developments in the law and society.[22] This has been particularly true of Republican nominees who have refused to state whether they would support longstanding legal precedent, like *Brown v. Board of Education*,[23] indicating a dangerous willingness to overthrow our traditional approach to common law jurisprudence.[24] Significantly, the judges who have ascended to the bench under recent Republican presidents have tilted the courts far to the right.[25]

The constitutional structure and the interpretation of that structure advanced by the Court itself has placed it at the center of American political debates. The Court exercises the power not only of judicial review but also of judicial supremacy—the right to define the scope of constitutional rights, to strike down legislation it believes to be inconsistent with the Constitution, and ultimately to have the final word on questions of constitutional interpretation.[26] With their life tenure, and increasingly long terms of service—research documents that many of them are on the Court for over thirty years now—makes who serves on the Court that much more important.[27] As recently as the late 1960s, justices served an average term of fifteen years; today the average is closer to twenty-six years.[28] Several justices have even served over thirty years, through many presidencies and eras, and, indeed, one could say, generations.[29]

It is thus unsurprising that the Supreme Court occupies a central place in America's current ideological battles. It is not simply because the nation is highly polarized politically, but also because the Supreme Court itself enjoys a special status both because of its role in the constitutional structure and its unique powers. To a surprising extent for

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22. *See* Stephanie Mencimer, *Trump Judicial Nominees Are Refusing to Endorse* Brown v. Board of Education, MOTHER JONES (Feb. 14, 2019), https://www.motherjones.com/politics/2019/02/trump-judicial-nominees-are-refusing-to-endorse-brown-v-board-of-education [https://perma.cc/D7RT-4P8B].

23. 347 U.S. 483 (1954).

24. *See* Mencimer, *supra* note 22.

25. *See, e.g.*, Ian Millhiser, *Republicans Can Choose the Judge Who Hears Their Lawsuits. DOJ Wants to Stop That.*, VOX (Feb. 14, 2023, 11:00 AM), https://www.vox.com/policy-and-politics/2023/2/14/23597741/supreme-court-matthew-kascmaryk-judge-shopping-texas-utah-walsh-justice-department [https://perma.cc/BV9C-YEZR] ("[R]ight-wing policies implemented by a handful of outlier judges often remain in effect for months or even more than a year before the Supreme Court finally steps in and restores a modicum of sanity.") (cleaned up).

26. Lino A. Graglia, *Rethinking Judicial Supremacy*, 31 CONST. COMMENT. 381, 382–83 (2016).

27. *See* SUP. CT. PRACS.' COMM., PROPOSALS RELATING TO THE SUPREME COURT AND ITS PROCEDURES 78, 80–81 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Geller-Mahoney-Testimony.pdf [https://perma.cc/K23Y-VDPT].

28. PRESIDENTIAL COMM'N, FINAL REPORT, *supra* note 17, at 114.

29. SUP. CT. PRACS.' COMM., *supra* note 27, at 78, 80–81.

foreign observers, the Court has exercised an enormous impact on life in the United States; for many Americans, its decisions have been life-changing for Americans and deeply affected personal autonomy.[30] The Court also, however, has played a powerful shaping role on the system of government and how the branches interact and what powers they may exercise.[31] And each individual justice, because of his or her life tenure, is a uniquely powerful individual. The country's sharp and deep political divide makes battles over the Court's personnel and decisions even more acute.[32]

It is not only in the twenty-first century that the Court has become a focus of conflict. It has long been a lightning rod for criticism or approbation because of particular decisions or a jurisprudential trend that has changed the nation: from its infamous *Dred Scott* decision claiming that Black people could not be full citizens,[33] post-Civil War decisions limiting the scope of the Reconstruction Amendments,[34] its many decisions blocking economic and labor regulation during the Progressive Era and then New Deal legislation designed to rescue the nation from the Great Depression,[35] to its lionized role in repudiating segregation in *Brown v. Board of Education*,[36] and its protection of civil liberties, including the right to privacy and to choose whether to bear a child.[37]

At the current moment, the Court's decisions play the same existential role in American life. Certainly, *Dobbs*, in which the Court ruled that women no longer have a constitutional right to determine whether or not to bear a child,[38] and *Bruen*,[39] in which the Court barred states from imposing many rational restrictions on gun ownership and use, has affected peoples' lives in an irreversible way. It was particularly shocking that *Bruen* came shortly after a string of mass shootings,

30. Zoe Christen Jones, *World Leaders React to the U.S. Supreme Court's Decision to Overturn* Roe v. Wade, CBS NEWS, https://www.cbsnews.com/news/supreme-court-roe-v-wade-abortion-rights-international-response/ [https://perma.cc/77AG-9UP6] (June 24, 2022, 7:13 PM).

31. *See* Graglia, *supra* note 26, at 382–83 (characterizing the Court as "the most powerful institution of American government in terms of domestic social policy").

32. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 814–15 (2006).

33. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

34. *The Civil Rights Cases*, 109 U.S. 3 (1883).

35. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45 (1905) (Progressive Era); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (New Deal Era).

36. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

37. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *contra Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

38. *Dobbs*, 142 S. Ct. at 2242–43.

39. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2133–34, 2156 (2022).

underscoring the Court's disconnect from the American people.[40] The Court's decisions continue to have—and are projected to have—both immediate and long-term effects on the welfare of individuals and communities, including the rights of people of the same sex to marry,[41] the right to bear arms or to be safe from mass shootings,[42] religious discrimination,[43] property ownership,[44] women's reproductive rights and freedom,[45] access to health care,[46] participation in the political process and voting,[47] the operation of the criminal justice system,[48] diversity in higher education,[49] and the regulation of workplaces and the right to organize,[50] among many others.

Because it is so clear the enormous power justices wield, selecting them has become a form of warfare that is waged fiercely.[51] The selection process is a high-stakes game for activists, partisans and ideologues across the political spectrum who are fully aware that the Court may be the best arena to protect or challenge rights and liberties they hold dear, including the power of other branches of government or the states to legislate in those areas.[52]

Democrats mounted a fierce opposition against Judge Robert Bork, nominated in 1987 by President Ronald Reagan because of his extreme views.[53] Despite the fact that Bork's jurisprudence was on the far right, his supporters attempted to claim that his record and views were mischaracterized by his opponents. They coined the term "borked,"

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40. Andrew R. Morral & Rosanna Smart, Opinion, *Want Fewer Shootings? Pass Tougher Gun Laws. Our Research Shows Lax Laws Fuel Violence.*, USA TODAY, https://www.usatoday.com/story/opinion/2023/01/24/states-strict-gun-laws-could-reduce-violence/11111232002 [https://perma.cc/CPS4-BBM3] (Jan. 24, 2023, 8:49 PM).

41. *E.g.*, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

42. *E.g.*, *Bruen*, 142 S. Ct. 2111 (2022).

43. *E.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

44. *E.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

45. *E.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

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

47. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

48. *E.g.*, *Utah v. Strieff*, 136 S. Ct. 2056 (2016).

49. *See What You Need to Know About Affirmative Action at the Supreme Court*, ACLU (Oct. 31, 2022), https://www.aclu.org/news/racial-justice/what-you-need-to-know-about-affirmative-action-at-the-supreme-court [https://perma.cc/4VPS-GFP5] (discussing two upcoming Supreme Court cases about affirmative action).

50. *E.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

51. *See* Frederick A. O. Schwarz, Jr., *Saving the Supreme Court*, BRENNAN CTR. (Sept. 13, 2019), https://www.brennancenter.org/our-work/analysis-opinion/saving-supreme-court [https://perma.cc/29LP-JKDB].

52. Peter Weber, *Were Supreme Court Confirmations Always So Ugly?*, THE WEEK (Jan. 29, 2022), https://theweek.com/news/1009524/how-supreme-court-confirmation-fights-got-so-ugly [https://perma.cc/44JL-59UH].

53. *See id.*

which is now recognized in the Merriam-Webster Dictionary as meaning that a nominee had been subject to unfair treatment through "an organized campaign of harsh public criticism or vilification."[54] In reality, Judge Bork was treated quite fairly and was given an extensive hearing at which he had an opportunity to present and defend his views at length.[55] His nomination was not blocked or derailed but failed because a bipartisan majority voted against him after a floor debate[56]—but his alleged victimhood has allowed those on the right to claim that the Democrats have been equally at fault in the increasingly partisan nomination fights.[57]

President Donald Trump was able to make three nominations to the Court, all of which engendered significant controversy because of the extreme views of the nominees and the process that was used to jam them through.[58] First, after Justice Antonin Scalia died in February 2016, the Republican majority in the Senate absolutely refused to consider President Barack Obama's March 2016 nomination of Chief Judge Merrick Garland to fill that seat.[59] This unprecedented obstruction resulted in the seat remaining empty for nine months, allowing Trump to fill it rather than Obama. Judge Garland did not get so much as a hearing despite the fact that he had been confirmed (with strong Republican votes) to his seat on the Court of Appeals for the District of Columbia.[60]

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54. *Bork*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/bork [https://perma.cc/758U-SZGC] (last visited Mar. 4, 2023).

55. Stephen M. Griffin, *Politics and the Supreme Court: The Case of the Bork Nomination*, 5 J.L. & POL. 551, 561–62 (1989).

56. *Id.* at 566.

57. *See, e.g.*, Gregory Korte, *Bork Fight Still Still Haunts Supreme Court Confirmation Process*, USA TODAY, https://www.usatoday.com/story/news/politics/2016/03/07 /bork-fight-still-looms-over-broken-supreme-court-confirmation-process/81414374 [https://perma.cc/V36G-88F8] (Mar. 7, 2016, 10:23 PM).

58. 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; Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html; Carl Hulse, *How Mitch McConnell Delivered Justice Amy Coney Barrett's Rapid Confirmation*, N.Y. TIMES, https://www.nytimes.com/2020/10/27/us/mcconnell-barrett-confirmation.html (Nov. 3, 2020).

59. Nina Totenberg, *170-Plus Days and Counting: GOP Unlikely to End Supreme Court Blockade Soon*, NPR (Sept. 6, 2016, 4:30 PM), http://www.npr.org/2016/09/06/492857860/173-days-and-counting-gop-unlikely-to-end-blockade-on-garland-nomination-soon [https://perma.cc/75M4-2XZ6].

60. Sarah Weaton, Josh Gerstein & Seung Min Kim, *Obama Picks Merrick Garland for Supreme Court*, POLITICO, https://www.politico.com/story/2016/03/obama-to-announce-supreme-court-pick-at-11-am-220851 [https://perma.cc/8GRS-8KJB] (Mar. 16, 2016, 12:30 PM).

Republican senators had even encouraged Obama to nominate him to the Supreme Court because they preferred his moderate views to those they feared Obama might otherwise nominate.[61] President Trump later appointed then-Judge Neil Gorsuch to fill the vacant seat. Next, in the summer of 2018, Justice Anthony Kennedy—widely viewed as occupying the Court's ideological center (which shows how far right the Court has gone)—announced he would retire.[62] President Trump nominated Judge Brett Kavanaugh, whom the Senate confirmed after contentious hearings and floor debate.[63] Then-Judge Kavanaugh, credibly accused of sexual misconduct, was rushed through by the Republicans who limited the normal FBI background investigation seemingly to avoid uncovering even more evidence of possible malfeasance.[64] Finally, Justice Ruth Bader Ginsburg died in September 2020, creating another election-year vacancy. Although the Senate's Republican majority had opposed the election-year confirmation of Judge Garland for nearly eight months before the 2016 election, this time it took up President Trump's nomination of Judge Amy Coney Barrett and confirmed her in less than one month, on October 26, after voting in the 2020 presidential election had already commenced.[65]

When Justice Stephen Breyer announced he would retire, President Biden nominated Judge Ketanji Brown Jackson from the United States Court of Appeals for the District of Columbia to take his seat.[66] Jackson is the first Black woman nominated or confirmed to the Supreme Court. Her nomination hearings showcased the newly assertive white supremacy of the Republican Party. Senators asked her belittling questions, attacked her impeccable credentials, and tried to besmirch her name with innuendo and false implications.[67] Jackson handled the hearings with aplomb, demonstrating her intellectual and moral superiority, all while maintaining an approachable and modest demeanor.

Since 1968, votes for Supreme Court justices have been on the record. Before that date, most justices were confirmed in a voice vote

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61. Totenberg, *supra* note 59.

62. Jacob Pramuk & Marty Steinberg, *Anthony Kennedy Retiring from Supreme Court*, CNBC, https://www.cnbc.com/2018/06/27/anthony-kennedy-retiring-from-supreme-court.html [https://perma.cc/B9PH-GL5K] (June 28, 2018, 10:09 AM).

63. Stolberg, *supra* note 58.

64. *Id.*

65. Hulse, *supra* note 58.

66. *The Historic Nomination of Ketanji Brown Jackson to the Supreme Court*, NAACP, https://naacp.org/resources/historic-nomination-ketanji-brown-jackson-supreme-court [https://perma.cc/ZP7T-9GWN] (last visited Mar. 4, 2023).

67. Amy Davidson Sorkin, *The Republicans' Wild Attacks at Ketanji Brown Jackson's Confirmation Hearing*, NEW YORKER (Mar. 24, 2022), https://www.newyorker.com/news/daily-comment/the-republicans-wild-attacks-at-ketanji-brown-jacksons-confirmation-hearing [https://perma.cc/7WNN-ERQJ].

because the nominations were not very controversial. The tide has turned, however, and now not only are votes on the record but they are also increasingly partisan.[68] Increasingly, justices now receive votes mostly or sometimes solely from the party of the president who has nominated them: Justice Sonia Sotomayor received sixty-eight votes (all Democrats and nine Republicans voting to confirm); Justice Elena Kagan received sixty-three (all but one Democrat and only five Republicans voting to confirm); Justice Gorsuch received fifty-four (all Republicans and only three Democrats voting to confirm); Justice Kavanaugh received fifty (all Republicans and just one Democrat voting to confirm); and Justice Barrett received fifty-two (all but one Republican and no Democrats voting to confirm).[69]

In many ways, these confirmation battles are more consequential than presidential campaigns. Thus, it is not surprising that campaigns mimicking regular political campaigns seek to affect the outcome of both selection and confirmation of justices. Millions and millions of dollars go to lobbying and media buys to influence the President, the senators, and the general public regarding who should be chosen and confirmed—or blocked—including huge right-wing efforts supporting Brett Kavanaugh and Amy Coney Barrett.[70] These efforts seek to ensure that the White House pays close attention to the backgrounds and views of nominees to ensure they will issue decisions in line with the views of the activists and donors. And, with life tenure, the younger the nominee, the longer those views will remain dominant.

These battles have spurred calls for reform by many advocates, in particular by those of us who believe that the seats previously occupied by Justices Scalia and Ginsburg were "stolen" by Republicans from Democrats. It is self-evident that Republicans achieved the current conservative super-majority on the Court by jettisoning the norms that should govern, and have governed, the appointments process in the past.

To answer the question of this Symposium—"controlling the Court through a broken confirmation process: 'how to fix it going forward?'"—one must initially recognize that the problem is substantive and not purely normative, it is outcomes and not just appearances. The substantive problem for many Americans is indisputably that the Court has embarked upon a radical revision of American law and ultimately policy nationwide, which has resulted in upheaval, controversy, and undermined the status of the judiciary in the United States—and especially the reputation and approval of the Supreme Court.

A system that is broken: The normative problem is related to the problem of the Court's substantive rulings but exhibits procedural flaws

68. PRESIDENTIAL COMM'N, FINAL REPORT, *supra* note 17, at 16.
69. *Id.*
70. *Id.* at 16–17.

that are troublesome on their own. The process itself, with televised hearings in the Senate Judiciary Committee that highlight the partisan nature of the nomination as well as campaign trail events announcing the names of nominees approved by the "base," demonstrates the judiciary's lack of independence and enables the selection of nominees who are more committed to a political party and an ideology than to an independent judiciary. In essence, the way nominees are selected and vetted underscores and exacerbates the failings of our system of checks and balances. Because this problem is so self-evident—and a problem that will ultimately be resolved through many of the same reforms—I will not spend any time in this Essay expanding on the conclusion that the nominations process is broken. It is.

II. SOLUTIONS

In this section, I lay out possible responses to both the normative and substantive failings of the Supreme Court and the confirmation process.

A. Substance and Outcomes (Democracy Under Threat)

For the substantive problem, there are several possible reforms that might address the Court's increasing right-wing extremism. In addition to court expansion, possible reforms include limiting the Court's jurisdiction, creating a congressional override of disfavored court decisions, and adding ethics constraints on the justices as well as term limits. In addition to reforms to the Court itself, which I will discuss below, there are several possible "political checks": amending the Constitution to overturn a bad decision and changing the members of the Court, either through the natural process of retirement and replacement or through impeachment. Unfortunately, the political checks on the Supreme Court are not very effective.

One way to deal with a bad constitutional decision from the Court would be to overrule it by amending the Constitution.[71] A constitutional amendment is extremely difficult, evidenced by the fewer than twenty

71. Remember that decisions wrongly interpreting statutes—as opposed to constitutionally based decisions—can be overridden by Congress, although with the state of polarization in that body, that too is almost impossible. *See generally* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 332–33, 335–38 (1991) (analyzing Congressional response to Supreme Court cases and the relationship between the two entities in regard to statutory interpretation); Drew DeSilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades [https://perma.cc/N7TF-V7Z8].

times Americans have amended the Constitution after the Bill of Rights.[72] Article V of the Constitution lays out two mechanisms for amendment. The first, via a constitutional convention, has never been used. This provision empowers two-thirds of the state legislatures to petition Congress to call a convention.[73] The second, through adoption by each house of Congress on a two-thirds vote and ratification by three-fourths of the states, is the only one that has had success.[74] But obviously, with the meager number of amendments adopted—the most recent being adopted in 1972—the Constitution perhaps even exceeds the Framers' hopes of limiting fundamental alterations.

As Wilfred Codrington and John Kowal note in their recent book, *The People's Constitution*, "Out of more than twelve thousand additions and revisions put forward since the Constitution was adopted, Congress has managed to send just thirty-three amendments to the states for their consideration."[75] Some of these amendments did in fact overrule Supreme Court decisions: the Eleventh Amendment was adopted to protect state sovereign immunity;[76] the Thirteenth, Fourteenth and Fifteenth Amendments were adopted to end slavery and provide civil rights to Black Americans;[77] then the People pushed for the Sixteenth Amendment to allow an income tax;[78] and, most recently, the Twenty-Sixth Amendment which allowed eighteen-year-olds to vote.[79]

B. Reforms to the Court Itself

One set of proposals to reduce the power of the Supreme Court involves limiting the Court's jurisdiction. Over the last fifty years, various members of Congress have proposed bills that would strip the jurisdiction of the Supreme Court—sometimes also the jurisdiction of other courts—to rule on the constitutionality of anti-abortion legislation, school prayer, the Affordable Care Act, prohibitions against

72. Drew DeSilver, *Proposed Amendments to the U.S. Constitution Seldom Go Anywhere*, PEW RSCH. CTR. (Apr. 12, 2018), https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere [https://perma.cc/VQ56-DAYY].

73. U.S. CONST. art. V.

74. *Id.*

75. JOHN F. KOWAL & WILFRED U. CODRINGTON III, THE PEOPLE'S CONSTITUTION 4 (2021).

76. *Id.* at 66–68.

77. *Id.* at 90–107, 110–15 (discussing the history and passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, respectively).

78. *Id.* at 130–35.

79. *Id.* at 207–14.

pornography, local mandates to recite the Pledge of Allegiance, and the now-invalidated Defense of Marriage Act.[80]

The Constitution clearly provides that Congress has the power to determine the jurisdiction of the federal courts. Article III of the Constitution, after outlining a small set of cases for the Supreme Court's "original" jurisdiction, then states that "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[81] This power also applies to the lower courts, which were originally established by congressional action.

Most prominent jurisdiction-stripping proposals today would bar the Supreme Court, all federal courts, or all federal and state courts from considering specific, substantively defined issues, legislation, or policies. While most of these proposals have focused on substantive issues, some proponents also argue that curbing federal courts' jurisdiction would also help rebalance power in favor of the political branches. There are many arguments in favor of such an approach. For one thing, many countries that protect individual rights operate perfectly well without judicial review.[82] And it certainly would enhance democracy. But there are worries about protections for minority rights without some independent body to review the excesses of a majority. In any case, such legislation to limit court jurisdiction would face many hurdles. The biggest hurdle is that the current Supreme Court would likely find it unconstitutional, thus setting up a constitutional conflict and possibly a crisis. Moreover, there are many difficult issues to resolve including how to structure such an override—which courts and which issues should be subject to congressional review.

A second way to reduce the Supreme Court's power would require that the Court invalidate statutes only with a supermajority vote or, similarly, require the Court to use a deferential standard of review in constitutional cases. The U.S. Supreme Court has always decided cases by majority vote simply based on practice, not legal mandate. In at least ten countries, the high courts must decide constitutional cases with a supermajority.[83]

Obviously, this reform too would make the Court more deferential to the political branches. Some argue it would also require more deliberation by the justices and produce better decision-making. Most clearly, this reform would respond to recent decisions of major impact that were decided on a five-to-four vote. A similar outcome might be

80. PRESIDENTIAL COMM'N, FINAL REPORT, *supra* note 17, at 154.

81. U.S. CONST. art. III, § 2.

82. *See, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1384–85 (2006).

83. PRESIDENTIAL COMM'N, FINAL REPORT, *supra* note 17, at 171.

produced by requiring the Court to apply a standard of review in constitutional cases that presumes that Congress's actions are constitutional. The Court itself has imposed different standards of review in certain areas of the law—either subjecting legislative action to more exacting or less intensive scrutiny depending on the subject matter and rights affected. Such a reform, however, might also be found unconstitutional as it is not clear Congress has the power to impose such standards. And again, with the current Court, it seems highly likely that such legislation would be struck down.

Another proposal would give Congress the power to override Court decisions as a way to restore power to the political branches and to strengthen the system of checks and balances. Overrides like this do exist in certain other countries.[84] Proposals range from giving Congress this power over any decision striking down a statute on constitutional grounds or only over decisions involving certain constitutional provisions. Once again, however, to give Congress such a power would most likely require a constitutional amendment and in the other countries where it exists, the override has not been much used.[85] It is not clear that the effort to establish a congressional override would be worth the effort required to amend the Constitution.[86]

The proposal to change the number of justices could have the most impact on the current Court's decisions and is designed to countermand what many of us believe to be an illegitimate arch-conservative supermajority. Most Americans may not understand that the size of the Court is surprisingly not fixed in the Constitution. Instead, the size has been left to Congress to determine and Congress has in fact changed the number of justices several times in American history.[87] Therefore, this reform is perhaps the most effective and the most obviously constitutional in nature.

Change in membership, even in a traditional way (with retirement, death, or impeachment), can undoubtedly have a powerful effect. Impeachment requires the vote of a majority of House.[88] If impeached by the House, a judge faces a trial by the Senate and will be removed if two-thirds of the Senate votes to do so.[89] But only one Justice has ever been

84. *Id.* at 183.

85. *Id.* at 183, 187.

86. For jurisdiction-stripping, legislative overrides, and supermajority requirements, see the analysis in Chapter Four of the Final Report of the United States Commission on the Supreme Court. *Id.* at 152–91.

87. *Id.* at 67, 73–74.

88. *Institution, Origins & Development: From the Constitution to the Modern House, Impeachment,* HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Origins-Development/Impeachment/ [https://perma.cc/9SEV-65AV] (last visited Mar. 24, 2023).

89. U.S. CONST. art. I, § 3.

impeached—Samuel Chase by Republicans following the election of 1800—and he narrowly escaped conviction in the Senate.[90] Several lower court judges have been impeached, and there have been threats to impeach other justices but none has been successful.[91] Normal attrition or retirement, however, has played a more significant role in shifting the Court's direction. For example, when Justice Alito took Justice Sandra Day O'Connor's seat, the Court swerved strongly against its prior rulings on campaign finance restrictions and affirmative action.[92] If President Obama's nominee, Judge Garland, had been confirmed or if Hillary Clinton had been elected president, the United States would have seen a major power shift on the Court. Instead, Trump was elected and went on to appoint three extremely conservative justices who are working at top speed to move the Court in a radically rightward direction.[93] And of course, in an earlier era, the legal landscape was completely transformed by President Franklin Delano Roosevelt's appointments.[94] That explains, of course, why confirmation hearings have become major political events.

Congress on several occasions in the country's first century altered the size of the Court, starting in 1789 when Congress created a six-person court.[95] Soon after, in 1800, Congress reduced the size to five.[96] Other size changes happened episodically in the nineteenth century motivated by a mix of institutional and political concerns. The Court was profoundly mistrusted by anti-slavery members of Congress after *Dred Scott v. Sanford*,[97] which held that African Americans were not

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90. *Art and History, Institution, Powers and Procedures, Impeachment,* U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment.htm [https://perma.cc/ZME7-WVKQ] (last visited Mar. 24, 2023).

91. *Id.*

92. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365–66 (2010) (overruling prior court decisions restricting campaign finance, including *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), in which Justice O'Connor joined the majority); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722–25 (2007) (limiting the reach of *Grutter v. Bollinger*, 539 U.S. 306 (2003), a prior decision authored by Justice O'Connor upholding affirmative action in higher education).

93. PRESIDENTIAL COMM'N, FINAL REPORT, *supra* note 17, at 14–15, 75–77.

94. *See, e.g.*, Robert Harrison, *The Breakup of the Roosevelt Supreme Court: The Contribution of History and Biography*, 2 L. & HIST. REV. 165, 198–99 (1984).

95. *The Court as an Institution*, U.S. SUP. CT. https://www.supremecourt.gov/about/institution.aspx [https://perma.cc/BZX6-HCQK] (last visited Mar. 24, 2023).

96. Jed Glickstein, *After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 YALE J.L. & HUMAN. 543, 543–44, 547 (2012).

97. 60 U.S. 393 (1857). *See* Stephen Breyer, Justice, U.S. Sup. Ct., Supreme Court Historical Society Annual Lecture: Guardian of the Constitution: The Counter Example of *Dred Scott* (June 1, 2009),

"citizens," and that Congress could not prohibit slavery in the territories.[98] As a result, during the Civil War, the Republican Congress in 1863 added a tenth seat to the Supreme Court, enabling President Lincoln to appoint a pro-Union, anti-slavery Justice Stephen Johnson Field.[99] Similarly, after Lincoln was assassinated, Congress reduced the size of the Court out of mistrust of President Andrew Johnson's sympathies for the South.[100] Congress restored the Court to nine after the election of President Ulysses S. Grant—Republican and former Union army General.[101]

It was not until the presidency of Franklin Roosevelt's and his so-called "Court-packing plan" in 1937 that another attempt was made to expand or contract the Court. Roosevelt threatened to expand the Court as a response to a series of decisions by the Supreme Court in 1935 and 1936 invalidating major New Deal legislation enacted by Congress and championed by Roosevelt, as well as a myriad of state labor and social welfare laws, all directed at bringing the nation out of the economic and social calamity of the Great Depression.[102] He threatened to appoint an additional justice for each justice over seventy years of age (who did not retire within six months)—for a possible total of fifteen members.[103] When the Court changed course and began to uphold his legislation, he abandoned the plan.[104] So, there is no doubt that those changes to Court size (or even threatened changes) have an effect. But the problem that faces us now is that justices tend to serve for very long periods because they are appointed at a younger age and live longer.

Currently, many in favor of court expansion are motivated by the outrageous behavior of the Republicans in the Senate who refused to consider President Obama's nomination of Judge Garland to the Supreme Court, setting the stage for its confirmation of the three justices nominated by President Trump—as well as the effect those norm violations may have on both the health of the democratic process and the scope of bedrock constitutional rights. It is imperative to address the ruptures to the norms but also to stop the Court on its path to an extreme

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https://www.supremecourt.gov/publicinfo/speeches/sp_06-01-09.html [https://perma.cc/HJW3-2BVK].

98. *Dred Scott*, 60 U.S. at 403–04.

99. Timothy Huebner, *The First Court-packing Plan*, SCOTUSBLOG (July 3, 2013, 1:37 PM), https://www.scotusblog.com/2013/07/the-first-court-packing-plan [https://perma.cc/9YUW-7WU5].

100. *Id.*

101. *Id.*

102. NCC Staff, *How FDR Lost His Brief War on the Supreme Court*, NAT'L CONST. CTR. (Feb. 5, 2023) https://constitutioncenter.org/blog/how-fdr-lost-his-brief-war-on-the-supreme-court-2 [https://perma.cc/T67T-FGBD].

103. *Id.*

104. *Id.*

right-wing agenda. In recent years, the Court took a sledgehammer to the Voting Rights Act and other anchors of democracy and affirmed state laws and practices that restrict voting and disenfranchise certain constituencies, such as people of color, the poor, and the young.[105] Its decisions have empowered partisans on the right allowing them to entrench power despite popular opposition.

Moreover, an expansion would potentially help make the Court reflective of the American people and thus be seen as more legitimate. With a larger number of justices, hopefully, at least some of the expansion justices would include those with experience in different sectors of the legal community or, even more generally, the public sphere. It also might include individuals of diverse religious, socioeconomic, racial, geographical, or other demographic backgrounds.

C. Addressing the Supreme Court's Normative Problem

As mentioned above, to answer the question of "Controlling the Court through a broken confirmation process: 'how to fix it going forward?'" one must address both the substantive concern (threat to democracy and rule of law) and the normative one (perception of the Court's lack of independence and partisanship as undermining rule of law). One reform that would address both concerns—but for the existential reasons mentioned above must follow the Court expansion—is placing limits on the terms served by Supreme Court Justices.

Among the proposals for reforming the Supreme Court, non-renewable limited terms—or "term limits"—for Supreme Court Justices is a reform that finds appeal across the ideological spectrum.[106] In fact, I support the idea that life tenure for judges should be ended and was pleased "[w]hen the National Constitution Center organized separate

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105. Nina Totenberg, *The Landmark Voting Rights Act Faces Further Dismantling at the Supreme Court*, NPR (Oct. 4, 2022, 5:00 AM) https://www.npr.org/2022/10/04/1126619000/voting-rights-act-supreme-court [https://perma.cc/FD5H-695D].

106. *See, e.g.*, Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, CTR. FOR AM. PROGRESS (Aug. 3, 2020), https://www.americanprogress.org/article/need-supreme-court-term-limits [https://perma.cc/55PB-UGMJ]; Lee Drutman, *It's Time for Term Limits for Supreme Court Justices*, VOX (June 27, 2018, 3:57 PM), https://www.vox.com/platform/amp/polyarchy/2018/6/27/17511030/supreme-court-term-limits-retirement [https://perma.cc/2U7D-LUB5]. *Compare* Robert P. George, Michael W. McConnell, Colleen A. Sheehan, & Ilan Wurman, *The Conservative Constitution*, NAT'L CONST. CTR. 2, 5, https://constitutioncenter.org/media/files/The_Conservative_Constitution.pdf [https://perma.cc/96L3-L2TY] (last visited Mar. 24, 2023), *with* Caroline Fredrickson, Jamal Greene, & Melissa Murray, *Introduction to the Progressive Constitution*, NAT'L CONST. CTR. 2, 5, https://constitutioncenter.org/media/files/The_Progressive_Constitution.pdf [https://perma.cc/4ZHY-96JJ] (last visited Mar. 24, 2023).

groups of 'conservative' scholars and 'progressive' scholars to draft their own proposals for improving the Constitution, both groups concluded that Supreme Court Justices should be limited to eighteen-year terms."[107] I was one of the three members on the progressive team, along with Melissa Murray of New York University Law School and Jamal Greene of Columbia Law School. We all agreed that it is anomalous to have the highest court in a nation dominated by a group that can determine the nation's future for a generation or more. Thus, term limits would help ensure the Court would not get too out of step with society and curb the significant powers of any individual justice. Plus, a change in personnel would bring in new perspectives and legal thinking.

Term limits would serve to balance the Court on a regular basis, as opposed to needing to do so in response to the current emergency. The proposal would do so by giving each president two nominations per term, with each justice to serve eighteen years.

The current system, under which a sitting justice must leave before a president can appoint another justice, leads to a great deal of randomness regarding the distribution of selections between different administrations—some have none and some (like Trump) have three or more. The vacancies result either from unforeseen deaths or strategic choices by justices to leave during an ideologically aligned presidency. When justices time their departure this way, they have extended their hold on the nation's legal regime well beyond their service. This too undercuts the legitimacy of the Court. Professors Steven Calabresi and James Lindgren prophetically described this very problem in an article, stating that those presidents who served during a "hot spot" with several vacancies can "contribute to the Court[] being out of step with the American people's understanding for long periods of time."[108] At the same time, "the irregular occurrence of vacancies on the Supreme Court means that when one does arise, the stakes are enormous, for neither the President nor the Senate can know when the next vacancy might arise."[109] Thus, "Supreme Court appointments have become politically contentious not only because the Justices exercise great power, but because they exercise [it] for so long."[110]

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107. PRESIDENTIAL COMM'N, FINAL REPORT, *supra* note 17, at 111; *see also* George, McConnell, Sheehan, & Wurman, *supra* note 106, at 5 (discussing the conservative approach to Supreme Court Justices' term limits); Fredrickson, Greene, & Murray, *supra* note 106, at 5 (discussing the progressive approach to Supreme Court Justices' term limits).

108. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 811 (2006).

109. *Id.* at 813.

110. Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313, 1318 (2007).

U.S. Supreme Court Justices have always had life tenure, but this system is vanishingly rare in both the United States' state courts and internationally. For example, the United States is the only major constitutional democracy in the world that has neither a retirement age nor a fixed term of years for its high court justices.[111] A regularized appointment process, giving each president two appointments for justices who would serve for eighteen years or less, would address these arbitrary consequences of life tenure by making judicial appointments more predictable and the composition of the U.S. Supreme Court more rationally related to the outcome of democratic elections over time. Right now, the nine Justices are unaccountable to the American public and sit for a generation or more, something that is untenable in a democracy. While life tenure is problematic generally, it has gotten worse over time as justices live longer and are appointed younger. "Up until the late 1960s the average term of service was [around] fifteen years."[112] By contrast, the average tenure of the justices who have left the Court since 1970 has been roughly twenty-six years.[113]

One of the more difficult questions in the implementation of a term limits proposal is how to phase it in, and what to do about the currently sitting justices. Simply waiting until all current justices retire would delay the implementation of term limits for an unacceptable period of time. A recent article by Adam Chilton of the University of Chicago, Daniel Epps and Kyle Rozema of Washington University in St. Louis, and Maya Sen of Harvard University calculates that if current justices remain on the current as full-time justices, without additional appointments, term limits would not be in place for all justices before an average of fifty-two years, and possibly up to sixty-nine years.[114] Thus, the authors conclude, such an approach to the transition would "continue to allow for unequal influence on the Court across presidential terms during the transition period, which is one of the key issues term limits are intended to address."[115]

The solution to this dilemma is to allow for a temporary Court expansion, beginning as soon as term limits are adopted. Such an approach would take thirty-five years approximately to come into effect.[116] With the new justices serving only the eighteen-year term, the size of the Court will shrink back to nine and remain there.

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111. PRESIDENTIAL COMM'N, FINAL REPORT, *supra* note 17, at 112.

112. *Id.* at 18.

113. *See id.*

114. Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. 1, 6 (2021).

115. *Id.*

116. *Id.* at 42.

In practice, the plan would be implemented over time as follows with a few assumptions:

> Current justices would not be subject to the new term limits law, but starting with passage of a term limits law, presidents would be able to add two justices per term.
>
> Current estimates would assume they will serve, like many predecessors, to the age of seventy-five, approximately. Especially once term limits are adopted, pressures—along with health issues and other reasons for retirement (such as having a president in office likely to appoint a successor with similar views) make this a likely scenario.[117] As retirements in presidential election years are quite rare, the below projections, developed by Fix the Court, assume that no one will retire in those years.
>
> **2023**: Roberts, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson (9 justices)
>
> **2023**: Term limits law passes, add Justice A: Roberts, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson, A (10 justices)
>
> **2025**: Thomas retires (34-year term), add Justice B: Roberts, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson, A, B (10 justices)
>
> **2027**: Alito retires (21-year term), add Justice C: Roberts, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson, A, B, C (10 justices)
>
> **2029**: Sotomayor retires (20-year term), add Justice D: Roberts, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson, A, B, C, D (10 justices)
>
> **2030**: Roberts retires (25-year term) (9 justices)
>
> **2031**: Add Justice E: Kagan, Gorsuch, Kavanaugh, Barrett, Jackson, A, B, C, D, E (10 justices)
>
> **2033**: Add Justice F: Kagan, Gorsuch, Kavanaugh, Barrett, Jackson, A, B, C, D, E, F (11 justices)
>
> **2035**: Kagan retires (25-year term), add Justice G: Gorsuch, Kavanaugh, Barrett, Jackson, A, B, C, D, E, F, G (11 justices)

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117. *One Way a SCOTUS Term Limits Bill Could Be Implemented*, FIX THE CT. (Dec. 28, 2022), https://fixthecourt.com/2022/12/one-way-a-scotus-term-limits-bill-could-be-implemented [https://perma.cc/435L-FRFY].

2037: Add Justice H: Gorsuch, Kavanaugh, Barrett, Jackson, A, B, C, D, E, F, G, H (12 justices)

2039: Add Justice I: Gorsuch, Kavanaugh, Barrett, Jackson, A, B, C, D, E, F, G, H, I (13 justices)

2041: Justice A retires (18 years after appointment), Kavanaugh retires (23-year term), add Justice J: Gorsuch, Barrett, Jackson, B, C, D, E, F, G, H, I, J (12 justices)

2042: Gorsuch retires (25-year term) (11 justices)

2043: Justice B retires, add Justice K: Barrett, Jackson, C, D, E, F, G, H, I, J, K (11 justices)

2045: Jackson retires (23-year term), Justice C retires, add Justice L: Barrett, D, E, F, G, H, I, J, K, L (10 justices)

2047: Barrett retires (27-year term), Justice D retires, add Justice M: E, F, G, H, I, J, K, L, M (9 justices becomes permanent).[118]

Under this reform, justices would serve for eighteen years of "active service" for future justices but provide that at the end of their active service, the justices would serve in a senior capacity.[119] This senior justice role would ensure that the new term limits comport with the requirement in Article III of the Constitution that federal judges, including justices, "shall hold their offices during good behavior," obviating the need for a constitutional amendment.[120] Should the Court shrink below nine for any pending case—due to sickness, retirement, or recusal—the justice who most recently entered senior status would fill in.

But for term limits to work, they must be accompanied by reforms to the confirmation process itself—otherwise the current partisan divide will prevent this system from working as each party obstructs the nominees from the other party. With the Senate confirmation process broken, it would be difficult to ensure that each president's two nominees are considered and confirmed without disabling the filibuster and other means of Senate obstruction. I have written at length about how to reform the Senate; I will not do so again here. But simply abolishing the filibuster through a Senate rules-change will not ensure readoption by the Senate or another means of obstruction used. And vacancies that arise when the Senate is controlled by the opposing party to the president could lead to lengthy obstruction, obviating the ability of each president to appoint two justices. So, any reform imposing term limits would have to be accompanied by a statutory-rule change similar to the budget law

118. *Id.*
119. Chilton, Epps, Rozema & Sen, *supra* note 114, at 24.
120. U.S. CONST. art. III, § 1.

(Reconciliation) that bars the filibuster by law, ensuring the Senate cannot readopt the obstructive tactic without first passing a new law through both houses and signed by the president. Other ideas, include a proposal by Steven Calebresi to make the salaries of the president and the Senate contingent on reaching an agreement on a nominee and bar other government work from moving forward.[121] The authors of "Designing Court Term Limits" mention some "less aggressive possibilities" such as having a roster of candidates who would automatically be confirmed were the Senate not to act within a set period of time or "penaliz[ing] the Senate majority's party by depriving the next president from that party of nominations to which she would normally be entitled. Such a provision would thus deprive a further president of the very advantage which the Senate was attempting to seize."[122] My preference, however, would be the simplest: simply ban supermajority votes by statute. It has worked for the budget, so why not for the Supreme Court?

D. Additional Reforms

Additional reforms that would address the normative problems once the substantive ones have been resolved include transparency and ethics reforms such as ethics, recusal, and disclosure rules,[123] and changes to the practice of using the so-called "shadow docket."[124] One area that certainly should be addressed is the Supreme Court's lack of transparency and ethics rules. Reforms in this area would not make a major difference in terms of jurisprudence but might affect the public perception of the Court and provide greater accountability for justices.

1. JUDICIAL ETHICS

The U.S. Supreme Court Justices of the U.S. Supreme Court are the only members of the federal judiciary who are not covered by a code of conduct. Since 1973, an advisory code of conduct has covered all other federal judges, but that code does not apply to the Supreme Court

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121. Steven G. Calabresi, Opinion, *End the Poisonous Process of Picking Supreme Court Justices*, N.Y. TIMES (Sept. 22, 2020), https://www.nytimes.com/2020/09/22/opinion/ginsburg-supreme-court-confirmation.html.

122. Chilton, Epps, Rozema & Sen, *supra* note 114, at 68.

123. *Undue Influence: Operation Higher Court and Politicking at SCOTUS: Hearing Before the H. Comm. on the Judiciary*, 117th Cong. 30–31 (2022) (testimony of Caroline Fredrickson, Visiting Professor, Georgetown University Law Center).

124. *See* PRESIDENTIAL COMM'N, FINAL REPORT, *supra* note 17, at 203–04, 209–11; *cf.* Rebecca Frank Dallet & Matt Woleske, *State Shadow Dockets*, 2022 WIS. L. REV. 1063, 1083–85 (discussing reform to state shadow dockets).

Justices.[125] Congress could enact a code for the Supreme Court, and indeed several bills have been proposed;[126] such proposals usually direct the Court administration to craft a code for the Court (or simply make the existing code applicable to the justices). But Congress could also write the code itself.

2. TRANSPARENCY

The Court has never allowed cameras to cover proceedings and only recently allowed live audio streaming, because of the exigencies of the pandemic.[127] This effort added additional fuel to the long-standing debate over cameras—it is worth noting that the Supreme Court's courtroom is usually capable of seating only around fifty members of the general public at a time.[128] Proponents of cameras in the courtroom emphasize the importance of transparency and the potential educational, historical, and civic benefits of being able to see the justices at work.[129] Congress has introduced numerous bills calling for cameras.[130]

3. THE SHADOW DOCKET

Ostensibly, every court system needs a way to deal with emergency appeals. That said, why is the Supreme Court's practice of hearing emergency appeals, dubbed the "shadow docket" because of the lack of transparency about the rulings, become a lightning rod for criticism and debate?[131] The shadow docket has received a large amount of scrutiny in recent years, based on the number of law review articles, newspaper stories, and amount of legislative attention.

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125. Scott Bomboy, *Why the Supreme Court Isn't Compelled to Follow a Conduct Code*, NAT'L CONST. CTR: CONST. DAILY BLOG (July 15, 2016), https://constitutioncenter.org/blog/why-the-supreme-court-isnt-compelled-to-follow-a-conduct-code [https://perma.cc/ZQJ2-MP79].

126. *See, e.g.*, Supreme Court Ethics, Recusal, and Transparency Act of 2022, H.R. 7647, 117th Cong. (2022).

127. Jesse Wegman, Opinion, *Live From D.C., It's the Supreme Court!*, N.Y. TIMES (May 4, 2020), https://www.nytimes.com/2020/05/04/opinion/supreme-court-coronavirus-telephone.html.

128. Amy Howe, C*ourtroom Access: The Nuts and Bolts of Courtroom Seating—and the Lines for Public Access*, SCOTUSBLOG (Apr. 1, 2020, 1:06 PM), https://www.scotusblog.com/2020/04/courtroom-access-the-nuts-and-bolts-of-courtroom-seating-and-the-lines-to-gain-access-to-the-courtroom [https://perma.cc/E2TK-CTKR].

129. *See, e.g.*, Erwin Chemerinsky & Eric J. Segall, *Cameras Belong in the Supreme Court*, 101 JUDICATURE 14, 15 (2017).

130. *See, e.g.*, S. 446, 111th Cong. (2009); Cameras in the Courtroom Act, S. 807, 117th Cong. (2021).

131. *Cf.* Dallet & Woleske, *supra* note 124, at 1072–74.

The normal route by which the nine life-tenured Supreme Court justices accept cases for review is through the grant of certiorari.[132] They hear very few such cases per year, indeed fewer and fewer in recent years.[133] In the certiorari cases, the justices have access to briefs from the parties, as well as amici curiae and subsequent to reading those materials, as well as the opinions from lower courts, they hear oral arguments before issuing their opinions.[134] Those justices authoring and joining an opinion are named on the decision as well as those in dissent. They sign their names to their position and must stand by it, until they decide to join another opinion reversing course. While the Supreme Court is not known as the most transparent institution in the world, the certiorari process at least tells us who voted for which outcome and for what reasons. Each justice must stand before the public and defend their position—if only in the words of their opinions—and this is how it should be, particularly in a system of life-tenure and judicial supremacy under which judges get to determine what our Constitution means for all of us for generations.

By contrast, when issuing their brief decisions on the shadow docket, the justices do not identify themselves to the public (unless it is clear who wrote the opinion from other evidence or the rare occasions when they issue a writing dissent to a shadow docket decision) nor their reasons for an outcome.[135] And yet, they have decided cases of major import involving voting rights, abortion, and the very right to life or death.[136] When hearing these cases, the justices often lack the benefit of a decision by a lower court or courts because the cases by definition are rushed and partial. So, without written lower court decisions, only fragmentary briefing or oral argument by parties, and a limited time span to consider the complex legal questions and contested facts, the Supreme Court nonetheless issues decisions that can have significant and long-lasting consequences, including making major changes to doctrine.

One particularly concerning set of shadow docket cases, and one in which the Court has been subject to much criticism on its regular docket

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132. *Supreme Court Procedures*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/R64E-KT4A] (last visited Mar. 4, 2023).

133. Michael Heise, Martin T. Wells & Dawn M. Chutkow, *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court's Incredibly Shrinking Docket*, 95 NOTRE DAME L. REV. 1565, 1567–68 (2020).

134. Carolyn Shapiro, *Behind the Scenes: How the U.S. Supreme Court Decides*, AM. BAR ASS'N (June 24, 2022), https://www.americanbar.org/groups/public_education/resources/reproductive-rights-us-supreme-court/behind-the-scenes-how-the-u-s-supreme-court-decides [https://perma.cc/H8V4-RTQL].

135. *Cf.* Dallet & Woleske, *supra* note 124, at 1064–65.

136. *Id.* at 1063–64, 1070.

as well, is in the realm of election administration, voting rights, and gerrymandering.[137] While any decision on this docket that has far-reaching impacts should be scrutinized, the decisions involving the basic mechanisms of democracy need a particularly close and critical examination. These cases have significantly affected access to the ballot box, allowed racial gerrymandering, and hobbled efforts to ensure elections are fair and free to all eligible voters.

The Court should be required in all cases to provide its reasoning and to show how each justice voted.

CONCLUSION

So, to answer the question posed in this Symposium, "controlling the Court through a broken confirmation process: 'how to fix it going forward?,'" we must address the implicit prior question of what does it mean that the confirmation process is broken and why does it matter? The problems are both substantive and normative and deeply interrelated. The substantive problem, that the Court poses a direct threat to our democracy, demands an immediate and potent response. The normative problem will resolve itself once the Court's right-ward and constitutionally unmoored race to the right is thwarted. So, the first and necessary act is to expand the Court, followed by important long-term and normative reforms such as establishing fixed terms for justices, addressing ethics problems, and eliminating the shadow docket, except for true emergencies.

As I mentioned at the outset, I am deeply concerned about the challenges presently facing the United States, and I believe the Supreme Court itself has exacerbated those difficulties. It is critical for American democracy that we review the Court's role and adopt reforms that will restore a proper balance between the governing branches and a greater power to the People to determine their future.

In terms of immediate impact, adding justices to the Court would be the most effective in curbing its extreme right-wing ideology. Other important reforms would address long-term deficiencies such as placing term limits on the justices, considering legislative overrides or voting rules, and certainly requiring the justices abide by ethics and transparency rules. The United States is the world's longest-lasting democracy. Will it last?

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137. *See* Ellis Champion, *With Redistricting, the U.S. Supreme Court Is Leaving Voters in the Shadows*, DEMOCRACY DOCKET (May 3, 2022), https://www.democracydocket.com/analysis/with-redistricting-the-u-s-supreme-court-is-leaving-voters-in-the-shadows [https://perma.cc/W739-F6RE]; Edward Foley, *Symposium: The Particular Perils of Emergency Election Cases*, SCOTUSBLOG (Oct. 23, 2020, 5:28 PM), https://www.scotusblog.com/2020/10/symposium-the-particular-perils-of-emergency-election-cases [https://perma.cc/H9M5-XE7U].

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