Connecticut Debate Association
State Finals, March 22, 2019
Joel Barlow High School

Resolved: The US Supreme Court should be significantly reformed.

Article III Section 1 of the US Constitution

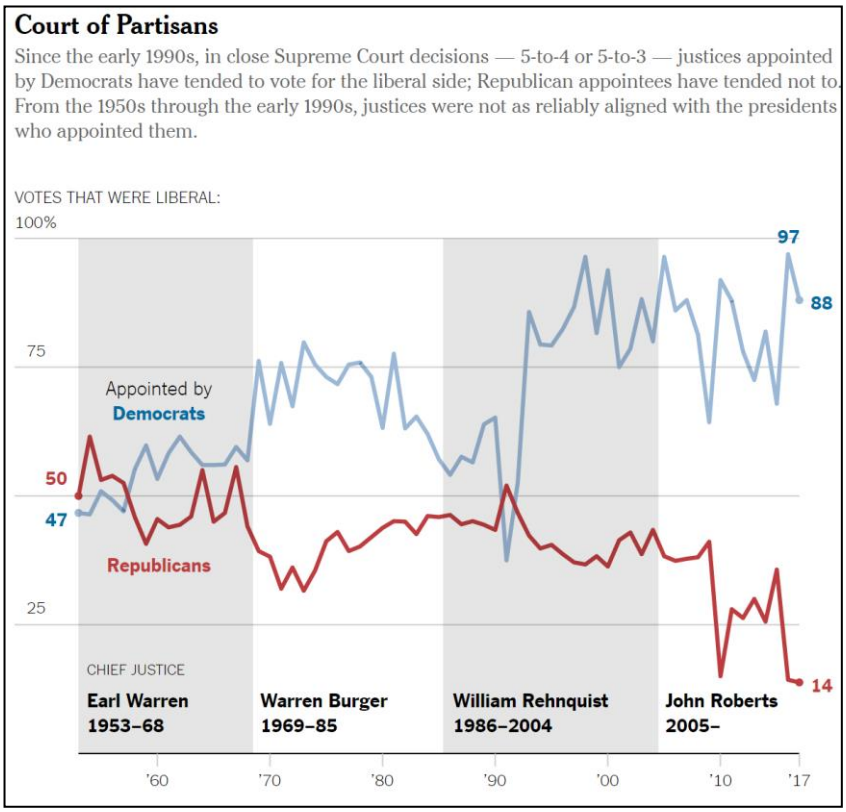
The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

If the Supreme Court Is Nakedly Political, Can It Be Just?

The New York Times, By Lee Epstein and Eric Posner, July 9, 2018

President Trump was always going to pick a conservative for the Supreme Court. The only question has been whether to replace Justice Anthony Kennedy with a "business conservative" or a "religious conservative." No one seriously thought that he would consider a moderate, a liberal or an ideologically ambiguous replacement.

Sure enough, Brett Kavanaugh is a conservative in good standing.



The next Democratic president will nominate a liberal to the court in the hope of tilting it in the other direction. Everyone is so accustomed to this state of affairs that people have forgotten to question it.

But we wonder whether a Supreme Court that has come to be rigidly divided by both ideology and party can sustain public confidence for much longer.

The court has recently entered a new era of partisan division. If you look at close cases — 5 to 4 or 5 to 3 — going back to the 1950s to illustrate this division, you will see that the percentage of votes cast in the liberal direction by justices who were appointed by Democratic presidents has skyrocketed. And the same trajectory applies on the other side: The percentage of votes cast in the conservative direction by justices who were appointed by Republican presidents has also shot up.

The trend is extreme — and alarming. In the 1950s and 1960s, the ideological biases of Republican appointees and Democratic appointees were relatively modest. The gap between them has steadily grown, but even as late as the early 1990s, it was possible for justices to vote in ideologically unpredictable ways. In the closely divided cases in the 1991 term, for example, the single Democratic appointee on the court, Byron White, voted more conservatively than all but two of the Republican appointees, Antonin Scalia and William Rehnquist. This was a time when many Republican appointees — like Sandra Day O'Connor, Harry Blackmun, John Paul Stevens and David Souter — frequently cast liberal votes.

In the past 10 years, however, justices have hardly ever voted against the ideology of the president who appointed them. Only Justice Kennedy, named to the court by Ronald Reagan, did so with any regularity. That is why with his

replacement on the court an ideologically committed Republican justice, it will become impossible to regard the court as anything but a partisan institution.

It is hard to think of any historical precursors. The most famous period of ideological division on the court was in the 1930s, when it repeatedly struck down liberal legislation. But what is remarkable is that the division was not strongly partisan. Among the "four horsemen" — the die-hard opponents of the New Deal — one was appointed by a Democratic president, and another was a Democrat appointed by a Republican president. Among the three justices who typically voted to uphold New Deal programs, two were appointed by Republican presidents.

The modern divisions on the court can be traced to the Warren court of the 1950s and 1960s. The Warren court was not partisan — two of its liberal stalwarts, William Brennan and Earl Warren himself — were appointed by Dwight Eisenhower, a Republican. But the Warren court took a liberal stand on the most controversial issues of the day — including civil rights, sexual freedom, and the rights of criminal suspects and political dissenters. The post-Warren court case of Roe v. Wade finally galvanized the right. Since then, Republican presidential candidates have repeatedly promised to appoint conservative jurists to the court.

But they have not always kept the promise. Republicans still can't forgive President Reagan for appointing two moderates, Justices O'Connor and Kennedy, and President George H. W. Bush for appointing Justice Souter, who veered left. Both the pressure on the presidents by conservative groups and the ideological vetting procedure for nominees were ramped up. President George W. Bush's appointments — John Roberts and Samuel Alito — were impeccably conservative. Presidents Bill Clinton and Barack Obama appointed liberals in an effort to halt the court's rightward drift.

For the first time in living memory, the court will be seen by the public as a party-dominated institution, one whose votes on controversial issues are essentially determined by the party affiliation of recent presidents. That's if one party wins the Senate as well as the presidency. It seems likely that the next time the presidency and the Senate are divided by party, any appointment will be blocked. Indeed, that's what happened in 2016, when the Republican Senate refused to consider President Obama's nominee Merrick Garland.

Frustrated with the Supreme Court's opposition to the New Deal, President Franklin Roosevelt tried to pack the court — that is, add more justices. Although the plan died in Congress, the court also backed down from its confrontation with the president. Both Roosevelt and the court were badly damaged by the clash.

Today we see similar attacks on the judiciary in Hungary, Poland and other illiberal democracies. Assaults on judicial independence are made easier when the public comes to view the judiciary as a political body. This risk, and not just the identity of the next justice, should be at the center of public attention.

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How to save the Supreme Court

Vox, By Daniel Epps and Ganesh Sitaraman, Oct 10, 2018

The Supreme Court faces a legitimacy crisis. Here's what we can do about it.

With the confirmation of Brett Kavanaugh to the Supreme Court, Republicans have succeeded in a decades-long effort to capture total control of the judicial branch. While they will surely celebrate this victory, the real loser in this partisan battle is not the other side — it's the Supreme Court. And without radical reforms to save its legitimacy, the Court may never recover from its transformation into a nakedly partisan institution.

After more than 200 years, the Supreme Court still plays a crucial role in our constitutional democracy. It offers a check on the political process, and it holds Americans to our deepest commitments by upholding society's laws. Indeed, with the Court as the highest arbiter of legal disputes in our country, the public's trust that it isn't just playing out partisan politics is inextricable from public confidence in the rule of law itself.

The Court has never been completely disconnected from politics, but the past several decades represent a dangerous swing in a deeply partisan direction. The increased polarization in society, the development of alternative schools of legal interpretation that line up with political leanings, and increased interest-group attention to the Supreme Court nomination process have combined to create a system in which the Court has become a political football.

The years-long process of tit-for-tat escalation by each side culminated in 2016, when Senate Majority Leader Mitch McConnell and his Republican colleagues blocked President Barack Obama's nominee, Judge Merrick Garland, from even receiving a hearing solely because they wanted to hold open the seat for a potential Republican appointee — a gambit that paid off with the successful nomination of Neil Gorsuch.

But the crisis truly arrived this summer when Kavanaugh was nominated to replace Justice Anthony Kennedy — likely

the last justice to frequently vote contrary to what his party affiliation might suggest in some high-profile cases. With his replacement by a more predictable ideological justice, the notion of the Court as an institution above the political fray seemed very much in jeopardy.

And the past few weeks made the situation even worse. Sexual assault allegations, toxic hearings, shocking statements, and shameless political maneuvers over the final days of the confirmation battle led to one of the closest votes ever for a Supreme Court nominee. The debate over Kavanaugh sparked passionate conversations all across the country, took center stage in political campaigns from North Dakota to Maine and generated outrage among senators on both sides of the aisle.

Now President Trump's two nominations guarantee a solidly conservative Court that we should expect to reliably decide cases — especially hot-button cases — along party lines. This will make it very difficult for many to see the Supreme Court as anything but a set of political actors making partisan judgments, to a degree that is without precedent in American history.

A Court that lacks widespread, bipartisan confidence faces grave risks. One can imagine the firestorm that might result if, say, the Court struck down by a 5-4 margin along party lines a Democratic president's signature legislative accomplishment. The political branches might feel pressure to ignore the Court's judgment, which would provoke an unprecedented constitutional crisis. Even if that did not come to pass, it's likely the confrontation between the branches would significantly weaken the Court.

Other possibilities seem even worse. Anticipating the possibility that the new conservative majority would block progressive reforms, Democrats are warming to the idea of court-packing. Even if justified, such moves will only provoke further partisan escalation that will leave the Court's image, and the rule of law, badly damaged.

Can this coming crisis be averted? Can the Supreme Court be saved from this fate? We think so. But preserving the Court's legitimacy as an institution above politics will require a complete reenvisioning of how the Court works and how the justices are chosen. To save what is good about the Court, we must radically change the Court.

The Supreme Court panel solution

Successful reform could take many shapes. To advance the discussion, we'll propose two ideas here. The first is changing the Supreme Court from nine permanent justices to a rotating group of justices, similar to a panel on a court of appeals. Every judge on the federal court of appeals would also be appointed as an associate justice of the Supreme Court. The Supreme Court "panel" would be composed of nine justices, selected at random from the full pool of associate justices. Once selected, the justices would hear cases for only two weeks, before another set of judges would replace them.

This approach would effectively eliminate the high stakes of Supreme Court appointments, thereby taking the Court out of the electoral and political realm. It would also significantly decrease the ideological partisanship of each court decision. No single judge would be able to advance an ideological agenda over decades of service or develop a cult of personality among partisans. And it would be very difficult to be a judicial activist on any given case because the next panel — arriving as soon as two weeks later — might have a different composition and take a different tack.

Cases would also be chosen behind a veil of ignorance. While serving their two weeks, the justices would consider petitions for Supreme Court review. But with such short terms of service, the justices could not pick cases with a partisan agenda in mind; another slate of justices would hear the cases they select.

Activist lawyers would also not be able to game the system, bringing legal arguments and cases based on predictions of which way the Court is likely to decide. In the run of cases, the Court's decisions would likely be far more deferential to the democratic process and far more tightly linked to precedent. That would be especially true if the new system were combined with a rule requiring supermajority votes to strike down federal statutes on constitutional grounds.

The balanced court solution

We call our second approach the balanced court. On this proposal, the Supreme Court would have 15 justices. Ten justices — five Republican and five Democratic — would be chosen through a political process much like our current system, and thus would be expected to vote in line with their party affiliation. The key to the proposal is that these politically appointed justices would need to unanimously pick five additional justices, drawn from the courts of appeals, to sit with them for a year. To ensure that the justices come to consensus, the Court would need to agree on all five additional justices or else it would be deemed not to have a quorum, and thus unable to hear cases.

In theory, the system would create incentives for the politically appointed justices to select judges who were universally respected as good lawyers and honest brokers — not devoted partisans. The resulting Court would still have a number of justices whose votes in the most controversial cases would match their political affiliation. But it would also, we hope, include some judges whose votes might be more unpredictable. Under today's highly politicized selection process, presidents are unlikely to select independent-minded moderates.

These reforms raise some practical and constitutional questions, to be sure. But they are better starting points than many others on the table. Some commentators, for example, have proposed that Supreme Court justices serve an 18-year term instead of a lifetime term. Each president would get two appointments, and appointments would be predictable, removing the pressure to stack the Court with younger and younger justices. While this is a well-intentioned proposal, it is unlikely to depoliticize the Court. If anything, it will make things worse.

First, it guarantees that the Supreme Court will be a campaign issue in every single presidential election because each president would get to shape the Court with two nominees. During the appointment process, movement activists on both sides would still jockey to make sure only the purest ideologues would be appointed. And once on the bench, the justices themselves might actually become more political: A term-limited justice might see the Court as the perfect jumping-off point for a presidential run, decide cases in hopes of retiring into a lucrative lobbying gig, or play to the public to secure a future on Fox News or MSNBC.

Our proposals, by contrast, turn down the temperature of the Supreme Court nomination process and stand a chance of creating a Court that doesn't always vote along party lines. To be sure, even under our proposals, there would still be politics related to the appointment of federal court of appeals judges. But our suggestions would guarantee more ideological, methodological, and experiential diversity from the Supreme Court. Combined with short terms of service, this diversity will make it harder for any willful judge to impose their agenda on the country.

Whether or not policymakers adopt our proposals, it is imperative that they make some kind of reform. Doing nothing is not a viable option. The Court will be gravely damaged by inevitable clashes between the conservative majority and progressive politicians once Democrats regain power. But more aggressive, nakedly political reforms like court-packing, as attractive as they might seem in the short term, are unlikely to be stable. Saving the Court by transforming the Court is our best hope.

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Democrats Don't Want to 'Pack the Supreme Court' — They Want to Reform It

New York Magazine, March 19, 2019, By Eric Levitz@EricLevitz

Donald Trump has already appointed 91 judges to the federal judiciary. Thanks to Mitch McConnell's ruthless subversion of Senate norms, the president is poised to appoint more than 100 additional federal judges before his first term ends. There's a decent chance that at least one of those will be a Supreme Court justice (Ruth Bader Ginsburg is 86 years old).

The high court's existing conservative majority has evinced few qualms about legislating from the bench. Within the past two decades, conservative jurists have gutted the Voting Rights Act, legalized most forms of political bribery; rewritten antitrust law; declared voluntary school desegregation plans unconstitutional; invented an individual right to bear arms; abolished virtually all restrictions on corporate spending in American elections; overturned an Arizona law that attempted to counter such spending by providing candidates with public funds; restricted the capacity of consumers and workers to sue corporations that abuse them; rewrote Barack Obama's Medicaid expansion in a manner that enabled red states to reject the program (thereby condemning thousands of Americans to preventable deaths); and came within one vote of striking down Obama's entire health-care law on audaciously specious grounds.

Meanwhile, the world's top climate scientists say that averting ecological catastrophe will now require a World War II–style mobilization — which is to say, aggressive forms of state intervention in the private economy that many conservative jurists regard as unconstitutional.

Together, these realities have persuaded a large number of progressive activists and intellectuals that reforming the federal judiciary may well be a prerequisite for social progress (if not human civilization's long-term survival). And now, they have convinced a significant number of Democratic presidential candidates of the same:

Sens. Kamala Harris, Elizabeth Warren and Kirsten Gillibrand told POLITICO they would not rule out expanding the Supreme Court if elected president, showcasing a new level of interest in the Democratic field on an issue that has until recently remained on the fringes of debate.

… "We are on the verge of a crisis of confidence in the Supreme Court," said Harris (D-Calif.). "We have to take this challenge head on, and everything is on the table to do that." … Gillibrand said in an interview that she believes Justice Neil Gorsuch essentially possesses an illegitimate seat after Garland was denied even a committee hearing. The New York Democrat added that the Senate should move swiftly to impose strict ethics rules on the Supreme Court.

"It's not just about expansion, it's about depoliticizing the Supreme Court," said Warren (D-Mass.), who mentioned bringing appellate judges into Supreme Court cases as an option.

"It's a conversation that's worth having," she added.

This is an encouraging development for the reasons outlined above. But Politico's coverage of the issue elides (or underemphasizes) three critical points:

1. Democratic candidates want to reform the courts, not pack them.

Court-packing is a pejorative in American politics, one that connotes a partisan power grab. Thus, it makes sense that Republicans would wish to describe the plans that Warren and Harris are mulling as "court packing." But progressive advocates for those plans should probably avoid doing so —not least because the term is inaccurate.

As Warren suggests, the goal is not merely to expand the Supreme Court, or to turn a bastion of conservative judicial activism into a liberal one. Rather, the idea is that one could nullify the threat that a reactionary, activist judiciary (appointed largely by men who were not popularly elected) poses to self-government in the U.S. without triggering an endless court-packing arms race — by establishing new rules that lower the stakes of Supreme Court appointments, and suppress judicial partisanship.

In article for Vox last fall, the legal scholars Daniel Epps and Ganesh Sitaraman outlined two different ways in which this could be achieved. When Warren mentioned "bringing appellate judges into Supreme Court cases," she may have been referencing their first suggestion:

[C]hanging the Supreme Court from nine permanent justices to a rotating group of justices, similar to a panel on a court of appeals. Every judge on the federal court of appeals would also be appointed as an associate justice of the Supreme Court. The Supreme Court "panel" would be composed of nine justices, selected at random from the full pool of associate justices. Once selected, the justices would hear cases for only two weeks, before another set of judges would replace them.

This approach would effectively eliminate the high stakes of Supreme Court appointments, thereby taking the Court out of the electoral and political realm. It would also significantly decrease the ideological partisanship of each court decision. No single judge would be able to advance an ideological agenda over decades of service or develop a cult of personality among partisans. And it would be very difficult to be a judicial activist on any given case because the next panel — arriving as soon as two weeks later — might have a different composition and take a different tack.

Cases would also be chosen behind a veil of ignorance. While serving their two weeks, the justices would consider petitions for Supreme Court review. But with such short terms of service, the justices could not pick cases with a partisan agenda in mind; another slate of justices would hear the cases they select.

They also offer a "balanced court" solution, in which "ten justices — five Republican and five Democratic — would be chosen through a political process much like our current system" and then "these politically appointed justices would need to unanimously pick five additional justices, drawn from the courts of appeals, to sit with them for a year."

Of course, today's Republicans are likely to view any reform that nullifies their hard-won Supreme Court majority as an illegitimate power grab. But if you squint hard, you can imagine a world in which Democrats win federal power, pass one of these judicial reforms — and then retain power long enough to endow the new system with bipartisan legitimacy. That said, red states would liable to start nullifying Supreme Court decisions in the interim.

Regardless, such concerns are almost certainly moot for the foreseeable future because:

2. The next Democratic president is extremely unlikely to have the votes necessary for reforming the Supreme Court.

Democratic senators Cory Booker, Amy Klobuchar, Michael Bennett, and Dianne Feinstein have all already voiced opposition to meddling with the Supreme Court's composition. Which is to say: It isn't just red-state moderates like Jon Tester and Joe Manchin who stand in the way of judicial reform — it's the median member of Chuck Schumer's caucus. Heck, many of the Senate's most progressive senators can't even bring themselves to endorse abolishing the (utterly irrational) legislative filibuster.

Meanwhile, Democrats will need to pull off a minor miracle just to secure a single-vote Senate majority in 2021. And even if they dominate the next two election cycles, they still (almost certainly) won't be in a position to pass any laws that don't have the support of the likes of Booker and Klobuchar. What's more, absent a drastic escalation in the Roberts Court's activism, public opinion is unlikely to force moderate Democrats' hands. Thanks to the public's capacious ignorance of 99 percent of Supreme Court rulings, rank-and-file Democratic voters actually espouse a broadly positive view of the existing judiciary; as of last month, a plurality of Democratic voters approved of Chief Justice John Roberts, while just 7 percent described him as "very conservative" (despite the man's evisceration of landmark civil-rights legislation, and myriad efforts to expand corporate power).

Reforming the courts is a good policy — and may prove a necessary one. But there's no evidence it's good politics. Which means that moderate Democratic senators are unlikely to budge, absent a massive judicial power grab that eviscerates a core Democratic achievement.

Nevertheless, the push for Supreme Court reform remains worthwhile because:

3. Building support for reform could temper John Roberts's appetite for judicial activism.

Franklin Roosevelt never managed to pass his "court packing" scheme — but the threat alone (ostensibly) forced a reactionary high court to make peace with the New Deal state.

There's reason to think that contemporary efforts to politicize the court (or, perhaps, to politicize the right's politicization of said courts) could have a similarly beneficent effect. In her forthcoming biography of John Roberts, The Chief, journalist Joan Biskupic reports that Roberts initially intended to join his four conservative colleagues in voting to strike down the Affordable Care Act, but was reluctant to make such a sweeping intervention into an issue as potent as health care. Thus, he reportedly negotiated a "compromise" with Stephen Breyer and Elena Kagan, which resulted in those two liberals voting to undermine the Medicaid expansion, while Roberts voted to preserve the bulk of the law.

Biskupic holds out the possibility that Roberts's "change of heart really arose from a sudden new understanding of the congressional taxing power." But the weight of the available evidence suggests otherwise.

And even if the justices do not consciously consider the risk of political backlash, that threat still might unconsciously inform their reasoning. So long as progressives are loudly preparing plans for stripping the court of its present prerogatives, its conservative jurists will have some cause to worry that striking down the next expansion of public health insurance might be more trouble than it's worth.

Granted, as stipulated above, the threat to reform the courts isn't currently an empty one. But Roberts may wish to protect this status quo, by declining to give Amy Klobuchar & Co. a good excuse to change their minds.

Yes, it's time to reform the Supreme Court — but not for the wrong reasons

Salon, by ERIC J. SEGALL, DECEMBER 4, 2018

Everyone agrees the Supreme Court wields too much power. But almost all the reform ideas are deeply flawed

In the wake of the national nightmare known as the Brett Kavanaugh confirmation hearings, we have seen an avalanche of proposals by Supreme Court watchers, pundits and experts with the express purposes of weakening the court and trying to turn down the political temperature of future confirmation battles. Most of these court-altering suggestions have come, not surprisingly, from the left. After all, as many have observed, the nation's highest court is likely to be a conservative bulwark for the next 20 to 40 years. These proposals include ending life tenure, reforming recusal practices, requiring a supermajority vote to overturn laws and even stripping the Supreme Court of jurisdiction over various controversial areas of constitutional law.

But weakening the court because of its current political makeup is looking for answers in all the wrong places. This country needs to restructure the U.S. Supreme Court not because it is too conservative, too liberal or even too moderate. We need to change the court because it wields far too much power and influence regardless of which political side benefits from its decisions. In 2012, I made many of the suggestions listed above in the final chapter of my book "Supreme Myths: Why the Supreme Court is not a Court and its Justices are not Judges." At the time, most liberals strongly opposed these ideas while conservatives were slightly, though not dramatically, more sympathetic. Now the urge to reform comes mostly from the left -- but not for the right reasons.

Why do we allow judges to overturn laws voted on by the people? The original reason, and still today the most persuasive rationale, for allowing federal judges to invalidate laws was stated succinctly by Alexander Hamilton in the most important Federalist Paper discussing judicial review, No. 78:

The courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

In a representative democracy, governed by a written constitution, it makes perfect sense for an independent judiciary to enforce that document's written limitations when they are violated by the other branches of government. But notice the limitation on this power articulated by Hamilton; before judges should overturn legislation there must be an

"irreconcilable variance" between the law and the Constitution. Another way that some people at the time thought of this standard was that judges should act with humility and modesty when reviewing legislative acts, and only invalidate them in cases of "clear error."

What the founding fathers did not anticipate was that the Supreme Court would over time assume the authority to use vague constitutional limitations, which in most situations are more accurately called aspirations, to legislate morality for the American people. Where the Constitution places a clear limit on our structure of government, such as that the president must be 35 years old, or that all impeachments must begin in the House and be tried in the Senate, it makes sense to speak of "irreconcilable variances." And where the history behind a vague text is clear, such as the First Amendment's obvious prohibition on prior restraints, it might make sense to allow the court to strike down what Jed Rubenfeld has called "paradigm" constitutional violations. But conceding all that is worlds away from allowing the Supreme Court to use imprecise constitutional text and contested historical accounts of that text to resolve many of our country's most difficult and controversial issues of social, economic, educational and political policy.

From 1903 to 1936, the court took it upon itself to limit progressive calls for state and federal laws to regulate workplace safety, minimum wages, overtime rules and a myriad of other statutes dealing with workers' rights. The justices struck down hundreds of statutes dealing with these issues despite no clear text or history supporting that laissez-faire ideology. All that overreaching led to a liberal backlash and the court's retreat from the economic arena but not before many laws were overturned due to political differences, rather than violations of text or history.

The court mostly stayed out of politics between 1936 and the early 1960s except for ending formal legal segregation in public schools (substantial de facto segregation of course exists to this very day). But starting around 1963, the liberal and aggressive Warren and early Burger courts issued a series of social and moral decisions redefining how much of the country governed itself, culminating, of course, with Roe v. Wade in 1973. As my new book, "Originalism as Faith," points out, the justices didn't even try in many of these cases to support their opinions through constitutional text or history. Many of these decisions, such as Griswold v. Connecticut, which overturned a state law banning contraception devices, were less than 10 pages long and read more like edicts than judicial opinions.

There was a predictable backlash to the court's many liberal opinions and once conservatives seized the court, they too started overturning laws without any showing of an "irreconcilable variance" between the laws they were striking down and the Constitution. The court has inserted itself over the last 50 years in our country's politics by invalidating laws dealing with affirmative action, gay rights, difficult free speech questions impossible to resolve on the basis of text or history, voting rights, districting maps (one person, one vote), congressional power to enforce the 14th Amendment and numerous other disputes that in most countries would be voted on by the people, not left to the political preferences of life-tenured judges. Where the Constitution is not clear, and history contested, the justices have no legal basis to choose one outcome over the over other than their own collective ideologies.

All this explains why the confirmation process for Supreme Court justices has become so political and heated. They are not judges resolving legal disputes but a political veto council exercising authority over all 50 states and the federal government. Conservatives are happy with the court today, but there will come a time when either liberals will be in charge again or the political backlash to the court's decisions will severely hurt the Republican Party, as the backlash to Roe has damaged Democrats. Either way, these political swings hurt democracy and our ability to govern ourselves.

We need a bipartisan effort to restructure the Supreme Court of the United States to weaken it for all time. Term limits would help, but are not nearly enough. Structural reform to make it harder for the court to overturn laws is essential, whether it takes the form of a supermajority voting requirement or jurisdiction-stripping, meaning limiting the court's influence in areas where text and history cannot resolve hard constitutional questions.

I proposed these limitations years before the court turned sharply to the right but it is even more important today, not because of that turn but because an overly ideological court, in either direction, not only distorts our politics for the worse but allows unelected, life-tenured judges to dictate policy even when no reasonable person could argue there is an "irreconcilable variance" between the decisions made by elected officials and our written Constitution. Giving that authority to judges, liberal, conservative or moderate, is not only inconsistent with the original plan of those who first governed our country, it is a terrible idea -- as we learn every time our polity must endure yet another confirmation process nightmare.

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The Supreme Court's Legitimacy Crisis

The New York Times, by Michael Tomasky, Oct. 5, 2018

It's not about Brett Kavanaugh's alleged behavior. It's about justices who do not represent the will of the majority.

Test your Supreme Court knowledge: In the entire history of the court, exactly one justice has been

a) nominated by a president who didn't win the popular vote and

b) confirmed by a majority of senators who collectively won fewer votes in their last election than did the senators who voted against that justice's confirmation.

Who was it?

If you're like me, your mind started leapfrogging back to the 19th century. After all, this sounds like one of those oddities that was far more likely to have happened when our democracy was still in formation.

So let's see … John Quincy Adams lost the popular vote in 1824. Someone he named to the Court? Or Rutherford B. Hayes — lost to Samuel J. Tilden in 1876, then was named president by a rigged commission. Maybe him?

It's neither of those.

Then perhaps it's a trick question? George W. Bush lost the popular vote in 2000. Good try, but he didn't name a court nominee until his second term, when he won the popular vote.

No — it turns out you don't have to go back very far at all. The answer is Neil Gorsuch.

Donald Trump won just under 46 percent of the popular vote and 2.8 million fewer votes than Hillary Clinton. And Judge Gorsuch was confirmed by a vote of 54-45. According to Kevin McMahon of Trinity College, who wrote all this up this year in his paper "Will the Supreme Court Still 'Seldom Stray Very Far'?: Regime Politics in a Polarized America," the 54 senators who voted to elevate Judge Gorsuch had received around 54 million votes, and the 45 senators who opposed him got more than 73 million. That's 58 percent to 42 percent.

And if the Senate confirms Brett Kavanaugh soon, the vote is likely to fall along similar lines, meaning that we will soon have two Supreme Court justices who deserve to be called "minority-majority": justices who are part of a five-vote majority on the bench but who were nominated and confirmed by a president and a Senate who represent the will of a minority of the American people.

And consider this further point. Two more current members of the dominant conservative bloc, while nominated by presidents who did win the popular vote, were confirmed by senators who collectively won fewer popular votes than the senators who voted against them.

They are Clarence Thomas, who was confirmed in 1991 by 52 senators who won just 48 percent of the popular vote, and Samuel Alito, confirmed in 2006 by 58 senators who garnered, again, 48 percent of the vote.

And finally, ponder this. If fate were to hand President Trump one more opportunity to put a justice on the court before 2021, it would almost certainly again be a bitterly contested and close vote, and it would probably leave us with a majority of Supreme Court justices, five, who were confirmed by senators who received a minority share of the vote.

This sort of thing has never happened, by the way, with nominees advanced by Democratic presidents. First, no Democratic president has ever taken office after losing the popular vote. And second, justices nominated by Democrats have never been confirmed by such narrow margins. Of the four liberals currently on the court, all received 63 votes or more, from senators winning and representing clear majorities of their voters.

If you believe Christine Blasey Ford over Judge Kavanaugh, and if you believed Anita Hill in 1991, you are understandably enraged over the fact that we are about to have two Supreme Court justices who made it to the bench under broad suspicion that they did so having lied about their sexual histories and their treatment of women.

But I implore you to take a moment to be angry about all this, too. This is a severe legitimacy crisis for the Supreme Court.

The court, as Professor McMahon notes, was intended never to stray far from the mainstream of American political life. The fact that justices represented that mainstream and were normally confirmed by lopsided votes gave the court's decisions their legitimacy. It's also why past chief justices worked to avoid 5-4 decisions on controversial matters: They wanted Americans to see that the court was unified when it laid down a major new precedent.

But now, in an age of 5-4 partisan decisions, we're on the verge of having a five-member majority who figure to radically rewrite our nation's laws. And four of them will have been narrowly approved by senators representing minority will.

How has this happened? Conservatives would look at the numbers I've presented and say: "Look, this shows that our side is more reasonable than the other side. Republicans vote for nominees they don't like in greater numbers than Democrats do. We're the civil ones."

The real explanation, of course, is quite different. Bill Clinton and Barack Obama did not nominate jurists who had left

paper trails of judicial extremism or dropped other hints that their jurisprudence would be radical.

Republican presidents have. None more so than Mr. Trump, who seems to have outsourced the judicial-selection process to right-wing groups like the Federalist Society and the Heritage Foundation and twice nominated judges with an eye cast largely toward how happy they would make conservative evangelicals.

And so Republicans are doing to the Supreme Court what they have already accomplished in Congress. There, through aggressive gerrymandering, they've muscled their way to a majority even as their candidates have sometimes received collectively fewer votes than Democrats. And now they're doing it to the court, by breaking the rules (Merrick Garland) and advancing nominees who are confirmed by legislators representing minority support.

Judge Kavanaugh's alleged youthful behavior is a scandal, but this legitimacy crisis is one too, and with arguably greater consequences. Mitch McConnell, the Senate majority leader, may not care about them. But Chief Justice John Roberts, and for that matter Brett Kavanaugh, surely should.

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Beyond the confirmation circus

The Washington Times, By Peter Morici - - Wednesday, October 10, 2018

If the Kavanaugh nightmare demonstrates anything, it is the need to reform how U.S. Supreme Court justices are selected. This requires coming to terms with the court's historic role.

Most cases before the court are not about great constitutional issues but rather merely tough disagreements about the interpretations of federal statutes, and conflicts among the federal circuits and state courts on a wide range of civil, criminal and corporate issues. Most are beyond the comprehension of practicing attorneys, because the latter are relegated to intellect-dousing, hyper-specialization in areas like real estate, finance, patents and the like.

To deal with the range of issues that comes to the court, we should select from among generalists that sit on the appellate courts and outstanding scholars with robust experience and interests. Lawyers who demonstrate an unusual appetite and capacity for variety and the energy and insight to craft durable, though not eternal, decisions.

In recent decades, presidents have shifted remarkably well in that direction — Justices Brett Kavanaugh and Elena Kagan offer examples from each side.

In contrast, when President Eisenhower appointed Chief Justice Warren, the court was genuinely political. Warren was governor of California with no judicial experience, and he joined three justices who were former senators and two who served as attorney general for the presidents who appointed them.

These days, they may be textualists or otherwise but by and large, the justices are outstanding legal scholars with a passion for fairness — but what is fair?

Those ethical and moral judgments should be the province of the political branches, but since the dawn of the Republic members of Congress and presidents have been at war among themselves about states' rights, race and civil rights. All reflecting deep divisions among Americans drawn across regional, ethnic and class lines.

Going well back into the 19th century, the Supreme Court has settled political issues Congress could not resolve and conflicts among federal circuit decisions and state laws that impose unworkable requirements on individuals and businesses.

Generally, it does so well but sometimes rather badly. Plessy v. Ferguson (1896) upheld racial segregation in schools, and Dred Scott (1857) limited federal latitude to prohibit slavery and protect the civil rights of free blacks in Northern states and territories — ultimately that contributed to Lincoln's election and the Civil War.

Liberals who lean so heavily on stare decisis regarding Roe (1973) and Planned Parenthood v. Casey (1992) ought to remember under that doctrine Brown v. Board of Education (1954) should never have happened and schools should still be segregated.

Abortion, gay marriage and the latitude of regulatory agencies to impose CO2 emission rules when Congress has failed to act are why we fight over who gets on the court — not judicial competence.

It was laughable when Sen. Mazie Hirono said that Christine Blasey Ford's charges must be true effectively because Brett Kavanaugh embraces conservative legal views and Sen. Kamala Harris accepted that a mere accusation of sexual misconduct was enough to disqualify, because both are trained lawyers. But it was understandable given the political stakes.

These days, presidents don't send up unqualified scholars, and Supreme Court confirmations are political campaigns — so anything goes, including character assassination.

The Democrats and especially liberals view losing elections as the papacy would church burnings. Liberal moral and

political judgments are not merely different than those of conservatives. Rather, liberals are holy and conservatives' are evil — the latter's beliefs should be classified among the heresies of the vilest personalities.

Consequently, Democrats have declared Donald Trump invalid and all Supreme Court appointees he may send up are illegitimate and fair target for the most false and destructive attacks.

Recognizing the inherently political role of the court and that liberals no longer feel bound in their conduct by elections when they lose, the best we can do is assign each political party an equal number of appointments. The president could alternate between consulting with the Democratic and Republican members of the Senate Judiciary Committee much like the possession arrow in college basketball.

We simply can't expect decent men and women to accept nominations or our polity to survive if the cynical tactics of Sen. Dianne Feinstein and her co-conspirators are to keep occurring. The last time passions were this high, the Civil War resulted — and don't for a moment think this, too, can't end in violence.

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Judicial Procedures Reform Bill of 1937

From Wikipedia, the free encyclopedia

The Judicial Procedures Reform Bill of 1937[1] (frequently called the "court-packing plan")[2] was a legislative initiative proposed by U.S. President Franklin D. Roosevelt to add more justices to the U.S. Supreme Court. Roosevelt's purpose was to obtain favorable rulings regarding New Deal legislation that the court had ruled unconstitutional.[3] The central provision of the bill would have granted the President power to appoint an additional Justice to the U.S. Supreme Court, up to a maximum of six, for every member of the court over the age of 70 years and 6 months.

In the Judiciary Act of 1869 Congress had established that the United States Supreme Court would consist of the Chief Justice and eight associate justices. During Roosevelt's first term the Supreme Court struck down several New Deal measures as being unconstitutional. Roosevelt sought to reverse this by changing the makeup of the court through the appointment of new additional justices who he hoped would rule his legislative initiatives did not exceed the constitutional authority of the government. Since the U.S. Constitution does not define the size of the Supreme Court, Roosevelt pointed out that it was within the power of the Congress to change it. The legislation was viewed by members of both parties as an attempt to stack the court, and was opposed by many Democrats, including Vice President John Nance Garner.[4][5] The bill came to be known as Roosevelt's "court-packing plan".[2]

In November 1936, Roosevelt won a sweeping reelection victory. In the months following, Roosevelt proposed to reorganize the federal judiciary by adding a new justice each time a justice reached age seventy and failed to retire.[6] The legislation was unveiled on February 5, 1937, and was the subject of Roosevelt's 9th Fireside chat of March 9, 1937.[7][8] His claim "can it be said that full justice is achieved when a court is forced by the sheer necessity of its business to decline, without even an explanation, to hear 87% of the cases presented by private litigants?" Publicly denying the President's statement, Chief Justice Charles Evans Hughes, reported "there is no congestion of cases on our calendar. When we rose March 15 we had heard arguments in cases in which cert has been granted only 4 weeks before. This gratifying situation has obtained for several years".[9] Three weeks after the radio address the Supreme Court published an opinion upholding a Washington state minimum wage law in West Coast Hotel Co. v. Parrish.[10] The 5–4 ruling was the result of the apparently sudden jurisprudential shift by Associate Justice Owen Roberts, who joined with the wing of the bench supportive to the New Deal legislation. Since Roberts had previously ruled against most New Deal legislation, his support here was seen as a result of the political pressure the president was exerting on the court. Some interpreted his reversal as an effort to maintain the Court's judicial independence by alleviating the political pressure to create a court more friendly to the New Deal. This reversal came to be known as "the switch in time that saved nine"; however, recent legal-historical scholarship has called that narrative into question[11] as Roberts's decision and vote in the Parrish case predated both the public announcement and introduction of the 1937 bill.[12]

Roosevelt's legislative initiative ultimately failed. The bill was held up in the Senate Judiciary Committee by Democratic committee chair Henry F. Ashurst who delayed hearings in the Judiciary Committee saying, "No haste, no hurry, no waste, no worry—that is the motto of this committee."[13] As a result of his delaying efforts, the bill was held in committee for 165 days, and opponents of the bill credited Ashurst as instrumental in its defeat.[5] The bill was further undermined by the untimely death of its chief advocate in the U.S. Senate, Senate Majority Leader Joseph T. Robinson. Contemporary observers broadly viewed Roosevelt's initiative as political maneuvering. Its failure exposed the limits of Roosevelt's abilities to push forward legislation through direct public appeal. Public perception of his efforts here was in stark contrast to the reception of his legislative efforts during his first term.[14][15] Roosevelt ultimately prevailed in establishing a majority on the court friendly to his New Deal legislation, though some scholars view Roosevelt's victory as pyrrhic.