

CONTINGENT DESIGN & THE COURT REFORM DEBATE

G. Michael Parsons

Once unimaginable, the prospect of Supreme Court reform seems increasingly real. Republican presidents have appointed fifteen of the last twenty Justices despite losing the popular vote in seven of the last eight elections, and these figures can no longer be chalked up to the timing of vacancies alone. After blocking President Obama's nominee for Justice Scalia's seat for almost a year to purportedly give "the American people a voice in selecting their next Supreme Court Justice," Senate Republicans filled Justice Ginsburg's seat with President Trump's nominee mere weeks before the 2020 election. With Democrats now in control, the debate has turned to what new policies might replace the old, defunct norms.

According to conventional wisdom, this debate revolves around one task: identifying the reform plan that best threads a needle between political reality and legal rigor. This is because Congress will presumably get "one shot" before the benefits of time and inertia shift to the Court itself. The consequences of this framing are profound: reformers water down popular policies to protect against invalidation, court-packing dominates the debate based on its constitutional credentials, and the chance to achieve real change quickly starts to slip away.

This Article challenges the premise Congress must take such a passive approach to judicial review, expressing policy preferences in seriatim fashion (and being "sent back to the drawing board" each time a policy fails). This approach merely reflects institutional habits. And by failing to question these habits, reformers forfeit an enormous amount of legislative power.

Congress can reclaim this power by strategically structuring judicial review using two methods.

First, Congress can constitutionally safeguard its reform agenda by layering its policy preferences from most politically desirable to most legally defensible using "fallback" (or "backup") law. If the Court holds the first preference unconstitutional, the second will automatically take its place—and so on. Thus, the Court shoulders the inertial cost of its own unpredictability. While it retains the power to evaluate each layer's lawfulness, it cannot wage a war of attrition against Congress.

Second, Congress can politically safeguard its power by designing appellate procedures that consolidate and prioritize all challenges to the law. By giving the same coalition that enacted the law a chance to respond to the Court's decision, this approach insures against the tail risk of total invalidation and prevents the Court from "running out the clock" against Congress.

* Program Affiliate Scholar, New York University School of Law. J.D. 2013, Georgetown University Law Center; A.B. 2008, Davidson College. I thank Gabe Roth, Keshav Poddar, and Professors Tara Leigh Grove, Mark Tushnet, Sam Moyn, and Dan Epps for their helpful and insightful comments and feedback. I also thank Rachel Baron for her tremendous research assistance and many contributions to this article. Finally, I am grateful to the staff of the *University of Pennsylvania Journal of Constitutional Law* for their excellent suggestions and professional work guiding this symposium contribution to print.

By identifying how existing court-reform proposals price in the inertia- and time-related risks of a passive approach and by proactively neutralizing those risks, this more strategic frame opens up new reform possibilities. It also offers two warnings. First, because the time available to Congress is a source of institutional power, Congress should begin its work straightaway and enact a reform package as early as possible in the current session. Second, Congress should avoid pursuing a single “best” policy given that this could perversely shrink the space for agreement. Instead, Congress should layer its reform proposals in whatever way produces the strongest coalition and the most durable plan.

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INTRODUCTION

Once a third rail in American politics, the prospect of Supreme Court reform is now mainstream—and it’s easy to see why. The traditions and conventions we typically associate with judicial independence are historically contingent,¹ and the past few years have seen a surge in norm-breaking by Republicans² to an extent that has made Democratic complacency unacceptable, including to longtime skeptics of court reform.³

Calls for court packing, for example, have quickly gone from unthinkable radical to part of an “everything is on the table” posture embraced by

1 Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 517 (2018) [hereinafter Grove, *Judicial Independence*] (arguing that “the current conventions of judicial independence depend in part on narratives crafted by our political and legal culture”).

2 Examples include routine filibustering to block judicial nominees (in the minority); ending “blue slips,” where Senators can informally veto home-state nominees; foregoing ABA review of nominees; refusing to hold hearings on President Obama’s nominee to fill Justice Scalia’s seat, and confirming President Trump nominees after his loss. See E.J. Dionne Jr. et al., *How the GOP Prompted the Decay of Political Norms*, THE ATLANTIC (Sept. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/09/gop-decay-of-political-norms/540165/> (The Republican party has seen a “deterioration in the standards of political behavior” take root); Dahlia Lithwick & Tobias Barrington Wolff, *Mitch McConnell Is Cranking Out Lame-Duck Judges*, SLATE (Dec. 17, 2020, 6:43 PM), <https://slate.com/news-and-politics/2020/12/mitch-mcconnell-lame-duck-judges.html> (Republican Senator Mitch McConnell “push[ed] through yet more judges even after his party has lost the presidency in a national election”). Such moves are sometimes referred to in the literature as “constitutional hardball.” See Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004) (“[I]t consists of political claims and practices—legislative and executive initiatives—that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in tension with existing *pre*-constitutional understandings.”).

To be sure, Democratic responses contributed to this decay in norms (such as Senate Majority Leader Harry Reid’s disposal of the filibuster for all lower court appointments), and accusations of “unprecedented” behavior admittedly represent “creative act[s] of interpretation” that reflect political judgments. See generally Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96 (2017). Nonetheless, there is a growing consensus that Republicans have more readily embraced these hardball tactics over the last few decades. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 920–26 (2018).

3 Various 2020 Democratic presidential candidates showed interest in altering the Court despite the topic having “until recently remain[ed] on the fringes of the debate.” Burgess Everett & Marianne Levine, *2020 Dems Warm to Expanding Supreme Court*, POLITICO (Mar. 18, 2019, 5:04 AM), <https://www.politico.com/story/2019/03/18/2020-democrats-supreme-court-1223625> (including Senators Elizabeth Warren and Kirsten Gillibrand). See also Quinta Jurecic & Susan Hennessey, *The Reckless Race to Confirm Amy Coney Barrett Justifies Court Packing*, THE ATLANTIC (Oct. 4, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/skeptic-case-court-packing/616607/> (the most common suggestion has been to add two seats to the Court).

Democratic leadership.⁴ Even Joe Biden—a practiced centrist initially reluctant to wade into the debate on the campaign trail⁵—eventually pledged to create a commission to study what reforms might be available to fix a system that had grown “out of whack.”⁶

With Biden’s election and Democratic control of Congress,⁷ the debate has now shifted from a question of “whether” to questions about “what” and “when.” Will President Biden’s commission help create consensus or just waste precious time?⁸ Can Democrats construct a political coalition in 2021 or does the thin margin of control in the Senate doom meaningful reform?⁹

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- 4 See Jeff Shesol, *The Case Against Packing the Court*, NEW REPUBLIC (Oct. 14, 2020), <https://newrepublic.com/article/159691/case-against-packing-supreme-court> (quoting Senate Minority Leader Chuck Schumer that “[n]othing is off the table” if Republicans appoint Barrett to fill Ginsburg’s seat before the 2020 election); see also Andrew K. Jennings & Athul K. Acharya, *The Supreme Court and the 177th Congress*, 11 CALIF. L. REV. ONLINE 407, 408–09 (2020) (“[P]rominent members of Congress, including Representative Jerry Nadler (the chair of the House Judiciary Committee, which has jurisdiction over federal courts), have suggested that expanding the Court would be an appropriate response to a pre-election or lame-duck confirmation.”); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 2, 3 n.1 (forthcoming 2021) (quoting Ian Millhiser, *Vox’s* Supreme Court reporter, for the point that court-packing would have seemed “extraordinarily radical” only “two years ago”).
- 5 See generally EVAN OSNOS, *JOE BIDEN: THE LIFE, THE RUN, AND WHAT MATTERS NOW* (2020) (examining Joe Biden’s quest for the presidency and how history placed him at “pivotal moments of modern history”).
- 6 Sam Gringlas, *Asked About Court Packing, Biden Says He Will Convene Commission to Study Reforms*, NPR (Oct. 22, 2020, 9:46 AM), <https://www.npr.org/2020/10/22/926607920/asked-about-court-packing-biden-says-he-will-convene-commission-to-study-reforms>.
- 7 Given that Vice President Kamala Harris is not a member of the Senate, the Senate is technically a “tied Senate” despite Democrats having effective majority control given Harris’s tie-breaking role. See Louis Jacobson, *How Will the Senate Work Under a 50-50 Split?*, POLITIFACT (Jan. 7, 2021), <https://www.politifact.com/article/2021/jan/07/how-will-senate-work-under-50-50-tie/> (“[T]here is no written roadmap that Senate leaders must follow.”).
- 8 See Niels Lesniewski, *Biden’s Court Commission Draws Ire of Court-packing Critics and Supporters*, ROLL CALL (Oct. 22, 2020, 11:24 AM), <https://www.rollcall.com/2020/10/22/bidens-court-commission-draws-ire-of-court-packing-critics-and-supporters/> (describing President Biden’s desire to create a commission).
- 9 Democratic Senator Joe Manchin, who “[i]n a deadlocked Senate . . . could be the deciding vote on a wide range of issues,” opposes packing the Court. Salena Zito, *Joe Manchin Digs In: ‘Under No Circumstances’ Would Break Tie to Nuke Filibuster and Pack Court*, WASHINGTON EXAMINER (Nov. 11, 2020, 6:58 AM), <https://www.washingtonexaminer.com/opinion/joe-manchin-digs-in-under-no-circumstances-would-break-tie-to-nuke-filibuster-and-pack-court>. See also Matt Ford, *The Supreme Court Is in Charge Now*, THE NEW REPUBLIC (Nov. 13, 2020), <https://newrepublic.com/article/160178/supreme-court-biden-judicial-gridlock> (“Even if [Democrats win the Georgia runoff], court reform is effectively dead for the foreseeable future. Democrats would have had an uphill battle to pack the Supreme Court even with a substantial majority in the House

Should reformers seek changes to the Court’s personnel or to its underlying power?¹⁰ And which option (among the several available in each category) should Congress ultimately pursue, given the political and legal risks and benefits of each?¹¹

While these questions are vital, I argue in this Article that they are being artificially constrained and distorted by an unnecessary set of assumptions—an implicit framing of the debate in which Congress imagines itself to be a passive actor. This framing assumes (1) that Congress can only express singular preferences about court design in seriatim fashion (with Congress “sent back to the drawing board” to enact new legislation if the Court finds the first policy unconstitutional), and (2) that the Court will review legislation under the procedures (and at the pace) of typical litigation. These two assumptions silently cede an enormous amount of institutional power—the power of inertia and time—from Congress to the Court. And taken together or separately, they reflect a surprising self-abnegation, forfeiting key sources of legislative leverage.

In this Article, I challenge this passive account and explain how Congress can proactively set the terms of the debate to meet the Court on more level ground. Congress could do so in two ways: (1) using contingent provisions (otherwise known as “fallback” or “backup” law) to layer its design preferences from most politically desirable to most constitutionally defensible, and (2) designing specific appellate procedures to consolidate and prioritize challenges so that the same political coalition that enacted the court-reform package has a chance to respond to the Court’s decisions about that law.

By identifying how commentators have strategically (and unnecessarily) discounted policy options based on their relative inertia- and time-related risks, this proactive framing of the debate opens up a range of new political and legal options by greatly expanding the bargaining zone available to potential political coalition members.

and a few extra seats in the Senate; the current margins will make it impossible even if they secure control of the Senate.”).

10 See Doerfler & Moyn, *supra* note 4, at 1–2 (“Progressives are taking Supreme Court reform seriously for the first time in almost a century.”); Jennings & Acharya, *supra* note 4, at 407–10 (discussing the 117th Congress’s legislative options to “expand the court, limit its certiorari discretion, restrict its jurisdiction, or reroute its jurisdiction” and concluding that any of these responses is possible).

11 See *infra* text accompanying notes 42–52 (listing current set of statutory reform proposals). Like Professors Doerfler and Moyn, this Article focuses on statutory reforms options given the likely infeasibility of constitutional reform. See Doerfler & Moyn, *supra* note 4, at 4, n.3.

But first, how did we get here? The last meaningful discussion of Supreme Court reform occurred in the 1930s and long stood as “a cautionary tale more than an inspiring precedent.”¹² Conservative and progressive scholars alike floated ideas to rein in judicial power over the years, but outside the academy the general shape and structure of the Court has remained unchallenged since President Franklin D. Roosevelt’s failed court-packing attempt.¹³

Yet as Professor Tara Leigh Grove observes in her recent article charting our conventions about judicial independence, “[w]hat we currently view as utterly ‘out of bounds’” is highly contingent on historical developments and prevailing social and political forces.¹⁴ There is nothing inevitable about the particular “shared norms” that developed since the 1930s, and nothing to keep them norm-like when they cease being shared.

Our current period of rapid norm-transformation is perhaps best explained (and bookended) by two statements by then-Senate Majority Leader Mitch McConnell.¹⁵ Following the unexpected death of Justice Antonin Scalia, the first statement came on February 13, 2016 when McConnell vowed to block any nominee put forward by President Barack Obama to fill Scalia’s

12 Doerfler & Moyn, *supra* note 4, at 4. *See also* Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 132 (2010) (describing the conventional wisdom that “FDR lost the battle, but won the war, since the Court . . . acceded to the New Deal’s constitutionality,” but observing that “FDR’s legislative assault on the Court destroyed his political coalition, in Congress and nationally The progressive domestic policy agenda did not recover until 1964”).

13 Doerfler & Moyn, *supra* note 4, at 9–11.

14 Grove, *Judicial Independence*, *supra* note 1, at 545. *Cf.* Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), <https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/> (“Three years ago, the idea that the [Affordable Care Act’s] mandate to purchase health insurance might be unconstitutional was, in the view of most legal professionals and academics, simply crazy. . . . Yet in three years’ time, the argument . . . has moved from crazy to plausible . . .”).

15 There are, to be sure, deeper and longer trends at play as well. Professors Doerfler and Moyn posit the 2008 financial crisis led to the rise of a “political and academic left” with a more ambitious agenda and a more discerning appreciation for the structural bulwarks blocking progressive change beyond the edge of center-left liberalism. *See* Doerfler & Moyn, *supra* note 4, at 10. This trend followed an even longer forty-year campaign within conservative circles to make deeper inroads in legal academia and the courts. Maria Liasson & Barbara Sprunt, *As Supreme Court Nears Solid Conservative Majority, GOP Reaps Reward From “Long Game”*, NPR (Aug. 4, 2018, 7:00 AM), <https://www.npr.org/2018/08/04/632865899/as-supreme-court-nears-solid-conservative-majority-gop-reaps-reward-from-long-ga>. Even so, the willingness of establishment liberals to contemplate reform seems triggered by more recent events.

seat.¹⁶ While the partisan politics of this obstruction were obvious, the position at least came accompanied by a neutral patina to provide public cover: “The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president.”¹⁷

Over the next four years, however, McConnell’s judicial campaign was never far from the headlines as it became increasingly aggressive. Following through on his vow, McConnell blocked President Obama’s moderate nominee, Judge Merrick Garland, for 293 days,¹⁸ and confirmed conservative Justice Neil Gorsuch to the seat shortly after the election of President Donald Trump.¹⁹

Then the Court’s median “swing” vote, Justice Anthony Kennedy, decided to retire after hand-picking and personally suggesting his own successor: former Kennedy clerk and conservative judge, Brett Kavanaugh. Kavanaugh ascended to the seat following a confirmation battle in which he was credibly accused of sexual assault and offered shockingly partisan and vindictive testimony, calling the allegations against him “a calculated and orchestrated political hit” and “revenge on behalf of the Clintons.”²⁰

Finally, following the death of liberal stalwart Justice Ruth Bader Ginsburg, Senate Republicans scrambled to fill her seat in less than a month with yet-another reliable conservative: Justice Amy Coney Barrett. This sudden rush in the waning days of the 2020 presidential campaign²¹ put final lie to the Republican claim that they had blocked Garland’s nomination almost five

16 Burgess Everett & Glenn Thrush, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, POLITICO (Feb. 13, 2016, 9:56 PM), <https://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248>.

17 *Id.*

18 Jess Bravin, *President Obama’s Supreme Court Nomination of Merrick Garland Expires*, WALL ST. J. (Jan. 3, 2017, 5:23 PM), <https://www.wsj.com/articles/president-obamas-supreme-court-nomination-of-merrick-garland-expires-1483463952>.

19 Nina Totenberg, *Senate Confirms Gorsuch to Supreme Court*, NPR (Apr. 7, 2017, 2:47 PM), <https://www.npr.org/2017/04/07/522902281/senate-confirms-gorsuch-to-supreme-court>.

20 Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L. J. 148, 158-59 (2019).

21 Sahil Kapur et al., *Senate Confirms Amy Coney Barrett, Heralding New Conservative Era for Supreme Court*, NBC (Oct. 27, 2020, 6:47 AM), <https://www.nbcnews.com/politics/congress/amy-coney-barrett-set-be-confirmed-supreme-court-monday-n1244748>.

years prior based on “[a] long-standing tradition of not fulfilling a nomination in the middle of a presidential year.”²²

While Republicans’ disparate treatment of Garland and Barrett demonstrated that the norms governing appointments were no longer shared, McConnell’s closing statement following the confirmation of Justice Barrett removed all doubt: “A lot of what we’ve done over the last four years will be undone sooner or later by the next election . . . [but Democrats] won’t be able to do much about this for a long time to come.”²³

To be sure, nominations are (and long have been) a political affair, with partisan coalitions trying to lock in judges and Justices favorable to their agendas.²⁴ But the current confluence of judicial polarization,²⁵ judicial supremacy,²⁶ and judicial detachment from popular sentiment²⁷ has reached a new extreme. Today, five out of the six conservatives on the Court were appointed by Republican Presidents who lost the popular vote,²⁸ and the most recent three of those Justices were confirmed by Senators representing a

22 Russell Wheeler, *McConnell’s Fabricated History to Justify a 2020 Supreme Court Vote*, BROOKINGS INST. (Sept. 24, 2020), <https://www.brookings.edu/blog/fixgov/2020/09/24/mcconnells-fabricated-history-to-justify-a-2020-supreme-court-vote/> (quoting McConnell).

23 ‘*They Won’t Be Able to Do Anything About This’: McConnell Revels in Barrett Supreme Court Vote*, THE GUARDIAN (Oct. 25, 2020, 3:43 PM), <https://www.theguardian.com/law/2020/oct/25/mitch-mcconnell-amy-coney-barrett-supreme-court-republicans-democrats-mike-pence-covid>.

24 See, e.g., JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 77-80 (2020) (discussing “partisan entrenchment” in the federal judiciary).

25 NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 2 (2019) (observing that the Justices reflect the “polarization that has had its greatest effects in elite segments of American society”); Epps & Sitaraman, *supra* note 20, at 155-56 (“[T]he Supreme Court is perfectly polarized on party lines as well—for the first time, all Democrat-appointed Justices are reliably liberal and all Republican-appointed Justices are reliably conservative.”).

26 See BALKIN, *supra* note 24 at 69, 81-84 (observing that the partisan definitions of what counts as “judicial activism” or “judicial restraint” change with the cycle of political regimes, but that the Court’s power as a whole tends to grow through these cycles regardless).

27 See *infra* notes 28-29.

28 See Ronald Brownstein, *Fight over Ginsburg Succession Poses Stark Question: Can Majority Rule Survive in US?*, CNN (Sept. 20, 2020), <https://edition.cnn.com/2020/09/20/politics/ruth-bader-ginsburg-supreme-court-successor/index.html> (noting that in addition to the three justices nominated by President Trump, who lost the popular vote, two of the six “currently serving Republican-appointed justices were nominated by President George W. Bush, who also initially lost the popular vote. The final one, Clarence Thomas, was approved by senators who also represented less than half of Americans.”).

minority of the American people as well.²⁹ This new “minoritarian majority” of Justices exercises more power than ever before, and they exercise it in more reliably partisan ways than ever before.³⁰

In short, “[f]or the first time in living memory, the [C]ourt will be seen by the public as a party-dominated institution, one whose votes on controversial issues are essentially determined by the party affiliation of [their appointing] presidents.”³¹ And while the concept of judicial independence contemplates judges who can decide discrete cases free from the vicissitudes of public opinion once in office,³² it is incompatible with an appointment process that creates a *durable* partisan power center. Indeed, the most historically significant attempts to capture the courts in this way predate our modern conventions and resulted—predictably—in backlashes to *restore* whatever relative balance had been disrupted.³³

And so our current moment unfolds in predictable fashion. Overreach is met with correction. The violation of past norms unsettles expectations until new conventions create a new equilibrium. The current debates over court-reform design reflect this search: How will the new system promote stability? Fairness? Legitimacy?³⁴

These are important questions, no doubt. But so too is *how we get there*. This “new system” will not spontaneously arise: any changes must earn the support of a broad coalition, traverse both chambers of Congress, and then face the courts themselves. The power, policy, and politics of the result

29 Michael Tomasky, *The Supreme Court’s Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html> (written about the last two appointments before Barrett).

30 *See generally* DEVINS & BAUM, *supra* note 25.

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

32 *See infra* notes 112, 149–153 (noting that the core of judicial independence is “decisional independence” and discussing the institutional safeguards created to allow such independence).

33 *See* Grove, *Judicial Independence*, *supra* note 1, at 507–08 (highlighting partisan efforts to modify the composition of the Court in advance of the Jefferson and Johnson administrations); Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2751 (2020) (distinguishing the legitimacy assigned to modifications to the Court’s size arising from circuit-riding from those that were primarily catalyzed by partisan motivations).

34 *See, e.g.*, Epps & Sitaraman, *supra* note 20, at 152 (noting that any proposal “needs to be stable going forward” in order to create “a fair equilibrium” and also evaluating proposals based on fairness). *But cf.* Doerfler & Moyn, *supra* note 4, at 12–13 (critiquing definitions of “fair-dealing” that rely on assumptions of judicial non-partisanship or neutrality and aim to re-legitimate judicial power).

depend on the power, policy, and politics of the transition. The terms of that transition are our focus here.

Part I identifies how the court reform debates to date have implicitly adopted a view of Congress that renders it a passive observer in the transition process. By unconsciously operating within this frame, legislators unilaterally relinquish otherwise-powerful sources of political consensus and institutional leverage. The passive framing also shapes and prelimits the options available to court reformers and warps comparisons between those options in ways that are avoidable once the assumptions underpinning the passive framing are let go.

Part II explains how Congress can assert itself more strategically and proactively in the interbranch dialogue over court reform by enacting legal and political safeguards to govern the terms of the transition process and the accompanying interbranch dialogue. These include layering multiple contingent reforms via a set of “fallback” or “backup” provisions (to ensure overall constitutionality and to offset the risks associated with institutional inertia) as well as designing appellate procedures and prioritization requirements (to prevent the Judiciary from “waiting out” the political coalition that enacted the initial measure).

While none of the methods set out in Part II are entirely novel, they have not been a part of the court reform debate and can play a particularly powerful and unique role in this context. Indeed, that these approaches are uncontroversial is an important source of their legal and political power. The active account reveals that the high stakes and high risks currently associated with various standalone reform proposals are largely a byproduct of institutional advantages that are imputed to the Court rather than inherent.

Part III then offers an example of how a contingent approach to court reform might look, explores some benefits of the particular layers proposed, and anticipates potential objections to its layered design.

I. PASSIVE FRAMING: THE SELF-IMPOSED LIMITS OF THE TRADITIONAL COURT REFORM DEBATES

Over the past year, commentators, elected officials, and political candidates have contributed to a surge in debate over various court reform proposals and their merits. To some extent, this discussion incorporates the

challenges of transition, with commentators designing and weighing options based on the political and legal risks posed by each option.³⁵

Yet, at a deeper level, all of these discussions reflect a set of shared assumptions about how Congress must structure legislation and how the Court will review it. I call this set of assumptions the “passive frame,” and its fundamental premise is simple: the task facing Congress is to identify a singular reform plan that represents the best possible combination of political reality, constitutional defensibility, and institutional sufficiency.

Why is the debate framed in this way? Because commentators presume Congress will only have “one shot” to get its proposal right at the time of enactment.³⁶ Once Congress enacts its plan, the institutional benefits of time and inertia will shift to the Court—the institution that will ultimately decide the plan’s fate.³⁷ The consequences of this framing on the debate are profound.

If Congress overshoots its mark and enacts a plan that the Court finds unconstitutional, Congress will have spent a vast amount of political capital for nothing. Not only might Congress lack the ability to gear back up and enact a new plan (given shifting electoral pressures and competing political priorities), but the slow pace of litigation also means that the political coalition that enacted the plan may no longer exist due to intervening elections. “Congress,” after all, changes every two years. The Court does not.

If Congress undershoots the mark, however, the cost of adequately anticipating the Court’s predilections may simply be inefficacy: a weak plan that fails to adequately set a new norm (or, perhaps, a plan so tepid that no coalition finds it worth enacting in the first place).

35 See, e.g., Epps & Sitaraman, *supra* note 20, at 172–204 (discussing and offering various proposals for Court reform); see also Doerfler & Moyn, *supra* note 4, at 25–71 (analyzing the multitude of justifications for Court reform from both “personnel” and “disempowering” perspectives). *But see* Epps & Sitaraman, *supra* note 20, at 171 (suggesting a potential backup option in the form of a “threat” that might cause the Court to “blink before striking down a reform measure as unconstitutional,” such as adding “five new Justices” or removing the Court’s jurisdiction). For the reasons set out in Part III.C.3., such an approach might be more vulnerable to constitutional challenge in its own right.

36 See *supra* Parts I.A. & I.B.

37 I say this as a practical and predictive manner, not as a prescriptive manner. I also bracket questions of justiciability in this piece, including standing and the political question doctrine. Court reformers of all stripes assume that a Court determined to find a “hook” for review will be able to do so. That makes evaluating the merits of plans a necessary endeavor, even if solely for strategic and political insurance.

This conundrum reveals how heavily the institutional advantages of inertia and time influence Congress's calculus. Commentators believe the Court has inherent leverage in any fight over its future form. First, the Court can wage a war of attrition, rejecting proposals seriatim until Congress simply relents. Second, the Court can "run out the clock," managing its docket to slow down review of the legislation and "wait out" the political coalition that enacted the initial reform.

Yet these supposed institutional advantages are not inevitable. Instead, they result from various players (judicial, legislative, academic) settling into patterns associated with, but not demanded by, judicial supremacy. Identifying these trappings of judicial supremacy helps us to prevent imputing more power to the Court than it deserves or has traditionally claimed. For even if one believes (rightly or wrongly)³⁸ that the Supreme Court does or should have *interpretive* supremacy over the substantive meaning of the Constitution, one need not subscribe to any broader view of *institutional* supremacy or power.

Congress still retains a robust set of powers to structure the terms of its interbranch dialogue with the Court—powers that have been left on the table to date. By overlooking the effect of these powers on the larger court reform debate, scholars and elected officials are unintentionally prelimiting their universe of potential design options and unnecessarily constricting their ability to form the broadest possible political coalition.

In the rest of Part I below, I provide some examples of how the passive view of Congress not only shapes the design of individual court reforms but also impacts the comparison between those design options, including which designs seem worth pursuing at all.

A. *The Impact on Option Design*

As Professors Ryan Doerfler and Samuel Moyn observe in a recent article, court reform proposals generally fall into one of two categories: changes to the Court's *personnel* or changes to the Court's *power*.³⁹

38 For discussions of popular constitutionalism and departmentalism, see generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 *LAW & CONTEMP. PROBS.* 105 (2004).

39 Doerfler & Moyn, *supra* note 4, at 17-18. See also Jennings & Acharya, *supra* note 4, at 410 (identifying two court reform options that affect personnel and two that affect jurisdiction).

Personnel reforms “propose to alter the Supreme Court’s partisan or ideological composition”⁴⁰ to help protect the Court’s legitimacy (“that is, the degree to which it is perceived as legitimate by the American people”).⁴¹ Examples of personnel proposals include court-packing,⁴² panel systems,⁴³ senior-status requirements after a term of years (e.g., 18 years),⁴⁴ or more innovative designs, such as the “Balanced Bench”⁴⁵ or “Lottery”⁴⁶ systems proposed by Professors Daniel Epps and Ganesh Sitaraman. For the most part, personnel reforms take for granted the powerful role that the Court plays in American society today—they just aim to make the exercise of that power “fairer” (whether by moderating the Court’s politics or by regularizing appointments so that the Court’s politics are never durably minoritarian).⁴⁷

Disempowering reforms, on the other hand, are about “institutional redefinition” rather than “institutional relegitimation.”⁴⁸ Rather than focus on who sits on the Court, they focus on what the Court can do.⁴⁹ Examples of disempowering proposals include jurisdiction-stripping,⁵⁰ supermajority voting

40 Doerfler & Moyn, *supra* note 4, at 17.

41 Epps & Sitaraman, *supra* note 20, at 150–51.

42 *See e.g.*, Doerfler & Moyn, *supra* note 4, at 19 (describing the “pack the courts” movement); Epps & Sitaraman, *supra* note 20, at 175–77 (discussing what court-packing is and entails).

43 *See e.g.*, Doerfler & Moyn, *supra* note 4, at 19–20; Epps & Sitaraman, *supra* note 20, at 175 (describing potential Supreme Court panel systems).

44 Epps & Sitaraman, *supra* note 20, at 173–75. Many “term limit”-style plans originated as proposals for constitutional amendments. *See* Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1211–12 (1988) (recommending lawmakers consider both an age limit and a term limit of fifteen to twenty years for Supreme Court Justices); Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799 (1986) (outlining the benefits of a Supreme Court whose members are limited to eighteen-year terms); James E. DiTullio & John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093 (2004) (proposing the adoption of a constitutional amendment that would limit Supreme Court service to a fixed eighteen-year term).

45 Epps & Sitaraman, *supra* note 20, at 193–205.

46 *Id.* at 181–92.

47 Doerfler & Moyn, *supra* note 4, at 17–25 (distinguishing between “moderating” reforms and “democratizing” reforms).

48 *Id.* at 8.

49 *Id.* at 18.

50 *Id.* at 23–24; Epps & Sitaraman, *supra* note 20, at 177–79.

rules for judicial review,⁵¹ and congressional review procedures.⁵² These approaches “limit the Supreme Court’s ability to make policy to varying degrees” and “effectively reassign power away from the judiciary and to the political branches.”⁵³

For this Article, however, the specific details of each plan and the different values each promotes are less important than one feature they all share: they are each envisioned and evaluated as “standalone” options. Each proposal is designed on the assumption that there is unlikely to be much political appetite for going “multiple rounds” with the Court and so any political and legal risks must be addressed from the outset.

Consider one of the most popular personnel reforms: requiring Justices to take “senior status” after eighteen years so that a new Justice can be appointed every two years.⁵⁴ This approach would regularize the appointment process, give every president two appointments, and ensure that the “active” members of the Court never reflect any durable partisan affiliation. Although this proposal is often colloquially said to create “term limits” for the Justices, the moniker is not quite right: Justices would retain a lifetime appointment, continue to decide cases by sitting on the circuit courts, and could “fill in” any

51 See generally Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73 (2003) (describing how Congress could instate supermajority rules to fix the pattern of the Supreme Court invalidating federal legislation by a bare majority); Doerfler & Moyn, *supra* note 4, at 24 (claiming that a supermajority rule “would effectively implement a Thayerian ‘clear error’ standard for judicial review” (citing James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893))); Epps & Sitaraman, *supra* note 20, at 190-92 (describing arguments for and against supermajority voting rules); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (2003) (detailing how using a supermajority rule could resolve decreased consensus and deference to Congress on the Supreme Court); Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692 (2014) (discussing majority decision and arguments against it). *But see* Caminker, *supra*, at 94-101 (identifying some difficulties with justifying supermajority rules on the logic of operationalizing Thayerian deference, but arguing that this “misses the fundamental point” that supermajority rules “can serve as an *independent mechanism* for tempering the aggressiveness of judicial review . . .”); Guha Krishnamurthi, *For Judicial Majoritarianism*, 22 U. PA. J. CONST. L. 1201 (2020) (providing a defense of majority voting on appellate courts over supermajority or unanimity rules).

52 Doerfler & Moyn, *supra* note 4, at 24-25.

53 *Id.* at 18.

54 See *id.* at 21-22.

vacant Supreme Court seats that might open prematurely due to an active Justice’s retirement or death.⁵⁵

This proposal has enjoyed strong bipartisan support over the years, has no obvious or durable political valence over time, and—in our current moment—seems uniquely suited to creating a new, stable norm.⁵⁶ But is it constitutional? With credible arguments both in favor⁵⁷ and against⁵⁸ its constitutionality, the odds of such a plan being upheld are highly uncertain. And while scholars may be comfortable opining about the *plausibility* of the plan’s constitutionality,⁵⁹ legislators are unlikely to find similar comfort in such lukewarm assurances.

This fear of invalidation has prompted proponents to preempt concerns by including a “grandfather” clause. This clause suspends the operation of the senior-status requirement for *sitting* Justices and limits its application to *future* appointments.⁶⁰ From a legal perspective, the clause is thought to strengthen the constitutionality of the Act “by eliminating a retroactive application of the Act’s redefinition of the ‘office’ of a Supreme Court Justice.”⁶¹ And from a

55 See generally Term Limits, FIX THE COURT, <https://fixthecourt.com/fix/term-limits/> (last updated Sept. 29, 2020) (providing an overview of the key distinctions between retirement and senior status).

56 See *infra* Part III.B.1.i. for a discussion of the benefits of implementing an eighteen-year senior-status requirement as the “Layer One” reform.

57 See, e.g., Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, PAULCARRINGTON.COM (July 5, 2005), <http://paulcarrington.com/Supreme%20Court%20Renewal%20Act.htm> (proposing that Congress enact a law imposing term limits and related measures in order to prevent the negative consequences of lifetime tenure); see also, e.g., Roger C. Cramton, *Reforming the Supreme Court*, 95 CAL. L. REV. 1313, 1323–34 (2007) (advocating for implementation of Supreme Court term limits by statute or constitutional amendment).

58 See, e.g., Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 855–68 (2006) (discussing arguments in opposition to reforms related to lifetime tenure).

59 See, e.g., Doerfler & Moyn, *supra* note 4, at 51; see also Epps & Sitaraman, *supra* note 20, at 152 (highlighting the precise proposals conducted by scholars, Daniel Epps and Ganesh Sitaraman). If the Court observed a Thayerian account of judicial review, “plausibility” might roughly track constitutionality, see note 51, but that is not how the Court currently understands its role and not how reformers and scholars approach the question today.

60 See, e.g., Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Cong. § 2 (2020) (stating that no Justice appointed before the date of enactment of this Act shall be required to retire pursuant to the Act’s subsection (a)); see Carrington & Cramton, *supra* note 55 (proposing a rotational system wherein all Justices appointed to the Court in the future would serve as the nine deliberating and deciding members for a period of eighteen years); see also Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 1001 (2007) (mentioning two proposed schemes for eighteen-year term limits for Supreme Court Justices that apply only prospectively to new appointees).

61 Carrington & Cramton, *supra* note 55.

political perspective, it might increase the odds that the law is upheld because it “buys out” the Justices who will likely rule on the constitutionality of the measure itself.

Here we can see how a passive framing of the issue warps the proposal. Even if one believes a grandfather clause is not legally necessary, advocates and legislators are compelled to include it to give the plan its “best shot” at survival. This calculation takes the Supreme Court’s supposed institutional advantages of inertia and time into account when building the proposal.

But the very inclusion of the clause changes the stakes of the plan and the potential coalitions that might support it. A plan implemented in dribs and drabs over the next forty years presents a very different proposition than a plan that would see the four most senior Justices (Thomas, Breyer, Roberts, and Alito) take senior status over the next eight years.⁶²

The influence of the passive frame also silently guides the shape of popular disempowering reforms like jurisdiction-stripping. The general concept behind jurisdiction-stripping is simple: Congress removes the jurisdiction of the courts to hear certain kind of cases, effectively leaving those disputes to political rather than judicial resolution.⁶³

But this purported simplicity is deceiving. “[T]he constitutionality of jurisdiction-stripping proposals remains one of the most significant unanswered questions in the field of federal courts,”⁶⁴ and the questions “become more difficult the more comprehensive the strip.”⁶⁵ Given these concerns, Congress has generally declined to enact the vast majority of

62 See Doerfler & Moyn, *supra* note 4, at 61 (calling one set of term limits proposals “feasible because trivial” and stating passage would make little difference). At the time of writing, Justice Breyer has not yet announced his retirement.

63 See Doerfler & Moyn, *supra* note 4, at 23 (noting that “[b]y removing the judiciary from the process, jurisdiction-stripping legislation would tie policy outcomes exclusively to the most recent congressional and presidential legislation”).

64 Epps & Sitaraman, *supra* note 20, at 178 (citing Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1045 (2010), and Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 839–40 (2012)) (emphasizing that “[T]here is one [question] in particular that puzzled scholars unlike any other: whether Congress can withhold all federal jurisdiction...in a case raising a federal constitutional claim); see also Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364–65 (1953) (fearing “destruction of] the essential role of the Supreme Court in the constitutional plan”).

65 Doerfler & Moyn, *supra* note 4, at 54.

jurisdiction-stripping statutes that have been introduced over the years,⁶⁶ and the Court has studiously avoided directly ruling on the constitutionality of those statutes that have managed to survive the legislative process.⁶⁷ This uneasy truce has persisted for generations, and an explicit jurisdiction-stripping bill would push Congress into clear confrontation with the Court.

Of course, the whole point of jurisdiction-stripping legislation is to directly limit the Court's reach and explicitly reserve questions for political resolution. But, here too, congressional fears about the potential judicial response preemptively shape the specific scope of the proposal. The risk is that the Court might get the final word, with Congress shying away from future forays if it receives a strong rebuke.

Jurisdiction-stripping proposals thus reflect the same balance between minimizing risk and undermining the efficacy of the reform. A strip that is sweeping—whether in court coverage or substance matter coverage⁶⁸—would be more efficacious but riskier. A more limited strip might assuage constitutional concerns⁶⁹ but simply not be worth the effort.

In short, the instinct to “preempt constitutional concerns” by watering-down or qualifying the proposal at hand often has less to do with the proponent's independent interpretive judgment about constitutional meaning and more to do with a belief that the Court holds a strategic institutional upper hand.

B. The Impact on Option Comparison

This strategizing over the likelihood of survival also informs the comparison *between* options.

First, it focuses undue attention on the comparison between court-packing and, well, everything else. Because court-packing is a plainly constitutional

66 See Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 880–887 (2011) [hereinafter Grove, *Structural Safeguards*] (describing the long history of jurisdiction-stripping efforts).

67 Fallon, *supra* note 64, at 1045 (“[O]n the infrequent occasions when Congress has enacted laws that appear to attempt comprehensive jurisdiction withdrawals, the Supreme Court, more often than not, has strained to read them as effecting less than total preclusions . . . to avoid the serious constitutional questions that otherwise would arise.”).

68 Doerfler & Moyn, *supra* note 4, at 22–23 (discussing calls for sweeping strips such as prohibiting courts from reviewing federal legislation or constitutionality at all).

69 To be fair, a targeted strip might raise different constitutional concerns that a more general strip does not.

option, it receives attention disproportionate to its other risks and benefits. Does abandoning the convention of nine Justices risk a popular backlash and a quick loss in the political capital necessary to pursue other legislation?⁷⁰ Sure. Does court-packing risk retaliation and escalation?⁷¹ Sure. Does “reciprocal hardball can play into the hands of authoritarians by alienating moderates, unifying autocratic forces, and even providing a pretext for government repression?”⁷² Sure. But is it certain to survive the judicial gauntlet? You bet.⁷³ And for many reformers, that is (understandably) priority number one.

Second, the danger of judicial invalidation pushes some of the most intriguing contenders out of the debate given the relative degree of uncertainty they prompt. Even someone who supports ideas like the “lottery,” broad jurisdiction-stripping, or congressional review *in theory* may be understandably skeptical to do so *in fact*, given the stakes. Simply put, a once-in-a-century moment does not seem like a great time to test out a creative idea or explore the limits of one of the biggest debates in federal courts.

Third, the assumptions implicit in the passive account distort the comparison between personnel versus disempowering approaches more generally. While these two categories might be squared off to determine which is worth pursuing,⁷⁴ this either/or framing rests on an assumption that the enactment of one is likely to come at the expense of the other given the political capital it will take to enact *any* reform. But the issues presented by personnel and disempowering reforms are related.⁷⁵ Personnel changes might be unlikely to have the kind of deep, structural impact of disempowering

70 Pildes, *supra* note 12, at 132 (“Reflecting back, FDR’s second vice president, Henry Wallace, observed: ‘The whole New Deal really went up in smoke as a result of the Supreme Court fight.’ No rational politician, looking back at FDR’s attempt to bring the Court into line, other than through the ordinary appointments process, is likely to repeat FDR’s efforts.”).

71 Braver, *supra* note 33, at 2793 (explaining that “[b]ecause court packing is irreversible, the sole form of available retaliation is more packing, an escalatory pattern that is lethal for the Supreme Court”).

72 Michael J. Klarman, *Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 242 (2020) (citing STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 215–16 (2018)).

73 *But see* Will Baude, *Why Isn’t Court-Packing Unconstitutional?*, THE VOLOKH CONSPIRACY (Oct. 31, 2020, 8:02 AM), <https://reason.com/volokh/2020/10/31/why-isnt-court-packing-unconstitutional/> (arguing that the constitutionality of court-packing is at least debatable).

74 *See generally* Doerfler & Moyn, *supra* note 4, at 51 (highlighting both personnel and disempowering reform proposals).

75 Doerfler & Moyn, *supra* note 4, at 57 (noting that the absence of institutional intervention “affects both personnel and disempowering reforms alike”).

changes, but disempowering changes—standing alone—might be unable to survive judicial review without substantial personnel changes.

* * *

As this Part demonstrates, the legislative anticipation of judicial review alone profoundly shapes the content of court reform proposals and the comparison between those proposals. But what if Congress did not feel bullied into proposing a watered-down plan from the outset? What if the alternative to full and immediate implementation was not complete invalidation?

II. ACTIVE FRAMING: SETTING THE TERMS OF INTERBRANCH DIALOGUE

Given that the entire court reform debate focuses specifically on regulating a coordinate branch, surprisingly little scholarship interrogates the process through which this new institutional settlement will unfold. And with substantive policies and analysis so focused on reining in the Court's institutional power, the failure to identify and challenge the supposed advantage of inertia and time ascribed to the Court constitutes a curious gap in the literature and the popular debate.

In this Part, I propose two ways Congress could proactively offset interbranch inequalities in both the substantive and procedural design of any court reform package. These approaches will strengthen Congress's bargaining position vis-à-vis the Court and can be applied to any number of substantive reform proposals. And while these approaches minimize the power differential between the Court and Congress in the specific interbranch dialogue at issue, they do not rely on any broader challenge to judicial review or judicial supremacy.⁷⁶

A. *Constitutional Safeguarding: Inertia v. Layered Design*

The first approach is to build any court reform legislation in a series of substantive policy layers, with each layer's operational status contingent on a constitutional ruling by the Court. Rather than Congress bearing the inertial cost of the Court's unpredictability, both parties would bear the cost equally.

76 Although judicial supremacy may be worth challenging through a variety of cultural, legal, and political avenues over time, that is a more complex and charged topic beyond the scope of this Article.

If the Court deems the first-preference policy unconstitutional, the second-preference policy takes its place. If the Court deems the second-preference policy unconstitutional, the third-preference policy takes its place—and so on.

In short, the Court would remain entitled to act on the legislation, but it could not wage a war of attrition against Congress by leveraging the power of inertia and forcing Congress to consider the question anew with each round.

Constitutionally safeguarding legislation through layered design could open valuable spaces in the court reform debate that are currently closed off. First, it allows for a cleaner debate over the relative merits of various reform options. Once the risk of wholesale invalidation is replaced with a next-best alternative policy, the debate can proceed undistorted by strategic considerations about what the Court *might* decide. Consider how the merits of court-packing compare to other design options when the downside risk is no longer complete policy failure.⁷⁷

Second, layered design creates new coalitional opportunities by increasing the bargaining zone available to legislators. Legislators can reserve higher layers for their most politically preferred policies and lower layers for those designs most certain to survive judicial review. For example, a progressive legislator might not be willing to vote for a senior-status approach that includes a grandfather clause because such a plan would lock in conservative control in the near term and reward norm-breaking behavior by Republicans.⁷⁸ If the grandfather clause were removed, however, the legislator might be on board. Inversely, a moderate legislator might find court-packing too radical as a standalone plan but might be willing to reconsider their stance on the Court's size if they knew in advance that such a proposal would only be triggered if the Court had already invalidated multiple other layers of their preferred policies.

In short, taking a layered approach to court reform could bring more robust options to the table, expand the scope of debate, and enhance the odds Congress enacts reforms that it prefers rather than designing legislation from a defensive crouch shaped by an unwarranted sense of institutional passivity.⁷⁹

77 See *supra* Part I.B. for the comparison of court-packing against other policy designs.

78 See Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, S. CAL. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788497 (manuscript at 3) (explaining that the average time to transition all nine justices to serve eighteen-year terms is sixteen years without the grandfather clause and fifty-two years with the grandfather clause).

79 To be clear, such an approach is not meant to cast off the risks associated with legal uncertainty *per se*; instead, it is meant to cast off the risk of *institutional unpredictability*. A legislator might reasonably

And while such substantive “backup” provisions are not common,⁸⁰ nor are they novel or unprecedented—an important political and legal strength in this context.

Case law (albeit limited) suggests that the Supreme Court would dutifully follow the prescribed instructions of a layered design.⁸¹ In *Bowshar v. Synar*, the Supreme Court faced a backup provision within the Gramm-Rudman-Hollings Act.⁸² Having determined that the Act as structured contained a constitutional infirmity, the Court reflected on some of the nettlesome severability questions raised by its decision.⁸³ “Fortunately,” the Court observed, “this is a thicket we need not enter” for “[t]he language of the [Act] itself settles the issue.”⁸⁴

After noting that “Congress ha[d] explicitly provided ‘fallback’ provisions in the Act that take effect ‘[i]n the event . . . any of the reporting procedures . . . are invalidated,’”⁸⁵ the Court held that “[t]he fallback provisions are ‘fully operative as a law’⁸⁶ and obviated any need for the Court to “perform the type

believe a policy is constitutional while being skeptical (or just unsure) that the policy would survive judicial review given the current composition of the Court.

80 Dorf, *infra* note 79, at 305 (“Less commonly, fallback law takes the form of substitute provisions . . .”).

81 The Court also briefly discussed backup provisions in both *McConnell v. FEC*, 540 U.S. 93 (2003) and *Citizens United v. FEC*, 558 U.S. 310 (2010), but these references offer less persuasive precedent because the backup provisions at issue were irrelevant to the analysis. In *McConnell*, for example, the majority upheld “all applications of the primary definition and accordingly ha[d] no occasion to discuss the backup definition.” *McConnell*, 540 U.S. at 190 n.73. Four Justices, meanwhile, would have held that both the primary and the backup provisions were invalid. *See* Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 307 n.12 (citing *McConnell*, 540 U.S. at 277–78 (Thomas, J., concurring in part and dissenting in part); *see also id.* at 337–38 (Kennedy, J., joined by Rehnquist, C.J., and, in relevant part, Scalia, J., concurring in part and dissenting in part)); *see also Citizens United*, 558 U.S. at 327–28 (“The Snowe-Jeffords Amendment operates as a backup provision that only takes effect if the Wellstone Amendment is invalidated.”).

Of course, one might see these discussions as partial support given that none of the Justices questioned whether the relevant backup provision was suspect *based on its contingent nature*. *See, e.g., McConnell*, 540 U.S. at 337–38 (Kennedy, J., joined by Rehnquist, C.J., and, in relevant part, Scalia, J., concurring in part and dissenting in part) (“As I would invalidate § 203 under the primary definition, *it is necessary to add a few words about the backup provision . . . I would also invalidate the ban on electioneering communication under the backup definition.*”) (emphasis added).

82 *See* 478 U.S. 714, 735–36 (1986) (noting that the court’s holding “permits the fallback provisions to come into play”).

83 *Id.* at 734.

84 *Id.* at 735.

85 *Id.* at 735 (quoting 26 U.S.C. § 274(f)(1)) (emphasis omitted).

86 *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (quoting *Champlin Refining, Co. v. Corp. Comm’n of Oklahoma*, 286 U.S. 210, 234 (1932))).

of creative and imaginative statutory surgery” that might otherwise occur after a severability analysis.⁸⁷

Moreover, the Supreme Court’s references (and citations) to severability in *Bowsher* raise a broader point about first principles and the separation of powers.⁸⁸ As Professor Michael Dorf observes in his essential work on the topic, substantive backup provisions are themselves a subset of a much broader category of “fallback law” that *includes* severability provisions.⁸⁹ After all, a “truncated law is not simply smaller; it is also different from the original law.”⁹⁰ Given that a normal severability analysis involves judicial speculation about what the legislature *might* have wanted,⁹¹ it would be odd to claim that courts are somehow “better situated than legislatures to make the policy-laden choice between partial invalidation, complete invalidation, and substitute provisions[.]”⁹²

As Professor Dorf notes, “no workable system of judicial review could function without a large role for severability” and a categorical rejection of fallback law would be a radical (if not impossible) position for the Court to take.⁹³ To the extent other meaningful objections exist to layering, I will address these in Part III.C.

B. Political Safeguarding: Time v. Custom Appellate Procedures

The second approach is to design a unique appellate procedure to govern challenges to the constitutionality of the court-reform package. Congress has the power to regulate the jurisdiction of inferior federal courts pursuant to its

87 *Id.* at 736.

88 *See* Dorf, *supra* note 81, at 306, n.11 (referencing how “[b]oth Buckley and Champlin Refining involved severability rather than substitutive fallback provisions”).

89 *See generally id.* at 305.

90 *Id.* As Professor Dorf discusses, “[the] point is easy to see in a case like *United States v. Booker*,” in which the Supreme Court held that “the portion of the [Federal Sentencing Guidelines] mandating the [ir] imposition . . . was severable.” *Id.* at 305–06. “After all, a regime of advisory guidelines operates very differently from a regime of mandatory ones. The new regime is not simply the old one minus some now-eliminated part; it has its own distinctive characteristics.” *Id.* at 306.

91 Fred Kameny, *Are Inseverability Clauses Constitutional?*, 68 ALB. L. REV. 997, 1000 (2005) (stating that a court’s severability analysis “is guesswork by definition” and that “it is understandable for legislators to fear that the courts might guess wrong”).

92 Dorf, *supra* note 81, at 370.

93 *Id.* at 310, 370 (discussing how “[a] real rule of nonseverability would treat any invalid provision of law as invalidating the entire legal code. Thus, real nonseverability is never an option for a court, and so, for courts as well as legislatures, the question is never whether to sever, but how much to sever or what kind of fallback to utilize.”).

powers under Article III, Section 1,⁹⁴ and Congress has the power to regulate the appellate jurisdiction of the Supreme Court under Article III, Section 2.⁹⁵

There are two main reasons for Congress to exercise this power and craft custom-tailored appellate procedures for the review of court reform legislation. First, the typically slow pace of litigation combined with the Court's default power of discretionary review gives the Court an unnecessary time advantage in the interbranch exchange. If the Justices believe their decision will be unpopular with the political coalition that enacted the reform package, the Court could delay any final ruling in the hopes that an intervening election will strengthen its hand by weakening the political coalition that sought to regulate it. Second, consolidating challenges and funneling them through a single court (or a single vertical chain of courts) is particularly helpful when backup provisions are in play to avoid a fracturing of lower-court decisions that might purport to trigger competing provisions.⁹⁶

To ensure that the political coalition that passed the law has a chance to respond to any potentially unexpected decisions by the Court (including wholesale invalidation), Congress should include several features in its reform bill. First, Congress should make the Supreme Court's appellate review mandatory, carving out an exception to the Court's default certiorari procedures.⁹⁷ Second, Congress should funnel all challenges through a single venue such as the Court of Appeals for the D.C. Circuit, if any lower court at all.⁹⁸ Finally, Congress should require any court facing a challenge to the law to

94 U.S. CONST. art. III, § 1 (“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.*” (emphasis added)).

95 U.S. CONST. art. III, § 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In 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.*” (emphasis added)).

96 See Dorf, *supra* note 81, at 309, 359-63.

97 The vast majority of cases filed at the Court fall within the Court's discretionary jurisdiction and are denied review at the certiorari stage. See, e.g., 28 U.S.C. § 1253 (providing for direct appeal from three-judge district courts in a limited set of cases); see also 28 U.S.C. § 1254 (indicating that courts of appeals cases *may* be reviewed by the Supreme Court).

98 See, e.g., 19 U.S.C. § 1516a(g)(4)(A), (H) (requiring that constitutional challenges to certain trade agreement settlement systems “may be brought only in the United States Court of Appeals for the District of Columbia Circuit” and “shall be reviewable by appeal directly to the Supreme Court of the United States”). Although allowing any court, such as the D.C. Circuit, to weigh in prior to the Supreme Court creates time-delay concerns, it may be worth having a disinterested (or at least “less interested”) set of judges examine and rule on the issues presented first.

advance the case to the front of its docket, carving out an exception to the general discretion vested in federal courts by the Priorities Act.⁹⁹

All of these are well-worn methods of appellate regulation, but the last—forcing the Court to issue a prompt ruling—is particularly critical to safeguard Congress’s authority. Before 1984, Congress had enacted tens of dozens of “prioritization” provisions over the years,¹⁰⁰ creating a patchwork of demands that became functionally impossible for federal courts to observe.¹⁰¹ With the Priorities Act,¹⁰² Congress largely wiped the slate clean, reserving only a handful of special cases for priority consideration¹⁰³ and otherwise granting courts wide discretion to organize their dockets as they saw fit.¹⁰⁴ And while congressional policy generally disfavors “the creation of any new civil priorities,”¹⁰⁵ it seems

99 See, e.g., 28 U.S.C. § 1657 [hereinafter Priorities Act] (providing each federal court discretion on how civil actions are heard and determined, except for habeas corpus and recalcitrant witness actions).

100 See Pub. L. No. 98-620, § 402, 98 Stat. 3335 (1984) (providing a list of enacted and amended “prioritization” provisions).

101 See H.R. REP. NO. 98-985, at *7 (1984), as reprinted in 1984 U.S.C.C.A.N. 5779, 5784–85 (discussing the newly amended prioritization laws and the difficulties presented by their implementation).

102 28 U.S.C. § 1657 (“Notwithstanding any other provision of law, each court of the United States shall determine the order in which civil actions are heard and determined, except that the court shall expedite the consideration of any action brought under chapter 153 or section 1826 of this title, any action for temporary or preliminary injunctive relief, or any other action if good cause therefor is shown. For purposes of this subsection, ‘good cause’ is shown if a right under the Constitution of the United States or a Federal Statute (including rights under section 552 of title 5) would be maintained in a factual context that indicates that a request for expedited consideration has merit.”).

103 See *Freedom Commc’ns Inc. v. Fed. Deposit Ins. Corp.*, 157 F.R.D. 485, 486 (C.D. Cal. 1994) (“[C]ertain specific actions are named the highest priority civil actions—habeas corpus actions, recalcitrant witness actions and actions for preliminary or temporary injunctive relief. The Act encourages the courts to give special consideration to actions asserting federal rights. Regarding FOIA, the text states only that the rights granted by FOIA are among the federal rights worthy of special consideration. As there is no reason to suppose the converse, the special designation makes FOIA acts first among equals.”).

104 See *id.* (“[T]he 1984 Act repealed some eighty individual prioritization provisions and enacted section 1657. . . . The Act grants a court wide discretion to organize its docket.”); 75 AM. JUR. 2D *Trial* § 22 (2020) (“The federal statute concerning the priority of civil actions grants the court wide discretion to organize its docket, and it is procedurally proper for a party to move for an expedited consideration under the statute, as Congress contemplated case-by-case decision making.”).

105 H.R. REP. NO. 98-985, at 4 (1984). Interestingly, providing expedited consideration to a wider range of statutes could be one strategy to raise the profile and urgency of the court-reform debate by forcing the Court to grapple with Democratic policies sooner rather than later. See Mark Tushnet (@Mark_Tushnet), TWITTER (Oct. 18, 2020, 9:39 AM), https://twitter.com/Mark_Tushnet/status/1317822571941953537 *et seq.* (proposing such a procedure for fast-tracking judicial review).

fair to say that finalizing the structure of the Supreme Court itself should be priority number one.

Given Congress's explicit constitutional authority to regulate the appellate procedures of the Supreme Court, such a prioritization requirement hardly seems subject to challenge.¹⁰⁶ Federal courts have routinely observed the Priorities Act's requirements in managing their dockets,¹⁰⁷ and a mere prioritization command raises none of the more complex questions posed by legislation that imposes time limits on judicial decision-making.¹⁰⁸

* * *

By layering its substantive policies in a series of contingent provisions and setting out a bespoke appellate process to govern any challenges to those provisions, Congress has the power to reject an institutionally passive posture in its interbranch dialogue with the Supreme Court. None of the proposals above tread new ground or challenge the Court's prerogative to review the constitutionality of Congress's legislation; instead, they merely set aside assumptions about the transition to a new judicial design that have unnecessarily constrained the scholarly and legislative imagination.

III. A LAYERED PROPOSAL FOR SUPREME COURT REFORM

Building on these insights and approaches, I provide a sample reform proposal in Section A, discuss the benefits and risks of the layers offered in Section B, and evaluate some of the potential objections to the layered structure as a whole in Section C.

106 See, e.g., *Zukowski v. Howard, Needles, Tammen, & Bergendoff*, 115 F.R.D. 53, 55 (D. Colo. 1987) (discussing the constitutional authority for the Priorities Act).

107 See, e.g., *Fresenius Kabi USA, LLC v. Nebraska*, 733 F. App'x. 871, 871-72 (8th Cir. 2018) (granting motion for expedited appeal brought in part under the Priorities Act where plaintiff sought to enjoin Nebraska from using drugs produced by plaintiff in an execution); *Van Hollen v. Fed. Election Comm'n*, Nos. 12-5117, 12-5118, 2012 WL 1758569, at *1 (D.C. Cir. May 14, 2012) (citing Priorities Act when granting expedited appeal); *Kiyemba v. Bush*, Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429, 2008 WL 4898963, at *1 (D.C. Cir. Oct. 20, 2008) (expediting appeals under Priorities Act); *In re Hicks*, 118 F. App'x. 778, at *1 (4th Cir. 2005) (invoking the Priorities Act as a reason to order the lower court to act on a prisoner's habeas petition); *Serono Lab's, Inc. v. Shalala*, No. 97-5188, 1998 WL 744103, at *1 (D.C. Cir. Aug. 12, 1998) (citing Priorities Act when granting expedition); *Gregorio T. v. Wilson*, 54 F.3d 599, 600 (9th Cir. 1995) (referring to the Priorities Act in an order granting a motion to expedite an appeal of a preliminary injunction decision).

108 See, e.g., William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 807-10 (1997) (outlining objections to time limits being imposed on courts' consideration of cases).

A. *Regularizing Appointments & Restoring Jurisdiction*

The proposal uses three layers of policy to advance two primary goals: regularizing appointments to the Court and reining in the Court's discretionary jurisdiction. As discussed in Part II.B., any challenges to the Act should be advanced to the front of the docket and be subject to mandatory appeal either directly to the Supreme Court or via the D.C. Circuit.

1. *Layer One*

To regularize appointments and prevent partisan capture of the Court, the Act would designate Justices (including sitting Justices) who have served eighteen years as "senior Justices." The Act would also set a confirmation timetable to approve nominations in each odd-numbered year, with senior Justices automatically filling vacant seats until the next scheduled appointment. In other words, Justices Thomas and Breyer would immediately become senior Justices while continuing to serve in their own vacant seats. (If Congress passed the Act in 2021, for example, President Biden would fill Thomas's seat in 2021 and Breyer's seat in 2023.) Senior Justices would continue to serve by designation on the courts of appeals.

To temper the Court's discretionary control over its own docket and to reduce its ability to actively shape doctrine through strategic case selection, the Act would also reinvestigate the courts' of appeals certification power. As Professors Craig S. Lerner and Nelson Lund have suggested, Congress should amend 28 U.S.C. § 1254 to include a provision that "each Term, the number of cases taken by the Supreme Court pursuant to the first paragraph (discretionary certiorari petitions) may not exceed the number of cases taken pursuant to the second paragraph (court of appeals certifications)."¹⁰⁹

If the Supreme Court invalidates any provision within Layer One, the entire layer would become inoperable and Layer Two would take effect as operative law.

2. *Layer Two*

The next continent layer would retain the same policy goals as the first layer but reflect a more constitutionally robust structure.

109 Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1289 (2010).

To regularize appointments the Act would follow a model proposed by Professor Jack Balkin, in which Congress creates two en banc courts: one consisting of all active Justices to decide cases under the Court's original jurisdiction, and one consisting of the nine Justices most junior in service to decide cases under the Court's appellate jurisdiction.¹¹⁰ Appointments would, again, take place in every odd-numbered year, ensuring that nearly all cases arising under the Court's appellate jurisdiction are heard by a set of nine Justices, each serving eighteen years. Although the total size of the Court would admittedly expand under this model, the number of Justices hearing the Court's most important cases would remain at nine.

To even more rigorously ensure that the Court's discretionary control over its agenda was not used to pursue aggressively partisan ends, this layer would also include a modification of the Court's certiorari procedures. Rather than the Court's informal "Rule of Four" (which states that the Court will *grant* certiorari to any petition receiving four votes), the Act would impose a new supermajority rule requiring a two-thirds vote to *deny* certiorari. Although the logic behind this approach will be discussed below, such a supermajority rule might marginally reduce the Court's agenda-setting power.

If the Supreme Court invalidated any provision within Layer Two, the entire layer would become inoperable and Layer Three would take effect as operative law.

3. Layer Three

The third layer would retain the same policy goals as above but provide the strongest possible constitutional foundation as a final backup.

To regularize appointments, the Act would do away with any fixed number of Justices or bifurcated court structure. Instead, two seats would be automatically added to the Court at the start of any presidential term in which there were no pre-existing vacancies.¹¹¹ In short, the size of the Court would

110 See BALKIN, *supra* note 24 at 152-53 (proposing judicial reforms); see also Jack M. Balkin, *Don't Pack the Court. Regularize Appointments*, BALKINIZATION (Oct 5, 2020), <https://balkin.blogspot.com/2020/10/dont-pack-court-regularize-appointments.html>; Jennings & Acharya, *supra* note 4, at 414 ("The only jurisdiction Article III mandates that the Supreme Court have is its original jurisdiction.").

111 For a similar suggestion, see Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. ECON. PERSPS. 119, 136-37 (2021) (advocating for a "decoupling" of appointments and retirements

automatically expand and contract to ensure that each term the president could fill two vacancies. As above, confirmations could be scheduled to take place in every odd-numbered year.

And given the increased capacity that this expanded structure would provide to hear cases under the full court's appellate jurisdiction, the Act would require a unanimous vote to deny certiorari.

B. Policy Benefits & Objections

The structure above offers a pair of policies that would proportionally respond to recent norm violations, immediately establish a stable new norm, provide no partisan advantage over time, rely on historical practices for constitutional authority, and redress troubling judicial and political trends that have caused bipartisan concern over recent decades. And the particular layers proposed would allow for all actors (Republican and Democratic; legislative and judicial) to converge on a new institutional consensus that respects their varying perspectives, interests, and constitutional duties.

1. Regularizing Appointments

The first policy advanced by the proposal is to regularize the appointment process, ensuring that each president has an equal opportunity to appoint two Justices following every presidential election and that senators have a chance to influence the confirmation process of one Justice following every congressional election. This policy would respond to trends that have drawn concern from both sides of the aisle over the past several decades and restore an equilibrium more consistent with historical practice.

From the earliest days of the Republic, the Supreme Court was structured to strike a careful balance: Justices needed to be insulated from political pressures to ensure decisional independence (*i.e.*, the “ability to issue a ruling without fear of sanctions”)¹¹² but also needed to remain sufficiently in touch with society to prevent the emergence of a powerful and unaccountable juristocracy.

and the addition of “two justices at the beginning of each [presidential] term, regardless of how many vacancies have occurred or will occur”).

112 Grove, *Judicial Independence*, *supra* note 1, at 472; *see also* Jackson, *supra* note 60, at 967–68 (describing the degrees to which certain accountability mechanisms and political responses to unpopular rulings undermine and promote judicial independence).

As a matter of constitutional design, “[t]he language and history of the Good Behavior Clause, viewed in the light of the circumstances of the time,” struck this balance fairly well.¹¹³ On the one hand, judges received an explicit promise of undiminished salary and an implicit promise of life tenure (at least according to the most common readings).¹¹⁴ On the other hand, the appointments process itself provided a “direct and important formal source of democratic control,” given average life expectancy at the time.¹¹⁵ Between 1789 and 1970, Justices served an average of fifteen years, which allowed vacancies on the Court to open up once every two years.¹¹⁶

This design—with its regular infusion of new judges—ensured that the Supreme Court could not become “completely divorced from democratic accountability.”¹¹⁷ After all, the system *could* have been designed “to allow the Justices to elect their own successors,” but “we do not allow the Justices to pick their own successors . . . precisely because we believe that the judiciary, just like the legislature and the executive, needs to be subject to popular control and to the system of checks and balances.”¹¹⁸

The Constitution also provides Congress extensive control over the structure and design of the judiciary as a whole¹¹⁹—powers that Congress used early and often to foster public trust, to promote democratic legitimacy, and to prevent the Justices from becoming too isolated from society.¹²⁰ The most

113 Cramton, *supra* note 57, at 1316.

114 See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”); Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 89 (2006) (observing that “[m]odern judges, scholars, and politicians” tend to assume that “the term ‘good Behaviour’ was merely a code phrase or term of art meaning ‘life tenure,’” and then disputing this reading of the “good Behaviour” clause).

115 Calabresi & Lindgren, *supra* note 58, at 810.

116 *Id.* at 775.

117 *Id.* at 813.

118 *Id.* at 812. *But see infra* text accompanying notes 124–130 (describing the practice of timing retirements to influence the ideological agenda of successor).

119 See U.S. CONST. art. III, §§ 1–2 (describing the structure of the judicial branch).

120 See Marin K. Levy, *Visiting Judges*, 107 CALIF. L. REV. 67, 93 (2019) (noting that circuit riding was meant to “increase the public’s sense of the legitimacy of the federal judiciary”); see also Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1754, 1761 (2003) (noting that one of the justifications behind circuit riding was to “enhance[] the justices’ ability to contribute to the formation of national law by exposing them to local political sentiments and legal practices”); cf. Steven G. Calabresi & David C. Presser, *Reintroducing Circuit*

obvious early example was the requirement that the Justices sit regularly with district court judges throughout the country to decide cases, a practice known as “riding circuit” and thought to encourage these values.¹²¹ But “riding circuit” is by no means the only example; Congress has long exercised a power to flexibly structure the judiciary as a whole to respond to changing needs and circumstances.¹²²

Over the past fifty years, however, the power of the Court has grown while the regular confirmation and appointment process has collapsed. Before 1970, Justices served an average of 15 years.¹²³ Since 1970, Justices have served an average of 26 years.¹²⁴ The increased power and longevity of the Justices has transformed a consistent and necessary source of democratic legitimacy into a disturbing ritual where judges and politicians alike now work in tandem to gain

Riding: A Timely Proposal, 90 MINN. L. REV. 1386, 1388–89 (2006) (proposing that Justices of the present day be required to ride circuit for a four-week session in July so that they stay in touch with popular opinion).

121 See Levy, *supra* note 120, at 93 (“[B]y adjudicating cases and spending time in towns and cities outside of Washington D.C., the Justices were to become more familiar with the laws and customs of different localities.”); see also Calabresi & Presser, *supra* note 120, at 1386 n.1 (quoting 33 ANNALS OF CONG. 125–26 (1819) (statement of Sen. Smith)) (“Sir, in a country like this, it is of some importance that your judges should ride the circuits . . . that they may not forget the genius and temper of their government.”); *id.* at 1386–87 n.2 (quoting 2 REG. DEB. 932 (1826) (statement of Rep. Buchanan)) (“If the Supreme Court should ever become a political tribunal, it will not be until the Judges shall be settled in Washington, far removed from the People, and within the immediate influence of the power and patronage of the Executive.”); David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1710–11 n.1 (2007) (quoting CONG. GLOBE, 30th Cong., 1st Sess. 596 (1848) (statement of Sen. Badger regarding a bill that would have ended the practice of circuit riding)) (“[W]e shall have these gentlemen as judges of the Supreme Court . . . not felt, and understood, and realized as part and parcel of this great popular Government; but sitting here alone—becoming philosophical and speculative in their inquires as to law . . . unseen, final arbiters of justice, issuing their decrees as it were from a secret chamber—moving invisibly amongst us, as far as the whole community is concerned; and, in my judgment, losing in fact the ability to discharge their duties as well as that responsive confidence of the people, which adds so essentially to the sanction of all acts of the officers of Government.”).

122 See, e.g., Levy, *supra* note 120, at 71–72 (discussing a “tradition of fluidity within the court structure”); see generally Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 81 (1996) (discussing how three-judge district courts “significantly affect the functioning of the American political system”).

123 Calabresi & Lindgren, *supra* note 58, at 775.

124 *Id.* at 771. Calabresi and Lindgren track from 1970 to 2005. *Id.* The average has remained steady since then. It is 25.6 from 1970–2000; and it remains at 26.1 if one omits Justice Souter who took senior status after roughly 18 years—an unusual step by modern standards. *Id.* at 795 n.75.

partisan control of the judicial branch despite the unrepresentative and delegitimizing consequences.¹²⁵

From the judicial side, it is no secret that Justices (and judges) strategically time their retirements to influence the ideological agenda of the successor to their seat.¹²⁶ And this “soft” form of judicial control may be sharpening. Justice Kennedy, it is reported, suggested to President Trump that he consider Brett Kavanaugh for the “next” Supreme Court opening.¹²⁷ Once Trump added Kavanaugh’s name to his public list of potential picks, Justice Kennedy then retired—creating a space for his chosen successor to ascend to his seat.¹²⁸

Justice Ruth Bader Ginsburg’s final “most fervent wish”—to “not be replaced until a new president is installed”¹²⁹—was a rare, public expression of a trend that is widely recognized but rarely appreciated for its constitutional implications.¹³⁰ If judges are not supposed to select their own successors,¹³¹ then the operation of our current system is—to an extent—out of step with the constitutional design.¹³²

125 Acknowledging that judges are not (and cannot be) genuinely “neutral” or “nonpartisan” in any kind of objective sense does not undermine (and, in fact, enhances) the importance that judges be broadly representative for the operation of law to be (and be viewed as) legitimate.

126 See Calabresi & Lindgren, *supra* note 58, at 841 (calling for an end to this practice); Carrington & Cramton, *supra* note 57 (noting the incentives supporting the practice); Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 615 (2005). To be sure, this “timing” is not always successful. See Cramton, *supra* note 57, at 1322 (“Justice Black attempted to survive the Nixon presidency, and Justice Douglas attempted to survive both Nixon and then Ford, but both Justices failed. Justices Brennan and Marshall attempted to survive Reagan, and they also failed.”).

127 Robert Barnes, *Justice Kennedy Asked Trump to Put Kavanaugh on Supreme Court List*, *Book Says*, WASH. POST (Nov. 21, 2019, 3:03 PM), https://www.washingtonpost.com/politics/courts_law/justice-kennedy-asked-trump-to-put-kavanaugh-on-supreme-court-list-book-says/2019/11/21/3495f684-0b0f-11ea-8397-a955cd542d00_story.html.

128 *Id.*

129 John Nichols, *Ruth Bader Ginsburg: ‘My Most Fervent Wish Is That I Will Not Be Replaced Until a New President Is Installed,’* NATION (Sept. 18, 2020), <https://www.thenation.com/article/politics/ruth-bader-ginsburg-fervent/>.

130 Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2314 (2006) (drawing attention to how “the invisibility of political parties has left constitutional discourse about separation of powers with no conceptual resources to understand basic features of the American political system” and has “generated judicial decisions and theoretical rationalizations that float entirely free of any functional justification grounded in the actual workings of separation of powers”).

131 See *supra* text accompanying notes 112–118.

132 See *supra* text accompanying notes 136–130.

From the political side, the picture has been more complicated. On the one hand, the increased lifespan and power of the Justices significantly raises the stakes of every appointment.¹³³ And, with the “democratic instillation of public values on the Court through the selection of new judges” becoming “infrequent and irregular,”¹³⁴ confirmation hearings have become partisan life-or-death events as senators seek to impact the political skew of the judicial branch as much as possible before the brief “window” for influence closes.¹³⁵ On the other hand, the *availability* of Supreme Court vacancies has—at least in recent history¹³⁶—remained outside political control.

That is not to say the system has not been unrepresentative. But the *source* of that unrepresentative skew in recent history has been a product of dumb luck or *judicial* manipulation of vacancy-timing. For example, “Presidents Taft and Harding made six and four Supreme Court appointments, respectively, while Woodrow Wilson made only three appointments despite serving longer as President than both Taft and Harding combined.”¹³⁷ Similarly, Richard Nixon appointed four Justices over five years, while Jimmy Carter appointed none over four years.¹³⁸

133 See Carrington & Cramton, *supra* note 57 (arguing that giving Supreme Court justices life tenure has resulted in a series of negative consequences); Calabresi & Lindgren, *supra* note 58, at 771 (“[T]he combination of less frequent vacancies and longer tenures of office means that when vacancies do arise, there is so much at stake that confirmation battles have become much more intense.”).

134 Calabresi & Lindgren, *supra* note 58, at 811 (citing DiTullio & Schochet, *supra* note 44, at 1116–19) (“[Y]ears will pass without any openings and, suddenly, two, three, or even four seats may open up within the space of a few years, followed by another long period without any vacancies. When this happens, the party in power at that particular time has a disproportionate impact on the Supreme Court, which can again prevent the American people from being able regularly to check the Court . . .”).

135 To be sure, without broader changes reining in the Supreme Court’s power, “determining the ideological character of the Supreme Court would remain an enormously high-stakes affair” even with regularized appointments. Doerfler & Moyn, *supra* note 4, at 45. But regular appointments might be expected to at least *lower* those stakes, and that would be a marked improvement. See Calabresi & Lindgren, *supra* note 58, at 836 (“The regularization of vacancies on the Court and the more frequent appointments to the Court would make each appointment less important politically and should have a net effect of reducing the politicization of the process.”). Novelty, after all, is a strong tool in cultivating attention. See G. Michael Parsons, *Fighting for Attention: Democracy, Free Speech, and the Marketplace of Ideas*, 104 MINN. L. REV. 2157, 2202–03 (2020) (discussing how news media has historically used attention-grabbing headlines to stimulate reader interest and how inflammatory headlines are used today).

136 See Grove, *Judicial Independence*, note 1, at 505–17 (discussing the development of the negative norm against court-packing).

137 Calabresi & Lindgren, *supra* note 58, at 812.

138 *Id.*

These dynamics disrupted the constitutional balance between independence and representativeness, but at least that imbalance did not result from *legislative* manipulation.

Senator McConnell's recent maneuvering shattered this already-uneasy truce, deepening the unrepresentative skew of the Court. It is now the case that fifteen of the last twenty Supreme Court Justices have been nominated by Republicans,¹³⁹ even though Republicans have lost the popular vote in seven of the last eight presidential elections.¹⁴⁰

Regularizing appointments to the Supreme Court through a statutory scheme that is immediately implemented fixes these dangerous trends, responds to the recent violation of norms to discourage future violations, implements a stable scheme going forward, and restores the appointment process's traditional role as a constitutional check to maintain the judiciary's balance between independence and accountability.¹⁴¹

The three layers proposed by the plan follow the structure set out in Part II, with the most politically preferable policy set out in Layer One and the most constitutionally predictable policy set out in Layer Three. Because the literature already covers the "standalone" legality of various reform proposals, I will only engage with the legal arguments briefly below to help explain their relative ordering.

i. Layer One: Requiring Senior Status After Eighteen Years

From a political perspective, leading with an eighteen-year senior-status requirement carries several benefits. First, it brings the service of active Justices back in line with the average historical tenure of Justices and in line with the implicit value tradeoffs underlying the constitutional design.¹⁴²

139 *Supreme Court Nominations (1789-Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> (last visited Jan. 26, 2021).

140 Elaine Kamarck & John Hudak, *How to Get Rid of the Electoral College*, BROOKINGS (Dec. 9, 2020), <https://www.brookings.edu/blog/fixgov/2020/12/09/how-to-get-rid-of-the-electoral-college/>.

141 See Ryan, *supra* note 108, at 797 ("[J]udicial independence is not an end in itself, but rather a means of securing other goals, most notably that of ensuring that litigants and potential litigants will receive impartial judicial decisions[,] . . . preserv[ing] clear lines of public accountability for both the judicial and the political branches[,] . . . and reduc[ing] the risk of arbitrary decisions, something the Framers knew was critical to the judiciary's legitimacy.").

142 See Calabresi & Lindgren, *supra* note 58 at 775 (providing support for an eighteen-year term).

Second, it respects the political, social, and psychological attachment to having nine active Justices—a number fixed since 1869.¹⁴³ Whether or not one believes the current manifestation of the Court (in its unrepresentative form) is worth “saving,”¹⁴⁴ the more traditional and aspirational conception of the Court (as an institution kept broadly “small-r” republican through regular appointments) *would be* worth “saving.”¹⁴⁵ And the more any new norm can to carry forward and communicate an earlier and more long-standing convention to help foster continued acceptance, the better.

Finally, like the other policies below, a senior-status system operates over the long run with no clear partisan valence, meaning that legislators can adopt the reform behind a “veil of ignorance” as to its long-term effects.¹⁴⁶

For these reasons, the concept of regularly rotating Justices off the bench at regular intervals—whether via constitutional “term limits” requiring actual retirement or via statutory service rotation requiring senior status—has been a consistently popular reform over time and across ideological constituencies.¹⁴⁷

Setting an eighteen-year senior-status requirement as “Layer One” also opens up a unique opportunity given our current political moment: Congress can enact the policy *without* including a grandfather clause to exempt sitting Justices. Although proposals usually include this clause to address legal concerns, the clause also serves a political purpose that one might consider

143 Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121, 1128 (2020).

144 See Doerfler & Moyn, *supra* note 4, at 6 (“Asking ‘how to save the Supreme Court’ is asking the wrong question. For saving it is not a desirable goal; getting it out of the way of progressive reform is.”).

145 See *id.* at 35 (“Term limits are . . . distinct among personnel reforms in that their democratizing effect is systematic.”); Chilton, Epps, Rozema & Sen, *supra* note 78.

146 See JOHN RAWLS, A THEORY OF JUSTICE 136–142 (1971) (explaining the concept of the “veil of ignorance”).

147 “Among the reforms [on offer], term[] limit[s] for Supreme Court Justices enjoy the most popular support.” Doerfler & Moyn, *supra* note 4, at 21 (citing *New Poll Shows SCOTUS Term Limits Still Popular Across Party Lines*, FIX THE COURT (June 10, 2020), <https://fixthecourt.com/2020/06/latest-scotus-term-limits-poll/> (finding that 77% of Americans support restrictions on length of service for Supreme Court Justices in 2019)); Jeffrey Rosen, *What If We Wrote the Constitution Today?*, ATLANTIC (Dec. 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/12/what-if-we-could-rewrite-constitution/617304/> (indicating bipartisan support for Supreme Court term limits); David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute,”* 83 WASH. U. L.Q. 1397, 1400 (2005) (quoting John M. Broder & Carolyn Marshall, *White House Memos Offer Opinions on Supreme Court*, N.Y. TIMES, July 30, 2005, at A11) (“Even Chief Justice John Roberts argued in favor of term limits as a government lawyer.”).

valuable under normal political conditions: removing short-term partisan implications from the equation.

On the heels of a unilateral norm violation by Republicans, however, full and immediate implementation of a senior-status requirement could be a political benefit rather than a political liability. Because Justice Thomas would typically be expected to “wait out” Biden’s term in office while Justice Breyer might be expected to retire, immediate implementation would provide a short-term proportionate response to McConnell’s norm violation (by rotating Thomas out of active service) and long-term apolitical stability (by placing any other partisan consequences beyond the next presidential election). Removing the grandfather clause, in other words, ensures that a dangerous precedent is not rewarded and that the plan itself can operate as a sufficiently assertive form of anti-hardball.¹⁴⁸

From a legal perspective, the constitutionality of a mandatory senior-status requirement is at least plausible—and perhaps stronger than traditionally assumed.¹⁴⁹ To start, senior Justices still exercise the judicial power, still hear cases, still exercise decisional independence in resolving those cases, still receive full compensation, and arguably maintain the same “office” despite the

148 See generally David E. Pozen, *Hardball and/as Anti-Hardball*, 21 N.Y.U.J. LEGIS. & PUB. POL’Y 949, 955 (2019) (“[S]ome of the most morally and democratically compelling forms of anti-hardball may be unattainable without the aid of hardball”); see also Jurecic & Hennessey, *supra* note 3 (“All of these ideas [18-year terms, supermajorities, etc.] could help place the Court at arm’s length from politics and restore its authority, but it’s hard to imagine why Republicans would assent to such proposals unless the party knew that Democrats were willing to play hardball right back.”).

By omitting a grandfather clause, the proposed plan goes further than the typical 18-year term proposals. Some might (understandably) say that even this isn’t sufficiently responsive or adequately deterrent. Yet the disparate treatment of Garland and Barrett offers the most indisputable offense—one that provides the clearest example of a *shared* norm violation and the strongest justification for a corrective response.

Moreover, the fact that both Roberts and Alito would be “next up” after Thomas and Breyer means Democrats would have the opportunity make more substantial inroads after the next presidential election (moving from 6-3 now, to 5-4 in one term, and 3-6 after two terms) and Republicans would have a chance to protect their majority (moving 6-3 now, to 5-4 in one term, and 5-4 after two terms).

It should be noted that a two-year “gap” would be required in 2033 to allow Justice Gorsuch to serve 18 years.

149 See Carrington & Cramton, *supra* note 57 (arguing that a Justice’s “life tenure” can be read to include service that starts “in the Supreme Court and moved to a lower court or vice versa”). *But see* Calabresi & Lindgren, *supra* note 58, at 858-859 (identifying weaknesses in Carrington and Cramton’s proposal).

specific terms of that office not remaining constant over time.¹⁵⁰ As the Supreme Court suggested in *Chandler v. Judicial Council of the Tenth Circuit*, decisional independence is the constitutional core of judicial independence:

There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business.¹⁵¹

And while riding circuit *consistently* over the course of one's career is different than riding circuit *sequentially* over the course of one's career, the relevant question is whether this distinction is of such constitutional weight that the Good Behavior Clause prohibits Congress from enacting such a law.¹⁵²

There are good reasons to believe legal objections based on the Good Behavior Clause are weaker than the literature typically imagines. First, judicial manipulation of appointments through strategic retirement, while lamented as “unseemly,” is typically considered orthogonal to the question of constitutionality.¹⁵³ But given that the appointments process itself is supposed to operate as a check on judicial power, a decision by Congress to safeguard this check in a way that both honors decisional independence and combats strategic retirements seems appropriate.

Second, when a convention associated with judicial independence is “not clearly etched into our constitutional text and structure” but is merely “constructed by political institutions over time,”¹⁵⁴ a violation of one set of existing norms may require changes to another set of adjacent norms to

150 *Myths and Facts About SCOTUS Term Limits*, FIX THE COURT (Nov. 25, 2019), <https://fixthecourt.com/2019/11/myth-facts-scotus-term-limits/>; 28 U.S.C. § 371 (stating that judges that take senior status “retain the office”). *But see generally* David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453 (2007) (addressing the constitutionality of senior judges).

151 398 U.S. 74, 84 (1970); *see also* Grove, *Judicial Independence*, *supra* note 1, at 472 (defining judicial independence as decisional independence); Jackson, *supra* note 60, at 967–68 (discussing selection and tenure rules that contribute to judicial independence).

152 *See* Carrington & Cramton, *supra* note 57 (arguing that the Good Behavior Clause does not so prohibit Congress). *See also* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) (upholding power of Congress to require Supreme Court Justices to sit as lower court judges).

153 *See* Calabresi & Lindgren, *supra* note 58, at 841 (describing the practice as unseemly and as causing the public to view the Court as political).

154 Grove, *Judicial Independence*, *supra* note 1, at 470; *see also* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 102–07 (2017) (discussing the early development of—and contests around—judicial structuring norms).

reestablish institutional stability and prevent constitutional backsliding overall. In other words, even if an eighteen-year senior-status requirement might seem like it violates the Good Behavior Clause given past practice, the constitutional weight of that practice cannot be easily separated from related practices that fulfilled a supporting role.

Finally, the principle of judicial independence is itself protected by broader structural safeguards; namely, Article I's constitutional requirements of bicameralism and presentment.¹⁵⁵ Over the course of our country's history, these structural safeguards have provided the first line of defense against targeted jurisdiction-stripping efforts¹⁵⁶ and have provided stability to the design of the federal court system overall. The very fact that the Judiciary is so dependent on Congress for its structure and jurisdiction is, arguably, a vital source of its democratic legitimacy.¹⁵⁷

In short, if both the President and majorities in both the House of Representatives and the Senate have decided that a change to the structure of the federal court system is required in light of recent events to stabilize and protect the impartiality, legitimacy, and independence of the judiciary, the Supreme Court should be particularly cautious before imposing its own implicit rule based on a more formal, practice-driven conception of

155 See Grove, *Structural Safeguards*, *supra* note 66, at 873 (“[T]he primary protection for many of our most precious rights and liberties (of which the independent judiciary forms a crucial part) would be structural.”). Traditionally, “scholars have assumed either that there must be judicially enforceable limits on Congress’s power, or that there are no constitutional limits and the federal judicial power is simply a matter of legislative will (or benevolence).” *Id.* As Professor Grove points out, this overlooks how other structural features, such as bicameralism and the presidential veto, protect federal jurisdiction.

Interestingly, the executive branch has also historically played a role in constraining jurisdiction-stripping efforts. See Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 251–55, 268–86 (2012) (describing the executive branch’s efforts in protecting the scope of federal jurisdiction).

156 See Grove, *Structural Safeguards*, *supra* note 66, at 929 (showing that the Court has, appropriately, “indicated a willingness to enforce the jurisdictional limitations that survive the Article I lawmaking process”).

157 As Professor Grove notes, this has “strong normative underpinnings.” *Id.* (“[T]he very existence of a congressional power to limit federal jurisdiction can serve to legitimize judicial decisions. [As] Professor Black explained: ‘Jurisdiction’ is the power to decide. If Congress has wide and deep-going power over the courts’ jurisdiction, then the courts’ power to decide is a continuing and visible concession from a democratically formed Congress.’ Thus, when Congress . . . leaves federal jurisdiction in place, it signals (by its forbearance) that it has decided to trust certain matters to the independent federal judiciary.”).

“independence” arguably at odds with a deeper fidelity to the purposes underlying the structure of Article III and the Constitution as a whole.

ii. Layer Two: Bifurcating Original & Appellate Jurisdiction

The advantage of layering policies, of course, is that Congress can express a potential constitutional disagreement with the Court without forfeiting its institutional power in the process. Because the runaway power of the Court is itself a reason for reform, Layer Two ensures that the political will to achieve regular appointments does not go to waste.

From a political perspective, structuring the Supreme Court so that only the nine most junior Justices hear cases under the Court’s appellate jurisdiction carries almost all the benefits described above. And while the overall number of active Justices on the Court will swell beyond nine, original jurisdiction cases only constitute a fraction of the Court’s docket.¹⁵⁸

Perhaps one might object that the structure of the plan is more complicated than court-packing or even a senior-status requirement,¹⁵⁹ but that could be as much of a political benefit as a political risk. The “takeaway” is that nine Justices will continue to hear virtually all of the Supreme Court’s cases and those nine Justices will serve in that capacity for eighteen years. The burden of explaining any complexities beyond that would seem to fall most heavily on those objecting to the design.

From a legal perspective, the measure seems strong but not without doubt. The idea of limiting the Supreme Court to its original jurisdiction relies on a widely accepted understanding of the Supreme Court’s jurisdiction,¹⁶⁰ and Congress could rely on its “tradition of fluidity” in judicial design to support the bifurcated structure.¹⁶¹

158 See Balkin, *supra* note 110 (proposing a system in which a new Supreme Court Justice is appointed in every odd-numbered year); see also Jurisdiction: Original, Supreme Court, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/courts/jurisdiction-original-supreme-court> (last accessed June 25, 2021) (“The Supreme Court’s original docket has always been a minute portion of its overall caseload.”).

159 See Doerfler & Moyn, *supra* note 4, at 62 (“What only law professors can understand, a popular movement will never demand.”).

160 Jennings & Acharya, *supra* note 4, at 414 (“The only jurisdiction Article III mandates that the Supreme Court have is its original jurisdiction.”).

161 Levy, *supra* note 120, at 71–72; see, e.g., 28 U.S.C. § 46 (authorizing circuit courts to sit in panels). Another approach might be to create a separate intermediary “Supreme Court of Appeals” between

Still, one might object to the idea that this “tradition of fluidity” exists to quite the same extent for the Supreme Court (given its constitutional stature) and that Congress therefore cannot functionally strip only *some* Justices of their appellate jurisdiction.¹⁶² Moreover, this kind of split might be viewed as inconsistent with the text of Article III, which refers to the judicial power being vested in “one supreme Court.”¹⁶³

While this objection brings us into uncharted (or at least academic) territory, adding a final, third layer provides an extra degree of comfort to the aggregate reform package.

iii. Layer Three: Automatically Adding Seats

The final approach—automatically adding seats at regular, predetermined intervals—is a kind of “court-packing lite.” From a political perspective, legislators might find it unenticing as a first layer but more acceptable as a third layer. A Member of Congress otherwise attached to the norm of nine Justices, for example, might be open to an expanded Court knowing that the policy would only activate if the Court itself rejects all other options.

Such an approach also avoids the political risk of escalation that could come from a one-time attempt to expand the Court.¹⁶⁴ An immediately implemented “automatic additions” plan proportionally responds to past abuse while promising political opponents a fair and equal opportunity to influence future appointments after the next round of elections. This could

the circuit courts and the Supreme Court, although populating the seats of this court raises its own unique complexities.

162 To be sure, this form of generalized jurisdiction-stripping does not raise the kind of “decisional independence” questions, *see infra* note 226 (discussing *Klein*), or other “improper motive” questions that often accompany jurisdiction-stripping, *e.g.*, Fallon, *supra* note 67, at 1074–83 (stripping jurisdiction from federal courts on the assumption that state courts will not only be more favorable to certain types of claims, but that this favorability will encourage state courts to openly defy prior Supreme Court precedents). But, then again, lawyers—and Justices—are nothing if not creative.

163 *See* U.S. CONST. art. III, § 1; Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 979 n.272 (2013) [hereinafter Grove, *The Exceptions Clause*] (providing examples of Members of Congress and the Court disfavoring a panel system on the Supreme Court based on the provision that there be “one supreme Court”).

164 Klarman, *supra* note 72, at 242 (“[R]eciprocal hardball can play into the hands of authoritarians by alienating moderates, unifying autocratic forces, and even providing a pretext for government repression.”).

help the plan take root quickly, establish a new norm, and achieve stability going forward.¹⁶⁵

To be sure, this floating approach to composition could regularly lead to an even number of Justices. One might reasonably object that the Supreme Court should have an odd number so that the institution as a whole can speak with one voice on most questions that come before it. Yet this raises important normative questions about what role the Supreme Court can and should play in society—questions to which we now turn.

2. *Restoring Jurisdiction*

Apart from the personnel changes above, coalitions from across the political spectrum have proposed reining in the institutional power of the Supreme Court over the years.¹⁶⁶ And while these proposals normally take the form of jurisdiction-stripping, some scholars have suggested another remedy: “giving the Supreme Court more to do, not less.”¹⁶⁷

The second policy advanced by the layered the proposal, then, is to incrementally decrease the Supreme Court’s discretion over its case-selection process. While not immediately intuitive, jurisdiction-*restoring* as a method for disempowering the Court has strong political and legal advantages over jurisdiction-stripping.

For more than the first hundred years of its existence, the Supreme Court had no control over which cases it would decide.¹⁶⁸ For the Framers, mandatory jurisdiction provided a powerful reply to those who feared the emergence of an “imperial judiciary.”¹⁶⁹ In the Antifederalist Papers, Brutus warned of Justices that were *too* independent: “[T]hey are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven

165 See Epps & Sitaraman, *supra* note 20, at 152 (stating that a proposal to reform the Court “needs to be stable going forward” and consist of something that “both sides might be able to live with in the long term, leading to a fair equilibrium”).

166 See Doerfler & Moyn, *supra* note 4, at 64 (“[D]isempowering reforms can cut across existing partisan configuration.”).

167 Lerner & Lund, *supra* note 109, at 1283; see BALKIN, *supra* note 24, at 154–55 (arguing that making the Court “decide more cases, not less . . . may limit the Justices’ ability to shape litigation campaigns.”).

168 Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1649 (2000).

169 Lerner & Lund, *supra* note 109, at 1262.

itself.”¹⁷⁰ Hamilton, responding in the Federalist Papers as Publius, wrote that the judiciary should not be feared, for it could “take no active resolution whatsoever” and had “neither Force nor Will, but merely judgment.”¹⁷¹

And, for a time, this characterization held. The early Supreme Court did not control its docket, could only act on the cases that came before it, and resolved all the cases that came before it, playing more of an “error-correction” role than a “law-declaration” role.¹⁷² In the pre-Marshall Court, for example, 71% of reported opinions were brief and without attributed authorship, and the Court issued opinions within days (or at most weeks) of oral argument.¹⁷³

Mandatory jurisdiction also underpins the traditional justification for judicial review; namely, that “the *power* of judicial review rests . . . upon the constitutional *duty* of the judiciary ‘to say what the law is.’”¹⁷⁴ As Chief Justice Marshall wrote in *Marbury v. Madison*, “Those who apply the rule to particular cases, must of necessity expound and interpret that rule. . . . So if a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs the case.”¹⁷⁵ This, Marshall proclaimed, was “the very essence of judicial duty.”¹⁷⁶

Over time, however, the Supreme Court’s workload swelled beyond its capacity. Between 1874 and 1924, the Court heard more than 200 or even 250 cases per year,¹⁷⁷ and in the five years between 1917 and 1922, the Court heard an average of 330 cases per term.¹⁷⁸ In short, the size of the Court’s

170 THE ANTIFEDERALIST PAPERS No. 15, at 222, 223 (Brutus) (Morton Borden ed., 1965).

171 THE FEDERALIST No. 78 (Alexander Hamilton).

172 See Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 44–56 (2009) [hereinafter Grove, *Vertical Maximalism*] (discussing the error correction role of the early Supreme Court).

173 See Lerner & Lund, *supra* note 109, at 1277.

174 Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 518 (1966) (emphasis in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); see generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1273 (1996) (“The power to interpret the laws is an incident to this case- or controversy-deciding function; courts must interpret because they must decide.”).

175 *Marbury*, 5 U.S. (1 Cranch) at 177–78.

176 *Id.* at 178.

177 Lerner & Lund, *supra* note 109, at 1268.

178 Hartnett, *supra* note 168, at 1646 n.12.

docket eventually reached a point where full (or even mostly) mandatory jurisdiction became practically untenable.¹⁷⁹

Eventually, Congress stepped in to alleviate the issue, rendering most of the Supreme Court's jurisdiction discretionary in the so-called "Judges' Bill" of 1925, and eliminating almost all remaining mandatory jurisdiction in 1988.¹⁸⁰ This allowed the Court to alter its "manner of speaking" over time to "emphasize[] the enunciation of doctrine over the resolution of disputes,"¹⁸¹ definitively shifting the Supreme Court's overall role in the constitutional scheme from error-correction to law-declaration.¹⁸²

Since this shift, the Supreme Court has steadily reduced the number of cases it decides on the merits. Rather than deciding up to 350 cases per year, the Supreme Court now typically decides "no more than 100 cases involving about 70–75 opinions for the Court."¹⁸³ At the same time, Congress also eased the relative workload of each case by doubling each Justice's number of law clerks from two (prior to 1970) to four (in 1978).¹⁸⁴

Finally, the Justices "helped themselves" to more discretion soon after the Judges' Bill passed, "extend[ing] [their] discretion by (among other things) claiming the power to issue limited writs of certiorari, by subjecting ostensibly mandatory appeals to discretionary review, and by practically eliminating the certification power of courts of appeals."¹⁸⁵

179 Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1096 (1987) (stating that with the "expansion of federal judicial business . . . working for the general coherence of the national legal system is the only possible function of the Court").

180 Hartnett, *supra* note 168, at 1646 n.10.

181 Strauss, *supra* note 179, at 1094–95.

182 See generally Grove, *Vertical Maximalism*, *supra* note 172, at 44–59 (arguing that the Court better maintains its hierarchical role by focusing more on setting precedent than in resolving disputes in an individual case, as evidenced by a trend in the modern jurisprudence of the Court toward law-declaration).

183 Cramton, *supra* note 57, at 1317. See also *Supreme Court Cases, October Term 2019-2020*, BALLOTPEdia, https://ballotpedia.org/Supreme_Court_cases,_October_term_2019-2020#:~:text=It%20is%20often%20referred%20to,during%20its%202019%2D2020%20term (last visited Jan. 9, 2020) (noting that between 2007 and 2019, the Court has released an average of 76 cases per year). More recently, this number has moved into the 50s, but that may be related to Court's current remote posture due to the COVID-19 pandemic. See Steve Vladeck (@steve_vladeck), TWITTER (Feb. 1, 2021, 4:00 PM), https://twitter.com/steve_vladeck/status/1356346603490185217 *et seq.*

184 Calabresi & Lindgren, *supra* note 58, at 808.

185 Hartnett, *supra* note 168, at 1704–05.

All of these developments over the last century have empowered the Court. Rather than resolving whatever cases come before it, the Court now has the power to “set its own agenda” and can treat cases as mere “vehicles” for taking up whatever social, political, or economic questions the Justices wish to address.¹⁸⁶ Contrary to Hamilton’s reassurances, “[this] ability to set one’s own agenda is at the heart of exercising will.”¹⁸⁷

The more we have taken this aspect of the Court’s role for granted, the more law students, lawyers, judges, and politicians have shifted their expectations about the role of the Justices themselves and the propriety of assertive judicial intervention.¹⁸⁸ And with increasing polarization among political elites the Justices have now sorted into defined partisan blocs,¹⁸⁹ encouraging ever-greater “celebrity” behavior.¹⁹⁰

To counter these trends, the proposed package incrementally decreases the discretion that a bare majority of the Justices hold over the decision to hear cases with each successive policy layer.¹⁹¹ This approach would encourage the Justices “to behave more like their counterparts on the inferior appellate courts” and to shift their approach marginally closer back towards a more limited “error-correction” role.¹⁹²

186 *Id.* at 1718–19, 1733–34.

187 *Id.* at 1718.

188 *Id.* at 1733 (“[T]he Court’s unbridled discretion to control its own docket, choosing not only which cases to decide, but also which ‘questions presented’ to decide, appears to have contributed to a mindset that thinks of the Supreme Court more as sitting to resolve controversial questions than to decide cases.”); *id.* at 1648 (stating that sweeping discretionary jurisdiction has “encouraged Supreme Court Justices to think of themselves less as deciders of cases and more as final arbiters of controversial questions” and “deeply shaped substantive constitutional law itself”). *See also* Grove, *Judicial Independence*, *supra* note 1, at 472 (describing the process by which students, practitioners, and judges are acculturated to support certain conventions over time).

189 From 1790 until 1936, there were no “liberal and conservative blocs that fell along partisan lines as defined by the party of the president who appointed a Justice.” DEVINS & BAUM, *supra* note 25, at 63. The “infrequency of dissent” may have been “partly a product of . . . the Court’s mandatory jurisdiction over the great majority of cases that came before it during its first century of operation.” *Id.* at 64.

190 Lerner & Lund, *supra* note 109, at 1259–60 (discussing the growing trend of “celebrity Justice” behaviors: long, unnecessary opinions and emphasizing culture war issues and pop philosophy in opinions over the resolution of cases).

191 A clarification: The Court current employs an informal “Rule of Four,” which gives some control to a bare minority of Justices. Because a minority cannot *prevent* cases, however, the ideological coalition in the majority holds the most agenda-setting power. *See* Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 981 (1957) (stating that, according to Justice Van Devanter, the Court always grants the certiorari petition when as many as four Justices think it should be granted).

192 Lerner & Lund, *supra* note 109, at 1273–74.

i. Layer One: The Certiorari/Certification Rule

Professors Lerner's and Lund's proposal that the Supreme Court be required to take more cases via certification by the courts of appeals than by discretionary certiorari petitions would help decentralize the selection of the cases on the Court's docket.¹⁹³

From a political perspective, this would help ensure that the Court's docket is largely driven "by the perceived needs of the judicial system, as determined by the lower court judges themselves"¹⁹⁴ and less driven by the ideological agendas of the Justices. In this respect, it carries some benefits of Professors Epps and Sitaraman's more novel "lottery" approach without requiring a wholesale overhaul over the Supreme Court's structure.¹⁹⁵ The concept of "restoring" the Court's jurisdiction is also likely to be less politically controversial than the concept of "stripping" the Court's jurisdiction—an important factor in building political support for the overall reform package.

On the other hand, one might fairly wonder: Given the benefits of layering for minimizing legal uncertainty, why not make jurisdiction-stripping "Layer One" and jurisdiction-restoring "Layer Two"? That is an option, but reformers should consider whether pairing such a reform with the appointment-regularizing reforms above might *encourage* the Supreme Court to strike down Layer One more readily than it might otherwise by giving the Court an alternative basis for its decision.¹⁹⁶ The reason for pairing an appointment-regularizing policy with a jurisdiction-restoring policy is that only the former turns on judicial behavior that is genuinely unpredictable.¹⁹⁷

And that is because, from a legal perspective, the certification proposal presents little risk. In fact, such a proposal is more consistent both with Congress's historical expectations about the Court's appellate procedure and with the constitutional role of the Court itself.

One early proposal for handling the Justices' increased workload was to create circuit courts and then require those circuits to certify any question

193 *Id.* at 1289.

194 *Id.*

195 Epps & Sitaraman, *supra* note 20, at 183–84.

196 Congress could, of course, separate the two policies so that the elements of Layer One do not rise and fall together.

197 *See* Epps & Sitaraman, *supra* note 20, at 163 (arguing that public perception regarding how the Supreme Court comes to decisions gives rise to its legitimacy and increases the potential for the public to accept unpopular decisions).

decided differently by another circuit court.¹⁹⁸ Instead, Congress settled on a design that would include both certification and certiorari, noting during the hearings on the Judges' Bill that the Supreme Court would not fully control its own jurisdiction.¹⁹⁹

The Court soon went about undermining the certification function, however, by expressing hostility to certification and reading the role of certification narrowly.²⁰⁰ As Professor Edward Hartnett observes, certificates dropped off precipitously. From 1927 to 1936, the courts of appeals issued seventy-two certificates. From 1937 to 1946, that dropped to twenty. And between 1946 and 1985, the Court accepted four.²⁰¹ "At this point, certification is practically a dead letter,"²⁰² contrary to the expectations of the Congress that empowered the Court in the first place.

At a more fundamental level, discretionary jurisdiction itself is a legislative creation—an exercise of Congress's power to create exceptions to the Court's appellate jurisdiction.²⁰³ This is a profoundly powerful point in favor of using a jurisdiction-restoring approach. While the constitutionality of jurisdiction-stripping becomes more dubious the more it disempowers the Court, the constitutionality of jurisdiction-restoring arguably becomes *stronger* the more it disempowers the Court.

ii. Layer Two: The Two-Thirds Certiorari Rule

Given the legal strength of the certiorari/certification rule, Layer One is likely to stand or fall based on the Supreme Court's views on the constitutionality of the senior-status requirement. Assuming that the "bifurcated court" approach outlined above is constitutional, the question then becomes what jurisdiction-restoring approach is best suited to the new judicial structure.

198 Hartnett, *supra* note 168, at 1651.

199 *Id.* at 1710.

200 *Id.* at 1710–12.

201 *Id.*

202 *Id.* at 1712.

203 See Grove, *The Exceptions Clause*, *supra* note 163, at 930–33, 952–59, 969–72. Some have questioned the compatibility of discretionary review with the power of judicial review itself. See Jennings & Acharya, *supra* note 4, at 413 (citing Charles L. Black, *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 845–46 (1975)).

To ensure that the “full” Court does not use its agenda-control power to pursue partisan ends or to otherwise manipulate the offerings available to the most-junior nine Justices, Layer Two would implement a new rule to govern petitions for certiorari.

Today, the Supreme Court follows an informal “Rule of Four.” If at least four Justices support hearing a case, the Court will grant the petition for certiorari.²⁰⁴ Layer Two would replace this rule with a formal, inverted supermajority requirement: a petition would be *granted* unless two-thirds voted to *deny* certiorari.²⁰⁵

Switching the default to grants while retaining a supermajority ability to reject petitions would prevent a bare majority from exercising agenda control and would move the institution as a whole marginally closer back towards the error-correction role that it historically occupied by increasing the likelihood of grants overall. To be sure, “even if the Court decided 150 or 200 cases per year . . . , it would dispose of only a fraction of its 9,000-case docket and could not possibly correct every error in lower court interpretations of federal law.”²⁰⁶ We are well past the day when the Court could feasibly exercise *full* mandatory jurisdiction, and there are compelling normative reasons to reject this goal as well.²⁰⁷

But the Court’s “error-correction” and “law-declaration” roles are less distinct categories so much as ends on a spectrum. The certiorari votes of individual Justices, for example, may reflect each Justice’s views about what institutional place on this continuum the Supreme Court *should* occupy.²⁰⁸ Professors Margaret Meriwether Cordray and Richard Cordray suggest that Justice White’s frequent certiorari votes tended to reflect his own view that

204 Leiman, *supra* note 191.

205 Jennings & Acharya, *supra* note 4, at 412, propose revising the Rule of Four and “requiring a majority—or six, seven, eight, or even all nine—of the Justices to agree to grant certiorari” to “permit minority perspectives on the Court to block cases that are likely to be the most ideologically, socially, or politically divisive.” Although this helps neutralize action on the most divisive cases, it might (1) leave splits standing and (2) further reduce the Justices’ workload, unintentionally encouraging grandstanding and partisan celebrity behavior.

206 Grove, *Vertical Maximalism*, *supra* note 172, at 57.

207 See *id.* at 56–59 (“To fulfill its ‘supreme’ role in this judicial hierarchy, the Court must focus on establishing broad precedents, not on correcting isolated errors in lower court decisions.”).

208 See Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 423 (2004) (proposing that certiorari grant patterns reflect Justices’ views on whether the Court should utilize more of a “rule-articulating approach,” a “standard-setting approach,” or “an incrementalist approach”).

“[t]he function of a judge . . . is to decide cases, not to write essays or to expound theories,”²⁰⁹ while Justice Scalia’s less frequent votes reflected his view that the Supreme Court should take a more assertive, rule-articulation approach.²¹⁰

By imposing a new certiorari rule that automatically grants petitions unless a supermajority of the Justices denies the petition, Congress could weigh in on this debate and implement its own view that the Court should be more in the business of deciding cases and less in the business of setting rules—a systematically, if subtly, disempowering shift.

iii. Layer Three: The Unanimous Certiorari Rule

If the Justices invalidate both Layer One and Layer Two, the Supreme Court will grow well beyond its current size given the terms of Layer Three. With this expanded membership, the Supreme Court could handle a far greater workload, allowing it to move even closer to the error-correction end of the spectrum.

For this reason, Layer Three would implement a *unanimous* certiorari rule, placing a heavy thumb on the scale in favor of the Court granting petitions and resolving cases.²¹¹ Shifting to a rule that requires unanimity might also have additional benefits.

First, an unanimity rule would end any attempt by the Justices to exercise the Court’s agenda-setting power in even minimally partisan ways given the dispersal of control.

Second, it would create strong intra-institutional levers of power to encourage consensus both inside and outside the certiorari process itself. By granting individual Justices the power to marginally increase their colleagues’ workload, Congress could introduce a form of “judicial filibuster” into the Court’s internal deliberations. This procedural leverage could have a meaningful substantive impact, not only encouraging consensus around holdings, but even encouraging consensus around judicial culture and language. Individual Justices may be less likely to write a sarcastic takedown in

209 *Id.* at 429.

210 *Id.* at 425–27.

211 One might ask why not simply restore mandatory jurisdiction. First, even a greatly expanded Court likely could not resolve all the petitions that the Court receives in any given year. Second, giving the Court a “percolation” option may be useful to help develop the law and allow for a degree of flexibility that is useful in promoting constitutional stability. *Id.* at 437–39.

a concurring opinion or publicly wade into culture wars off the bench if they know their peers will punish such behavior with more work.²¹²

Third, by reducing the rewards of “celebrity” behavior and the power and prestige of the Court overall, these changes might rein in a related problem: circuit judges “auditioning” for a position on the Supreme Court.²¹³

In the end, Layer Three offers an approach that redefines both the size and function of the Supreme Court in a surprisingly disempowering way, given the proposal’s clear constitutional footing.

C. Layering Objections

With so many political and legal benefits associated with layered reform, why pursue any other approach? Unfortunately, there will always be some legal unpredictability surrounding any proposal, and the very process of layering policies introduces its own kind of uncertainty into the transition.

While the constitutionality of fallback law in general seems secure enough to outweigh the uncertainties associated with various standalone plans, some potential legal objections remain, and there are more (and less) risky approaches to layering. I address these below.

In the end, the only true insurance against the “tail risk” of complete invalidation is the combination of political safeguards discussed in Part II.B.: mandatory appeal, consolidated venue, and prioritization. By including these provisions in any reform package, Congress can protect its prerogative to respond to whatever action the Supreme Court takes.

1. Legislative Duty

In his article, *Fallback Law*, Professor Dorf suggests that contingent legislative design raises difficult theoretical questions about the legislator’s duty to exercise independent constitutional judgment, whether one subscribes to a Lincolnian view, a Dialectic view, or even a Judicial Exclusivity view.²¹⁴ The conceptual tensions that Professor Dorf identifies are intriguing, and I commend readers to his excellent analysis.

212 See CARLY SIMON, *You’re So Vain, on NO SECRETS* (Elektra 1972) (“You’re so vain/You probably think this song is about you.”).

213 See Lerner & Lund, *supra* note 109, at 1294 (arguing that changes “might even encourage some mediocre lower court judges to refrain from campaigning for a seat on the high court”).

214 Dorf, *supra* note 81, at 342–50.

For our more pedestrian purposes, however, Professor Dorf's final takeaway puts to rest any concerns that legislators might have: the Supreme Court almost certainly will not invalidate legislation on this basis.²¹⁵ To do so, the Court would need to strike down *otherwise valid* legislation based on a brand-new separation of powers doctrine built on an equally new constitutional theory. What theory? That the Supreme Court has the power to *judicially* enforce a *legislative* duty that itself requires legislators to "abide by their best guess about what the courts would do."²¹⁶

As Professor Dorf concludes, "[m]erely to describe such possibilities is to explain why they are untenable as formal doctrines."²¹⁷ Even judicial supremacy does not require this kind of legislative groveling.

2. *Nondelegation*

With the nondelegation doctrine on the cusp of making a comeback,²¹⁸ might the Court hold that a layered design impermissibly delegates policy choices to the judiciary?²¹⁹

No. In a layered design, the Court is not being asked to craft policy or even to choose in its own discretion among various policy options. Rather, the Court must enforce a clear legislative policy: Layer One. If the Court holds that legislative policy is constitutionally deficient, it must enforce a different, clear legislative policy: Layer Two.

215 *Id.* at 350–51.

216 *Id.*

217 *Id.* at 351.

218 See *Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring) ("[S]ince 1935, the Court has uniformly rejected nondelegation arguments If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); *id.* at 2131–2148 (Gorsuch, J., dissenting) (arguing that the provision of the Sex Offender Registration and Notification Act ("SORNA") authorizing the Attorney General to specify registration requirements violates the nondelegation doctrine); see also Hannah Mullen & Sejal Singh, *The Supreme Court Wants to Revive a Doctrine That Would Paralyze Biden's Administration*, SLATE (Dec. 1, 2020, 12:56 PM), <https://slate.com/news-and-politics/2020/12/supreme-court-gundy-doctrine-administrative-state.html> (explaining there are at least five justices who have indicated they would support a "revived nondelegation doctrine").

219 See Dorf, *supra* note 81, at 326 (arguing that Congress does not violate the nondelegation doctrine when it enacts fallback laws).

Ironically, Congress delegates *more* implicit authority to the Judiciary when it *declines* to include severability guidance or other substitute law, as *Bowsher v. Synar* suggests.²²⁰

3. Judicial Coercion

The strongest objection to contingent design is that it could be used to coerce the Judiciary in a way that undercuts decisional independence.²²¹ Consider a plainly unconstitutional law backed up by an unrelated fallback provision that dramatically raises taxes or terminates a popular program.²²² As Dorf notes, “[b]y including a highly *undesirable* fallback provision in legislation, the legislature can raise the cost of invalidation to the court.”²²³

This kind of judicial coercion seems contrary to basic principles of decisional independence central to the exercise of judicial power. And the principle that coerced acts are void or illegitimate “is about as basic as legal principles get.”²²⁴ Even if Congress has the power to enact freestanding legislation that “retaliates” against a judicial decision *ex post*,²²⁵ it might lack the power to “pretaliate” as a way to force the Court’s hand *ex ante*.²²⁶

220 See *supra* text accompanying notes 82–87; see also Dorf, *supra* note 81, at 327 (“Seen in this light, we can understand substitutive fallback law as a legislative effort to *avoid* the delegation issues that arise from a general background presumption of severability.”).

221 See generally Dorf, *supra* note 81, at 327–42 (discussing how the legislature can create laws to coerce the judiciary); Kameny, *supra* note 91, at 1001 (arguing that the legislature sometimes uses inseverability clauses for “an *in terrorem* function, as the legislature attempts to guard against judicial review altogether by making the price of invalidation too great.”).

222 Or consider the DOMA hypothetical posed in Dorf, *supra* note 81, at 333–36.

223 *Id.* at 327.

224 Kameny, *supra* note 91, at 1001–02 (“[F]or example, a contract entered into under duress is void; a will or other donative transfer executed under duress is void; an involuntary confession by a criminal defendant is inadmissible; and so on.”).

225 Dorf, *supra* note 81, at 332 (“There are also reasons of principle to think that perhaps Congress is entitled to retaliate against the courts for unpopular decisions. Although the Court’s modern jurisprudence tends to be self-protective, *Stuart v. Laird* and *Ex parte McCordle* have not been formally overruled” (footnotes omitted)).

226 *Id.* at 335–36. Some argue that *United States v. Klein*, 80 U.S. 128 (1871), and its progeny support Congress’s power to coerce the judiciary in this way. See, e.g., Keshav Poddar, *How Democrats Can Keep Their Policies Safe From This Supreme Court*, SLATE (Jan. 26, 2021, 5:45 AM), <https://slate.com/news-and-politics/2021/01/democrats-supreme-court-progressive-policies-protection.html> (“Congress could . . . use[e] backup provisions unrelated to the main policy in a bill to coerce the [C]ourt into letting the legislation stand [because] . . . the [C]ourt has held that Congress

Assuming that a majority of the Justices are open to announcing a new separation of powers doctrine to this effect, the court reform package above could raise two questions. What would be the “test” for unconstitutional coercion, and would the particular layering found in the proposal above violate that test?

National Federation of Independent Business v. Sebelius (NFIB) offers at least one data point for thinking through how the Court might operationalize

can change underlying law relevant to a specific case . . . to explicitly dictate what the outcome of that case should be.”). This is questionable.

By most accounts, *Klein* prohibits Congress from conditioning the Court’s jurisdiction on a particular outcome on the merits, thereby ensuring that only one party can win on the merits. See Ryan, *supra* note 108, at 793 (explaining that the Court in *Klein* forbids Congress from granting jurisdiction conditionally to force the Court to reach a certain outcome); see also Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (plurality opinion) (“Congress violates Article III when it compel[s] . . . findings or results under old law, [in effect dictating that] [i]n *Smith v. Jones*, Smith wins.” (first two alterations in original) (internal quotation marks omitted) (citations omitted)). If, however, Congress changes the law relevant to a specific pending case (including jurisdictional law), it can effectively achieve a similar result. See generally Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016), and Patchak, 138 S. Ct. at 897. But this power does not neatly track the constitutional issues raised by backup law as a conceptual matter, nor are the boundaries of this power settled as a practical matter.

On the conceptual front, coercive backup laws and changes to the law underlying a pending case both reflect congressional attempts to achieve a particular result, but they use distinct methods and raise different concerns. For *Klein*, Congress wants a particular *judgment* in a pending case (or set of cases) and so Congress writes a law that unambiguously forces the desired result based on the expectation that the Court will faithfully interpret and apply the new law. For retaliation, Congress wants a particular *interpretation* of the Constitution (across all cases, pending and future) and so Congress writes the backup law in a way expected to compromise the Court’s faithful interpretation of the primary law. One strikes at judicial independence over the *decisional* process, while the other strikes at judicial independence over the *interpretive* process. See G. Michael Parsons, *Gerrymandering & Justiciability: The Political Question Doctrine After Rucho v. Common Cause*, 95 IND. L.J. 1295, 1323–45 (2020). To be sure, a principled basis exists for viewing the latter as more contestable terrain. See *supra* note 38. But the current Supreme Court seems likely to view both with a skeptical eye, and many scholars have proposed that the Court adopt a purpose-based reading of *Klein* that is *more* aggressive, not less. See, e.g., Fallon, *supra* note 64, at 1074–83 (discussing the importance of considering Congress’s intent when interpreting statutes and arguing that the Court did this in *Klein*); Shugerman, *supra* note 51, at 985 (suggesting that *Klein* is about Congress’s motive).

On the practical front, the most recent case in the *Klein* line—*Patchak v. Zinke*—was a highly fractured case with no majority opinion. Only four Justices—Thomas, Breyer, Alito, and Kagan—stated Congress could remove jurisdiction over a pending case to ensure that case would be dismissed. Justices Ginsburg and Sotomayor thought the suit should be dismissed on sovereign-immunity grounds, and Justices Kennedy and Gorsuch joined a dissent by Chief Justice Roberts who would have held the law to be an unlawful intrusion upon the judicial power. This does not bode well for any future attempts by Congress to explore the boundaries of decisional- or interpretive-forcing, especially with the addition of Justices Kavanaugh and Barrett. [Disclosure: I represented Respondent Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians in *Patchak v. Zinke*.]

a “decisional-coercion” standard.²²⁷ In *NFIB*, the Supreme Court struck down part of the Affordable Care Act’s Medicaid expansion provision.²²⁸ The provision required states to expand Medicaid coverage to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line.²²⁹ If a state did not do so, it would lose *all* of its federal Medicaid funding, including the funding it received before the enactment of the Affordable Care Act.²³⁰

The *NFIB* Court held that this exceeded Congress’s powers under the Spending Clause of Article I, Section 8.²³¹ Although Congress may “grant federal funds to the States, and may condition such a grant upon the States’ ‘taking certain actions that Congress could not require them to take,’”²³² the terms of that condition cannot cross the constitutional line from encouragement to coercion.²³³ Seven of the Justices held that the Medicaid expansion conditions crossed the line into unconstitutional coercion, but the rationales offered for this holding split across two opinions.²³⁴

For our purposes, a deep dive into the specifics of each opinion is unnecessary. The composition of the Court has changed in significant ways since the decision, and the substantial differences between spending-coercion and judicial-coercion strains the analogical value of any detailed analysis. (One can question, for example, the premise that Congress possesses a predicate power to intentionally “encourage” a particular judicial decision, let alone “coerce” it.)

For the sake of prediction, however, *NFIB* reflects the Court’s general willingness to articulate doctrines that protect the perceived prerogatives of

227 See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 575–85 (2012) (Roberts, C.J.) (applying a coercion standard to the Affordable Care Act).

228 See *id.* at 585 (severing part of the statute because “the Secretary cannot apply § 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion”).

229 *Id.* at 576 (Roberts, C.J.) (“The Medicaid provisions of the Affordable Care Act, in contrast, require States to expand their Medicaid programs by 2014 to cover *all* individuals under the age of 65 with incomes below 133 percent of the federal poverty line.”).

230 *Id.* at 579–80 (“Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States’ existing Medicaid funds.”).

231 *Id.* at 579–80; *id.* at 681–82 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

232 *Id.* at 576 (Roberts, C.J.) (quoting Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999)).

233 *Id.* at 579–80; *id.* at 681–82 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

234 See Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 866–67 (2013) (outlining the opinions in *NFIB*).

constitutional actors, and the decision also reveals several factors that could play into an anti-coercion standard: germaneness of the condition,²³⁵ significance of impact,²³⁶ existence of coercion-in-fact,²³⁷ attaching new conditions to an existing status quo,²³⁸ or perhaps some combination of these factors (e.g., “leveraging”).²³⁹

By almost all of these measures, the proposal above would seem to fare well. Each of its two policies—regularizing appointments and restoring jurisdiction—have common institutional aims addressing related troubling trends, and each layer pursues those ends with increasingly “settled” policy choices. No layer operates as a “punishment” unrelated to the prior layer, no layer attaches new conditions to an existing status quo, and no layer imposes any kind of drastic short-term change.²⁴⁰

To be sure, the use of a contingent design (whatever the particular substance of its layers) is intended to level the institutional advantage of inertia that the Court might otherwise use to fight off reform, but that is not relevant to the question presented here: whether any of the *specific backup policies* proposed above might coerce the Court into choosing the *primary policy* in a way that threatens the Court’s decisional independence over the constitutionality of the primary policy.

The only aspect of the package remotely open to a coercion objection could be the fact that the two policies are tied together within each layer: each layer stands or falls as one. Why would this create concern? Because Justices in the majority could view the “threat” to their agenda-setting power (reflected

235 See *id.* at 892 (noting that Roberts “employed an analysis that resembles, but is importantly distinct from, the germaneness doctrine”).

236 See *id.* at 871 (noting that the dissenters “looked principally to the size of the federal grant at issue”).

237 See *id.* at 870 (“For the Chief Justice, then, congressional motive to pressure the states is not enough to render a threatened funding cutoff unconstitutional; rather, the threat must actually take away the states’ ability, ‘not merely in theory but in fact,’ to choose whether to accept a funding condition.” (quoting *NFIB*, 567 U.S. at 581)).

238 See *id.* at 872 (“And that is true whether the conditions are new strings attached to a preexisting federal program or are terms imposed for the first time in an entirely new program.”).

239 See *id.*

240 Consider a senior-status requirement backed by a provision that *immediately* changes the size of the Court to twenty-five members so that the current President can appoint all of the new members at once. The question is not whether such a plan is *independently* constitutional, but whether using such a plan *as a backup provision* to the senior-status requirement plan *could* be seen as coercing the Justices into ruling favorably on the senior-status requirement.

in layers two and three) as a way of influencing their decision on the merits of the senior-status policy found in layer one.

The idea that this aspect of the legislation could be held “threatening” in a way that renders the entire bill constitutionally invalid seems implausible for many reasons.

First, each layer’s approach to restoring jurisdiction is reasonably related to that layer’s approach to regularizing appointments. If the Supreme Court will remain at nine active Justices (as under Layer One), making only minor changes to the structure of the Court’s docket seems appropriate. If the Supreme Court seems likely to swell to, say, twenty or more Justices (as under Layer Three), shifting more heavily towards an error-correction role becomes more feasible. And the bigger the active appellate bench the more error-correcting it can be, which explains the differences between Layer Two and Layer Three.

Second, *all* the layers reduce the Court’s overall agenda-setting power to some extent. Thus, Layer One does not offer any kind of inappropriate “inducement” since none of the layers maintain the status quo.

Third, it is worth considering who the change supposedly threatens, what power is supposedly threatened, and how that relates to the judicial role. The imposition of a supermajority (or unanimity) requirement to govern the power of case selection *only* reins in the power of particular blocs of Justices to decide what cases the Court should decide. Not only is this discretionary power a matter of legislative grace, but it also already stands in tension with the Justices’ own constitutional duties and is exercised in ways contrary to the implicit assurances provided to Congress when the power was granted.

In advocating for the power to exercise this discretion, the Justices assured Congress that any petitions involving cases “of public importance or of wide general interest”—especially constitutional cases—would be granted in due course, and that the denial of petitions would mainly impact the “very large proportion of the cases that come to the court” and “ought never to be there at all.”²⁴¹

The Supreme Court as an institution is supposed to exercise its certiorari power in a nonpartisan and nonideological manner—or at least, to quote the Massachusetts Constitution, in a manner as impartial “as the lot of humanity

241 Hartnett, *supra* note 168, at 1680, 1685 (citations omitted).

will admit.”²⁴² Such a power *simply is not threatened* by a supermajority or unanimity requirement. No bloc of Justices within the Court is supposed to be exercising any kind of ideological agenda-setting power in the first place, so any suggestion that the “power” of such a bloc of Justices would be threatened amounts to a confession of bad faith by the Court more than a demonstration of bad faith by Congress.

In short, the “tying” within each layer cannot act as a sword of Damocles without revealing the depth of the rot that the policies themselves are designed to address. Both liberal and conservative Justices alike pledge fidelity (to an almost comical degree) to the idea that they are mere “umpires”²⁴³ in the constitutional scheme, calling “balls and strikes”²⁴⁴ by impartially “applying the law to the facts at hand.”²⁴⁵

While few legal scholars subscribe to such a simplistic assessment of judicial power (and one might reasonably question the sincerity of such statements), the universal invocation of these themes during confirmation hearings “suggests the existence of deep popular expectations about the distinction between law and politics.”²⁴⁶ And if Justices do *not* view themselves as “policy entrepreneurs, who seek to fulfill their policy goals through . . . their case selection policies”²⁴⁷ there is no basis for believing that a rule requiring unanimity to deny certiorari could be a “threat.”

242 MASS. CONST. pt. 1, art. XXIX.

243 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary U.S. S.*, 109th Cong. 55 (2005) (statement of John G. Roberts, Nominee to be C.J. of the United States); *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary U.S. S.*, 111th Cong. 79 (2009) (statement of Hon. Sonia Sotomayor, Nominated to be an Associate J. of the Supreme Court of the United States); see also Brett M. Kavanaugh, *I Am an Independent, Impartial Judge*, WALL ST. J. (Oct. 4, 2018, 7:30 PM), <https://www.wsj.com/articles/i-am-an-independent-impartial-judge-1538695822> (“[A] good judge must be an umpire—a neutral and impartial arbiter who favors no political party, litigant or policy.”).

244 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, *supra* note 243, at 56.

245 *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States*, *supra* note 243, at 79; see also *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary U.S. S.*, 111th Cong. 202–03 (statement of Elena Kagan, Solicitor General of the United States) (emphasizing that judges do not do “anything other than apply[] the law.”).

246 Lerner & Lund, *supra* note 109, at 1256.

247 Hartnett, *supra* note 168, at 1720 (citation omitted).

For these reasons, it seems unlikely that the Justices would hold that the layered design above unconstitutionally undermines their interpretive independence.

All the same, enacting meaningful court reform is already an unpredictable endeavor and legislators may wish to minimize risk to the greatest extent possible. By uncoupling the two policies so that each stands alone, Congress could preempt even the minimal risk that the Court could hold the “tied” approach to layering coercive.

CONCLUSION

As I began writing the conclusion to this Article, an armed mob incited by President Trump broke into the U.S. Capitol, inflicting violence and destruction in an attempt to halt the counting of electoral college votes and the peaceful transition of power.²⁴⁸ As Members of Congress took shelter under their chairs, Capitol Police deployed tear gas in the rotunda and drew weapons at the chamber doors to protect the elected officials inside.²⁴⁹ During the insurrection that left five dead, authorities also discovered explosive devices hidden outside the nearby headquarters of the two major parties.²⁵⁰

We are, hopefully, beyond the stage of denial where the implosion of democratic conventions can be written off as liberal handwringing. Norms at the federal (and state)²⁵¹ level have been collapsing at an astonishing rate, and it is time to stop indulging the notion that this growing authoritarian strain in our politics will dissipate with accommodation.

248 See Lisa Mascaró, Eric Tucker, Mary Clare Jalonick & Andrew Taylor, *Biden Win Confirmed After Pro-Trump Mob Storms US Capitol*, ASSOCIATED PRESS (Jan. 7, 2021), <https://apnews.com/article/joe-biden-confirmed-0409d7d753461377f2c5bb91ac4050c>.

249 *Id.*

250 See generally Rosa Sanchez, *FBI Posts Photo of Person Who Placed Suspected Pipe Bombs Outside DNC, RNC*, ABC NEWS (Jan. 11, 2021, 7:31 PM), <https://abcnews.go.com/Politics/fbi-posts-photo-person-suspected-pipe-bombs-dnc/story?id=75126041>.

251 See, e.g., Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1224 (2019) (noting the rise of so-called “power plays” that “bear a close family resemblance to the more familiar concept of what legal scholars have termed ‘constitutional hardball’: practices that flout widely agreed upon constitutional understandings without violating the law outright”); Levy, *supra* note 143, at 1122 (“[Court packing] has unquestionably happened in the past several years in state courts across the country. Specifically, in the last decade, there have been legislative attempts in at least ten states to alter the size of their courts of last resort, with two being ‘successful.’”).

In 2021, Democrats have a chance to rebuff (and, Republicans, a chance to repent for) the unpacking scheme that unsettled longstanding traditions governing Supreme Court appointments and to rebuild in their place a fairer and more durable system. Those committed to reestablishing and respecting democratic principles should put their words into action.

A commitment to reforming the Supreme Court is only one part in that process, but no less important for it.²⁵² As Professor Michael Seidman's contribution to this Symposium on "Constitutional Law Outside the Courts" makes plain, the line between law and politics is often illusory,²⁵³ and the exercise of power by the Supreme Court cannot be independent or legitimate if it is unrepblican.

And while Democrats should make a good-faith effort to create bipartisan buy-in from Republicans, the "proactive" insights above suggest that Democrats should not simply stand by and wait for the Biden Administration's bipartisan court-reform commission to announce its findings.

To start, the window of time available in a legislative session is a source of institutional power that Congress should not squander. Moreover, the task of identifying a "best" proposal is a trap. The only consensus that matters is the kind forged in actual legislative negotiations, and the presentation of a single proposal (rather than a layered proposal) could have the perverse effect of *shrinking* the space for potential agreement. Both Congress and the commission should be careful to avoid investing too much time and attention in a process that could ultimately undermine political action rather than encouraging it.

Whatever system emerges, Congress could and should also apply it to the entire federal judiciary. The patterns and habits of strategic judicial retirements and partisan unpacking-through-obstruction extend well beyond the Supreme

252 Indeed, the opportunity to make inroads in the Judiciary was a meaningful source of the Republican establishment's indulgence of the party's Trumpian turn. See Elie Mystal, *Donald Trump and the Plot to Take Over the Courts*, NATION (July 15, 2019), <https://www.thenation.com/article/society/trump-mcconnel-court-judges-plot/> ("Trump has been all too happy to play along with the game orchestrated by Senate majority leader Mitch McConnell [because] Trump delivers the judges, helping fulfill the conservative movement's long-cherished dream of remaking the judiciary, and his base remains content.").

253 See Louis Michael Seidman, *Rucho is Right - But for the Wrong Reasons*, 23 U. PA. J. CONST. L. (forthcoming 2021) (manuscript at 5-9), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715561 (arguing that it is "close to inevitable that political considerations will play some role in the [legislative districting] process").

Court, and, in the latter case, the more routine stalling of lower-court judge confirmations arguably prepared the ground for the blockade of Judge Garland.²⁵⁴ An eighteen-year senior service requirement could extend to all judicial offices to prevent judicial manipulation, and new seats could be created automatically based on a predictable schedule and a formula tied to caseload per court to prevent legislative manipulation.²⁵⁵

Any statutory change is, of course, subject to the risk that the opposing party will roll it back after the next election or whenever the opportunity arises. Nothing about the package above can guarantee bipartisan compliance over time.

But then there's nothing magical about the number nine either. Norms are durable only when they are shared. The layered approach—and plan—above proposes just one method to quickly assemble the largest possible coalition around a set of principled practices. Beyond that, it's up to us to make deviations from the plan a new “third rail” of politics and to transform those practices into stable conventions.

254 See, e.g., Sam Berger, *Conservative Court Packing*, CTR. FOR AM. PROGRESS (Apr. 3, 2019, 9:01 AM), <https://www.americanprogress.org/issues/democracy/news/2019/04/03/468234/conservative-court-packing/> (“[T]he treatment of Judge Garland was merely the most visible manifestation of a far-reaching scheme to hold judicial seats open until a conservative president could fill them. It was conservative efforts to prevent any appointments to the U.S. Court of Appeals for the District of Columbia Circuit—following five years of obstructing Obama’s judicial nominees—that finally led senators supportive of President Barack Obama’s nominees to eliminate the filibuster in 2013 when confirming lower-court judges.”).

255 See Jamelle Bouie, *Court Packing Can Be an Instrument of Justice*, N.Y. TIMES (Oct. 9, 2020), <https://www.nytimes.com/2020/10/09/opinion/court-packing-amy-coney-barrett.html> (noting that the last major expansion was thirty years ago, the population has grown since then, and the Judicial Conference of the United States itself uses a formula for recommending the creation of new seats).