Foreword

A Hill to Die On: Federal Court Reform in the 2020s

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The Federal Judiciary stands at a crossroads.[1] Public trust in the judicial branch has fallen steadily over the past quarter-century, from

∗ Symposium Articles Editor, *Minnesota Law Review*, Volume 106. I would like to thank Professor Jill Elaine Hasday for serving as the advisor for this Symposium. Further thanks to Professors Kristin E. Hickman and Robert A. Stein for offering their advice and guidance in the early planning stage of this event. Thank you to the Executive Board of *Minnesota Law Review* Vol. 106. I'm proud to have worked together to make this volume go, and I'm lucky to know each of you. Thank you specifically to Kerry Gibbons, Vol. 106 Lead Articles Editor and the dearest of friends, for stepping in to cover my Symposium duties after the birth of my child. Thank you to Jessica Szuminski, Symposium Articles Editor, *Minnesota Law Review* Vol. 105, for her mentorship and friendship, both of which prepared me well for this role. In addition to the friends, family, and colleagues mentioned in prior publications, thank you to Zack Crandell, Emily Curran, Will Ely, "Burger" Rob Frakes, Jordan Francis, Joe Hamaker, Matt Jacobs, Josiah and Leah Lindstrom, Matt McCracken, Patrick Murray, Dylan Saul, Justina Schiroo, and Rachel Starkman for their camaraderie and support during the most challenging personal and professional time in my life. Most of all, thank you to my wife, Dana Peterson. For everything, forever and always. Finally, thank you to Dana and my son, Henry David Suitor, for bringing so much joy into our family and somehow making the last semester of law school an even more thrilling adventure than the first five. I hope that someday you can read this and see what a strong, loving community there was around you and your parents. It was those people who made this entire experience worth it.

1. The *Minnesota Law Review* Vol. 106 Symposium was held on Friday, March 25, 2022. This Foreword was originally composed in the following week. Both events predated, but anticipated, the Supreme Court's string of controversial decisions that drastically expanded the scope of the Free Exercise clause and protected religious speech under the First Amendment; *see* Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); reversed course on hard-fought tribal sovereignty and jurisdictional issues decided just two years prior; *see* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022); trampled principles of federalism and signaled a total hostility to state regulation of firearms in the process of expanding Second Amendment rights; *see* New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022), declared open war on the administrative state and signaled a total hostility to federal regulation of environmental issues while deciding a moot issue, *see* West Virginia v. EPA, 142 S. Ct. 2587 (2022), and, finally, undoing nearly a half-century of precedent to rescind federal abortion protections, leaving the reproductive choices of people capable of pregnancy up to the whims of their state governments, *see*

a high of eighty percent approval in 1999 to fifty-four percent in 2021.[2] While our Article III courts have never been immune from political concerns,[3] Americans increasingly disapprove of their work, particularly that of the Supreme Court.[4] The last decade has seen fights over the high court erupt[5] into full-scale[6] partisan[7]

Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). *Minnesota Law Review* has made the editorial decision to largely maintain the original text of this Foreword as a snapshot of a moment in time just before this deluge of conservative rulings. Citations have been updated or added to reflect events since early April or to illustrate the arguments made by Symposium participants.

2. *See* Megan Brenan, *Americans' Trust in Government Remains Low*, GALLUP (Sept. 30, 2021), https://news.gallup.com/poll/355124/americans-trust-government-remains-low.aspx [https://perma.cc/78LH-D4ME] (reporting the results of a September 2021 poll charting the percentage of Americans who had "a great deal" or "a fair amount" of "trust in confidence in . . . the judicial branch" compared to historical results).

3. *See, e.g.*, FRANKLIN D. ROOSEVELT, *March 9, 1937: Defending the Plan to 'Pack' the Supreme Court*, *in* FDR'S FIRESIDE CHATS 83, 86, 89 (Russell D. Buhite & David W. Levy eds., 1st ed. 1992) ("We are at a crisis . . . . The [Supreme] Court . . . has improperly set itself up as a third House of the Congress—a superlegislature . . . . we must take action to save the Constitution from the Court and the Court from itself."); *Address to the Nation on the Supreme Court Nomination of Robert H. Bork*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (Oct. 14, 1987), https://www.reaganlibrary.gov/archives/speech/address-nation-supreme-court-nomination-robert-h-bork [https://perma.cc/8444-CX4W] (referring to opposition to the nomination of Circuit Judge Robert Bork to the United States Supreme Court, by Democratic Party senators, as a "campaign of distortion and disinformation" that "will permanently diminish the sum total of American democracy").

4. *See* Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/22SV-X66W] (reporting the results of a June 2022 poll finding that only "[t]wenty-five percent of U.S. adults say they have 'a great deal' or 'quite a lot' of confidence in the U.S. Supreme Court, down from 36% a year ago and five percentage points lower than the previous low recorded in 2014").

5. *See* Russell Wheeler, *Senate Obstructionism Handed a Raft of Judicial Vacancies to Trump—What Has He Done with Them?*, BROOKINGS INST. (June 4, 2018), https://www.brookings.edu/blog/fixgov/2018/06/04/senate-obstructionism-handed-judicial-vacancies-to-trump [https://perma.cc/SXG7-WUR8] (reporting that the Republican Party-controlled Senate confirmed just twenty Article III judges in the final two years of Democratic President Barack Obama's second term, compared to an average of seventy-five confirmations for the prior four presidents' final two years).

6. *See* Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html [https://perma.cc/N5NC-23XV] ("Judge Neil M. Gorsuch was confirmed by the Senate on Friday to become the 113th justice of the Supreme Court, capping a political brawl that lasted for more than a year and tested constitutional norms inside the Capitol's fraying upper chamber.").

7. *See* Maggie Jo Buchanan & Abbey Meller, *Brett Kavanaugh: A Representation of the Damaged U.S. Judiciary*, CTR. FOR AM. PROGRESS (Oct. 1, 2019),

war,[8] and a strong majority of Americans see the Justices as political creatures,[9] despite the Justices' strenuous claims to the contrary.[10] As federal courts increasingly divert from public opinion on important issues,[11] and political actors exert pressure on them to depart even

https://www.americanprogress.org/article/brett-kavanaugh-representation-damaged-u-s-judiciary [https://perma.cc/U5ZZ-4X5V] ("[The] Senate voted 50-48 to confirm Brett Kavanaugh to the Supreme Court despite credible, powerful allegations of sexual assault. The vote came on the heels of a partisan display by Kavanaugh . . . in which he put forward conspiracy theories that echoed his long career in conservative politics.").

8. *See* Lisa Mascaro, *Barrett Confirmed as Supreme Court Justice in Partisan Vote*, AP NEWS (Oct. 26, 2020), https://apnews.com/article/election-2020-donald-trump-virus-outbreak-ruth-bader-ginsburg-amy-coney-barrett-82a02a618343c98b80ca2b6bf9eafe07 ("Amy Coney Barrett was confirmed to the Supreme Court . . . . [the] 52-48 vote was the closest high court confirmation ever to a presidential election, and the first in modern times with no support from the minority party.").

9. *See, e.g.*, *62% of Americans Say Politics, Not Law, Drives Supreme Court Decisions*, GRINNELL COLL. (Oct. 20, 2021), https://www.grinnell.edu/news/62-americans-say-politics-not-law-drives-supreme-court-decisions [https://perma.cc/644S-T79H] (reporting the results of an October 2021 poll finding that that sixty-two percent of Americans "believe the decisions of the court are based more on the political leanings of justices than the Constitution and the law").

10. *See* STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS 66 (2021) ("A judge's loyalty is to the rule of law, not the political party that helped to secure his or her appointment."); Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap over Judges*, AP NEWS (Nov. 21, 2018), https://apnews.com/article/north-america-donald-trump-us-news-ap-top-news-immigration-c4b34f9639e141069c08cf1e3deb6b84 ("'We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them,' [Chief Justice John] Roberts said."). *But see* Law Boy, Esq. (@The_Law_Boy), TWITTER (Nov. 21, 2018, 1:43 PM), https://twitter.com/The_Law_Boy/status/1065329976550019078 [https://perma.cc/P3QK-JSC7] ("Thank you Chief Justice Roberts. What non-lawyers don't understand is that judges do not rule based on politics. The fact that every judge's judicial philosophy aligns with their politics is simply the greatest coincidence in all of human history.").

11. *Compare, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)), *with NPR/PBS NewsHour/Marist National Poll: Abortion Rights, May, 2022*, MARIST POLL (May 19, 2022), https://maristpoll.marist.edu/polls/npr-pbs-newshour-marist-national-poll-abortion-rights-may-2022 [https://perma.cc/6PCX-RP7N] (reporting the results of a May 2022 poll finding that "64% of Americans do not think Roe v. Wade should be overturned, while 33% think it should").

further,[12] growing public support for changes to the judiciary indicates an escalating belief among Americans that the Article III courts are no longer working for them.[13]

Thus, the questions are posed: Is the Federal Judiciary broken and, if so, what can we do to fix it?

To that end, *Minnesota Law Review* hosted its annual Symposium on March 25, 2022. Titled "A Hill to Die On: Federal Court Reform in the 2020s," the event gathered some of the country's leading thinkers, writers, and broadcasters studying the structure and operation of the Article III courts. Across three wide-ranging discussions, the Symposium's participants attempted to answer the overarching inquiries by investigating the Supreme Court, lower federal courts, and the current events surrounding them.

The Symposium began with a live recording of the *Strict Scrutiny* podcast. Hosted by Professors Leah Litman,[14] Melissa Murray,[15] and Kate Shaw,[16] the episode[17] provided detailed analysis of that week's

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12. *Compare* Mark Joseph Stern, *The Ketanji Brown Jackson Hearings Show Marriage Equality is the Next Target once Roe Falls*, SLATE (Mar. 23, 2022), https://slate.com/news-and-politics/2022/03/ketanji-brown-jackson-hearings-obergefell-roe.html [https://perma.cc/7RAC-DZBB] ("[M]any [Republican] senators have turned their attention to a different precedent that's likely next on their hit list once *Roe* likely falls this summer: *Obergefell v. Hodges*, the 2015 decision recognizing same-sex couples' constitutional right to marry."), *and Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) ("[W]e should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."), *with* Justin McCarthy, *Record-High 70% in U.S. Support Same-Sex Marriage*, GALLUP (June 8, 2021), https://news.gallup.com/poll/350486/record-high-support-same-sex-marriage.aspx [https://perma.cc/66LV-MU48] (reporting the results of a May 2021 poll finding that seventy percent of all Americans, and fifty-five percent of Republicans, believe that "same-sex marriages should be recognized by the law as valid").

13. *See 1 in 3 Americans Say They Might Consider Abolishing or Limiting Supreme Court*, ANNENBERG PUB. POL'Y CTR. OF THE UNIV. OF PA. (Oct. 4, 2021), https://www.annenbergpublicpolicycenter.org/1-in-3-americans-say-they-might-consider-abolishing-or-limiting-supreme-court [https://perma.cc/4KWD-NKVH] (reporting the results of a September 2021 poll finding that thirty-four percent of Americans would consider abolishing the Supreme Court if it "started making a lot of rulings that most Americans disagreed with," representing a thirteen percent increase since 2005); *id.* (reporting the results of a September 2021 poll finding that thirty-eight percent of Americans would support Congress restricting the Supreme Court's jurisdiction over certain issues, representing a sixteen percent increase since 2005).

14. Assistant Professor of Law, University of Michigan Law School.

15. Frederick I. and Grace Stokes Professor of Law, New York University School of Law.

16. Professor of Law, Benjamin N. Cardozo School of Law at Yeshiva University.

17. Strict Scrutiny, *Backwards and in High Heels*, CROOKED MEDIA (Mar. 28, 2022), https://crooked.com/podcast/backwards-and-in-high-heels

confirmation hearings for Supreme Court Justice Ketanji Brown Jackson.[18] The hosts began by discussing Judge Jackson's opening statements. Professor Shaw highlighted Judge Jackson's reflection on the challenge of balancing work and motherhood, and she directed listeners to Professor Murray's recent writing on the subject.[19] Professor Murray discussed the supportive presence of Judge Jackson's family at the proceedings and her remarks about her husband, while Professor Litman pointed to Judge Jackson's comments paying tribute to Judge Constance Baker Motley, the first Black woman confirmed as a federal judge.[20]

The hosts went on to highlight notable statements in support of Judge Jackson. Professor Murray introduced Senator Cory Booker's comments, while Professor Shaw discussed Judge Thomas Griffith's[21] comments, which raised the specter of partisan influences on the hearing. The hosts proceeded to discuss the questions and topics used as political wedges in the proceedings. Professor Litman discussed the use of public controversy over critical race theory as a conservative stalking horse to portray Judge Jackson negatively based on her race. Meanwhile, Professor Shaw analyzed the questions posed to Judge Jackson concerning the treatment of gender and parental rights under the law. The hosts continued by dissecting questions posed to Judge Jackson about her sentencing record in child pornography cases; Professor Litman discussed the substantive law governing the sentencing guidelines in such cases and pointed to empirical analysis showing that Judge Jackson's downward departures are overwhelmingly common among judges. Professor Shaw connected Senator Josh Hawley's detailed description of child pornography case facts with the hearings on Justice Clarence Thomas's alleged sexual harassment of Anita Hill, wherein Ms. Hill was asked to recite statements Justice Thomas had allegedly said to her.

[https://perma.cc/DRD3-2BG5] (archival recording on file with *Minnesota Law Review*).

18. Then a Judge for the United States Court of Appeals for the District of Columbia Circuit.

19. Melissa Murray, Opinion, *Amy Coney Barrett Was a Supermom. So Is Ketanji Brown Jackson.*, N.Y. TIMES (Mar. 7, 2022), https://www.nytimes.com/2022/03/07/opinion/supreme-court-jackson-mother.html [https://perma.cc/82RN-HW2J].

20. *Constance Baker Motley: Judiciary's Unsung Rights Hero*, U.S. CTS. (Feb. 20, 2020), https://www.uscourts.gov/news/2020/02/20/constance-baker-motley-judiciarys-unsung-rights-hero [https://perma.cc/BW25-PGSG].

21. Retired Judge, United States Court of Appeals for the District of Columbia Circuit.

Professor Murray then discussed questions posed to Judge Jackson on substantive issues of law, particularly those concerning unenumerated rights. Professor Murray's analysis used comments by Republican senators to trace a potential revanchist path for the conservative movement through *Roe*,[22] *Loving*,[23] and *Griswold*,[24] before highlighting senatorial comments that likened *Obergefell*[25] to *Dred Scott*.[26] Professor Shaw then discussed the questions to Judge Jackson about expansion of the Supreme Court. Professor Murray invoked NAACP Legal Defense Club President and Director-Counsel Emeritus Sherrilyn Ifill's tweets connecting Senator Tom Cotton's "soft on crime" rhetoric towards Judge Jackson to similar questions faced by Justice Thurgood Marshall at his own confirmation hearings.[27] A lively group discussion followed, criticizing the consistency of opposition to Judge Jackson compared to her confirmation to the D.C. Circuit in June 2021[28] and factual inaccuracies posited by certain senators. The podcast concluded with the hosts offering words of admiration and support towards Judge Jackson.

The Symposium then moved into its first panel discussion, titled "The Lower Federal Judiciary," focusing on issues facing the federal district and circuit courts and weighing solutions to resolve them.[29] Participating in the panel were Professors Marin K. Levy,[30] Leah Litman, and Stephen I. Vladeck,[31] while Professor Maria Ponomarenko[32] moderated the discussion.

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22. Roe v. Wade, 410 U.S. 113 (1973).

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

24. Griswold v. Connecticut, 381 U.S. 479 (1965).

25. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

26. The Dred Scott Case, 60 U.S. 393 (1857).

27. Sherrilyn Ifill (@Sifill_LDF), TWITTER (Mar. 22, 2022, 6:32 PM), https://twitter.com/Sifill_LDF/status/1506413489442770946 [https://perma.cc/ND4T-FDFB].

28. *See Question: On the Nomination (Confirmation: Ketanji Brown Jackson, of the District of Columbia, to be U.S. Circuit Judge for the District of Columbia Circuit)*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00231.htm [https://perma.cc/UMW4-64R3].

29. Minnesota Law Review, *Minnesota Law Review Symposium Panel: The Lower Federal Judiciary (District & Circuit Court Reform)*, YOUTUBE (Mar. 28, 2022), https://youtu.be/e4WMer9uK3s (archival recording on file with *Minnesota Law Review*).

30. Professor of Law, Duke University School of Law.

31. Charles Alan Wright Chair in Federal Courts, University of Texas School of Law.

32. Then Associate Professor of Law, University of Minnesota Law School; now Assistant Professor, University of Texas School of Law.

The discussion began with an inquiry into expansion of the lower courts. Professor Levy answered by characterizing expansion as "maintenance" rather than "reform," arguing that Congress has failed to create enough federal judgeships to keep up with caseloads over the years. Professor Levy added that a larger judiciary would allow for the opportunity to diversify the courts and pointed out that congressional hearings held in 2021 indicated there may be bipartisan support for lower court expansion.[33] Professor Litman pointed to backlogs of over a year in certain district courts, and suggested that new laws, such as one prohibiting mandatory arbitration for cases of sexual harassment and assault,[34] could add to that backlog. Professor Litman then highlighted recent articles by Professors Merritt E. McAlister[35] and Brandon Hasbrouck[36] to argue that court expansion could have racially equitable effects. Professor Levy suggested that congressional action is not even necessary to expand the lower federal courts. She argued that more judges should take senior status and pointed out that, at one point during the Biden Administration, there were sixty judges eligible to take senior status. Professor Litman suggested that President Joe Biden could influence more judges to take senior status by nominating more "activist" judges with views amenable to longtime liberal jurists.

The conversation shifted to a discussion of reform to forum-shopping practices. Professor Vladeck argued that the true problem was "judge shopping," wherein individual states seek to sue the United States in district court divisions where they have an overwhelmingly likely chance to have their case heard by a particular judge. He argued

33. *See* House Committee on the Judiciary, *The Need for New Lower Court Judgeships, 30 Years in the Making*, YOUTUBE (Feb. 24, 2021), https://youtu.be/cwFJ5g5YidI.

34. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022).

35. *See* Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 NW. U. L. REV. 1137, 1140–41, 1164 (2022) (arguing that the two-tiered "triage" system of appellate review, where nonjudicial staff attorneys screen "and (essentially) decide large numbers of appeals with varying degrees of judicial oversight" may "disproportionately harm people of color and poor communities, who tend to live where these procedures are most used").

36. *See* Brandon Hasbrouck, *Democratizing Abolition*, 69 UCLA L. REV. (forthcoming 2022) (manuscript at 33–34) (on file with author) (arguing that modern abolitionist movements should "prioritize gaining representation on [federal] courts" and finding that adding "52 new [circuit] judges of color would bring the federal judiciary's racial composition in line with the overall population, while the addition of 55 female judges would normalize its gender balance"); *id.* (manuscript at 34 n.153) (finding that adding 145 new judges of color and 215 female judges would achieve such per capita representation in the district courts).

that this "quirk in federal venue law," which provides district courts with wide discretion to divide their caseload,[37] could be resolved by passing a law that adds a single line to 28 U.S.C. § 137 prohibiting disproportionate case assignments. Professor Vladeck argued that the problem became more acute during the Biden Presidency, that courts have regularly overlooked Article III standing doctrine in cases by states suing the federal government during that time, and that nationwide injunctions against federal policies have been overissued as a result. As reforms, Professor Vladeck argued that cases requesting a nationwide injunction against the federal government as relief should be heard by a three-judge panel, as was judiciary policy from 1937 to 1976; that the U.S. Justice Department should have the option to remove any such case to the D.C. District or Circuit Courts; and that such cases could be subject to a form of the intercircuit lottery system.

In a discussion of nonstructural reforms to the Article III courts, Professor Litman argued for the benefits of passing the Judiciary Accountability Act,[38] which would apply federal civil rights and antidiscrimination laws to judiciary employees, create an office independent of the judiciary to investigate allegations of misconduct, and impose more transparent reporting requirements of such issues. In support, Professor Levy pointed to an article she co-authored, in which she interviewed federal judges anonymously, to suggest that the judiciary might actually welcome more guidance and resources concerning judicial misconduct.[39] Professor Vladeck suggested that recent events further the case for permitting judges less discretion in policing their own conflicts of interest.[40]

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37. *See* 28 U.S.C. § 137(a) ("The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court. The chief judge of the district court shall be responsible for the observance of such rules and orders . . . .").

38. Judiciary Accountability Act of 2021, H.R. 4827, 117th Cong. (2021).

39. *See* Marin K. Levy & Jon O. Newman, *The Office of the Chief Circuit Judge*, 169 U. PA. L. REV. 2425, 2462–63 (2021) (summarizing interviews with chief circuit judges and discussing what was "universally described as one of the most difficult aspects of the job . . . handling judicial misconduct complaints").

40. *See* Adam Liptak, *Ginni Thomas's Texts, and the Limits of Chief Justice Roberts's Power*, N.Y. TIMES (Mar. 31, 2022), https://www.nytimes.com/2022/03/31/us/politics/ginni-thomas-john-roberts-supreme-court.html [https://perma.cc/R7A8-DTPP] (explaining that despite evidence that the wife of Justice Clarence Thomas "embraced conspiracy theories about the election and urged . . . President Donald J. Trump's chief of staff, to work to overturn the results," Chief Justice John Roberts "is powerless to force Justice Thomas to recuse himself").

Professor Vladeck argued that efforts for court reform should include reforms to federal precedent—such as *Bivens* immunity doctrine[41] or *Iqbal* pleading standards[42]—that would promote better government accountability through litigation, reversing a thirty-year trend of imposing such procedural "underbrushes." Professor Vladeck discussed the need for *habeas* reform to address the "contorted" state of the law on sentencing deficiencies, and Professor Litman expounded on that point to suggest *habeas* law should be expanded to allow additional *habeas* claims in cases where the trial court's interpretation of a statute is later deemed an error. Professor Levy also discussed recent movements to revive the federal Office for Access to Justice, which provided "legal services to indigent [individuals] . . . in civil litigation" before being shuttered by the Trump Administration.[43]

In response to a question from the audience, the panelists debated the proposed split of the Ninth Circuit. Professor Levy tracked the history of that proposal to the 1970s and pointed to the logistical difficulty of splitting the circuit, which entails either (1) dividing parts of California between the two new circuits or (2) leaving the state as effectively the sole state in a circuit. She also argued that adding enough judges to the circuit to effectively address its caseload might result in a court large enough to justify the split. Professor Vladeck argued that the Ninth Circuit is ironically the most administratively efficient circuit because of its size, and that splitting the circuit is a "solution in search of a problem." He argued that calls to split the Ninth Circuit are often made because of the court's alleged liberality, but that President Donald J. Trump's judicial confirmations effectively shifted the circuit's ideology to the right.

The panel ended on a positive note. Professor Levy suggested that reformers should be more optimistic about the prospect of lower court reform because of the wider variety of measures which could garner bipartisan support. Professor Vladeck advised law students to pay attention to the lower courts, as they are "much more likely to be the source of drama in [their] lives than the Supreme Court." Professor Litman ended the panel by noting that the general public often finds

41. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

42. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009).

43. *See* Katie Benner, *Garland Revives Effort to Expand Access to Legal Aid*, N.Y. TIMES (Oct. 29, 2021), https://www.nytimes.com/2021/10/29/us/politics/office-access-justice-legal-aid.html [https://perma.cc/C8LN-E9WM] (discussing the refunding and revival of the Office for Access to Justice over three years after it was effectively closed by the Trump Administration by zeroing out its budget).

events in the lower courts "genuinely shocking," which bolsters the argument for lower federal court reform.

The Symposium concluded with its second panel discussion, titled "This Court Can Fit *So* Many Justices," contemplating the legitimacy crisis faced by the United States Supreme Court and the potential for certain proposed reforms to address it.[44] Participating in the panel were Molly Coleman,[45] and Professors Daniel Epps[46] and Tara Leigh Grove,[47] while Professor David Schultz[48] moderated the discussion.

The panel began with a discussion of whether the public's declining approval of the Supreme Court[49] should be a cause for surprise and worry. Professor Grove expressed the need for concern towards any government institution's loss of sociological legitimacy, but noted that the public's trust in the Supreme Court has declined less than that in the other branches of government.[50] Professor Grove further noted volatility in the Court's popularity around the times when high-profile decisions are made, pointing to a spike in popularity around the time that *Bostock* was published[51] and a major decline when the Court allowed Texas's nearly exhaustive abortion ban to go into effect.[52] She also suggested that "ugly" confirmation processes could "influence the public's perceptions of the court." Ms. Coleman saw reason for opti-

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44. Minnesota Law Review, *Minnesota Law Review Symposium Panel: This Court Can Fit* So *Many Justices (Supreme Court Reform)*, YOUTUBE (Mar. 28, 2022), https://youtu.be/nhCve9TuiWM (archival recording on file with *Minnesota Law Review*).

45. Executive Director, People's Parity Project.

46. Treiman Professor of Law, Washington University in St. Louis School of Law.

47. Then Charles E. Tweedy, Jr. Endowed Chairholder in Law, University of Alabama School of Law; now Vinson & Elkins Chair in Law, University of Texas School of Law.

48. Distinguished University Professor of Political Science and Legal Studies, Hamline University.

49. Professor Schultz referenced a poll finding that only forty percent of adult Americans approved of "the way the Supreme Court is handling its job," representing the high court's lowest approval rating in twenty years. Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sept. 23, 2021), https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx [https://perma.cc/8K7P-S23Z].

50. *See* Brenan, *supra* note 2.

51. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020) (extending Title VII discrimination protections on the basis of sex to "homosexual or transgender" individuals).

52. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021).

mism, in that public dissatisfaction could lead to more democratic engagement with the Supreme Court. She argued that waning approval might represent a more nuanced understand of the judiciary than a cursory civics education might portray, and that this juncture presents an opportunity for government to re-earn legitimacy in the eyes of the public.

Professor Epps also touched on the pendulum-like nature of views on Supreme Court legitimacy, but suggested that there may be reasons to believe present events are more serious than past ones. Professor Epps argued that, while the conservative Supreme Court of the past few decades had garnered broader public support by awarding victories to differing interests, that its decisions have increasingly tracked with partisan affiliation. He suggested that this could lead to a further loss of legitimacy for the Court, and that loss could further erode democratic norms such as respect for laws and the rule of law. Professor Epps also argued that reduced legitimacy could ultimately reduce the Court's own power to overturn legislation and make it "less able to get out in front of the country."

The panel continued with a discussion of the Supreme Court as a political entity (or non-entity). Ms. Coleman expressed an opinion that nothing has dissuaded her from seeing the Court as a political body. She pointed to the Justices' highly predictable partisan voting patterns in "high-salience political cases" and suggested that they are only "occasionally able to put aside their political priors." Professor Epps characterized the Supreme Court as two separate courts: the one that "solves technical legal questions about obscure provisions" of federal statutes, and the "constitutional court" deciding "big questions of high principle." He emphasized the importance of disentangling those two types of cases and warned about the self-fulfilling prophetic nature of selecting Justices for their partisan ideology. Professor Epps also acknowledged that resisting an understanding of Supreme Court Justices as political could lead to a cognitively dissonant view, "putting a veneer on decisions that are hard to explain as something other than partisan."

Professor Grove drew attention to the political origins of Supreme Court Justices, nominated by the President and confirmed by the Senate, but contrasted it with the judicial independence contemplated by the Constitution. Professor Grove acceded to Professor Epps's two-court construction but noted that the relatively "small sub-

set [of cases] that seem to involve ideology" are the ones driving public perception of the Court.[53] She expressed a belief that the Justices sincerely do not conceive of their roles in partisan terms, and this conception is valuable to the Court. Professor Grove suggested that the "schoolhouse" conception of the Justices discussed by Ms. Coleman and Professor Epps places constraints on them even in "ideologically driven" cases, and that those constraints are furthered by the obligation of judges to provide reasoning for their decisions.

In response to the proposition that increased use of the "shadow docket"[54] cuts directly against that obligation of reasoning, Professor Grove countered that the Supreme Court commonly issued lightly reasoned opinions even when it maintained mandatory appellate review. She argued that rising attention to the shadow docket might pressure the Justices to issue more reasoned opinions from its regular docket. Professor Epps highlighted the ability of the emergency docket to allow the Court to move quickly where certain cases demand and suggested that it has increasingly tried to provide more reasoning in such orders. He then argued for the importance of attempting to disentangle and more clearly identify the objectionable aspects of the shadow docket. Ms. Coleman responded by positing that the main problem with the emergency docket is its frequent and increasing use to issue decisions outside of the typical Supreme Court process, without adequate briefing and reasoning, which affect the lives of a great number of Americans for the worse. Ms. Coleman then criticized the enmeshment of certain Justices in conservative political circles for eroding the separation of the Judicial and Legislative Branches. She concluded by arguing that this hazard is furthered by the dearth of ethical rules for Supreme Court Justices and their apparent failure to adhere to the few they do have.[55]

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53. Professor Grove also jokingly lamented the fact that more people didn't focus on the "jurisdictional niceties" that she enjoys thinking about.

54. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1, 5 (2015) (defining the "shadow docket" as "a range of orders and summary decisions that defy [the Supreme Court's] normal procedural regularity," stemming from its orders list, outside its more intently watched merits-case docket).

55. *See, e.g.*, Liptak, *supra* note 40 ("'I have complete confidence in the capability of my colleagues to determine when recusal is warranted,' Chief Justice Roberts wrote . . . . 'The Supreme Court does not sit in judgment of one of its own members' decision . . . .'"). *But see* Law Boy, Esq. (@The_Law_Boy), TWITTER (Mar 24, 2018, 6:24 PM), https://twitter.com/The_Law_Boy/status/1507136411492880384 [https://perma.cc/RCK7-G86L] ("not recusing yourself on a case where your wife's text messages are being subpoenaed is comically corrupt").

Contemplating the idea that the public might see something alarming about the high court that legal observers might be inured to, Professor Grove highlighted the ways two different publics perceive the trajectory of that body. She characterized the liberal wing as "extremely frustrated by what has happened to the Supreme Court," and the conservative wing seeing it either as a response to past wrongdoing by liberals or simply the regular operation of the political process. Professor Epps admitted that it might be all too easy for lawyers and professors to dive "deep in the legal weeds" on a case and extoled the importance of stepping back, so as to not let legal training get in the way of a clear answer about the workings of the Court. Ms. Coleman carried that idea even further, suggesting that non-lawyers tend to see such things more clearly than lawyers. Ms. Coleman argued that the opinions of those people being most impacted by the Supreme Court should be weighed heavily. She raised concerns about the antidemocratic nature of the Court, pointing out that a majority of its conservative Justices were nominated by presidents who lost the popular vote and confirmed by senators representing a minority of the population. Ms. Coleman closed by arguing that such an inability to shape the Court via the prescribed democratic process will invariably lead liberals to support structural reform.

In considering the specific deficiencies of the Supreme Court at present, and ways to remedy them, Professor Epps raised concerns about a powerful institution with the ability to overturn democratically-enacted laws increasingly doing so in accordance with partisan ideology. He also suggested that the Court's chance-based membership, largely dictated by "who happens to die when," is growing more difficult to justify. As reforms, he suggested changes to the judicial selection process, the promotion of a less-partisan legal culture, and potential limitations to the Court's jurisdiction.

Professor Grove classified the judicial appointment process as "pretty broken in really terrible ways," seeing it as a place for bipartisan support. Professor Grove expressed her surprise that Judge Jackson's confirmation process was not smooth, but admitted that perhaps she should not have been so shocked. She argued that reforms to judicial ethics were a clear place for widespread agreement. Professor Grove asserted that, at a minimum, the rules applicable to the lower Federal Judiciary should be applied to the Supreme Court and extended that logic to rules applicable to the general federal government such as anti-discrimination and anti-harassment laws. She concluded by noting that, in her observations, the entity most resistant to these

reforms is the Judiciary itself. Ms. Coleman argued that any reform effort must begin with court expansion, questioning whether other reforms would survive review by the Supreme Court. She also echoed calls to pass the Judiciary Accountability Act,[56] deeming it a clear first step.

When asked to prioritize their reforms of choice, Professor Epps suggested a "regularized system of appointments" which would evenly divide appointments across presidential terms. Professor Grove reiterated her calls for an enhanced code of judicial ethics and the application of anti-discrimination and anti-harassment standards. Ms. Coleman placed court expansion as her number-one priority, admitted to recently coming around on the idea of term limits of the type promoted by Professor Epps, and echoed Professor Grove's concerns for ethics and workplace accountability.

A question from the audience, citing Judge Richard Posner's work on the Supreme Court's system of discretionary review,[57] asked whether it would be possible or desirable to limit the Court's ability to choose its cases. Professor Grove pointed to the Necessary and Proper Clause[58] and jurisdictional caveats in Article III[59] as eminent signs of the idea's possibility, and then proposed that reversing congressional grants of discretionary review could be a positive change. Professor Grove noted that the Supreme Court shifted from deciding around 400 cases per year in the early twentieth century, to an average of 150 cases per term in the 1980s, to today's meager figures.[60] She suggested that, while the Court would likely still dodge issues and maintain an emergency docket, it might help the system to have the highest court decide more cases of lesser controversy as a method of providing guidance to the lower courts. Professor Epps pointed to the variance of lower court outcomes and argued that if jurisdiction stripping

56. *See supra* note 38 and accompanying text.

57. *See generally* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32 (2005) (arguing that the Supreme Court's system of discretionary review is partially responsible for its outsized politicization).

58. U.S. CONST. art. I, § 8 ("Congress shall have power . . . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.").

59. *Id.* art. III, § 2 ("[T]he Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.").

60. The Supreme Court has averaged around sixty-six decisions per year over the past half-decade. Data reported by SCOTUSBLOG at https://www.scotusblog.com/reference/stat-pack.

turned more cases over to the lower courts, it could result in more decisions seen as "crazy" by the public.

Another question from the audience inquired about Chief Justice Roberts's role in shoring up the Court's legitimacy. Professor Epps discussed the oft-repeated wisdom of the court-watching crowd: that Chief Justice Roberts is aware of concerns about the Supreme Court's legitimacy, that the issue matters a great deal to him, and that he appears to make decisions that reflect an interest in maintaining that legitimacy. Professor Grove pointed to beliefs that Chief Justice Roberts may have sublimated his own views to moderate the Court's jurisprudence. Professor Grove also weighed the benefits and detriments of Chief Justice Roberts defending the judiciary against President Trump's claims of partisan judges.[61] Ms. Coleman discussed other Justices perceived to share Chief Justice Roberts's concerns, but argued that it does little to legitimize the Supreme Court. Ms. Coleman explained that Chief Justice Roberts "siding with the Democratic appointees . . . in *Dobbs* . . . makes it a 5-4 decision instead of a 6-3 decision, and that does nothing to fix the structural issues" facing the Court.

An audience question asked the panelists to consider the benefits and drawbacks of an expanded Supreme Court where smaller, randomly assigned panels of justices hear cases. Professor Epps pointed to an article he co-authored proposing a similar idea.[62] He suggested that an expanded, panel-based high court would reduce the importance of any one judicial appointment but, conversely, would promote more randomness in outcomes. Ms. Coleman followed up to suggest that it would change litigation strategy, as advocates would no longer be able to tailor their cases to a perceived fifth-vote justice. She argued that this deemphasis on individual Justices would be a positive development. Professor Grove questioned the constitutionality of the panel system, suggesting that the text of Article III, which extends judicial power to "one Supreme Court,"[63] has given rise to arguments that the panel system is unconstitutional.

Addressing another audience question, the panelists returned to a discussion of the relative costs and benefits that result from characterizing the Court as an apolitical body. Ms. Coleman argued that it

61. *See* Sherman, *supra* note 10.

62. *See* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 181–92 (2019) (detailing the authors' "Supreme Court Lottery" proposal that begins by appointing every circuit judge as a Supreme Court justice).

63. U.S. CONST. art. I, § 1.

does more harm than good, warning of the issues presented by reduced public attention on the Federal Judiciary, and suggested that gatekeeping of information by the legal profession contributes to this problem, especially when so many life-impacting decisions are not being made by the politically elected branches of government. Ms. Coleman argued for improved access to justice for people without law degrees and individuals "who don't sit around reading law review articles."[64] Closing out the audience questions, Professor Grove discussed historic proposals to create intermediary courts between the Circuits and the Supreme Court, but noted that they ran afoul of similar constitutionality analysis as the panel-system proposal, and agreed that prohibiting summary affirmances could be a positive reform. Ms. Coleman raised concerns about how, in system with an extra appellate layer, the judiciary would identify potential high-salience cases in order to ensure they were heard by the Supreme Court.

The panelists' closing comments took on a pensive tone. Professor Grove urged advocates for Supreme Court reform to consider how comfortable they would feel about desired reforms if they were proposed by the opposing political party. Professor Epps wanted to leave attendees sitting with the difficult questions of whether society should think of the Court as political, and whether that is answer is productive. Ms. Coleman encouraged anyone with a desire to engage further about court reform to get involved with advocacy and activism.

Minnesota Law Review's Volume 106 Symposium provided a wide-ranging survey of potential methods of reforming the Article III courts. The panelists made convincing legal, administrative, political, and moral cases for the means and need to reform our Federal Judiciary. The articles that follow in this issue focus on the highest-profile attempt to study court reform: the Presidential Commission on the Supreme Court of the United States.[65] Professor Epps builds upon his testimony to the Commission to develop a nonpartisan argument for Supreme Court reform.[66] Professor Epps then argues that, while it likely did little to affect public opinion, the Supreme Court Commission

64. Professor Epps jokingly declared his surprise at Ms. Coleman's suggestion that not everyone reads law review articles in their spare time, stating that he "thought they were all massive bestsellers."

65. *See generally Presidential Commission on the Supreme Court of the United States*, WHITE HOUSE, https://www.whitehouse.gov/pcscotus [https://perma.cc/9GRU-VKTU].

66. Daniel Epps, *Nonpartisan Supreme Court Reform and the Biden Commission*, 106 MINN. L. REV. 2609 (2022).

avoided long-term harm to reform efforts which "may have been the most that supporters of reform could have hoped for."[67] Professor William Baude,[68] one of the named Commissioners,[69] expounds upon his own analysis of the proposed reforms considered by the Commission and reflects on the structural limitations of that body.[70]

Americans are rapidly losing faith in the federal courts' willingness and ability to perform their constitutional duties. With the Executive Branch's agenda stymied in equal parts by an even partisan split in the Senate and internecine conflict within the President's party,[71] the 6-3 conservative supermajority on the Supreme Court is poised to be the country's prime lawmaking body.[72] With no sign of the high court wavering from its archconservative bent,[73] it can feel as though the United States may be forced to act soon or forever hold its peace with the structure of the judiciary.[74] Hopefully the conversations held around this Symposium can provide resources and inspiration for

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67. *Id.* at 2628.

68. Professor of Law, University of Chicago Law School.

69. *See Presidential Commission on SCOTUS: Commissioners*, WHITE HOUSE, https://www.whitehouse.gov/pcscotus/commissioners [https://perma.cc/79Z3-RLHL].

70. William Baude, *Reflections of a Supreme Court Commissioner*, 106 MINN. L. REV. 2631 (2022).

71. *See, e.g.*, Jonathan Weisman, *In Voting Rights Fight, Democrats Train Ire on Sinema and Manchin*, N.Y. TIMES (Jan. 19, 2022), https://www.nytimes.com/2022/01/19/us/politics/democrats-filibuster-sinema-manchin.html [https://perma.cc/SKD7-JRXB] (discussing Democratic Party activist frustration with Senators Joe Manchin and Kyrsten Sinema's refusal to agree to changes to the filibuster rule in order to pass a "far-reaching voting rights bill"); Brigid Kennedy, *Joe Manchin: Build Back Better Bill is 'Dead'*, WEEK (Feb. 1, 2022), https://theweek.com/joe-manchin/1009653/joe-manchin-build-back-better-bill-is-dead [https://perma.cc/9JWP-2H5Z] ("In reference to President Biden's languishing hallmark legislation, Manchin replied, 'What Build Back Better bill? . . . It's dead . . . .'").

72. *See, e.g.*, *supra* note 1 (providing examples of Supreme Court decisions, since April 2022, that have announced new law concerning the First Amendment, Second Amendment, tribal sovereignty, the power of administrative agencies, and the power of people over their own reproductive organs).

73. For example: during its next term, the Supreme Court will hear cases which could end affirmative action in higher education or allow any business to decline to serve LGBTQ+ individuals on religious grounds. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 142 S. Ct. 895 (2022) (granting certiorari); 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022) (granting certiorari).

74. *See, e.g.*, Wis. Legislature v. Wis. Elections Comm'n, 142 S. Ct. 1245, 1250–51 (2022) (striking down state legislative electoral maps because the Wisconsin Supreme Court "failed to answer . . . whether a race-neutral alternative that did not add a seventh majority-black district would deny black voters equal political opportunity").

would-be reformers into the future. May they take comfort that, however dire the situation may seem, the inexorable march of time can chart a path to justice.[75] To quote a great man who lived one town over in our humble home state, it is

> my belief that in an indeterminate world I cannot control, it is still possible to live fully in the trust that a way will be found leading through the uncertain future. . . . I know of no other way to make good on the aspirations that tell us who we are, and who we mean to be, as the people of the United States.[76]

75. *See* David H. Souter, *Text of Justice David Souter's Speech*, HARV. GAZETTE (May 27, 2010), https://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech [https://perma.cc/7EA3-K7DM] ("Actually, the best clue to the difference between [*Brown v. Board of Education* and *Plessy v. Ferguson*] is the dates they were decided, which I think lead to the explanation for their divergent results.").

76. *Id.*