
Essay

Term Limits and Embracing a Political Supreme Court

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INTRODUCTION

In the run up to the 2020 Presidential election, then-candidate Joseph R. Biden, Jr. lamented the increasing dysfunction of the United States Supreme Court and campaigned on rectifying the august institution.¹ This was indeed part of Biden’s general message: a return to norms, normalcy, and mutual respect.²

The problems with the Court and its public legitimacy did not result from a singular episode, it had arisen from a series of politically volatile and fractious moments. Each side had its grievances. For a non-exhaustive list of these moments, emphasizing the events often stressed in current discourse: the failed

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1. See, e.g., Sarah Mucha, *Biden Says if Elected He Will Form Bipartisan Commission to Recommend Changes to Supreme Court*, CNN (Oct. 22, 2020), <https://www.cnn.com/2020/10/22/politics/biden-supreme-court/index.html> [<https://perma.cc/CE85-NVZL>] (quoting Biden stating: “If elected what I will do is I’ll put together a national commission of—bipartisan commission of—scholars, constitutional scholars, Democrats, Republicans, liberal, conservative, and I will ask them to over 180 days come back to me with recommendations as to how to reform the court system because it’s getting out of whack, the way in which it’s being handled.”).

2. See, e.g., Ezra Klein, *Joe Biden’s Promise: A Return to Normalcy*, VOX (May 20, 2019), <https://www.vox.com/policy-and-politics/2019/5/20/18631452/joe-biden-2020-presidential-announcement-speech> [<https://perma.cc/M9TP-XJ46>] (quoting Biden stating: “The American people want their government to work, and I don’t think that’s too much for them to ask . . . I know some people in DC say it can’t be done. But let me tell them something, and make sure they understand this. The country is sick of the division. They’re sick of the fighting. They’re sick of the childish behavior.”).

nomination of Robert Bork,³ the contentious confirmation of Justice Clarence Thomas,⁴ the failure to hold a vote on then-Judge Merrick Garland's nomination⁵ and subsequent nomination and confirmation of Justice Gorsuch to that seat,⁶ the contentious confirmation of Justice Brett Kavanaugh,⁷ and the confirmation of Justice Amy Coney Barrett under circumstances that directly contradicted the purported justification for denying Merrick

3. See, e.g., Noah Feldman, *Supreme Court Nominations Will Never Be the Same*, BLOOMBERG (Dec. 20, 2016), <https://www.bloomberg.com/opinion/articles/2016-12-20/supreme-court-nominations-will-never-be-the-same> [<https://perma.cc/TLS9-VDJQ>] (explaining the “epochal” consequences of Robert Bork’s failed nomination); MICHAEL PERTSCHUK & WENDY SCHAEZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* (1989) (discussing the process and strategies used by citizen advocacy groups in achieving an anti-Bork consensus); ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989) (following the struggles for and against Robert Bork’s Supreme Court nomination).

4. See, e.g., Roxanne Roberts, *‘It Was Just Awful’: The Clarence Thomas Hearings, In the Words of Those Who Were There*, WASH. POST (Apr. 9, 2016), https://www.washingtonpost.com/lifestyle/style/it-was-just-awful-the-clarence-thomas-hearings-in-the-words-of-those-who-were-there/2016/04/07/662eda1a-f120-11e5-85a6-2132cf446d0a_story.html [<https://perma.cc/E7BQ-33F6>]; Sherrilyn A. Ifill, *Through the Lens of Diversity: The Fight for Judicial Elections After Republican Party of Minnesota v. White*, 10 MICH. J. RACE & L. 55, 77 (2004) (“The nomination of Clarence Thomas to the Court in 1992 was among the ugliest and most contentious in the history of Supreme Court nominations.”).

5. See, e.g., Eric Bradner, *Here’s What Happened When Senate Republicans Refused to Vote on Merrick Garland’s Supreme Court Nomination*, CNN (Sept. 19, 2020), <https://www.cnn.com/2020/09/18/politics/merrick-garland-senate-republicans-timeline/index.html> [<https://perma.cc/3BM7-Y7QV>]; Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama’s Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53 (2016).

6. See, e.g., David Faris, *How Democrats Can Make Republicans Pay for Justice Gorsuch*, WEEK (Mar. 20, 2017), <https://theweek.com/articles/681352/how-democrats-make-republicans-pay-justice-gorsuch> [<https://perma.cc/Q7KC-W26E>]; Lawrence Weschler, *How the US Supreme Court Lost Its Legitimacy*, NATION (Sept. 17, 2018), <https://www.thenation.com/article/archive/how-the-us-supreme-court-lost-its-legitimacy> [<https://perma.cc/983C-F4FM>].

7. See, e.g., Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html> [<https://perma.cc/4NQL-BV8U>]; Benjamin Wittes, *I Know Brett Kavanaugh, but I Wouldn’t Confirm Him*, ATLANTIC (Oct. 2, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/why-i-wouldnt-confirm-brett-kavanaugh/571936> [<https://perma.cc/YYY3-MGFW>].

Garland a vote.⁸ In the background, the Court was issuing increasingly controversial decisions that appeared to be overturning or presaging the demise of fixtures of the constitutional order. This includes *Abood*,⁹ the Voting Rights Act,¹⁰ *Roe v. Wade* and *Casey v. Planned Parenthood*,¹¹ and *Obergefell v. Hodges*.¹² In light of all this, fixing the Court would be no simple task.

8. See, e.g., Jill Filipovic, *Amy Coney Barrett's Day One Hearing Was Rank Hypocrisy From Start To Finish*, *GUARDIAN* (Oct. 13, 2020), <https://www.theguardian.com/commentisfree/2020/oct/13/amy-coney-barrett-hearing-us-supreme-court> [<https://perma.cc/66VL-G5WA>]; Philip Ewing, *Republicans Blast 'Hypocrisy' of Democrats Calling Barrett Hearings Political*, *NPR* (Oct. 12, 2020), <https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/12/923017696/republicans-blast-hypocrisy-of-democrats-calling-barrett-hearings-political> [<https://perma.cc/Z8DA-DKKV>]. There are others, too, such as the failed impeachment of Justice William O. Douglas. James D. Robenalt, *Gerald Ford Tried to Impeach a Supreme Court Justice—and Failed*, *WASH. POST* (Mar. 29, 2022), <https://www.washingtonpost.com/history/2022/03/29/gerald-ford-william-douglas-impeachment> [<https://perma.cc/UXQ5-7NAR>]. Thanks to Will Thomas for the pointer.

9. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (overruling *Abood* with respect to public sector unions); Erwin Chemerinsky, *Does Precedent Matter to Conservative Justices on the Roberts Court?*, *A.B.A. J.* (June 27, 2019), <https://www.abajournal.com/news/article/chemerinsky-precedent-matters-little-to-conservatives-on-the-roberts-court> [<https://perma.cc/S5J2-5MMG>] (discussing *Janus* and *Abood*); Kate Andrias, *Janus's Two Faces*, 2018 *SUP. CT. REV.* 21, 21 (2018) (“The *Janus* decision marks the end of the post-New Deal compromise with respect to public sector unions and the First Amendment. Looking to the future, *Janus* lays the groundwork for further attack on labor rights—as well as for a broader erosion of civil society and democracy at the expense of corporate power.”).

10. See, e.g., *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); see also Leah M. Litman, *Inventing Equal Sovereignty*, 114 *MICH. L. REV.* 1207, 1208 (2016); Ian Millhiser, *Chief Justice Roberts's Lifelong Crusade Against Voting Rights, Explained*, *VOX* (Sept. 18, 2020), <https://www.vox.com/21211880/supreme-court-chief-justice-john-roberts-voting-rights-act-election-2020> [<https://perma.cc/QN6F-TC8J>].

11. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (upholding S.B. 8, Texas's law restricting abortion); *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022) (overruling *Roe* and *Casey*).

12. *Obergefell v. Hodges*, 576 U.S. 644 (2015); Bradley C. S. Watson, *Reclaiming the Rule of Law After Obergefell*, *NAT. REV.* (July 9, 2015), <https://www.nationalreview.com/2015/07/same-sex-marriage-and-rule-law> [<https://perma.cc/L32T-FAK7>]. To be clear, I am not claiming any of these in fact upset the

So, what was to be done? Create a committee of course! Shortly after his inauguration, now-President Biden signed Executive Order No. 14,023, forming the Presidential Commission on the Supreme Court of the United States.¹³ The Commission, chaired by Professor Bob Bauer and Professor Christina Rodriguez, was constructed to be bipartisan, made up of legal scholars, judges, and practitioners.¹⁴

The Commission's operations were not wholly smooth. There were premature departures of conservative members.¹⁵ Some questioned the ability of such a constructed Commission to come to any worthwhile, practicable conclusions on reform.¹⁶ Still others, including members of the Commission, questioned its charge: what was the Commission even supposed to report on?¹⁷

Notwithstanding these unanswered concerns, in late 2021, the Commission released a substantial report offering its observations about the Court's operation and its evaluation of the

constitutional order, but rather that they are viewed that way by one side of the aisle (depending on the case).

13. Exec. Order No. 14,023, 86 Fed. Reg. 19,569 (Apr. 9, 2021).

14. *Id.*; see also *President Biden to Sign Executive Order Creating the Presidential Commission on the Supreme Court of the United States*, WHITE HOUSE (Apr. 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/09/president-biden-to-sign-executive-order-creating-the-presidential-commission-on-the-supreme-court-of-the-united-states> [<https://perma.cc/QDZ2-LSXQ>].

15. John Kruzel, *Two Conservatives Resign from Biden's Supreme Court Commission*, HILL (Oct. 15, 2021), <https://thehill.com/regulation/court-battles/576993-two-conservatives-resign-from-bidens-supreme-court-commission> [<https://perma.cc/LH7R-4MV4>] (reporting the resignation of Profs. Jack Goldsmith and Caleb Nelson from the Commission).

16. Ryan Doerfler, *Why Progressives in Congress Should Ignore Biden's Supreme Court Commission*, WASH. POST (May 20, 2021), <https://www.washingtonpost.com/outlook/2021/05/20/supreme-court-commission-pointless> [<https://perma.cc/L2JB-H79H>]; Ian Millhiser, *Biden's Supreme Court Reform Commission Won't Fix Anything*, VOX (Apr. 10, 2021), <https://www.vox.com/2021/4/10/22375792/supreme-court-biden-commission-reform-court-packing-federalist-society> [<https://perma.cc/VS22-QF9R>]; Mark Joseph Stern, *Biden's Supreme Court Reform Commission Shows He Doesn't Really Want Court Reform*, SLATE (Apr. 9, 2021), <https://slate.com/news-and-politics/2021/04/joe-biden-supreme-court-reform-commission.html> [<https://perma.cc/4LZ4-NDZQ>].

17. William Baude, *Reflections of a Supreme Court Commissioner*, 106 MINN. L. REV. 2631 (2022) (observing that the Commission seemed split between an intellectual charge and a political one).

plausible recommendations for reform.¹⁸ To the chagrin of some, the Commission did not outright provide its own recommendations.¹⁹ But with 34 members representing a multitude of political and ideological viewpoints,²⁰ it was unlikely the Commission would arrive at the requisite consensus for recommendations of reform. Still, some commentary following the Commission's Report suggests the possibility of a consensus position on term limits for Justices as a viable and impactful reform.²¹ Indeed, the Commission devoted particular attention to what would be the best way to accomplish the reform—whether by statute or by constitutional amendment.²²

In this Essay, I argue that the Commission's analysis of term limits is unduly focused on the desire to reduce politicization of the Supreme Court and its Justices, which consequently impedes our ability to genuinely reform the Court. Instead, the Commission should have forthrightly acknowledged that the Supreme Court is a political entity, subject to ordinary partisanship, and tying its makeup closely to electoral politics will enhance that.²³ Nevertheless, the politicization of the Court needn't be a death knell for the proposal of term limits or the

18. *Presidential Commission on the Supreme Court of the United States: Final Report*, WHITE HOUSE (Dec. 8, 2021) [hereinafter "*The Report*"], <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/AZN7-FFMB>].

19. Nina Totenberg, *Biden's Supreme Court Commission Steers Clear of Controversial Issues in Draft Report*, NPR (Dec. 6, 2021), <https://www.npr.org/2021/12/06/1061959400/bidens-supreme-court-commission-releases-draft-report> [<https://perma.cc/T24X-2ETQ>] (discussing a draft report that was finalized shortly thereafter without substantial changes: "The Presidential Commission on the Supreme Court is to vote Tuesday on its final report and recommendations, but the panel steers clear of taking a position on many of the most controversial suggestions for changing the court . . . It likely won't please any of the major players in the debate[s]").

20. See *The Report*, *supra* note 18, at App. E (listing commission members and giving a brief description of their background).

21. Charlie Savage, *Biden's Supreme Court Commission Shows Interest in Term Limits for Justices*, N.Y. TIMES (Nov. 18, 2021), <https://www.nytimes.com/2021/11/18/us/politics/supreme-court-term-limits-biden.html> [<https://perma.cc/2B4Z-6V8C>].

22. *The Report*, *supra* note 18, at Ch. 3., Parts III–IV.

23. I think this view is undeniably correct, but the Commission need not have taken such an absolute position. It should have instead set forth in detail this plausible view of the Court and explained how term limits might impact the Court, if viewed as a political, partisan entity.

continuing relevance of the Court. Drawing from the work of Professor Jack Balkin and Professor Sandy Levinson,²⁴ it is evident that a political Supreme Court can serve two important functions that further the democratic character of the nation: first, Justices can engage in and deliberate over longer-term projects on foundational issues, insulated from a capricious populace; and second, Justices, as political actors, can serve as a backstop to political upheavals, thereby ensuring that substantial changes to our polity are triggered by political will sustained over time.

I. TERM LIMITS WILL POLITICIZE THE COURT

We begin by considering the Commission's discussion of term limits. The Commission Report first sets forth the arguments for and against term limits. Thereafter, it considers how to actually implement term limits, either by constitutional amendment or statute. And finally, it considers the possibility of

24. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001). I do not mean to claim that this piece would educate the Commission about something it did not know. The Commission is a superlative collection of constitutional experts. Moreover, Professor Balkin served on the Commission and his and Professor Levinson's work is canonical (indeed the Report cited it, see *infra*), so the Commission was aware of it and its persuasive force.

But the Commission nevertheless did not explicate the arguments that the Court is a political entity that tracks partisan politics. The Commission cited *Understanding the Constitutional Revolution*, but only for the banal proposition that "[s]ome also question whether courts necessarily operate in ways that are antidemocratic." *The Report*, *supra* note 18, at 153–54, 193. And it did not discuss the article specifically with respect to term limits.

My argument here is that the Report, as exemplified in the above, is not sufficiently transparent about the nature of the Court. My view is that the Commission should have recognized the political, partisan nature of the Court—full stop. But at the least, I contend it was incumbent on the Commission to explain at greater length this very plausible account of the Court, especially with respect to term limits.

One response is that the Commission was heeding the political winds in adopting the myth of the apolitical, nonpartisan Court. I must confess that politics is not my strong point, but I nevertheless think that the Commission's purpose is not served by adopting the myth or otherwise perpetuating a lack of transparency about the nature of the Court. I say this with great humility, because my batting average on convincing anyone of anything is well below the Mendoza line. Regardless, this Essay serves to "fill the gap" and explicate that the Court is a political, partisan entity, that the Court can nevertheless serve a pro-democratic function, and that terms and term limits can enhance that function.

constitutional impasse on appointments and how that can be addressed in a system of term limits.²⁵ I focus here on the arguments for and against term limits.²⁶

In favor of term limits, the Report proffers three main arguments: *First*, term limits will regularize appointments, align them with the results of democratic elections, and thus make them less arbitrary.²⁷ This is particularly pressing because of the variation in appointments by presidential term.²⁸ *Second*, lifetime tenure does not comport with notions of limited government, and so term limits combat this by making the accumulated power in Justices more diffuse.²⁹ However, the proponents of term limits claim that they are consistent with judicial independence and do not equate with a President's desires for particular results.³⁰ *Third*, term limits will eliminate strategic retirements by Justices, which "can fuel public beliefs that the Court is a partisan institution" and also that the system is "unfair" or "rigged."³¹

Each of these arguments presses, at least in part, on the notion of the political legitimacy of the Court. Term limits are to ensure that appointments appear less arbitrary and untethered to electoral results, that Justices do not have too much political power, and that the Court not appear to be partisan. While acknowledging that term limits will make appointments more responsive to democratic politics, the term-limit proponents emphasize that Justices will not necessarily become partisan wands because they will maintain independence, including from partisan politics. Indeed, the term-limit proponents contend that "[i]n our constitutional system, judges and Justices are not and should not be considered the mere representatives of political

25. See *The Report*, *supra* note 18, at Ch. 3.

26. The phrase "term limits" is ambiguous. It can mean the limit of a particular term of service—for example, referring to the fact that upon election Senators serve a limited term of six years. U.S. CONST. art. XI, § 6. It can also refer to the limit on the number of terms that someone can serve—for example, Presidents may serve a maximum of two terms, pursuant to the Twenty-Second Amendment. U.S. CONST. amend XXII. The Report appears to be talking about the former meaning, referring to the limit on the length of the term for Supreme Court Justices. I explain how we might also limit the number of terms, *infra* notes 74–76 and accompanying text.

27. *The Report*, *supra* note 18, at 112–13.

28. *Id.* at 113–14.

29. *Id.* at 113.

30. *Id.* at 114.

31. *Id.* at 114–16.

parties or the creatures of a particular President, and the argument for term limits does not rest on such assumptions.”³²

Against term limits, the Report counters with five main arguments. *First* is the observation that term limits would “further politicize appointments and heighten the belief that Justices are allies of the President and the President’s party”³³—which would do damage to the Court by ensconcing the belief that the Court is a partisan institution.³⁴ This would not only lead to the public thinking that the Justices are partisan, but it could also impact the way Justices see themselves.³⁵ *Second*, term limits would make confirmation battles, which have become partisan circuses, more common.³⁶ *Third*, term limits would lead to an erosion of judicial independence and heightened politicization because Justices might need to worry about what they would do after their term expires.³⁷ *Fourth*, term limits would cede too much power to the Presidency.³⁸ And *fifth*, term limits might lead to strategic behavior by litigants and judicial actors on when to bring and decide cases with respect to expected retirements, and thus erode the legitimacy of the Court.³⁹

Again, a principal focus in most of these arguments is the political legitimacy of the Court. That is, by politicizing the Court, the Court will lose face; by increasing confirmation battles, the Court will appear more political; by decreasing judicial independence, judges may be more subject to political whims; term limits give the President too much power, which may erode checks on presidential power and may largely reflect majoritarian desires; and term limits encourage strategic behavior, which also erodes the legitimacy of judicial decision making.

32. *Id.* at 114.

33. *Id.* at 117.

34. *Id.*

35. *Id.* at 118.

36. *Id.*

37. *Id.* at 118–19.

38. *Id.*

39. *Id.* at 120. The Report also observes the anti-term-limit arguments that term limits might destabilize Court doctrine and lessen judicial wisdom, which apparently ripens with age. *Id.* at 119–20. The former is not in itself a detriment if the Court’s doctrine should evolve. The latter argument is entirely speculative—and there is just as much reason to think that Justices will have weaknesses that come from long tenures—both of capacity and an inability to cope with modernity. Of course, selection can also take care of this—Presidents can select Justices who are experienced judges.

Both sides of this debate have the legitimacy of the Court as apolitical and nonpartisan firmly in mind.⁴⁰ I contend that this discourse between the pro- and anti-term-limit positions is wrongheaded. It mistakenly seeks to gainsay the public's growing concern that the Supreme Court is a political body, subject to partisan battles.⁴¹

It is of course true that regularizing Supreme Court appointments will make them more political.⁴² We need go no further than examining the vacancy caused by Justice Scalia's death. Beyond the fiasco of then-Judge Garland's failed nomination due to the unprincipled obstinance of the Senate Republicans, the right to nominate the next Supreme Court Justice was a key issue in the 2016 Presidential election.⁴³ Donald Trump and Hillary Clinton both ran on the issue. Donald Trump released two

40. The Report affirms this view of politicization and the Court several times. *The Report*, *supra* note 18, at 22 (discussing the view that "the Court is (or has become) illegitimate" because "[it] is functionally a 'political' or even partisan body" but not setting forth the view that the Court's political or partisan nature is compatible with its legitimacy). Similarly, in the discussion of "partisan entrenchment" and "misalignment," the Report does not set forth the plausible accounts of how this could be pro-democratic. *Id.* at 26–28.

41. Throughout this Essay, I use the terms political and partisan as essentially synonymous. My claim is that the Supreme Court may be a political entity that involves normal partisan politics in both makeup and internal decision making, and that it still can serve its democratic function.

42. Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511 (2006) (observing that regularization of nominations could increase politicization); Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407 (2005) (same).

43. Nina Totenberg, *The Supreme Court: A Winning Issue in the Presidential Campaign?*, NPR (Sept. 29, 2016), <https://www.npr.org/2016/09/29/495960902/the-supreme-court-a-winning-issue-in-the-presidential-campaign> [<https://perma.cc/LUR4-LPR2>]; John Whitesides, *Clinton Warns of Possible Trump Supreme Court Nominations*, REUTERS (Mar. 28, 2016), <https://www.reuters.com/article/us-usa-election/clinton-warns-of-possible-trump-supreme-court-nominations-idUSKCN0WU160> [<https://perma.cc/E6NG-9WDA>]; Jane Coaston, *Polling Data Shows Republicans Turned Out for Trump in 2016 Because of the Supreme Court*, VOX (June 29, 2018), <https://www.vox.com/2018/6/29/17511088/scotus-2016-election-poll-trump-republicans-kennedy-retire> [<https://perma.cc/6QQ3-4QQ5>].

pre-election lists of potential nominees, proudly touting the Federalist Society's influence over judicial decisions.⁴⁴ The ultimate choice, Justice Neil Gorsuch, came from the cumulative list.⁴⁵

If presidential nominees campaigning on appointments became a permanent part of the system, given the power of the Supreme Court over a variety of social and political issues, there is no doubt that presidential candidates would provide a slate of nominees, with assurances to voters that their choices would be faithful partisans. In that way, term-limit proponents' claims that judicial independence will remain steadfast are unlikely to hold. It may be true that Justices will have the power to freely decide cases, but they will be selected such that they hew to the party line. Term-limit proponents won't be able to have it both ways: it cannot be that nominations will better reflect electoral preferences and also that the resulting Justices will be independent of partisan preferences. Those benefits and detriments will occur together.

On the other hand, it's just as pollyannaish to think that we should resist reform to the High Court to ensure that it remains—or appears to remain—a nonpolitical, nonpartisan entity. That cat is out of the bag.⁴⁶ Justices *do* render decisions for

44. Alan Rappeport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html> [https://perma.cc/F5NC-KQUC]; Nina Totenberg, *Donald Trump Unveils New, More Diverse Supreme Court Short List*, NPR (Sept. 23, 2016), <https://www.npr.org/2016/09/23/495216645/donald-trump-unveils-new-more-diverse-supreme-court-short-list> [https://perma.cc/D8VB-KJRN]; see Ian Millhiser, *Trump Says He Will Delegate Judicial Selection to the Conservative Federalist Society*, THINKPROGRESS (June 15, 2016), <https://thinkprogress.org/trump-says-he-will-delegate-judicial-selection-to-the-conservative-federalist-society-26f622b10c49/> [https://perma.cc/5WPT-F57Z].

45. So did the other finalist, Third Circuit Judge Thomas Hardiman, in then-President Donald Trump's game-show-like selection process. Elliot Hanon, *Donald Trump Chooses Conservative Judge Neil Gorsuch to Fill Supreme Court Seat*, SLATE (Jan. 31, 2017), <https://slate.com/news-and-politics/2017/02/trump-picks-supreme-court-justice-between-finalists-gorsuch-and-hardiman.html> [https://perma.cc/4647-ENCE] (“The buildup to the entire affair had the air of a game show, as the two presumed finalists Judge Gorsuch and Judge Thomas M. Hardiman were both summoned to Washington, D.C., on Tuesday as the ‘finalists’ for the position.”).

46. Bryan Metzger & Oma Seddiq, *More Than 60% of Americans Say the Supreme Court Is Motivated by Politics, While Just 32% Believe They Rule Based on Law: Poll*, BUS. INSIDER (Nov. 19, 2021), <https://www.businessinsider.com/61-percent-think-supreme-court-motivated-politics-not-law-poll-2021-11> [https://perma.cc/5MZD-FJ9G].

reasons sounding in politics; in part because the Justices believe in those reasons, as they were selected by politicians to make those decisions.⁴⁷ That is not to say that every decision is politically fractured. It might be that many cases are robustly dictated by the settled law, or they are somehow otherwise obvious even among politically diverse decision makers, and that is why we see unanimous or near-unanimous decisions.⁴⁸ But many consequential ones are not, and the Court operates like a super-legislature in those cases.⁴⁹

Indeed, it's hard to see how the anti-term-limit opponents' arguments truly erode the purported nonpolitical nature of the Court. Justices are already selected from ideological camps and often vote in predictable ways.⁵⁰ Sometimes there are surprises, but those are scorned by the appointing party,⁵¹ and so political actors will try to minimize such future surprises whether Justices are picked during election time or not. Confirmation battles are already extremely partisan and contentious—and they will

47. See, e.g., MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS* (1994) (identifying that the politics of Justices plays a large role in their selection); Gerald N. Rosenberg, *The Broken-Hearted Lover: Erwin Chemerinsky's Romantic Longings for a Mythical Court*, 69 VAND. L. REV. 1075, 1083 (2016) (observing that Justices are selected in light of their political views); Maya Sen, *Courting Deliberation: An Essay on Deliberative Democracy in the American Judicial System*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 318 (2013) ("Presidents would be silly not to appoint those individuals most likely to implement their long-term ideological agendas."); see also Adam Serwer, *The Lie About the Supreme Court Everyone Pretends to Believe*, ATLANTIC (Sept. 28, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/lie-about-supreme-court-everyone-pretends-believe/620198> [https://perma.cc/U4YX-GWZN] ("The public is meant to look at these justices' records on abortion and voting rights and assume that it is *just a coincidence* that their legal reasoning lines up with their policy preferences.").

48. See, e.g., Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601, 1605 (2015).

49. *Id.* at 1605–06.

50. See, e.g., Leah M. Litman, "Hey Stephen," 120 MICH. L. REV. 1109, 1117 (2022) ("Scholars have shown that measuring a justice's ideology can predict their votes on many issues and that public opinion can have effects on Supreme Court decisions."); Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* 227–29 (1993); Frank B. Cross, *Political Science and the New Legal Realism*, 92 NW. U. L. REV. 251, 275–79 (1997).

51. See, e.g., Josh Gerstein, *Conservatives Steamed at Chief Justice Roberts' Betrayal*, POLITICO (June 25, 2015), <https://www.politico.com/story/2015/06/gop-conservatives-angry-supreme-court-chief-john-roberts-obamacare-119431> [https://perma.cc/9DTP-GWSF] (reporting on conservatives' anger at Chief Justice Roberts for his vote to uphold the Affordable Care Act).

continue to be that way. That there are more of them does not clearly increase the partisanship of the Court. Justices' plans after their lengthy terms will likely not lead to an increase in partisanship decision making, because they are already substantially partisan-aligned.⁵² Also, insofar as the concern with ceding power to the President is about inordinately reflecting majoritarian politics, that is simply always the case, because the President always nominates Justices.⁵³ Finally, strategic behavior near the end of a Justice's term is possible but marginal, and not so much greater than strategic behavior in our current termless system.⁵⁴

The Supreme Court *just is* a political body, with Justices who act in ways that are politically determined and largely predictable on the measures of partisan politics—whether the Justices regard themselves as politicians or not. As a consequence, focusing on reforms that will mitigate the Court's political character is nearly abject. Insofar as we are simply trying to hide the Court's true nature, that is dishonest. And it is also hopeless; the public catches on.⁵⁵ But that is not the end of the story: a political Supreme Court can still be an essential part of our democratic order and term limits can support and enhance its democratic function.

II. TERM LIMITS SUPPORT THE DEMOCRATIC FUNCTION OF A POLITICAL COURT

So, if the Supreme Court is inevitably political, why should we have a Court at all? There are at least two ways in which the

52. Furthermore, because they will still receive their pensions and can take on prestigious, rewarding nonpolitical civic roles, it is hard to see Justices acting non-independently in a way that they would otherwise not. I am not arguing that Justices are nonpolitical—precisely the opposite.

53. Insofar as the concern is giving each President too much power in selecting four Justices over a two-term period, that (or even more appointments) might occur regardless, especially with strategic retirements. Nevertheless, there might be a concern here that could be rectified by expanding the Court.

54. That is, parties in litigation can of course engage in strategic delay based on their expectation that a Justice might retire. If terms are long enough, then this is a rare concern in absolute terms, even if the chances are increased compared to a life-tenure system. The Court can also manage this with anti-strategic litigation rules; see also Guha Krishnamurthi, *For Judicial Majoritarianism*, 22 U. PA. J. CONST. L. 1201, 1216 (2020) (discussing the virtue of stability and how various court reform proposals impact it).

55. See *supra* note 46 and accompanying text.

Supreme Court, operating as a political, partisan entity, can promote democratic function. *First*, the Supreme Court Justices' long terms allow Justices to deliberate and make decisions insulated from short-term political whims of the populace.⁵⁶ *Second*, the Supreme Court's makeup can serve as a political backstop, to ensure that large-scale or fundamental changes to the political order are supported by a temporally sustained political will.⁵⁷ And, as I will show, both of these democratic functions are supported and enhanced by term limits.

A. TERM LIMITS ENHANCE INDEPENDENCE AND DELIBERATION IN A POLITICAL COURT

As it stands, Supreme Court Justices serve with life tenure.⁵⁸ The standard explanation for this is that the Supreme Court, and the judiciary more generally, is called upon to make decisions that may flout the designs of other powerful political actors and rebut the political will. In order to be able to make those decisions—which may sound in constitutional rights and separation of powers—the judiciary requires a level of independence that life tenure affords.⁵⁹ Typically, on this justification, the Supreme Court is seen as a neutral, nonpartisan arbiter of the meaning of the Constitution.⁶⁰ But political independence isn't necessary. Even if the Supreme Court is made up of politician Justices,⁶¹ the same reasoning holds.

56. Balkin & Levinson, *supra* note 24, at 1070, 1076–77.

57. *Id.* at 1067.

58. See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 777 (2006) (“Life tenure for Supreme Court Justices has been a part of our Constitution since 1789, when the Framers created one Supreme Court and provided that its members ‘shall hold their Offices during good Behaviour.’” (citing U.S. CONST. art. III, § 1)).

INDNF Even with Justices being appointed in middle age, they still serve a substantially long term, without democratic intervention.

59. THE FEDERALIST NO. 78 (Alexander Hamilton); Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 674 (1999) (discussing the need for judicial independence to preserve constitutional guarantees).

60. Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 608 (1996).

61. Indeed, many Supreme Court Justices were formerly elected politicians. But even if they remain partisan actors when Justices, the reasoning can apply. Thanks to Will Thomas for crystallizing this point.

1. The Court as a Partisan Deliberative Body

Our democratic system has political officials with various term lengths. We have U.S. Representatives, who have two-year terms; U.S. Presidents, who have four-year terms; and U.S. Senators, who have six-year terms.⁶² Between Representatives and Senators, the idea is to have one house of Congress that is keenly responsive to the public in a way that is sensitive to present political opinion, while another is more insulated such that it can engage in more deliberation and long-term thinking.⁶³ And we see this play out: Senators have the ability to make unpopular decisions, for example, on budgetary spending, with less repercussion because of their longer and staggered terms.⁶⁴ Similarly, we afford Presidents four-year terms to allow them a genuine opportunity to implement their agenda.⁶⁵

But this same principle applies to Supreme Court Justices, with the need for lengthier terms. This is true even if we recognize that the Supreme Court is made up of partisan actors. The Supreme Court is structured to decide constitutional cases—which involves delineating the contours of rights and adjudicating disputes between other political bodies. Consider the examples of our presently contested political questions: guns, abortion, and healthcare.⁶⁶ These are at bottom political questions, and disagreements about them boil down to political viewpoints. In particular, they all raise the question: how important is one's individual right, when it conflicts with others' well-being and their moral and social commitments? That doesn't change when they are enmeshed with constitutional questions.

The status of the right to bear arms, the right to have an abortion, and the right to healthcare are, as a constitutional matter, dependent on political beliefs. Whether there are, for example, rights to self-defense, privacy, autonomy, and minimum

62. Stephen Macedo, *Our Imperfect Democratic Constitution: The Critics Examined*, 89 B.U. L. REV. 609, 619 (2009).

63. *Id.*

64. *Id.* (explaining that “[t]he Senate, with its six-year terms with re-eligibility, small size and high visibility, indirect selection by state legislatures, and relatively large and diverse constituencies, would—it was hoped—be . . . capable of standing against the people's own “temporary errors and delusions.””).

65. THOMAS E. CRONIN, *INVENTING THE AMERICAN PRESIDENCY* 61–70 (1989) (detailing the considerations that went into choosing a four-year presidential term at the time of the Founding).

66. Krishnamurthi, *supra* note 54, at 1204 (identifying important questions of our polity resolved by the Supreme Court).

standards of well-being—and how they weigh against each other. At this juncture, one might object that their pet judicial/interpretive/constitutional philosophy drains these constitutional questions of any political character. But this is only a buck-passing, can-kicking tactic: the choice of judicial, interpretive, or constitutional philosophy is itself a political choice.⁶⁷

Answers to these questions may still be unpopular in the moment, whether or not the decisions are made by political actors or (mythological) neutral arbiters. That is, it will be the case that some of these decisions are answers to the kinds of questions that, regardless of political viewpoint, we recognize can be warped by momentary passions. As an analogy, think of someone who has decided to restrict their spending and save money, though they recognize that they have profligate tendencies. They engage the help of an accounting referee who must authorize their expenditures. Even though the spendthrift has expressly delegated authority to authorize expenditures, they might disagree with and resent adverse decisions in the moment. That is in the nature of that kind of decision.⁶⁸ Similarly, we may need Justices—even recognizing their political nature—to make decisions with long-term consequences in mind. As Balkin and Levinson suggest, we might consider them super-Senators who are still, of course, politicians.⁶⁹ Furthermore, even understanding that the choices on rights and political-conflict questions are inevitably political, we might recognize that we need someone to make definitive decisions that can end debate and allow us to collectively

67. See, e.g., CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 72 (2005); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 177 (1990) (acknowledging that originalism is a political choice).

68. One can think of Odysseus tying himself to the mast, so as to hear the Sirens' song without being led into temptation (and eventual ruin). HOMER, ODYSSEY, bk. 12.

69. Balkin & Levinson, *supra* note 24, at 1076 (“[W]e might think of judges as analogous to senators who are elected for a term of roughly eighteen years and never have to face reelection.”). Balkin and Levinson further explain partisan entrenchment and how it contributes to constitutional revolutions. In so doing, they observe that judges and justices represent a “temporally extended majority” and thus see this as not posing a counter-majoritarian difficulty. *Id.* at 1066–76.

Importantly, it may be that determinations of a “temporally extended majority” and those of the present majority—represented by the political branches, say—are at odds. In that case, there may not be a counter-majoritarian difficulty, because both can lay claim to representing the majority. But there remains the difficulty of determining which in fact should govern.

proceed.⁷⁰ Thus, Justices—acting politically—may nevertheless require independence to make these decisions. And long terms will enable this kind of independence.

2. Term Limits Balance Deliberative Independence and Democratic Responsiveness

Of course, if long terms induce this kind of independence, why not use life tenure, the longest term possible? The answer is because independence is not the only interest we seek to maximize.⁷¹ Indeed, the Commission itself observed that term-limit proponents argue such limits would strike a balance between judicial independence and democratic accountability.⁷² Yet this is subject to the criticism that judicial independence of an *apolitical, neutral* body should not be subject to such checks. The judiciary, so the argument goes, is precisely there to guard against majoritarian evils, and subjecting the judiciary to such inevitably politicized democratic interference is a perilous prescription.

This criticism, though, loses its bite when we recognize the fact of the political, partisan Court. When we consider that the Supreme Court is made up of political Justices, we want democratic accountability and flexibility in decision making.⁷³ Judicial independence is no longer an unmitigated good—it is more subject to reasonable balancing, just like with the House, Senate, and Presidency. Given the deliberative role of the Court and its undertaking of long-term projects, especially as measured against the other political branches, the appropriate balance is best accomplished with longer *but still limited* terms. Of course, what ultimately is the right term is difficult to precisely determine, and it may be subject to the problem of vagueness that arises when fixing a precise numerical value.⁷⁴ That said, fixing staggered terms of twelve to eighteen years for the Justices

70. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1385 (1997) (discussing the settlement function of the Supreme Court); Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 944 (2013) (“Political actors thus have some reason to promote the Supreme Court’s settlement function.”).

71. Calabresi & Lindgren, *supra* note 58, at 812–13 (observing that there are other goods beyond judicial independence, such as democratic accountability).

72. *The Report*, *supra* note 18, at 113.

73. Krishnamurthi, *supra* note 54, at 1211 (identifying various virtues of adjudicatory systems).

74. Roy Sorensen, *Vagueness*, STAN. ENCYC. PHILOSOPHY (2018), <https://plato.stanford.edu/entries/vagueness> [<https://perma.cc/97KM-VGTQ>].

seems both adequate to confer sufficient independence while still allowing for democratic accountability of the Court as a political, partisan institution.⁷⁵

Now, it is a further open question whether Supreme Court Justices should be limited to one term. We could certainly allow for the possibility of Justices to be appointed to a subsequent term. However, depending on the term length, given practical realities of age and change in Presidents who select Justices, it is unlikely that Justices will ever be chosen for subsequent terms. We could also reasonably impose a limit of one term, to restrict the power of any particular person in our polity, just as we limit Presidents to two terms.⁷⁶

What is optimal with respect to the length and limit of such terms requires balancing the many democratic desiderata, complicated by the fact that those desiderata are often in tension.⁷⁷ Indeed, this may mean that the search for an optimal system is quixotic. Even still, recognizing that we want some democratic intervention for Justices can improve upon the current regime of life tenure. And this becomes clearer when we understand that the Court is a political entity, subject to the forces of partisan politics.

B. TERM LIMITS SERVE AS POLITICAL BACKSTOPS TO REFLECT POLITICAL WILL OVER TIME

As discussed, our system has decision makers of various terms. We have seen that one democratic reason for this is to

75. The average term of Justices from 1917 to 2018 was approximately seventeen years. David Fishbaum, *The Supreme Court Has a Longevity Problem, but Term Limits on Justices Won't Solve It*, HARV. BUS. REV. (July 13, 2018), <https://hbr.org/2018/07/the-supreme-court-has-a-longevity-problem-but-term-limits-on-justices-wont-solve-it> [<https://perma.cc/9GEV-MVL9>] (arguing that term limits for each Justice may allow one President to appoint a majority of the Court, but not if the term limit is fixed to the seat the Justice occupies). That average tenure period is projected to increase past thirty-five years over the next century. *Id.*; *the Report*, *supra* note 18, at 18 (stating the average term is currently twenty-six years).

76. U.S. CONST. amend. XXII.

77. Adam Chilton, Daniel Epps, Kyle Rozema, and Maya Sen explore how to design term limits for the Supreme Court, using a method of analyzing how term limits would have shaped the Court if in place over the last eighty years. Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. 1, 1–2 (2021). In future work, Ryan Copus and I will explore this question using quantitative models, with a focus on how term lengths and limits may impact electoral wins necessary for fundamental changes.

afford certain officials a greater deliberative capacity and independence. Another reason for this is to ensure that democratic representation reflects the political will over time. Terms can serve the same democratic function for a political, partisan Court.

The fact that democratic representatives have different terms mathematically requires that their elections will be at different times. Holding these elections at different times has the obvious benefit of capturing the political will over time. This can allow the public to use interim elections to serve as a check on power. The standard understanding of the benefit of elections in the middle of a Presidential term is that they can be used to gauge the President's performance. Functionally then, midterm elections can place into power democratic representatives who will facilitate or impede the President's agenda—through their legislative and oversight duties.⁷⁸

Relatedly, another critical democratic benefit is that staggered elections ensure that the public's momentary dispositions do not entirely dictate the political direction of the nation.⁷⁹ Results of elections are often naturally dictated by the prevailing issues and attitudes in the moment of that election. But how the public feels at a particular moment may not be representative of how it feels over time. This could happen because of idiosyncratic events, such as personal scandals, or natural or man-made disasters that create temporary strife.

Imagine that scenario then: a wild scandal renders the lead of one party's electoral ticket—an otherwise politically viable candidate—as politically toxic.⁸⁰ The public here are often

78. David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 788–89 (2017).

79. THE FEDERALIST NOS. 10, 51 (James Madison); BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 181–86 (1991).

80. Arguably, this situation arose to some extent with the “email scandal” that struck then-candidate Hillary Clinton's campaign. Eric Bradner, *Hillary Clinton's Email Controversy, Explained*, CNN (Oct. 28, 2016), <https://www.cnn.com/2015/09/03/politics/hillary-clinton-email-controversy-explained-2016/index.html> [<https://perma.cc/L9CS-49FK>]. However, this example is in no way singular and is known by a special name in American presidential politics: the “October surprise.” Taylor Gee, *15 October Surprises That Wreaked Havoc on Politics*, POLITICO (Oct. 4, 2016), <https://www.politico.com/magazine/story/2016/10/october-surprises-214320> [<https://perma.cc/75EJ-MAB9>].

straight-ticket voters or are inclined to treat the scandal as infecting the whole party.⁸¹ This leads to a wave election in favor of the other party. If the whole of governmental power was vested in this one electoral moment, that could lead to dramatic changes to the governmental order—even if the scandal’s actual impact on the public was intense but momentary.

By staggering elections, we do not place the entirety of governmental power at stake in one such moment. In order for one party to gain enough power to make substantial changes to the nation, they must win a number of races over multiple elections *spaced over time*. And in order to make fundamental changes to the nation’s constitutional order, the party must win enough of those temporally spaced races in the Presidency, the Senate, and the House.

The Supreme Court, and the judiciary more generally, have a large role to play in this as well. Whether you think the Supreme Court operates politically or not, the Supreme Court can and does regularly frustrate potential changes to the constitutional order. We have seen this recently, on both sides of the partisan spectrum. Most prominently, the Supreme Court previously halted Republican-led changes to abortion jurisprudence.⁸² Thereafter, the Republicans won a set of elections to nominate and confirm three Justices on the Supreme Court. And now the Republican-led effort to overturn *Roe v. Wade* has been successful, which in turn has seen a spate of extremely restrictive abortion laws.⁸³ Similarly, we have seen the judiciary pour cold water over aspects of President Biden’s immigration agenda.⁸⁴

81. See, e.g., Amber Phillips, *Is Split Ticket Voting Officially Dead?*, WASH. POST (Nov. 17, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/17/is-split-ticket-voting-officially-dead> [<https://perma.cc/6ZY7-TEEL>].

82. *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582 (2016) (affirming *Casey*’s undue burden standard in light of Texas’s attempts to restrict abortion), *abrogated by* *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022).

83. See *supra* note 11 and accompanying text.

84. See, e.g., Nolan Rappaport, *Federal Courts Have Dismantled Biden’s Immigration Plan*, HILL (Aug. 24, 2021), <https://thehill.com/opinion/immigration/569097-federal-courts-have-dismantled-bidens-immigration-plan> [<https://perma.cc/7HRN-UYYF>]; Priscilla Alvarez & Ariane de Vogue, *Supreme Court to Review Biden’s Effort to End Trump-Era ‘Remain In Mexico’ Rule for Migrants*, CNN (Feb. 18, 2022), <https://www.cnn.com/2022/02/18/politics/remain-in-mexico-supreme-court/index.html> [<https://perma.cc/K67U-U7CW>].

Of course, this is not a one-party affair. Under President Trump, the judiciary—especially the lower courts—ruled against many policies, frustrating change from the office of the President. Fred Barbash, Deanna Paul, Brittany

Initially, we might view this as a frustration of the democratic political will. But conceiving of the Supreme Court as a political body in our framework of various democratic officials, we see the political Supreme Court has a genuine democratic role. It may serve as another backstop, to ensure that electoral victories over a short period of time are not enough to change the fundamental constitutional order. In order to enact changes to the fundamental constitutional order, a party must get through the political Supreme Court. And if the political makeup of the Supreme Court is adverse to the controlling party, the party must have electoral victories when there are vacancies on the Court such that they can nominate *and* confirm Justices to those vacancies. This is no small task. Most recently, when there may have been such a flip of the Supreme Court's partisan balance, the Democrats were unable to obtain the advantage due to not having enough Senate seats to confirm Merrick Garland (or to even get him a vote).⁸⁵ Balkin and Levinson observe that in our system, elected officials—principally, the President and Senate—nominate and confirm judges and justices with the goal of extending the partisan advantage won at the ballot box beyond the term of those electoral wins.⁸⁶ They call this “partisan entrenchment,” and further explain how entrenchment—through judicial interpretation—can engender constitutional change and even revolution.⁸⁷ But most basically, partisan entrenchment can maintain the status quo and frustrate or indeed halt change, even when a party has thoroughly lost its electoral mandate.⁸⁸

At first glance, this may sound precisely undemocratic. But that judgment is premature. If our view of democracy takes into account that popular will has temporal extension and that our democratic system should be calibrated to capture that, then the

Renee Mayes & Danielle Rindler, *Federal Courts Have Ruled Against Trump Administration Policies at Least 70 Times*, WASH. POST (updated Apr. 26, 2019), <https://www.washingtonpost.com/graphics/2019/politics/trump-overruled/> [<https://perma.cc/A5L3-DHGM>].

85. See *supra* note 5 and accompanying text. Despite an uncooperative Senate, the President may also be able to make appointments to the Supreme Court through a recess appointment. But this power, too, has become fairly limited after the High Court's decision in *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 548–56 (2014) (holding that the Senate could hold *pro forma* sessions to ensure there was no recess sufficient for a presidential appointment).

86. Balkin & Levinson, *supra* note 24, at 1068–69, 1071.

87. *Id.* at 1066–67.

88. *Id.* at 1066–69.

political, partisan Supreme Court *can serve* a democratic purpose: to ensure that fundamental changes to the political order are precipitated by a sustained political will to make those changes.⁸⁹

That is not to say it always will. Sometimes, due to our institutional design and the political ground realities, the Supreme Court will act politically in an anti-democratic way. The pressing question then is how we properly calibrate the Supreme Court's political backstop role. Clearly, we would not want to allow the Supreme Court to serve as a permanent ideological backstop in one partisan direction. We would not want, say, a system where Supreme Court Justices get to pick their own successors of the same partisan or ideological bent. That would ensconce enormous political advantage in the Supreme Court permanently. At the same time, we would not want to give Justices extremely short terms, like U.S. Representatives, because that would not serve as any additional political backstop (as well as cost us the deliberative independence discussed above). It's a "[G]oldilocks problem."⁹⁰ With the greater lifespans of Justices, life tenure is too long and too unpredictable to properly preserve the democratic value of the political backstop. Conceived of as a *political* backstop, we want the Supreme Court to be subject to change if there is a sustained political will calling for such change. Terms, and term limits, can rectify these problems. Although finding the optimal term length and limit may be difficult,⁹¹ there are determinations we can make to at least *improve* our system on democratic desiderata.

Notice, though, the politicization of the Supreme Court accompanying term limits is not to be avoided regardless. It is good that Supreme Court nominations would be predictable and thus

89. *Id.* On my reading, this is also similar to what Bruce Ackerman explains as a "constitutional moment," for foundational change. ACKERMAN, *supra* note 79, at 60–61. Ackerman sets forth that constitutional moments must proceed through four stages: a "signaling phase," channeling through proposals, fair opportunities for opposition and deliberation, and "broad and deep" popular support that ensures the proposals are "translate[d]" into constitutional principles. *Id.* at 266–88. My view is that, as a descriptive matter, all that may be required to make fundamental change is broad and deep support that can ensure sufficient electoral wins to change the makeup of the High Court.

90. Tom Ginsburg, Testimony, Presidential Commission on the Supreme Court of the United States 9 (July 20, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Ginsburg-Testimony.pdf> [<https://perma.cc/MYN2-A86A>]; ROBERT SOUTHEY, GOLDILOCKS AND THE THREE BEARS (1837).

91. *See supra* note 74 and accompanying text.

more subject to political contest. Furthermore, we should be willing to undergo fundamental changes to our constitutional order if there is a sustained political will calling for such change over a generation. Thomas Jefferson famously called for revising the Constitution every nineteen years.⁹² With staggered terms of twelve to eighteen years, sustained political victories spanning more than a generation would allow for changing the makeup of the Court and thus for pursuing fundamental changes to the constitutional order. This would enhance the democratic function of the Supreme Court as political backstop. And it does so fully recognizing the political, partisan character of the High Court.

CONCLUSION

One main concern that has predominated efforts to reform the august Supreme Court, as exemplified by the Biden Commission's Report, is a concern with ensuring the Court is not politicized and the Justices are not simply partisan actors. The animating thought seems to be that politicization will render the Court ineffective in its judicial duty and illegitimate in the public's eyes. This Essay seeks to prove that assertion wrong and furthermore, that such beliefs unduly hinder our ability to pursue reform. The Supreme Court is a political body. Once we embrace that reality and understand the political Court's democratic benefits, we can pursue genuine, practical, and meaningful reform.

Informed by the insights of Balkin and Levinson about the true nature of the Supreme Court, this Essay argues that the Court still has a place in our democratic order *even if* we accept it as a political entity with Justices rightly conceived of as partisan politicians. First, we can think of the political Court and its Justices as serving as a type of legislature with longer terms. These longer terms provide the Justices with independence so

92. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 396 (Julian P. Boyd & William H. Gaines, Jr., eds., 1958). Jefferson based this proposal on his understanding of then-current lifespans, to match both the constitution and a generation's lifespan. David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1721–22 (2003). Though our lifespans are now much longer, staggered terms of twelve to eighteen years would mean that a party would require victories over a generation or longer (around twenty to thirty years) to substantially change the Court's makeup. That approximates what I consider to be sustained political will for fundamental change. For greater discussion of these calculations, look for future work by Ryan Copus and me exploring these questions using quantitative modeling. *See supra* note 77.

that they can engage in deliberation and long-term decision making on important issues that may require unpopular decisions, without concerns about retribution from momentary public opinion. Second, we can understand the political Supreme Court as serving as another backstop, to ensure that fundamental changes to the governmental order occur only when bolstered by sustained political will. Importantly, both democratic functions are supported and enhanced by reasonable term limits, which allow the public to have a democratic say in who their decision makers are, as well as the ability to check the progress of such political decision making. Life tenure, on the other hand, can improperly ensconce stasis and partisan advantage, despite overwhelming and sustained contrary public opinion.