

# Court Packing, Senate Stonewalling, and the Constitutional Politics of Judicial Appointments Reform

Matthew A. Seligman<sup>\*</sup>

## ABSTRACT

*Reforming the Supreme Court is at the center of the political and legal landscape for the first time in generations. The growing gap between the ideological composition of the Court, the democratic will of the electorate, and perceived procedural irregularities in the appointment of Justices over the last five years, has fueled calls for expanding the size of the Court. Those calls have triggered renewed efforts to repair the appointments process through term limits and a regularized appointments schedule. But in an age of peaking partisanship, the bipartisan cooperation that would be necessary for that proposal to pass seems far out of reach.*

*This Article offers a novel path forward. First, it completes the unfinished work of designing a full solution to the broken appointments process by addressing the problem of Senate stonewalling, like in 2016 when the Republican Senate refused to confirm any nominee put forward by President Obama. It offers the only viable solution to that problem: vesting the appointment power in the President in office at the time the vacancy arises. Second, because that solution would require a constitutional amendment, it analyzes the prospects of achieving that challenging goal through game theory. It offers three models of the parties' strategic behavior in the face of a cycle of escalation. The analysis shows that the increased salience of escalating constitutional hardball tactics in general alters the incentive structure for the parties in a way that makes judicial appointments reform the winning strategy for both parties. It arrives at the counterintuitive conclusion that in this moment of cratering cooperation and collapsing constitutional*

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*norms, there may thus be a rare political and legal opportunity to restructure the judicial appointments process for the better and for good.*

#### INTRODUCTION

The constitutional politics of appointments to the Supreme Court rage with a fiery intensity not seen since at least the 1930s,<sup>1</sup> and perhaps not ever in our history.<sup>2</sup> Even marking the start of this conflagration is itself contentious. Some suggest it began in earnest with the Republican Senate's refusal to consider President Obama's nomination of then-Judge Merrick Garland to the seat vacated by Justice Scalia's death, resulting in President Trump filling that vacancy instead with Justice Gorsuch.<sup>3</sup> Others point to Democrats' abolition of the filibuster for lower court nominees in 2013.<sup>4</sup> Or to Republicans' obstruction of President Obama's nominations, including three nominations to the D.C. Circuit.<sup>5</sup> Or further back to the Democrat-controlled Senate refusing to confirm Judge Robert Bork in 1987.<sup>6</sup> Cycles of

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1. See JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 434 (2010) (recounting conflict between Roosevelt and *Lochner*-era Supreme Court, culminating in Roosevelt's failed attempt to expand the Court and the so-called "switch in time that saved the nine").

2. See Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2750 (2020).

3. See *id.* at 2749; Jamelle Bouie, Opinion, *Mad About Kavanaugh and Gorsuch? The Best Way To Get Even Is To Pack the Court*, N.Y. TIMES (Sept. 17, 2019), <https://www.nytimes.com/2019/09/17/opinion/kavanaugh-trump-packing-court.html> [<https://perma.cc/56CD-6BH4>].

4. See Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), [https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c\\_story.html](https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html) [<https://perma.cc/9C3Q-GBVD>] ("Senate Democrats took the dramatic step Thursday of eliminating filibusters for most nominations by presidents, a power play they said was necessary to fix a broken system but one that Republicans said will only rupture it further.").

5. See *id.* ("The immediate rationale for the move was to allow the confirmation of three picks by President Obama to the U.S. Court of Appeals for the District of Columbia Circuit – the most recent examples of what Democrats have long considered unreasonably partisan obstruction by Republicans.").

6. See Carl Hulse, *How Mitch McConnell Delivered Justice Amy Coney Barrett's Rapid Confirmation*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/2020/10/27/us/mcconnell-barrett-confirmation.html> [<https://perma.cc/9C77-7T9H>] (Senator Mitch McConnell "regularly recites a practiced history that traces Democratic culpability for the judicial wars to Judge Robert Bork's rejection by the Senate in 1987"); Kane, *supra* note 4 ("The [abolition of the filibuster for lower court nominees] was the culmination of more than 25 years of feuding over nominations, beginning with President Ronald Reagan's choices for the Supreme Court and including Obama's picks for obscure federal regulatory agencies.").

recrimination have led to partisan escalation, most recently manifest in calls for Democrats to add seats to the Supreme Court.<sup>7</sup>

This intensifying confrontation eludes simple resolution. The debate has recently centered on the Presidential Commission on the Supreme Court of the United States,<sup>8</sup> established by President Biden through executive order.<sup>9</sup> The Commission was charged with “provid[ing] an analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform,” including “the genesis of the reform debate; the Court’s role in the Constitutional system; the length of service and turnover of justices on the Court; the membership and size of the Court; and the Court’s case selection, rules, and practices.”<sup>10</sup> It heard testimony from numerous scholars and practitioners, whose recommendations range from radical reform to maintaining the status quo.<sup>11</sup> Few anticipated that it would endorse any

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7. See, e.g., Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 246–53 (2020) (arguing that Democrats should expand the Supreme Court to retaliate for prior rounds of aggressive tactics by Republicans); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 164 (2019) (“[C]ourt-packing is under serious discussion after being seen as beyond the pale for decades.”); Aaron Belkin, *Court Expansion and the Restoration of Democracy: The Case for Constitutional Hardball*, 2019 PEPP. L. REV. 19, 40–41 (2020); DAVID FARIS, IT’S TIME TO FIGHT DIRTY: HOW DEMOCRATS CAN BUILD A LASTING MAJORITY IN AMERICAN POLITICS 94 (2018) (arguing that Democrats should expand “the Supreme Court to whatever number is necessary to secure a liberal majority”); Ian Ayres & John Fabian Witt, Opinion, *Democrats Need a Plan B for the Supreme Court. Here’s One Option*, WASH. POST (July 27, 2018), <https://wapo.st/2mQH0pA> [<https://perma.cc/BNY7-E7XA>].

8. See *Presidential Commission on the Supreme Court of the United States*, THE WHITE HOUSE, <https://www.whitehouse.gov/pscotus/> [<https://perma.cc/5V3K-KAB3>].

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

10. See *Presidential Commission on the Supreme Court of the United States*, *supra* note 8.

11. Compare Nikolas Bowie, Assistant Professor of Law, Harvard Law School, Written Statement for The Presidential Commission on the Supreme Court of the United States: Hearing on “The Contemporary Debate over Supreme Court Reform: Origins and Perspectives” (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf> [<https://perma.cc/JV7K-FWGH>] (advocating for weakening of judicial review because it is “antidemocratic as a matter of theory” and its historical role including “the Supreme Court’s relationship to America’s racial caste system”), with Noah Feldman, Felix Frankfurter Professor of Law, Harvard Law School, Written Statement for The Presidential Commission on the Supreme Court of the United States: Hearing on “The Contemporary Debate over Supreme Court Reform: Origins and Perspectives” (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf> [<https://perma.cc/A2YF-WBYD>] (“[W]e collectively have much more to gain by preserving the institutional legitimacy of the Supreme Court than by breaking it . . . Whatever alternative designs might once have existed in theory, sapping that power would, in practice, leave the current system with no institutional actor capable of protecting the rule of law, fundamental rights, or the structure of democracy and motivated to do so.”), and Michael W. McConnell, Richard and

proposed alteration to the composition of the Court or the timing and manner of appointment.<sup>12</sup> In line with those expectations, the Commission's Final Report made no recommendation regarding expanding the Court. It did "not seek to evaluate or judge the weight of any of these arguments" from proponents and opponents," and "the Commission [took] no position on the wisdom of expansion."<sup>13</sup>

Even in the wake of the Commission's report taking no firm position on court expansion, the underlying dynamics driving the push for court reform are unlikely to defuse unaddressed and so that push is unlikely to fade away on its own.<sup>14</sup> Beyond the decades-long tendencies that have led to a yawning gap between the ideological composition of the Court and the country,<sup>15</sup> several more particular phenomena of the current moment compound those long-term trends. Political polarization, both on judicial ideology and more broadly, is peaking.<sup>16</sup> The anti-democratic long-term trends affecting the allocation of judicial power are amplified by the Court's recent cases on voting rights and campaign finance which, some claim, further facilitate popular minorities entrenching themselves as electoral majorities.<sup>17</sup> The Court made a dramatic shift on the single most politically inflammatory issue to come before it: abortion. After decades of dedicated conservative opposition to reproductive rights, the Supreme Court overruled *Roe v. Wade*

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Francis Mallery Professor, Stanford Law School, Written Testimony for The Presidential Commission on the Supreme Court of the United States: Hearing on "The Contemporary Debate over Supreme Court Reform: Origins and Perspectives" (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/McConnell-SCOTUS-Commission-Testimony.pdf> [<https://perma.cc/ZLP5-AGYW>] ("Any attempt to increase the size of the Court would be widely, and correctly, regarded as a partisan interference with the independence of the Court.").

12. See Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398, 401, 403, 411 (2021) ("We expect the Commission to assess all reform options, but given this political context, major reform appears hard to imagine for at least the next two years.").

13. See Final Report, *Presidential Commission on the Supreme Court of the United States*, The White House, <https://www.whitehouse.gov/pscscotus/final-report/>.

14. See *infra* Part I (discussing long-term dynamics driving push for court reform).

15. See Epps & Sitaraman, *supra* note 7, at 156 (noting that "only three of the current Justices (Justices Thomas, Sotomayor, and Kagan) were nominated by a President who entered office after winning the majority of the national popular vote").

16. See *generally* NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* (2019).

17. See, e.g., *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330 (2021) (narrowing scope of § 2 of the Voting Rights Act); *Shelby Cnty. v. Holder*, 570 U.S. 529, 556–57 (2013) (striking down preclearance coverage formula in § 4 of the Voting Rights Act); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365–66 (2010) (striking down provision of Bipartisan Campaign Reform Act that prohibited independent expenditures by corporations in support of candidates).

and its progeny<sup>18</sup> in *Dobbs v. Jackson Women's Health Organization*.<sup>19</sup> And reproductive rights may be only the beginning. In a concurring opinion, Justice Clarence Thomas stated that “in future cases, [the Court] should reconsider all of [its] substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*,” cases which recognized rights to the use of contraceptives, to gay sex, and gay marriage.<sup>20</sup> Just a day before eliminating a constitutional reproductive right that enjoys strong majority support among the public, the Court for the first time recognized a Second Amendment right to carry a firearm outside of the home,<sup>21</sup> thus striking down gun regulations that themselves enjoy strong bipartisan support. In the wake of those two decisions, the Supreme Court's standing in popular opinion is at an all-time low.<sup>22</sup> And perhaps unsurprisingly, progressive Democrats have renewed their call to expand the Court.<sup>23</sup>

In addition to the increasing ideological conflict between the Court and the country on key issues, there are signs that the procedural hardball we have seen with prior vacancies will grow ever more extreme. Senator McConnell, the architect of the Republican Senate's refusal to consider any nominee in the last year of President Obama's term and the rush to confirm Justice Barrett in the last weeks before President Trump's failed re-election bid, recently indicated that if he once again becomes Majority Leader after the midterm elections in 2022, he would once again refuse to confirm any Democratic

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18. See *Planned Parenthood of Pa. v. Casey*, 505 U.S. 833, 845–46 (1992) (reaffirming core holding of *Roe v. Wade* that Fourteenth Amendment protects right to an abortion in certain circumstances).

19. See *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (June 24, 2022) (overruling *Roe v. Wade*).

20. *Id.* (Thomas, J., concurring) (slip op., at 3).

21. See *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, No. 20-843 (June 23, 2022).

22. Jeffrey R. 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/MQ35-45ED>].

23. Compare @ Alexandria Ocasio-Cortez, TWITTER (June 25, 2022, 10:56 AM), <https://twitter.com/AOC/status/1540755948758859777?s=20&t=Jx8PydYotgcFd8ymv1Q5> [<https://perma.cc/7KRZ-6WV9>] and Jamelle Bouie, *How to Discipline a Rouge Supreme Court*, N.Y. TIMES (June 25, 2022), <https://www.nytimes.com/2022/06/25/opinion/supreme-court-constitution.html> [<https://perma.cc/RQW4-MTR6>], with Alexandra Hutzler, *Biden Doesn't Support Expanding the Supreme Court, White House Says*, ABC NEWS (June 25, 2022, 12:14 PM), <https://abcnews.go.com/US/biden-support-expanding-supreme-court-white-house/story?id=85703773> [<https://perma.cc/8YYD-7463>].

nominee in the presidential election year of 2024<sup>24</sup>—or possibly even in 2023.<sup>25</sup>

This maelstrom of legal and political currents could culminate in an explosive conclusion. The continuation of the movement for court reform would thwart the hopes of institutionalists who believe that calls for court packing amount to attacks on the legitimacy of the Supreme Court and should be resisted on that basis.<sup>26</sup> But refraining from fixing the underlying problems poses perhaps an even graver threat to that legitimacy. Now that the Supreme Court has overturned *Roe v. Wade*, if a Republican Senate then refuses to consider any nominee to the Court during the last two years of President Biden’s term, the calls for court expansion that were once confined to progressive circles may engulf half the country.

This Article examines the constitutional politics of the appointments process in an era of rising partisanship and constitutional hardball through the lens of game theory. It advances the counterintuitive conclusion that in this time of cratering cooperation and collapsing constitutional norms, there may be a rare political and legal opportunity to restructure the judicial appointments process for the better and for good. In support of that conclusion, it offers two novel contributions to the literature. First, it argues that that the perennially proposed reform for Supreme Court nominations—judicial term limits with a regularized appointments schedule<sup>27</sup>—is insufficient to solve the broader problem of manipulation of the Court’s membership. As the past several years have shown, partisans can manipulate the size and thus composition of the Court *either* through court packing *or* Senate stonewalling of a President’s nominee. Solving the first problem but

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24. See Carl Hulse, *McConnell Suggests He Would Block a Biden Nominee for the Supreme Court in 2024*, N.Y. TIMES (June 14, 2021), <https://www.nytimes.com/2021/06/14/us/politics/mcconnell-biden-supreme-court.html> [https://perma.cc/3K2E-NEMD] (“I think in the middle of a presidential election, if you have a Senate of the opposite party of the president, you have to go back to the 1880s to find the last time a vacancy was filled . . . So I think it’s highly unlikely.”).

25. See *id.* (answering whether he would block the confirmation of a nominee in 2023, McConnell said “[w]ell, we’d have to wait and see”). See also Erin Doherty, *McConnell won’t commit to hearings for Biden SCOTUS picks if GOP retakes Senate*, AXIOS (Apr. 7, 2022), <https://www.axios.com/2022/04/07/mcconnell-supreme-court-biden-gop-senate> [https://perma.cc/CA28-EWE3].

26. See, e.g., Feldman, *supra* note 11, at 8.

27. See, e.g., James E. DiTullio and John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1127–28 (2004). This idea, which predates the present vacancy, has found renewed vigor from legal commentators. See, e.g., Bob Bauer, *How to End the Judicial Confirmation Wars*, ATLANTIC (July 1, 2018), <https://www.theatlantic.com/politics/archive/2018/07/how-to-end-the-judicial-confirmation-wars/564188/> [https://perma.cc/X25R-MDKN].

not the second is worse than a partial solution; it is an invitation for more frequent exploitation that risks more dire depopulation of the Court and by stalling, stealing of many more seats.<sup>28</sup> The Article therefore considers the few existing proposals to address the Senate stonewalling problem and finds all fundamentally lacking, because each either collapses into appointment by unchecked executive decree or fails to prevent Senate stonewalling in the first place. The Article then proposes a novel approach that effectively solves the Senate stonewalling problem: vesting the appointment power for a particular vacancy in the President in office when the vacancy arises (or her designee) even after her term in office expires. That solution uniquely solves the problem of Senate stonewalling without empowering the President to unilaterally control appointments to the Court.

Second, it addresses the constitutional politics of Supreme Court appointments reform in light of the necessity of a solution to Senate stonewalling. Because any successful solution to the Senate stonewalling problem tied to term limits is beyond the reach of statutory reform,<sup>29</sup> a lasting peace in the confirmation wars must come through a constitutional amendment. That is the basis of the primary challenge in making appointments reform a reality: getting the parties to *agree* to that reform, which would stabilize the judicial appointments process but may not be in the short-term interest of the party in power. This Article argues that the present constitutional moment provides an unexpected and potentially unique opening for the parties to cooperate to redesign the Supreme Court nominations process permanently. That argument maps a pathway to cooperation that connects the political incentives for a constitutional amendment to current gestures towards court packing and Senate stonewalling. By presenting the possibility—or, it can sometimes seem, inevitability—of a long-term cycle of escalation in view of the dynamics of an iterated two-player game with known strategies, it seeks to reframe the discussion away from winning an adversarial game and toward changing the rules of that game to be more cooperative.

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28. See Adam Chilton et al., *Designing Supreme Court Term Limits*, S. CAL. L. REV. (forthcoming 2022) (manuscript at 21) (on file with author) (“Without some solution to this problem, ‘instituting staggered term limits could spectacularly backfire.’” (quoting in part Ilya Shapiro, *Term Limits Won’t Fix the Court*, ATLANTIC (Sept. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/09/term-limits-wont-fix-court/616402/> (<https://perma.cc/RVK7-V9EM>)).

29. The Epps and Sitaraman proposals—the Supreme Court Lottery and the Balanced Bench—fall outside the scope of this analysis because both fundamentally restructure the Supreme Court in ways that go far beyond term limits. See Epps & Sitaraman, *supra* note 7, at 181–84, 193–200.

In particular, this Article shows that the parties' self-interested incentives are now aligned toward cooperation in the three plausible models of the game of court packing and Senate stonewalling in our current political and social environment: the Prisoner's Dilemma, the Hawk-Dove Game, and the Asymmetrical Hawk-Dove Game. Because the threat of escalation through court packing by Democrats or Senate stonewalling by Republicans is now so salient, and the parties' apparent commitment to playing hardball is now so deep, under any of the three models both parties should now recognize the value of pursuing a long-term solution that disarms both of those hardball tactics over securing short-term advantage. A constitutional amendment reforming the judicial appointments process has never been easy, and it will not be now. It would be naïve to suggest otherwise. But precisely because an amendment to repair the Supreme Court nominations process has never been more needed, it has never been more politically attainable.

#### I. CONSTITUTIONAL HARDBALL AND JUDICIAL APPOINTMENTS

Cries for court packing arise from the perception of a gap between the Court, the people, and their political representatives. The proper authority of the judiciary rests on a precarious balance between insulating it from the whims of the political process in deciding its cases and ensuring a foundation of democratic accountability in the appointment of its members. When that balance tips too far away from democratic accountability in appointments, the counter-majoritarian difficulty sharpens.<sup>30</sup> It is one thing for unelected judges to strike down democratically enacted laws. It is quite another for unelected judges to do so when their appointments, in the aggregate, do not reflect the long-term political will of voters. That concern applies more broadly than the context of judicial review of the constitutionality of legislation and executive action. Even in the interpretation of statutes, where the Court's domain purports to be the minimalist task of implementing the will of Congress, the reality of the pliability of statutory interpretation creates the possibility of a long-run mismatch between the Court's and people's perceptions of Congressional will.<sup>31</sup>

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30. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (Yale Univ. Press, 2d ed. 1986) (1962).

31. This mismatch may be manifest in, among other phenomena, the rarity of congressional overrides of the Court's statutory decisions. Compare *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007) (holding statute of limitations on Title VII claim for discriminatory pay starts when pay decision made, not most recent unequal paycheck), with Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (amending Title VII to reverse *Ledbetter*). Because of the many veto points in the legislative process, the Court's statutory decisions can have staying power even if they contravene the public's will.



A foundational norm, which may come clearly into view only when it is violated, may thus underlie the legitimacy of the judiciary: an approximate proportionality principle, according to which the long-term ideological balance of the Court should roughly reflect the long-term ideological preferences of the people.<sup>32</sup> The Constitution provides a partial assurance of that proportionality by vesting the authority to appoint Supreme Court Justices in the President with the advice and consent of the Senate.<sup>33</sup> But that guarantee is imperfect. The vagaries of the timing of judicial retirements and of human mortality, compounded by the anti-democratic slant of the Electoral College and the Senate, imbed the perpetual risk of a destabilizing disparity between the Court and the country. As a result, six of the nine Justices currently on the Court were appointed by Republican presidents, even though a Democratic candidate has won the popular election for the presidency in seven of the last nine presidential elections.<sup>34</sup>

At the heart of the deepening crisis lie several long-term trends that together pose a potentially grave challenge to the legitimacy of the judiciary. These trends feed the perception of a swelling disconnect between the allocation of judicial power and the democratic will of most Americans. First, the decisions of the Supreme Court play an increasingly central role in the governance of the nation. While the Court has issued major decisions from its inception, blockbuster cases now come several a Term rather than once every several years or even decades.<sup>35</sup> Second, over the last several decades the judicial ideology of a Justice has become much more predictable from the

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32. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 375 (2009).

33. See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall . . . nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.”).

34. Republican candidates lost the popular vote but won the Electoral College in 2000 and 2016. See FED. ELECTION COMM’N, *FEDERAL ELECTIONS 2000* 11–12 (2001), <https://www.fec.gov/resources/cms-content/documents/federalections00.pdf> [<https://perma.cc/BA5K-WFB6>]; FED. ELECTION COMM’N, *FEDERAL ELECTIONS 2016* 6 (2017), <https://www.fec.gov/resources/cms-content/documents/federalections2016.pdf> [<https://perma.cc/JY4K-JBT5>]. The resulting mismatch between Supreme Court appointments and the outcome of the national popular vote is thus jointly caused by the Electoral College and the random or strategic distribution of vacancies across presidential administrations.

35. See WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876* 138–39 (2004) (“[W]hile the Court then did on occasion review a case of great national importance [during the Nineteenth Century] . . . such cases were few and far between. The staple of judicial business was cases that were brought into federal court only because the plaintiff and defendant were citizens of two different states. . . . The result was that the justices spent most of their time on cases . . . with no consequences except for the parties themselves.”).

party affiliation of the nominating President.<sup>36</sup> That does not necessarily mean that Justices decide cases on political grounds; it does mean, at least, that Presidents have become more adept at selecting nominees whose judicial ideology will reliably result in outcomes the President prefers.<sup>37</sup> Third, Justices now serve for decades longer than they did at the Founding,<sup>38</sup> increasing the importance of a single nomination and decreasing the frequency of new members joining the Court. That lengthening of tenure, and thus the deceleration of turnover, allows the Court's jurisprudential approach to lag far behind that of the country.<sup>39</sup> Finally, vacancies on the Court now arise only out of two equally undemocratic contexts: the unpredictability of a Justice dying or becoming incapacitated,<sup>40</sup> or the strategic maneuvering of a Justice timing retirement to hand the vacancy to a President with sympathetic ideology.<sup>41</sup>

The lack of proportionality between the public's political preferences and appointments to the Court is compounded by perceived procedural irregularities in the appointment of Justices over the last five years.<sup>42</sup> Under Republican Majority Leader Mitch McConnell, the Senate refused to hold a confirmation hearing for then-Judge Merrick Garland, President Obama's

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36. See Epps & Sitaraman, *supra* note 7, at 155–56 (“And now, the Supreme Court is perfectly polarized on party lines as well—for the first time, all Democrat-appointed Justices are reliably liberal and all Republican-appointed Justices are reliably conservative.”); Lee Epstein & Eric Posner, Opinion, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html> [https://perma.cc/HBD3-QY7R] (“For the first time in living memory, the [C]ourt will be seen by the public as a party-dominated institution, one whose votes on controversial issues are essentially determined by the party affiliation of recent presidents.”).

37. See Epps & Sitaraman, *supra* note 7, at 157 (“The inescapable conclusion from these events is that the party affiliation of Supreme Court Justices matters—and that politicians will go to great lengths to control the Court.”). See generally DEVINS & BAUM, *supra* note 16.

38. See David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1081 (2000).

39. See Chilton et al., *supra* note 28 (manuscript at 1) (“This results in an unequal influence that presidential elections have on the composition of the Court, which in turn has created disparities in the influence of political parties on the Court.”).

40. See Epps & Sitaraman, *supra* note 7, at 170 (“Whatever one’s views on abortion, free speech, gay marriage, or the powers of Congress, important governmental decisions on these matters should not depend on the health of individual octogenarians.”).

41. Chilton et al., *supra* note 28 (manuscript at 8) (“[T]he timing of justices’ deaths and retirements can lead to a Court in which one party or the other’s nominees are disproportionately represented in light of their electoral success.”); see ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 311 (2015).

42. See Epps & Sitaraman, *supra* note 7, at 156 (“These more general concerns are exacerbated by the circumstances of how the two newest Justices [i.e., Justices Gorsuch and Kavanaugh] joined the Court.”). Since the Epps & Sitaraman article was published, Justice Barrett joined the Court just days before the 2020 presidential election. See *infra* note 49 and accompanying text.

nominee to the Supreme Court to succeed Justice Scalia.<sup>43</sup> The Senate's refusal was not grounded in any substantive objection to Garland, who was subsequently confirmed by the Senate as Attorney General five years later by a vote of seventy to thirty, including twenty Republicans.<sup>44</sup> The purported basis was instead that it was the final year of President Obama's term. According to McConnell, "[t]he American people should [therefore] have a voice in the selection of their next Supreme Court Justice" and "th[e] vacancy should not be filled until we have a new president."<sup>45</sup> That "arguably unprecedented blockade" of any nominee the President named violated "a longstanding custom, but [not a] clear-cut legal obligation, that the Senate provide[] timely advice and consent on Supreme Court nominations."<sup>46</sup> After the election, President Trump subsequently nominated and the Senate confirmed now-Justice Gorsuch to the vacancy.<sup>47</sup> Justice Kennedy's retirement the next year led to the nomination of now-Justice Kavanaugh, who was confirmed by the Republican Senate by nearly the smallest margin in history, notwithstanding allegations of sexual misconduct.<sup>48</sup> Finally, after Justice Ginsburg's death on September 18, 2020—just 46 days before the 2020 presidential election—President Trump nominated and the Republican Senate confirmed now-Justice Amy Coney Barrett on October 26, 2020, little more than a week before Election Day.<sup>49</sup>

The Senate's differential treatment of President Obama's nomination of then-Judge Garland nine months before the 2016 election and President Trump's nomination of Justice Barrett much closer to the 2020 election was

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43. Burgess Everett & Glenn Thrush, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, POLITICO (Feb. 13, 2016, 9:56 PM), <https://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248> [<https://perma.cc/EA69-ERVS>].

44. See Roll Call Vote 117th Congress - 1st Session, UNITED STATES SENATE, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=117&session=1&vote=00114](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=117&session=1&vote=00114) [<https://perma.cc/5KGM-37ET>] (voting summary on the nomination of Merrick Garland to be Attorney General).

45. Everett & Thrush, *supra* note 43.

46. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 917, 920–21 (2018).

47. 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/L645-LGA7>].

48. See 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/Y9QE-2RMT>].

49. See Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html> [<https://perma.cc/XJZ9-KAP7>] ("The vote capped a brazen feat for Republicans, who pushed through a Supreme Court nominee in little more than five weeks with the election looming.").

based solely on the party of the nominating president. In response to “cries of blatant hypocrisy,”<sup>50</sup> Senator McConnell claimed “that he had not reversed his position” because “[t]he difference . . . is that in [2020], the same party control[led] both the Senate and the White House as opposed to 2016, when Democrats held the presidency and Republicans the Senate.”<sup>51</sup> Senate minority leader Chuck Schumer characterized the confirmation of Justice Barrett as “the most illegitimate process [he] ha[d] ever witnessed in the Senate.”<sup>52</sup>

These two factors—the growing lack of proportionality between the Court’s ideological composition and the public and the procedural hardball of recent appointments—drive the push for reforming the Supreme Court. The most prominent proposals attack the perceived problem directly by changing the way appointments affect the composition of the Court.<sup>53</sup> Those proposals most often involve expanding the Supreme Court by adding seats.<sup>54</sup> These proposals are often explicitly framed as aiming to counteract procedurally and democratically illegitimate appointments by President Trump.<sup>55</sup> The broader justification offered by its proponents is that the

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50. Hulse, *supra* note 6.

51. Carl Hulse, *For McConnell, Ginsburg’s Death Prompts Stark Turnabout from 2016 Stance*, N.Y. TIMES (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/us/mitch-mcconnell-rbg-trump.html> [<https://perma.cc/6USW-42KY>]; *see also* Hulse, *supra* note 24 (quoting McConnell as stating that “[w]hat was different in 2020 was we were of the same party as the president . . . [a]nd that’s why we went ahead with it.”).

52. Jemima McEvoy, *After Boycotting Vote, Senate Democrats Continue To Protest ‘Illegitimate’ Amy Coney Barrett Confirmation*, FORBES (Oct. 22, 2020, 12:39 PM), <https://www.forbes.com/sites/jemimamcevoy/2020/10/22/after-boycotting-vote-senate-democrats-continue-to-protest-illegitimate-amy-coney-barrett-confirmation/>.

53. In addition to appointments reform, scholars and commentators have advanced other measures aimed at reducing the power of the Court, including jurisdiction-stripping and requiring a supermajority of Justices to strike down a Congressional enactment. *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1720–21 (2021).

54. Epps and Sitaraman are a notable exception. They propose two different ways of reforming the composition of the Court that are not simple expansion: that panels of Justices are selected among federal appellate judges by lottery, or that the Justices be explicitly balanced by ideology. Epps & Sitaraman, *supra* note 7, at 181–84, 193–200. The “balanced bench” approach would be modeled on private arbitration panels: five Justices appointed by Democrats, five Justices appointed by Republicans, and five Justices appointed by the first ten. *Id.* at 193. Epps and Sitaraman contend that these approaches would address the existing challenges to the Court’s legitimacy without leading to an unstable cycle of escalation. *Id.* *But see* Stephen Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J. F. 93, 95 (2019) (“Yet their proposals—rotating the Court’s membership biweekly or requiring a partisan balance for its Justices—are unfortunately ill-conceived. They might end up destroying the Court’s legitimacy in order to save it.”).

55. *See, e.g.*, Ayres & Witt, *supra* note 7 (“The balancing plan [i.e., adding two seats to the Court] would be a temporary intervention tailored to rectify the Senate’s prior dereliction in the Garland nomination.”).

Supreme Court is captured by the conservative movement and is poised to entrench the counter-majoritarian structural features of American democracy that generate the Court's slanted composition in the first place.<sup>56</sup>

Altering the number of judges on the Supreme Court or the lower courts thus threatens to be the next iteration in the continuing saga of constitutional hardball over the judiciary.<sup>57</sup> The key constitutional feature of these proposals is that the number of judgeships is a matter of statutory law,<sup>58</sup> and so either party can execute this strategy without the cooperation of the other whenever it controls both the Presidency and Congress. Constitutional hardball is a "political claim[ ] [or] practice[ ] . . . that [is] without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing *pre-constitutional* understandings."<sup>59</sup> A "political maneuver can [thus] amount to constitutional hardball when it violates or strains constitutional conventions for partisan ends."<sup>60</sup> As a result of this defiance of previously settled norms, such "maneuvers elicit in their opponents a feeling that constitutional institutions or ideas have been instrumentalized for partisan gain" and "that there has been a process breakdown."<sup>61</sup>

Court packing would represent a marked escalation in our recent political history.<sup>62</sup> We have already seen how escalation plays out in prior rounds of constitutional hardball. Before that, Democrats eliminated the filibuster on judicial nominations to lower courts in order to clear the way for three of

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56. See Klarman, *supra* note 7, at 243 ("The Court is part of an interlocking system and cannot be excluded from a democracy-entrenching reform effort.").

57. See generally Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004).

58. See U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); Judiciary Act of 1789, ch. 20, 1 Stat. 73.

59. See Tushnet, *supra* note 57, at 523.

60. Fishkin & Pozen, *supra* note 46, at 921 (emphasis omitted).

61. *Id.* at 925.

62. Congress has indeed altered the number of Justices before, and sometimes for ideological or partisan reasons. Dave Roos, *Why Do 9 Justice Serve on the Supreme Court?*, HISTORY (Sept. 24, 2020), <https://www.history.com/news/supreme-court-justices-number-constitution> [<https://perma.cc/BF2U-DFBV>]. But it has not done so since shortly after the Civil War. *Id.* We ought not be content to emulate the escalation of partisan conflict that marked the American landscape in the middle of the Nineteenth Century. See Braver, *supra* note 2, at 2751 ("Proponents' normalization of court-packing is reassuring; it tells us that since we have been there before, we should not be worried about going there again. But court-packing is almost unprecedented, and U.S. history provides little evidence about its effects on the legitimacy of the Supreme Court.").

President Obama's nominees to the D.C. Circuit.<sup>63</sup> That step was, in the eyes of many Democrats, a response to what they viewed as unprecedented Republican obstruction of those lower court nominees.<sup>64</sup> Nonetheless, and perhaps predictably, Republicans subsequently abolished the filibuster for nominees to the Supreme Court, clearing the way for now-Justice Gorsuch to fill the seat previously occupied by Justice Scalia, to which then-Judge Garland had previously been nominated.<sup>65</sup> And so on, and so on, and so on.<sup>66</sup> If one party expands the size of the judiciary for partisan purposes, then there is every reason to expect that the other party will do the same when its turn at the wheel comes back around.<sup>67</sup> The ultimate result of initiating an escalating cycle of court packing is a deeply unstable judiciary populated by massive numbers of new judges seated in new posts created in each presidential term. That cycle would critically undermine legitimacy of the judiciary and the rule of law in a way that no one reasonably could endorse.<sup>68</sup>

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63. See 159 CONG. REC. S8413, S8417 (daily ed. Nov. 21, 2013) (statement of Sen. Reid) ("I raise a point of order that the vote on cloture under rule XXII for all nominations other than for the Supreme Court of the United States is by majority vote.").

64. Kane, *supra* note 4.

65. Carl Hulse, *Here's Why Republicans Can't Filibuster President Biden's Supreme Court Nominee*, N.Y. TIMES (Jan. 26, 2020, 6:00 PM), <https://www.nytimes.com/2022/01/26/us/politics/biden-scotus-nominee-filibuster.html> [<https://perma.cc/Q876-C5GF>].

66. See Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), <https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal/> [<https://perma.cc/KRY8-KU5U>] ("[W]hy would [court packing proponents] make such a proposal, knowing that whatever control of the judiciary they managed to achieve would last only until the political worm turned, and that the net result after a couple of cycles would be [a] mess . . . ?").

67. This assumes that the other party will, eventually, return to power. Predictions of a permanent majority by one party or the other have been advanced throughout American history, and so far they have always been wrong. *But see* Aziz Z. Huq & Tom Ginsburg, *How To Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018). Primus, evaluating the Calabresi-Hirji proposal to expand the lower courts by hundreds of judges, suggests that their strategy makes sense if "[w]e don't think in terms of the Democrats one day coming back into power. We are building for a world in which they *never* exercise power. And if the Democrats do return to power, then the Republic won't be worth saving anyway. In other words, competition between Republicans and Democrats is no longer an iterated game in which two rival parties who see each other as legitimate contenders for political power expect to take turns exercising more and less influence within the system. It's the last round, and it's a fight to the finish." Primus, *supra* note 66.

68. See Braver, *supra* note 2, at 2748 (suggesting that court packing would "balloon[] the Court's size so large that its legitimacy pops"). Recent scholarship models the size of the Court after cycles of court-packing to be thirty-nine Justices after 100 years. See Adam Chilton et al., *The Endgame of Court-Packing* (May 3, 2021) (unpublished manuscript),

The real puzzle is why the players might play the game this way anyway, and how to escape the downward spiral.<sup>69</sup>

## II. JUDICIAL TERM LIMITS AND THE PROBLEM OF SENATE STONEWALLING

Term limits for Justices are the longstanding alternative to both court packing and to the status quo.<sup>70</sup> Under the standard design of term limits, each of the nine Justices would serve for eighteen years and each President would nominate a new Justice every two years.<sup>71</sup> Versions of the term limit proposal vary in their details, including how to transition from life tenure to term limits, how to handle unexpected vacancies, and whether Justices retain a

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[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3835502](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835502) [<https://perma.cc/Q3JF-TM35>]. Chilton et al. are relatively sanguine about that prediction. *See id.* (manuscript at 24) (“[A]lthough there are good arguments for and against court-expansion, our findings provide limited support for dismissing the idea entirely on the grounds that it would increase the size of the Supreme Court to untenable levels.”). The basis of that conclusion is that “there may be ways to design procedures to facilitate decision making on complex questions with a body of this size, including hearing more straightforward cases in panels of justices.” *Id.* That does not account for harms aside from administrability that reciprocal court packing would cause, including the impact on the Court’s sociological legitimacy. *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018); *see also* Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019) (reviewing FALLON, *supra*).

69. Recently Adam Schiff, a member of Congress, expressed their public support of packing the court. More are likely to follow. *See* @RepAdamSchiff, TWITTER (June 30, 2022, 3:23 PM), <https://twitter.com/larrysobato/status/1521885099041730563?s=21&t=fdto6FUcZglFlxQu0m2vaw> [<https://perma.cc/DJQ3-FEKJ>].

70. *See* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 824–31 (2006); Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313, 1323–24 (2007); Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467 (Roger C. Cramton & Paul D. Carrington eds., 2006); DiTullio & Schochet, *supra* note 27, at 1119–20; Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 800–01 (1986); *see also* Linda Greenhouse, *New Focus on the Effects of Life Tenure*, N.Y. TIMES (Sept. 10, 2007), <https://www.nytimes.com/2007/09/10/washington/10scotus.html> [<https://perma.cc/6DS9-5QVJ>]. Terms limits for Supreme Court Justices has increased in popularity among the American public. *See* @LarrySabato, TWITTER (May 4, 2022, 9:10 AM), <https://twitter.com/larrysobato/status/1521885099041730563?s=21&t=fdto6FUcZglFlxQu0m2vaw> [<https://perma.cc/B2KJ-J4D6>].

71. *See, e.g., Letter to Congress on the Regularization of Supreme Court Appointments Act of 2017*, FIX THE COURT (June 29, 2017), <https://fixthecourt.com/2017/06/tlproposal/> [<https://perma.cc/Q97D-LRH9>] (proposing legislation to establish such a system).

judicial role at the expiration of their term.<sup>72</sup> All have the fundamental feature of blocking expansion of the Supreme Court by any party for any reason.

But the traditional term limit proposals address only half of the problem. They prevent partisan expansion of the Court (or, indeed, expansion for any other reason). But ironically, they fail to address the form of manipulation of the Court's composition that has actually happened in recent history. Nothing in the traditional term limit proposals prevents an opposition party with control of the Senate from stonewalling—that is, from refusing to confirm any nominee whatsoever by a President of the other party. That, of course, is precisely what the Republican Senate did in 2016 regarding President Obama's nominee.<sup>73</sup> And Senator McConnell has openly threatened to repeat that strategy if Republicans regain the Senate in 2023.<sup>74</sup> The danger of Senate stonewalling is not just that the Court would lack full membership for the duration of the stalling. The most acute danger is that, as in 2016, the stalling can effectively transfer the power to fill a particular vacancy from one party to the other. As many Democrats characterized the events of 2016, the Senate can effectively stall and steal a seat.<sup>75</sup> Moreover, the problem of Senate stonewalling becomes markedly more acute with term limits and regularized appointment schedules. Because vacancies arise much more frequently with term limits—twice a presidential term under most versions of the proposal—the opportunities for Senate stonewalling arise much more frequently as well.<sup>76</sup> Accordingly, a term limit proposal that does not solve the problem of Senate stonewalling is not even a half-solution. It makes the problem worse.

The problem of Senate stonewalling has received remarkably little analysis given its importance in designing effective appointments reform.<sup>77</sup> Most proposals fail to address the issue at all. That lack of attention has a

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72. Compare Oliver, *supra* note 70, with DiTullio & Schochet, *supra* note 27, and Calabresi & Lindgren, *supra* note 70.

73. See 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).

74. See note 25 and accompanying text.

75. Erick Trickey, *The History of 'Stolen' Supreme Court Seats*, SMITHSONIAN MAG.: HISTORY (Sept. 25, 2020), <https://www.smithsonianmag.com/history/history-stolen-supreme-court-seats-180962589/> [<https://perma.cc/8HRL-99RH>].

76. See Shapiro, *supra* note 28 (“Imagine a scenario in which a GOP-controlled Senate blocks a Democratic president's 2025 and 2027 nominations. A Republican president is then elected in 2028 and the Senate confirms *four* nominees: in 2029 and 2031, to serve the regular 18-year terms, and for the two empty seats, with 14 and 16 years left on their terms, respectively.”).

77. Chilton et al., *supra* note 28 (identifying the problem of Senate stonewalling (termed “Senate impasses”) and considering the effects of existing responses to it in their modeling of the likely length of tenure of Justices under various term limit proposals). Neither Chilton et al. nor other commentators analyze other dimensions of the issue.



serious consequence: the few existing approaches to the problem of Senate stonewalling are undertheorized, and each suffers from fatal flaws. Those proposals either collapse into appointment of Justices by executive decree by effectively eliminating the Senate's role entirely, or they ultimately fail to prevent Senate stonewalling at all. The existing approaches are as follows:

*Appointment by Executive Decree.* The most obvious response to the problem of Senate stonewalling is to eliminate the Senate's ability to block appointments by eliminating its role entirely. The virtue of this approach is that it definitively solves the problem of Senate stonewalling. The question, though, is whether that solution is worth the price that must be paid. Under an approach of appointments by executive decree, there is no formal check on whom a President places on the Court. Such a system would place Supreme Court appointments on the same track as low-level executive branch political appointments.<sup>78</sup> The primary difference, and something of a minor saving grace, is that low-level executive branch political appointments have relatively little power and largely fly under the radar, and as a result they are subject to relatively modest political constraints.<sup>79</sup> A Supreme Court Justice, even if appointed by executive decree, is so high profile that political constraints may offer substantial guiderails to a President.<sup>80</sup>

Notwithstanding those potential political guardrails, appointment of Supreme Court Justices by executive decree is extremely dangerous. By eliminating the role of the Senate, this approach solves the problem of stonewalling by preventing an opposition Senate from blocking an appointment. But it also prevents a Senate controlled by the President's *own* party from blocking an appointment. As a result, an executive decree approach facilitates a President appointing Justices who would be rejected even by co-partisans. It thus allows a President to appoint Justices who would be rejected by *everyone* other than the President herself—in other words, presidential lackeys.

Recent history illustrates two of the risks of appointment by executive decree: elevating incompetence and abetting autocracy. First, in 2005 President George W. Bush nominated Harriet Miers, his White House Counsel, to the vacancy created by the retirement of Justice Sandra Day

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78. See U.S. CONST. art. II, § 2, cl. 2.

79. See *ArtII.S2.C2.2.1.4 Appointing Inferior Officers*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/article-2/section-2/clause-2/appointing> [<https://perma.cc/G8E4-UYVQ>].

80. Although many commentators predict—and hope—that judicial confirmations would be significantly less contentious once term limits are imposed because the stakes of each appointment would be reduced, it seems likely that the continued importance of the Court would ensure that appointments would still be subject to significant public attention and thus political constraints.

O'Connor.<sup>81</sup> Bush and Miers had been close for decades and Miers had served as his personal lawyer for years before he was elected president.<sup>82</sup> The nomination was nearly universally criticized by members of both parties, who voiced grave concerns about Miers's insufficient grasp of the law, her perceived lack of intellectual capacity for the job, and her lack of independence from President Bush.<sup>83</sup> In the face of that broad opposition—particularly from members of his own party—Bush withdrew Miers's nomination at her request.<sup>84</sup> At the time of her nomination, the Senate was controlled by Republicans and consequently her nomination failed only because of the check provided by President Bush's co-partisans.<sup>85</sup>

Second, in his single term in office President Trump nominated, and the Republican Senate confirmed, three Justices to the Supreme Court.<sup>86</sup> During his campaign, Trump famously released a list, purportedly prepared by the Federalist Society, of potential nominees.<sup>87</sup> His three nominees were drawn from that list (or its updated version released during his time in office).<sup>88</sup> Those nominees were well-credentialed members of the establishment conservative legal elite, and they would have been on the short-list of any Republican president.<sup>89</sup> Many political commentators believe that President Trump was most constrained by the Republican Party, and as a result hewed most closely to Republican orthodoxy, in judicial nominations.<sup>90</sup> That contrasts sharply with Trump's many heresies on other matters of policy and

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81. Dana Bash et al., *Miers Withdraws Supreme Court Nomination*, CNN (Oct. 28, 2005, 1:06 PM), <https://www.cnn.com/2005/POLITICS/10/27/miers.nominations/> [<https://perma.cc/XPY3-97AG>].

82. *See id.*

83. *See* PEW RSCH. CTR., MIERS CONCERNS CENTER ON QUALIFICATIONS AND CRONYISM (2005), <https://www.pewresearch.org/politics/2005/10/11/miers-concerns-center-on-qualifications-and-cronyism/> [<https://perma.cc/B8LW-34WT>].

84. Bash et al., *supra* note 81.

85. Chris Canipe, *Republicans Take Control*, WALL ST. J. (Jan. 20, 2017, 10:30 AM), <https://www.wsj.com/graphics/congress-control/> [<https://perma.cc/394G-2NAW>].

86. *Supreme Court Nominations (1789-Present)*, UNITED STATES SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.html> [<https://perma.cc/YA6A-7GKH>].

87. *See* Joel Achenbach, *A Look at the List Helping Trump Reshape the Supreme Court*, CHICAGO TRIB. (July 8, 2018, 6:33 PM), <https://www.chicagotribune.com/nation-world/ct-trump-supreme-court-list-20180708-story.html> [<https://perma.cc/SJD2-GJJD>].

88. *See id.*

89. *See id.*

90. *See* Rebecca R. Ruiz et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> [<https://perma.cc/7SMP-2CTC>].

executive branch appointments.<sup>91</sup> And critically, he was widely reported to place highest importance on personal loyalty over any other factor in non-judicial personnel decisions.<sup>92</sup>

It is not hard to envision the cataclysmic danger to democracy had Trump had the authority to appoint Justices by executive decree. In the absence of the political constraints on judicial appointments imposed by other Republicans, it seems likely that Trump would have appointed Justices who demonstrated unwavering loyalty to him personally rather than to orthodox conservative legal ideology.<sup>93</sup> Those Justices would then have played a central, and at times dispositive, role in numerous cases in which Trump's personal interests were at stake. None looms larger than the litigation about the 2020 election.<sup>94</sup> With the relatively minor exception of the lawfulness of Pennsylvania counting several thousand mail-in ballots that election authorities received after Election Day, the Supreme Court refused to wade into election disputes on Trump's behalf.<sup>95</sup> Rock-ribbed Trump-loyalist Justices, if they walked the same path as Trump's most loyal executive branch appointments, would have voted to endorse even the wildest conspiracy theories about the election. Even if those three votes were not enough to provide legal cover for reversing the result of the presidential election, the violent attempt to coerce Congress into rejecting electoral votes cast for President Biden and the residual partisan division about the election might have been much more severe if several Supreme Court Justices had signaled their support.<sup>96</sup>

In sum, appointment of Supreme Court Justices by executive decree, although solving the problem of Senate stonewalling, simply creates unacceptable risks to the nation by enhancing the President's power to subjugate judicial checks on her action. A plausible solution must be found

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91. Steve Peoples, *How Donald Trump Cast Aside Decades of Republic Orthodoxy*, PBS NEWS HOUR (Dec. 31, 2016, 1:41 PM), <https://www.pbs.org/newshour/politics/republican-orthodoxy-stand-donald-trump> [https://perma.cc/G8UL-JMHB].

92. See Stuart Shapiro, *Trump Prizes Loyalty over Competence — We Are Seeing the Results*, HILL (Aug. 1, 2020, 6:00 PM), <https://thehill.com/opinion/white-house/510130-trump-prizes-loyalty-over-competence-we-are-seeing-the-results> [https://perma.cc/QR23-44S6].

93. See Ruiz et al., *supra* note 90.

94. See generally David F. Levi et al., *2020 Election Litigation: The Courts Held*, 105 JUDICATURE 8 (2021), [https://judicature.duke.edu/wp-content/uploads/2021/04/TheCourtsHeld\\_Spring2017.pdf](https://judicature.duke.edu/wp-content/uploads/2021/04/TheCourtsHeld_Spring2017.pdf) [https://perma.cc/T7P5-YZBE].

95. Jessica Gresko, *Supreme Court Rejects Trump Election Challenge Cases*, AP NEWS (Feb. 22, 2021), <https://apnews.com/article/joe-biden-donald-trump-pennsylvania-elections-us-supreme-court-5cc6aee8c328c7bb1d423244b979bcec>.

96. See generally Karen Yourish et al., *The 147 Republicans Who Voted To Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html> [https://perma.cc/7JR4-JNVG].

elsewhere. The existing alternatives the literature has floated, however, are not promising.

*Third-Party Appointment.* Professor Adam Chilton and his coauthors briefly mention the possibility of transferring the power of appointment from the president to “a third party of some kind.”<sup>97</sup> This approach would work as a solution to the problem of Senate stonewalling only if that third party’s appointments were not subject to Senate confirmation either. The flaws in third-party appointment depend on who the third-party is. For some, the problem is similar to the problems with executive decree. For others, it simply fails to solve the problem of Senate stonewalling at all.

There are three options: Congress (or perhaps just the Senate); the judiciary; or some special-purpose commission created specifically for the task. Appointment by congressional decree suffers from an analogous problem to appointment by executive decree: Congress would have unchecked authority to appoint Justices who would in turn be responsible for deciding the limits of congressional power. Although the hazards of legislative aggrandizement are not as harrowing as those of executive imperialism, unilateral legislative appointment nonetheless risks upsetting the balance of power between the political branches by working as the referee that adjudicates disputes between them. Appointment by judicial decree raises even more dire concerns. It would convert the Supreme Court into a self-replicating legal aristocracy with no democratic check on its composition or power. That approach echoes the ancient House of Lords, which the United Kingdom has wisely removed from the pinnacle of its judiciary in recent years.<sup>98</sup> The final possibility—a special-purpose commission—fails because it simply pushes the problem back one level. The conflicts that now focus on appointments to the Court would then focus on appointments to the commission that makes appointments to the Court. Giving unilateral authority to the President (or to Congress) to appoint members of that commission makes the commission the extension of the President (or of Congress). And requiring cooperation between the President and Congress on those appointments raises the real risk that the branches could not agree on the commission’s membership. Stonewalling redux.

*Waiting Period.* The sole strategy to address Senate stonewalling that has made its way into a concrete legislative proposal is a bill recently introduced

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97. Chilton et al., *supra* note 28.

98. *The Justice System and the Constitution*, CTS. & TRIBUNALS JUDICIARY, <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/justice-sys-and-constitution/> [https://perma.cc/8G2H-N38B].

in Congress by Representative Ro Khanna.<sup>99</sup> It provides that “[i]f the Senate does not exercise its advice and consent authority with respect to a President’s nominee to the Supreme Court within 120 days after the nomination, the Senate shall be deemed to have waived its advice and consent authority with respect to such nominee, and the nominee shall be seated as a Justice of the Supreme Court.”<sup>100</sup> This creative statutory solution aims to solve the problem of Senate stonewalling by purporting to adjust the procedure of confirmations. It flips the legal effect of inaction from non-confirmation to confirmation. Even assuming its constitutionality (what if a future Senate refuses to be bound by a prior enactment that purported to regulate the Senate’s constitutional advice and consent role?), the waiting period approach also fails. The exact way it fails depends on whether the waiting period is reset if the Senate votes on and rejects a nominee. If the waiting period does not reset, then the Senate is powerless to prevent the President from nominating whomever she wants. All she must do is wait 120 days, and the Senate will be deemed to have consented to any nominee she puts forward. If, on the other hand, the Senate can reset the waiting period by voting down the President’s nominee, then it will always be able to block the President’s appointments to the Court indefinitely with a pro forma vote. So, as with the approaches above, this proposed solution either collapses into appointment by executive decree or it is no solution at all.

*Vesting the Appointment Power.* The insufficiency of the existing proposed solutions to the problem of Senate stonewalling shows that a novel approach is needed. That novel approach should be targeted precisely at the core of the problem: that Senate stonewalling allows the opposition party to stall and then steal a seat on the Supreme Court. That is, the real problem—as we saw in 2016 and as we may see again in 2023 and 2024—is that Senate stonewalling empowers the opposition party to block a nomination *in hopes of handing the power to fill the vacancy to a successor President of the opposition party*. There are, to be sure, other harms resulting from Senate stonewalling—most notably, that a Court with only eight members is sometimes unable to decide important cases because it is equally divided.<sup>101</sup>

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99. See Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Cong. (2020).

100. *Id.* § 9.

101. See Epps & Sitaraman, *supra* note 7, at 197 (“Where the Justices [on an equally-divided Court] were unable to reach agreement—in the most ideological cases with the highest stakes—the Court was left powerless to make law, and the courts of appeals effectively became the Supreme Court.” (citing *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided court*, 579 U.S. 547 (2016) (mem.) (per curiam) and *Friedrichs v. California Teachers Ass’n*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *aff’d by an equally divided court*, 578 U.S. 1 (2016) (mem.) (per curiam))).

But the fundamental structural challenge posed by Senate stonewalling is its ability to transfer partisan control of the appointment.

The best way to solve that problem is the most direct way: to provide that if the Senate blocks a President's nominee, the power to fill that vacancy does *not* pass to the President's successor (who may be of the opposition party). Instead, under an approach that I call *vesting* the nominating power, the President in office at the time the vacancy arose (or her designee)<sup>102</sup> retains the appointment power until the vacancy is filled by her (or her designee's) nominee by confirmation by the Senate—whenever that happens, even if it is after that President's term in office expires.

In 2016, a vesting approach would have operated as follows. Upon Justice Scalia's death, a vacancy arose on the Supreme Court and the President in office at the time—President Obama—thereby acquired the power to appoint his successor. The Republican Senate refused to confirm President Obama's nominee for the remainder of the presidential term. Upon the expiration of President Obama's term, the power to appoint Justice Scalia's successor would *not* have passed to the incoming President Trump. Instead, President Obama (or his designee) would retain that power until the seat was filled. Assuming that a Republican Senate would have continued to refuse to confirm any of then-former President Obama's nominees, that seat would have remained vacant until Democrats regained control of the Senate in 2021. At that time, President Obama (or his designee, which could be President Biden) would have submitted a nomination and the Democratic Senate would have confirmed that nominee.

That alternative history demonstrates both the effectiveness and the cost of vesting the appointment power. Because the appointment power was vested in President Obama, nothing the Republican Senate could do would have transferred the appointment of Justice Scalia's successor from a Democratic president to a Republican president. The stall and steal strategy was definitively defanged. But assuming a Republican Senate stuck to its blockade of any Democratic nominee even absent the hope of a Republican President one day filling that seat, it also resulted in a vacant seat for almost five years as opposed to only one year under the current system. More generally, assuming maximal Senate obstructionism,<sup>103</sup> the vesting approach

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102. The purpose of vesting the appointment power in the President or her designee is to deal with the eventuality that the President with the appointment power dies before the seat is ultimately filled. In such a case, the President's appointment power would pass to her designee, which presumably would be a co-partisan like a senior member of Congress.

103. It is possible that vesting the appointment power would minimize obstructionism because the reward for that obstruction is substantially reduced. Instead of yielding partisan

results in vacancies persisting for as long as the Senate is in the opposition party's control. Although a depopulated Court is decidedly suboptimal,<sup>104</sup> there is no better alternative. Any plausible solution to the problem of Senate stonewalling will have this unfortunate consequence.<sup>105</sup> Any reasonable reform that empowers a President to appoint a nominee over the objections of a maximally obstructionist Senate controlled by the opposition party ultimately amounts to appointment by executive decree.

The path forward with Supreme Court term limits thus amounts to a choice between three alternative approaches to the problem of Senate stonewalling: the status quo, appointment by executive decree, or vesting the appointment power. Tallying the principal advantages and disadvantages of those three approaches yields a clear conclusion: vesting the appointment power is superior to the other two approaches. The status quo permits Senate stonewalling and thus empowering an opposition party to stall and steal a seat. Appointment by executive decree permits the appointment of presidential lackeys, which in the worst-case scenario could clear the path for presidential authoritarianism. Vesting the appointment power solves the problem of Senate stonewalling without empowering the President to appoint lackeys at the cost of the possibility of long-lasting vacancies. That cost is far less than those of the other two approaches, both of which strike deeply at the legitimacy of the Court as a non-partisan institution.

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control of the seat, maximal obstruction would merely deprive the President's party of the seat for some amount of time. That deprivation is significant because it could change the outcome of cases decided while the vacancy persists—which is why vesting the appointment power is merely the best and not a perfect solution to the problem of Senate stonewalling. But an opposition party (or, more accurately, the most moderate members of the opposition party) may find that the political price of obstructionism is not worth paying for that diminished reward. If so, then the duration and even the existence of long-lasting vacancies may diminish.

104. See *supra* note 101 and accompanying text.

105. A potentially implausible approach warrants mention. The problem of Senate stonewalling arises due to hardball partisan tactics to seize a particular appointment. The failure of appointment by executive decree as a solution to that problem is due to the fact that it would empower the President to appoint presidential lackeys who would not be confirmed even by her own party. Those two facts suggest the potentially implausible approach: requiring confirmation by *only* the Senators who are members of the same party as the President, *even if they are the minority of the full chamber*. That system would simultaneously prevent both the appointment of presidential lackeys and long-lasting vacancies. The principal shortcoming of this approach is that nominees would be confirmed with a mere majority of the minority, which is a weak check on the President's discretion in nominees. It would also constitutionally entrench the two-party system, a feature it shares with Epps and Sitaraman's Balanced Bench proposal. See Epps & Sitaraman, *supra* note 7, at 198–99 (“One . . . objection concerns our proposal's emphasis on partisan balance. Why should the Court's design evenly balance the two parties (and thus their respective judicial ideologies) no matter what, instead of allowing for more variability based on the results of the political process?”).

Vesting the appointment power cannot be accomplished by a statute.<sup>106</sup> As a result, solving the problem of Senate stonewalling requires a constitutional amendment. That unfortunate fact forces the challenging question of how that high hurdle might be cleared. I turn to that question in the next Part.

### III. STRATEGIES OF COOPERATION IN JUDICIAL APPOINTMENTS REFORM

The conventional wisdom is that constitutional amendments are so difficult under current political circumstances that they are effectively impossible, especially on an issue as contentious as judicial appointments reform.<sup>107</sup> That conventional wisdom is so widely held that both scholars and advocates of term limits begin with the requirement that reform must be achievable by statute.<sup>108</sup> This Part challenges that conventional wisdom.

In what follows, I analyze the parties' behavior and strategies in the court packing dynamic through a series of game theory models. The first two—the Prisoner's Dilemma and the Hawk-Dove Game—share the same fundamental structure, differing only in the payouts that determine the incentive structures presented to the parties. The third model, the Asymmetrical Hawk-Dove Game, is a variation in which the parties have different views on how bad a cycle of escalation would be. In any of these three models, under present partisan conditions there is an opportunity for the parties to agree on a binding cooperative solution.

#### A. Court Packing and Senate Stonewalling as a Prisoner's Dilemma

In our new environment of reciprocal and credible threats of court packing and Senate stonewalling, the familiar Prisoner's Dilemma may best fit reality. The Prisoner's Dilemma models a world in which both parties prefer an endless cycle of court packing and Senate stonewalling to a world in which the other party achieves judicial dominance by packing and stonewalling

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106. A statute that purported to bind future Presidents to appoint whoever was named by the former President (or her designee) who was in office at the time the vacancy arose would almost certainly violate the separation of powers. The appointment power is textually committed to the President. *See* U.S. CONST. art. II, § 2, cl. 2. Any statute that purported to limit whom the President could nominate—indeed, in this case to *dictate* whom the President must nominate—would fundamentally infringe upon that constitutional power.

107. *See, e.g.,* Epps & Sitaraman, *supra* note 7, at 171 (“Given the polarization of society, the stakes of control over the Supreme Court, and the relative distribution of partisan affiliation within and across the United States, it is very hard to imagine that a constitutional amendment changing the structure of the Supreme Court could pass in the near term.”).

108. *See, e.g., id.* (“[A]ny statutory reform proposal should also be plausibly constitutional.” (emphasis omitted)).



unilaterally. If the parties share that preference, then the dynamics of constitutional politics will lead both parties to play hardball. Each side has ample incentives to seek short-term partisan advantage.<sup>109</sup> And when a party plays constitutional hardball to alter the structural features of government—like the size and composition of the judiciary—in order to further those substantive policy aims, it risks initiating (or perpetuating) a downward spiral of retaliation that leaves everyone worse off.<sup>110</sup>

A Prisoner's Dilemma, in its classic form, is a single-round, two-party game in which each party has a choice between cooperating and defecting.<sup>111</sup> It is always in each party's self-interest to defect, because no matter what the other side does one is better off defecting rather than cooperating.<sup>112</sup> But—and this is the key—*both* sides are better off if *both* cooperate rather than if both defect.<sup>113</sup> In the classic Prisoner's Dilemma, the two sides are isolated from each other and so they cannot coordinate or cooperate.<sup>114</sup> As a result, neither party has any assurance—not even an empty promise—that the other side will cooperate rather than defect.<sup>115</sup> The structure of the classic Prisoner's Dilemma thus reflects the following payoff matrix:<sup>116</sup>

		Party A	
		Cooperate	Defect
Party B	Cooperate	A: 5 B: 5	A: 10 B: 0
	Defect	A: 0 B: 10	A: 2 B: 2

109. That is not to say that the parties always *do* act on those incentives to seek short-term partisan advantage, nor to say that they *should* from a broader moral perspective. This Article analyzes the effective strategies for the parties under current conditions *even if* they act only to further their partisan advantage.

110. See generally Jack Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147 (2017); Jack Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QUINNIPIAC L. REV. 579 (2008).

111. *The Prisoner's Dilemma*, BRITANNICA, <https://www.britannica.com/science/game-theory/The-prisoners-dilemma> [<https://perma.cc/TP2U-KF8U>].

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. The Prisoner's Dilemma, as originally formulated, involved two prisoners deciding whether to provide information to the authorities about the other in exchange for a reduced term of imprisonment. Accordingly, in that framing, *lower* numbers were better. To make matters more intuitive here, this Article reverses the framing so *higher* numbers are better.

In this matrix, both Party A and Party B have an incentive to defect regardless of which strategy the other party takes. Party A can raise its payoff from five to ten by defecting in the case that Party B cooperates, and it can raise its payoff from zero to two by defecting in the case that Party B also defects. And vice versa for Party B. As a result, if both parties pursue their self-interested strategy of defection, then both parties will end up with a payoff of two. By contrast, if both parties had cooperated, both would have ended up with a payoff of five. Therein lies the irony, and the tragedy, of the Prisoner's Dilemma.

Constitutional hardball may manifest the same payoff structure, though reality complicates the classic formulation of the Prisoner's Dilemma in important respects I will elaborate on below. First, consider a simple version of the game that involves decisions whether to follow a single constitutional norm. Each party faces a choice between following that constitutional norm or playing constitutional hardball. If both parties follow the constitutional norm, then the system enjoys partisan peace. Imagine the halcyon, if partially apocryphal, years of cooperation between the parties prior to our current era of polarization.

But each party is better off, from the perspective of its partisan advantage, if it defects by playing hardball. The Senate's refusal to consider Judge Garland's nomination to the Supreme Court was a hardball move that furthered the partisan advantage of the party that made it. And like the classical Prisoner's Dilemma, the self-interested superiority of defection holds regardless of which strategy the other party pursues. If one party plays hardball while the other follows the norm, the party playing hardball will achieve dominance. Imagine a filibuster for me, but not for thee. But if both parties play hardball, then both defeat the dominance of the other party—at the price of dragging the nation into an equilibrium of reciprocal hardball as the norm dissolves.<sup>117</sup> Either way, then, it is in both parties' partisan self-interest to play hardball.<sup>118</sup> The structure of this simple model of the

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117. I assume here that a world in which the constitutional norm dissolves is better for each party than a world in which the other party dominates. I relax that assumption below. *See infra* Section III.B.

118. This fact prompts the question: why didn't the parties always play maximal hardball? The answer is surely complicated, but likely involves some amalgam of the ideological inconsistency of the parties for much of the twentieth century prior to the partisan realignment

Prisoner's Dilemma of constitutional hardball thus reflects the following payoff matrix:

		Party A	
		Follow Norm	Constitutional Hardball
Party B	Follow Norm	Partisan Peace	Party A Dominance
	Constitutional Hardball	Party B Dominance	Reciprocal Hardball

Real constitutional hardball is more complicated than this simple Prisoner's Dilemma model in two significant respects. The first complication is that, unlike the classic Prisoner's Dilemma, the two parties can communicate. As a result, they can at least in principle cooperate. Nonetheless, history has shown the parties' inconsistent inclination or ability to do.<sup>119</sup> And cooperation may seem particularly unlikely in today's political environment. The second complication is that in real partisan politics, the game is iterated.<sup>120</sup> After the parties make their play to abide by a given constitutional norm or to play hardball with respect to that norm, they must play again (and again, and again).

The possibility of communication and the inevitability of iteration can, in concert, fundamentally alter the dynamics of the court packing and Senate stonewalling game in ways that make cooperation achievable. To begin, the fact that the game is iterated introduces the possibility of retaliation. Game

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that ushered in the Sixth Party System; the effects of that ideological heterogeneity on the ability of individual politicians to cooperate with members of the other party; the belief among politicians that the public would punish them at the ballot box for what it perceived as extreme partisanship; and, perhaps, the moral character of individual party leaders that exercised restraint in the face of the temptation for partisan advantage.

119. See Richard Franza, *How Washington Can Solve the 'Prisoner's Dilemma,'* AUGUSTA CHRON. (Jan. 16, 2021, 9:15 AM), <https://www.augustachronicle.com/story/business/2021/01/16/rick-franza-congress-must-avoid-disaster-using-game-theory/4146519001/> [<https://perma.cc/9GXQ-WGD6>].

120. This is true for parties, but perhaps less true for individual politicians insofar as they may not face individual consequences for their conduct towards the other party. That may be because they plan to retire, or it may be because their seat is so safe that they are effectively immune from electoral consequences and do not care about whatever soft sanctions the other party can impose upon them personally. For the related point that parties are aggregates of individuals and therefore evolve as their personnel turn over and ideological commitments shift, see Mark Tushnet, *Politics as Rational Deliberation or Theater: A Response to "Institutional Flip-Flops,"* 94 TEX. L. REV. 82, 83–84 (2016).

theorists often claim that one superior strategy in a two-player, iterated Prisoner's Dilemma is "tit-for-tat."<sup>121</sup> Under that strategy, a party's move tracks the opposing party's prior move.<sup>122</sup> A party implementing tit-for-tat will cooperate if, and only if, the other party cooperated during the prior round.<sup>123</sup> Whether or not tit-for-tat is truly an optimal strategy, there is reason to believe that the parties will follow it. For example, both parties appear to have employed tit-for-tat in their historical use of a filibuster in lower court judicial nominations.<sup>124</sup> Party A filibustered the lower court nominees submitted by a President from Party B, and when the roles reversed Party B filibustered Party A's nominees. The result of both parties following tit-for-tat depends on how they start.<sup>125</sup> If the first move in the game is to cooperate, then the joint adoption of tit-for-tat yields a perpetual partisan peace. But if the first move is to play hardball, then it yields perpetual reciprocal hardball.<sup>126</sup>

The stakes of the game of constitutional hardball are higher still. The history of the game as it has been played reveals the threat of escalation. The dynamics are not limited to a choice about whether to abide by a single constitutional norm. Each party faces a further series of choices about whether to abide by additional constitutional norms that are perceived as subsequent to, or deeper than, the norm that dissolved in the prior round of the game. Consider as an illustration the sequential eliminations of the filibuster for lower court and then Supreme Court nominees.<sup>127</sup> In some sense, the norm that permitted filibusters for Supreme Court nominees was perceived by some partisans as subsequent to or deeper than the norm that permitted filibusters for lower court nominees. Or at least it appeared to be in the eyes of some observers when Democrats eliminated the latter but not the former. Republicans therefore, in some sense, faced a choice not just whether

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121. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); Robert Axelrod, *Effective Choice in the Prisoner's Dilemma*, 24 J. CONFLICT RESOL. 3 (1980). To be clear, tit-for-tat is not a "solution" to the two-player, iterated Prisoner's Dilemma. It is merely a highly effective strategy under certain circumstances. Axelrod, for his part, believes it is not even the most effective possible strategy. See Robert Axelrod, *More Effective Choice in the Prisoner's Dilemma*, 24 J. CONFLICT RESOL. 379, 401–02 (1980) [hereinafter *More Effective Choice*].

122. *More Effective Choice*, *supra* note 121, at 382.

123. *Id.*

124. Charlie Savage, *The Senate Filibuster, Explained*, N.Y. TIMES (Apr. 3, 2017), <https://www.nytimes.com/2017/04/03/us/politics/filibuster-supreme-court-neil-gorsuch.html> [<https://perma.cc/L9ZT-2V2Z>].

125. See *id.*

126. The tit-for-tat strategy starts with a cooperative move for precisely this reason. *More Effective Choice*, *supra* note 121, at 382.

127. Scott Bomboy, *Senate Kills Supreme Court Filibuster in Historic Moment*, NAT'L CONST. CTR. (Apr. 6, 2017), <https://constitutioncenter.org/blog/senate-kills-supreme-court-filibuster-in-historic-moment> [<https://perma.cc/7THQ-B8BA>].

to reinstate the norm about lower court nominees—they faced the additional choice whether to abide by the arguably separate norm about Supreme Court nominees. And they chose not to abide by the second norm. That, in the eyes of some, was an escalation of hardball.<sup>128</sup>

The real world of constitutional hardball thus looks more like a payoff matrix where the threat lies not merely in reciprocal hardball about a single constitutional norm, but in the endless escalation of hardball on a series of constitutional norms:

		Party A	
		Follow Norms	Constitutional Hardball
Party B	Follow Norms	Partisan Peace	Party A Dominance
	Constitutional Hardball	Party B Dominance	Endless Escalation

Court packing and Senate stonewalling together take this dynamic to its most extreme expression. The apparent inevitability of endless escalation presents itself to us with greater clarity in this context than anything that came before. There was, perhaps, some uncertainty about the opposing sides' strategies and potential responses in this iterated game when it came to the abolition of the filibuster or with respect to how late in a President's term the Senate will consider a Supreme Court nominee. Court packing and Senate stonewalling are different. Once the cycle of court packing begins, that uncertainty will likely evaporate. Each party will be certain—or as certain as one can be when it comes to law and politics—that the other party will re-pack the courts with ever greater numbers. So too with Senate stonewalling, especially if Republicans repeat that move in 2023 and 2024. Moreover, unlike other hardball moves like the elimination of the filibuster, court

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128. Of course, whether that choice counts as “escalation” or not depends, in part, on whether one considers the norm about Supreme Court Justices to be a truly separate norm than the one about lower court nominees, or just a different application of the very same norm that the other party had dissolved in the prior round. And, unsurprisingly, the political debate about such moves often revolves around that question of framing. *See generally* Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430 (2018).

packing and Senate stonewalling admit of no clear limiting principle. The parties can eliminate the filibuster only once. But once the parties start packing the courts, there is no natural stopping point. Once the parties entrench a new norm that an opposition party in control of the Senate will not confirm the President's nominee to the Supreme Court under any circumstances, that new norm will persist. And both parties know that.

That shift from uncertainty to near-certain knowledge of imminent escalation with no foreseeable stopping point is the unique circumstance that may change the game. The players now know that the other side's strategy will be hardball, and that those strategies will inevitably lead to endless escalation. That alters the payoff matrix in a critical respect. Neither party has any reasonable hope of achieving unilateral dominance through the hardball of court packing, because it knows that the other party will respond by playing the hardball of court packing as well. As a result, the payoff matrix to the court packing and Senate stonewalling game eliminates those outcomes (represented as shaded dark grey in this schema) to reflect the improbability of either party dominating:

		Party A	
		Follow Norm Against Packing	Pack the Court
Party B	Follow Norm Against Packing	Status Quo	Party A Dominance
	Pack the Court	Party B Dominance	Endless Escalation

The dynamics of the Prisoner's Dilemma remain, so, absent some agreement to cooperate, both sides will still have an incentive to pack the court in order to defeat the other party's dominance. Cooperation to maintain the status quo, or at least the status quo with respect to the number of Justices,

is plausibly superior in the eyes of each party to endless escalation in court packing and Senate stonewalling.<sup>129</sup> But the ever-present and well-grounded fear that the other side will break any informal agreement to follow the norm against court packing and Senate stonewalling (to the extent the latter norm even exists at that point) when it gets the chance in the future renders any such cooperation unstable at best and illusory at worst.

The key to escaping endless escalation in court packing and Senate stonewalling is the possibility of a *binding* cooperative solution. The instability of an informal agreement to cooperate (or, for that matter, of a mere statutory solution that could be eliminated whenever a party controls both Congress and the Presidency) derives from the fact that either party can break it in the future whenever it appears convenient to do so. If we can eliminate each party's perception of a risk that the other party will defect from the agreement not to pack the courts or stonewall in the Senate in the future, then we can achieve a stable and superior solution in which both sides follow the norm—because they must. A constitutional amendment satisfies those requirements. Because the procedural requirements of amending (or, critically, repealing an amendment) are so high,<sup>130</sup> both parties can correctly perceive that it is unlikely the opposing party will achieve even fleeting supermajorities sufficient to break the cooperative agreement unilaterally.

Accordingly, with such a proposal to reform the appointments process by constitutional amendment on the table, the payoff matrix may now look importantly different than it did before:

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129. Some partisans on either side may disagree. For example, some Democrats may be unwilling to accede to any path forward that accepts the Senate's obstruction of Judge Garland's nomination. Or some Republicans may have been, prior to *Dobbs*, unwilling to accede to any path forward that did not reverse *Roe* immediately. This Article need not comment on the substantive merits of those positions. It is enough to suggest that the total number of partisans on both sides who prefer endless escalation to the status quo is modest. And even fewer would prefer endless escalation to a permanent solution to the judicial appointments process. Nonetheless, I consider the possibility that one party is willing to accept endless escalation in the Asymmetrical Hawk-Dove Game below.

130. See generally Drew DeSilver, *Proposed Amendments to the U.S. Constitution Seldom Go Anywhere*, PEW RSCH. CTR. (Apr. 12, 2018), <https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/> [https://perma.cc/82KC-EYXJ].

		Party A	
		Fix the Court	Pack the Court
Party B	Fix the Court	Ideal: Fixed Court	Party A Dominance
	Pack the Court	Party B Dominance	Endless Escalation

In this version of the Prisoner's Dilemma model of the court packing and Senate stonewalling game, each party now faces a choice only whether to enter a binding cooperative agreement to fix the Court, or to enter the endless escalation of iterative rounds of court packing and Senate stonewalling. For both parties, the binding cooperative solution is superior to the non-cooperative outcome. Thus, due to the newly shared perception of impossibility of achieving dominance through hardball about courts, for the first time the parties' self-interested incentives point to a strategy of binding cooperation. Accordingly, precisely because the threat of escalation has become so salient and so apparently inevitable, judicial appointments reform may be more attainable than it ever has been before.

#### *B. Court Packing and Senate Stonewalling as a Hawk-Dove Game*

Analyzing court packing and Senate stonewalling as a Prisoner's Dilemma assumes that both parties prefer a cycle of endless escalation over acquiescing to the other party's unilateral dominance. That is a plausible assumption, especially in today's political environment. It may be hard to imagine that either party would *not* respond in kind to the other party packing the courts and stonewalling in the Senate. Nonetheless, it is worth analyzing how the game dynamics play out if we relax that assumption. Some commentators argue, for example, that Democrats should not pack the courts because they ought to be committed more deeply to the integrity of institutions than to the



particular outcome of court cases.<sup>131</sup> What happens if the parties themselves really believe, as commentators like Professor Richard Primus do, that an escalating cycle of court packing would be calamitous?<sup>132</sup>

The Hawk-Dove Game models the world in which the parties both view an endless cycle of court packing as catastrophic—or at least, as worse than a world in which the other party packs unilaterally.<sup>133</sup> The key feature of the Hawk-Dove Game is that the payoffs for mutual aggressive conduct are worse for *both* parties than the payoffs for letting the other side dominate.<sup>134</sup> The clearest real-life example of the Hawk-Dove Game, keeping with the avian theme, is the game of chicken. Imagine two ruffians race their cars head-on toward each other. In their community, swerving carries the cost of the social shame of being a chicken. As a result, the ideal for each ruffian is for the other ruffian to swerve. If both ruffians swerve, then both lose some face but aren't fully chicken. But the consequences of neither ruffian swerving are a fatal collision that neither party prefers to being a chicken:

		Ruffian A	
		Swerve	Stay the Course
Ruffian B	Swerve	A: 5 B: 5	A: 10 B: 0
	Stay the Course	A: 0 B: 10	A: -1000 B: -1000

Unlike the Prisoner's Dilemma, the Hawk-Dove Game's payoff matrix does not alone determine a single equilibrium. Both the upper right and the lower left quadrants are equilibria, because in both states neither party has an incentive to change strategies. If the other side is going to swerve, you do best by staying the course. And if the other side is going to stay the course, you are *much* better off by swerving. Consider the upper right quadrant, where Ruffian A stays the course and Ruffian B swerves. Ruffian A has no

131. See, e.g., Bob Bauer, *Don't Pack the Courts*, ATLANTIC (July 6, 2018), <https://www.theatlantic.com/politics/archive/2018/07/dont-pack-the-courts/564479/> [<https://perma.cc/DG5E-KE4U>] (“The question progressives must answer in this and other cases is whether the alarms rightly sounded about Trump’s threat to democracy must be understood entirely or mostly in terms of democracy as outcomes, or also democracy as institutions.”).

132. Primus, *supra* note 66.

133. The name “Hawk-Dove Game” derives from its application in evolutionary biology. See J. Maynard-Smith & G. R. Price, *The Logic of Animal Conflict*, 246 NATURE 15, 15–18 (1973).

134. See Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 223–224 (2009).

incentive to swerve, because Ruffian B already is. And Ruffian B has no incentive to stay the course, because doing so when Ruffian A does as well leads to a fatal crash.

If both parties view an escalating cycle of court packing and Senate stonewalling as sufficiently damaging to the political and judicial system, then they might view it like a head-on collision which to avoid one party or the other must swerve. Both parties prefer someone to swerve, and indeed for the other party to swerve. The question, then, is which party lets the other party dominate. A key difference between the Prisoner's Dilemma and a Hawk-Dove Game like the game of chicken is thus that the latter introduces distributional questions that are absent in the former. As Professor Richard McAdams explains, "The two equilibria outcomes in [the Hawk-Dove Game] necessarily have unequal payoffs where one player prefers one equilibrium and the other player prefers the other equilibrium."<sup>135</sup> And the results can be tragic: even though neither party prefers a collision to swerving, if both parties obstinately aim for their ideal result by *not* swerving then they will collide anyway. That, unfortunately, might seem like an accurate description of the current political environment.

Because the payoff matrix alone does not determine which outcome the parties will reach, the question of which party will swerve is answered by other factors like history, psychology, and culture.<sup>136</sup> If a party is sufficiently worried that its counterpart will refuse to swerve, then it will serve itself to avoid disaster. But what if—due to stubbornness, or recklessness, or any other explanation that goes beyond the payoffs themselves—*both* parties now seem rather unlikely to let the other party win?

In such a cultural context—which may well be where we are right now, to listen to the tenor of political discourse—a binding cooperative solution suddenly becomes appealing in the same way it did in the Prisoner's Dilemma model of court packing. Because of history, psychology, and culture, neither party can reasonably hope to achieve the dominance of unilateral court packing or Senate stonewalling. That is because neither party can count on the other party swerving, even though both prefer backing down to escalation. And neither party is itself willing to accept the other party achieving unilateral dominance due to causal factors that go beyond the payoffs themselves, like culture and psychology. In conditions where parties perceive

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135. *Id.* at 231.

136. *Id.* ("In a single equilibrium game, an economic model can claim to account for the influence of history and culture by making adjustments to the payoffs, which then uniquely determine how individuals will behave. But the surprising result of a coordination game, or any game with multiple equilibria, is that the payoffs, whatever they include, do *not* uniquely determine the behavior. Something else besides payoffs can and does influence how people act.").

the substantial possibility that the other side will act aggressively regardless of the payoffs, then the moment is primed for cooperation—because the only likely alternative is a crash.

And as with the Prisoner's Dilemma model, any solution to this model of the court packing and Senate stonewalling game must be binding. In this environment, neither party can trust the mere promises of its opponent, just like neither of the two ruffians could trust the other's mere assurance that she will swerve. A non-binding promise not to pack the courts or stonewall in the Senate may similarly appear simply to be a feint to induce the other side to let the promising party win. The only workable alternative is for the parties to agree to a binding cooperative solution that forces both parties not to take the more aggressive strategy. And that is precisely what a constitutional amendment reforming the judicial appointments process is: a binding agreement for both parties to swerve away from packing the courts and stonewalling in the Senate when neither party can trust either itself or the other side to avoid collision.

### *C. Court Packing and Senate Stonewalling as an Asymmetric Hawk-Dove Game*

But what if only one party views escalating court packing as a calamity, but the other party does not? Those differing views would likely lead the parties to behave differently—one side would be willing to risk escalation, but the other side would not. Professors Joseph Fishkin and David Pozen (among others) have argued that our era thus far has been characterized by *asymmetric* constitutional hardball whereby Republicans play hardball to a degree and with a commitment unmatched by Democrats.<sup>137</sup> That claim is, naturally, somewhat disputed.<sup>138</sup> But to the extent that alleged asymmetry exists (in either direction), it complicates the game dynamics. If one party is incompletely committed to hardball, then the opposing party retains a reasonable hope of achieving unilateral dominance and thus the incentive to seek a binding cooperative solution dissolves.

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137. See Fishkin & Pozen, *supra* note 46.

138. See David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 931 (2016) ("Claims about the other side's 'unprecedented' tactics have ethical content in light of the theory of constitutional conventions; they imply an abuse of process or power." (footnote omitted)). Compare Kar & Mazzone, *supra* note 73, at 60, with Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 119 (2017) ("Of course, one can characterize many of these moves in such a way as to make the 'unprecedented' label fit (or, perhaps, so as to make the events fit the label). But . . . one can also locate the events squarely within the longer historical arc of congressional debates over obstructive tactics.").

This potential dynamic can be modeled as an Asymmetric Hawk-Dove Game.<sup>139</sup> That is, one, but only one, of the parties views an escalating cycle of court packing as worse than letting the other side achieve dominance. Returning to the game of chicken, imagine that one of the ruffians does not fear death and so actually prefers a collision to swerving:

		Ruffian A	
		Swerve	Stay the Course
Ruffian B	Swerve	A: 5 B: 5	A: 10 B: 0
	Stay the Course	A: 0 B: 10	A: 5 B: -1000

In this model, Ruffian A has an incentive to stay the course regardless of what Ruffian B does—because Ruffian A prefers a collision to losing face by swerving. Ruffian B, knowing that Ruffian A will stay the course no matter what, has an incentive to swerve—because Ruffian B prefers losing face to a crash. By the same logic, if Party A prefers an escalating cycle of hardball to backing down but the Party B does not, then Party B will achieve dominance by playing unilateral hardball.

Nonetheless, the iterative structure of court packing and Senate stonewalling may disarm this concern. Even if one party is less willing to play hardball *outside* the context of court packing and Senate stonewalling, it seems implausible that either party would refrain from *re*-packing the courts or by stonewalling *in response* to prior Senate stonewalling if the other party does either first.<sup>140</sup> There is little doubt that Democrats would respond to a

139. Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1693–94 (2000).

140. As a test of this intuition, consider this hypothetical: if Democrats had controlled the Senate during President Trump’s term in office, would they have confirmed any nominee whatsoever he put forward for Justice Scalia’s seat? It is hard to imagine that they would have, given that it was precisely the seat that they believe the Republican Senate stole from President Obama. The more challenging question arises in a second hypothetical: if President Trump filled

first salvo of court packing by Republicans by re-packing the courts when they returned to power, as would Republicans in response to a first salvo of court packing by Democrats. And once the cycles of court packing begin, it is hard to imagine that either party would refrain from stonewalling in the Senate when it had the opportunity to do so. So whatever strategic asymmetry there may be elsewhere in constitutional politics evaporates in the context of court packing and Senate stonewalling. And, because both parties know that, the choice for both parties really does come down to endless escalation of court packing and Senate stonewalling or a cooperative solution.

#### *D. Some Final Considerations*

One might wonder why Republicans would agree to a cooperative solution if, as it may currently appear, they have a structural advantage in the Senate and in the Electoral College that grants them a disproportionate share of judicial appointments relative to the aggregate votes they win nationally. In other words, why compromise with the Democrats when they can appoint Justices even when they lose the national popular vote by three million votes? The value of compromise may in general seem diluted in such circumstances, but that perception is flawed with respect to judicial appointments reform. If a party achieves long-term political dominance, either through a structural advantage or simply through superior political appeal, then in a few years that party will achieve dominance on the Court *even under the reform proposal*. And that reform proposal would ensure that the opposing party was unable to achieve fleeting judicial dominance by packing the courts or Senate stonewalling whenever it wins an election. As a result, a party that believes it has a political advantage—from whatever source—should agree to a binding cooperative solution that ensures the proportionality between judicial appointments and long-term political outcomes.

Relatedly, if that's the case then why would Democrats agree to a binding cooperative solution that locked in Republican structural advantages in the Senate and the Electoral College by ensuring such proportionality? As an initial matter, we should be wary of confident claims that one side or another has a “permanent” structural advantage in either the Senate or the Electoral

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Justice Scalia's seat in 2017 and had won a second term, and Democrats took control of the Senate in 2021, would they have confirmed any nominee by President Trump to a *new* vacancy? Or would they have refused on the grounds that it counterbalances the Republican Senate's prior theft of a seat in 2016? *See* Feldman, *supra* note 11 (“[M]ost close observers of whatever political persuasion would agree that today, it is increasingly unlikely that a Senate controlled by a majority from a different political party than the party of the president would be willing to confirm any nominee to the Court.”).

College. But even if there were such a long-lasting structural advantage, that problem pertains to the political system more generally and its implications for the judiciary cannot be solved within the appointments process. Insofar as those structural advantages exist, they will influence who gets to appoint Justices under any system—including our current system. The only ways to attempt to combat that dynamic within the appointments process itself are through court packing and Senate stonewalling. And those moves, we have seen, will eventually lead to endless escalation that ultimately fails to counteract the impact on the judiciary of one party's political dominance. As a result, there is no viable strategy *within* the appointments process to respond to the judicial implications of structural advantages in politics. Accordingly, a party that fears it may remain in the minority over the long-term still has ample incentive to cooperate on judicial appointments reform.

Finally, some may perceive a Democratic move to pack the Court or stonewall a future Republican nominee in the Senate as a warranted response to Republicans' stonewalling of Judge Garland's nomination on what they view as unprecedented obstructionist grounds along with the obviously hypocritical confirmation of Justice Barrett just days before the presidential election. Adding seats to the Supreme Court or future stonewalling of a Republican nominee could be viewed, in this framing, as a legitimate move to counteract the improper shift in the ideological balance of the Court that Republicans' prior obstructionist move entailed. Whatever the justice or fairness of that response, however, it is unlikely to work. Republicans are certain to reject any framing that legitimates a single round of packing or stonewalling by Democrats, even (or especially) if it were to be followed by a proposed binding cooperative solution. Republicans would surely respond to a first round of court packing or a next round of Senate stonewalling by Democrats, however framed, with a round of re-packing or stonewalling—and thus begins the endless escalation. As a result, the only realistic options for Democrats are either (a) to pursue a binding cooperative solution *without* responding to the Garland obstruction and Barrett confirmation, or (b) to attempt to remedy that obstruction through packing, thereby initiating an escalating cycle that would undermine that attempted remedy by re-shifting the ideological balance back (and forth) and would cause much collateral damage besides.

Declining to respond in kind to the Garland obstruction and Barrett confirmation may be a bitter pill for Democrats to swallow, but it is not *prospective* unilateral disarmament as long as the binding cooperative solution of a constitutional amendment is in place. Moreover, though the impact of the difference between a hypothetical Justice Garland and the actual Justice Gorsuch will last for decades, it will not last forever. By

contrast, an escalating cycle of court packing and Senate stonewalling plausibly could. And, most importantly from the perspective of this Article's analysis, in light of certain Republican retaliation there is no other realistic option that is superior to seeking to cooperate now.

#### CONCLUSION

This Article's contribution was to point the way towards effective judicial appointments reform through a game theoretic analysis that includes the unique circumstances of our present moment: that both parties are positioned to perceive the imminent and potentially inevitable risk of escalation of court packing and Senate stonewalling. Under plausible assumptions about the payoffs the parties perceive, that fact alters the payoff matrix in a way that changes which strategy the parties should pursue to further their self-interest. As a result, if the parties recognize the benefits of cooperation now, there may be a realistic opportunity to achieve permanent reform of the judicial appointments process through a constitutional amendment.