

THE FUTURE OF SUPREME COURT REFORM

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For a brief moment in the fall of 2020, structural reform of the Supreme Court seemed like a tangible possibility. After the death of Justice Ruth Bader Ginsburg in September, some prominent Democratic politicians and liberal commentators warmed to the idea of expanding the Court to respond to Republicans' rush to confirm a nominee before the election, despite their refusal four years prior to confirm Judge Merrick Garland on the ground that it was an election year.¹ Though Democratic candidate Joe Biden won the Presidency in November, Democrats lost seats in the House and have a majority in the Senate only through the tiebreaking vote of the Vice President.² These slim margins, which make aggressive legislative action appear unlikely, led observers to conclude that “court reform is effectively dead for the foreseeable future.”³

But is that really so? This Essay seeks to examine the prospects for Supreme Court reform — in both the short and the long term. We argue that it is too soon for proponents of Supreme Court reform to give up. Some modest reforms are still possible today, despite current political realities. And more ambitious reforms may return to the agenda sooner rather than later.

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¹ See Astead W. Herndon & Maggie Astor, *Ruth Bader Ginsburg's Death Revives Talk of Court Packing*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/09/19/us/politics/what-is-court-packing.html> [https://perma.cc/5HJ8-8HNG].

² See Alexander Burns, *Democrats Beat Trump in 2020. Now They're Asking: What Went Wrong?*, N.Y. TIMES (Feb. 20, 2021), <https://www.nytimes.com/2021/02/20/us/politics/democrats-house-races-trump.html> [https://perma.cc/83BA-H8F4]; Jim Tankersley & Michael D. Shear, *With Democrats in Control, Biden Moves to Advance Agenda*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/07/business/democrats-biden-agenda.html> [https://perma.cc/SXR8-Q9HX].

³ Matt Ford, *The Supreme Court Is in Charge Now*, NEW REPUBLIC (Nov. 13, 2020), <https://newrepublic.com/article/160178/supreme-court-biden-judicial-gridlock> [https://perma.cc/S5ZD-8WPF]. While Ford's article was written before the January 2021 Georgia Senate runoffs that gave Democrats narrow control over the Senate, he made clear his prediction did not turn on that possibility. See *id.*; see also Mary Kay Linge, *What Joe Biden and Democrats Can and Can't Do with Control of Congress*, N.Y. POST (Jan. 9, 2021, 10:45 AM), <https://nypost.com/2021/01/09/what-joe-biden-and-dems-can-and-cant-do-with-control-of-congress> [https://perma.cc/J7U9-652J].

In other work we have developed our own proposals for Supreme Court reform.⁴ We have also attempted to situate Supreme Court reform within broader constitutional-theoretic debates about judicial review in a democracy.⁵ Here, our goal is not to persuade the reader to pursue our reforms nor to accept our preferred theoretical framework. Our ambition is more pragmatic and more pluralistic; we hope to provide immediate help to policymakers and reformers who are thinking about these issues, by identifying various possibilities for reform to ensure that the policy discussion considers all the options.

The Essay proceeds as follows. In Part I, we acknowledge that at present, significant structural reform appears unlikely given the current configuration of the Senate. But we argue that this does not mean that *no* reform of the Supreme Court is possible. Instead, we suggest there are a number of less aggressive, but still meaningful, reforms that might generate sufficient bipartisan support to obtain passage in Congress — and we think this kind of “skinny” Court reform is worthy of serious consideration, even if it does not solve all the problems that proponents of reform hope to address. While much of the focus of Court reform has centered on Congress, we also identify, perhaps surprisingly, changes within the Executive Branch that could have a significant effect on the Supreme Court’s operations. And finally, we outline a variety of voluntary reforms that the Justices themselves could adopt that would help turn down the temperature — and change the perception — of the politics surrounding the Supreme Court. Again, while we do not necessarily endorse these reforms as our preferred path forward or think they would solve all problems (or even the biggest ones), we do think they are meaningful — and worthy of debate and consideration.

In Part II, we cast our gaze further and consider the long-term prospects for major structural reform of the Supreme Court. We argue that the factors that generated a surge of interest in Court reform in the last three years are unlikely to disappear. And, whatever the current political situation, there are realistic scenarios in which structural reform of the Court begins to look possible once more. To be sure, structural reform faces — as it always has — an uphill battle. But its proponents should not abandon their efforts to build political and intellectual support for institutional change that remains critically important and badly needed.

⁴ See Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019).

⁵ See Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J.F. 821 (2021).

I. REFORM IN THE NEAR TERM

After the failure of President Franklin Delano Roosevelt's Court-packing plan in 1937,⁶ politicians have avoided attempts to meddle with the Supreme Court's membership and structure. But in the wake of pitched political battles over the Court's membership in the last few years, Democratic politicians suddenly became willing to touch what was once seen as a third rail. Presidential candidate Pete Buttigieg made structural Supreme Court reform one of his marquee policies,⁷ and a number of other candidates endorsed various, significant reforms.⁸ The Democratic Party Platform ultimately included a call for "structural court reforms to increase transparency and accountability."⁹

In the wake of Republicans' hasty effort to confirm then-Judge Amy Coney Barrett to replace Justice Ginsburg, the calls for Court reform became louder. Leading progressives demanded that Democrats retaliate by adding seats to the Court once they regained power.¹⁰ Shortly before the election, then-candidate Biden did not endorse efforts to expand the Court¹¹ but instead promised to create "a bipartisan commission of scholars, constitutional scholars, Democrats, Republicans,

⁶ For detailed examinations of this episode, see JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010); BURT SOLOMON, *FDR V. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY* (2009).

⁷ See Josh Lederman, *Inside Pete Buttigieg's Plan to Overhaul the Supreme Court*, NBC NEWS (June 3, 2019, 6:03 PM), <https://www.nbcnews.com/politics/2020-election/inside-pete-buttigieg-s-plan-overhaul-supreme-court-n1012491> [<https://perma.cc/VC88-VZW4>]. Buttigieg's proposal was co-created by the authors. See generally Epps & Sitaraman, *supra* note 4.

⁸ Senator Bernie Sanders indicated support for "if not term limits, then rotating judges to the appeals court as well." Gregory Krieg, *Bernie Sanders Floats Modified Term Limits for Supreme Court Justices*, CNN (Apr. 2, 2019, 12:42 AM), <https://www.cnn.com/2019/04/01/politics/bernie-sanders-supreme-court/index.html> [<https://perma.cc/GX5D-UVWQ>]. Beto O'Rourke endorsed 18-year term limits. See Caitlin Huey-Burns, *Beto O'Rourke Wants Term Limits for Supreme Court Justices*, CBS NEWS (June 5, 2019), <https://www.cbsnews.com/news/beto-orourke-interview-orourke-talks-with-cbsn-elaine-quijano-voting-rights-supreme-court-today-2019-06-05> [<https://perma.cc/BC2A-SD6D>]. So did Andrew Yang. See Andrew Yang, *18 Year Term Limit for Supreme Court Justices*, YANG2020 — ANDREW YANG FOR PRESIDENT, <https://www.yang2020.com/policies/scotustermimits> [<https://perma.cc/DH5W-V4GP>].

⁹ DEMOCRATIC NAT'L CONVENTION, 2020 DEMOCRATIC PARTY PLATFORM 58 (2020).

¹⁰ See Elaine Godfrey, *The Democrats' Supreme Court Hail Mary*, THE ATLANTIC (Sept. 24, 2020), <https://www.theatlantic.com/politics/archive/2020/09/democrats-case-court-packing/616446> [<https://perma.cc/W5ZB-BRY7>]; Kristina Peterson & Lindsay Wise, *Senate Democrats Grapple with Progressives' Supreme Court Demands*, WALL ST. J. (Sept. 24, 2020, 3:11 AM), <https://www.wsj.com/articles/senate-democrats-grapple-with-progressives-supreme-court-demands-11600974659> [<https://perma.cc/3ZA2-JPY3>].

¹¹ See Herndon & Astor, *supra* note 1.

liberal, conservative,” that he would ask to “come back to me with recommendations as to how to reform the court system because it’s getting out of wack.”¹²

Now-President Biden has named a commission, consisting of distinguished scholars and jurists.¹³ The Commission is tasked with providing, among other things, “[a]n analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals.”¹⁴ Given that the commission was designed to be bipartisan, it may be unlikely to endorse bold structural reform, at least to the extent that such reform would have a partisan valence. In addition, the slim margin of Democratic control in the Senate — Democrats have only fifty seats, with Vice President Kamala Harris breaking ties — means the prospects for an aggressive partisan move to add Justices are dim at best. That’s all the more so given that at least some Democratic Senators are apparently unwilling to abandon the legislative filibuster¹⁵ — surely a necessary first step were Democrats to seek to expand the Court on a party-line vote or pursue other muscular reforms aimed at reining in the conservative majority, such as stripping the Court’s jurisdiction. 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.

Even so, that doesn’t mean that *no* reform is possible. As we see it, there are a number of modest, though still meaningful, reforms that remain feasible and that are worthy of serious consideration. Some reforms would require congressional action, but others would not. Which of these reforms one thinks is worth pursuing will depend on what, exactly, one sees as the problem with the Supreme Court that reform is intended to solve. Some might see the problem as the Court’s ideology. Others might believe that the Court is too powerful and insufficiently deferential to the democratic process. In our own prior work, we have argued that the problem is that the Court has become too polarized along party lines and is increasingly likely to be seen as simply a partisan institution.¹⁶ Here, we take a pluralistic approach, making no particular

¹² Jack Shafer, Opinion, *Biden’s Slippery Tactic to Snuff the Court-Packing Debate*, POLITICO (Oct. 23, 2020, 7:13 PM), <https://www.politico.com/news/magazine/2020/10/23/biden-court-packing-commission-432036> [https://perma.cc/E9QR-6QYW].

¹³ Press Release, White House, President Biden to Sign Executive Order Creating the Presidential Commission on the Supreme Court of the United States (Apr. 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/09/president-biden-to-sign-executive-order-creating-the-presidential-commission-on-the-supreme-court-of-the-united-states> [https://perma.cc/L5DB-8TK4].

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

¹⁵ See Eric Levitz, *The Democrats’ Civil War over the Filibuster Has Barely Begun*, N.Y. MAG. (Jan. 27, 2021), <https://nymag.com/intelligencer/2021/01/manchin-sinema-schumer-mcconnell-filibuster.html> [https://perma.cc/K55L-J6BN].

¹⁶ See Epps & Sitaraman, *supra* note 4.

assumptions as to the correct diagnosis of the problem and instead simply cataloguing various possibilities as we see them.

In identifying many different kinds of possible reforms, we have several goals. First and most immediately, we hope to suggest to the relevant decisionmakers realistic and feasible ideas that might address some of the problems to which would-be Supreme Court reformers have pointed. At the same time, we also hope to expand the scholarly and popular conversation about Supreme Court reform, by demonstrating that there are many possible legislative proposals or policy changes that can all be grouped under the larger heading of Supreme Court reform. Reform need not be all or nothing; there are many small steps that could be taken even if a large leap is presently impossible. Finally, we hope to demonstrate that Supreme Court reform can come from institutions other than Congress; the Executive Branch has its own role to play, and the Court itself might wisely choose to reform itself in small ways in order to reduce calls for more significant reform.

A. “Skinny” Court Reform Through Legislation

Legislative action is the most obvious way to reform the Court. One major structural reform that some Democrats seem interested in advancing right now is Supreme Court term limits. Perhaps some may imagine that term limits could pass despite narrow divisions in Congress, given their apparent popularity with voters.¹⁷ But there are reasons to doubt the viability of statutory term-limits reform. The leading Democratic proposal would not impose term limits on currently serving Justices.¹⁸ That would likely mean that Democrats would not obtain a majority on the Court for years.¹⁹ Why would Democrats waste considerable political capital on a major reform that would not benefit their agenda?²⁰ Moreover, such a reform could even provide a windfall to *Republicans*: if President Biden were able to appoint two Justices, term limits would make it likely that any of his appointees would serve for shorter periods than they would otherwise, especially relative to

¹⁷ See, e.g., LEE EPSTEIN ET AL., PUBLIC RESPONSE TO PROPOSALS TO REFORM THE SUPREME COURT 3 (2020), <http://epstein.wustl.edu/research/CourtReformSurvey.pdf> [<https://perma.cc/3ZX3-V7RP>] (finding 60% of respondents supported term limits as short as *six or eight years* for Supreme Court Justices); ADAM ROSENBLATT, FIX THE COURT: AGENDA OF KEY FINDINGS 3 (2020), <https://fixthecourt.com/wp-content/uploads/2020/06/PSB-May-2020-key-findings-TL.pdf> [<https://perma.cc/8HY3-3WR3>] (finding 77% support among Americans for either term limits or a mandatory retirement age).

¹⁸ See Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Cong. § 8(b) (2020).

¹⁹ See Ganesh Sitaraman (@GaneshSitaraman), TWITTER (Sept. 29, 2020, 9:10 AM), <https://twitter.com/GaneshSitaraman/status/1310929984626798592> [<https://perma.cc/5DN6-UJSN>].

²⁰ Cf. Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1168 (2006) (describing the “basic trade-off between impartiality and motivation” that makes Supreme Court reform systematically unlikely).

President Trump's three appointees.²¹ One could imagine Republicans recognizing what they had to gain by going along with the proposal, but that same fact seems likely to preclude sufficient support among Democrats. Term limits have other drawbacks as well. They might make the Court *more* political, rather than less, by guaranteeing Court nominations are an election issue every two years; that would be even more true if, as some fear, the Justices themselves might shape their opinions with an eye toward a post-Court political career.²² On top of all that, whether term limits can be imposed via statute (rather than constitutional amendment) is deeply controversial.²³ These concerns are another reason to question whether term limits could obtain sufficient support to be enacted into law.

As a result, we see any major structural changes as unlikely in the short term. Does that mean *all* statutory reforms are impossible? We think not. It is conceivable that Senate Democrats could pursue somewhat less ambitious measures that could potentially attract sufficient Republican support to survive a filibuster. In making this suggestion, we do not mean to seem overly optimistic, given recent partisan rancor in Washington generally and the Senate in particular. Nonetheless, the possibilities we outline below are sufficiently conceivable that they deserve consideration.

One obvious starting place would be the imposition of ethics rules on the Justices, including adopting a code of conduct, reforming gift and disclosure rules, and putting in place guidelines around recusals. Currently, the Justices are the only judges in the country not bound by some code of ethics governing their behavior.²⁴ Observers have raised concerns about various episodes involving the Justices in recent years,

²¹ For an in-depth examination of the potential consequences of different term-limits proposals and how they would affect presidents' relative influence on the Court, see Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788497 [<https://perma.cc/8MS9-WVD3>].

²² See, e.g., Will Baude, *One Cheer for Supreme Court Term Limits*, VOLOKH CONSPIRACY (Oct. 26, 2020, 6:30 AM), <https://reason.com/volokh/2020/10/26/one-cheer-for-supreme-court-term-limits> [<https://perma.cc/C2MY-JDNU>] (expressing concerns about this "final-period problem"). Note, of course, that the problem may not be limited to a "final period," as Justices who aspire to be politicians might want to build a record that appeals to their future political base and might want to stand ready to resign for the right political opportunity.

²³ There are reasonable arguments in favor of the constitutionality of imposing effective term limits by statute. See, e.g., Roger C. Cramton, *Constitutionality of Reforming the Supreme Court by Statute*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 345, 359–60 (Roger C. Cramton & Paul Carrington eds., 2006). But there are also weighty counterarguments. See, e.g., Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 859–68 (2006).

²⁴ See Steven Lubet, *Why Won't John Roberts Accept an Ethics Code for Supreme Court Justices?*, SLATE (Jan. 16, 2019, 9:00 AM), <https://slate.com/news-and-politics/2019/01/supreme-court-ethics-code-judges-john-roberts.html> [<https://perma.cc/D8KG-A6CS>].

such as the liberal Justices' going on foreign trips paid for by outside organizations²⁵ or the late Justice Scalia's hunting trip with Vice President Dick Cheney weeks before the Court heard a case in which the Vice President was the petitioner.²⁶ Advocacy groups have urged the adoption of ethics rules²⁷ and conduct policies,²⁸ and members of Congress have previously introduced legislation to impose such rules on the Justices.²⁹

And though some have raised constitutional concerns about Congress's ability to regulate the Justices' conduct, Professor Amanda Frost has argued that well-crafted legislation would fall within Congress's "broad, but not unlimited, authority to regulate the Supreme Court Justices' ethical conduct."³⁰ Imposing such rules could strengthen public confidence in the Court during a period in which its legitimacy has been threatened. And such rules might attract support from both sides of the aisle, given that they have no obvious partisan valence. The success of ethics rules is dependent on enforcement, and it is unclear whether the Executive would enforce those rules if it created an appearance of interfering with the judiciary. Still, even with lax enforcement, if the Justices fail to follow ethics requirements, public reporting will likely increase pressure on them to comply — or further weaken confidence in the Court.

Another possible reform concerns the Court's statutory decisions. Although the Court's constitutional rulings tend to attract the most attention, the Court hands down numerous opinions involving the interpretation of federal statutes each Term. Some of those decisions are unanimous rulings on technical matters involving obscure provisions,

²⁵ See Opinion, *The Justices' Junkets*, WASH. POST (Feb. 20, 2011), https://www.washingtonpost.com/opinions/the-justices-junkets/2011/02/20/ABCJb7H_story.html [https://perma.cc/BSC9-WKQK].

²⁶ See Dan Collins, *Scalia-Cheney Trip Raises Eyebrows*, CBS NEWS (Dec. 15, 2003, 10:19 AM), <https://www.cbsnews.com/news/scalia-cheney-trip-raises-eyebrows> [https://perma.cc/7PDQ-S8PT]. For Justice Scalia's response to calls for his recusal, see *Cheney v. U.S. Dist. Ct.*, 541 U.S. 913 (2004).

²⁷ See, e.g., JOHANNA KALB & ALICIA BANNON, BRENNAN CTR. FOR JUST., SUPREME COURT ETHICS REFORM 2 (Sept. 24, 2019), https://www.brennancenter.org/sites/default/files/2019-09/Report_2019_09_SCOTUS_Ethics_FINAL.pdf [https://perma.cc/T5Q2-BFPR].

²⁸ For example, recently Professor Veronica Root Martinez, Professor Leah Litman, and Molly Coleman sent a letter to the Democratic and Republican leaders of the House Judiciary Committee urging Congress to enact stricter rules to prevent sexual harassment and other misconduct in the federal judiciary. Letter from Veronica Root Martinez, Leah Litman, and Molly Coleman to Hon. Hank Johnson and Hon. Darrell Issa (Apr. 14, 2021), <https://www.scribd.com/document/502776588/Letter-to-Courts-Subcommittee-re-misconduct-reform> [https://perma.cc/QF4H-GGAY].

²⁹ See, e.g., Supreme Court Ethics Act, H.R. 1057, 116th Cong. § 964 (2019); Twenty-First Century Courts Act, H.R. 6017, 116th Cong. § 365 (2020).

³⁰ Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 478 (2013).

but others closely divide the Court along political and ideological lines. Ian Millhiser has argued that Congress should pursue a “Civil Rights Act of 2021” that would overrule multiple statutory decisions, such as those approving forced arbitration and limiting the ability to sue for employment discrimination.³¹

Such a law is more plausible than one might initially think. As Millhiser notes, Congress successfully passed a similar omnibus override bill in the Civil Rights Act of 1991.³² And while there is certainly the possibility such a bill would face intractable opposition from Senate Republicans, it bears note that the last major effort by Democrats to overturn the result of a Supreme Court decision — the Lilly Ledbetter Fair Pay Act of 2009³³ — received some Republican support in the Senate. Statutory reforms like this one present no constitutional issues, and instead merely give Congress an opportunity to reassert its authority over federal law — and to put the Court on notice that it does not act with a totally free hand, at least in statutory cases.

Congress could also implement a procedure for regularizing review of the Court’s statutory decisions going forward. Although Congress can always revise statutory Court interpretations, it does so with less regularity than it once did.³⁴ The Congressional Review Act³⁵ (CRA) provides an analogy for reform. Under the CRA, regulations issued by federal agencies are subject to a “fast track” process in which Congress can pass resolutions of disapproval, which if passed by both houses and not vetoed by the President overturn the regulation.³⁶ One of us has argued for a Congressional Review Act for the Supreme Court, which would provide expedited procedures — including bypassing the traditional committee process and requiring priority on the House and Senate floors — for Congress to reconsider the Court’s interpretations of federal law.³⁷ This would enable quick legislative fixes where there is sufficient political support. Because such a bill would be purely procedural, it

³¹ Ian Millhiser, *9 Ways to Reform the Supreme Court Without Court-Packing*, VOX (Oct. 21, 2020, 12:55 PM), <https://www.vox.com/21514454/supreme-court-amy-coney-barrett-packing-voting-rights> [<https://perma.cc/H27C-E5W2>].

³² Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. §§ 2000e–2000e-16).

³³ Pub. L. No. 111-2, 123 Stat. 5 (2009).

³⁴ See Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1319 (2014) (offering data on overrides over time); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 338 (1991) (same).

³⁵ 5 U.S.C. §§ 801–808.

³⁶ See CONG. RSCH. SERV., THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS (Jan. 14, 2020), <https://fas.org/sgp/crs/misc/R43992.pdf> [<https://perma.cc/KM76-DRKJ>].

³⁷ Ganesh Sitaraman, *How to Rein in an All-Too-Powerful Supreme Court*, THE ATLANTIC (Nov. 16, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924> [<https://perma.cc/H85R-LXYT>].

might not be seen as a partisan power grab. Moreover, concerns about the institutional power of Congress vis-à-vis the Court could in some circumstances cut across party lines.

Reforms to the Supreme Court's jurisdiction that lack partisan valence might also be viable. For example, one of us has proposed expanding the Court's jurisdiction to include a number of cases selected at random from final judgments of the lower courts.³⁸ That reform would not seek to change the Court's decisionmaking in any partisan direction, but instead merely to force the Court to examine and rule on legal issues that routinely arise in the lower federal courts but that might otherwise escape the Court's attention. Such a reform could also help reinforce and emphasize the Court's role as an institution that resolves technical questions rather than one that issues grand pronouncements on values-laden constitutional issues.³⁹

B. *The Executive Branch and Supreme Court Reform*

Despite our arguments above, one might still conclude that getting reforms through Congress is impossible in the short run. But even reformers who take this view need not give up entirely. The Executive Branch can make policy changes that don't involve Congress at all, and Congress can make reforms to the Executive that would indirectly affect the Court without targeting it. These changes should also be seen as part of the larger project of Supreme Court reform.

Start with the observation that the Executive Branch — particularly the Office of the Solicitor General (OSG) within the Department of Justice (DOJ) — is one of the most influential players in constitutional law. So much so that the Solicitor General has been called “the tenth justice.”⁴⁰ The Solicitor General not only has “substantive influence” over the development of the law, but also “procedural influence” in choosing which cases to bring to the Court.⁴¹ The Solicitor General's

³⁸ See Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 707 (2018).

³⁹ Along these lines, one point of interest is Professor Benjamin Johnson's argument that the Supreme Court's certiorari practices go far afield from what Congress authorized when providing the Court with certiorari jurisdiction in 1891 and expanding that jurisdiction in 1925. See Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. (forthcoming 2021) (manuscript at 10) (on file with the Harvard Law School library). As Johnson argues, there is evidence that Congress intended to require the Court to review entire *cases*, and to cherry pick distinct legal *questions*, through the certiorari method. *Id.* at 10–11. Johnson's argument, if right, would provide a further basis for Congress to try to reassert itself — even if doing so involved merely holding hearings and not passing new legislation.

⁴⁰ See, e.g., LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 3 (1987).

⁴¹ Seth P. Waxman, *Foreword: Does the Solicitor General Matter?*, 53 STAN. L. REV. 1115, 1117 (2001).

choice of the order in which to bring cases, for example, can matter for how the law develops.⁴²

In recent years, the OSG has played a major role in the shape of the Court's docket by declining to defend federal statutes before the Court, despite longstanding norms under which DOJ "has a duty to defend the constitutionality of an Act of Congress whenever a reasonable argument can be made in its support."⁴³ In the litigation that led to *United States v. Windsor*,⁴⁴ OSG under the Obama Administration refused to defend the Defense of Marriage Act.⁴⁵ Then, under the Trump Administration, DOJ declined to defend the Affordable Care Act, arguing to the Court in *California v. Texas*⁴⁶ that the Act should be struck down in its entirety⁴⁷ — a development for which some thought the precedent set by the Obama Administration was partly to blame.⁴⁸

There is much debate on the importance of the duty to defend. Professors Neal Devins and Saikrishna Prakash argue that "there are absolutely no good constitutional reasons to preserve the duty to defend."⁴⁹ Nonetheless, there are reasons to worry about DOJ's political leadership choosing to ask the Court to overturn federal statutes in cases with a strong partisan valence. Such developments seem unlikely to foster confidence in DOJ or in the notion of the Court as an institution above politics. For this reason, Attorney General Merrick Garland could consider instituting stronger policies requiring DOJ attorneys to defend the constitutionality of federal statutes absent extremely compelling circumstances. Although there will certainly be disagreements about what constitutes compelling circumstances and such a policy could be reversed by a future administration, there could be value in reestablishing, and deepening, the norm that DOJ's job is to defend federal statutes.

A related point concerns DOJ's participation in constitutional cases before the Court. OSG participates in many hot-button cases as an *amicus curiae*, making arguments to persuade the Court of the current administration's preferred view of important constitutional questions.

⁴² *Id.* at 1118 (discussing the Justice Department's litigation strategy for cases on the New Deal).

⁴³ WILLIAM FRENCH SMITH, THE ATTORNEY GENERAL'S DUTY TO DEFEND THE CONSTITUTIONALITY OF STATUTES 25 (Apr. 6, 1981), https://www.justice.gov/sites/default/files/olc/opinions/1981/04/31/op-olc-vo05-p0025_o.pdf [<https://perma.cc/96M5-SVLV>].

⁴⁴ 570 U.S. 744 (2013).

⁴⁵ *Id.* at 781–82 (Scalia, J., dissenting).

⁴⁶ 140 S. Ct. 1262.

⁴⁷ Brief for the Federal Respondents at 13, *California*, 140 S. Ct. 1262 (Nos. 18-840 & 19-1019).

⁴⁸ See, e.g., Fred Barbash, *Trump Won't Defend an Act of Congress in Court. He's Following Obama's Lead.*, WASH. POST (Mar. 29, 2019, 8:18 AM), <https://www.washingtonpost.com/politics/2019/03/30/trump-wont-defend-an-act-congress-court-hes-following-obamas-lead> [<https://perma.cc/U5NS-LP8L>].

⁴⁹ Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 510 (2012).

Many such cases directly implicate federal interests, such as federal statutes, federal agencies, and so forth. But some cases in which OSG participates do not, at least not obviously so. For example, did OSG under the Obama Administration *need* to participate as an amicus in *Obergefell v. Hodges* in order to lay out a contested view of the constitutionality of state gay marriage bans?⁵⁰ Did OSG under the Trump Administration *need* to participate in *Fulton v. City of Philadelphia* in order to defend a broad interpretation of the Free Exercise Clause against a municipality's rules governing adoption agencies?⁵¹ A policy that limited OSG's participation in hot-button cases could reduce the appearance of the Court as a partisan institution, given that OSG's positions in such cases are likely to track the political views of the party controlling the White House.

Another political flashpoint has been OSG's efforts to seek emergency relief from the Supreme Court. As Professor Stephen Vladeck has documented, OSG under the Trump Administration sought emergency and extraordinary relief from the Court far more frequently than under previous Presidents.⁵² And it typically did so in cases raising the highest-profile, most controversial issues.⁵³ Where conservative judges acceded to these requests, it gave "at least the appearance that the Court is showing favoritism not only for the federal government as a party, but for a specific political party when it's in control of the federal government."⁵⁴

The Attorney General (or Solicitor General) could design policies limiting the circumstances in which OSG would seek emergency or extraordinary relief from the Court. True, such policies could be abandoned by a future administration and there is no guarantee that they would change the substance of the Court's decisions. But if the goal is to turn down the political temperature surrounding the Court and to rebuild trust in legal institutions, such a policy deserves serious consideration. We note also that members of Congress seem interested in reforms that might change how the Court deals with its "shadow docket."⁵⁵

⁵⁰ See Brief for the United States as Amicus Curiae Supporting Petitioners at 3–4, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571 & 14-574).

⁵¹ See Brief for the United States as Amicus Curiae Supporting Petitioners at 11, *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020) (mem.) (No. 18-280).

⁵² See Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 132–52 (2019).

⁵³ See *id.* at 132–41.

⁵⁴ *Id.* at 127.

⁵⁵ The House Judiciary Committee conducted a hearing on the "shadow docket." See *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Committee on the Judiciary*, 117th Cong. (2021). William Baude coined this term to refer to "a range of orders and summary decisions that defy [the Supreme Court's]

There is another systemic problem with the OSG's role in litigation before the Court. As one of us has argued, the Government has a meaningful and persistent advantage in cases involving criminal justice, given various structural advantages and incentives the OSG has in comparison to lawyers for individual criminal defendants.⁵⁶ A solution to this problem is the creation of a "Defender General" who would advocate for the interests of criminal defendants collectively before the Court.⁵⁷ Given that criminal justice reform has become a surprisingly popular issue,⁵⁸ this reform could find support on both sides of the aisle. Although this proposal would likely require statutory authorization or, perhaps, unilateral action by the Court itself, it could help address systemic problems posed by the Executive Branch's role at the Court — problems that indirectly connect to public discontent with criminal justice.

C. *Voluntary Reforms: Court Reform from the Inside*

The final source of Supreme Court reform could come from an unlikely source: the Court itself. The Justices could choose to adopt rules constraining themselves. They might choose to do so in order to improve perceptions of the Court among members of the public. But doing so might also be a way to help the Court stave off more aggressive reform efforts by Congress down the road.

The most obvious starting point would be for the Justices to voluntarily adopt ethics rules. Doing so might undercut efforts in Congress to impose an ethics code on the Justices. And the rules the Justices designed for themselves might be more amenable to the Justices themselves than whatever Congress would come up with. In fact, the Court may already be at work on this effort. In testimony before Congress in 2019, Justice Kagan said that the Chief Justice was considering whether to implement an ethics code for the Justices.⁵⁹ As no ethics code has since appeared, he may have shelved the effort. But, at a moment where

normal procedural regularity." William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015).

⁵⁶ See Daniel Epps & William Ortman, *The Defender General*, 168 U. PA. L. REV. 1469, 1471–72 (2020).

⁵⁷ See *id.* at 1472; see also Adam Liptak, *A Proposal to Offset Prosecutors' Power: The "Defender General"*, N.Y. TIMES (Jan. 27, 2020), <https://www.nytimes.com/2020/01/27/us/a-proposal-to-offset-prosecutors-power-the-defender-general.html> [<https://perma.cc/88ZS-BUZ9>].

⁵⁸ See Colleen Long & Hannah Fingerhut, *AP-NORC Poll: Nearly All in US Back Criminal Justice Reform*, AP NEWS (June 23, 2020), <https://apnews.com/article/ffaa4bc564afcf4a90b02f455d8fdfo3> [<https://perma.cc/F98K-L7U9>].

⁵⁹ See Robert Barnes, *Supreme Court Justices Tell Congress They Are Not Considering Televising Hearings*, WASH. POST (Mar. 7, 2019, 6:39 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-justices-tell-congress-they-are-not-considering-televising-hearings/2019/03/07/5fb28684-4116-11e9-9361-301ffb5bd5e6_story.html [<https://perma.cc/GA44-Q6BY>].

the Court arguably faces greater political pushback than it has encountered in decades — exemplified by the sudden willingness to consider Court-expansion by Democratic politicians⁶⁰ — the time may be right to resume those efforts. As Professor Veronica Root Martinez has put it, adopting ethics reforms would “signal to the public that the institution and its members — the Justices — are above reproach.”⁶¹

An issue closely intertwined with ethics rules is the Court’s disclosure of gifts and other potential financial transactions. There is bipartisan support for the Court to become more transparent in its disclosures. Recently, Senator Sheldon Whitehouse (a Democrat) and Senator Lindsey Graham (a Republican) sent the Court a letter suggesting that “a legislative solution may be in order to bring the judiciary’s financial disclosure requirements in line with other branches of government if the Court does not address the issue itself.”⁶² The Court would be well advised to take the hint.

Consider also the independent powers of the Chief Justice. For example, the Chief Justice has the power to designate federal judges to serve on the Foreign Intelligence Surveillance Court (FISC).⁶³ In 2013, a report in the *New York Times* showed that “[t]en of the court’s 11 judges — all assigned by Chief Justice Roberts — were appointed to the bench by Republican presidents.”⁶⁴ It is possible that the *Times* story may have pushed Chief Justice Roberts to pick both Republican- and Democratic-appointed judges; in the intervening years, the court’s membership has become balanced between both parties.⁶⁵ The Chief Justice should voluntarily continue to pick both Republican and Democratic appointees for FISC in roughly equal numbers in order to ensure a partisan balance — and signal that he is not simply committed to giving Republican-appointed judges more influence over the shape of the law. The Chief Justice has a variety of other administrative roles, including

⁶⁰ See *supra* p. 398.

⁶¹ Veronica Root Martinez, *A Weakened Supreme Court Needs a Code of Ethics*, BLOOMBERG L. (Nov. 5, 2020, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/a-weakened-supreme-court-needs-a-code-of-ethics> [<https://perma.cc/4ZEK-CKP2>].

⁶² See Letter from Sens. Sheldon Whitehouse and Lindsey Graham to Hon. John G. Roberts and Hon. Scott S. Harris (Feb. 4, 2021), <https://www.whitehouse.senate.gov/imo/media/doc/2.4.2021%20Whitehouse-Graham%20SCOTUS%20travel%20%20gift%20disclosure%20letter.pdf> [<https://perma.cc/U28L-32GL>]. Republican Senator John Kennedy recently proposed the Supreme Court Transparency Act, which would impose more obligations on the Justices to provide publicly available ethics and financial disclosures. S. 956, 117th Cong. (2021).

⁶³ Charlie Savage, *Roberts’s Picks Reshaping Secret Surveillance Court*, N.Y. TIMES (July 25, 2013), <https://www.nytimes.com/2013/07/26/us/politics/robertss-picks-reshaping-secret-surveillance-court.html> [<https://perma.cc/U2E8-ASNJ>].

⁶⁴ *Id.*

⁶⁵ See United States Foreign Intelligence Surveillance Court, *Current Membership*, <https://www.fisc.uscourts.gov/current-membership> [<https://perma.cc/VVM5-VCLF>].

controlling some nonjudicial appointments, which he could also manage in a balanced manner.⁶⁶

The Court could also take steps to make its practices more transparent and less insular. Professor Kate Shaw has shown that the Court's selection of amici curiae to represent orphaned arguments have largely gone to former law clerks of the Justices.⁶⁷ The selections are important as they give rare opportunities to gain experience arguing before the Supreme Court. That the Court's selection process tends to select individuals the Justices know well (indeed, have worked closely with) has implications not only for the diversity of the Supreme Court bar, but for the development of the law as well.⁶⁸ With a 6-3 Court favoring conservatives, this dynamic suggests that conservatives will likely get more opportunities to build a career arguing at the Supreme Court — and in the process, shaping its decisions. The Court could instead establish a more transparent process governing this selection.

The Court could also modify its rules governing the disclosure of funding behind amicus curiae briefs. Senator Whitehouse has recently urged the Court to strengthen these rules.⁶⁹ At present, the Supreme Court Rules require amici to disclose who made monetary contributions to the brief,⁷⁰ but where the amicus (or the funders of the amicus) is an organization, the amicus need not disclose the organization's ultimate source of funding. Ensuring integrity in the amicus process seems especially important when the Court regularly relies on amicus briefs for important factual citations in its opinions.⁷¹ And greater transparency can only improve the perception of the Court in the public eye. These are only a few of the possible ways the Court could reform itself. There likely are others that the Justices themselves could identify. And while these reforms are admittedly modest, especially when compared to the major restructuring progressives have demanded, they would nonetheless be improvements to an institution that is facing a challenge to its legitimacy. The Court should consider them on its own initiative, and those outside the Court should encourage the Justices to do so as well.

⁶⁶ CONG. RSCH. SERV., THE CHIEF JUSTICE OF THE UNITED STATES: RESPONSIBILITIES OF THE OFFICE AND PROCESS FOR APPOINTMENT 5–6 (2005).

⁶⁷ Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 CORNELL L. REV. 1533, 1556–57 (2016).

⁶⁸ *Id.* at 1575–83.

⁶⁹ See Mike Scarcella, *Sheldon Whitehouse Slams “Plainly Inadequate” SCOTUS Amicus Disclosure Rule*, NAT'L L.J. (Jan. 23, 2020), <https://www.law.com/nationallawjournal/2020/01/23/sheldon-whitehouse-slams-plainly-inadequate-scotus-amicus-disclosure-rule> [<https://perma.cc/2DF3-Y99K>]. One of the authors (Epps) previously served as a Special Counsel for Senator Whitehouse on the Senate Judiciary Committee.

⁷⁰ See SUP. CT. R. 37.6.

⁷¹ See Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1777–79 (2014).

II. A LONGER VIEW

We have outlined ways in which some modest Supreme Court reforms, broadly construed, might still be possible in the short term. What about the longer term — beyond the next two or four years, and thus beyond today's precise balance of political power? Calls for more significant Court restructuring will not dissipate overnight. Indeed, the underlying causes of calls for Court expansion and other external constraints and structural reforms will likely persist.

Here, we proceed into the realm of speculation. We tread with humility about our ability to predict the future course of political events. Nonetheless, consider one way things could play out. Within the next few years, the strongly conservative majority on the Court could well produce decisions that sharply move the law to the right and that generate significant public controversy. And those decisions would produce significant reactions by Democratic politicians. If so, that will reawaken calls for major structural change to the Court. In that moment, how the public reacts and how much power Democrats wield in Washington will determine whether structural Court reform becomes a realistic possibility. Public support for Court expansion or other types of major reform seem more likely if the current Court becomes seen as highly partisan.

None of this is certain to happen. And we note that there have been plenty of predictions over the years that the Court was about to make radical changes to the law that did not quite come to pass. Three decades ago, Kathleen Sullivan in a *Harvard Law Review* Supreme Court Foreword observed that the Rehnquist Court showed “surprising moderation” despite numerous predictions that “a conservative revolution was at hand.”⁷² If such predictions proved overblown before, shouldn't we be careful about similar predictions today?⁷³

Perhaps, but one could conclude that the situation now is different from earlier moments. First, the conservative majority is not merely 5-4, but 6-3. That means that in many cases that are likely to divide the Court along ideologically predictable lines, not just one but two conservative Justices would need to “swing” in order for the Court to issue decisions that reach surprising results. That hasn't been true in recent decades, when there have been four ideologically liberal Justices needing only one of the conservative Justices to join them to form a majority.

Second, the selection of Supreme Court nominees has become more ideological in recent years, and the Justices who have joined the Court

⁷² Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 24 (1992).

⁷³ Then again, it was only four years later that Professor Erwin Chemerinsky would declare the arrival of the “Rehnquist Revolution.” Erwin Chemerinsky, *The Rehnquist Revolution*, 1 NEXUS 21 (1996). See also Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7 (2001); Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1 (2004).

recently appear to have much more rigid interpretive approaches than their predecessors. The three newest Justices — Gorsuch,⁷⁴ Kavanaugh,⁷⁵ and Barrett⁷⁶ — have all expressed support for originalism and textualism.⁷⁷ None seems likely to produce decisions that are as ideologically unpredictable as Justice Kennedy, who was the Court’s key swing vote from 2005 until his retirement in 2018. Moreover, legal culture has become increasingly polarized in recent decades, such that liberal and conservative Justices increasingly operate in different worlds and speak to different audiences⁷⁸ — a development that may produce less ideological drift among Justices than seen in previous generations.

Finally, several early data points suggest that observers should not expect “surprising moderation” from this Court. First, in a recent opinion, Justice Kavanaugh — who is now widely seen as the Court’s median Justice⁷⁹ — voiced support for an aggressive reading of Article II of the Constitution’s Election Clause, indicating an eagerness for the Court to review rulings by state courts interpreting state election laws.⁸⁰ Such rulings could well tip the outcomes of future elections and would surely expose the Court to significant criticism from those seeking to paint the majority as partisan.

Second, Justice Alito recently delivered a keynote address to the Federalist Society that suggested his willingness to pursue an aggressively conservative agenda. In remarks that some saw as openly partisan, Justice Alito touched on numerous hot-button social issues, seeming

⁷⁴ See Emily Bazelon, *How Will Trump’s Supreme Court Remake America?*, N.Y. TIMES (Feb. 28, 2020), <https://www.nytimes.com/2020/02/27/magazine/how-will-trumps-supreme-court-remake-america.html> [https://perma.cc/4VSQ-5WF3].

⁷⁵ See Emily Bazelon & Eric Posner, Opinion, *Who Is Brett Kavanaugh?*, N.Y. TIMES (Sept. 3, 2018), <https://www.nytimes.com/2018/09/03/opinion/who-is-brett-kavanaugh.html> [https://perma.cc/4JN4-5XGW]; Eric J. Segall, Opinion, *Does Originalism Matter Anymore?*, N.Y. TIMES (Sept. 10, 2018), <https://www.nytimes.com/2018/09/10/opinion/kavanaugh-originalism-supreme-court.html> [https://perma.cc/XK3S-2PFK].

⁷⁶ See Brian Naylor, *Barrett, An Originalist, Says Meaning of Constitution “Doesn’t Change Over Time,”* NPR (Oct. 13, 2020, 10:08 AM), <https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time> [https://perma.cc/T9DH-4DPE].

⁷⁷ We note that there is debate about how similar the three Justices’ approaches actually are. See, e.g., Adam Liptak, *Kavanaugh and Gorsuch, Justices with Much in Common, Take Different Paths*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/05/12/us/politics/brett-kavanaugh-neil-gorsuch.html> [https://perma.cc/48V4-WNU2].

⁷⁸ See generally NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* (2019).

⁷⁹ See Greg Stohr, *Kavanaugh Emerges as Man-in-the-Middle with Supreme Court Set to Shift Right*, BLOOMBERG L. (Sept. 23, 2020, 9:32 PM), <https://news.bloomberglaw.com/us-law-week/kavanaugh-emerges-as-unlikely-liberal-hope-for-court-swing-vote> [https://perma.cc/A549-LR3Q].

⁸⁰ See *Democratic Nat’l Comm. v. Wis. State Legislature*, No. 20A66, slip op. at 9 n.1 (U.S. Oct. 26, 2020) (Kavanaugh, J., concurring in denial of application to vacate stay).

to take sides on the Republican side of the culture wars.⁸¹ Based on this speech, there is little reason to think that Justice Alito would prioritize moderate compromises.

Finally, one of the first substantive rulings by the Court since Justice Barrett was confirmed may be a preview of what is to come. In *Roman Catholic Diocese of Brooklyn v. Cuomo*,⁸² the Court issued a 5-4 per curiam decision, with Justice Barrett in the majority, enjoining occupancy limits imposed on the Diocese by New York Governor Andrew Cuomo due to the COVID-19 pandemic.⁸³ Justice Gorsuch wrote a particularly cutting concurrence in which he implied that the dissenters — including Chief Justice Roberts — were “shelter[ing] in place when the Constitution is under attack.”⁸⁴ While it is too soon to say what this new majority will do, the *Roman Catholic Diocese* decision suggests that the majority may not be shy about issuing controversial decisions.

If the Court majority does choose to pursue an aggressive agenda, what would happen next? Structural reform proposals could quickly become the top priority policy goal for progressives. What is currently low-simmering frustration could boil over into fiery rage at any moment, depending on what the Court does.

Whether all this happens, or whether it actually leads to any concrete reforms, is anyone’s guess. But it is enough of a possibility that those who study the Court and the Constitution should continue to do the work of thinking about possible Court reforms so that political leaders can be ready when the issue returns to the agenda. The conversation about how and why to reform the Court will, and must, continue.

⁸¹ See Adam Liptak, *In Unusually Political Speech, Alito Says Liberals Pose Threat to Liberties*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/2020/11/13/us/samuel-alito-religious-liberty-free-speech.html> [<https://perma.cc/EN97-4JPN>].

⁸² No. 20A87, 2020 WL 6948354 (Nov. 25, 2020).

⁸³ *Id.* at *3-4.

⁸⁴ *Id.* at *6 (Gorsuch, J., concurring).