Partisan Fidelity or Legal Principle?

Charlie Hammond

It's not every day that the wife of a Supreme Court Justice connives to overturn a presidential election. When it was unveiled that Justice Clarence Thomas' wife helped orchestrate the January 6 insurrection—much less sent more than two-dozen text messages to the former Trump White House chief of staff encouraging him to annul the election—another fissure opened in the Court's veneer of impartiality.[1] Justice Thomas then refused to recuse himself from any cases related to election integrity, breaching the institution's statute of self-disqualification when a Justice's "impartiality might reasonably be questioned."[2] Thomas embarrassed the neutral foundation of the Court. Notwithstanding, the evidence of a biased Court has been brewing quietly for years—but recent activity has mushroomed its partisanship to a magnitude that can no longer be ignored. The Court has not always been a political institution. In the genesis of American democracy, the judiciary was established as an unpolluted referee between the legislative and executive branches. In *Federalist 79,* Hamilton writes, "The judiciary...has no influence over the sword or the purse...it may be truly said to have neither force nor will, but merely judgement."[3] Hence, the Court's purpose and legitimacy hinge on impartiality; in the Founders' eyes, it is the only branch immune to factions and ambition, a disinterested interpreter of the Constitution.

Currently, Congress' polarized deadlock has rendered it difficult to pass many laws. As such, though it was established as the weakest branch of government, the Court is in a position where it is practically the most powerful.[4] A Court majority can scrap legislation, direct federal and state executives, overrule lower federal and state courts, and provide the decisive interpretation of the Constitution while enjoying lifetime tenure.[5] Justices are free to warp the Constitution with few repercussions. Engulfed in an aggressive 6-to-3 conservative majority, the current Court is persuading no one that the institution floats above politics. In fact, 62% of Americans say that politics, not law, drives Supreme Court decisions.[6] To quote George H.W. Bush's Deputy Attorney General, Donald Ayer, "The expanding right-wing majority on the Supreme Court has relied on an array of innovative constitutional rights to undermine traditional governmental actions while discarding longstanding precedents with which they disagree."[7]

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[1] Ryan Nobles, "First on CNN: January 6 Committee Has Text Messages between Ginni Thomas and Mark Meadows," CNN, last modified March 25, 2022, https://www.cnn.com/2022/03/24/politics/ginni-thomas-mark-meadows-text-messages/.

[2] "28 U.S. Code § 455 - Disqualification of Justice, Judge, or Magistrate Judge," Cornell Law School,

[3] Alexander Hamilton, *The Federalist Papers: No. 79* (1788), https://avalon.law.yale.edu/18th_century/fed79.asp.

[4] A. Martinez, "Are People Losing Confidence in the Supreme Court?," NPR, last modified May 6, 2022, https://www.npr.org/2022/05/06/1097065438/are-people-losing-confidence-in-the-supreme-court.

[5] Daniel Epps and Ganesh Sitaraman, "How to save the Supreme Court," *The Yale Law Journal* 129, no. 1 (October 2019): 161, Academic Search Premier.

[6] Do You Think U.S. Supreme Court Decisions Are More Based on the Constitution and the Law, or More on the Political Views of Its Members?, chart, Grinnell College, October 21, 2021, https://www.grinnell.edu/news/62-americans-say-politics-not-law-drives-supreme-court-decisions.

[7] Donald Ayer, "The Supreme Court Has Gone off the Rails," *The New York Times*, last modified October 4, 2021, https://www.nytimes.com/2021/10/04/opinion/supreme-court-conservatives.html.

Thus, partisanship has greatly adulterated the legitimacy of the Supreme Court, as evident through both the appointment and retirement processes, as well as the institution's landmark rulings.

There is an argument, however, that it is not partisanship, but judicial philosophy that shepherds the Court. Judicial philosophy is the way in which a judge interprets the law; as the Court's primary responsibility, Justices understand the Constitution in different ways, reflecting individual value systems. To outline particular judicial philosophies, Justices apply labels, such as "activist," "strict constructionist," or "textualist." One might argue that differences in judicial philosophy explicate the differences between Justices. Individual philosophies are perfectly acceptable in the legal world—after all, the Constitution does not interpret itself. The Justices (most prominently Stephen Breyer and Clarence Thomas) avow that the Court is an apolitical institution, attributing what may look like political dispute to their individual judicial philosophies.[8] To quote Amy Coney Barrett, "This court is not comprised of a bunch of partisan hacks…Judicial philosophies are not the same as political parties."[9]

Yet, the Court's decisions tell a different story. The institution's attempt to vindicate itself is not only a tale of irony, but of deception: if judicial philosophies are so different from politics, why are the Court's rulings divided so strictly across partisan lines? In examining almost every landmark case of the last decade (*Citizens United v. FEC, Rucho v. Common Cause, Shelby County v. Holder,* the list goes on…), the Court has consistently issued 5-to-4 rulings (or 6-to-3, depending on the majority) that directly reflect the parties that appointed each Justice.[10] There are no coincidences; a Justice can label herself an "originalist," but what she likely means is that she is a Republican. In the widely-acclaimed "Split Definitive," Neil Devins and Lawrence Baum assert that in the last decade, the line between party and philosophy has virtually dissolved; before 2010, the Court never had such clear ideological blocks that coincided with party lines.[11] Hence, this is a very recent development, one reflecting America's sweeping surge in hyperpolarization. Devins and Baum tie the politicization of the Court to two chief principles: partisan sorting, where conservatives increasingly become Republicans and liberals Democrats, and affective polarization, where members view their own party amicably and the opposing party with hostility. The elite world has become so polarized that the social networks of Justices reinforce conservatism for Republican-appointed Justices and liberalism for Democratic-appointed Justices. Of particular importance, legal societies meld with political organizations to groom future Justices. For instance, The Federalist Society believes that liberal ideology dominates elite law universities, and has thus pledged to shift the country's judiciary to the right. The Federalist Society connects and mentors young conservative lawyers, with the

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[8] Martin Pengelly, "Clarence Thomas Insists Supreme Court Justices Do Not Rule Based on Politics," The Guardian, last modified September 17, 2021, https://www.theguardian.com/us-news/2021/sep/17/clarence-thomas-supreme-court-justices-politics.

[9] Ryan C. Williams, "Supreme Court Justices Say the Institution Must Be Nonpartisan — but They Make It Political," NBC News, last modified September 19, 2021, https://www.nbcnews.com/think/opinion/supreme-court-justices-say-institution-must-be-nonpartisan-they-make-ncna1279280.

[10] Pawel Laidler, "The 2020 U.S. Supreme Court and Political Identity," *Politeja*, no. 68 (2020): 221, JSTOR.

[11] Neal Devins and Lawrence Baum, "Split Definitive: How Party Polarization Transformed the Supreme Court into a Partisan Court," *The Supreme Court Review*, 2016, 303, JSTOR.

Court's current six conservative Justices as former members.[12] Hence, politics are ingrained in the judicial network. Moreover, swing Justices are no longer part of the composition of the Court. Historically, Republicans would appoint Justices who would periodically side with Democratic-appointed Justices, and vice versa. In today's climate, moderation, and ideological deviation rarely occurs. Arguably the most famous swing Justice was Anthony Kennedy, who decided many gridlocked landmark cases by his single vote.[13] Yet, with such a lopsided conservative majority, the Court is forced into partisan decisions, with the public generally able to predict which Justice voted what.

In addition, Justice confirmation has led to political conflict; the process plays out as a battle over which lucky party is able to further its agenda. Presidents view the nomination process as an opportunity to affirm the legacy of their administrations.[14] That being said, the process was not always so politicized. Until roughly the end of the 21st century, judicial nominations were fairly uncontested; for instance, Byron White's 1962 questioning lasted a whopping eleven minutes long, undergoing no partisan bickering meant to sabotage his nomination. The precedent that nominees even appeared before the Senate Judiciary Committee was not instituted until 1925. However, Robert Bork's 1987 nomination dramatically altered the way in which Justices were confirmed. When Reagan nominated Bork, Democrats were immediately committed to derailing him. There was no question as to his qualifications—Bork was a Yale law professor, a former federal appeals judge, and Nixon's Justice Department official. Rather, it was his conservatism that virtually ensured defeat, engendering a 58-42 victory for the Democrats. Bork's confirmation process was such a disaster that it coined a new verb, "borking," meaning the vilification of a nominee by political attack. Since 1987, the Senate Judiciary Committee has "borked" various nominees out of partisan disagreement. In 2016, Obama's nomination of Merrick Garland was ignored entirely. Political dispute is one thing, but to completely void the nomination? There was no piece of legislation, no precedent that prohibited a president from nominating a Justice in his final year. Regardless, 11 Republican members of the Committee pledged to thwart any nomination from Obama; later, Senator Mitch McConnell remarked, "One of my proudest moments was when I looked Barack Obama in the eye and I said, 'Mr. President, you will not fill the Supreme Court vacancy.'"[15] Republicans were determined to leave this vacant spot for a successor's eager hands, as the ability to nominate a Justice is a coveted, advantageous political opportunity. Hence, Garland was a casualty of partisan ignorance. In "The Garland Affair," Robin Bradley Kar and Jason Mazzone assert that this Republican obstruction of Garland is the first of its kind.[16] In analyzing the previous incidents in which a President has

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[12] "The Conservative Club That Came to Dominate the Supreme Court," The Harvard Gazette, last modified March 4, 2021, https://news.harvard.edu/gazette/section/national-world-affairs/.

[13] Colin Dwyer, "A Brief History of Anthony Kennedy's Swing Vote — and the Landmark Cases It Swayed," NPR, last modified June 27, 2018, https://www.npr.org/2018/06/27/623943443/a-brief-history-of-anthony-kennedys-swing-vote-and-the-landmark-cases-it-swayed.

[14] Stephen P. Nicholson and Thomas G. Hansford, "Partisans in Robes: Party Cues and Public Acceptance of Supreme Court Decisions," *American Journal of Political Science* 85, no. 3 (July 2014): 623, JSTOR.

[15] Jason Silverstein, "Here's What Mitch McConnell Said about Not Filing a Supreme Court Vacancy in an Election Year," CBS News, September 19, 2020, https://www.cbsnews.com/news/mitch-mcconnell-supreme-court-vacancy-election-year-senate/.

[16] Robin Bradley Kar and Jason Mazzone, "The Garland Affair: What History and the Constitution Really Say about President Obama's Powers to Appoint a Replacement for Justice Scalia," *NYU Law Review* 91 (March 22, 2016): 75.

begun an appointment process prior to the election of a successor, Kar and Mazzone find that in every case, the President has been successful in appointing a replacement Justice; even the instances *during* an election year, Justices have been appointed. As such, Republicans strayed from two centuries worth of historical precedent. That year, the Supreme Court was forced to assemble with only eight Justices, deadlocking across party appointed-lines on a number of significant cases, such as *United States v. Texas*, a suit regarding Obama's immigration reform; to avoid stalemate, some major cases were punted entirely, including one regarding Obamacare's birth control mandate. Hence, partisanship in the confirmation process has not only raised the question of the Court's legitimacy, but has greatly hindered the way in which the institution operates.

Additionally, the opportunity to nominate a Justice is so coveted that parties have drastically changed the rules to ensure its political thrust. In 2017, Republican senators lowered the voting requirement from 60 votes to a simple majority to confirm Justice Gorsuch. This re-engineering of the process, dubbed the "nuclear option," encapsulates the extent to which partisan acrimony has polluted the Court: Republicans are willing to rewrite well-established precedent to further their agenda. Democrats are guilty of rule-changing, too. In 2013, Democrats altered Senate rules to block Republican filibusters of nominees to lower courts and government positions. However, the Supreme Court was left untouched; the institution was too revered, too sacrosanct for party politics. Clearly, Republicans do not hold the Court to such esteem. For Republicans to annul long-standing Senate rules raises grave concerns about future nominations. Confirmation by a simple majority increases the likelihood of extremist Justices elevating to the Court; without the regulation of 60 votes, parties could impel unpopular, radical appointees, as each party has stripped the other of the power to filibuster unqualified Justices.

Moreover, politics dominate the hearing processes in which the Senate Judiciary Committee questions nominees. In the recent Ketanji Brown Jackson hearings, Senators exploited their floor-time to fuel the nation's culture war. This politicization was especially apparent in Ted Cruz's interrogation of Jackson, demanding to know whether she thought babies were racist, asking her if he could decide to be an Asian man tomorrow, and labeling her a child-predator empathizer.[17] Cruz steered clear of questions regarding her qualifications or legal philosophy—rather, he took advantage of this revered process to preach his own campaign, goading typical right-wing concerns. With midterms around the corner, Cruz slandered Jackson to prove his dedication to conservative ideology. The same goes for Tennessee's Marsha Blackburn, who asked Jackson to define "woman."[18] When Senators squander their time to create political acrimony, it is nearly impossible to verify whether a Justice is qualified to serve or not. How is the nation, much less the Committee, expected to know a Justice's true disposition? This shameful, self-serving political move diminishes the Court. Not only are Senators guilty of politicization, but various Justices are as well. In 2018, when Brett Kavanaugh

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[17] *Judge Ketanji Brown Jackson Confirmation Hearings: Hearings Before the Senate Judiciary Committee* (2022) (statement of Ted Cruz). https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-on-judge-ketanji-brown-jackson-i-see-a-record-of-activism-and-advocacy.

[18] Alia E. Dastagir, "Marsha Blackburn Asked Ketanji Brown Jackson to Define 'woman.' Science Says There's no Simple Answer.," USA Today, last modified March 24, 2022, https://www.usatoday.com/story/life/health-wellness/2022/03/24/marsha-blackburn-asked-ketanji-jackson-define-woman-science/7152439001/.

testified before the Senate Judiciary Committee, he utilized his hearing to declare that Christine Blasey Ford's sexual assault allegations were a leftist conspiracy orchestrated by the Clintons to smear his reputation—he claimed the accusations were “fueled with apparent pent-up anger about President Trump and the 2016 election.”[19] Furthermore, Kavanaugh threatened his political enemies, infamously asserting, “What goes around comes around.” Kavanaugh essentially promised that, if elected, he would avenge the left. In doing so, Kavanaugh entirely circumvents his duty of impartiality, shepherding politics into a neutral institution. Justices like Kavanaugh make a laughing stock of the Court.

In addition to the appointment process, a Justice’s decision to retire has fallen into politicization. Retirement from the Supreme Court is a strategic political ploy, a calculated tactic to ensure that a Justice’s vacant seat will be filled by an ideologically proximate successor. In “Strategic Retirements: A Political Model of Turnover on the United States Supreme Court,” Timothy M. Hagle evaluates the relationship between politics and Justices’ retirements. In examining the history of retiring Justices, Hagle discovered a significant partisan element in a Justice’s decision to exit the Court; notably, Hagle found that when the Court majority emulates the Senate majority, one can expect a 51% increase in retiring Justices.[20] Similarly, in “A Theory of Justices' Retirement,” Álvaro Bustos and Tonja Jacobi conclude that conservative Justices retire more than moderate Justices when the dominant ideologies of the Senate and the Court are conservative, and less when the ideologies are liberal;[21] in “Retirement and Death in Office of U.S. Supreme Court Justices,” Ross M. Stolzenberg and James Lindgren contend that Justices tend to delay or hasten retirement to politically benefit the party of the president that appointed them.[22] Hence, the notion of a partisan retirement process is widely endorsed by political scholars. As such, the Court’s elderly Justices undergo significant pressure to retire when the party of the current president matches that of their appointed president. This urgency is to avoid a liberal Justice dying under a conservative president—or vice versa—which would warrant a significant setback for the party. When Democratic-appointed Justice Ginsberg passed away during the Trump administration, vehement criticism erupted from the left. Democrats believed that Ginsberg should have retired under Obama, who would have ordained a progressive replacement. Instead, Ginsberg’s death fomented the rise of Amy Coney Barrett, a deep-dyed conservative who Kamala Harris worried would “undo [Ginsberg’s] life’s work.”[23] Justice Stephen Breyer faced a similar pressure, which was effective in triggering his resignation on January 26, 2022. Realizing their mistake in not pressuring Ginsberg quite enough, Democrats aggressively urged Breyer to exit the court under the Biden administration to ensure a liberal successor. For instance, in Washington D.C., a progressive group hired a billboard truck reading,

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[19] *Brett M. Kavanaugh Confirmation Hearings: Hearings Before the Senate Judiciary Committee* (2018) (statement of Brett. M. Kavanaugh). https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/.

[20] Timothy M. Hagle, "Strategic Retirements: A Political Model of Turnover on the United States Supreme Court," *Political Behavior* 15, no. 1 (March 1993): 38, JSTOR.

[21] Todd A. Curry and Mark S. Hurwitz, "Strategic Retirements of Elected and Appointed Justices: A Hazard Model Approach," *The Journal of Politics* 78, no. 4 (October 2016): 1096, JSTOR.

[22] Ross M. Stolzenberg and James Lindgren, "Retirement and Death in Office of U.S. Supreme Court Justices," Demography 47, no. 2 (May 2010): 275, JSTOR.

[23] Averi Harper, "Amy Coney Barrett 'will undo' Ruth Bader Ginsburg's Legacy: Sen. Kamala Harris," ABC News, last modified September 28, 2020, https://abcnews.go.com/Politics/amy-coney-barrett-undo-ruth-bader-ginsburgs-legacy/story?id=73294943

"Breyer, Retire" to encircle the Court.[24] With the bench composed of only three Democratic-appointed Justices, Breyer's exit—either by death or retirement—under a Republican administration would tip the Court even deeper into its conservative majority. To the left's relief, Breyers' decision to retire allowed Biden to appoint Ketanji Brown Jackson, the Court's first Black female Justice. Hence, as demonstrated by both scholars and the institution itself, a Justice's decision to retire is governed by political strategy, chiefly aimed at preserving a party's numbers on the bench.

Additionally, through landmark decisions, the current Supreme Court has developed into a political mule for the aggressive conservative agenda. In the last few decades, Justices have proved unable to rise above party politics. Arguably, the most infamous incident in which partisanship enveloped the Court was when the institution decided the outcome of the 2000 election. When the "hanging chad" ballots led to confused Floridians voting for the wrong candidate, the gap between Bush and Gore narrowed to less than 0.01 percent.[25] Under Florida election law, a recount is required when the margin of victory is less than 0.5 percent; as such, the Florida Supreme Court ordered immediate manual recounts, declaring that if ballots have different rules as to whether hanging chads count, a constitutional violation occurs, as the same ballot in two different locations would be counted differently. Bush, who was ahead of Gore by less than a hair, urged the Supreme Court to halt the recount—and it did. When taken to the Supreme Court, the Justices ruled that Florida's recount violated the Equal Protection Clause of the 14th Amendment.[26] Moreover, the Court decided that there was not enough time for a recount to take place, as it would surpass the safe-harbor deadline. In truth, there was enough time. According to voting expert Nate Persily, if the Court had authorized the recount, Gore would have won—which is exactly what the conservative majority was afraid of. The institution decided to embrace equal protection in voting, but it was declared a single-use decision; the Court essentially pledged to not follow through on this new principle. It was a legal precedent erected and eradicated just to hand Bush the presidency. *Bush v. Gore* was an amalgam of partisan rapacity and judicial activism. In his dissenting opinion, Justice Stevens declared the Court's ruling both unconstitutional and unwise. Stevens argued that throughout history, the Court has uniformly respected the states' opinions on questions of state law, and *Bush v. Gore* should not have been any different. He wrote, "Preventing the recount from being completed will inevitably cast a cloud on the legitimacy of the election. [...] Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."[27] Stevens predicted correctly. It is inevitable for politics to reach the cases in which the Supreme Court adjudicates—however, America must be able to expect its Court to apply identical principles in these cases as in every other. A political case cannot be a unique opportunity for the Court to wedge politicians into power.

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[24] Pete Williams, "Justice Stephen Breyer to Retire from Supreme Court, Paving Way for Biden Appointment," NBC News, https://www.nbcnews.com/politics/supreme-court/justice-stephen-breyer-retire-supreme-court-paving-way-biden-appointment-n1288042.

[25] "Bush v. Gore," Encyclopaedia Britannica.

[26] Michael J. Klarman, "Bush v. Gore Through the Lens of Constitutional History," *California Law Review* 89, no. 6 (December 2001): 1746, Academic Search Premier.

[27] Bush v. Gore Dissent of Justice Stevens," Wikipedia, https://en.wikisource.org/wiki/Bush_v._Gore/Certiorari/Dissent.

In addition, politics drove the Court in *Rucho v. Common Cause*. In 2019, the Court decided that though partisan gerrymandering is "incompatible with democratic principles," federal courts cannot consider constitutional claims against it.[28] Gerrymandering allows state legislatures to manipulate an electoral district to bolster one party and debilitate the other. By packing Democrats (for example) into very few districts and spreading Republicans across many, the state gives its voters unequal voices in the legislature. Gerrymandering subdues voters—oftentimes minorities—to consolidate a seizure of power. For example, in North Carolina, a state roughly divided equally between parties, the congressional map tried to give the GOP ten seats out of the fourteen. In *Rucho v. Common Cause*, North Carolina plaintiffs claimed that the state's redistricting plan disproportionately harmed Democrats, violating the First Amendment, the Equal Protection Clause, the Elections Clause, and Article I, Section II.[29] The Supreme Court ruled that gerrymandering—voter suppression—was outside the remits of the Court. Decided strictly across party lines, the conservative majority's ruling represents the GOP's greater war against voting rights—not to mention the fact that North Carolina's gerrymandering benefited the GOP. In her dissenting opinion, Justice Elena Kagan wrote:

> And gerrymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense…In our government, "all political power flows from the people."…And that means, as Alexander Hamilton once said, "that the people should choose whom they please to govern them."…But in Maryland and North Carolina they cannot do so…Is it conceivable that someday voters will be able to break out of that prefabricated box? Sure. But everything possible has been done to make that hard. To create a world in which power does not flow from the people because they do not choose their governors. Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.[30]

The Court should have been able to recognize and eliminate the acute partisanship displayed in these congressional districts, but it did not. In doing so, the Court has revealed its own. Furthermore, in *Fulton v. Pennsylvania*, the Supreme Court declared that Pennsylvania adoption agencies are permitted to refuse same-sex couples in accordance with the First Amendment. There is no coincidence that the Court delivered this ruling merely months after Justice Alito delineated marriage as "a union between one man and one woman."[31] Alito's statement is an opinion better suited for a political convention than the legal society he was addressing. As evident, political judgment is piloting the Court, with American liberties as its casualty.

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[28] Rucho v. Common Cause, 588 U.S. (Oct. 2018). https://www.supremecourt.gov/opinions/18pdf/18-422_9ol1.pdf.

[29] Richard L. Hasen, "The Supreme Court's Pro-Partisanship Turn," *Georgetown Law* 109 (Summer 2020): 60.

[30] Rucho v. Common Cause, 588 U.S.

[31] Robert Barnes, "Alito Homes in on Gay Marriage, Gun Rights, Religious Liberty in Stern Speech to Conservatives," *The Washington Post*, last modified November 13, 2020, https://www.washingtonpost.com/politics/courts_law/samuel-alito-gay-marriage-religious-liberty-federalist-society/2020/11/13/1ff0a322-25bd-11eb-8672-c281c7a2c96e_story.html.

The question of the Court's legitimacy especially arises in its current dogfight with *Roe v. Wade*. At 1 a.m. on September 2, 2021, the Supreme Court issued an order to allow Texas ban abortion at six weeks, as well as to encourage private citizens to sue anyone who aids or abets an abortion for a $10,000 reward. The law essentially places a bounty on anyone helping a woman terminate her pregnancy; it's an anti-female, anti-choice statute. Disturbingly, the Court acted through its shadow docket, a process allowing emergency appeals that prevent imminent harm, such as death-penalty cases; the shadow docket excludes oral arguments, oftentimes requiring no public explanation nor briefing.[32] The conservative majority exploited the shadow docket to further the right's anti-abortion crusade, implementing life-changing policy without the tedium of traditional legal procedure. The Court found a loophole to institute grievous political change. As Donald Ayer observed, "What is new is the court's frequency and brashness in achieving these radical outcomes, and its willingness to do so often without an honest explanation and acknowledgement of what is actually going on."[33] In her dissenting opinion, Justice Sotomayor wrote the following:

> The Court's order is stunning. Presented with an application to enjoin a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny, a majority of Justices have opted to bury their heads in the sand. Last night, the Court silently acquiesced in a State's enactment of a law that flouts nearly 50 years of federal precedents…Today's ruling illustrates just how far the court's 'shadow-docket' decisions may depart from the usual principles of appellate process. That ruling, as everyone must agree, is of great consequence…The Court should not be so content to ignore its constitutional obligations to protect not only the rights of women, but also the sanctity of its precedents and of the rule of law.[34]

Partisanship swathed in the language of constitutionalism is the current theme of the Court. Conservative Justices permit what they want and obstruct what they don't, declaring that some Constitutional formality has determined the result. Last week, in a leaked opinion draft, the Court proved itself hardly different from any other partisan branch of government. The opinion disclosed the Court's intent to completely overturn *Roe v. Wade,* extirpating decades worth of women's rights. The right to abortion is a liberty woven into the social fabric of the nation—and the Court's new ruling would not even exempt cases of rape or incest. Overturning *Roe* after Trump vowed that his three appointed Justices would do so bears no coincidence. Considering the right's campaign to morph the Court into a surrogate of their agenda, the ruling highlights how the institution's impartiality is little more than a guise. As Justice Sotomayor asked in the *Dobbs* oral argument, "Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?"[35] Moreover, nearly two-thirds of Americans say that abortion should be left to women and their doctors.[36] The numbers—reflecting majority support—have hardly changed since a Gallup poll conducted in

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[32] Maggie Astor, "How the Supreme Court Quietly Undercut Roe v. Wade," *The New York Times*, last modified September 2, 2022, https://www.nytimes.com/2021/09/02/us/politics/roe-v-wade-supreme-court.html.

[33] Ayer, "The Supreme," *The New York Times*

[34] Whole Woman's Health v. Jackson, 594 U.S. (Sept. 1, 2021). https://www.supremecourt.gov/opinions/20pdf/21a24_8759.pdf.

[35] Dobbs v. Jackson Women's Health Organization, No. 19-1392, slip op. at 15 (Dec. 1, 2021).

[36] "America's Abortion Quandary," Pew Research Center, last modified May 6, 2022, https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/.

1975, only two years after *Roe* was first decided.[37] Rather, it is the Court that has changed. Engulfed by right-wing politics, the Court is struggling to reflect the people it serves. Hence, as evident through landmark rulings, the institution is hardly immune to partisanship. As a proxy for the conservative agenda, the Court has been weaponized for politics.

Thus, it is evident in both the appointment and retirement processes, as well as the institution's landmark rulings, that politics have defiled the Supreme Court. The dire reality of the Court—where partisanship supersedes legal principle—hurls America all the more into George Packer's nightmare of mass cynicism, a bleak dystopian world where Americans lifelessly acquiesce to a system they have no faith in.[38] If we cannot trust our institutions, Democracy perishes and so might the Court's power to settle serious questions of law, which only works if the people go along. Yet, this partisan calamity can be stopped. To save the Court requires radical reconsideration of how the institution operates. In "How to Save the Supreme Court," Daniel Epps and Ganesh Sitaraman discuss salient reforms to rescue the Court's legitimacy.[39] Of note, the article discusses the "Balanced Bench." This reform requires the Court to be equally composed of Democratic- and Republican-appointed Justices. These 10 Justices would then select an additional five Justices unanimously (or by supermajority) from current circuit court judges to serve for one-year terms. The premise behind the "Balanced Bench" lies in the fact that it restores the notion that Justices are deciding questions of law, rather than political preference. Additionally, Eric Holder, former Attorney General of the United States, urges two primary reforms. Holder suggests that each president has the opportunity to appoint the same number of Justices per term—one every year. This concept would ensure that the Court reflects "the will of the people, rather than being driven by acts of God and strategically timed retirements."[40] Holder also urges the implementation of 18-year term limits for Justices, as regular turnover prevents Justices from both attaining too much power, as well as losing touch from the will of the people. Not only does Justice Roberts endorse the application of term-limits, but three-fourths of Americans do.[41] Thus, our Democracy can be salvaged by thwarting further destruction by a partisan Court.

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[37] Do you think abortion should be legal under any circumstances, legal only under certain circumstances, or illegal in all circumstances?, chart, Gallup, https://news.gallup.com/poll/235445/abortion-attitudes-remain-closely-divided.aspx.

[38] George Packer, "Are We Doomed?," The Atlantic, last modified December 6, 2021, https://www.theatlantic.com/magazine/archive/2022/01/imagine-death-american-democracy-trump-insurrection/620841/.

[39] Epps and Sitaraman, "How to save," 193.

[40] Eric Holder, "The Supreme Court Was Broken Long before the Leak," TIME, last modified May 7, 2022, https://time.com/6174465/eric-holder-supreme-court-broke/.

[41] "Three-Fourths of Americans Agree: The Supreme Court Needs Term Limits," Fix the Court, https://fixthecourt.com/termlimits/.

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