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## Exhuming Brutus: Constitutional Rot and Cyclical Calls for Court Reform

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# Exhuming Brutus: Constitutional Rot and Cyclical Calls for Court Reform

*Amanda Hollis-Brusky\**

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## I. INTRODUCTION: BRUTUS, CONSTITUTIONAL ROT AND CYCLICAL CALLS FOR COURT REFORM

Once upon a time, in the late eighteenth and early nineteenth centuries, the phrase “judicial independence” struck fear into the hearts of many Americans, especially those associated with the Anti-Federalist movement. Robert Yates, for example, writing under the pseudonym “Brutus,” wrote with horror of the proposed independence of the judiciary:

[The Constitution has] made the judges *independent*, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.<sup>1</sup>

Brutus was not alone in sounding the alarm about the dangers of a truly independent judiciary.<sup>2</sup> Thomas Jefferson, in a letter to Spencer Roane in 1819, referred to the Constitution as “a mere thing of wax in the hands of the judiciary” and warned that “it should be remembered as an axiom of eternal truth in politics that whatever power in any government is independent, is absolute also.”<sup>3</sup>

Alexander Hamilton, as persuader-in-chief of the constitutional ratification period, provided a rebuttal to these alarmist critiques of the proposed design for the federal judiciary. In an essay we now refer to as *Federalist* No. 78,<sup>4</sup> Hamilton vigorously defended the importance of judicial independence for the rule of law and for the integrity of our written Constitution. Hamilton emphasized that the judicial branch, precisely because of its structural independence, was the only branch positioned to serve as the guardian of the Constitution<sup>5</sup>. Constitutional rights and protections, Hamilton reasoned, would be safe – or at least safest given the alternatives – with a judiciary removed from public pressures.<sup>6</sup>

But there are caveats – significant ones – in Hamilton’s essay; caveats that many seem to have forgotten about. The judiciary had to exercise its

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1. *Letters of Brutus*, XV, N.Y. J., March 20, 1788, reprinted in THE COMPLETE ANTI-FEDERALIST 186–89 (Herbert J. Storing ed., 1981) (emphasis added).

2. See, e.g., Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 321 (1999).

3. Letter from Thomas Jefferson, to Spencer Roane, (Sept. 6, 1819), <https://founders.archives.gov/documents/Jefferson/98-01-02-0734> [<https://perma.cc/X5BT-5RLG>].

4. THE FEDERALIST NO. 78, at 432–40 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

5. *Id.*

6. *Id.*

power in a particular way, separated from and distinct from politics and from the political branches. If the courts were ever to become simply another arm of partisan politics, Hamilton warned, the consequences for liberty and for the rule of law would be frightful to contemplate.<sup>7</sup> If these Hamiltonian caveats were to be realized, judicial independence would not only be threatened, it would become threatening. That is, under certain conditions, judicial independence – as Brutus, Jefferson, and the Anti-Federalists feared – would, in fact, become dangerous for and destructive to the American constitutional system.

In *The Cycles of Constitutional Time*, Jack Balkin argues that we are currently witnessing the very conditions that make judicial independence potentially dangerous and destructive for our system.<sup>8</sup> Collectively, Balkin refers to these conditions as “constitutional rot.”<sup>9</sup> Constitutional rot is a period marked by the visible and identifiable “backsliding in democratic and republican norms and institutions” that is usually indicative of the impending death of one constitutional regime and the birth of another.<sup>10</sup> In the Parts that follow, using Balkin’s excellent analysis as a jumping off point, I give a bit more texture to some of these drivers of our current period of constitutional rot. Specifically, I examine polarization, partisanship, court capture, and the trend of increasing judicial supremacy and the finality of Supreme Court rulings as ingredients of constitutional rot.

These dynamics help explain and contextualize the sudden resurgence of calls for court reform on the left, which I am calling the “exhumation of Brutus.” This is especially true in the wake of the jarring and sudden death of Justice Ruth Bader Ginsburg and the fevered battle to fill her seat just days before the 2020 presidential election.<sup>11</sup>

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7. *Id.* at 434.

8. JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME*, 44–45 (Oxford Univ. Press 2020).

9. *Id.* at 45.

10. *Id.*

11. Mark Z. Barabak & Janet Hook, *McConnel vows to fill Ginsburg’s seat thrusting court to center of 2020 presidential race*, L.A. TIMES, (Sept. 18, 2020), <https://www.latimes.com/politics/story/2020-09-18/ruth-bader-ginsburg-trump-biden-mcconnell-politics>.

## II. RECIPE FOR CONSTITUTIONAL ROT: A PARTISAN COURT, A CAPTURED COURT, AND A *MORE* SUPREME COURT<sup>12</sup>

In the 1830s, Alexis de Tocqueville observed something rather unique about the fledgling American democracy; namely, that “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”<sup>13</sup> Almost two centuries later, this observation rings truer than ever. With polarization and gridlock in Congress, individuals and organized interest groups are increasingly looking to the judicial branch to carry out their policy agendas. The Supreme Court, itself intensely divided along partisan lines, has demonstrated a willingness to play a more active, hands-on role in politics. In the last decade, for example, the high court has issued divided and divisive rulings on voting rights,<sup>14</sup> campaign finance,<sup>15</sup> gun rights,<sup>16</sup> contraception,<sup>17</sup> marriage equality,<sup>18</sup> healthcare,<sup>19</sup> immigration,<sup>20</sup> abortion,<sup>21</sup> and LGBTQ discrimination,<sup>22</sup> just to name a few.

As political scientists since Alexis de Tocqueville have observed, certain underlying features of our political system and culture invite lawyers and judges to play a significant role in policymaking in the United States. These features include a mismatch between our inherited political institutions, our political culture, and a politically selected, independent federal judiciary with the power of judicial review.

That our political institutions reflect a profound distrust and skepticism of concentrated power has been an implicit feature of our political culture. As James Madison famously wrote in *Federalist* No. 51: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and

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12. Parts of this section originally appeared in Amanda Hollis-Brusky, *An Activist’s Court: Political Polarization and the Roberts Court*, in PARCHMENT BARRIERS: POLITICAL POLARIZATION AND THE LIMITS OF CONSTITUTIONAL ORDER (2018).

13. ALEX DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed., 1945).

14. *Shelby County v. Holder*, 570 U.S. 529 (2013).

15. *See Citizens United v. FEC*, 558 U.S. 310 (2010); *see also McCutcheon v. FEC*, 572 U.S. 185 (2014).

16. *See District of Columbia v. Heller*, 554 U.S. 570 (2008), *see also McDonald v. City of Chicago*, 561 U.S. 742 (2010).

17. *See Burwell v. Hobby Lobby, Inc.*, 573 U.S. 682 (2014).

18. *See Obergefell v. Hodges*, 576 U.S. 644 (2015).

19. *See Nat’l Fed’n of Indep. Bus. V. Sebelius*, 567 U.S. 519 (2012); *see also King v. Burwell*, 576 U.S. 988 (2015).

20. *See Dep’t of Homeland Sec. v. Regents of the Univ. of California*. 140 S. Ct. 1891 (2020).

21. *See June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

22. *See Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018); *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

in the next place oblige it to control itself.”<sup>23</sup> Dividing and fragmenting power through federalism and the separation of powers, our Madisonian system of government was designed to reign in and prevent an overly active or energetic government.<sup>24</sup> On the other hand, in tension with these inherited political and constitutional structures, we have a political culture that increasingly seeks out and demands “total justice”<sup>25</sup> – that is, a set of attitudes that “expects and demands comprehensive governmental protections from serious harm, injustice and environmental dangers.”<sup>26</sup> In short, Americans increasingly want the government to protect them from harm – to ensure their airplanes and vehicles are safe, their food and water are not poisoned, and their toys are not harmful to children<sup>27</sup> – but the fragmented political institutions we have inherited on top of our lingering skepticism of “Big Government” make courts, not legislatures or bureaucracies, a much more appealing option for satisfying these demands.

Thomas Burke, building on the work of Robert A. Kagan, explains how and why this mismatch between our political structures and our political culture invites and encourages policymaking through litigation and courts:

First, courts offer activists a way to address social problems without seeming to augment the power of the state. . . . Second, [policymaking through litigation] offer[s] a means of overcoming the barriers to activist government posed by the structures of the Constitution. . . . activists [can] surmount the fragmented, decentralized structure of American government, which, (as its creators intended and James Madison famously boasted) makes activist government difficult.<sup>28</sup>

An independent and politically selected judiciary makes litigation even more attractive to policy entrepreneurs; especially to those on the losing end of the political process. Political losers and political minorities turn to the independent judiciary (that is, unelected and unaccountable) in the hopes of persuading judges of claims that fail to command a majority in the legislature.

Because federal courts have the power of judicial review, interest groups and policy entrepreneurs routinely ask them to strike down federal and state

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23. THE FEDERALIST NO. 51, at 290 (James Madison) (Clinton Rossiter ed., 1999).

24. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* 15 (2nd ed., Harvard Univ. Press 2019); *see also* THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS* 7 (2004).

25. *See generally* LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1994).

26. KAGAN, *supra* note 24, at 15.

27. LAWRENCE M. FRIEDMAN, *LAW IN AMERICA* 6–7 (2nd prtng. 2004).

28. BURKE, *supra* note 24, at 7.

statutes, or to overturn the rulings of administrative agencies. Additionally, the decentralized structure of the American judiciary actively encourages forum shopping; that is, well-resourced policy entrepreneurs testing their claims in multiple courts in the hopes of finding a sympathetic judge who is willing to creatively interpret existing statutory or constitutional language to advance their policy agenda (or to thwart the policy agenda of their political opponents).<sup>29</sup>

The underlying structural and cultural features that have long invited judges and lawyers to play a role in American politics have been amplified over the past twenty years by political polarization in Congress, the rise of divided government, and alternating and uncertain party control of government. These developments in our legislative politics have further incentivized groups or movements seeking policy change to opt for a strategy of litigation over legislation, turning the Supreme Court into what I have elsewhere referred to as “an Activist’s Court.”<sup>30</sup>

*A. Ingredients of Constitutional Rot: Political Polarization + A Partisan Court*<sup>31</sup>

One of the primary features of constitutional rot, according to Balkin, is polarization: “[R]ot encourages polarization and it is exacerbated by polarization.”<sup>32</sup> Since 1980 – incidentally, the beginning of our current constitutional regime according to Jack Balkin – the ideological distance between the Democrat and Republican elites has grown at a remarkable rate.<sup>33</sup> Prior to Ronald Reagan’s rise to power, there was “no meaningful gap in the median liberal-conservative scores of the two parties,” with both Democrats and Republicans in Congress occupying “every ideological niche.”<sup>34</sup> Fast forward four decades and there is currently no ideological overlap between the two parties in Congress. The most liberal Republican is still to the right of the most conservative Democrat, and vice-versa. Political scientists refer to this phenomenon as “political polarization.” Because “the Supreme Court follows the election returns,”<sup>35</sup> our polarized politics have produced a polarized, ideologically divided judiciary.

As regime politics theory details, because we have a politically selected judiciary, over time the courts will tend to reflect the values of the electoral

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29. KAGAN, *supra* note 24, at 16.

30. Hollis-Brusky, *supra* note 12.

31. Parts of this section originally appear in Hollis-Brusky, *supra* note 12.

32. Balkin, *supra* note 8, at 151.

33. Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 321 (2016).

34. *Id.* at 29.

35. Forrest Maltzman, Lee Sigelman & Paul J. Wahlbeck, *Supreme Court Justices Really Do Follow the Election Returns*, 37 PS: POL. SCI. & POLITICS 839, 839 (2004).

coalition that dominates.<sup>36</sup> As Cornell Clayton and Michael Salamone write, “During the past 40 years, American politics has been dominated by a partisan regime that is at once more conservative than the New Deal regime it replaced, but also more closely divided and polarized than any in more than a century.”<sup>37</sup> Control of the White House and control of the Senate has vacillated between Republicans and Democrats since the early-1990s when the most senior Associate Justice was appointed to the Supreme Court.<sup>38</sup> This pattern of alternating party dominance in national electoral politics, coupled with the rise of strategic retirements by judges and Justices since President Clinton (that is, retiring under an ideologically compatible or same-party president),<sup>39</sup> has left us with a correspondingly divided and polarized Supreme Court.

The rise of divided government and alternating party control has also resulted in increasing gridlock and obstructionism in the federal government, which has further encouraged policy entrepreneurs to use the courts rather than legislatures to advance their own policy agendas. Though pursuing a legal strategy to advance a policy agenda can be risky due to the unpredictable nature of judicial rulings<sup>40</sup> and the various constraints that inhibit courts from easily enforcing broad and sweeping changes in policy,<sup>41</sup> groups are more attracted to litigation as a strategy under two primary conditions: when significant political and institutional barriers make litigation the only realistic option<sup>42</sup> and when policy entrepreneurs want to insulate their policy gains<sup>43</sup>

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36. See, e.g., Robert A. Dahl, *Decision Making and Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279, 298–99 (1957); Howard Gillman, *Courts and the Politics of Partisan Coalitions*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 644, 645 (Keith E. Whittington et al. eds., 2008).

37. Cornell W. Clayton & Michael S. Salamone, *Still Crazy After All These Years: The Polarized Politics of the Roberts Court Continue*, 12 THE FORUM 739, 740 (2014).

38. *Current Members*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/biographies.aspx> [https://perma.cc/V7DS-B497] (last visited Feb. 4, 2021).

39. Brandon L. Bartels, *The Sources and Consequences of Polarization in the US Supreme Court*, in AMERICAN GRIDLOCK: THE SOURCES, CHARACTER AND IMPACT OF POLITICAL POLARIZATION 171, 179 (James A. Thurber & Antoine Yoshinaka eds., Cambridge Univ. Press 2015).

40. See generally KAGAN, *supra* note 24.

41. See generally GERALD N. ROSENBERG, THE HOLLOW HOPE (John Tryneski ed., Univ. of Chicago Press 2d ed. 2008).

42. See Silverstein, *Law’s Allure*. See also, Burke, *Lawyers Lawsuits and Litigation*.

43. See generally, Thomas F Burke, *Lawyers, Lawsuits and Legal Rights*.



from shifting and uncertain electoral fortunes.<sup>44</sup> Both conditions currently exist.

Divided government, which occurs when one political party controls the presidency while the opposition controls at least one branch of Congress (and which has been the norm in American politics since 1989),<sup>45</sup> erects barriers to policymaking through legislative channels. This is because divided government, particularly when coupled with ideologically distant parties, increases the number of potential veto points in the policymaking process, often requiring supermajorities to pass legislation. As Thomas Keck writes, “[O]n both the left and the right, legislative losers turn to the courts as a matter of course.”<sup>46</sup> More veto points and more gridlock makes virtually every group a “legislative loser” and makes the courts a more attractive venue.<sup>47</sup> Instead of having to win the votes of majorities or super-majorities in the legislature, at the Supreme Court, one only needs to secure five votes.<sup>48</sup>

Pursuing policy through the courts also allows policy entrepreneurs to “insulate” their victories from political enemies.<sup>49</sup> This is a particularly attractive option when partisan control of the legislature and the executive is in near-constant flux and turnover, as it has been since the 1980s.<sup>50</sup> In the period from 1980-2015, for example, control of the presidency alternated between Democrats and Republicans four times, the Senate changed hands seven times, and the House of Representatives three times.<sup>51</sup> And, as I detailed earlier, for the majority of this period, no single party had control of both houses of Congress and the presidency.<sup>52</sup> This makes policy gains

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44. See, e.g., FRANCES E. LEE, *INSECURE MAJORITIES 1* (Univ. of Chicago Press 2016).

45. Tyler Hughes & Deven Carlson, *How Party Polarization Makes the Legislative Process Even Slower When Government is Divided*, UNITED STATES POLITICS & POLICY BLOG, (May 19, 2015), <http://bit.ly/1EhrEsO> [<https://perma.cc/J8UH-6XY7>].

46. THOMAS M. KECK, *JUDICIAL POLITICS IN POLARIZED TIMES 20* (Univ. of Chicago Press 2014).

47. See BALKIN, *supra* note 8, at 139–40.

48. It is illustrative here to cite the late Associate Justice William Brennan’s famous Rule of Five: “Brennan liked to greet his new clerks each fall by asking them what they thought was the most important thing they needed to know as they began their work in his chambers. The pair of stumped novices would watch quizzically as Brennan held up five fingers. Brennan then explained that with five votes, you could accomplish anything” Dawn Johnsen, *Justice Brennan: Legacy of a Champion*, 111 MICH. L. REV. 1151, 1159 (2013).

49. BURKE, *supra* note 24, at 14–15.

50. See *Party Government Since 1857*, HISTORY, ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES (last visited February 4, 2021), <https://history.house.gov/Institution/Presidents-Coinciding/Party-Government/> [<https://perma.cc/M9HA-9WL2>].

51. *Id.*

52. *Id.* Between 1980 and 2015, the government was unified just seven of the total eighteen sessions of Congress during that period. *Id.*

through the federal legislature a risky and uncertain bet. Even if one party does manage to secure unified government for a short period, as the Democrats did between 2009 and 2011,<sup>53</sup> any policies passed – even major legislation like the Affordable Care Act – must be considered to be unstable and uncertain.<sup>54</sup> When the Republicans took back the House and the Senate in the ensuing years, they voted more than fifty times to repeal or roll-back parts of the Act.<sup>55</sup> These efforts failed only because the Democrats maintained control of the presidency. Because courts are relatively independent from the rest of the political system, they can provide a “seemingly safer route” for policymaking and implementation than the political branches.<sup>56</sup> Moreover, because judges serve longer terms and create legal precedent with their rulings, judicial decisions tend to be stickier or more “path-dependent” than those in the political branches.<sup>57</sup>

Not only is the Supreme Court more polarized than ever before, as Balkin notes,<sup>58</sup> it is also more identifiably partisan than any time in the last 100 years. Since 2010, for example, the Supreme Court has been strictly divided along partisan lines, with every Justice appointed by a Democratic president voting more liberally than every Justice appointed by a Republican president.<sup>59</sup> Far from being the historical norm, this partisan divide is out of step with traditional patterns of voting and alignment on the Court.<sup>60</sup> For example, the Roberts Court has split or “sharply divided” (five-to-four, four-to-four, four-to-three, or three-to-two) on nearly one of every five decisions it has rendered, which is the highest rate of division of any court since the New Deal.<sup>61</sup> This partisan split on the Court has produced divided and divisive

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53. *Id.*

54. Patient Protection and Affordable Care Act, 42 U.S.C. §§ 18001–18122 (2010).

55. Byron York, *No, House Republicans Haven't Voted 50 Times to Repeal Obamacare*, WASH. EXAMINER (Mar. 15, 2014, 12:00 AM), <https://www.washingtonexaminer.com/no-house-republicans-havent-voted-50-times-to-repeal-obamacare> [<https://perma.cc/J3R7-JWTS>].

56. BURKE, *supra* note 24, at 15.

57. *See* Silverstein, *supra* note 42, at 1086–91; AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 149–51 (Steven Teles ed., Oxford Univ. Press 2015).

58. BALKIN, *supra* note 8, at 118–21.

59. Devins & Baum, *supra* note 33.

60. *Id.* at 310.

61. Clayton & Salamone, *supra* note 37, at 745.

five-to-four rulings on major issues such as gun control,<sup>62</sup> health care,<sup>63</sup> voting rights,<sup>64</sup> campaign finance,<sup>65</sup> and fair housing.<sup>66</sup> As Brandon Bartels notes, a “vicious circle” exists between polarization on the Supreme Court and the nomination process, with each political party vying to either preserve (the Republicans) or dismantle (the Democrats) the first ideologically homogenous voting bloc on the Supreme Court since the Warren Court.<sup>67</sup>

This identifiable pattern of partisan voting and behavior on the Supreme Court has invited politicians, scholars, and commentators to attack and attempt to delegitimize judicial rulings by noting that the judiciary is doing nothing more than enacting its preferred policy and voting on strictly partisan lines.<sup>68</sup> This has consequences for how the public views the legitimacy of the federal judiciary. Political science literature puts an exclamation point on this, demonstrating the damaging and corrosive effects these portrayals of the federal judiciary as “just another political institution” can have on the legitimacy of the courts.<sup>69</sup>

Stephen Nicholson and Thomas Hansford write that the public’s perception of the Supreme Court as a “legal” versus a “political” institution is key to the public’s perception of its legitimacy.<sup>70</sup> James L. Gibson and Michael Nelson confirmed this finding with recent survey research.<sup>71</sup> These scholars concluded that the single greatest threat to the Supreme Court’s legitimacy comes from its perceived politicization; that is, the belief that “judges are little more than ‘politicians in robes.’”<sup>72</sup> More recent research suggests how perceptions of a politicized judiciary can be exacerbated by high-profile and contentious judicial confirmation hearings.<sup>73</sup> This scholarship provides contemporary empirical support for what Alexander

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62. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

63. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

64. See, e.g., *Shelby County v. Holder*, 570 U.S. 529 (2013).

65. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010).

66. See, e.g., *King v. Burwell*, 576 U.S. 473 (2015).

67. BARTELS, *supra* note 39, at 172.

68. See, e.g., James Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507, 507 (2007).

69. James L. Gibson & Michael J. Nelson, *Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy*, 14 J. EMPIRICAL LEGAL STUD. 592, 592 (2017).

70. Stephen P. Nicholson & Thomas G. Hansford, *Partisans in Robes: Party Cues and Public Acceptance of Supreme Court Decisions*, 58 AM. J. POL. SCI. 620, 620–636 (2014).

71. *Id.*

72. Gibson & Nelson, *supra* note 69, at 595.

73. Christopher N. Krewson & Jean R. Schroedel, *Public Views of the U.S. Supreme Court in the Aftermath of the Kavanaugh Confirmation*, 101 SOC. SCI. Q. 1430, 1430 (2020).

Hamilton knew to be true even in the eighteenth century<sup>74</sup>: the judiciary’s power under our constitution – its very legitimacy – depends on the people seeing it as distinct from politics.

*B. Ingredients of Constitutional Rot: A Captured Court*<sup>75</sup>

When courts become deeply involved in politics and policymaking, in addition to putting their institutional legitimacy on the line, they also run the risk of provoking some of the more pernicious features of our constitutional design. Policymaking through courts – that is, when judges become “the vanguard of policy change”<sup>76</sup> – can invite elite capture or minority tyranny and weaken the checks and balances built into the constitution. Policymaking through courts invites a handful of elite, unelected lawyers and judges to craft and shape policy, which in turn facilitates the kind of minority capture our Constitution was designed to guard against.

When policy entrepreneurs turn to courts instead of legislatures, they can effectively circumvent the various safeguards and constitutional veto points built into the legislative process (congressional committees, majority requirements, supermajority requirements, and the presidential veto). These veto points are designed to decelerate the legislative process, to ensure broad coalitions for governing, and to prevent smaller, energetic “factions” from capturing and dominating the process. As James Madison wrote in *Federalist* No. 10, among the “numerous advantages” of this model of government was its ability to “break and control the violence of faction” by “extending the sphere” and multiplying the number of competing voices and distinct interests involved in the process.<sup>77</sup> These multiple veto points “foster more pluralistic legislative inputs and outputs” and prevent legislatures from acting swiftly and energetically.<sup>78</sup>

Policymaking by lawyers and judges circumvents these checks, leaving policy in the hands of the few, unelected elite, which, if we follow Madison’s analysis in *Federalist* No. 10, facilitates tyranny of the minority, or elite capture:

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74. See generally THE FEDERALIST NO. 78 (Alexander Hamilton).

75. Parts of this section first appeared in my written testimony before the House Judiciary Committee. See *Testimony Before the Comm. on the Judiciary Subcomm. on Courts, Intell. Prop. and the Internet*, 116th Cong. (2020) (statement of Amanda Hollis-Brusky, Assoc. Professor, Pomona Coll.).

76. BALKIN, *supra* note 8, at 139.

77. THE FEDERALIST NO. 10, at 71 (James Madison) (Clinton Rossiter ed., 1999).

78. Mark A. Graber, *Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order*, 94 B.U. L. REV. 611, 643 (2014).

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.<sup>79</sup>

When it comes to judicial policymaking, the number of individuals with access to power and the “compass” within which they are placed are both incredibly small.

To make policy through the Supreme Court, for example, policy entrepreneurs simply need to secure five votes.<sup>80</sup> And, while historically the Justices of the Supreme Court have come from diverse backgrounds, education, and careers, we currently have a Supreme Court that is composed entirely of elite, educated lawyers (eight of whom attended Ivy League law schools) with no political or legislative experience.<sup>81</sup> As Mark Graber writes, Supreme Court “[j]ustices tend to act on elite values because Justices are almost always selected from the most affluent and highly educated stratum of Americans.”<sup>82</sup> In other words, Madison’s recipe for elite capture in *Federalist* No. 10 (a small number of people with uniform interests and backgrounds who can readily and easily concert to execute their plans) reads like a template for our current Supreme Court.<sup>83</sup>

Moreover, because judicial policymaking requires lawyers to argue and bring cases to the courts (judges and Justices cannot simply make cases and questions appear before them “as if by magic”),<sup>84</sup> the policymaking process is de facto captured and controlled by this unelected, elite group. This capture by lawyers has become even more pronounced over the past two decades, with the rise of the Federalist Society on the right and the American Constitution Society on the left. As I write in *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*, these two groups of lawyers are actively working to shape both the “supply side” of judicial policymaking (bringing cases, organizing litigation campaigns, providing intellectual

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79. THE FEDERALIST NO. 10, *supra* note 77, at 78.

80. Robert E. Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-90*, 21 HOFSTRA L. REV. 667, 667 (1993).

81. Michelle McGough, *How to diversify the Ivy League club that is the Supreme Court*, LOS ANGELES TIMES (Oct. 28, 2014), <http://www.latimes.com/opinion/opinion-la/la-ol-supreme-court-diversity-ivy-league-20141028-story.html>.

82. Mark Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOW. L. J., 661, 664 (2013).

83. THE FEDERALIST NO. 10 (James Madison).

84. See CHARLES EPP, *THE RIGHTS REVOLUTION* 5 (1998). See also HOLLIS-BRUSKY, *supra* note 57.

support for judicial decisions) as well as the “demand side” (working to get particular kinds of judges and Justices nominated and confirmed).<sup>85</sup>

For reasons I explore in more depth in *Ideas*, only one of these groups has managed to actually achieve a “de-facto monopoly” on the “training, promotion and disciplining of lawyers and judges”<sup>86</sup>: the Federalist Society for Law and Public Policy Studies. It is worthwhile for that reason to spend some time examining how they achieved this “monopoly” as this could be perceived by the public as capture or at the very least politicization of the courts.<sup>87</sup>

Launched in 1982 by a small group of conservative and libertarian law students at Yale Law School and the University of Chicago Law School, the Federalist Society was founded to provide an alternative to the perceived liberal orthodoxy that dominated the law school curriculum, the professoriate, and most legal institutions at the time.<sup>88</sup> Almost 40 years later, the Federalist Society has moved beyond law schools and grown into a vast network of upwards of 70,000 conservative and libertarian lawyers, policymakers, legislators, judges, journalists, academics, and law students.<sup>89</sup> The project of the Federalist Society was and is to create a conservative counter-elite – that is, a group of interconnected legal professionals dedicated to conservative judicial and policy positions – and to actively work to get these people into positions of power where they can push the law and public policy in a conservative direction.<sup>90</sup> Federalist Society co-founder Steven Calabresi described this project in our interview together:

I think my own goal for the Federalist Society has been . . . [to] have an organization that will create a network of alumni who have been shaped in a particular way. . . . [B]ecause many of our members are right of center and because they tend to be interested in public policy and politics, a lot of them go on to do jobs in government and take positions in government where they become directly involved in policymaking. So I think it’s fair to say that Federalist Society alumni

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85. See HOLLIS-BRUSKY, *supra* note 57, at 165–75.

86. *Id.* at 152–55..

87. This section borrows heavily from my previously published work. See HOLLIS-BRUSKY, *supra* note 57.

88. See HOLLIS-BRUSKY, *supra* note 57.

89. About Us, THE FEDERALIST SOCIETY, <https://fedsoc.org/about-us> [<https://perma.cc/SKE5-4ZED>].

90. David Montgomery, *Conquerors of the Court*, THE WASHINGTON POST MAGAZINE (Jan. 2, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/> [<https://perma.cc/HQ3R-WH3X>].

who go into government have tended to push public policy in a libertarian–conservative direction.<sup>91</sup>

As I detail in *Ideas with Consequences*, the Federalist Society has been incredibly successful in its project to “push public policy” and judicial decision-making in a conservative-libertarian direction.<sup>92</sup> I briefly outline below three ways the Federalist Society – now with a six-Justice super-majority on the Supreme Court – continues to exert its influence on the federal courts.

### 1. Judicial Selection<sup>93</sup>

As several Federalist Society members said to me in our interviews together, “policy is people.” There is a recognition that in order for ideas to have consequences, you need to get people who share those ideas and provide them with access to the levers of power. When it comes to the federal courts, this is done first by populating White House counsel and those responsible for judicial selection under Republican administrations with Federalist Society network members. Don McGahn, former White House Counsel under President Trump and stalwart Federalist Society member, has openly and repeatedly referred to this as “in-sourcing” judicial selection to the Federalist Society.<sup>94</sup> Those network members working within the administration then identify, vet, and select judges with identifiable and reliable ties to the Federalist Society network. In this way, as Federalist Society member Michael Greve put it in our 2008 interview, the Federalist Society has “a de facto monopoly” on the process. Highlighting the contrast between the Federalist Society on the right and attempts to replicate its influence on the left, Greve emphasized, “on the left there a million ways of getting credentialed, on the political right, there’s only one way in these legal circles.”<sup>95</sup>

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91. HOLLIS-BRUSKY, *supra* note 57, at 10.

92. *Id.*

93. *Id.* at 153–55.

94. Robert Barnes, *Federalist Society, White House Cooperation on Judges Paying Benefits*, THE WASHINGTON POST, (Nov. 18, 2017), [https://www.washingtonpost.com/politics/courts\\_law/federalist-society-white-house-cooperation-on-judges-paying-benefits/2017/11/18/4b69b4da-cb20-11e7-8321-481fd63f174d\\_story.html](https://www.washingtonpost.com/politics/courts_law/federalist-society-white-house-cooperation-on-judges-paying-benefits/2017/11/18/4b69b4da-cb20-11e7-8321-481fd63f174d_story.html). It is worth noting that at a March 2020 conference on the future of judicial nominations at Princeton University that I attended, McGahn’s keynote doubled down on the synchronous relationship between the Republican Party and the Federalist Society, noting that he only hired Federalist Society members in his office and his office only considered Federalist Society judges because this credential signaled loyalty to the team.

95. HOLLIS-BRUSKY, *supra* note 57, at 152.

## 2. Lobbying the Courts<sup>96</sup>

Once Federalist Society judges are appointed to the federal bench, they can then be lobbied or helped by fellow network members who support them in pushing the law in a conservative-libertarian direction. Primarily, this involves Federalist Society members providing judges and their clerks with what I call “intellectual capital” to help them justify radically altering or reshaping longstanding constitutional frameworks. Because judges and Justices do not simply “vote” like legislators, but instead publish judicial opinions that outline their reasoning and provide justifications for their decisions, courts are uniquely susceptible to this kind of intellectual influence and lobbying. As I show in *Ideas*, in some of the most controversial decisions of the conservative counterrevolution currently underway on the Supreme Court, the Federalist Society network played a key role in providing the intellectual support and scaffolding for these judicial opinions.<sup>97</sup>

## 3. Acting as a Vocal and Vigilant “Judicial Audience”<sup>98</sup>

To have a serious and lasting influence on the direction of constitutional law and jurisprudence – a constitutional revolution – you need to appoint the right kinds of judges and Justices to the federal judiciary and then you need to make sure that, once appointed, they do not fall victim to “judicial drift” – that is, the observed tendency for some conservative Supreme Court appointees to moderate their beliefs during their tenure on the court. It has been well-documented that the Federalist Society influences the first half of this equation under Republican administrations – who gets appointed – but, as I show in *Ideas*, it also influences the second half of the equation by exerting social and psychological pressure to keep these judges faithful to their Federalist Society principles once on the bench.<sup>99</sup>

This function is best understood in light of political scientist Lawrence Baum’s concept of a “judicial audience.”<sup>100</sup> In his book, *Judges and Their Audiences*,<sup>101</sup> Baum draws on research in social psychology to argue that judges, like all other people, seek approval or applause from certain social and professional groups, and that the manner in which a judge decides cases and writes opinions may be influenced by certain “audiences” the judge knows

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96. *Id.* at 148–52.

97. *Id.*

98. *Id.* at 155–59.

99. *Id.*

100. *See* BALKIN, *supra* note 8, at 118–21.

101. Lawrence Baum, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 24–49 (2006).



will be paying attention to his or her “performance.”<sup>102</sup> Moreover, Baum shows that of all the types of audiences for whom a judge might perform, “social groups and the legal community have the greatest impact on the choices of most judges.”<sup>103</sup> The Federalist Society for Law and Public Policy, as a social and professional network extending to all levels of the legal community, can be understood as a hybrid of both of these most influential referent groups for judges. I provide anecdotes from my interviews with Federalist Society members who describe approaching judges and Justices at Federalist Society conferences and dinners and meetings and telling them “face to face” that these judges and Justices erred. In fact, these members valued the opportunity, through the Federalist Society, to provide “direct feedback” to these judges.<sup>104</sup>

#### 4. The Trump Administration: “In-Sourcing” Federalist Society Influence

Whereas the pages of *Ideas* chronicle the subtle, behind-the-scenes manner in which Federalist Society members worked in the Reagan, George H.W. Bush, and George W. Bush administrations to influence judicial selection and decisionmaking, the Trump administration has taken Federalist Society access and influence to a new zenith.<sup>105</sup> Even before Trump was sworn into office, his campaign took the unprecedented step of releasing a list of twenty-one potential Supreme Court nominees – a list curated by multiple Federalist Society network members, including Vice President of the Federalist Society Leonard Leo – two months prior to the election with the aim of wooing partisan Republicans who might otherwise be loath to vote for Trump.<sup>106</sup>

President Trump made good on his promise to appoint judges “in the mold of Justice Scalia,” repaying partisan Republicans and the Federalist Society network for their loyalty.<sup>107</sup> With Federalist Society Vice President Leonard Leo at his side, advising him and helping to shepherd his nominees

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102. *Id.*

103. *Id.* at 118.

104. HOLLIS-BRUSKY, *supra* note 57, at 155.

105. *Id.*

106. Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, THE NEW YORKER (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> [<https://perma.cc/FLT5-N3MP>]; John Malcolm, *How Trump Changed the Courts in 2017*, HERITAGE FOUNDATION (Dec. 27, 2017), <https://www.heritage.org/courts/commentary/how-trump-changed-the-courts-2017> [<https://perma.cc/GG4N-FTTG>].

107. Jonathan Adler, *How Scalia-esque will Donald Trump’s Supreme Court nominee be?*, WASHINGTON POST (Jan. 26, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/how-scalia-esque-will-donald-trumps-supreme-court-nominee-be/> [<https://perma.cc/NK2N-QRD3>].

through confirmation, it is no overstatement to say that Trump has changed the face and the ideological balance of the federal judiciary, appointing young, conservative Federalist Society-type judges for lifetime terms.<sup>108</sup> As his administration comes to a close, Trump can claim over 200 Article III appointees to the federal judiciary.<sup>109</sup>

Perhaps most consequentially, Trump has helped the Federalist Society secure a six-Justice super-majority on the Supreme Court for the first time in history.<sup>110</sup> Newly minted Justice Amy Coney Barrett has joined Federalist Society brethren John Roberts, Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh,<sup>111</sup> securing a super-majority voting bloc on

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108. Tessa Berenson, *Inside Trump's Plan to Dramatically Reshape U.S. Courts*, TIME MAGAZINE (Feb. 8, 2018), <https://time.com/5139118/inside-trumps-plan-to-dramatically-reshape-us-courts/> [<https://perma.cc/KW8Q-XBTM>].

109. John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RESEARCH CENTER (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [<https://perma.cc/JZC9-WMA3>].

110. Michael Avery & Danielle McLaughlin, *Barrett Poised to Be Sixth SCOTUS Justice Hand-Picked by Federalist Society*, TRUTHOUT, (Oct. 24, 2020), <https://truthout.org/articles/barrett-poised-to-be-sixth-scotus-justice-hand-picked-by-federalist-society/> [<https://perma.cc/UNW5-CHTB>]. Just weeks into his term as president, Trump selected long-time Federalist Society member and conservative judge Neil Gorsuch to fill Scalia's seat on the Supreme Court. In another Federalist Society-friendly twist of fate, in June of 2018, Reagan appointee Anthony Kennedy announced his retirement from the Supreme Court. In addition to being the Supreme Court's last remaining centrist or swing vote, Kennedy was the last remaining Republican-appointed justice on the Supreme Court with no ties to the Federalist Society. Kennedy was replaced with Brett Kavanaugh who, as was well-documented during his extremely controversial confirmation hearings, has long-standing and deep ties to the Federalist Society network. See generally Josh Gerstein, *Gorsuch takes victory lap at Federalist dinner*, POLITICO (Nov. 16, 2017), <https://www.politico.com/story/2017/11/16/neil-gorsuch-federalist-society-speech-scotus-246538> [<https://perma.cc/3L37-T6QF>]. Toobin, *supra* note 106.

111. Michael Kruse, *The Weekend at Yale Politics that Changed American Politics*, POLITICO MAGAZINE (Oct. 2018), <https://www.politico.com/magazine/story/2018/08/27/federalist-society-yale-history-conservative-law-court-219608> [<https://perma.cc/5JVR-FFYM>]; Annie Grayer, *Brett Kavanaugh was concerned with his Federalist Society membership in 2001, emails show*, CNN, (Aug. 19, 2018), <https://www.cnn.com/2018/08/19/politics/brett-kavanaugh-federalist-society-emails/index.html> [<https://perma.cc/F5DD-D2EJ>].

the Supreme Court.<sup>112</sup> As I tell my students every year when I do my judicial process lecture, the late Justice William Brennan was reported to have told every incoming class of law clerks that the “Rule of Five” is the most important rule to learn in Supreme Court jurisprudence.<sup>113</sup> Why? Because “with five votes, you could accomplish anything.”<sup>114</sup> Just imagine what the Federalist Society will be able to do with six.

If we trust the political science on this matter – and I do – then the Federalist Society’s increasingly open ties to the Republican Party, and specifically the Trump administration, is problematic from the standpoint of judicial independence and legitimacy and is contributing to what Balkin calls “constitutional rot.” Recall that political scientists have shown empirically that when the public views the courts as “just another political institution,” their trust and belief in the legitimacy of the courts suffers.<sup>115</sup> Whether the courts have, in fact, been captured by the Federalist Society is not what I am here to debate. Just as the standard in campaign finance law is not just “corruption” but also “the appearance of corruption,” our conversation needs to focus not just on “capture” but also on “the appearance of capture.”

The Federal Judicial Conference recognized this, too. Advisory Opinion 117 sought to amend the Judicial Code of Conduct to bar sitting federal judges from participating in conferences and seminars sponsored by groups “generally viewed by the public as having adopted a consistent political or ideological point of view equivalent to the type of partisanship often found in political organizations.”<sup>116</sup> Though this advisory opinion was eventually withdrawn after intense opposition from Republican Senators and over 200 Republican-appointed judges, its objectives were consistent with what the political science literature tells us. When judges participate in organizations that are “generally viewed by the public as having adopted a consistent political or ideological point of view,” judicial legitimacy suffers; distrust in the courts increases, and, as Balkin reminds us, constitutional rot deepens.<sup>117</sup>

### *C. Ingredients of Constitutional Rot: A More Supreme Court*<sup>118</sup>

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112. Noah Feldman, *Democrats Can’t Stop Brett Kavanaugh’s Confirmation*, BLOOMBERG (Sept. 4, 2018), <https://www.bloomberg.com/opinion/articles/2018-09-04/kavanaugh-hearings-federalist-society-is-so-close-to-victory>.

113. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 196 (2010).

114. *Id.*

115. Gibson & Nelson, *supra* note 69, at 592.

116. Amanda Hollis-Brusky & Calvin TerBeek, *The Federalist Society Says It’s Not an Advocacy Organization. These Documents Show Otherwise*, POLITICO, Aug. 13, 2019.

117. See Balkin, *supra* note 8, at 151 (“Rot both produces and is caused by distrust in government institutions, especially the courts.”).

118. Parts of this section originally appear in Hollis-Brusky, *supra* note 12.

Perhaps equally as pernicious for our constitutional design and the rule of law, political polarization in Congress effectively weakens the checks and balances built into the constitution by empowering judges to have the final say in the interpretation and implementation of policy. In short, it makes the Supreme Court even more supreme.

When political scientists discuss the checks and balances between the courts and Congress, they often point out that the courts do not necessarily have the final say in matters of statutory and constitutional interpretation.<sup>119</sup> “The governing model of congressional-Supreme Court relations,” Richard Hasen writes, “is that the branches are in dialogue on statutory interpretation: Congress writes federal statutes, the Court interprets them, and Congress has the power to overrule the Court’s interpretations.”<sup>120</sup>

If, for instance, the courts interpret a federal statute in a way Congress does not like or agree with, the latter can pass an override that revises or fixes the statute, which is what happened when the Supreme Court narrowly interpreted the statute of limitations for filing an equal pay lawsuit regarding pay discrimination under the Civil Rights Act of 1964.<sup>121</sup> Congress responded by passing the Lilly Ledbetter Fair Pay Act of 2009, which clarified that the statute of limitations resets with every paycheck affected by discriminatory action.<sup>122</sup> If the courts strike down part of a statute as unconstitutional, Congress can propose a constitutional amendment to address it, as it did with the Twenty-Sixth Amendment, which overrode the Supreme Court’s decision regarding lowering the voting age in *Oregon v. Mitchell* (1970).<sup>123</sup> Alternatively, Congress can rewrite the statute or part of the statute so that it aligns with the court’s understanding of the Constitution.

But when political polarization results in gridlock and paralysis in Congress, its ability to “counteract” the “ambition” of the courts is severely compromised (to return to Madison’s *Federalist* No. 51).<sup>124</sup> Two different scholars, using different methodologies, studied congressional overrides of Supreme Court decisions and reached the same conclusion: the number of congressional overrides of court decisions has dramatically declined since

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119. Lawrence Baum & Lori Hausegger, *The Supreme Court and Congress: Reconsidering the Relationship*, in *MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE* 107 (Mark C. Miller & Jeb Barnes eds., 2004).

120. Richard L. Hasen, *End of the Dialogue?*, 86 S. CAL. L. REV. 205, 208 (2013).

121. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

122. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

123. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

124. THE FEDERALIST NO. 51, at 290 (James Madison) (Clinton Rossiter ed., 1999).

1998.<sup>125</sup> This means that, for all intents and purposes, the Court has the final say in matters of statutory and constitutional interpretation, which has real, practical consequences for the checks and balances between the branches. As Hasen concludes, “In a highly polarized atmosphere and with Senate rules usually requiring sixty votes to change the status quo, the Court’s word on the meaning of statutes is now final almost as often as its word on constitutional interpretation.”<sup>126</sup>

When, for example, the Supreme Court, by a five-to-four vote, struck down Section 4 (the coverage formula) of the Voting Rights Act in *Shelby County v. Holder* (2013),<sup>127</sup> Chief Justice John Roberts suggested in his opinion that Congress could simply update the coverage formula and make the statute constitutional: “Congress may draft another formula based on current conditions . . . Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”<sup>128</sup> But, as all astute political observers at the time recognized, this invitation to Congress to simply “draft another formula” would not be taken up.

In the dialogue that has traditionally characterized Court-Congress relations, Congress has effectively silenced itself through polarization and gridlock and has, as a consequence, shifted the balance of power to the courts. Practically speaking, this means that the Court has the final say in matters of statutory and constitutional interpretation, which has consequences for the checks and balances between the branches. This can mean that five men – or five men and one woman – get the final say on the most significant political questions facing our country.

### III. CONCLUSION: ROT, CONSTITUTIONAL HARDBALL & CALLS FOR COURT REFORM

As this Article has illustrated, our polarized politics have led to ideologically-motivated and partisan appointments to the federal courts, invited minority capture of the policymaking process by a small group of unelected lawyers and judges, and aggravated some of the more pernicious features of our constitutional design and encouraged – even rewarded – more partisan decisionmaking by the judges and Justices on the federal bench. Political science warns us that the politicization of the federal courts has grave consequences for judicial independence. The mere perception that courts are partisan and captured – whether or not we are convinced that this is an empirical reality – can cause “we the people” to call into question the very legitimacy of the federal courts and their rulings. When we couple these

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125. See Hasen, *supra* note 120; Matthew R. Christiansen, *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1319 (2014).

126. Hasen, *supra* note 120, at 209.

127. *Shelby County v. Holder*, 570 U.S. 529 (2013).

128. *Id.* at 557.

problematic perceptions of the judiciary with the very real fact that the word of the courts is increasingly final and increasingly supreme on account of polarization and gridlock in Congress, then it is no overstatement to say we are at an inflection point in our constitutional democracy.

It is worthwhile to recall Thomas Jefferson's warnings in 1819 about the unique threat judicial supremacy poses for our entire constitutional system.<sup>129</sup> In his letter to Spencer Roane, Jefferson warned that making the judiciary – an unelected, unaccountable branch of government – too powerful would constitute, in his words, a “*felo de se*” (suicide) of our constitutional system:

[F]or intending to establish three departments, coordinate and independent, that they might check and balance one another, it has given according to this opinion, to one of them alone the right to prescribe rules for the government of the others; and to that one too which is unelected by, and independent of, the nation.<sup>130</sup>

Jefferson is reminding us of the dark side of judicial independence – the possibility of an unaccountable and unchecked rule by a few over the many. And, as Brutus warns, “Men,” and I will add women, “placed in this situation will generally soon feel themselves independent of heaven itself.”<sup>131</sup>

This is why, as Jack Balkin astutely predicts in *The Cycles of Constitutional Time*,<sup>132</sup> scholars, students, and now even elites and legislators in the Democratic Party are talking seriously about court reform and, in doing so, exhuming Brutus to illustrate the dark, dangerous, and even destructive side of judicial independence. The fevered push by Senate Republicans and President Trump to fill Ginsburg's seat over the late Justice's own dying wish and the desire of millions of Americans to wait until after the presidential election is exactly the kind of episode of “constitutional hardball” that has and continues to characterize our period of constitutional rot.<sup>133</sup> As Balkin notes, “Rot leads to ever more aggressive rounds of constitutional hardball; it causes

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129. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819) (available on *Founders Online*, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-0734>).

130. *Id.*

131. *Letters of Brutus, XV*, N.Y. J., March, 20, 1788, reprinted in *THE COMPLETE ANTI-FEDERALIST* 186 (Herbert J. Storing ed., 1981).

132. Balkin, *supra* note 8, at 148–51.

133. Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020, 7:28 PM), <https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87>.

politicians to believe that they should risk reprisals to force a victory now before the other side has a chance to force a victory on them.”<sup>134</sup>

This brazen and seemingly hypocritical political move by the Republicans in power – a move that has solidified a super-majority conservative voting bloc on the Supreme Court for the GOP into the foreseeable future – was, as it turns out, an inflection point for the left. This dramatic episode has catapulted the issue of court reform onto the political agenda for Democrats. While the hashtag #PackTheCourt was trending on Twitter during the nomination hearings of Amy Coney Barrett (and continues to be a rallying call for the left on social media sites), President Joe Biden has committed only to a bipartisan courts commission,<sup>135</sup> to study the various options that would be available to his administration under unified government.

Like President Biden, Jack Balkin urges the Democrats to proceed with caution and resist the allure of “packing the court” – that is, expanding the number of seats on the Supreme Court and lower courts so that Democrats can fill them with ideologically compatible judges and Justices.<sup>136</sup> As Balkin warns, “Packing the Supreme Court by increasing its membership does nothing to promote public trust in the courts or the political branches. It encourages constitutional hardball by the other side. It is likely to increase polarization.”<sup>137</sup> In short, Balkin, concludes, court packing “may make liberal Democrats feel better, but it will not address the deeper causes of rot in our constitutional system.”<sup>138</sup>

Instead, Balkin recommends four kinds of reforms that would tend to “lower the stakes” of judicial appointments, thereby deescalating the arms race the parties have been engaged in over the Supreme Court for the last decade and a half in particular: (1) Instituting regular and predictable Supreme Court appointments; (2) creating a practical equivalent of term limits for Supreme Court Justices; (3) giving the Supreme Court less control over its own docket; and (4) using sunrise provisions that will encourage bipartisan reform.<sup>139</sup>

The Balkin-Biden approach – which seeks to deescalate, disarm, take down the heat – seems to follow from the analysis and drivers of the cycles of polarization and depolarization in *The Cycles of Constitutional Time*.<sup>140</sup> But it also seems illustrative of the Democrats’ tendency toward unilateral disarmament, especially when it concerns the courts. The more impatient or

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134. Balkin, *supra* note 8, at 151.

135. See, e.g., Jennifer Rubin, Opinion, *Biden’s Court Commission Strikes the Right Balance*, WASH. POST (Oct. 23, 2020), <https://www.washingtonpost.com/opinions/2020/10/23/bidens-court-commission-strikes-right-balance/>.

136. Balkin, *supra* note 8, at 151.

137. *Id.*

138. *Id.*

139. *Id.* at 152.

140. *Id.* at 30–37.

militant wings of the left, those advocating for immediate and dramatic escalation proportional to the Garland and Ginsburg episodes, are likely to see this as another concession from Democrats to a long-gone aspiration of civility that the Republicans have decisively abandoned in the name of constitutional hardball. If, as Balkin and political scientists contend, we are seeing the results of asymmetric polarization<sup>141</sup> – that is, the Republicans have moved farther to the right than the Democrats have to the left – then we might understand this set of court reform recommendations as an illustration of asymmetric constitutional hardball.

Faced with a conservative constitutional regime that was given a last-minute artificial life-extension just days before an election that handed the presidency to the Democrats by over five million votes, those on the left are likely to become impatient waiting for the judiciary – by natural process of replacement – to catch up to the American people. A more symmetrical response from the Biden administration might be one that satisfies the calls from the left for a more proportional response to the Republican Party's escalating constitutional warfare (#PackTheCourt) but that would still put us on the path towards deescalation and the regularizing of Supreme Court appointments. Introducing four or six new, term-limited seats on the Supreme Court could achieve the long-term goals outlined by Balkin in *The Cycles of Constitutional Time* while in the short term providing restitution or restorative justice for those on the left who believe the Republicans effectively stole two seats from them.<sup>142</sup> Given that the political opportunity structure may not allow for any serious court reform bills to be passed until after the next midterm elections, the Democrats have some time on their hands.<sup>143</sup>

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141. *Id.* at 162. See generally MATT GROSSMAN & DAVID A. HOPKINS, ASYMMETRIC POLITICS: IDEOLOGICAL REPUBLICANS AND GROUP INTEREST DEMOCRATS (2016).

142. The details of such a proposal could be fleshed out by the Courts Commission. But, in brief, these four or six new seats would need to be staggered in their terms – two at 18 year terms, two at 12 year terms, two at 8 year terms for example – so they would not all be replaced at once by a single future president. When the non-term limited Justices retired, their seat would then become term-limited and be eligible for a single agreed-upon term (18 or 12 years seem to be the most popular proposals). As the new justices rotated off at varying points, their seats would also revert to the single agreed-upon term. Eventually, we would have 13 or 15 term-limited seats and achieve regularized judicial appointments, which Balkin recommends as a longer term solution to polarization and escalating partisan warfare over judicial appointments.

143. At the time of this writing it appears as if even if the Democrats win both of the run-off races for Senate in Georgia, they would at best have a 50-50 split in the Senate. Even with vice-president elect Kamala Harris as the tie-breaker, conservative Democrat Joe Manchin of West Virginia has signaled that he has no interest in



In the meantime, a six-Justice super-majority on the Supreme Court will, depending on how far they want to push their conservative counterrevolution, determine how urgent and how central the issue of court reform remains for the Democrats leading into the 2022 midterm elections.<sup>144</sup> These six Republican-appointed Justices will determine through the scope and direction of their rulings whether Brutus and his dire warnings of the dangers of judicial independence are exhumed once again and weaponized in service of radical court restructuring and change, or whether Brutus is left interred, lying dormant until the next cycle of constitutional rot.

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eliminating the filibuster; a move that would be required for any court reform proposals to make it through that branch and land on President Biden's desk.

144. *About the Court*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Feb. 5, 2021), for who appointed each of the current members of the Supreme Court.