

## FOREWORD

# A Court in Flux That Doesn't Need "Reform"

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The Cato Institute's Robert A. Levy Center for Constitutional Studies is pleased to publish this 20th volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the term just ended plus a look at the term ahead. We are the first such journal to be released, and the only one that approaches its task from a classical liberal, Madisonian perspective, grounded in the nation's first principles, liberty through constitutionally limited government. We release this volume each year at Cato's annual Constitution Day symposium on September 17, a day that really ought to be celebrated as much as July 4 and, belatedly, June 19 (Juneteenth, our newest federal holiday).

Of course, the fact that we can even have an in-person symposium again marks a bit of a return to normal, or perhaps a new normal as the COVID-19 pandemic wanes—or becomes an endemic part of our lives like the common cold (which actually covers many different viral strains, including coronaviruses). We may still be dealing with lingering mask mandates and other restrictions of dubious constitutionality—let alone policy wisdom—but at least vaccines and therapeutics allow most of us to live our lives essentially as in the “before times.”

The same could also be said about the Supreme Court, not in terms of scientific developments, but that the addition of three new

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justices in the last four years hasn't yet transformed the body as it returns to in-person arguments. This past term was supposed to be the coming-out party for a new, 6-3 hyper-conservative Court, but—despite the last day's high-profile cases that broke on such “partisan” lines, correctly resolving issues of election regulation and donor disclosure—was marked largely by surprising unanimity and never-before-seen splits. There just weren't too many ideological-looking decisions, though that's partly because the more pragmatic justices forged grand compromises.

More savvy observers are calling it the 3-3-3 Court, with Stephen Breyer, Sonia Sotomayor, and Elena Kagan on the left; Clarence Thomas, Samuel Alito, and Neil Gorsuch on the right; and John Roberts, Brett Kavanaugh, and Amy Coney Barrett in the middle (or center-right). I'm not yet convinced of that, even if that's a correct general description of how the justices align relative to each other. And recall that the biggest recent conservative “betrayal” was Justice Gorsuch's authorship last year of *Bostock v. Clayton County*—but that's only if conservatives don't consider Chief Justice Roberts worth counting on at all anymore.

Perhaps most notably, Justice Barrett shocked doomsayers (but nobody else) by ruling according to her own brand of jurisprudence more than any political agenda. She joined her Democratic-appointed colleagues when the law, as she saw it, demanded it, including in the 7-2 majority that rejected the latest (and last) existential challenge to Obamacare. Those senators, activists, and pundits who acted during her confirmation process as if she were nominated to take health care away from millions were either misinformed or disingenuous (or both).

Interestingly, the “shadow” docket—a range of orders and summary decisions other than in cases that enjoy full briefing and argument—showed Barrett's impact more than the regular one. Before Justice Ruth Bader Ginsburg died, the Court sustained pandemic-related restrictions on religious services, 5-4 with Roberts joining the liberals. After “ACB” joined the Court, it started blocking similar restrictions, with the chief in dissent.

Justice Barrett wasn't alone in defying expectations. When you look at the numbers, the justices were all over the place—except Justice Kavanaugh, who was in the majority in all but two cases and is the definitive man in the middle. This mish-mash is the ultimate

vindication for Justice Breyer, who at a Harvard lecture in April repeated that the Court is a *legal* rather than political institution. The Court's politics-avoidance tamped down calls for court-packing and other radical changes—though we'll see what the presidential commission on the Supreme Court comes up with when it issues its report (due November 15, right in time for Thanksgiving).

And speaking of Breyer, court-watchers waited with bated breath for word of whether he'd retire. The oldest justice, having just turned 83, is well aware of the Democrats' razor-thin Senate margin, but he's enjoying finally becoming the leader of the liberal bloc (having initially been the junior justice for 11 years, the longest of anyone since the Court was fixed at nine seats). It also could be that pressure from progressive activists marginally pushed him to stay another year ahead of the 2022 midterms. In any case, even as Democrats fear a repeat of the late Justice Ginsburg's refusal to retire when their party last held both the White House and Senate, that concern won't truly ripen until next year.

Interestingly, this term had the second-lowest number of opinions after argument (57) since the Civil War, topping only the previous term, when the pandemic forced the postponement of oral arguments and bumped some cases into this term. So the Court is being stingy with its cert. grants, which frustrates advocates who see many worthy petitions inexplicably denied—or sometimes with one, two, or even three dissents from denial (which shows that, however they rule on the merits, Justices Kavanaugh and Barrett are more cautious on this aspect of the shadow docket).

But note that 27 of those 57 opinions were decided unanimously. When you add in the cases with one dissent, you're already at 60 percent of the docket—so the narrative of a starkly divided Court is false. There were only a dozen 6-3 opinions and half a dozen 5-4 ones. Notably, Chief Justice Roberts issued his first-ever solo dissent, in the nominal-damages student speech case of *Uzuegbunam v. Preczewski*.

But back to Kavanaugh: the only other justices in the last half-century who were in the majority as much as he was this term (97 percent of the time) are Roberts last year and Anthony Kennedy three times. Kavanaugh isn't exactly a "swing" vote—there were six different alignments in the 6-3 cases and five in the 5-4 cases—but he's definitely at the Court's center. Not surprisingly, Justice

Sotomayor was least in the majority, being on the winning side in fewer than half the nonunanimous cases. Also not surprisingly, Kavanaugh and Roberts continue to be the justices most likely to agree, while Sotomayor and Alito are least likely to be on the same side.

The Ninth Circuit attained a magnificent 1-15 record—the one affirmance was in the NCAA antitrust case—keeping its crown as the biggest loser (unless you count courts with few reviewed cases). It may not maintain that dubious distinction for long, however, because President Trump’s ten appointments to that court mean that there are now five circuits with a higher ratio of Democratic to Republican-appointed judges (and thus presumably, but not automatically, less in sync with the Supreme Court). But really, wherever your appeal originates, getting the justices to take your case is most of the battle; this term, an amazing 80 percent of lower court rulings on the regular (sunshine?) docket were reversed or vacated.

Finally, getting back to my original theme, the liberal bloc was in the majority in 13 of the 29 nonunanimous decisions, and there were only six “partisan” 6-3 decisions. So while the Court certainly leans right in conventional shorthand, it’s very much in flux.

Still, the last few years have shown that the Supreme Court is now covered by the same toxic cloud that has enveloped all the nation’s public discourse. Although it’s still respected more than most institutions, it’s increasingly viewed through a political lens. What most concerns people is how judicial politics affect the Court’s “legitimacy”—a broader subject that I’ve written about elsewhere—but given the controversy over the confirmation of the previous administration’s three justices, what lessons can we draw from the history of confirmation battles? I came up with seven, and they show that, to the extent we need institutional reform, it has nothing to do with process or structural issues.

## **1. Politics Has Always Been Part of the Process**

Politics has always been part of the process of selecting and confirming judicial nominees. From the early republic, presidents have picked justices for reasons that include balancing regional interests, supporting policy priorities, and providing representation to key constituencies. They’ve tried to find people in line with their own political thinking, and that of their party and supporters. Look at

the judicial battles of John Adams and Thomas Jefferson, with the Midnight Judges Act: the original court-packing. There's never been a golden age when "merit" as an objective measure of legal acumen was the sole consideration for judicial selection.

And control of the Senate is key. Historically, the Senate has confirmed fewer than 60 percent of Supreme Court nominees under divided government, as compared to just under 90 percent when the president's party controlled the Senate. Timing matters too: over 80 percent of nominees in the first three years of a presidential term have been confirmed, but barely more than half in the fourth year. Combining these disparities shows that only 20 percent of election-year nominees have been confirmed under divided government but 90 percent under united.

Nearly half the presidents have had at least one unsuccessful nomination, starting with George Washington and running all the way through Barack Obama. In all, of 164 nominations formally sent to the Senate, only 127 were confirmed, a success rate of 77 percent. Of those 127, one died before taking office and seven declined to serve, the last one in 1882—an occurrence unlikely ever to happen again. Of the rest, 12 were rejected, 12 were withdrawn, ten expired without the Senate's taking any action, and three were "postponed indefinitely" or tabled. So the 2016 blockade of Merrick Garland was hardball politics, but hardly unprecedented.

## **2. Confirmation Fights Are Now Driven by Judicial Philosophy**

To a certain extent, the politicization of Supreme Court appointments has tracked political divisions nationally. But couching opposition in terms of judicial philosophy is a relatively new phenomenon.

Earlier controversies tended to revolve around either the president's relationship with the Senate or deviations from shared understandings of the factors that go into nominations for particular seats—especially geography and patronage. That dynamic is markedly different from the ideological considerations we see now for at least two reasons. With the culmination of several trends whereby divergent interpretive theories map onto partisan preferences at a time when the parties are ideologically sorted and polarized, it's impossible for a president to find an "uncontroversial" nominee.

The conservative legal movement, meanwhile, has learned its lesson; "no more Souters" means there must be a proven record, not

simply center-right views and affiliations, showing not telling a commitment to originalism and textualism. The entire reason candidate Trump released his list was to convince Republicans, as well as cultural conservatives who may otherwise have stayed home or voted Democrat, that he could be trusted to appoint the right kind of judges. This was a real innovation, and we could see lists become standard practice, even if candidates from the two parties might use different criteria for shaping those lists, with more concern for demographic representation among the Democrats, who have a broader swath of lawyers to choose from.

### **3. Modern Confirmations Are Different Because the Political Culture Is Different**

The inflection point for our legal culture, as for our social and political culture, was 1968, which ended that 70-year near-perfect run of nominations. Until that point, most justices were confirmed by voice vote, without having to take a roll call. Since then, there hasn't been a single voice vote, not even for the five justices confirmed unanimously or the four whose no votes were in the single digits. And despite those "easy" confirmations, we've seen an upswing in no votes; five of the closest eight confirmation margins have come in the last 30 years. Not surprisingly, the increased opposition and scrutiny has also signaled an increase in the time it takes to confirm a justice; six of the eight longest confirmations have come since 1986.

There are many factors going into the contentiousness of the last half-century: the Warren Court's activism and then *Roe v. Wade* spawned a conservative reaction; the growth of presidential power to the point where the Senate felt the need to reassert itself; the culture of scandal since Watergate; a desire for transparency when technology allows not just a 24-hour media cycle but a constant and *instant* delivery of information and opinion; and, fundamentally, more divided government. As the Senate has grown less deferential, and presidential picks more ideological, the clashes have grown.

To put a finer point on it, all but one failed nomination since Abe Fortas in 1968 have come when the opposite party controlled the Senate. The one exception is Harriet Miers, who withdrew

because she was the first nominee since Harrold Carswell in 1969 to be seen as not up to the task. For that matter, this turbulent modern period has seen few outright rejections—just three in 53 years—with prenomination vetting and Senate consultation obviating most problematic picks. At the same time, the inability to object to qualifications has led to manufactured outrage and scandal-mongering.

#### **4. Hearings Have Become Kabuki Theater**

Public hearings have only been around for a century, starting with the contested Louis Brandeis nomination in 1916. But Brandeis didn't testify himself; it simply wasn't regular practice until the 1950s, when Dixiecrats used hearings to rail against *Brown v. Board of Education*. Otherwise, hearings became perfunctory discussions of personal biography. John Paul Stevens, the first nominee after *Roe v. Wade*, wasn't even asked about that case—which was already controversial, have no doubt.

Things changed in the 1980s, not coincidentally when the hearings began to be televised. Now all senators ask questions but nominees largely refuse to answer, creating what Elena Kagan 25 years ago called a "vapid and hollow charade." But even with this conventional narrative, there has been a subtle shift; from Robert Bork in 1987 through Stephen Breyer in 1994, nominees went into some detail about doctrine. Clarence Thomas discussed natural law and the role that the Declaration of Independence plays in constitutional interpretation. Ruth Bader Ginsburg talked about gender equality and the relationship between liberty and privacy.

Beginning with John Roberts in 2005, however, the nominees still covered the holdings of cases and what lawyers call "black letter law"—what you need to know to get a good grade in law school—but there's been little revelation of personal opinions. These days, senators try to get nominees to admit that certain controversial cases are "settled law," whether *Roe* when coming from a Democrat or *District of Columbia v. Heller* from a Republican. Of course, when you're dealing with the Supreme Court, law is settled until it isn't, so nominees have come to say that every ruling is "due all the respect of a precedent of the Supreme Court," or some such. And that's before we even get to last-minute accusations of sexual impropriety.



## 5. Every Nomination Can Have a Significant Impact

The confirmation process has little to do with being a judge or justice. Once that spectacle is over, the new justice takes his or her seat among new colleagues—a lifetime “team of nine,” as Justice Kavanaugh called it at his hearing—to begin reading briefs and considering technical legal issues. As former White House Counsel Don McGahn has described, “it’s a Hollywood audition to join a monastery.”

Regardless, as the late Justice Byron White was fond of saying, every justice creates a new Court, so each change shakes up the previous balance. Not all historically significant cases would’ve turned out differently if one justice were replaced, but some would have. And not simply by changing the party of the president making the appointment. The *Slaughterhouse Cases*, which eviscerated the Fourteenth Amendment’s protections against state action, was a 5-4 ruling with Lincoln appointees split 2-3, Grant appointees split 2-1, and a Buchanan appointee breaking the tie. *Lochner v. New York* was another 5-4, with Republican appointees split 3-3 and Democratic appointees split 2-1.

And all that’s before we get to the modern era, when we got used to having certain justices as the swing votes on issues ranging from affirmative action and redistricting to religion in the public square and gay rights. So many cases would’ve been decided differently had the conservative Bork been confirmed instead of the moderate Kennedy, and differently still had the libertarian Douglas Ginsburg—President Reagan’s next nominee after Bork, who withdrew after revelations of marijuana use—occupied that seat. For that matter, had Edith Jones been nominated in 1990 instead of David Souter, Kennedy wouldn’t have been the median vote from 2005 to 2018; John Roberts would’ve been. And if Michael Luttig had been picked instead of Roberts in 2005, it would’ve been a *very* different Court these last 16 years.

In part because they’ve been burned so many times, Republicans focus on the Court as an election issue much more than Democrats. *Bush v. Gore*, *Citizens United*, and *Shelby County*, the three biggest progressive losses of the last 25 years, have riled activists and elites, and ratcheted up confirmation battles, but haven’t translated into campaigns regarding judges as such. Democrats may now be catching up, even though *during* the Garland experience, they didn’t make much of the vacancy.



Moreover, vacancies have become more important in the last half-century because justices now serve longer. Before 1970, the average tenure of a Supreme Court justice was less than 15 years. Since then, it's been more than 25. Justices appointed at or before age 50, like Roberts, Kagan, Gorsuch, and Barrett, are likely to serve 35 years, or about nine presidential terms. Justice Thomas, who was 43 when he joined the Court and has already served 30 years, could stay on another decade!

## **6. The Hardest Confirmations Come When There's a Potential for a Big Shift**

Replacing liberal lion Thurgood Marshall with counterculture conservative Clarence Thomas was a fight, but appointing Antonin Scalia to William Rehnquist's seat when Rehnquist was elevated was a cakewalk. Would Kavanaugh have faced such strong opposition if he had been nominated for Thomas's seat? Would there have been as big a ruckus last fall if President Trump were replacing Justice Thomas rather than Justice Ginsburg? Will the fight to replace Justice Breyer be fiercer under President Biden or a Republican president?

Of course, presidents aren't always successful in moving the Court in their preferred direction. Thomas Jefferson tried valiantly to dislodge the powerful Federalist judicial impulse, only to see his nominees fall under John Marshall's sway. Abraham Lincoln named Treasury Secretary Salmon P. Chase as chief justice, partly to get him out of his hair, but more importantly to uphold the legislation by which the federal government had financed the Civil War. Instead, Chief Justice Chase wrote the opinion finding the Legal Tender Act unconstitutional. Teddy Roosevelt should've been pleased with the great progressive Oliver Wendell Holmes, but after a major antitrust case, TR inveighed that "I could carve out of a banana a judge with more backbone than that."

Woodrow Wilson, a renowned scholar of jurisprudence and thus in theory more sensitive to these concerns than most other presidents, named another storied progressive, Brandeis, but also the most retrograde justice of that or possibly any time, James Clark McReynolds, who didn't seem to share any of Wilson's views other than with regard to antitrust (and bigotry). Calvin Coolidge's sole nominee, Harlan F. Stone, would end up betraying his benefactor's laissez-faire proclivities by joining with Holmes and Brandeis in

taking the Court in a judicially restrained, and therefore progressive, direction. Harry Truman called putting Tom Clark on the Supreme Court his “biggest mistake” after Justice Clark ruled against his 1952 seizure of steel mills. Dwight Eisenhower was disappointed with both Earl Warren and William Brennan, although the latter was more of a political calculation ahead of the 1956 election, intended to help with the Catholic (and crossover Democrat) vote. Nixon’s appointment of Harry Blackmun similarly mitigated the reversal of the Warren Court that he had hoped to achieve. I could go on.

Moreover, a nominee picked for his views on the issues of the day might act contrary to type when the issue mix changes. The judicial restraint of Felix Frankfurter, a New Deal progressive who co-founded the ACLU, made him a conservative in the postwar era, while John Roberts’s similar restraint led him to defer both to a wartime president and a peacetime Congress.

## **7. The Court Rules on So Many Controversies That Political Battles Are Unavoidable**

Under the Framers’ Constitution, by which the country more-or-less lived for its first 150 years, the Supreme Court hardly ever had to curtail a federal law. If you read the Congressional Record of the 18th and 19th centuries, Congress debated whether particular legislation was constitutional much more than whether something was a good idea. In 1887, Grover Cleveland vetoed an appropriation of \$10,000 for seeds to Texas farmers who were suffering from a terrible drought because he could find no warrant for such appropriation in the Constitution.

Judges play bigger roles today; as the Court has allowed the government to grow, so has its own power to police the federal programs its own jurisprudence enabled. For example, the idea that the General Welfare Clause justifies any legislation that gains a majority in Congress—as opposed to *limiting* federal reach to national issues—emerged in the Progressive Era. In the 1930s and ’40s, we thus had the perverse expansion of the Commerce Clause with cases like *NLRB v. Jones & Laughlin* and *Wickard v. Filburn*, which gained renewed prominence in the constitutional debate over Obamacare.

We’ve also had the flipside of the expansion of powers: the warping of rights. In 1938, the infamous Footnote Four in the *Carolene Products* case bifurcated our rights such that certain rights are more

equal than others in a kind of *Animal Farm* approach to the Constitution. So it's the New Deal Court that politicized the Constitution, and thus also the confirmation process, by laying the foundation for judicial mischief of every stripe.

In that light, modern confirmation battles are all part of, and a logical response to, political incentives, to which senators are merely responding. As my predecessor Roger Pilon wrote presciently nearly 20 years ago, "Because constitutional principles limiting federal power to enumerated ends have been ignored, the scope of federal power and the subjects open to federal concern are determined now by politics alone. Because the rights that would limit the exercise of that power are grounded increasingly not in the Constitution's first principles but in the subjective understandings of judges about evolving social values, they too increasingly reflect the politics of the day."<sup>1</sup>

The ever-expanding size and scope of the federal government has increased the number of issues brought under Washington's control, while the collection of those new federal powers in the administrative state has transferred ultimate decision-making authority to the courts. The imbalance between the executive branch and Congress has made the Supreme Court into the decider both of controversial social issues and complex policy disputes.

### **Possible Changes to the Confirmation Process**

But will any reforms to the confirmation process change the toxic dynamic people complain about? Should we have rules for how many days after a nomination there must be a hearing and then a vote? Maybe we should consider restoring the filibuster for nominees—although Gorsuch was the first and only Supreme Court nominee subjected to a partisan filibuster. Of course, if we had the political alignment for these kinds of changes, we wouldn't have the toxic atmosphere we're in, so it's a chicken-and-egg problem.

Henry Saad, a former Michigan Court of Appeals judge whose nomination to the Sixth Circuit was filibustered under George W. Bush, has proposed a number of reforms to the nomination and confirmation process, most of which are relevant only to the

<sup>1</sup> Roger Pilon, "How Constitutional Corruption Has Led to Ideological Litmus Tests for Judicial Nominees," *Cato Inst. Pol'y Analysis* No. 446, at 11, Aug. 6, 2002.

lower courts.<sup>2</sup> With respect to reforms that would apply equally to Supreme Court nominees, Saad would make it a violation of judicial ethics for nominees to give their opinions about a case, while making hearings untelevised, with questions submitted in writing, restricted to professional qualifications, and asked by the chief counsel for each party's judiciary committee members. Some committees allow this in other contexts, and while it didn't seem to work very well for Republicans in the supplemental Kavanaugh hearing, that was largely a function of the five-minute increments the counsel questioning was forced into. Any personal information or ethical concerns could be handled in the confidential session that the judiciary committee already holds to discuss the FBI background investigation and other sensitive matters.

These sort of post-nomination proposals are healthy because they target the spectacle that confirmations have become, with senators either not equipped to handle the required lines of questioning or grandstanding to produce a gotcha moment, or at least B-roll for campaign videos. "It's like testifying in a restaurant," quipped Don McGahn, with photographers clicking away in front and protestors haranguing in the back. And it's not like we learn anything about nominees, who are now coached to avoid saying anything newsworthy.

I've come to the conclusion that we should get rid of hearings altogether, that they've served their purpose for a century but now inflict greater cost on the Court, Senate, and rule of law than any informational or educational benefit. Nominees have instantly searchable records these days—going back to collegiate writings and other digitized archives—so is there any need to subject them, and the country, to a public inquisition? At the very least, the Senate could hold nomination hearings entirely in closed session.

Outside-the-box thinking should be commended and proposals to improve confirmation processes shouldn't be discounted lightly, especially if cosmetic or easy changes would enhance public confidence in the Court's integrity. I'm willing to consider anything that would show that there's a difference between interpreting the law and making it, between judging and legislating.

<sup>2</sup> Henry Saad, remarks at conference on "The Politics of Judicial Nominations in an Age of Mistrust," Princeton Univ., Mar. 6, 2020.

But I'm not sure any of these formalistic changes would do anything given that it's not a breakdown in the rules that caused the poisonous atmosphere surrounding nominations, but the other way around. All of this "reform" discussion boils down to re-arranging the deck chairs on a sinking ship. And this Titanic is not the appointment process, but the ship of state. The fundamental problem we face, and that the Supreme Court faces, is the politicization not of the *process* but of the *product*. The only way judicial confirmations will be detoxified, and the only way we reverse the trend whereby people increasingly see judges as "Trump judges" and "Obama judges," is for the Supreme Court to restore our constitutional order by returning improperly amassed federal power to the states, while forcing Congress to legislate on the remaining truly national issues rather than letting bureaucratic rules govern us.

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As one Court watcher wrote a quarter-century ago, "Today's confirmation battles are no longer government affairs between the President and the Senate; they are public affairs open to a broad range of players. Thus, overt lobbying, public opinion polls, advertising campaigns, focus groups, and public appeals have all become a routine part of the process."<sup>3</sup> Those trends have only accelerated in the intervening 25 years, such that Supreme Court nominations are perhaps the highest-profile set-pieces in the American political system. Not even set-pieces but months-long slogs. Once the inside game of picking the nominee ends, the outside game begins, culminating in the literally made-for-TV hearing and then a vote that can be just as dramatic.

It's not good, but we've gotten here because Congress and the presidency have gradually taken more power for themselves, and the Supreme Court has allowed them to get away with it, aggrandizing itself in the process. As we've gone down that warped jurisprudential track, the judiciary now affects the direction of public policy more than ever—so of course judicial confirmations are going to be fraught.

There are two big buckets of cases where that dynamic has contributed to the ratcheting up of tensions that has both crumbled

<sup>3</sup> John A. Maltese, *The Selling of the Supreme Court Nominees* 143 (1995).

Senate norms and filtered down into lower-court nominations: (1) cultural issues, ranging from abortion and LGBTQ issues to the Second Amendment and death penalty, and (2) what I'll call "size of government" issues, which encompasses everything from environmental regulations to Obamacare, guidance documents to enforcement practices. And then there's an overlay of "structural" cases on election regulation whose legal issues in the abstract shouldn't have partisan valence, but in the real world of American politics obviously do.

As the response of the conservative legal movement to various judicial provocations has shifted, the debate over that constellation of issues has crystallized. From calls for restraint in the face of the Warren Court's making up social policy out of whole cloth—which ultimately led to too much deference to the political branches, and thus a long-term loss for constitutional governance—the focus now is on engaging the law instead of exercising what Alexander Bickel called the "passive virtues." Indeed, "activism" has become a vacuous term that conveys only disagreement with the judge or opinion being criticized. The battle has been joined over the legal theory rather than judicial process.

That is, so long as we accept that judicial review is constitutional and appropriate in the first place—how a judiciary is supposed to ensure that the government secures and protects our liberties without it is beyond me—then we should only be concerned that a court "gets it right," regardless of whether that correct interpretation leads to the challenged law being upheld or overturned. To paraphrase John Roberts at his confirmation hearings, the "little guy" should win when he's in the right, and the big corporation should win when it's in the right. The dividing line, then, is not between judicial activism (or passivism) and judicial restraint, but between legitimate and vigorous judicial engagement and illegitimate judicial imperialism.

The judicial debates we've seen the last few decades were never really about the nominees themselves—just like proposals for court-packing and the like aren't about "good government." They're about the Court's direction. The left in particular needs its social and regulatory agendas, as promulgated by the executive branch, to get through the judiciary, because they would never pass as legislation at the national level. That's why progressive forces pull out all the stops against originalist nominees who would enforce limits on

federal power. Indeed, all the big nominee blowups in modern times have come with Republican appointments. The one quasi-exception didn't involve any attacks on the nominee, but the rare case of an election-year vacancy arising under divided government.

If nominations were depoliticized, whether through term limits or any other reforms, or some unpredictable shock that recalibrated norms, that would likewise depoliticize the exercise of judicial power, both in perception and reality. But term limits would take a constitutional amendment and everything else is either completely unworkable or doesn't actually solve the identified problem. We can't just wave a magic wand and go back to some halcyon age where the issues we faced as a country, the development of the law, and the political dynamic, were all different. "If they could truly, truly go back, I hear from most senators that they would prefer a return to the pre-nuclear-option days," Ron Klain observed to me, drawing on his experience with judicial nominations in the Clinton and Obama administrations. The man who's now President Biden's chief of staff (some say "prime minister") continued, "in many ways, it's easier for them now, because there's very little constituency for voting for the other party's nominees."

The only lasting solution to what ails our body politic is to return to the Founders' Constitution by rebalancing and devolving power, so Washington isn't making so many big decisions for the whole country. Depoliticizing the judiciary and toning down our confirmation process is a laudable goal, but that'll happen only when judges go back to judging rather than bending over backwards to ratify the constitutional abuses of the other branches.

The judiciary needs to once again hold politicians'—and bureaucrats'—feet to the constitutional fire by rejecting overly broad legislation of dubious constitutional warrant, thus curbing executive-agency overreach and putting the ball back in Congress's court. And by returning power to the people, while ensuring that local majorities don't invade individual constitutional rights. After all, the separation of powers and federalism exist not as a dry exercise in Madisonian political theory but as a means to that singular end of protecting our freedom.

Ultimately, judicial power is not a means to an end, but an enforcement mechanism for the strictures of a founding document intended just as much to curtail the excesses of democracy as to



empower its exercise. In a country ruled by law, and not men, the proper response to an unpopular legal decision is to change the law or amend the Constitution. Any other method leads to a sort of judicial abdication and the loss of those very rights and liberties that can only be vindicated through the judicial process. Or to government by black-robed philosopher kings—and as Justice Scalia liked to say, why would we choose nine lawyers for that job?

The reason we have these heated court battles is that the federal government is simply making too many decisions at a national level for such a large, diverse, and pluralistic country. There's no more reason that there needs to be a one-size-fits-all health care system, for example, than that zoning laws must be uniform in every city. Let federal legislators make the hard calls about truly national issues like defense or (actually) interstate (actual) commerce, but let states and localities make most of the decisions that affect our daily lives. Let Texas be Texas and California be California. That's the only way we're going to defuse tensions in Washington, whether in the halls of Congress or in the marble palace of the highest court in the land.