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Forum: What's the Matter With the Supreme Court?

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POLITICS SUPREME COURT THE CONSTITUTION

Forum: What's the Matter With the Supreme Court?

And what can be done to fix it?

By Michael Klarman, Nadine Strossen, Eli Noam, Sanford Levinson and Mark Tushnet

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Supreme Court nominee Brett Kavanaugh during his Senate Judiciary Committee confirmation hearing on Capitol Hill
(Reuters / Joshua Roberts)

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or nearly two months now, the Senate has been pretending to consider the president's nomination of Brett Kavanaugh—a partisan hack undistinguished but for his marked commitment to the limitlessness of executive power—as an associate justice on the Supreme Court. A painfully sad sequel to the judicial coup d'état that was last year's elevation of Neil Gorsuch to what rightfully should have been Merrick Garland's seat, Kavanaugh's confirmation now appears all but certain, presenting a clear and present danger to the rights and liberties of countless Americans—a calamity from which the country will not recover, if it does at all, for many, many years.

The problem goes beyond Kavanaugh, however, and deeper than Trump. How is it possible—and why should it be—for a proudly incompetent, boisterously corrupt president who, by any reasonable measure, lost the election by millions of votes to shape the interpretation of the Constitution by the high court for decades to come? Why is it that the fate of the republic itself hinges on the health and well-being of a single berobed octogenarian? Somewhere in the constitutional design of the Supreme Court something is not working—or, more frighteningly, perhaps it is working all too well.

To find out what really ails the Supreme Court, and how it can be fixed, we asked a few progressive constitutional lawyers to offer their prescriptions.

—*Richard Kreitner*



SIZE MATTERS

MICHAEL KLARMAN

The Supreme Court has always been a political institution, but in recent decades it has become an adjunct of the Republican Party. Today's conservative majority on the Court busts labor unions (which remain the backbone of the Democratic Party) and undermines class-action litigation (which the Republican justices regard as a gravy train for plaintiffs' lawyers, who contribute disproportionately to Democratic coffers). That same majority legitimizes voter suppression to diminish turnout among racial minorities, poor people, and young adults—all to the disadvantage of the Democratic Party. Conservative justices have refused to intervene against gerrymandering, which vastly inflates Republican power at the state and national levels. These same justices have also used dubious interpretations of the First Amendment in campaign-finance rulings that inevitably redound to the benefit of the Republican Party, which derives a disproportionate share of its resources from billionaire donors. The Court's Republican majority

ferrets out nonexistent animus against conservative Christians in a Colorado civil-rights commission, while turning a blind eye to transparent animus against Muslims within the Trump administration. And, lest we forget, Republican justices shut down a recount that jeopardized the prospects of their party's presidential candidate.

When progressives win back political power, they will be confronted with the most conservative Supreme Court in nearly a century. It is easy to imagine that Court concocting constitutional arguments against virtually every measure a progressive administration might pursue—for example, universal health care, a ban on assault weapons, protections for voting rights, and environmental regulations to mitigate the effects of human-caused global climate change.

The most direct solution would be to increase the institution's size. Adding one justice would be an obvious and eminently just solution to Mitch McConnell's theft of the seat President Obama nominated Merrick Garland to fill. But Democrats should not stop there. Altering the size of the Court has been done many times in American history (though not since 1870), and is clearly constitutional.

Democratic candidates have won the popular vote in six of the last seven presidential elections. One would think that would entitle Democrats to control

of the Supreme Court. But such control has eluded them because of the vagaries of the Supreme Court appointments process, our absurd Electoral College system, Senator McConnell's theft of the Scalia seat, and Russian meddling in the 2016 election. A president who lost the popular election by 2.9 million votes, whose victory was rendered possible only by an FBI director's misguided intervention in the final days of the contest and by Russian meddling in the election, ought not to be making appointments to the Supreme Court that will continue to affect the country for the next 30-plus years.

Of course, Republicans will scream bloody murder at the mere mention of "court-packing," accusing Democrats of an unprecedented assault on our democratic institutions and traditions. Given Republican behavior of recent decades, such protests would be risible.

Democrats are rightly proud that we do not threaten to default on the national debt when we do not get our way, or steal Supreme Court vacancies when our party is out of power, or eviscerate the powers of an office after losing control of it (as the Republican-controlled North Carolina legislature did to the state's governorship after the 2016 election). Most Democrats would prefer a world in which both

parties played by the established rules. But we cannot continue to fight with one arm tied behind our backs.



ABOLISH LIFE TENURE

NADINE STROSSEN AND ELI NOAM

Arguably the most important structural problem with the Supreme Court is the justices' lifetime tenure "during good Behavior."

In 1787, when the Constitution was drafted, average life expectancy in the United States was just 36 years. Death itself would limit how long justices served. Today, however, average life expectancy is almost 79 years.

Unsurprisingly, vacancies have become rare. In the past two decades, a vacancy has occurred, on average, once every four years. In the preceding two centuries, vacancies occurred twice as often.

The nine most recent vacancies were created by the death or resignation of justices who had served, on average, 26 years. The average for their 96 predecessors? Just 16 years.

The justices' longer terms on the Court, and the randomness with which the vacancies occur, have several negative consequences.

First, the stakes for presidential appointments have become extraordinarily high, leading to a hyper-intense confirmation process rampant with political and personal attacks.

Second, some presidents have far more appointments than others, and some have none at all. This haphazard distribution of an important presidential power has repercussions that extend for decades beyond the tenure of any given president who appoints a justice. It also incentivizes presidents to select younger, less experienced justices.

Third, justices feel pressure to remain on the Court until an ideologically compatible president again enters the White House. This encourages justices to remain well past their prime. It also reinforces the Court's politicization and reduces the public's respect for it as an institution insulated from partisan influence.

All of these problems could be addressed with a fixed, non-renewable 18-year term for all Supreme Court justices. There would be a vacancy on the Court every two years, and every president would have two appointments during each four-year presidential term.

The regularity of Court vacancies would reduce the stress on the political system. Presidents could appoint distinguished individuals older than 60, and with diverse backgrounds, without fear of forfeiting any influence over the judicial branch.

Eighteen years is hardly a short term of office. It would assure stability, striking the appropriate balance between continuity and change.

If a justice dies or retires during that period, his or her term would be finished by an appointee who would not be eligible for reappointment, thus maintaining the two-year cycle of vacancies.

Some people might fear giving a particular president two or four appointments, and thus reshaping the Court. They might still support the basic principle of a regular fixed tenure, though with a longer term.

This system could be gradually phased in, applied to each future appointment after the adoption of the required constitutional amendment.

Surveys show that the public's trust in the Supreme Court is in decline. It is increasingly seen as just another partisan political institution. Imposing set terms of office would not favor conservatives or

liberals. Rather, it would promote the rule of law by reestablishing the Court's credibility as a neutral, principled arbiter.



MANDATE DIVERSITY

SANFORD LEVINSON

I have long supported holding a new constitutional convention to address the multiple deficiencies of the Constitution framed in 1787. The organization of the judiciary isn't one of our most pressing constitutional problems, but certain reforms would be highly desirable.

The first piece of business would be to eliminate life tenure for members of the Supreme Court. This could be done through age limits. Almost every state imposes such restrictions on judges in their own courts, as do almost all other national constitutions in the world. But the best solution, already supported by many, would be nonrenewable 18-year terms, which would eliminate the ability of justices to time their resignations for political purposes.

A convention might also raise questions about the appointment process itself. The United States has, without a doubt, the most deeply politicized high court in the world. This was inevitable once the two-party system developed and presidents realized that friendly judges were important to achieving their

political goals. At the state level, most judges are elected, a practice that began with the 1846 New York State constitution in an effort to strengthen judicial independence by limiting the power of the governor to appoint his confederates. But there are obvious problems with elected judiciaries, especially in an era of deregulated campaign finance. Instead, many states have moved to forms of “commission” appointment. New Jersey operates under an informal rule that only four of its seven justices can come from a single political party (though Chris Christie tried to violate it). The new Democratic governor, Phil Murphy, recently reappointed one of Christie’s unsuccessful nominees when a “Republican seat” became open. Enshrining such a requirement in the Constitution itself could work to defuse tensions at the national level as well.

Finally, we should require a greater diversity of judges. Justice Oliver Wendell Holmes Jr. famously wrote that the life of the law “is not logic” but, rather, “experience.” We should be concerned that the current experience of all of the justices is so remarkably narrow. Every single member of the current Court attended either the Harvard or Yale Law Schools (though Justice Ginsburg wound up receiving her degree from Columbia). There is also a distinct East Coast tilt, with three members originally from New York City alone. This is a stunningly large country, with different problems

arising in different areas. Anyone who lives in the West is likely to be aware of the vital problems raised by water and its potential scarcity. But of the current justices only Neil Gorsuch and Stephen Breyer were born west of the Mississippi. The Tennessee Constitution requires that its nine justices be chosen equally from the three parts of the state. Wisdom is not concentrated in one region, as a truly representative Supreme Court would reflect.

Incredibly, the present Court is also absent of anyone who has ever run for, let alone held, elective office. Nor is there any justice who ever served on a state court. None since Thurgood Marshall has had the experience of visiting a client in jail, possibly facing a capital murder trial. The Belgian constitution requires that several of its members must have served in the national parliament. There is no reason our Constitution shouldn't be rewritten to include similar stipulations.



DOWN WITH JUDICIAL SUPREMACY

MARK TUSHNET

What should progressives do about a Supreme Court that's going to be quite conservative for at least 10 or 15 years? Both for strategic reasons and for reasons rooted in political ideals, progressives

should start—now—to think seriously about increasing the size of the federal judiciary to offset the packing the Trump administration has already done. A Democratic Congress with a Democratic president can add a lot of judges to the lower federal courts, and they should do so.

If they do, we will hear howls about why “packing the courts” is bad or even unconstitutional, and not simply from conservatives. The “thoughtful” chin-strokers in the nation’s major media will join in the criticism. Progressives should be ready to openly defend court-packing as a sensible move in a world where the federal courts have already become highly politicized.

Beyond court-packing, however, progressives should start thinking seriously about the Constitution itself and our tradition of judicial supremacy.

There used to be a progressive tradition of popular constitutionalism. The labor movement around the turn of the 20th century argued passionately that the Constitution guaranteed a right to organize and strike, no matter that the Supreme Court said otherwise. Popular constitutionalism is a practice in which the views of ordinary people about what the Constitution means and does matter more than the views of the Supreme Court. For popular constitutionalists, Supreme Court rulings are

interesting data, expressions about the Constitution's meaning that probably ought to be taken seriously but need not be regarded as conclusive.

Some contemporary progressives worry about popular constitutionalism. For them, the point of the Constitution is to protect minorities against oppressive majorities. History suggests that is a utopian vision of the Court, only occasionally matched in practice by its actions. We can be pretty sure that the Supreme Court in the near future isn't going to do much in the way of protecting minorities; the travel-ban decision indicates as much.

The problem of continuing to support judicial supremacy is that the presumably meager minority-protecting benefits of a conservative Court are easily offset by the cost of having a Court that can and will obstruct progressive legislation. At the very least, progressives have to have a serious conversation among themselves about the shibboleth of judicial review and its record of protecting minorities.

Another concern voiced by some progressives about popular constitutionalism is that it means the “yahoos”—ignorant and biased people—will control what the Constitution means. This concern often emerges when progressives suggest it would be a

good idea to have another constitutional convention. Many worry about who would control such a convention or that holding it today it would pretty much replicate the politics that have gridlocked Congress.

That might be right—today. But progressives should be thinking and talking about the long term. If progressivism means anything today, it means believing that the good sense of the people of the United States is on our side. All we need to do is bring that good sense to the surface of our daily politics. Popular constitutionalism can help in that task.

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