WHY YOU CANNOT FIND A SWING JUSTICE WHEN YOU REALLY NEED ONE

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INTRODUCTION

From Richard Nixon's 1972 appointment of swing Justice Lewis Powell until Donald Trump's 2018 appointment of Brett Kavanaugh (to replace swing Justice Anthony Kennedy),[1] the swing Justice ruled the roost.[2] Sometimes voting with the Court's conservatives and other times with its liberals, the swing Justice often cast the deciding vote and often embraced a sui generis middle ground.[3] Those days now seem like a distant memory. An ideologically simpatico majority coalition drives the post-2018 Roberts Court (especially after Justice Amy Coney Barrett filled Justice Ruth Bader Ginsburg's seat in 2020).[4] In this Article, I will use the Court's affirmative action in higher education cases to better understand why the swing Justice was pivotal from 1972 to 2018, why there are no swing Justices on the post-2018 Roberts Court, and why the swing Justice will not return. In so doing, I will connect the demise of the swing Justice to the simultaneous rise of party

1. Justices Powell and Kennedy were generally recognized as "swing Justices" and were often at or around the ideological median (based on Martin-Quinn scores). *See generally* Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005).

2. Before Nixon became president in 1969, the Warren Court was driven by an ideologically simpatico majority (and no swing Justice). *See generally* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000). Nixon appointees—including Powell—transformed the Warren Court into the swing-dominated, ideologically incoherent Burger Court. *See infra* notes 124-29 and accompanying text.

3. *See* Peter K. Enns & Patrick C. Wohlfarth, *The Swing Justice*, 75 J. POL. 1089, 1089-91 (2013) (noting that swing Justices are not necessarily at the Court's median but, instead, are the Justices most willing to "swing" from liberal to conservative positions when casting decisive votes).

4. There is some dispute as to whether the Court is split six-to-three or three-to-three-to-three. *See* Josh Blackman, *We Don't Have a 6-3 Conservative Court. We Have a 3-3-3 Court.*, REASON: THE VOLOKH CONSPIRACY (June 18, 2021, 9:21 AM), https://reason.com/volokh/2021/06/18/we-dont-have-a-6-3-conservative-court-we-have-a-3-3-3-court/ [https://perma.cc/4H2F-C3R5]. There is no dispute that the six conservative Republicans are—with respect to ideology—far closer to each other than to any of the Democratic Justices. *See* Oriana González & Danielle Alberti, *The Political Leanings of the Supreme Court Justices*, AXIOS (July 3, 2023), https://www.axios.com/2019/06/01/supreme-court-justices-ideology [https://perma.cc/G3X2-JZNQ]. For an accounting of how the Supreme Court came to reflect the rise of party polarization and the related demise of moderates, see generally NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 103-46 (2019).

polarization and the conservative legal movement. I will also explain why this linkage of party and ideology did not begin until 2010 and how it is that this linkage could contribute to the eventual packing of the Court.[5] Swing Justices may be critical to the survival of a nine Justice Court, but these "Super-Justices" cannot withstand the kryptonite of party polarization.

Let me set the stage by quoting Justice Elena Kagan, Volokh Conspiracy blogger Josh Blackman, and Justice Felix Frankfurter.

First, Elena Kagan's 2018 remarks on why swing Justices are particularly needed during polarized times:

> It's been an extremely important thing for the court that in the last 40 years, starting with Justice [Sandra Day] O'Connor and continuing with Justice Kennedy, there has been a person who found the center, where people couldn't predict in that sort of way.... That's enabled the court to look so it was not all by one side or another and it was indeed impartial and neutral and fair. And it's not so clear that I think going forward that sort of middle position—it's not so clear whether we'll have it.... It's an incredibly important thing for the court to guard is [sic] this reputation of being impartial, being neutral and not being simply [an] extension of a terribly polarizing process.[6]

The second image comes from Josh Blackman (writing on The Volokh Conspiracy blog)[7] and his description of the Federalist Society Annual Meeting. In explaining why Justices Barrett and Kavanaugh resisted efforts to delay the overturning of *Roe v. Wade*, Blackman compared the Court's "conservative" Justices to Chief Justice Roberts (who cast the deciding vote approving the Affordable

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5. There, of course, is no immediate risk of Court reform. The Court is presently operating within boundaries clearly acceptable to the elected branches—a fact underscored by the 2024 Republican sweep of the White House and both houses of Congress. For further discussion, see *infra* notes 285-311 and accompanying text.

6. Josh Gerstein, *Kagan Fears Supreme Court Losing Swing Justice*, POLITICO (Oct. 5, 2018, 8:25 PM) (first alteration in original), https://www.politico.com/story/2018/10/05/elena-kagan-supreme-court-kennedy-877288 [https://perma.cc/T83C-M8C2].

7. The Volokh Conspiracy blog is a well-known legal blog; it covers legal and political issues from an ideological orientation it describes as "generally libertarian, conservative, centrist, or some mixture of these." *See Editorial Independence*, REASON: THE VOLOKH CONSPIRACY, https://reason.com/volokh/editorial-independence/# [https://perma.cc/XDZ6-JDGX].

Care Act in the *National Federation of Independent Business (NFIB) v. Sebelius* case)[8]:

> The conservative Justices occupy a rarified place in the conservative legal movement. When they enter a ballroom at the Federalist Society Convention, they are given thunderous applause. It is rare for them to be attacked by friendly fire.... But if John Roberts had entered a FedSoc ballroom after *NFIB*, he would likely have been booed. The strong reaction on the right to the [Texas anti-abortion statute] S.B. 8 arguments signaled to Kavanaugh and Barrett what would likely happen if they caved on *Dobbs*. Kavanaugh and Barrett are not welcome in other legal forums. At best, they are briefly tolerated, while angry students are kept at bay. Kavanaugh and Barrett know this. The conservative legal movement is their only home.[9]

Third and finally, Justice Felix Frankfurter's reaction to the death of Chief Justice Fred Vinson and the appointment of Earl Warren to fill his seat; at that time, the Justices were set to hear reargument in *Brown v. Board of Education*.[10] When the case was first argued, five Justices had voted to uphold segregation, and Vinson seemed set to steer the Court on a disastrous course.[11] Under Warren's leadership, all nine Justices found a way to subordinate their legal policy preferences in favor of a compromise decision.[12] For Frankfurter (who had worked with the NAACP and had hired the Court's first African American law clerk),[13] Vinson's death was

8. *See* JOAN BISKUPIC, THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS 221 (2019).

9. Josh Blackman, *Ten Reflections on Justices Kavanaugh and Barrett's Votes in* Dobbs, REASON: THE VOLOKH CONSPIRACY (Dec. 16, 2023, 11:58 PM), https://reason.com/volokh/2023/12/16/ten-reflections-on-justices-kavanaugh-and-barretts-votes-in-dobbs/ [https://perma.cc/JA8H-XFT5].

10. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 301-02 (2004). The Court had redocketed the case so that the decision could address segregation in Washington D.C. schools (where the Fifth, not Fourteenth, Amendment Equal Protection Clause would control). *See id.* at 300-01.

11. *See id.* at 300-02; *see also* WILLIAM O. DOUGLAS, THE COURT YEARS, 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 245 (1980).

12. *See* KLARMAN, *supra* note 10, at 302; *see also* S. Sidney Ulmer, *Earl Warren and the* Brown *Decision*, 33 J. POL. 689, 698-99 (1971); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 34-43 (1980).

13. *See* Christine Perkins, *Counsel for the Situation: William T. Coleman Jr. '46 (1920-2017)*, HARV. L. TODAY (Apr. 4, 2017), https://hls.harvard.edu/today/william-t-coleman-

"the first solid piece of evidence [he] ever had that there really is a God."[14]

Let me now connect the dots between these disparate images. Justice Kagan's homage to the swing Justice prioritizes institutional concerns ahead of doctrinal coherence.[15] It is at once a plea and a warning to her conservative rivals; her message is that each side must sometimes claim victory to protect the Court from political attack. But—as Josh Blackman's reporting underscores—it is a message that has less traction now than ever before. In today's hyper-polarized world, there is no place for judicial moderates; instead, ideological networks have become dominant.[16] The conservative legal network has no interest in putting institutional concerns ahead of their preferred legal policy vision.[17] They have strong precommitments to originalism and textualism, and they have the votes to get their way.[18] For their part, progressives may turn to draconian measures such as Court-packing. With little prospect of winning before the Court, Democrats may be poised to delegitimize the Court whenever they return to power.[19] Compare today's tribalism to the *Brown* era. Party polarization was at historic lows, and there was no ideological gap between Democrats and Republicans.[20] Correspondingly, ideology did not figure into

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obituary/ [https://perma.cc/7BJ4-QMTE]; *U.S. Supreme Court Justices*, U.S. NAT'L PARK SERV. (Apr. 11, 2024), https://www.nps.gov/brvb/learn/historyculture/justices.htm [https://perma.cc/K6WY-FF66].

14. Philip Elman interviewed by Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 840 (1987).

15. This dichotomy is often framed as a battle between sociological legitimacy (focusing on the Court's ability to preserve its institutional capital and have it and its decisions treated with respect) and legal legitimacy (focusing on the Court's commitment to getting the law right). *See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2244, 2253 (2019) (book review); Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 353, 356, 358 (2020); Thomas G. Donnelly, *Supreme Court Legitimacy: A Turn to Constitutional Practice*, 47 BYU L. REV. 1487, 1496-98 (2022).

16. *See generally* DEVINS & BAUM, *supra* note 4.

17. *Compare* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2278 (2022) (the post-Barrett Roberts Court rejecting the reaffirmation of *Roe* on stare decisis grounds), *with* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845-46 (1992) (swing Justices O'Connor and Kennedy voting to uphold *Roe* on stare decisis grounds).

18. *See infra* Part III.A.

19. *See infra* notes 283-84 and accompanying text.

20. *See* Archive of *The Polarization of Congressional Parties*, VOTEVIEW (Jan. 30, 2016), https://legacy.voteview.com/political_polarization_2015.htm [https://perma.cc/7HLR-6NR9].

Supreme Court appointments. Dwight Eisenhower, notwithstanding his misgivings about ending school segregation, still paved the way for *Brown* by appointing Earl Warren.[21] In other words, neither tribalism nor ideological purity stood in the way of institutionalism or compromise. Justice Frankfurter's comments are a tribute to Earl Warren's ability to forge a compromise. They also call attention to the critical role that serendipity plays both in the composition and decision-making of the Supreme Court.[22]

In the pages that follow, I will back up this narrative by discussing the Supreme Court's affirmative action in higher education decision-making. First, I will show how swing Justices cast the decisive votes and effectively controlled the Court's affirmative action jurisprudence from *Regents of the University of California v. Bakke* (1978, Lewis Powell) to *Grutter/Gratz v. Bollinger* (2003, Sandra Day O'Connor) to *Fisher I* & *II* (2013/2016, Anthony Kennedy). These cases also highlight the indeterminacy and incoherence of swing Justice decision-making. I will also show how the dominance of swing Justices ended with the appointments of Brett Kavanaugh and Amy Coney Barrett; *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (2023) underscores that reality. *Students for Fair Admissions* also highlights how an ideologically cohesive Court is more likely to produce predictable, rule-like decision-making.[23] Second, I will explain why swing Justices were in control for so long. Notwithstanding the purported rise of ideology in judicial appointments, Richard Nixon and Ronald Reagan veered away from ideology when appointing Justices Powell, O'Connor, and Kennedy.[24] These judicial moderates were further fueled by the institutional design of Supreme Court decision-making, a design that concentrates power around the ideological center of the Court.[25] Third, I will chronicle the rise of the conservative

21. *See* KLARMAN, *supra* note 10, at 302.

22. *See generally Justices 1789 to Present*, U.S. SUP. CT., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/VVL8-TPRA].

23. *See generally* Neal Devins, *Ideological Cohesion and Precedent (or Why the Court Only Cares About Precedent When Most Justices Agree with Each Other)*, 86 N.C. L. REV. 1399 (2008).

24. *See infra* Part II.A.

25. *See* Jonathan S. Gould, *Rethinking Swing Voters*, 74 VAND. L. REV. 85, 140 (2021). For additional discussion, see *infra* Part II.B.

legal movement and, with it, the eventual transmogrification of the Court. The Court is now divided along partisan lines;[26] there are no judicial moderates playing the role of swing Justice.[27] *Students for Fair Admissions* exemplifies today's partisan divide. Fourth, I will argue that the Court is at greater risk of partisan political reprisal than at any other time in its history. Hardball confirmation politics, the metastasizing of party polarization, and the very real possibility that the Court will be seen as a political institution supporting only one party creates a perfect storm for retaliation and retribution (whenever the "opposition" party assumes the mantle of power).[28] The earlier claims of political scientists no longer seem true, namely, that the public objects to making fundamental structural changes to the Court[29] and that the Court is a majoritarian institution (because the President and Senate control nominations and confirmations).[30] Whether we are nearing the precipice of fundamental

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26. *See infra* note 250 and accompanying text.

27. *See infra* note 251 and accompanying text.

28. Unlike earlier efforts to pack the Court or strip it of jurisdiction, today's Court is divided by party lines and is more vulnerable to attack by a political system also divided by party lines. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2366-68 (2006). Witness, for example, President Biden's July 2024 proposal to set term limits for Supreme Court Justices. Aamer Madhani & Colleen Long, *Biden Decries 'Extremism' on Supreme Court, Details Plan for Term Limits, Ethics Code for Justices*, AP NEWS (July 29, 2024, 8:38 PM), https://apnews.com/article/supreme-court-reform-biden-harris-trump-ffd48f3a2023aeca841bb53c2147ef03 [https://perma.cc/E4SS-FCCC]. Senate leader Charles Schumer also supported the proposal. *See* Carl Hulse, *Schumer Promises Year-End Judicial Push as Courts Gain New Political Importance*, N.Y. TIMES (Aug. 1, 2024), https://www.nytimes.com/2024/08/01/us/politics/schumer-supreme-court-justices.html [https://perma.cc/EA3W-LWJ8]. The testing of this boundary puts into focus the newfound willingness of political leaders to see the size and composition of the Court as a legitimate political target. For further discussion, see *infra* note 283.

29. *See* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 658-61 (1992). For discussion of how so-called "diffuse support" for the Court has waned in the aftermath of the *Dobbs v. Jackson Women's Health Organization* abortion decision, see Linda Greenhouse, *What Sandra Day O'Connor Got Wrong*, N.Y. TIMES (Dec. 15, 2023), https://www.nytimes.com/2023/12/15/opinion/supreme-court-guns-abortion.html [https://perma.cc/6K77-7NF7]. *See also infra* note 279.

30. *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283-85 (1957). For an update, see generally Emily Bazelon, *When the Supreme Court Lurches Right*, N.Y. TIMES (Aug. 22, 2018), https://www.nytimes.com/2018/08/22/magazine/when-the-supreme-court-lurches-right.html [https://perma.cc/P3ZA-ZQR3]. *See also infra* note 273 and accompanying text; Jonathan P. Kastellec, *Is the U.S. Supreme Court Facing a Crisis of Democratic Legitimacy? A Review Article*, POL. SCI. Q. 1, 13-14 (2024) (reviewing Kevin McMahon, *A Supreme Court Unlike Any*

change remains to be seen. In the aftermath of the 2024 Republican sweep, there is no immediate risk to the Court. Indeed, if the 2024 elections came to be seen as a broad electoral mandate, it may turn out that the Court was in sync with the dominant political coalition.[31] On the other hand, the 2024 elections may well be seen as a reaction to inflation, immigration, and an extraordinarily unpopular Democratic president (who weighed down the campaign of his Vice President).[32] If that account proves true, the Court is very much vulnerable to political attack; Democrats now embrace Court reform and seem poised to pursue an anti-Court agenda whenever they regain the White House and Congress.[33] The fact that the Court was not punished for either overruling abortion rights or embracing presidential immunity does not mean that the Court will never face its day of reckoning. Indeed, the Court is increasingly seen as a partisan actor and, consequently, has lost the diffuse support necessary to fend off political attack.[34]

Time will tell whether the political coalition backing today's Court will retain sufficient power to protect the Court. By tracking the rise and fall of the swing Justice, this paper will serve as a warning cry to those concerned about the power and legitimacy of the Supreme Court.

Other (2024)) (questioning the continuing validity of Dahl's claims that the Court will be subject to political attack if it strays from dominant preferences of voters).

31. *See* Nate Cohn, *How Democrats Lost Their Base and Their Message*, N.Y. TIMES (Nov. 25, 2024), https://www.nytimes.com/2024/11/25/upshot/democrats-trump-working-class.html [https://perma.cc/8MBP-EDHU].

32. *See* Jennifer De Pinto, Fred Backus & Eran Ben-Porath, *How Trump Won the 2024 Election—CBS News Exit Poll Results*, CBS NEWS (Nov. 8, 2024, 12:38 PM), https://www.cbsnews.com/news/exit-polls-2024-presidential-election/ [https://perma.cc/9NDQ-5DMY]. It is also noteworthy that Harris's margin of defeat (1.5 percent) was particularly narrow. *See Presidential Election Margin of Victory*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/statistics/data/presidential-election-mandates [https://perma.cc/2UKS-ZAQJ].

33. *See supra* note 28 (discussing then-President Joe Biden seeking political advantage by proposing term limits for the Justices and other Court reforms); *see also* Katie Rogers, *Warning of 'Extreme' Agenda, Biden Calls for Supreme Court Overhaul*, N.Y. TIMES (July 29, 2024), https://www.nytimes.com/2024/07/29/us/politics/biden-supreme-court-austin-texas.html [https://perma.cc/GR4R-NPDJ].

34. *See* Greenhouse, *supra* note 29; *see also infra* note 283 (discussing how the post-Barrett Roberts Court has lost critical diffuse support).

I. AFFIRMATIVE ACTION IN HIGHER EDUCATION: THE RISE AND FALL OF SWING JUSTICES

The battle over affirmative action has long pitted conservatives who embrace the "color-blind" Constitution[35] and progressives who—in the words of Justice Harry Blackmun—think that "[i]n order to get beyond racism, we must first take account of race."[36] For conservatives, the only relevant fact is whether the government took race into account;[37] for progressives, the government is empowered to use race so long as it is benefitting a historically disadvantaged group.[38] For both sides, the fight is largely over the meaning of *Brown*: Chief Justice John Roberts declared that *Brown* prohibited the use of race in student assignments and that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race";[39] Justice Sonia Sotomayor, however, argued that *Brown* rejected "passive race neutrality" and that "race blindness" does little more than "entrench racial segregation."[40]

Before 2023, the Supreme Court refused to put in place either of these extremes. Instead of embracing one rule or another (that largely made factfinding irrelevant), it followed the lead of swing Justices. It embraced a middle ground—making use of ever-changing, indeterminate, fact-dependent standards, sometimes approving and sometimes striking down affirmative action programs.[41] By

35. Ronald Reagan famously invoked "color blindness" when speaking of Martin Luther King Jr.'s legacy. *See Reagan Quotes King Speech in Opposing Minority Quotas*, N.Y. TIMES (Jan. 19, 1986), https://www.nytimes.com/1986/01/19/us/reagan-quotes-king-speech-in-opposing-minority-quotas.html [https://perma.cc/8SHS-SLLY]. For an assessment of Reagan-era policies, see Neal Devins, *Affirmative Action After Reagan*, 68 TEX. L. REV. 353, 356, 379 (1989).

36. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

37. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 733, 746-48 (2007).

38. *See Bakke*, 438 U.S. at 328 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part). For an overview of the relationship of legal tests to factfinding burdens in affirmative action legislation, see Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1200-05 (2001).

39. *Parents Involved*, 551 U.S. at 748.

40. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2263 (2023) (Sotomayor, J., dissenting).

41. For further discussion of why swing Justices prefer standards to rules (and why

sacrificing doctrinal purity,[42] the Court reflected larger social and political cross-currents.[43] In 2023, however, the Court reflected another reality, namely, that there were no moderates on the Court, and today's Justices would not seek a middle ground.[44] Instead, reflecting the ideological divide between Democrats and Republicans, the majority Republican Court jettisoned diversity-based justifications, essentially embracing color-blindness.

A. 1978-2018: The Swing Justice Rules

Regents of the University of California v. Bakke set the tone—a sharply divided Court and a compromise ruling crafted by the Court's swing Justice.[45] Decided in 1978, the Court struck down a racial quota guaranteeing sixteen (out of one hundred) slots to minority applicants to the University of California, Davis Medical

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ideologically simpatico Courts prefer rules), see *infra* notes 288-89 and accompanying text. On the question of whether rules or standards should be preferred, see Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 122-23 (1992).

42. *Brown*, too, prioritized institutional concerns ahead of doctrinal purity. When deciding *Brown*, the Justices considered potential backlash. *See* Hutchinson, *supra* note 12, at 36, 40-44. Their solution was a unanimous, hugely symbolic, and toothless ruling. There was no judgmental rhetoric and no remedy. *See* KLARMAN, *supra* note 10, at 312; *see also* Hutchinson, *supra* note 12, at 42. When a remedy was issued, it invited tokenism and delay as local officials were told that "varied local school problems" were best solved by local districts. *See* Brown v. Bd. of Educ., 349 U.S. 294, 299 (1955); KLARMAN, *supra* note 10, at 313-16, 330-34; J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 988 n.213 (1975). For the next decade, the Court steered clear of school desegregation altogether. *See* KLARMAN, *supra* note 10, at 343. Moreover, the Court—for fear that it would jeopardize *Brown*—declined to resolve the anti-miscegenation issue until after Congress passed the 1964 Civil Rights Act. *See* Grove, *supra* note 15, at 2257-58.

43. This was particularly true of Justice O'Connor and *Grutter*. *See infra* notes 73-86 and accompanying text.

44. On the absence of moderates and the ideological leanings of the current Justices, see DEVINS & BAUM, *supra* note 4, at 130-40.

45. *See* 438 U.S. 265 (1978). For a thoughtful account of Justice Powell and his opinion in *Bakke*, see JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 501 (1994). *Bakke* was the Court's first merits ruling on affirmative action in education. Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 909-10, 910 n.6 (1983) (illustrating how *Bakke* was the first in the initial four affirmative action cases that was decided on the merits by the Supreme Court). Four years earlier, in *DeFunis v. Odegaard*, the Court ruled that a constitutional challenge to affirmative action was moot. 416 U.S. 312, 319-20 (1974) (per curiam). The Court divided five-to-four; Justice Powell was in the majority. *Id.* at 348 (Brennan, J., dissenting).

School.[46] The Court, however, also ruled that racial diversity was a compelling governmental interest and, as such, race could be used as a plus factor in university admissions.[47] The vote on both issues was five-to-four; the Court's swing Justice, Justice Lewis Powell, stood alone, joining the four liberals on diversity[48] and the four conservatives on quotas.[49] By splitting the difference, Powell put in place a "jurisprudence of balancing" and a "jurisprudence of centrism."[50] "For Powell, the goal of constitutional adjudication was to find the center, to strike the balance between competing interests."[51]

Powell, too, reflected emerging political cross-currents. Unlike today's sharp partisan divide on the use of race in college admissions (in which 74 percent of Republicans disapprove as compared to 29 percent of Democrats),[52] the divide between the Democratic and Republican parties had not emerged.[53] Beginning with Lyndon B. Johnson's initial embrace of affirmative action in 1965 and up until the 1980 election of Ronald Reagan, elected officials gave qualified support to affirmative action.[54] In *Bakke*, for example, the Carter Department of Justice (DOJ) argued that universities should be permitted to seek "reasonable goals or targets in contrast to rigid exclusionary quotas."[55]

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46. *See Bakke*, 438 U.S. at 319-20.

47. *Id.* at 299, 317.

48. *Id.* at 326 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

49. *Id.* at 325.

50. *See* Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1854, 1882 (1995) (book review).

51. Paul W. Kahn, *The Court, the Community, and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 2 (1987).

52. PEW RSCH. CTR., MORE AMERICANS DISAPPROVE THAN APPROVE OF COLLEGES CONSIDERING RACE, ETHNICITY IN ADMISSIONS DECISIONS 4-5 (June 8, 2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/06/PP_2023.06.08_college-admissions_REPORT.pdf [https://perma.cc/YRN9-TYZL].

53. *See* NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 165 (2d ed. 2015).

54. In his 1965 Howard University commencement address, Johnson pledged "not ... just to open the gates of opportunity" but to see to it that "[a]ll our citizens ... have the ability to walk through those gates." 2 LYNDON B. JOHNSON, *Commencement Address at Howard University: "To Fulfill these Rights" (June 4, 1965)*, *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 635, 636 (1966). For a discussion of Johnson, Nixon, and Carter's affirmative action initiatives, see DEVINS & FISHER, *supra* note 53, at 165-66.

55. Robert Reinhold, *U.S. Backs Minority Admissions but Avoids Issue of Racial Quotas*, N.Y. TIMES (Sept. 20, 1977) (quoting Brief for the United States as Amicus Curiae at 70,

Powell's opinion in *Bakke* and other affirmative action cases (as his biographer John C. Jeffries, Jr. put it) "was as conflicted as its author."[56] In cases involving public schools, for example, Powell rejected diversity arguments and essentially limited affirmative action to colleges and universities.[57] For this very reason, Paul Mishkin (Berkeley law professor and the principal author of the medical school's Supreme Court brief)[58] thought *Bakke* was at once a triumph and a disaster: a triumph because "[t]he Court took what was one of the most heated and polarized issues in the nation, and by its handling defused much of that heat";[59] a disaster because he "[could not] find an analytically sound principle to support [the] result."[60]

For Justice Sandra Day O'Connor, however, Powell's "willing[ness] to sacrifice a little consistency in legal theory in order to reach for justice in a particular case" was seen as an asset, not a limitation.[61] Apparently, it takes one to know one. Like Powell, O'Connor was a swing Justice who sought the middle ground. A skilled politician herself (having served as majority leader of the

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Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 187970, at *70), https://www.nytimes.com/1977/09/20/archives/us-backs-minority-admissions-but-avoids-issue-of-racial-quotas.html [https://perma.cc/BY4S-QTH2]. The Carter administration's compromise position reflected the fact that there was no Democratic Party position on the issue and, as a result, the DOJ, "under heavy pressure from many sources, appeared to sway back and forth before deciding what to do." *See id.*

56. John C. Jeffries, Jr., Bakke *Revisited*, UVA LAWYER (2004), https://www.law.virginia.edu/static/uvalawyer/html/alumni/uvalawyer/f04/bakke.htm [https://perma.cc/VRJ9-XS6W].

57. For example, Powell made no effort to square his embrace of diversity in *Bakke* with his repudiation of the "role model" theory in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 275-76 (1986). The role model theory embraced the idea that white and minority public school students alike would benefit by seeing racial minorities leading classrooms. *See* Brief for the Nat'l Educ. Ass'n et al. as Amici Curiae in Support of Respondents at 17-18, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (No. 84-1340), 1985 WL 669743, at *17-18. Justice Powell—foreshadowing arguments that Chief Justice Roberts would later make—depicted the role model theory as inconsistent with *Brown*, since it stands for the principle that "black students are better off with black teachers." *Wygant*, 476 U.S. at 276.

58. *See* Brief for Petitioner, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187977.

59. *See* Mishkin, *supra* note 45, at 929. In a similar vein, Vincent Blasi spoke of *Bakke* as "a disturbing failure by the Court to discharge its responsibility to give coherent, practical meaning to our most important constitutional ideals." Vincent Blasi, Bakke *as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CALIF. L. REV. 21, 21 (1979).

60. Mishkin, *supra* note 45, at 930.

61. *See* Sandra Day O'Connor, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395, 396 (1987).

Arizona state Senate),[62] O'Connor was "generally regarded as the least categorical of the [J]ustices" and the Justice most likely to pay "closer attention to details than to theory,"[63] embracing "nondoctrinaire, context-attentive," fact-dependent standards that allowed her to rule on either side of a case.[64] Described as a "jurisprudence of compromise and concession," this "unique fact-based jurisprudence" was widely seen as placing political pragmatism ahead of ideology.[65] Justice O'Connor stuck to the facts and created a "personalized jurisprudence" characterized by "embracing shallowness as a judicial virtue."[66] For Justice O'Connor, this type of incrementalism reflected her belief that courts were "mainly reactive institutions" and that legal victories are a "byproduct of an emerging social consensus" and not expressions of raw power.[67] Correspondingly, she "cared about the impact of the [C]ourt's decisions—not only on the law, but on the country itself."[68] When

62. *Sandra Day O'Connor*, OYEZ, https://www.oyez.org/justices/sandra_day_oconnor [https://perma.cc/8CQ2-MHRP].

63. *See* Linda Greenhouse, *Court to Revisit Colleges' Efforts to Gain Diversity*, N.Y. TIMES (Dec. 3, 2002), https://www.nytimes.com/2002/12/03/us/court-to-revisit-colleges-efforts-to-gain-diversity.html [https://perma.cc/9988-5STR].

64. *See* Greenhouse, *supra* note 29.

65. *See* Diane Lowenthal & Barbara Palmer, *Justice Sandra Day O'Connor: The World's Most Powerful Jurist?*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 211, 214 (2004). In the words of O'Connor's biographer Joan Biskupic, O'Connor takes a "pragmatic," "case-by-case" approach that steers clear of "sweeping pronouncements of law." Peter Bean, *Sandra Day O'Connor and the Supreme Court*, WILSON CTR. (Mar. 15, 2004), https://www.wilsoncenter.org/article/sandra-day-oconnor-and-the-supreme-court [https://perma.cc/52RM-R45H] (statement of Joan Biskupic's work tracing the evolution of the Supreme Court, with a focus on Sandra Day O'Connor); *see also* Peter S. Canellos, *Sandra Day O'Connor Was a Politician Justice. Now the Court Is All Nerds.*, POLITICO (Dec. 1, 2023, 3:18 PM), https://www.politico.com/news/magazine/2023/12/01/sandra-day-oconnor-supreme-court-00129648 [https://perma.cc/RNN3-62KA].

66. *See* Jeffrey Rosen, *The Age of Mixed Results*, NEW REPUBLIC, (June 28, 1999), https://newrepublic.com/article/74083/the-age-mixed-results [https://perma.cc/B52Y-UUUH] (reviewing CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999)) ("By embracing shallowness as a judicial virtue, Sunstein is advocating a version of the personalized jurisprudence of Sandra Day O'Connor.").

67. Greenhouse, *supra* note 29 (quoting SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE (2002)).

68. *See* Linda Greenhouse, *What We Lost When We Lost Sandra Day O'Connor*, N.Y. TIMES (Sept. 23, 2021), https://www.nytimes.com/2021/09/23/opinion/sandra-day-oconnor-supreme-court.html [https://perma.cc/WU3M-FTR7]; *see also* Margaret Talbot, *The Difference that Sandra Day O'Connor Made*, NEW YORKER: POSTSCRIPT (Dec. 3, 2023), https://www.newyorker.com/news/postscript/the-difference-that-sandra-day-oconnor-made [https://perma.

combined with her willingness to swing from side to side, this type of consequentialism defined the so-called O'Connor Court and, with it, Supreme Court decision-making during much of her tenure.[69]

Affirmative action exemplified Justice O'Connor's pragmatism and her power as a swing Justice. She backed diversity in higher education but not in broadcasting;[70] she embraced a role model theory for African Americans in the military or in business but not in public schools;[71] and she supported preferences designed to ensure a critical mass of minority students in elite universities while rejecting the granting of set preferences across-the-board.[72] Quite clearly, Justice O'Connor was not looking to settle future disputes by embracing one rule or another; her project was to settle the dispute at hand, leaving future disputes to the future.

Consider the Court's qualified approval of race-based diversity admissions in *Grutter v. Bollinger*.[73] Reflecting the political conflagration surrounding the case,[74] Justice O'Connor acted more like a political tactician than a jurist, refusing (as she put it) to speak in

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cc/6DEG-F77Y].

69. In the words of Erwin Chemerinsky: "O'Connor[] is in control.... [H]er key fifth vote determines what will be the majority's position and what will be the dissent. Lawyers who argue and write briefs to the Court know that often they are, for all practical purposes, arguing to an audience of one." Erwin Chemerinsky, *Justice O'Connor and Federalism*, 32 MCGEORGE L. REV. 877, 877 (2001). For her part, Justice O'Connor was well aware that her vote was often decisive; on affirmative action, for example, she reportedly told one of her law clerks that "[*Grutter*] is going to come down to me." *See* Evan Thomas, *Why Sandra Day O'Connor Saved Affirmative Action*, ATLANTIC (Mar. 19, 2019), https://www.theatlantic.com/ideas/archive/2019/03/how-sandra-day-oconnor-saved-affirmative-action/584215/ [https://perma.cc/B4LC-MKER] (statement of Justin Nelson, Clerk for Justice O'Connor).

70. *Compare* Grutter v. Bollinger, 539 U.S. 306, 328-29 (2003) (approving diversity in higher education), *with* Metro Broad., Inc. v. FCC, 497 U.S. 547, 602, 631 (1990) (O'Connor, J., dissenting) (rejecting diversity in broadcasting).

71. *Compare Grutter*, 539 U.S. at 330-31 (recognizing the critical leadership role performed by African Americans in the military and in business), *with* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275-76 (1986) (rejecting "role model" theory as applied to minority public school teachers).

72. *Compare Grutter*, 539 U.S. at 334 (approving preferences when there is individualized consideration of each student application), *with* Gratz v. Bollinger, 539 U.S. 244, 280 (2003) (O'Connor, J., concurring) (rejecting across-the-board preferences to all minority applicants).

73. When the Court granted certiorari, all eyes turned towards Justice O'Connor. Writing in *The New York Times*, Linda Greenhouse observed both that Justice O'Connor was "generally regarded as the least categorical of the [J]ustices" and, therefore, likely to "cast[] the deciding vote." Greenhouse, *supra* note 63.

74. *See generally* Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 347 (2003).

absolutes[75] and steering a middle-ground, "doctrinally awkward"[76] "compromise."[77] When the Court agreed to hear the case in 2002, *Grutter* had been seen as the likely death knell of affirmative action.[78] The Ronald Reagan and George H.W. Bush Justice Departments had previously taken hardline positions against race preferences, arguing that all racial classifications are "offensive to standards of human decency."[79] By the time *Grutter* was argued (in 2003), however, affirmative action opponents had become politically isolated. Elite support for affirmative action was incredibly strong; business and military leaders backed affirmative action, as did the education establishment.[80] More than that, the case was decided against the backdrop of Senate Majority Leader Trent Lott being forced to step aside after making racially insensitive comments.[81]

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75. *See* Linda Greenhouse, *On Affirmative Action, High Court Seeks Nuance*, N.Y. TIMES (Apr. 1, 2003), https://www.nytimes.com/2003/04/01/college/on-affirmative-action-high-court-seeks-nuance.html [https://perma.cc/HA7D-W7L6].

76. Jack M. Balkin, Plessy, Brown, *and* Grutter*: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1718 (2005); *see also* Greenhouse, *supra* note 63.

77. Talbot, *supra* note 68.

78. *See Court Affirms Affirmative Action*, CBS NEWS (June 24, 2003, 7:19 AM), https://www.cbsnews.com/news/court-affirms-affirmative-action/ [https://perma.cc/82UH-DT3T] (stating that *Grutter*'s outcome "put the Bush administration in an awkward spot" because "[t]he White House had sided with [the] white applicants"); Charles Lane, *In Affirmative Action Cases, Stevens Could be Sleeper*, WASH. POST (June 1, 2003, 8:00 PM), https://www.washingtonpost.com/archive/politics/2003/06/02/in-affirmative-action-cases-stevens-could-be-sleeper/721baed1-1295-4f9e-8c82-8bb64621c2b5/ [https://perma.cc/48FL-EMSP].

79. *Affirmative Action: Joint Oversight Hearings Before the Subcomm. on Civ. and Const. Rts. of the H. Comm. on the Judiciary and the Subcomm. on Emp. Opportunities of the H. Comm. on Educ. and Lab.*, 99th Cong. 273 (1985) (testimony of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Department of Justice). For examples of Reagan and Bush DOJ briefs, see Brief for the United States as Amicus Curiae Supporting Petitioners, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (No. 84-1340), 1985 WL 669739 (Reagan administration); Brief for the United States as Amicus Curiae Supporting Petitioner, Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (No. 89-453), 1989 WL 1126975 (Bush administration).

80. *See* Devins, *supra* note 74, at 368-69; *see also* DEVINS & BAUM, *supra* note 4, at 39-57 (explaining why the Justices are particularly concerned with elite support from reference groups that they are connected to); Carter G. Phillips, *Was Affirmative Action Saved by Its Friends?*, *in* A YEAR AT THE SUPREME COURT 113, 129 (Neal Devins & Davison M. Douglas eds., 2004) (stating that amicus briefs provide an "enormous benefit ... to the justices and their law clerks" and that such briefs "can and often do help the Court decide cases").

81. Lott praised former segregationist Strom Thurmond, claiming, at Thurmond's 100th birthday party, that the Dixiecrat should have been elected president. For my accounting of how this event figured into *Grutter*, see Devins, *supra* note 74, at 372 (citing Adam Nagourney

This episode silenced affirmative action opponents in Congress (none of whom filed a brief in the case)[82] and the George W. Bush White House (the DOJ backed away from its earlier unqualified opposition to diversity).[83] For Justice O'Connor (who cast the deciding fifth vote and wrote the Court's opinion), "her radar was set for the political center"[84]: she approved of race-based diversity, specifically relying on the claims of business and military leaders;[85] on the other hand, she specified a twenty-five-year sunset (when "the use of racial preferences will no longer be necessary") and also insisted that preferences be awarded as part of a holistic review of individual applications.[86]

By steering a fact-dependent middle path, Justice O'Connor essentially kicked the can down the road. Indeed, the conservative advocacy group that litigated *Grutter* encouraged others to file lawsuits to "level the whole regime."[87] And they did, most notably in a 2013 challenge to admissions at the University of Texas.[88] By this

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& Carl Hulse, *Bush Rebukes Lott Over Remarks on Thurmond*, N.Y. TIMES (Dec. 13, 2002), https://www.nytimes.com/2002/12/13/politics/bush-rebukes-lott-over-remarks-on-thurmond.html [https://perma.cc/4XFM-XZ8C]; June Kronholz & Jeanne Cummings, *Bush Decries Racial Preferences*, WALL ST. J., Jan. 16, 2003, at A4).

82. Devins, *supra* note 74, at 367. In contrast, 137 members of Congress signed onto briefs defending the University of Michigan's affirmative action program. *See id.* (citing Brief of Amici Curiae John Conyers, Jr., Member of Congress et al. at 24, Grutter v. Bollinger, 539 U.S. 306 (2003) & Gratz v. Bollinger, 539 U.S. 244 (2003) (Nos. 02-241 & 02-516); and then citing Brief of Amici Curiae Senators Thomas Daschle et al., at 22, Grutter v. Bollinger, 539 U.S. 306 (2003) & Gratz v. Bollinger, 539 U.S. 244 (2003) (Nos. 02-241 & 02-516)).

83. *See id.* at 371 (citing Linda Greenhouse, *Bush and Affirmative Action: News Analysis; Muted Call in Race Case*, N.Y. TIMES (Jan. 17, 2003), https://www.nytimes.com/2003/01/17/us/bush-and-affirmative-action-news-analysis-muted-call-in-race-case.html [https://perma.cc/46YJ-EY2U]).

84. Jeffrey Toobin, *Sandra Day O'Connor's Other Legacy*, N.Y. TIMES (Dec. 1, 2023), https://www.nytimes.com/2023/12/01/opinion/sandra-day-oconnor-death-supreme-court.html [https://perma.cc/BN3E-DMYE].

85. *See* Grutter v. Bollinger, 539 U.S. 306, 330-31 (2003).

86. *See id.* at 343. For this very reason, Justice O'Connor joined Chief Justice Rehnquist's 2003 opinion rejecting the mechanical addition of a set number of "diversity" points to minority applicants to the undergraduate University of Michigan. *See* Gratz v. Bollinger, 539 U.S. 244, 276, 280 (2003) (O'Connor, J., concurring).

87. *See* Peter Kirsanow, Grutter*: The Road to Further Litigation*, CTR. FOR INDIVIDUAL RTS. (July 7, 2003), https://www.cir-usa.org/2003/07/grutter-the-road-to-further-litigation/ [https://perma.cc/GGB8-KHZ9]; *see also* Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003) ("Diversity invites further litigation by offering a distinction without a real difference [between different types of affirmative action plans].").

88. *See* Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297 (2013).

time, however, Justice O'Connor had stepped aside and Anthony Kennedy assumed the role of swing Justice.[89] Like Justices Powell and O'Connor, Kennedy typically cast the deciding vote in sharply split opinions, sometimes siding with the Court's progressives and other times with its conservatives.[90] In the Court's five-to-four decisions, "he led or tied for most votes in the majority in twenty Terms ... and was close to the top in his other eleven Terms."[91] Depicted as "The Decider,"[92] "The Agonizer,"[93] and "The Super Median,"[94] all agreed with Noah Feldman's assessment that—when it came to the Supreme Court—"[i]t's Justice Anthony Kennedy's country [and] the rest of us just live in it."[95]

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89. *See* Marcia Coyle, *Why Replacing the 'Swing' Justice Ignites Warring Passions of Special Interest Groups*, PBS NEWS (July 11, 2018, 4:06 PM), https://www.pbs.org/newshour/politics/column-why-replacing-the-swing-justice-ignites-warring-passions-of-special-interest-groups [https://perma.cc/ZB86-XRZG] ("Justice Anthony Kennedy ... became the center of the [C]ourt after Justice Sandra Day O'Connor, who occupied that position more fully, left the [C]ourt in early 2006.").

90. Unlike Justices Powell and O'Connor (who typically favored narrow, fact-specific holdings), Justice Kennedy had "a fondness for grand and sweeping statements." *See* Katie Reilly, *How Anthony Kennedy's Swing Vote Made Him 'the Decider*,' TIME (June 27, 2018, 4:30 PM), https://time.com/5323863/justice-anthony-kennedy-retirement-time-cover/ [https://perma.cc/8KBU-HJD6]. He also was unconcerned with doctrinal clarity; he joined conservatives in demanding that unenumerated rights be "deeply rooted in ... history and tradition" while also backing progressives by repudiating that very same standard in cases involving same-sex sodomy and same-sex marriage. *Compare* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) ("[F]undamental rights and liberties ... are ... 'deeply rooted in this Nation's history and tradition.'" (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion))), *with* Lawrence v. Texas, 539 U.S. 558, 572 (2003) ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (alteration in original) (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))).

91. Jack L. Goldsmith, *In Tribute: Justice Anthony M. Kennedy*, 132 HARV. L. REV. 1, 12 (2018) (citing *Stat Pack Archive*, SCOTUSBLOG (June 29, 2018), https://www.scotusblog.com/reference/stat-pack/ [https://perma.cc/C9L8-6DXP]; *The Supreme Court, 1987 Term—The Statistics*, 102 HARV. L. REV. 350, 353 (1988); *The Supreme Court, 1988 Term—The Statistics*, 103 HARV. L. REV. 394, 397 (1989); *The Supreme Court, 1989 Term—The Statistics*, 104 HARV. L. REV. 359, 362 (1990); *The Supreme Court, 1990 Term—The Statistics*, 105 HARV. L. REV. 419, 422 (1991); *The Supreme Court, 1991 Term—The Statistics*, 106 HARV. L. REV. 378, 381 (1992); *The Supreme Court, 1992 Term—The Statistics*, 107 HARV. L. REV. 372, 375 (1993); *The Supreme Court, 1993 Term—The Statistics*, 108 HARV. L. REV. 372, 375 (1994); *The Supreme Court, 1994 Term—The Statistics*, 109 HARV. L. REV. 340, 343 (1995)).

92. Reilly, *supra* note 90.

93. Jeffrey Rosen, *The Agonizer*, NEW YORKER: ANNALS OF LAW (Nov. 3, 1996), https://www.newyorker.com/magazine/1996/11/11/the-agonizer [https://perma.cc/T428-CLDT].

94. Richard Brust, *The 'Super Median'*, ABA J., July 2010, at 20, 21.

95. *See* Noah Feldman, *The United States of Justice Kennedy*, BLOOMBERG (May 31, 2011,

On affirmative action, he steered an indecipherable, fact-specific path. In *Grutter*, he gave no deference to university officials who he thought were seeking to enroll a set number of minority students.[96] In *Fisher v. University of Texas at Austin (Fisher I)* (2013), Kennedy initially echoed those concerns; writing for a five-to-four majority, he concluded that a lower court was wrong to defer to the University of Texas's claims that it could not achieve its diversity goals without race-conscious admissions.[97] In 2016, however, the case was re-argued, and he gave broad deference to the university's claim that it could not achieve true diversity through race-neutral means (a 10 percent plan that guaranteed admission to students at the top of their graduating class).[98] The fact that his decision in 2016 could not be squared with his 2013 decision or his dissent in *Grutter* was beside the point.[99]

For Justice Kennedy, "the human stakes" were pivotal.[100] Perhaps reflecting the fact that his critical votes may "be closest to the median national voter,"[101] he was more interested in the case at hand than in doctrinal consistency. Correspondingly, he did not see the Court's decisions as the final word. At his Senate confirmation hearings, for example, he rejected judicial supremacy. Instead, he encouraged lawmakers to correct errant Supreme Court rulings.

9:52 AM), https://www.bloomberg.com/view/articles/2011-05-30/how-it-became-the-united-states-of-justice-kennedy-noah-feldman [https://perma.cc/4PVV-3399]; *see also* Reilly, *supra* note 90 ("[O]n most cases of great moment, the intellectual battlefield of the Supreme Court has shrunk to the space between this one man's ears." (quoting Massimo Calabresi & David Von Drehle, *What Will Justice Kennedy Do?*, TIME (June 18, 2012, 12:00 AM), https://time.com/archive/6641930/what-will-justice-kennedy-do/ [https://perma.cc/F4YD-2BDY])).

96. Unlike Justice O'Connor, who thought it enough that these officials testified "without contradiction," Grutter v. Bollinger, 539 U.S. 306, 336 (2003), Justice Kennedy was highly suspicious of their monitoring of "daily reports" of minority admissions, *id.* at 392 (Kennedy, J., dissenting).

97. *See* 570 U.S. 297, 314 (2013).

98. *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198, 2212-14 (2016).

99. Indeed, Justice Kennedy distanced himself from his 2013 opinion in the 2016 *Fisher II* case. He argued that the factual record was outdated and that the Court's decision was essentially limited to the case at hand (so that the Court's decision did not necessarily answer the question of whether the Texas plan was still constitutional). *See id.* at 2209 (noting severe limitations in factual record).

100. Goldsmith, *supra* note 91, at 14. For Kennedy, "[b]ehind all these cases, there's a real person." *Id.*

101. *See* Adam Liptak, *The Supreme Court, Public Opinion and the Fate of* Roe, N.Y. TIMES (June 20, 2022), https://www.nytimes.com/2022/06/20/us/politics/supreme-court-public-opinion-roe.html [https://perma.cc/YJZ8-DCYB].

Proclaiming that legislators may "attempt to affect its decision[s] in legitimate ways," Kennedy argued that lawmakers "would be fulfilling [their] duty" to take action against a Court ruling they disapprove of.[102]

B. A Court Without a Swing Justice

When Anthony Kennedy retired in June 2018, the Supreme Court "los[t] [i]ts [c]enter."[103] Kennedy occupied the place of "super median"; he was the only Justice in between the substantial ideological gap that separated the Court's four liberals from its four conservatives.[104] Kennedy defined the Court's identity for another reason. Starting in 2010, the ideological gap between progressives and conservatives was also a partisan gap. Following "the 2010 appointment of Democrat Elena Kagan to fill the seat [previously occupied by] liberal Republican John Paul Stevens," ideology and party—for the first time in the Court's history—lined up.[105] And with the appointment of conservative Brett Kavanaugh to the Kennedy seat, there no longer was a moderate Republican who would swing and join forces with left-leaning Democrats.[106] That is not to say that the Court's Republicans never broke ranks. Chief Justice Roberts would occasionally join with the Court's Democrats, most notably in casting the deciding fifth vote upholding the Affordable Care Act (June 2012) and in striking down a Louisiana abortion statute on stare decisis grounds (June 2020).[107] However, when Amy Coney

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102. *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 222-23 (1987).

103. Alicia Parlapiano & Jugal K. Patel, *With Kennedy's Retirement, the Supreme Court Loses Its Center*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/interactive/2018/06/27/us/politics/kennedy-retirement-supreme-court-median.html [https://perma.cc/2N9W-JCAN].

104. *See* Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 43, 67 (2008). Kennedy was super median starting with the 2006 retirement of Sandra Day O'Connor and until his retirement. *See* Parlapiano & Patel, *supra* note 103.

105. *See* DEVINS & BAUM, *supra* note 4, at 103-04.

106. Adam Liptak, *Confirming Kavanaugh: A Triumph for Conservatives, but a Blow to the Court's Image*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/conservative-supreme-court-kavanaugh.html [https://perma.cc/XNR7-53LZ].

107. *See* Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius, 567 U.S. 519, 588 (2012); June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2141-42 (2020) (Roberts, J., concurring). But these departures were rare, and the Chief Justice's institutionalist leanings neither masked his conservativism nor made him a Justice who truly swung between competing coalitions. *See*

Barrett filled Ruth Bader Ginsburg's seat in October 2020, these occasional departures were largely foreclosed. It would now take the flipping of two conservative Republicans to turn a six-to-three conservative majority into a five-to-four progressive majority. Chief Justice Roberts's failed efforts to delay the overturning of *Roe* in *Dobbs* exemplifies this phenomenon.[108]

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College likewise exemplifies the shift away from a swing-dominated Court to an ideologically cohesive Court.[109] The Court's six Republicans embraced several longstanding critiques of university affirmative action programs: *Brown* was seen as a prohibition of race-based decision-making, and affirmative action was thereby characterized as constitutionally prohibited race discrimination.[110] Correspondingly, the Court essentially overturned *Grutter* by repudiating race diversity as a compelling government interest; the "only two compelling interests that permit resort to race-based government action" are remedying specific instances of past discrimination and avoiding race riots that pose "imminent and serious risks to human safety."[111] Race diversity was deemed "not

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Grove, *supra* note 15, at 2244-46, 2250-54 (discussing institutionalist concerns that are critical to sociological legitimacy). For a discussion of Chief Justice Roberts, see Stuart Gerson, *Understanding John Roberts: A Conservative Institutionalist Concerned with Durability of the Law and Respect for the Court*, JURIST (July 31, 2020, 2:17 PM), https://www.jurist.org/commentary/2020/07/stuart-gerson-understanding-john-roberts/ [https://perma.cc/V4DC-NSMM].

108. *See* Adam Liptak, *June 24, 2022: The Day Chief Justice Roberts Lost His Court*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/us/abortion-supreme-court-roberts.html [https://perma.cc/7MDF-28C6]. For a detailed accounting of the inside-the-Court campaign to save *Roe*, see Jodi Kantor & Adam Liptak, *Behind the Scenes at the Dismantling of* Roe v. Wade, N.Y. TIMES (Dec. 15, 2023), https://www.nytimes.com/2023/12/15/us/supreme-court-dobbs-roe-abortion.html [https://perma.cc/3JRR-TEZU]. These efforts by Roberts stand in sharp relief to Roberts's actions in the ballot removal case, *Trump v. Anderson*, 144 S. Ct. 662 (2024) (per curiam). By casting the fifth vote in support of a broader-than-necessary holding, Roberts set in motion multiple opinions (including one by Justice Barrett) criticizing the five member majority for writing an unnecessarily divisive ruling. *See* Adam Liptak, *Justice Amy Coney Barrett Stakes Out Distinctive Stance in Trump Case*, N.Y. TIMES (Mar. 5, 2024), https://www.nytimes.com/2024/03/05/us/politics/amy-coney-barrett-trump-ballot-scotus.html [https://perma.cc/6N8X-WJF9]. Roberts's decision to speak broadly to the merits further highlights the difficulty of having two institutionally-minded defectors in a high salience case.

109. *See* 143 S. Ct. 2141 (2023).

110. *Id.* at 2160-61, 2175.

111. *Id.* at 2162. I do not mean to suggest that *Students for Fair Admissions* definitively

sufficiently coherent for purposes of strict scrutiny."[112] Finally, the Court treated Justice O'Connor's claim that affirmative action should stop in twenty-five years as a formal holding—castigating Harvard and the University of North Carolina for failing to provide an end date to affirmative action programs in that twenty-five-year window.[113]

Unlike 1978 to 2016 affirmative action rulings, there was little ambiguity in *Students for Fair Admissions*.[114] All six Justices signed onto the ruling and no member of the majority wrote separately to cast doubt on the ruling. And while the Court did not formally acknowledge that it was overturning precedent, there was no question that both diversity-based affirmative action was prohibited and that the majority spoke as one.[115] In so ruling, *Students for Fair Admissions* exemplifies the profound role that ideological cohesion plays in explaining the Court's willingness to embrace a coherent or

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settles all issues related to affirmative action. The Court did not address the applicability of its decision to high schools or whether the nation's military academies should be treated differently. *Id.* at 2166 n.4. The Court also acknowledged that applicants might refer to their racial identities in their personal statements. *Id.* at 2176.

112. *Id.* at 2166. For a similar critique of affirmative action by conservative interest groups, see Hans A. von Spakovsky, *Supreme Court Finally Ends Racist Discrimination in College Admissions*, HERITAGE FOUND. (June 30, 2023), https://www.heritage.org/courts/commentary/supreme-court-finally-ends-racist-discrimination-college-admissions [https://perma.cc/V727-HW8X].

113. *Students for Fair Admissions*, 143 S. Ct. at 2165-66; *see also id.* at 2221-24 (Kavanaugh, J., concurring).

114. That is not to say that affirmative action will not return to the Court. Most notably, the question of what is race-conscious is not fully resolved as some schools will allow students to refer to race in personal essays and some schools make use of 10 percent plans intended to boost minority enrollment. For an example of an unresolved situation, see Josh Gerstein & Bianca Quilantan, *Supreme Court Rejects Thomas Jefferson High School Admissions Case*, POLITICO (Feb. 20, 2024, 11:06 AM), https://www.politico.com/news/2024/02/20/supreme-court-thomas-jefferson-high-school-admissions-case-00142170 [https://perma.cc/F5CZ-JJJN]. The Court may also need to address statutory questions regarding the scope of statutory nondiscrimination requirements for recipients of government aid. *See, e.g.*, Anemona Hartocollis, *Northwestern Law School Accused of Bias Against White Men in Hiring*, N.Y. TIMES (July 2, 2024), https://www.nytimes.com/2024/07/02/us/affirmative-action-lawsuit.html [https://perma.cc/7Q5N-4N9T] ("[A] lawsuit against Northwestern University's law school ... claim[ed] that its attempts to hire more women and people of color as faculty members violate federal law prohibiting discrimination against race and sex.").

115. *See* Adam Liptak, *Supreme Court Rejects Affirmative Action Programs at Harvard and U.N.C.*, N.Y. TIMES (June 29, 2023), https://www.nytimes.com/2023/06/29/us/politics/supreme-court-admissions-affirmative-action-harvard-unc.html [https://perma.cc/3BHV-3XS8] ("The Supreme Court ... rejected affirmative action at colleges and universities around the nation.").

incoherent vision of the law. "When five or more Justices pursue the same substantive objectives, the Court will act as a coherent body. It will overrule precedents inconsistent with its vision and will establish constitutional precedents that embrace a coherent view of the law."[116]

Students for Fair Admissions exemplifies another reality of today's Court. Unlike 1978 to 2016, when Supreme Court opinions generally tracked dominant elite or public opinion,[117] today's Court is at odds with public opinion, and elite opinion has fractured into rival progressive and conservative factions. With respect to public opinion, the key date—according to a National Academy of Sciences study—is October 26, 2020, the day the Senate confirmed Amy Coney Barrett and she joined the Court.[118] Before Barrett, the Court generally tracked the "average American"; post-Barrett, the six-member conservative supermajority no longer reflects public opinion.[119] Instead, today's Court "appears to be settling into a position that reliably corresponds to Republican Party preferences—and [with Democrats frequently winning the popular vote in presidential elections] is to the right of the vast majority of Americans."[120] In Parts II and III, I will examine the causes and consequences of this partisan ideological divide. Before doing so, Part II explains how

116. Devins, *supra* note 23, at 1400.

117. On the dominance of public opinion, see BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14 (2009); Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 263 (2010). For a critique and explanation of the import of elite opinion, see Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1579-81 (2010).

118. *See* Stephen Jessee, Neil Malhotra & Maya Sen, *A Decade-Long Longitudinal Survey Shows that the Supreme Court is Now Much More Conservative than the Public*, PROC. NAT'L ACAD. SCIS., June 2022, at 1, 3, 5.

119. *Id.*

120. *See* Stephen Jessee, Neil Malhotra & Maya Sen, *The Supreme Court Is Now Operating Outside of American Public Opinion*, POLITICO (July 19, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/07/19/supreme-court-republican-views-analysis-public-opinion-00046445 [https://perma.cc/5EPU-T9PX]. On affirmative action, however, Republican skepticism reflects the popular will; opinion polls taken after the Court's ruling backed the Court. Matt Berg, *Most Americans Support Supreme Court's Ending Affirmative Action, Poll Finds*, POLITICO (Jan. 16, 2024, 12:27 PM), https://www.politico.com/news/2024/01/16/supreme- court-affirmative-action-00135787 [https://perma.cc/DJU9-S6VS].

politics, institutional design, and human nature contributed to a swing Justice-dominated Court from around 1972 to 2018.

II. WHY THE REIGN OF THE SWING JUSTICE LASTED SO LONG

First, some background. From 1953 to 1969, Earl Warren was at the helm of an increasingly progressive Supreme Court. Indeed, beginning with the 1962 appointment of Arthur Goldberg, "[d]uring Warren's tenure, the Supreme Court virtually rewrote the corpus of our constitutional law."[121] Powered by an ideologically cohesive majority, the so-called "second Warren Court" opened up areas that had "been thought closed to the exercise of judicial power," often "articulating broad rules that went well beyond the particular circumstances of individual cases."[122] The post-1962 Court aggressively pursued the nationalization of political problems and processes, especially equality for the underrepresented (minorities, the poor, the accused, and children). To achieve these objectives, the Warren Court—more than any Court before it—was willing to overturn constitutional precedent.[123]

Like today's Court, the post-1962 Warren Court was without a swing Justice. Like today's Court (whose *Dobbs* decision was predicted to be a focal point in the 2024 presidential race),[124] the

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121. MICHAL R. BELKNAP, THE SUPREME COURT UNDER EARL WARREN, 1953-1969 at 308 (2005) (quoting Bernard Schwartz, Commentary, *Earl Warren as a Judge*, 12 HASTINGS CONST. L.Q. 179, 179 (1985)).

122. Barbara Palmer, *Issue Fluidity and Agenda Setting on the Warren Court*, 52 POL. RSCH. Q. 39, 42 (1999) (first quoting RICHARD FUNSTON, CONSTITUTIONAL COUNTER-REVOLUTION? THE WARREN COURT AND THE BURGER COURT: JUDICIAL POLICY MAKING IN MODERN AMERICA 314 (1977); and then citing STEPHEN WASBY, CONTINUITY AND CHANGE: FROM THE WARREN COURT TO THE BURGER COURT (1976)).

123. BELKNAP, *supra* note 121.

124. Before the election, Democrats saw *Dobbs* and reproductive justice as critical to their message. *See* Tom Bonier, Opinion, *American Elections are About Abortion Now*, N.Y. TIMES (Nov. 10, 2023), https://www.nytimes.com/2023/11/10/opinion/abortion-presidential-election-biden.html [https://perma.cc/HUE4-YXGP]. On election day, however, abortion—while clearly relevant—played second fiddle in the presidential race to inflation and immigration. *See* Sarah Varney, *They Split the Ticket. Meet the Abortion Rights Voters Who Also Went for Trump*, NPR (Nov. 9, 2024, 6:05 AM), https://www.npr.org/sections/shots-health-news/2024/11/08/nx-s1-5184539/trump-election-abortion-votes-harris [https://perma.cc/BG2F-GX6V]; De Pinto et al., *supra* note 32. Nonetheless, the Democratic campaign against the Court is likely to continue and might prove critically important to a broad cross-section of voters. That is precisely what happened in 2016; Democrats and Republicans were both

Warren Court was on the ballot in the 1968 presidential election. Republican candidate Richard Nixon and independent candidate George Wallace courted the right by targeting the Court and its decisions.[125] Following Nixon's victory (and with Earl Warren having just stepped down), Nixon's appointment of Warren Burger literally and figuratively put an end to the Warren Court.[126] From that appointment and until (but not counting) the 2018 appointment of Brett Kavanaugh, Republican presidents had filled fourteen of eighteen Supreme Court vacancies.[127] Notwithstanding a supposed commitment to move the Court rightward, the Court was without a solid ideologically simpatico majority until Kavanaugh.[128] Instead, as the affirmative action cases show, the Court steered a more moderate path, with a swing Justice casting the decisive vote in the most divisive cases.[129]

In this Section, I will disaggregate the various factors that contributed to this nearly fifty-year reign of the swing Justice—appointments and confirmation politics, the institutional design of the Supreme Court, the personal incentives of the Justices to be liked and respected by those they like and respect, and serendipity. This narrative reveals that there is an inverse correlation between party polarization and a swing Justice-dominated Court; moderation breeds moderation, and tribalism breeds extremism.[130]

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energized and engaged in the fight over Justice Scalia's seat (so much so that presidential-candidate Trump sought to establish his bona fides with conservative voters by presenting a list of potential Supreme Court nominees). Associated Press, *2016 Candidates Stress Importance of Scalia's Successor*, PBS (Feb. 14, 2016, 3:26 PM), https://www.pbs.org/newshour/politics/2016-candidates-stress-importance-of-scalia-successor [https://perma.cc/YVK4-H5SU].

125. Wallace attacked the Court in general while Nixon focused on targeted decisions. *See generally* KEVIN J. MCMAHON, NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES 17-36, 41-42, 45-47 (2011).

126. Burger was the first of four appointments that Nixon made from 1969-1972. *See Nixon and the Supreme Court*, RICHARD NIXON PRESIDENTIAL LIBR. AND MUSEUM (Sept. 22, 2021), https://www.nixonlibrary.gov/news/nixon-and-supreme-court [https://perma.cc/JXD3-T32Q].

127. *See Justices 1789 to Present*, *supra* note 22.

128. *See supra* Part I.B.

129. *See supra* Part I.A.

130. *See* CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 8-12 (2009). For further discussion, see generally *infra* Part III.

A. The Appointments and Confirmation Process

Before Ronald Reagan made ideology "the most important criteria" in identifying judicial candidates,[131] presidents gave attention to other considerations when nominating Supreme Court Justices—considerations such as rewarding political allies, appealing to voters, and avoiding Senate confirmation battles.[132] Further, Democrats and Republicans alike occupied every ideological niche, and there was a significant cohort of moderates.[133] Conservative southern Democrats were key to the Democratic coalition; liberal Rockefeller Republicans, too, played a critical role in the constituencies of their party.[134] For this very reason, former Alabama Governor George Wallace (who launched a frontal assault against the Court) justified his third-party bid for president by claiming there was not a "dime's worth of difference" between Republicans and Democrats.[135]

Consider, for example, Richard Nixon's nomination of Lewis Powell. When running for president, Nixon sought to portray himself as "a man who could bridge the nation's divide."[136] A full-scale attack against the Court was out of the question. Nixon, instead, spoke of his "great respect for the Supreme Court ... [and] the men on it."[137] His attacks were limited to those issues on which the Warren Court was out of step with the American people, namely criminal procedure and school desegregation.[138] Correspondingly,

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131. DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 134 (1999).

132. *See, e.g.*, *id.* at 20-26, 55, 126.

133. *See generally* Steven S. Smith & Gerald Gamm, *The Dynamics of Party Government in Congress*, *in* CONGRESS RECONSIDERED 141, 141-51 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 9th ed. 2009) (showing comparable ideological scores between the parties from 1937 to 1977).

134. *See, e.g.*, EARL BLACK & MERLE BLACK, THE RISE OF SOUTHERN REPUBLICANS 2 (2002).

135. *See* Richard Pearson, *Ex-Gov. George C. Wallace Dies at 79 in Alabama*, WASH. POST (Sept. 14, 1998, 8:00 PM), https://www.washingtonpost.com/archive/local/1998/09/15/ex-gov-george-c-wallace-dies-at-79-in-alabama/f77a36e4-0689-4086-9b96-b0d9a293cd57/ [https://perma.cc/HX6Q-RFQR] (statement of George Wallace). *See generally* MCMAHON, *supra* note 125, at 41-51.

136. *See* MCMAHON, *supra* note 125, at 59.

137. *See id.* at 47 (statement of Richard M. Nixon).

138. *See* Eric A. Posner, *Casual with the Court*, NEW REPUBLIC (Oct. 24, 2011), https://newrepublic.com/article/94516/nixons-court-kevin-mcmahon [https://perma.cc/P37N-GSE8].

"politics far more than ideology drove" Nixon's judicial appointments.[139] An analysis of liberal votes cast by federal appeals judges from 1952 to 2002, for example, placed Nixon appointees (46 percent) much closer to Clinton (48 percent) than to Reagan or George W. Bush appointees (respectively 39 and 38 percent).[140]

Nixon's appointment of southern Democrat Lewis Powell exemplified Nixon's interest in solidifying his electoral base and his uninterest in ideology.[141] Powell's nomination was tied to Nixon's "[s]outhern [s]trategy."[142] Specifically, Nixon sought to win over conservative white southerners both by condemning the Court's school busing decisions and by appointing a southerner to the Court.[143] Nixon, however, did not want to alienate the traditional liberal coalition of the party.[144] His efforts to walk this tightrope were undone by the Senate's rejection of Clement Haynsworth and G. Harold Carswell, two white southerners who were "easily typecast as racial conservatives bent on reversing the Court's desegregation orders."[145] Reflecting the ideological diversity of both parties, a substantial number of Republicans voted against Haynsworth and Carswell, seventeen against Haynsworth and thirteen against Carswell.[146] Desperate to name a southerner who would easily win confirmation, Nixon turned to southern Democrat and former ABA president Lewis Powell.[147] Nixon paid no mind to Powell's ideology or the fact that he was championed by Nixon's

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139. MCMAHON, *supra* note 125, at 6.

140. CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 114-15 tbl.6-1 (2006).

141. *See* LAURA KALMAN, THE LONG REACH OF THE SIXTIES: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT 257, 307 (2017).

142. *Id.* at 209-10.

143. *See id.*; MCMAHON, *supra* note 125, at 106, 117.

144. *See* MCMAHON, *supra* note 125, at 79-80.

145. *Id.* at 80.

146. *See* Dov Weinryb Grohsgal, *The Senate Has Lost Its Way*, WASH. POST (Oct. 6, 2018, 6:34 AM), https://www.washingtonpost.com/outlook/2018/10/06/senate-has-lost-its-way/ [https://perma.cc/3VY8-CEKX]. Correspondingly, a substantial number of Democrats backed the nominees (nineteen for Haynsworth and seventeen for Carswell). *91st Congress > Senate > Vote 135*, VOTEVIEW.COM, https://voteview.com/rollcall/RS0910135 [https://perma.cc/8TTD-QQLP]; *To Consent to the Nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court.*, GOVTRACK (Apr. 7, 1970), https://www.govtrack.us/congress/ votes/91-1970/s357 [https://perma.cc/6RLH-DBQ2].

147. *See* KALMAN, *supra* note 141, at 290. Before nominating Powell, Nixon nominated Harry Blackmun to fill the seat vacated by Abe Fortas.

liberal Solicitor General Erwin Griswold.[148] All that mattered was that Powell was a southerner and confirmable.[149]

Unlike Nixon, Ronald Reagan was committed to remaking the Court by prioritizing ideology. As I will discuss in Part III, Reagan and his Attorney General Edwin Meese were instrumental both in establishing the conservative legal movement and in setting in motion the ideological split between Democrats and Republicans on today's Court.[150] Nonetheless, Reagan's appointments of Sandra Day O'Connor and Anthony Kennedy highlight the diminished role of ideology during the reign of the swing Justice. Moreover, like Powell (whose appointment came after two failed appointments), serendipity figured into both the O'Connor and Kennedy nominations.

When nominating Sandra Day O'Connor in 1981, Reagan honored a campaign pledge "to bring about a better balance on the federal bench" by appointing a woman to the Supreme Court and seeking out women to appoint to other federal courts.[151] At that time, there was neither a conservative legal movement nor "a deep bench of vetted conservatives."[152] "The decision to interview and later nominate O'Connor—then a little-known state court of appeals judge—[exemplifies the paucity] of credentialed conservative[s]."[153] Indeed, as a state lawmaker, O'Connor had backed both abortion rights and the Equal Rights Amendment (facts not lost on religious conservatives who expressed disapproval of her nomination).[154]

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148. *See* JEFFRIES, *supra* note 45, at 1, 4.

149. *See* MCMAHON, *supra* note 125, at 136; *The President Calling: Richard M. Nixon: Choosing Rehnquist*, AM. RADIOWORKS, https://americanradioworks.publicradio.org/features/prestapes/johndean.html [https://perma.cc/LF9H-BDR3] (interview by Kate Ellis with John Dean, Counsel to the President).

150. *See infra* Part III.A.

151. Lou Cannon, *Reagan Pledges He Would Name a Woman to the Supreme Court*, WASH. POST (Oct. 14, 1980, 8:00 PM), https://www.washingtonpost.com/archive/politics/1980/10/15/reagan-pledges-he-would-name-a-woman-to-the-supreme-court/844817dc-27aa-4f5d-8e4f-0ab3a5e76865/ [https://perma.cc/6ZRN-KQ7J] (statement of Ronald Reagan).

152. DEVINS & BAUM, *supra* note 4, at 126.

153. *Id.*

154. *See* Bill Peterson, *Reagan Choice for Court Decried by Conservatives but Acclaimed by Liberals*, WASH. POST (July 7, 1981, 8:00 PM), https://www.washingtonpost.com/archive/politics/1981/07/08/reagan-choice-for-court-decried-by-conservatives-but-acclaimed-by-liberals/409839b0-41dd-4070-b94b-060db2aba0e8/ [https://perma.cc/7MUU-WC5A]; Rowland Evans & Robert Novak, *Why Did He Choose Her?*, WASH. POST (July 10, 1981, 1:00 AM). https://www.washingtonpost.com/archive/politics/1981/07/10/why-did-he-choose-her/d04149e8-c976-4fa5-991e-6d42b05636ef/ [https://perma.cc/8XLZ-8DZV].

Serendipity also figures into this narrative. O'Connor was championed by her former Stanford Law School classmate William Rehnquist (who had asked O'Connor to marry him while in law school);[155] Reagan, too, was drawn to O'Connor because she had spent much of her childhood on a Western cattle ranch.[156]

Serendipity, likewise, figured into Anthony Kennedy's 1987 nomination to fill the seat vacated by Lewis Powell. Like Nixon's nomination of Powell, Kennedy's nomination came in the wake of two failed nominations.[157] Most notably, six Republican Senators joined fifty-two Democrats in voting against Robert Bork.[158] Bork was seen as an exemplar of Reagan's campaign against judicial activism and Court decisions on abortion, religion, race, and much more.[159] More significantly, by replacing a judicial moderate with a staunch conservative, Bork's nomination promised a constitutional counter-revolution.[160] Instead, following Bork's defeat and the withdrawal of a second nominee over marijuana use, Reagan turned to Kennedy;[161] he was a judicial moderate who would easily win confirmation.[162] Remarkably, Reagan's judicial selection team had

155. Evan Thomas, *Behind the Scenes of Sandra Day O'Connor's First Days on the Supreme Court*, SMITHSONIAN MAG. (Mar. 2019), https://www.smithsonianmag.com/history/behind-scenes-sandra-day-oconnor-first-days-supreme-court-180971441/ [https://perma.cc/98WB-G8Z6].

156. *See id.*

157. *See* Linda Greenhouse, *Reagan Nominates Anthony Kennedy to Supreme Court*, N.Y. TIMES (Nov. 12, 1987), https://www.nytimes.com/1987/11/12/us/reagan-nominates-anthony-kennedy-to-supreme-court.html [https://perma.cc/QL8M-W3KJ].

158. Linda Greenhouse, *Bork's Nomination Is Rejected, 58-42; Reagan Saddened*, N.Y. TIMES (Oct. 24, 1987), https://www.nytimes.com/1987/10/24/politics/borks-nomination-is-rejected-5842-reagan-saddened.html [https://perma.cc/T4KE-RGPG].

159. *See* ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 94-98 (1989).

160. For then-Senate Judiciary Committee Chair Joe Biden, the Bork controversy was more about the loss of Powell than about Bork himself, remarking that if "Bork were about to replace ... Rehnquist or ... Scalia, this would be a whole different ball game." *See* Edward Walsh, *Court Change Elevates Biden's Profile*, WASH. POST (July 12, 1987, 1:00 AM), https://www.washingtonpost.com/archive/politics/1987/07/12/court-change-elevates-bidens-profile/b3c04685-ed84-4c56-8a19-7e6e781a66cb/ [https://perma.cc/9UV7-LH76].

161. *See* Greenhouse, *supra* note 157.

162. The Judiciary Committee (fourteen-to-zero) and then the Senate (ninety-seven-to-zero) unanimously confirmed Kennedy. *See* Linda Greenhouse, *Senate, 97 to 0, Confirms Kennedy to High Court*, N.Y. TIMES (Feb. 4, 1988), https://www.nytimes.com/1988/02/04/us/senate-97-to-0-confirms-kennedy-to-high-court.html [https://perma.cc/2WGL-23W2]; Linda Greenhouse, *Senate Panel Approves Judge Kennedy*, N.Y. TIMES (Jan. 28, 1988), https://www.nytimes.com/1988/01/28/us/senate-panel-approves-judge-kennedy.html [https://perma.cc/8YC8-PQF6].

earlier identified "disturbing aspects" in Kennedy's record and rejected him on ideological grounds.[163]

Unlike today's partisan balkanization, the appointments of Kennedy, O'Connor, and Powell are tied to a political dynamic that cuts against ideology and in favor of moderation. As I will now discuss, the long reign of the swing Justice was also fueled by the institutional design of Supreme Court decision-making and the predisposition of moderates to trade-off doctrinal purity for personal power and institutional stability.

B. Institutional Design and Psychological Need[164]

The starting point is judicial motivation. Contrary to the dominant political science models (which assume that Justices are solely interested in their legal and/or policy preferences),[165] I think it is important to also take account of other motivations, including personal power and reputation.[166] This is particularly true for judges. By accepting a judgeship, an individual accepts substantial constraints on personal freedoms in exchange for an increase in prestige and power.[167] The types of people attracted to these trade-offs tend to care a great deal about the "esteem of others," particularly

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163. *See* Todd Ruger, *Reagan Aides Foresaw Kennedy Gay-Rights Views that Conservatives Now Lament*, ROLL CALL (June 26, 2015, 12:10 PM), https://rollcall.com/2015/06/26/reagan-aides-foresaw-kennedy-gay-rights-views-that-conservatives-now-lament/ [https://perma.cc/DM2E-K7AY]; *see also* YALOF, *supra* note 131, at 145-46.

164. Portions of this subsection (dealing with judicial motivation) are drawn from Neal Devins & William Federspiel, *The Supreme Court, Social Psychology, and Group Formation*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 85, 90-94 (David Klein & Gregory Mitchell eds., Oxford Univ. Press 2010).

165. *See* JEFFERY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 50-53 (2002) (discussing a theory that Justices vote their policy preferences); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 11-15 (1998) (discussing how Justices maximize legal policy preferences by acting strategically, that is, by considering backlash risks).

166. Lawrence Baum is the chief proponent of this social psychology model. Noting that the "Spock-like judges of the dominant [political science] models have no interest in public approval as an end in itself," Baum argues that political scientists need to acknowledge that judges, like other people, "care a great deal about what people think of them." LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 22 (2006). Along with Larry, I, too, have made use of the social psychology model to explain the rise of partisanship on the Court. *See* DEVINS & BAUM, *supra* note 4, at 15-26.

167. DEVINS & BAUM, *supra* note 4, at 11.

those individuals and groups that they are a part of or hold in high regard.[168]

Consider, for example, swing Justices. Unlike strong ideologues committed to the legal policy goals of their coalition, swing Justices maximize their power and status by being independent of either a conservative or progressive coalition.[169] Indeed, by casting critical votes for and against liberal and conservative coalitions, swing Justices enhance their power by creating space between themselves and competing coalitions.[170] Likewise, by signaling that their vote is gettable, swing Justices separate themselves from groups who value ideological purity; instead, they prefer to project an image of neutrality.[171] It is therefore unsurprising that—in closely divided cases—swing Justices (and only swing Justices) typically join the coalition which sides with public opinion.[172]

To exercise power this way, the Court must be ideologically diverse. An ideologically cohesive Court will not need the swing Justice's vote to advance its favored legal policy position. For that very reason, swing Justices flourished from 1972 (when Lewis Powell joined the Court) until 2018 (when the combination of Anthony Kennedy's departure and party polarization finally resulted in the formation of a dominant ideological group).[173] In Part III, I will detail how party polarization made inevitable the formation of a dominant group on today's Court. For the balance of this Section, I will explain how the Court's institutional design and the numerous psychological roadblocks to group formation led to the near-fifty-year reign of the swing Justice.

The first and most significant roadblock to group membership is ideological diversity. Individuals say a lot about themselves by joining a group and, consequently, "are only willing to associate themselves ... with groups that are in sync with their core beliefs."[174]

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168. *See id.* at 10-11.

169. For a useful summary of how swing Justices have exercised power, see Gould, *supra* note 25, at 100-02, 111-12.

170. *See id.* at 98-102; *see also* Epstein & Jacobi, *supra* note 104, at 43.

171. *See* Gould, *supra* note 25, at 98-99.

172. *See* Enns & Wohlfarth, *supra* note 3, at 1102.

173. For an explanation on why there is a positive correlation between polarization and group formation using social psychology, see *infra* Part III.

174. Devins & Federspiel, *supra* note 164, at 90-91. For this reason, joining a group is at the heart of (what social psychologists call) individual self-conception. Correspondingly, an

In other words, a Justice who joins a group must be truly committed to the values and beliefs of the group.[175] Ideological diversity makes that less likely to occur and, accordingly, is the principal roadblock to group formation.[176] For this very reason, the reign of the swing Justice is tied to the relative unimportance of ideology in Richard Nixon and Ronald Reagan's nominations of Lewis Powell, Sandra Day O'Connor, and Anthony Kennedy.[177]

"A second potential barrier to group formation is tied to an individual justice's ... need for power."[178] "An individual's need to influence others and to control ... the world around them ... is a basic psychological need."[179] Assuming there is not a dominant group (where the only way to exercise power is by joining the group), "people with a high need for power may find it best to refrain from joining a group and instead play the role of power broker, or 'decider,' between [two] factions."[180] "'Swing' [J]ustices exercise power by writing" separately "or by insisting" that the majority opinion conform to their legal policy preferences.[181]

"In paying attention to 'audiences,' justices engage in impression management, that is, the 'process of controlling how one is perceived by other people.'"[182] Although there is significant variation in how individuals engage in impression management, it is considered a "universal phenomenon" by social psychologists.[183] When the Supreme Court reaffirmed abortion rights in 1992, for example, swing Justices Sandra Day O'Connor and Anthony Kennedy were

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individual will not act in ways inconsistent with matters central to their cognitive networks. *See* Matthew J. Hornsey, *Social Identity Theory and Self-Categorization Theory: A Historical Review*, 2 SOC. & PERSONALITY PSYCH. COMPASS 204, 206-07 (2008).

175. Devins & Federspiel, *supra* note 164, at 95.

176. *Id.* at 90-91.

177. *See id.*

178. *Id.* at 91.

179. *Id.*

180. *Id.*

181. *Id.* And even if there is a dominant group, the would-be swing Justice might not join if they place a high value on how they are perceived by other groups, most notably, journalists, law professors, judges, et cetera. *Id.* Indeed, these were the dominant reference groups until party polarization shifted power towards more ideological groups. For further discussion, see *infra* Part III. For a detailed explanation of the changing face of the Justices' reference groups, see DEVINS & BAUM, *supra* note 4, at 43-44, 130-40.

182. *See* Devins & Federspiel, *supra* note 164, at 91 (quoting MARK R. LEARY, SELF-PRESENTATION: IMPRESSION MANAGEMENT AND INTERPERSONAL BEHAVIOR 2 (1996)).

183. *See id.*

determined to demonstrate both their commitment to the Court as an institution and their independence from politics (as the president who appointed them also asked the Supreme Court to overturn *Roe*).[184] By invoking stare decisis and, with it, the Court's legitimacy, they sought power and fame by assuming the role of standard bearer for that legitimacy. "Put another way: Without strong ideological precommitments to a particular group, [swing Justices will] likely ... value power and image in ways that make them resistant to forging a majority coalition."[185]

The institutional design of the Supreme Court also facilitates swing Justice dominion. Consider appointments: presidents could advance their legal policy preferences and facilitate group formation if they could cluster the appointment of like-minded Justices.[186] "[T]his is both because people who join an existing organization tend to identify with others who join at the same time and because such clustering means that the same president and Senate will be making the appointment[ ]."[187] "Because [J]ustices have life tenure," however, it is typically the case that appointments to the Court will not be clustered together.[188] During the reign of the swing Justice, there was little clustering and little attention to ideology in Supreme Court appointments.[189]

Other features of the Supreme Court's design empower the swing Justice, most notably, the size of the Court and the fact that the Court sits en banc. Panels of nine are sufficiently small that there is a greater prospect that there will be two roughly equal coalitions

184. *See* Robert L. Jackson, *The Abortion Decision: 'Betrayal' or 'Courage': 3 Justices Are Judged: Decision: O'Connor, Kennedy and Souter Take the Middle Ground, and Some Heat, in Break from the Right*, L.A. TIMES (June 30, 1992, 12:00 AM), https://www.latimes.com/archives/la-xpm-1992-06-30-mn-1303-story.html [https://perma.cc/C9ZC-TERZ].

185. Devins & Federspiel, *supra* note 164, at 93.

186. *See, e.g.*, Gould, *supra* note 25, at 138-39.

187. Devins & Federspiel, *supra* note 164, at 94.

188. *Id.*

189. *See id.* The same cannot be said of today's Court, where President Trump appointed three ideologically simpatico Justices—all of whom knew each other through the Federalist Society and two of whom clerked for Justice Kennedy and were part of the social network of ex-Kennedy clerks. *See* Lawrence Baum & Neal Devins, *Federalist Court: How the Federalist Society Became the De Facto Selector of Republican Supreme Court Justices*, SLATE (Jan. 31, 2017, 10:12 AM), https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html [https://perma.cc/82LD-XM6Y].

pushing in opposite directions.[190] Moreover, by sitting en banc on every case, a swing voter's power is binding. They can "dictate outcomes, and the Court's agenda can come to reflect the swing voter's real or perceived preferences."[191] Finally, rules concerning opinion assignment also shape swing voter power and, with it, the incentives to seek power that way. For Supreme Court Justices, "[d]iscretionary opinion assignment empowers swing voters because blocs can offer the swing voter the chance to write the majority opinion and swing voters can condition their joining a bloc on their being permitted to write for the majority."[192] Finally, Supreme Court rules governing the precedential weight of different judicial opinions likewise favor swing voters. The so-called "*Marks* rule" treats as controlling the opinion of the Justice "who concurred in the judgments on the narrowest grounds."[193] That typically is the swing Justice (who is driven less by ideology).

These institutional features, as Jonathan Gould observed, "collectively tilt the playing field in favor of swing voters existing and exercising power on the Supreme Court. When swing voters exist on the Court, ... they are largely a consequence of the Court's structure and rules."[194] As the above discussion underscores, swing Justices, too, are likely to reign when there is no dominant ideological coalition on the Court. That is likely to occur—as was the case with Justices Powell, O'Connor, and Kennedy—when presidents deemphasize ideology in favor of other goals. For reasons discussed above, Justices with comparatively weak legal policy preferences are more likely to seek power and/or the reputational benefits associated with their willingness to remain independent from competing ideological coalitions. In so doing, these judicial moderates are more likely to carve out a middle path that addresses the case at hand without embracing rules that seek to settle an issue once and for all. From the end of the Warren Court (around 1970) until the 2018 retirement of Anthony Kennedy, the moderate swing Justice wielded enormous power. This Section has explained why, including

190. *See* Gould, *supra* note 25, at 138-39.

191. *Id.* at 116.

192. *Id.* at 117.

193. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

194. Gould, *supra* note 25.

the serendipity at play in the appointment of these swing Justices. As Part III will now explain, those days are now behind us. The reign of the swing Justice could not withstand party polarization. Ironically, serendipity is also at play, most notably, the appointment of Amy Coney Barrett in the wake of the death of Ruth Bader Ginsburg.[195]

III. HOW PARTY POLARIZATION ENDED THE REIGN OF THE SWING JUSTICE

Starting with the 1991 appointment of Clarence Thomas, Republican Supreme Court appointees have been conservatives and Democratic appointees have been liberals.[196] Correspondingly, there has been a growing ideological divide between Republican and Democratic Justices.[197] In 2010 (when Elena Kagan filled the seat vacated by liberal Republican John Paul Stevens), this ideological divide metastasized; for the first time in the Court's history, there was a partisan divide where all Democratic appointees were to the left of all Republican appointees.[198] In 2018, Anthony Kennedy retired and the Court lost its last moderate and only swing Justice.[199] With the October 2020 confirmation of Amy Coney Barrett,

195. Actually, serendipity and hardball politics are at play, as evidenced by Senate Majority Leader Mitch McConnell's refusal to allow a vote on Obama Supreme Court nominee Merrick Garland while pushing through a quick vote on Justice Barrett. As a direct result, Republicans gained a seat on the Supreme Court and, with it, a six-member majority. For a provocative assessment of Republican-Democratic differences, see generally Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018). For additional discussion, see *infra* Part III.A.

196. Up until the 1990 appointment of left-of-center Republican nominee David Souter, party identity was not a proxy for ideology; instead, Republican nominees were often more liberal than Democratic appointees. *See* DEVINS & BAUM, *supra* note 4, at 76-84, 120-30.

197. *See* Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSPS. 97, 110-12 (2021).

198. *See* Lawrence Baum & Neal Devins, *Split Definitive: For the First Time in a Century, the Supreme Court is Divided Solely by Political Party*, SLATE (Nov. 11, 2011, 5:27 PM), https://slate.com/news-and-politics/2011/11/supremecourt-s-partisan-divide-and-obamas-health-care-law.html [https://perma.cc/F77J-GFRU].

199. The appointment of Brett Kavanaugh for the Kennedy seat was consequential but not transformative. In its 2018-19 term, the five-member Republican majority did not vote as a bloc and the Court's Democrats were in the majority in five-to-four cases as often as the Court's Republicans. *See* Adam Liptak, *Deciphering How the New Justice's Tilt to the Right Will Have an Impact on the Court*, SEATTLE TIMES (Oct. 6, 2018, 7:15 PM), https://www.seattletimes.com/nation-world/deciphering-how-the-new-justices-tilt-to-the-right-will-have-an-

the era of the swing Justice truly came to an end.[200] No longer could the flipping of a single vote turn defeat into victory or vice-versa; no longer did power lie with moderates willing to trade-off legal policy goals to gain power or advance institutional goals.[201] Instead, with a super-majority of six conservative Justices, today's Court is poised to become a conservative juggernaut (if it is not one already).[202]

This Section will tell two related stories. First, I will explain how the rise of the conservative legal network and hardball confirmation politics came together to produce today's Roberts Court. Second, I will argue that the partisan divide which defines today's Court is now entrenched (at least with respect to those issues that divide the parties).[203] The era of the swing Justice has been replaced by the era

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impact-on-the-court/ [https://perma.cc/4ATW-ZHWP]. Consider, for example, Chief Justice Roberts: having already engaged in a very public skirmish with then-President Trump about whether there were "Trump" and "Obama" judges, Roberts cast the fifth vote upholding Obama immigration initiatives and striking down Louisiana abortion restrictions. *See* Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge*,' N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html [https://perma.cc/X3T2-5FYD]; Jane Coaston, *Social Conservatives Feel Betrayed by the Supreme Court—and the GOP that Appointed It*, VOX (July 1, 2020, 11:00 AM), https://www.vox.com/2020/7/1/21293370/supreme-court-conservatism-bostock-lgbtq-republicans [https://perma.cc/6HJR-X75V]. In addition to Roberts, for example, Neil Gorsuch has both backed Native Americans in several disputes and played a defining role in extending statutory sex discrimination protections to LGBTQ+ workers. *See* Adam Liptak, *Justice Neil Gorsuch Is a Committed Defender of Tribal Rights*, N.Y. TIMES (June 15, 2023), https://www.nytimes.com/2023/06/15/us/politics/neil-gorsuch-supreme-court-opinions.html [https://perma.cc/M5H7-Z92D]; Nina Totenberg, *Supreme Court Delivers Major Victory to LGBTQ Employees*, NPR (June 15, 2020, 10:19 AM), https://www.npr.org/2020/06/15/863498848/supreme-court-delivers-major-victory-to-lgbtq-employees [https://perma.cc/B9QC-W98H].

200. *See* Jessee et al., *supra* note 118, at 3.

201. *See* Gould, *supra* note 25, at 89, 99-100, 111-12.

202. *See* Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative [https://perma.cc/JF8X-F83X]; Amelia Thomson-DeVeaux & Laura Bronner, *The Supreme Court's Partisan Divide Hasn't Been This Sharp in Generations*, FIVETHIRTYEIGHT (July 5, 2022, 1:08 PM), https://fivethirtyeight.com/features/the-supreme-courts-partisan-divide-hasnt-been-this-sharp-in-generations/ [https://perma.cc/K8LV-J8UM].

203. The Supreme Court now divides along party lines approximately 20 percent of the time—much higher than before but still much lower than the House of Representatives, which divides around 53.1 percent, and significantly lower than the Senate, which divides 83.1 percent of the time. Niels Lesniewski & Ryan Kelly, *2022 Vote Studies: Division Hit New High in Senate, Fell in House*, ROLL CALL (Mar. 24, 2023, 5:00 AM), https://rollcall.com/2023/03/24/2022-vote-studies-division-hit-new-high-in-senate-fell-in-house/ [https://perma.cc/3F9R-VKUJ]; *see* Thomson-DeVeaux & Bronner, *supra* note 202. This divide centers on the most

of the partisan Justice, that is, a Democratic Court will typically reach progressive results and a Republican Court will usually back conservative outcomes.[204] Correspondingly, when party control of the Court changes, constitutional doctrine—like a yo-yo—will also change.[205]

A. How We Got Here[206]

The story begins with Ronald Reagan.[207] By reaching out to conservative southern Democrats and largely abandoning moderate-to-liberal Rockefeller Republicans, Reagan transformed the Republican Party and, in so doing, set in motion the ideological divide that now separates Republicans and Democrats.[208] Moreover, by recognizing the political saliency of religion, race, and abortion, the Reagan administration saw the courts as "a primary player in the formulation of public policy."[209] Efforts to reshape the judiciary were initially limited, however.[210] At that time, the social and professional world of lawyers and judges was dominated by center-left bar groups—academics and journalists.[211] When Reagan took office in 1981, there was no conservative legal network; indeed, the Federalist Society did not start until 1982.[212] Consequently, the

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visible cases in the Court's docket, suggesting that there are essentially two Supreme Courts—one that looks particularly political in high-salience cases and more law-oriented in less salient cases. Along with Larry Baum, I am now researching that question.

204. *See* Thomson-DeVeaux & Bronner, *supra* note 202.

205. Mark Graber makes this point, invoking the yo-yo analogy, in Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOW. L.J. 661, 665-66 (2013).

206. This subsection is drawn from earlier writings of mine, especially DEVINS & BAUM, *supra* note 4, at 122-30.

207. Reagan was the first president to focus on ideology in judicial appointments and, as I am about to tell, the conservative legal movement is an outgrowth of his presidency. Before Reagan, American conservativism existed but did not have access to the levers of power. *See* RICK PERLSTEIN, REAGANLAND: AMERICA'S RIGHT TURN 1976-1980 at 978, 989, 1109 (2020).

208. *See* DEVINS & BAUM, *supra* note 4, at 103-06.

209. David M. O'Brien, *Federal Judgeships in Retrospect*, *in* THE REAGAN PRESIDENCY: PRAGMATIC CONSERVATISM AND ITS LEGACIES 327, 331 (W. Elliot Brownlee & Hugh Davis Graham eds., 2003) (statement of Bruce Fein, Reagan DOJ official).

210. *See* DEVINS & BAUM, *supra* note 4, at 103, 126.

211. For a discussion of the center-left social network and its impact, see Baum & Devins, *supra* note 117, at 1516-18, 1545-46.

212. *See* DEVINS & BAUM, *supra* note 4, at 43, 59.

Reagan administration could not draw from a deep bench of committed, credentialed conservatives when appointing judges and justices.[213]

Further complicating the appointment of committed conservatives, several Republican senators did not share Reagan's conservativism.[214] Unlike the party line voting, which characterizes much of today's confirmation politics, Reagan-era Republicans and Democrats would often cross party lines (typically to back opposite party judges and sometimes to oppose same party nominations).[215] This political dynamic was in play when the Senate unanimously confirmed swing Justices Sandra Day O'Connor and Anthony Kennedy in 1981 and 1987, respectively;[216] more strikingly, six (out of forty-six) Republican senators voted against conservative Supreme Court nominee Robert Bork in 1987.[217]

Notwithstanding its inability to transform the Supreme Court, the Reagan administration laid the seeds for the growth of the conservative legal movement and, ultimately, today's Roberts Court. Under the leadership of his second-term Attorney General Edwin

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213. Reagan DOJ official, Richard Willard, noted:

> Th[o]se were the days before the Federalist Society was really off the ground, so it was hard to find lawyers who had a conservative political outlook. At that time, the law schools and the professional associations were overwhelmingly liberal in their outlook, and so finding conservative lawyers who had the outlook, but also the professional competence, to do the job was a challenge.

Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 STUD. AM. POL. DEV. 61, 70-71 (2009) (quoting Interview with Richard Willard, Assistant Attorney General for the Reagan DOJ Civil Division (July 2008)).

214. *See, e.g.*, DEVINS & BAUM, *supra* note 4, at 120, 122.

215. *See id.* at 108.

216. *See* Linda Greenhouse, *Senate Confirms Judge O'Connor; She Will Join High Court Friday*, N.Y. TIMES (Sept. 22, 1981), https://www.nytimes.com/1981/09/22/us/senate-confirms-judge-o-connor-she-will-join-high-court-friday.html [https://perma.cc/2PVN-TSCJ]; *see supra* note 162 and accompanying text. The 1971 nomination and confirmation of swing Justice Lewis Powell was a near-unanimous eighty-nine-to-one. Fred P. Graham, *Senate Confirms Powell by 89 to 1 for Black's Seat*, N.Y. TIMES (Dec. 7, 1971), https://www.nytimes.com/1971/12/07/archives/senate-confirms-powell-by-89-to-1-for-blacks-seat-first-southern.html [https://perma.cc/RT7M-AAVX].

217. *See* Greenhouse, *supra* note 158. By way of contrast, Antonin Scalia was confirmed unanimously in 1986; in 1993, forty-one out of forty-four Republicans backed Ruth Bader Ginsburg's confirmation. *See* Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html [https://perma.cc/2WZE-K9JY]; *Roll Call Vote 103rd Congress—1st Session*, U.S. SENATE (Aug. 3, 1993, 10:25 AM), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1031/vote_103_1_00232.htm#position [https://perma.cc/Y38A-UZDQ].

Meese, Reagan took steps to groom a cadre of well-credentialed conservative lawyers and, in so doing, transformed constitutional discourse and judicial decision-making.[218] Most significantly, Meese sought to staff his department with young conservative lawyers—making "ideological commitment ... a credential rather than a disqualification."[219] The recently established Federalist Society was an important component of this strategy.[220] Meese hired the Society's founders, signaling both his desire to credential young conservative lawyers and his belief that young conservatives "could win" by acting "on the basis of your ideals."[221] Indeed, by using judicial clerkships and government jobs to reward and credential young conservatives, a feedback loop was created: Federalist Society members would be rewarded for acting on their beliefs—some of them would later become judges and agency heads and, at that time, they could credential and mentor young conservatives.[222] Federalist Society co-founder and Meese Special Assistant Steve Calabresi put it this way: "[T]here was a real desire to train a generation of people—a farm team—who might go on later on in future Republican administrations to have an impact and to hold more important positions."[223]

Following the Reagan administration, the divide between Democrats and Republicans continued to grow. The rise of the Federalist Society as the de facto screener of Republican judges is particularly instructive.[224] As noted, the Reagan administration and Federalist Society worked in tandem to foster the conservative legal network.[225] The George H.W. Bush and George W. Bush

218. For an exceptional treatment of Meese's influence, see generally Teles, *supra* note 213.

219. *See id.* at 74.

220. *See id.* at 63, 73, 80.

221. *See id.* at 74 (citing STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 141-42 (2008) (statement of Kenneth Crib, Counselor to Attorney General Edwin Meese)).

222. *Id.* at 69-70, 72.

223. *Id.* at 73 (quoting Interview with Steven G. Calabresi (July 2007)).

224. *See* DEVINS & BAUM, *supra* note 4, at 122.

225. For example, notwithstanding the fact that there were relatively few Federalist Society members during the Reagan years, 25 percent of the speakers at 1981-1988 Federalist Society annual meetings were serving or would serve in the Reagan administration. *See* DEVINS & BAUM, *supra* note 4, at 125 (citing Amanda L. Hollis-Brusky, The Reagan Administration and the Rehnquist Court's New Federalism: Understanding the Role of the Federalist Society 16 (Aug. 25, 2008) (unpublished manuscript)).

administrations likewise saw membership in the Federalist Society as a proxy for conservative ideology. Not only did people in the Federalist Society network play key roles in "selecting, vetting, and shepherding" judicial nominees, but also major legal policy positions (particularly in the DOJ) were often filled by Society members (including John Roberts, Neil Gorsuch, and Brett Kavanaugh).[226]

Over time, the number of credentialed conservatives boomed. By the end of George W. Bush's first term, fully half of his judicial appointments were Federalist Society members (again including John Roberts, Neil Gorsuch, and Brett Kavanaugh).[227] The nomination and withdrawal of George W. Bush confidante and Supreme Court nominee Harriet Miers vividly illustrates the power of the Federalist Society and, with it, the conservative legal movement.[228] Attacked by conservatives for both her ties to the American Bar Association and her lack of Federalist Society "credentials," conservatives demanded that she withdraw and be replaced by a nominee from the "deep farm team of superbly qualified and talented circuit judges primed for this moment."[229] Her replacement was Samuel Alito, a Society member and a favorite of the very people who had attacked Miers.[230]

By 2016, presidential candidate Donald Trump understood that he needed to partner with the Federalist Society to establish his conservative bona fides. Specifically, Trump promised that his judicial nominees would "all [be] picked by the Federalist Society" and then "turned to the 'Federalist people' ... to assemble a list of ...

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226. AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 154-55 (2015). Federalist Society member and Bush-appointed counsel to the Food and Drug Administration Daniel Troy put it this way: "Everybody, I mean everybody who got a job who was a lawyer was involved with the Federalist Society. I mean everybody." *Id.* at 154 (alterations in original omitted) (quoting Interview with Daniel Troy (Jan. 30, 2008)).

227. *See* Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court Into a Partisan Court*, *in* 2016 THE SUPREME COURT REVIEW 301, 342 (Dennis J. Hutchinson, David A. Strauss & Geoffrey R. Stone eds., 2017).

228. DEVINS & BAUM, *supra* note 4, at 123, 127.

229. *Id.* at 127; Todd J. Zywicki, *A Great Mind? Miers Might Vote Right, but What the Court Truly Needs Is Intellectual Leadership*, LEGAL TIMES (Oct. 10, 2005), https://sls.gmu.edu/todd-zywicki/publications/wp-content/uploads/sites/51/2019/09/Legal-Times-Mier-Op-Ed.pdf [https://perma.cc/LGC9-KRJJ].

230. *See* Baum & Devins, *supra* note 189.

potential Supreme Court nominees."[231] When the Society held its annual meeting shortly after the elections, "nine of the twenty-one judges [on the list] were [featured] speakers and nearly all the [remaining judges] were in attendance."[232] Not surprisingly, the three finalists were active Federalist Society members who "regularly spoke at [S]ociety events."[233]

Throughout this post-Reagan period, party and ideology have become inextricably linked and, correspondingly, the ideological divide between Democratic and Republican appointees has grown and grown.[234] Studies of federal court of appeals decision-making found "a significant difference between Republican and Democratic appointees," especially on issues that divided the parties.[235] More than that, judges with Federalist Society ties were significantly more conservative than other judges.[236]

Changes in Senate rules further fueled these flames. In November 2013, Senate Democrats broke a logjam (standing in the way of three Obama D.C. Circuit nominees) by suspending the filibuster for lower court judicial nominees.[237] When combined with party line voting, this procedural change effectively guaranteed the confirmation of lower court judges whenever the president's party was in control of the Senate.[238] In April 2017, Republican leadership suspended the filibuster for Supreme Court nominees, paving the way for the confirmation of Federalist Society members Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett.[239]

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231. *Id.* (alteration in original).

232. DEVINS & BAUM, *supra* note 4, at 127.

233. *Id.*

234. *See* Bonica & Sen, *supra* note 197, at 110-14. Reagan appointees, too, were more conservative than appointees of earlier Republican administrations. SUNSTEIN ET AL., *supra* note 140, at 119-21.

235. SUNSTEIN ET AL., *supra* note 140, at 122-23; *see also* THOMAS M. KECK, JUDICIAL POLITICS IN POLARIZED TIMES 163 (2014).

236. Nancy Scherer & Banks Miller, *The Federalist Society's Influence on the Federal Judiciary*, 62 POL. RSCH. Q. 366, 376 (2009).

237. *See* DEVINS & BAUM, *supra* note 4, at 107.

238. *See id.* at 107-08. Consequently, when Republicans took control of both the White House and Senate in 2017, ultra-conservative judges could be confirmed so long as the Republican coalition held. For this very reason, Trump White House counsel Don McGahn looked to judicial candidates with an extensive written record. *See* Donald F. McGahn II, *The Third Circuit in the Era of Trump*, 29 WIDENER COMMONWEALTH L. REV. 159, 161 (2020).

239. *See* DEVINS & BAUM, *supra* note 4, at 109.

These three appointments put in place today's post-Barrett Roberts Court, a Court that primarily reflects the priorities of the Republican Party in general and the conservative legal network in particular—including overturning *Roe* and *Grutter*, expanding religious liberty and gun rights, limiting the administrative state, and approving most barriers to voting.[240] By largely advancing the goals of one party, as I will explain in the Conclusion, the Court opens itself to political attack. Nonetheless, for reasons I will now detail, the partisan divide on today's Court is an inescapable feature of today's political and social environment.

B. Why Today's Partisanship Will Persist

Let me begin by connecting some dots. The swing Justice era was propelled by the appointment of moderates with relatively "weak legal policy preferences."[241] Ideology and partisan identity were not linked until the 1991 appointment of Clarence Thomas.[242] Correspondingly, with the rise of the conservative legal movement, Republican appointees are connected both ideologically and socially (through, for example, Federalist Society events).[243] Unlike the swing Justice era, there is an ideologically simpatico majority coalition. Consequently, there is no place for judicial moderates to exercise individualized power by casting the decisive swing vote. Today, the pursuit of a shared agenda is the most important manifestation of power.[244] Democrats are progressives who largely agree with one another; Republicans are conservatives who typically agree with each other.[245]

Serendipity too has played a role in this narrative (as it did with the swing Justice narrative). The Senate was under Republican

240. *See infra* note 276 and accompanying text.

241. *See* Baum & Devins, *supra* note 117, at 1536.

242. *See* DEVINS & BAUM, *supra* note 4, at 122-23, 133.

243. *See id.* at 117, 124-28.

244. For additional discussion of the need for power and how it impacts a Justice's willingness to either join a coalition or go it alone, see Devins & Federspiel, *supra* note 164, at 91-94; see also Lawrence Baum, *Motivation and Judicial Behavior: Expanding the Scope of Inquiry*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING, *supra* note 164, at 3, 19-21.

245. For a discussion of the ideological rankings of the post-Barrett Roberts Court, see Bonica & Sen, *supra* note 197, at 113-16. For an analysis of the rise of polarization and the related demise of judicial moderates, see generally DEVINS & BAUM, *supra* note 4, at 103-40.

control from 2015 to 2021 and Majority Leader Mitch McConnell blocked consideration of Obama-nominee Merrick Garland (nominated after the death of Justice Antonin Scalia) and fast-tracked Trump-nominee Amy Coney Barrett (nominated after the death of Justice Ruth Bader Ginsburg).[246] McConnell's winning-is-everything maneuvering explains the Republicans' six-to-three advantage.[247]

For reasons I will now explain, today's conservative majority may give way to tomorrow's liberal majority. Today's conservative majority, however, will not give way to a swing Justice-centered Court. There are no longer judicial moderates and, as such, partisan ideologically driven coalitions are likely to hold. Correspondingly, the appointments and confirmation process is dominated by ideological law-oriented groups. Witness Supreme Court nominee Harriet Miers's withdrawal, or the efforts of Demand Justice and other left-leaning groups for President Biden to appoint public defenders, civil rights lawyers, and other strong liberals.[248]

In the years since Ronald Reagan appointed moderate Anthony Kennedy, the ideological gap between Democrats and Republicans has grown and grown.[249] Starting in the 1990s, a surge of southern Republicans set in motion today's polarization of the parties.[250] By 1994, "23% of Republicans were more liberal than the median Democrat," and "17% of Democrats were more conservative than the median Republican."[251] When Donald Trump first became president

246. *See* Party Division, U.S. SENATE, https://www.senate.gov/history/partydiv.htm [https://perma.cc/M2J6-NVCU]; Peter S. Canellos, *McConnell Built Today's Supreme Court. Will He Come to Regret It?*, POLITICO (Feb. 29, 2024, 5:00 AM), https://www.politico.com/news/magazine/2024/02/29/mcconnell-supreme-court-00144007 [https://perma.cc/4YF8-2E8U].

247. *See* Canellos, *supra* note 246.

248. For discussion of Harriet Miers, see Zywicki, *supra* note 229. For discussion of the efforts of Demand Justice and other left-leaning groups, see Harper Neidig, *Biden Under Pressure to Revamp the Judiciary*, HILL (Dec. 24, 2020, 6:00 AM), https://thehill.com/regulation/court-battles/530955-biden-under-pressure-to-revamp-the-judiciary/ [https://perma.cc/7CX4-3BFR]. In terms of numbers, "[n]early 30% of Biden's nominees to the federal bench have been public defenders, 24% have been civil rights lawyers and 8% labor attorneys." Colleen Long, *Biden Seeking Professional Diversity in His Judicial Picks*, AP NEWS (Feb. 10, 2022, 9:25 AM), https://apnews.com/article/joe-biden-us-supreme-court-business-congress-race-and-ethnicity-e775b084ed2943c9c328a4726b21b579 [https://perma.cc/64UK-U5KF].

249. *See* Bonica & Sen, *supra* note 197, at 110-14.

250. *See generally* BLACK & BLACK, *supra* note 134.

251. Jocelyn Kiley, *In Polarized Era, Fewer Americans Hold a Mix of Conservative and Liberal Views*, PEW RSCH. CTR. (Oct. 23, 2017) (emphasis omitted), https://www.pewresearch.org/short-reads/2017/10/23/in-polarized-era-fewer-americans-hold-a-mix-of-

in 2017, those numbers had shrunk to 1 and 3 percent.[252] Moreover, this partisan sorting spurred on so-called "affective polarization."[253] Today's Democrats and Republicans "dislike, even loathe, their opponents" and are less likely to have interpersonal contact across party lines.[254]

Beyond the alignment of ideology and party, the Justices—as noted above—are part of social networks that reinforce their legal policy preferences. In particular, the Justices live in a world of social and political elites who tend to be the most extreme members of their respective parties.[255] By way of contrast, during the 1960s and 1970s, the most affluent and best educated Republicans and Democrats tended to converge on divisive policy issues.[256] On abortion, for example, the divide between pro-choice and pro-life had initially separated the best educated and most affluent from the working class and those without a college degree.[257] By 2017, affluent Democrats "express liberal attitudes on virtually every issue" and affluent Republicans express conservative positions.[258]

Fast forward to today's Roberts Court. It is a near perfect reflection of today's party polarization. There are no moderates in either the six-member Republican majority or three-member Democratic minority.[259] Unlike the swing Justice era, no Justice is

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conservative-and-liberal-views/ [https://perma.cc/5ZLL-SHKC].

252. *Id.* For 2024 data on the partisan divide, see *Changing Partisan Coalitions in a Politically Divided Nation*, PEW RSCH. CTR. (Apr. 9, 2024), https://www.pewresearch.org/politics/2024/04/09/changing-partisan-coalitions-in-a-politically-divided-nation/ [https://perma.cc/G8DU-783D].

253. Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OP. Q. 405, 405-07 (2012).

254. *Id.*

255. *See* Devins & Baum, *supra* note 227, at 325-27.

256. *See id.* at 325-26.

257. *See generally* Samantha Luks & Michael Salamone, *Abortion*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 97 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008).

258. *See Political Typology Reveals Deep Fissures on the Right and Left*, PEW RSCH. CTR. (Oct. 24, 2017), https://www.pewresearch.org/politics/2017/10/24/political-typology-reveals-deep-fissures-on-the-right-and-left/ [https://perma.cc/NKU8-TWBT].

259. Martin-Quinn scores (measuring ideology) show that there are no Republican or Democratic Justices who break from their party; instead, party compatriots are clustered near each other. *See* Thomson-DeVeaux & Bronner, *supra* note 202. By way of contrast, there was a significant spread between swing Justice Kennedy and competing clusters of conservative Republicans and progressive Democrats. *See id.*

more liberal than the Court's conservatives but more conservative than the Court's liberals. And while there is some variation in each coalition,[260] the Court's conservatives and progressives frequently vote as a bloc in the most visible, most divisive cases (more so today than any other time in the Court's history).[261] Indeed, the Court no longer reflects the average American (as it was during the swing Justice era);[262] the Court, instead, is far more conservative and reflects the average Republican.[263] More than that, the Court's Republicans are particularly reluctant to break ranks in cases where their vote could hand victory to the progressive Democratic coalition. A study led by Tom Clark found both that ideology played an oversized role in cases when a Justice cast the pivotal vote and that this was particularly true of the Republican Justices on the Roberts Court.[264] Moreover, as discussed above, all Republican Justices have ties to the Federalist Society and five are active members.[265] This bond is particularly meaningful because judges, similar to other people, seek to win approval from audiences they care about.[266] The social conservative network is such an audience.

260. This is particularly true of the Court's Republicans. Several commentators have suggested that Justices Barrett, Kavanaugh, and Roberts are a more moderate group as compared to Justices Thomas, Alito, and Gorsuch. *See* Blackman, *supra* note 4; *see also* Joan Biskupic, *Roberts, Kavanaugh and Barrett Have Seized the Supreme Court for Now*, CNN (June 18, 2021, 6:26 AM), https://www.cnn.com/2021/06/18/politics/roberts-kavanaugh-barrett-supreme-court/index.html [https://perma.cc/EK5G-YPCW].

261. *See* Thomson-DeVeaux & Bronner, *supra* note 202. With the 2024 reelection of Donald Trump, there is reason to think that today's ideological divide will be further solidified; specifically, there is widespread speculation that Justices Thomas and/or Alito will step aside for younger, equally conservative Justices. *See* John Fritze & Paula Reid, *Trump's Election Sparks Speculation and Infighting over Future Supreme Court Vacancies*, CNN (Nov. 9, 2024, 2:00 PM), https://www.cnn.com/2024/11/09/politics/supreme-court-alito-thomas-trump-retirement/index.html [https://perma.cc/32CN-4CPC].

262. *See generally* Enns & Wohlfarth, *supra* note 3 (showing that swing Justices' votes typically reflect public opinion).

263. *See generally* Jessee et al., *supra* note 118.

264. Tom S. Clark, B. Pablo Montagnes & Jörg L. Spenkuch, *Politics from the Bench?: Ideology and Strategic Voting in the U.S. Supreme Court* 1-15, 29-30 (CESIFO 1, Working Paper No. 7264, 2018), https://ssrn.com/abstract=3250082 [https://perma.cc/W83W-6WPV]. Clark's study reviewed 8,500 cases since World War II; it ranked Justices Gorsuch, Roberts, and Alito as the three most likely to vote in line with their ideology when casting the pivotal vote. Justices Barrett and Kavanaugh were not considered in the study. *See id.*

265. Lawrence Baum & Neal Devins, *The Federalist Society Majority*, SLATE (July 6, 2018, 2:01 PM), https://slate.com/news-and-politics/2018/07/the-federalist-society-will-soon-have-a-5-4-stranglehold-on-the-supreme-court.html [https://perma.cc/423J-GUZE].

266. For an instructive overview, see BAUM, *supra* note 166.

Even assuming that there is a Justice with weak legal policy preferences and without attachments to the social conservative network, there is no incentive in either seeking to stake out a moderate position or in swinging between the Court's progressive and conservative blocs. With a six-member conservative Republican coalition, two members of that coalition would need to join with the Court's three Democrats. Such cases are few and far between,[267] and, consequently, there is little strategic reason for a Justice to seek to locate herself at the Court's median.[268] In fact, the opposite is true. A strategic Justice interested in power should seek to join the dominant coalition in the hopes of playing a leadership role in that group.[269]

Were Democrats to regain control of the Court, the same analysis would hold true. Like their Republican counterparts, Democratic appointees would likely have strong legal policy preferences and be particularly interested in advancing their coalition's agenda, not the idiosyncratic agenda of a judicial moderate. Democratic appointees would likely agree with each other, likely vote as a bloc in divisive, high visibility cases, and likely seek validation from progressive elites. For these Justices, there is no analog to the Federalist Society;[270] rather, the larger elite world of law schools, bar groups, and the "mainstream media" serves as a validating reference group.[271]

All of this leads us to the rather obvious conclusion that today's Justices are unlikely to be moderates and unlikely to be interested in swinging. They, instead, are likely to have strong legal policy preferences and likely to be parts of social networks that have beliefs similar to their own. It also means that the Court will

267. Such cases—while rare—do exist. *See, e.g.*, Allen v. Milligan, 599 U.S. 1 (2023) (Justices Kavanaugh and Roberts backing voting rights in Alabama); Bostock v. Clayton Cnty., 590 U.S. 644 (2020) (Justices Gorsuch and Roberts supporting the extension of sex discrimination legislation to LGBTQ claimants); Garland v. Vanderstok, 144 S. Ct. 44 (2023) (Justices Barrett and Roberts backing the regulation of so-called "ghost guns").

268. There is reason to think that this pattern will persist (and be reenforced) during President Trump's second term. *See supra* notes 259-66 and accompanying text.

269. *See* Devins & Federspiel, *supra* note 164, at 90-94.

270. In explaining Republican-Democratic differences, Michael Greve put it this way: "[O]n the left there are a million ways of getting credentialed; on the political right, there's only one way in these legal circles." HOLLIS-BRUSKY, *supra* note 226, at 152 (quoting Interview with Lisa Brown, Executive Director (2001-2008), American Constitution Society (June 19, 2008)).

271. For a general treatment of the moderate-to-liberal mainstream, see generally TELES, *supra* note 221, at 22-57.

increasingly reflect the views of one or the other party and that doctrine will flip whenever there is a change in party control of the Court. Correspondingly, as post-Barrett Roberts Court decision-making makes clear, stare decisis will increasingly operate as a shibboleth—invoked by the dissent and largely abandoned by the majority. No doubt, the days of moderate swing Justices steering a middle path are gone. Goodbye *Bakke, Grutter*, and *Fisher;* hello *Students for Fair Admissions.*

CONCLUSION: WHY WE NEED SWING JUSTICES (ESPECIALLY WHEN THEY ARE HARD TO FIND)

The long reign of the swing Justice has now given way to today's Partisan Court and the prospects of a "constitutional yo-yo[ ]" on the salient issues which divide the parties.[272] This shift likewise casts doubt on longstanding claims that the Court typically reflects the beliefs and norms of the dominant political culture.[273] While it is certainly true that today's Court reflects the views of the appointing presidents and confirming senators, it is also true that the appointments and confirmation process reinforces Republican-Democratic differences. Today's Justices are drawn from competing elite social networks that are increasingly ideological and increasingly divergent from one another.[274] In other words, unless the 2024 elections prove transformative,[275] there no longer is a dominant political culture; instead, there are rival camps of strong liberals and strong conservatives. For this very reason, Roberts Court decision-making is in sync with the views of the average Republican, not public opinion.[276]

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272. *See* Graber, *supra* note 205.

273. Robert Dahl made this claim in his seminal 1957 article *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957). For a contemporary rethinking, see Emily Bazelon, *When the Supreme Court Lurches Right*, N.Y. TIMES (Aug. 22, 2018), https://www.nytimes.com/2018/08/22/magazine/when-the-supreme-court-lurches-right.html [https://perma.cc/P3ZA-ZQR3].

274. *See generally* DEVINS & BAUM, *supra* note 4.

275. *See supra* notes 31-34; *see also* Cohn, *supra* note 31.

276. *See supra* note 106 and accompanying text. Indeed, except for Clarence Thomas, Republican appointees to the Roberts's Court are "minority Justice[s]," that is, Supreme Court Justices appointed by presidents "who had failed to win the popular vote" and confirmed "with the support of a majority of senators who had garnered fewer votes ... in their most recent

This dynamic also explains why voters and lawmakers increasingly see the Court as a political actor (subject to political checks). This is especially true of Democrats who strongly disapprove of the Court's rulings on abortion, guns, religion, the administrative state, and much more.[277]

What all this means is that the Court is vulnerable to political attack, perhaps more than ever before. With increasingly partisan voters seeing the Court as increasingly partisan, popular support for the Court has fallen to historic lows.[278] In particular, the overruling of *Roe* has served as a rallying call for those who depict the Court as results-oriented, unconcerned with its own legitimacy.[279] The 2024 election does not change this equation. Voters may have prioritized inflation and immigration; voters did not change their position on the Supreme Court.[280] Correspondingly, the elections provided the

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elections than their colleagues in opposition." Kevin J. McMahon, *Will the Supreme Court Still 'Seldom Stray Very Far'?: Regime Politics in a Polarized America*, 93 CHI.-KENT L. REV. 343, 343 (2018) (showing that in 2017, for the first time in the history of the United States, a Supreme Court Justice was nominated by a president who lost the popular vote, and confirmed by senators who accounted for fewer votes than their oppositional counterparts). Of course, any second term Trump appointee to the Supreme Court will change this narrative (as Trump won the popular vote in 2024). Correspondingly, criticisms of first-term Trump Justices being "minority Justices" are somewhat ameliorated by Trump's 2024 victory. For a thoughtful assessment of McMahon's claims, see generally Kastellec, *supra* note 30.

277. Before Donald Trump's 2024 victory, Democrats had won the popular vote in seven of the prior eight presidential elections. More relevant (for my purposes), an August 2024 Pew poll found that "[j]ust 24% of Democrats and Democratic-leaning independents view the Supreme Court favorably." Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Aug. 8, 2024), https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low/[https://perma.cc/4T6D-3ML7].

278. *See id.* Public disapproval still continues, although there has been a slight uptick. *See* Olivia Alafriz, *Supreme Court's Approval Rating Ticks Up, Poll Shows*, POLITICO (Apr. 3, 2024, 1:51 PM), https://www.politico.com/news/2024/04/03/supreme-court-approval-ratings-00150365 [https://perma.cc/QN62-F6XC].

279. Jim Gibson argues that the Court suffered a severe blow after *Dobbs*. Specifically, Gibson found that there was opposition to the decision that carried over to a more fundamental loss of trust in the Court. This loss of so-called diffuse support as well as Gibson's article is explored by Linda Greenhouse in her essay, *What Sandra Day O'Connor Got Wrong*, *supra* note 29. *See also* James L. Gibson, *Losing Legitimacy: The Challenges of the* Dobbs *Ruling to Conventional Legitimacy Theory*, 68 AM. J. POL. SCI. 1041, 1041-42 (2024).

280. *See* De Pinto et al., *supra* note 32. Voters, for example, approved of anti-*Dobbs*, pro-choice initiatives in seven states (rejecting initiatives in three states). *See* Kate Zernike, *Abortion Rights Ballot Measures Succeed in 7 of 10 States*, N.Y. TIMES (Nov. 6, 2024), https://www.nytimes.com/2024/11/06/us/politics/abortion-ballot-measures.html [https://perma.cc/57NG-SZAT]. One of those three, Florida, imposed a 60 percent super-majority

Court with short-term protections against political attack.[281] In the long term, however, the Court remains vulnerable. With the Court playing an increasingly important role in our political and social lives,[282] Democratic candidates and liberal activists now back the enactment of Court-packing and other draconian legislation.[283]

What matters here is the saliency of the Court to both Republicans and Democrats. Just as Democrats will continue attacking the Roberts Court, Republicans, too, are stakeholders with a much different agenda. Indeed, if the shoe were on the other foot (a Democratic Court; a Republican White House and Congress), there is every reason to think that Republican activists would likewise take aim at a Democratic Court advancing Democratic priorities.[284] And

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requirement; 57 percent of Florida voters backed reform. *See id.* It is also noteworthy that the availability of state law remedies may provide an acceptable outlet to anti-Court voters. *See* Neal Devins, *The Federalism-Rights Nexus: Explaining Why Senate Democrats Can Tolerate Rehnquist Court Decision Making but Not the Rehnquist Court*, 73 U. COLO. L. REV. 1307, 1316 (2002) ("Also, because much of what is struck down is duplicative of state enactments, Congress has felt relatively little constituent pressure to respond to the Court." (footnote omitted)).

281. The election also paves the way for judicial appointments that will reenforce the Court's conservative majority. The appointment of young conservatives to the Court, however, may facilitate later attacks on the Court. Court-packing, for example, may be seen as the only realistic way to constrain the Court.

282. *See* DEVINS & BAUM, *supra* note 4, at 154-56 (discussing saliency of the Court as an election issue); *see also* Adam Liptak, Abbie VanSickle & Alicia Parlapiano, *The Major Supreme Court Decisions in 2024*, N.Y. TIMES (July 2, 2024), https://www.nytimes.com/interactive/2024/05/09/us/supreme-court-major-cases-2024.html [https://perma.cc/BS4U-HWJQ].

283. For a discussion of advocacy groups, see, for example, Alex Swoyer, *More than 50 Left-Leaning Groups Push for Supreme Court Term Limits, Back House Legislation*, WASH. TIMES (Apr. 10, 2024), https://www.washingtontimes.com/news/2024/apr/10/more-than-50-left-leaning-groups-push-for-supreme-/ [https://perma.cc/Z87U-2P9D]; Zach Schonfeld, *Left-Leaning Advocacy Coalition Calls on Congress to Investigate Supreme Court Ethics*, HILL (July 10, 2023, 9:58 AM), https://thehill.com/regulation/court-battles/4088549-left-leaning-advocacy-coalition-calls-on-congress-to-investigate-supreme-court-ethics/ [https://perma.cc/9PPG-C6W2]. For Democratic candidates, President Biden sought to salvage his then-imploding reelection bid by proposing term limits and other Court reforms. Madhani & Long, *supra* note 28. Likewise, Kamala Harris made the Court and its overruling of *Roe* a centerpiece of her campaign. *See* Hassan Ali Kanu, *Kamala Harris Has an Opportunity on SCOTUS Reform*, AMERICAN PROSPECT (July 24, 2024), https://prospect.org/justice/2024-07-24-kamala-harris-scotus-reform/ [https://perma.cc/9WLB-5TEY].

284. Indeed, Republicans have sought partisan advantage through Court-stripping and Court-packing proposals. *See* CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 268 (2006) (Court-stripping); Linda Greenhouse, *A Conservative Plan to Weaponize the Federal Courts*, N.Y. TIMES (Nov. 23, 2017), https://www.nytimes.com/2017/11/23/opinion/conservatives-weaponize-federal-

while today's Congress is too closely divided for either side to push through legislation (so long as the filibuster is in place),[285] public disapproval of the Court cuts against understandings of legitimacy that calls for the Court to speak and act in ways that make it "fit to determine what the Nation's law means and [its authority] to declare what it demands."[286]

For the balance of this concluding Section, I will return to the swing Justice. I will explain why the benefits of a swing Justice-dominated Court are most apparent when the parties and Justices are most polarized (and, relatedly, why it is most beneficial to have a swing Justice-dominated Court when it is particularly unlikely to have such a Court). There is much to say and I will only scratch the surface. My hope is to put into focus the risk of political reprisal and the benefit of lawmakers and the American people shaping the Constitution's meaning by engaging in constitutional dialogues with one another. Before turning to that project, let me be clear about what I am not arguing: My point is not that today's Court is acting inappropriately. It may be that the Roberts Court is right on the merits and right on stare decisis. Claims that the Court is opening itself to attack and thereby undermining its legitimacy must be separated from claims that the Court is unprincipled and lawless.[287]

A. Constitutional Dialogues, Not Yo-Yos

Let me start by returning to affirmative action and considering the differences between a swing Justice-dominated Court and a

courts.html [https://perma.cc/QJ2N-7A3J] (Court-packing).

285. Time will tell whether the filibuster survives party polarization. During the Biden administration, some Democratic lawmakers called for the abolition of the filibuster. *See* Sahil Kapur, *Democrats Gear Up to Overhaul the Senate Filibuster for Major Bills if They Win in 2024*, NBC NEWS (May 17, 2024, 6:00 AM), https://www.nbcnews.com/politics/congress/democrats-gear-overhaul-senate-filibuster-major-bills-win-2024-rcna152484 [https://perma.cc/USJ8-R8AU]. More telling, Democrats (under Obama) and Republicans (under Trump) suspended the filibuster for judicial appointments—initially for lower court judges and ultimately for Supreme Court Justices. *See supra* notes 239-40 and accompanying text (noting suspension of filibuster for judicial appointments).

286. Planned Parenthood of Se. Pa. v. Casey, 506 U.S. 833, 865 (1992).

287. As Richard Fallon, Tara Grove, and others have noted, there are different types of legitimacy—some focus on doctrine and others focus on the Court as an institution. *See* Grove, *supra* note 15, at 2244; RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 20-22 (2018).

Partisan Court.[288] A Partisan Court will make use of one or another absolutist rule—a Republican Court will reject diversity and embrace the color-blind Constitution; a Democratic Court will call for the end of racial isolation by embracing diversity. A swing Justice-dominated Court will steer a middle course by, for example, embracing a fact-specific standard that is sufficiently indeterminate that neither side is shut out.

As just described, a swing Justice-dominated Court would trade off a clear answer to the legal question in favor of giving the competing sides access to both the courts and the political process. A Partisan Court, however, would authoritatively settle the legal question. In the abstract, the question of whether and when the Supreme Court should settle constitutional conflicts is at the core of longstanding disputes regarding rules versus standards, judicial supremacy, and judicial minimalism.[289] The question before us is at once related but fundamentally different—related because it speaks directly to whether the Court should seek to definitively decide, and fundamentally different because today's Partisan Court is a "constitutional yo-yo."[290] If Democrats had gained control of the Court after Justice Scalia's death, a liberal majority would likely have overturned precedent regarding campaign finance, voting rights, the administrative state, and much more.[291]

Whatever its limitations, a swing Justice-dominated Court avoids the principal pitfall of a Partisan Court. Mark Graber (who coined the yo-yo analogy) put it this way: "Americans living in a regime where constitutional law swings wildly in different ideological directions enjoy neither the benefits promised by proponents nor opponents of constitutional settlement."[292] In such a

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288. *See generally supra* Part I.

289. In a 2015 book, *The Democratic Constitution*, Lou Fisher and I argued that the Constitution was made stronger through ongoing constitutional dialogues between the courts, elected officials, and the American people. *See* DEVINS & FISHER, *supra* note 53, at 242.

290. Graber, *supra* note 205, at 665. In his constitutional yo-yo article, Mark Graber put it this way: "Should Americans continue to live in a political environment structured by electoral volatility, elite polarization, and conflict extension, constitutional precedents are likely to be overturned at unprecedented rates." *Id.* at 711.

291. *See* Timothy Noah & Brian Mahoney, *How Liberal Is Merrick Garland?*, POLITICO (Mar. 16, 2016, 7:52 PM), https://www.politico.com/story/2016/03/supreme-court-merrick-garland-220904 [https://perma.cc/3H6B-WFHE].

292. *See* Graber, *supra* note 205, at 713, 716 (noting and critiquing "[s]trong majoritarians"

regime, constitutional law will be destabilized in ways that undermine its legitimacy; constitutional law and, with it, the Supreme Court, will be seen as emblems of partisan tribalism, not the rule of law. Correspondingly, as I will now explain, there is good reason to think that a Partisan Court is, over time, vulnerable to political reprisal.[293]

B. Political Reprisals Against a Partisan Court

On the eve of the 2004 presidential election, then-Chief Justice William Rehnquist announced that he had thyroid cancer.[294] That announcement did not transform or even impact the presidential race between George W. Bush and John Kerry.[295] At that time, the Court was of little interest to voters; opinion polls revealed that no more than 1 percent of voters ranked the Supreme Court as a top priority.[296] At that time, the Court defied partisan labels; the most liberal members of the Court were Republicans and swing Justices Sandra Day O'Connor and Anthony Kennedy helped steer a middle path.[297]

In sharp contrast, the Court has played a critical role in the 2016, 2020, and 2024 presidential races. Donald Trump established his conservative bona fides in 2016 by turning to the Federalist Society to prepare a list of potential Supreme Court nominees.[298] In 2020,

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who argue that "[p]opular majorities ... are best positioned" to decide whether regime change is appropriate).

293. In other words, the sociological legitimacy of the Supreme Court is also at risk if the Court exposes itself to political attack by embracing the legal policy preferences of only one or the other partisan side.

294. *See* Press Release, Supreme Court of the United States, Press Release Regarding Chief Justice William H. Rehnquist (Oct. 25, 2004), https://www.supremecourt.gov/publicinfo/press/pr_10-25-04.html [https://perma.cc/A2Q4-8J5H].

295. *See* Ken Rudin, *Order in the Court: Rehnquist and the '04 Vote*, NPR (Oct. 27, 2004, 12:00 AM), https://www.npr.org/2004/10/27/4128756/order-in-the-court-rehnquist-and-the-04-vote [https://perma.cc/X6CZ-SBR2].

296. *See* Neal Devins, *Smoke, Not Fire*, 65 MD. L. REV. 197, 197 (2006) (citing Press Release, Pew Research Center for the People & the Press, Moral Values: How Important? Voters Liked Campaign 2004, but Too Much 'Mud Slinging,' PEW RSCH. CTR. 1, 15 (Nov. 11, 2004, 4:00 PM), https://www.pewresearch.org/politics/2004/11/11/voters-liked-campaign-2004-but-too-much-mud-slinging/ [https://perma.cc/CUF2-JCCV] (demonstrating that only 1 percent of voters ranked Supreme Court as the most important factor in their decision)).

297. *See* Martin et al., *supra* note 1, at 1291, 1301-09.

298. *See* Baum & Devins, *supra* note 189.

candidate Joe Biden responded to progressive calls to pack the Court by promising to establish a commission on Court reform.[299] In 2024, the Court's overturning of *Roe* and, with it, the future of the Supreme Court was a critical part of Democratic campaign efforts.[300]

Differences between the 2004 election and the past three presidential races highlight both the rise of partisan polarization and how a Partisan Court is particularly likely to become a focal point in the battle between Democrats and Republicans. Unlike the centrist swing Justice-dominated Court, a Partisan Court is seen as a political antagonist by the out-party.[301] More than that, the Court wields enormous power on the critical issues that divide the parties and, as such, is subject to political attack when the out-party gains control of the White House and Congress.[302]

For the following reasons (all overlapping and all discussed above), today's Court is particularly vulnerable to political attack.[303] First, the Court is more important now than ever and, consequently, out-party lawmakers can seek political advantage by enacting Court-reform legislation.[304] Indeed, before the Republican sweep in 2024 (when opinion polls suggested that either party might gain control of the White House and Congress), legislation had been introduced to expand the size of the Supreme Court, to strip the Court of jurisdiction, and to police the so-called "shadow docket."[305]

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299. *See* Sam Gringlas, *Asked About Court Packing, Biden Says He Will Convene Commission to Study Reforms*, NPR (Oct. 22, 2020, 5:04 PM), https://www.npr.org/2020/10/22/926607920/asked-about-court-packing-biden-says-he-will-convene-commission-to-study-reforms [https://perma.cc/4CUT-5YMJ].

300. *See supra* note 124 and accompanying text; *see also* Tyler Pager, *Biden Team Increasingly Hopes to Ride the Abortion Issue to Victory*, WASH. POST (Apr. 12, 2024, 7:54 AM), https://www.washingtonpost.com/politics/2024/04/12/biden-campaign-abortion-rights-strategy/ [https://perma.cc/7P8R-KJFR].

301. *See* Keith E. Whittington, *Practice-Based Constitutional Law in an Era of Polarized Politics*, 18 GEO. J.L. & PUB. POL. 227, 237-38 (2020).

302. Keith Whittington put it this way: "[I]t helps if your ideological allies are winning elections rather than losing them.... If not, then an aggressive conservative majority on the Court might find itself in political hot water and emboldening the growing chorus of activists and politicians on the left who are calling for Court-packing." *Id.* at 238.

303. The 2024 Republican sweep will provide the Roberts Court with short term protection from partisan political attack. *See supra* note 285 and accompanying text.

304. *See, e.g.*, GEYH, *supra* note 284.

305. *See* JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10562, "COURT PACKING": LEGISLATIVE CONTROL OVER THE SIZE OF THE SUPREME COURT 4 (2020); JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10637, THE "SHADOW DOCKET": THE SUPREME COURT'S NON-MERITS ORDERS 6

Numerous left-leaning interest groups (at least fifty) had called on Congress to police the Court (Court expansion, term limits, et cetera), police the Justices (ethics reform), or alter confirmation rules (particularly the blue slip).[306] And while Senate norms, especially supermajority requirements, have thus far protected the Court, the drumbeat for reform is growing louder.[307] More than that, Senate Democrats (for lower court judicial confirmations) an Republicans (for the confirmation of Supreme Court Justices) have proven willing to suspend the filibuster—suggesting that supermajority requirements can be overcome. Second, voter dissatisfaction with the Court increases the likelihood of Court-reform. Public trust in the Court has declined dramatically and public approval of the Court has dropped to a record low 34 percent (with only 13 percent strongly approving).[308] Equally significant, there has been a precipitous decline in so-called "diffuse support," that is, the "'reservoir of good will' ... [that] insulates the Supreme Court from lasting negative consequences when it issues unpopular decisions."[309] For example, the Court did not rebound from widespread criticism of its decision overturning *Roe* (as it typically does—even after its 2000 decision handing the presidential election to George W. Bush).[310] And while voters did not punish the Court by electing

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(2021).

306. *See* Swoyer, *supra* note 283; Schonfeld, *supra* note 283; Jacqueline Thomsen, *Groups Urge End to 'Blue Slip' Tradition as Judicial Nominations Slow*, REUTERS (May 4, 2023, 4:29 PM), https://www.reuters.com/legal/government/groups-urge-end-blue-slip-tradition-judicial-nominations-slow-2023-05-04/ [https://perma.cc/GPP6-JKQ7].

307. For a nuanced explanation of why Biden-era Senate Democrats have resisted calls to enact reform legislation (calling attention to the interface of legislative reform with confirmation politics), see Carl Hulce, *Senate Democrats Face Escalating Calls for Broader Investigation into Supreme Court*, N.Y. TIMES (June 7, 2024), https://www.nytimes.com/2024/06/07/us/politics/senate-democrats-supreme-court-ethics.html [https://perma.cc/4HA2-3BPL]. It is also worth noting that Republicans seem more willing to play hardball politics than Democrats—so that the failure to pursue anti-Court legislation may be tied to the "asymmetry" between Democrat and Republican tactics. *See* Fishkin & Pozen, *supra* note 195, at 929, 936, 961.

308. *See U.S. Adults Who Approve of the Supreme Court* (Aug. 22, 2024), https://www.statista.com/statistics/1128124/share-adults-us-approve-supreme-court/ [https://perma.cc/8UV9-DVLJ]; *see also* Jeffrey M. Jones, *Supreme Court Approval Holds at Record Low*, GALLUP (Aug. 2, 2023), https://news.gallup.com/poll/509234/supreme-court-approval-holds-record-low.aspx [https://perma.cc/B6ZP-YRKY].

309. Greenhouse, *supra* note 29 (quoting Gibson, *supra* note 279).

310. *See id.*

anti-Court Democrat Kamala Harris, opinion polls at the time of the election revealed that public trust in the Supreme Court continued to decline.[311] Third, partyism is pervasive and cuts in favor of retaliation and against compromise.[312] Unlike earlier calls to pack the Court, strip it of jurisdiction where the Court's majority coalition were not "all of the [same] party",[313] today's majority and dissenting coalitions are defined by partisan identity.[314] Correspondingly, with Democrats and Republicans harboring personal animosity to each other, ideological differences are accentuated and compromise may prove less appealing than a knock-down-drag-out fight.[315]

All of the above backs up the claim that the Court may be "at greater risk today than at any time since Franklin D. Roosevelt's 1930s attack on the institution."[316] And while President Trump and Congressional Republicans can stymie Court-reform legislation until at least 2028, the 2024 Republican sweep provides no guarantees beyond that very important one. Indeed, there is no reason to think that things would be different if a Democratic-dominated Court were to pursue a liberal agenda.[317] The problem is divisive partisanship, not conservative outcomes. A Partisan Court has clearly defined winners and losers. A swing Justice-dominated Court leaves things up-for-grabs; it neither forecloses access to the courts nor to democratic outlets.[318]

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311. *Trust in U.S. Supreme Court Continues to Sink*, ANNENBERG PUB. POL'Y CTR U. PA. (Oct. 2, 2024), http://www.annenbergpublicpolicycenter.org/trust-in-us-supreme-court-continues-to-sink [https://perma.cc/C5P3-G2LZ].

312. *See supra* notes 249-54 and accompanying text (discussing affective polarization).

313. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 153 (2019). For this very reason, I think that my 2006 claim that congressional efforts to strip the federal courts of jurisdiction were principally symbolic should not be extended to today's battles. *See* Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1339 (2006).

314. Opinion polls measuring trust and distrust in the Supreme Court likewise reveal a partisan divide. In August 2024, 71 percent of Republicans said they trusted the Court as compared to 41 percent of independents and 24 percent of Democrats. *See* ANNENBERG PUB. POL'Y CTR U. PA., *supra* note 311.

315. *See* Epps & Sitaraman, *supra* note 313, at 169-70.

316. Greenhouse, *supra* note 29 (quoting Gibson, *supra* note 279, at 104).

317. *See* Epps & Sitaraman, *supra* note 313, at 169.

318. For much of the same reason, Lou Fisher and I argued against judicial supremacy and in favor of constitutional dialogues which made the Constitution more vibrant and more stable. *See* DEVINS & FISHER, *supra* note 53, at 232-35.

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I will wrap up by returning to *Brown* which, after all, is the subject of this Symposium. *Brown* stands as a sharp counterweight to today's Roberts Court. In *Brown*, the Justices put ideology to the side and worked together to pursue a shared vision of a better America.[319] At that time, there was next-to-no party polarization.[320] At that time, the Court was split, eight Democrats and one Republican; unlike today, however, the eight Democrats were ideologically diverse—a conglomeration of conservatives, liberals, and moderates.[321] Twenty-five years later, in *Regents v. Bakke*, the Court struggled to sort out the constitutionality of affirmative action and, with it, the meaning of *Brown*.[322] Like *Brown*, the Court was dominated by one ideologically diverse party and there was next-to-no party polarization (seven Republicans, including liberals, conservatives, and moderates).[323] For the next forty years, a swing Justice-dominated Court steered a middle ground that allowed both sides to feel that they could win in court. Correspondingly, the two sides largely fought a battle grounded in legal argument, not strong-arm politics. In other words, this middle ground approach both made the Court the focal point in the affirmative action wars and helped shield the Court from political attack.[324] Those days now seem behind us: there is a sharp partisan divide; institutionally-minded judicial moderates are at once hard to find and unwanted

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319. *See* KLARMAN, *supra* note 10, at 293, 342-43. See Martin et al., *supra* note 1, at 1317-21, for Martin-Quinn scores for the Warren Court.

320. *See* Keith T. Poole & Howard Rosenthal, *On Party Polarization in Congress*, 136 DAEDALUS 104, 106 (2007).

321. *See* DEVINS & BAUM, *supra* note 4, at 72, 74 (noting Martin-Quinn scores for Justices on the *Brown* Court). Moderate Justices on the pre-1962 Warren Court would swing between the Court's liberal and conservative blocs. *See* Steven Smith, *Justices Stewart and Clark: Swing Votes on the Warren Court*, 19 SANTA CLARA L. REV. 1009, 1025-27 (1979).

322. *See generally* 438 U.S. 265 (1978).

323. *See* DEVINS & BAUM, *supra* note 4, at 71, 88-89 (noting Martin-Quinn scores for Justices on the *Bakke* Court). For an accounting of *Bakke* and its parallels to *Brown*, see J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978 at 255-64 (1981).

324. Politicians too might have looked to the Court so as to avoid taking the heat for a controversial, divisive position. *See* Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUDS. AM. POL. DEV. 35, 41-43, 66, 69 (2008).

(by the political actors and interest groups responsible for judicial appointments).[325] More than that, partisan tribalism makes it close to impossible to pursue shared collective goals; instead, one or the other party will prevail in a high-risk, winner-take-all game.[326] Witness, for example, the Court's rejection of diversity-based affirmative action in the *Students for Fair Admissions* case.[327] Against this backdrop, it is easy to understand why—on the most salient issues which divide the nation—the Court appears less institutionally minded and, instead, looks more and more like a political actor (so that the Court is mainly a reflection of the party which appoints a majority of Justices).[328] It is likewise easy to understand why the Court is especially vulnerable to political attack when the out-party regains control of the levers of power.[329] After all, a swing Justice is hard to find when they are most needed.

325. *See* DEVINS & BAUM, *supra* note 4, at 110-11, 120-21.

326. *See* Epps & Sitaraman, *supra* note 313, at 161-64.

327. Students for Fair Admissions, Inc.v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2175-76 (2023). My point is that the rejection of diversity can be understood as an act of politics, not law. I am not defending diversity as a matter of law. *See* Neal Devins, Metro Broadcasting v. FCC*: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 145-46, 155 (1990) (arguing that the remedial justification for affirmative action is stronger than the diversity justification).

328. As noted earlier, there are many counter-examples. *See supra* note 107 and accompanying text; Liptak et al., *supra* note 282. At the same time (and this is my point), the Court votes along party lines more than ever before and especially in the most visible cases. *See* Liptak, *supra* note 108.

329. *See, e.g.*, GEYH, *supra* note 284.