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Review Article

Is the U.S. Supreme Court Facing a Crisis of Democratic Legitimacy? A Review Article

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Abstract

Kevin McMahon's *A Supreme Court Unlike Any Other* examines the extent to which the current Supreme Court—and its conservative supermajority—departs from earlier courts in the extent to which it suffers from a "democracy gap." McMahon persuasively argues that the current Court is different for two reasons. First, most of the justices in the conservative majority were appointed by presidents who did not win the popular vote and/or were confirmed by senators who represented fewer voters than the senators who opposed them. Second, the homogenization of nominee experience and background has created a "judicial aristocracy" in which the justices are experientially far removed from the elected branches. One puzzle this account raises is why this democracy gap took so long to emerge, given the institutional design of the Court. But given the current polarized state of American politics, the same forces that brought us to the reality of the conservative supermajority are unlikely to abate for quite some time.

Keywords: Supreme Court; nominations; democratic legitimacy; partisan sort; accountability

There is a certain rhythm to the calendar of American politics. A new Congress is sworn in biannually in January. The president gives the State of the Union address sometime early in the year. The federal fiscal year renews on October 1st, creating deadlines for the passage of appropriation bills. And every June, at the end of its term, the U.S. Supreme Court hands down its most consequential decisions.

Since 2021—the end of the first term featuring the Court's 6–3 conservative supermajority, which took shape following the death of Justice Ruth Bader Ginsburg in September 2020 and the quick confirmation of Justice Amy Coney Barrett the month after—the rhythm of the Court's June opinion-days has typically followed a very conservative beat. By 6–3 votes, with the six conservative justices (Roberts, Thomas, Alito, Kavanaugh, Gorsuch, and Barrett) all in the majority coalition, and the three liberal justices (Sotomayor, Kagan, and Jackson) all in the minority coalition, the Court has ended its term by (to name just a few cases): making it easier for states to impose restrictions on voting, further weakening the force of the Voting Rights Act (2021); overturning the fundamental right to abortion established in *Roe v. Wade*, as well as striking down numerous laws regulating the

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possession of guns in public (2022); ruling unconstitutional the use of affirmative action in higher education admissions (2023); and ruling that presidents have broad immunity from criminal prosecution, and that agencies are not entitled to deference when federal courts review bureaucratic implementation of federal statutes.[1]

The conservative supermajority and the Court's recent decisions have been the subject of intense scholarly, journalistic, and even public scrutiny over the past few years, particularly since the Court overruled *Roe* in 2022. Indeed, these decisions have placed both the Court and the appointment process for selecting justices in the spotlight to an extent not seen since 1937, when President Franklin D. Roosevelt (FDR) famously went to war with the Court.[2] The range of attention has been widespread. It includes several journalistic accounts of recent nomination fights;[3] several political science books that cover judicial appointments and the current Court from a variety of perspectives;[4] and multiple articles and op-eds from law professors and pundits arguing that these decisions threaten the Court's legitimacy.[5]

Into this constitutional mélange comes Kevin McMahon's excellent new book, *A Supreme Court Unlike Any Other*.[6] McMahon's focus is somewhat distinct, as

[1] In order, the names and citations for the cases mentioned are: *Brnovich v. Democratic National Committee* [594 U.S. ___ (2021)]; *Dobbs v. Jackson Women's Health Organization* 597 U.S. ___ (2022); *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1; *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* 600 U.S. 181; *Trump v. United States* No. 23–939; and *Loper Bright Enterprises v. Raimondo* No. 22-451. In each of these cases, the dispositional coalition was split 6–3 across the conservative and liberal blocs. In Dobbs, Chief Justice Roberts voted to uphold the Mississippi law in question but would not have overturned *Roe v. Wade;* in *Trump*; Justice Barrett only joined Roberts' majority opinion in part because she would recognize a more limited form of presidential immunity than granted in the majority opinion. Finally, Justice Jackson was technically recused from *Loper Bright,* but she joined the dissent in a companion case, *Relentless, Inc., et al. v. Department of Commerce, et al* No. 22–1219, which essentially reached the same issue as *Loper Bright*; thus, the vote was effectively 6–3 on the core question of overturning the *Chevron* precedent that granted more deference to agency decision-making.

[2] See Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court* (New York: W.W. Norton & Company, 2011).

[3] See, e.g., Joan Biskupic, *Nine Black Robes: Inside the Supreme Court's Drive to the Right and Its Historic Consequences* (New York: William Morrow, 2023); Adam Cohen, *Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America* (London: Penguin, 2021). Carl Hulse, *Confirmation Bias: Inside Washington's War Over the Supreme Court, from Scalia's Death to Justice Kavanaugh* (New York: HarperCollins, 2020). Ruth Markus, *Supreme Ambition: Brett Kavanaugh and the Conservative Takeover* (New York: Simon & Schuster, 2020).

[4] See, e.g., Charles M. Cameron and Jonathan P. Kastellec, *Making the Supreme Court: The Politics of Appointments* (Cambridge: Cambridge University Press, 2023); Paul M. Collins Jr, Lori Ringhand, and Christina Boyd, *Supreme Bias: Gender and Race in US Supreme Court Confirmation Hearings* (Stanford: Stanford University Press, 2023). Richard Davis, *Supreme Democracy: The End of Elitism in Supreme Court Nominations* (Oxford: Oxford University Press, 2017). Neal Devins and Lawrence Baum, *The Company They Keep: How Partisan Divisions Came to the Supreme Court* (Oxford: Oxford University Press, 2019).

[5] See, e.g., Jamelle Bouie, "The Supreme Court Is Playing a Dangerous Game," *New York Times*, 22 March 2024, accessed 30 September 2024, https://www.nytimes.com/2024/03/22/opinion/supreme-court-legitimacy-trump.html; Steven Greenhouse, "The US Supreme Court Is Facing a Crisis of Legitimacy," *The Guardian*, 5 October 2023, accessed 30 September 2024, https://www.theguardian.com/commentisfree/2023/oct/05/us-supreme-court-facing-crisis-of-legitimacy; Leah Litman, Joshua Matz, and Steve Vladeck, "We Ought to be Concerned about Preserving the Political Order of the Supreme Court," *Washington Post*, 18 June 2019, accessed 30 September 2024, https://www.washingtonpost.com/opinions/yes-the-publics-perception-of-the-supreme-court-matters/2019/06/18/5b25128c-91e6-11e9-b58a-a6a9afaa0e3e_story.html; Michael Tomasky, "The Supreme Court's Legitimacy Crisis," *New York Times*, 5 October 2018, accessed 30 September 2024, https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html; Steve Vladeck, "Why Many of the Supreme Court's Critics Are Trying to Save the Court from Itself," *Slate*, 4 October 2021, accessed 30 September 2024, https://slate.com/news-and-politics/2021/10/the-supreme-court-is-nearing-a-legitimacy-crisis.html.

[6] Kevin J. McMahon, *A Supreme Court Unlike Any Other: The Deepening Divide Between the Justices and the People* (Chicago: University of Chicago Press, 2024). The book expands upon McMahon's 2018 article, "Will the Supreme Court Still 'Seldom Stray Very Far'?: Regime Politics in a Polarized America," *Chicago-Kent Law Review* 93, no. 4 (2018): 343–71.

he is interested less on the outputs of the Court, or even the direction of the ideological imbalance per se; instead, he is interested in how the 6–3 court came to exist at all. In particular, McMahon examines and criticizes what he calls the Court's "democracy gap," which he defines as "the distance between the Court and the electoral processes that endow it with democratic legitimacy".[7] He further argues that the composition of the current Court is a break from historical practice in terms of its democracy gap.

In this essay, I argue that McMahon's account of the modern Court is descriptively quite persuasive and captures what is both important and distinctive about the justices' current place in American politics. In particular, McMahon's historical lens lends the important insight that today's heavily polarized politics has left behind the "regime approach" to understanding the Court's place in the separation of powers that was popularized by mid-century public law scholars. I then examine two more conceptual questions that McMahon's descriptive account raises. First, given the institutional design of the Court, is it more a surprise that a democracy gap emerged, or is the puzzle why it took so long for this reality to take hold? In answering this question, I argue that as the two parties and presidents sought more reliable justices to reliably advance their policy goals, a "judicial partisan sort" emerged in which Democratic and Republican presidents reliably picked liberal and conservative appointees, respectively, eliminating the presence of moderate or cross-cutting justices. This shift collided with the good fortune of the Republican Party in controlling the White House and Senate at key points this century, creating the conditions for the conservative supermajority to emerge. Finally, I question McMahon's suggestion (shared by many other observers) that the emergence of a Court with questionable *democratic* legitimacy will necessarily translate to a decline in *institutional* legitimacy, given that the conservative majority is firmly in line with the overall preferences of Republican elites, thereby insulating the Court from possible efforts to rein in its independence.

How the Current Court Came into Existence

In advancing the thesis that the composition of the current Court is a break from historical practice in terms of its democracy gap, McMahon focuses on two main types of evidence. The first rests on the fact that the conservative bloc was borne out of the reality of twenty-first century American politics, which has featured very close national elections in which the electorate has not overwhelmingly favored either the Democratic or Republican party. This string of tight elections stands in contrast to earlier eras, when one party would tend to have a significant advantage over several decades.[8] But whereas we might expect narrow elections results to produce an evenly divided court, that is not what we got once Justice Barrett joined the Court. Thus, the current Court and its partisan imbalance stands out as an anomaly in this era of partisan parity, and, according to McMahon, is indicative of a democracy gap for two reasons.

First, five of the six justices in the conservative bloc (all except Clarence Thomas) were appointed by Presidents George W. Bush and Donald Trump, each of whom

[7] McMahon, *A Supreme Court Unlike Any Other*, 1. As I discuss later in this essay, McMahon brackets his focus on democratic legitimacy from the broader institutional legitimacy of the Court.

[8] See Frances E. Lee, *Insecure Majorities: Congress and the Perpetual Campaign* (Chicago: University of Chicago Press, 2016).

came to office despite losing the popular vote. (Bush would win the popular vote in his re-election campaign in 2004, before appointing Chief Justice Roberts and Justice Alito to the bench in 2005.) Thus, due to the combination of the vagaries of when justices have died or strategically retired (or failed to strategically retire, as in the case of Justice Ginsburg), McMahon notes, "The Democratic Party nominee has won the popular vote in seven of the past eight presidential elections, but Republican presidents have appointed six of the nine sitting justices".[9] If we expand the horizon even further, the partisan split is even starker. Since the 1968 election, Republicans have appointed sixteen of twenty-one justices (76 percent), despite winning the presidential popular vote in just six of fourteen elections (43 percent).

While these patterns are generally well known by Supreme Court observers, McMahon focuses more on election results as they pertain to the Senate. In particular, he defines "numerical minority justices" as those who were confirmed by the Senate "but with the support of senators who represented a numerical minority of voters".[10] In other words, add up the vote totals from the most recent election of all the senators who voted to confirm a justice, then add up the vote totals of the senators who voted nay; if the latter is greater than the former, then we have a numerical minority justice. McMahon notes that of the six conservatives on the current Court, only John Roberts was a numerical majority justice; Clarence Thomas' narrow confirmation in 1991 represented the first such justice. The existence of such voting patterns is because roll call votes on Supreme Court nominees are now essentially party-line votes (more on this later); the reality of geographic sorting and the disproportionate power the Senate gives smaller, rural states leads to Republican senators representing smaller populations, on average.[11]

The combination of the conservative bloc being largely selected by presidential popular vote losers and the presence of numerical minority justices leads to what is essentially McMahon's thesis statement:

> In other words, weaker Republican performance at the presidential polls combined with the Senate's confirmation of numerical minority justices has produced *greater* success for conservatism on the Supreme Court. It's the Court's legitimacy paradox: weaker claims to democratic legitimacy have yielded a *more* ideologically driven, conservative Court. … The tie between democratic majoritarianism and the Court's doctrinal commitments have been severed. This is unprecedented. Past Supreme Courts have simply not been constructed in such a fashion, making this Court unlike any other in American history.[12]

And, while the Court's outputs are not McMahon's focus, very clever survey evidence shows that the current Court is, indeed, far more conservative than the American public.[13]

The second way in which the current Court is unlike any other relates to the type of justices who serve on the Court. McMahon notes that in earlier eras, justices had diverse experiences and backgrounds, with many former politicians (e.g., Earl

[9] McMahon, *A Supreme Court Unlike Any Other*, 2.

[10] McMahon, *A Supreme Court Unlike Any Other*, 2.

[11] On geographic polarization, see Jonathan A. Rodden, *Why Cities Lose: The Deep Roots of the Urban-Rural Political Divide* (New York: Basic Books, 2019).

[12] McMahon, *A Supreme Court Unlike Any Other*, 64 (emphasis in original).

[13] Stephen Jessee, Neil Malhotra, and Maya Sen, "A Decade-Long Longitudinal Survey Shows that the Supreme Court Is Now Much More Conservative than the Public," *Proceedings of the National Academy of Sciences* 119, no. 4 (2022): 1–7.

Warren) serving alongside career lawyers. But, beginning in the 1970s, presidents largely switched their focus to appointing federal appellate judges with a much narrower range of experience and geographic background. On the current Court, all but one justice (Kagan) was appointed directly from the U.S. Court of Appeals; all but one (Barrett) attended law school at Yale or Harvard; or all but two (Gorsuch and Barrett) lived most of their professional lives in Washington, DC or New York City before taking the bench. And, all nine justices were appointed when they were in their fifties (or younger), so as to maximize their expected longevity on the bench. Thanks mainly to the emphasis that Democratic presidents—and the Democratic party—has placed on diversity, the Court is now much more diverse in terms of race and gender than it was historically. But other than on that dimension (and, of course, the ideological separation of the conservative and liberal blocs), the current Court is extremely homogenous compared with prior courts. Based on this reality, McMahon offers this amusing "job posting" for any future Supreme Court vacancy:

> The president of the United States seeks applicants for the position of Supreme Court justice. Interested candidates must have graduated from an elite private undergrad institution (preferably an Ivy League University), earned a JD from an elite private law school (preferably Harvard or Yale), and be around fifty years old. Ideal candidates will be a judge on the Courts of Appeals, will have never sought elective office, and will have clerked for a Supreme Court justice. Professional experience in Washington, DC, is a significant plus. Ideological computability with the president is a must. All others need not apply.[14]

What explains this shift toward the homogeneity of nominees? Here, I should note that McMahon's explanation largely overlaps with that proposed by Charles Cameron and me in our book, *Making the Supreme Court: The Politics of Appointments, 1930–2020*.[15] There, we show that presidents used to choose nominees somewhat haphazardly, with little emphasis on selecting reliable nominees, often resulting in ideologically scrambled justices like Earl Warren and William Brennan (two very liberal justices appointed by a Republican president, Dwight Eisenhower). Beginning in the 1970s, the parties—particularly the Republican party—began to see the need for more reliable appointments; over time, this emphasis would become much more focused due to the number of Republican justices who would go on to disappoint the conservative legal movement by voting much more liberally than expected at the time of their selection (in particular, Justices Blackmun, Stevens, and Souter). And, although, as discussed above, Democratic presidents have appointed only five justices since 1968, all five are well credentialled moderate liberal justices without experience as politicians. The result of this overall shift, according to McMahon, is a "judicial aristocracy" resulting in a court much further removed experientially from the elected branches than in an earlier era.[16]

Finally, McMahon asks whether the decline of democratic legitimacy induced by numerical minority justices, combined with the emergence of a judicial

[14] McMahon, *A Supreme Court Unlike Any Other*, 98.

[15] Cameron and Kastellec, *Making the Supreme Court*. It is also worth noting that, as far as I am aware, the shift toward appointing justices with prior judicial experience was first documented in an article by Lee Epstein, Jack Knight, and Andrew D. Martin ["The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court," *California Law Review* 91, no. 4 (2003): 903–66].

[16] McMahon, *A Supreme Court Unlike Any Other*, 193. For a similar argument that the current justices are now members of an exclusive elite and far removed from public concerns, see Devins and Baum, *The Company They Keep*.

aristocracy, is countervailed at all by the emergence of the Court as an electoral issue in the past decade or so. Most notably, Donald Trump used Justice Scalia's death in 2016 as an opportunity to enhance his conservative bona fides by promising to appoint a reliable conservative to fill the seat. And, when Trump kept his pledge and the Court subsequently overturned *Roe* in 2022, the response to *Dobbs* placed abortion policy front and center in American politics, as many states moved to severely restrict abortion, creating a public backlash. While it is certainly likely that nomination and confirmation politics have had a larger presence in the role in the American public's consciousnesses compared with earlier eras, survey evidence shows that judicial nominations still rank fairly low in terms of the public's priorities.[17] Given this, McMahon argues—correctly, in my view—that the increased emphasis on the Court in national elections provides only a minimal dent against the overall decline in democratic legitimacy.

There is one smaller empirical claim in the book that I would challenge. First, in noting the seeming disconnect of a conservative supermajority emerging despite the nation being roughly equally divided ideologically, combined with the disproportionate string of Democratic presidential popular-vote winners, McMahon argues that the Senate has become a "bit player" in the confirmation process, since copartisan senators now almost uniformly support the president's nominee. To be sure, gone are the days when a nontrivial number of senators of the president's party would join in the opposition party to help sink a nominee, as happened with the nominations of Abe Fortas in 1968 (to become chief justice), Clement Haynsworth in 1969, Harrold Carswell in 1970, and Robert Bork in 1987. As a result, with the exercise of the nuclear option in 2017, thereby removing the filibuster as an option for the minority party to block a Supreme Court nominee, confirmation is almost entirely ensured now during unified government, absent an enormous scandal after confirmation.[18] (In 2018, Brett Kavanaugh was able to survive a late-breaking scandal regarding allegations of sexual assault and secure confirmation due to all but one senator in the narrow Republican majority voting to confirm him.) Thus, McMahon is correct that presidents "no longer need to worry about the filibuster, allowing one unified party—no matter the size of the Senate majority—the ability to dictate the course of constitutional law despite the lack of support from a majority of voters".[19]

But, whereas the votes of individual senators are now highly predictable based on partisanship, the flip side of this coin is that control of the Senate is now of immense importance for the fate of any given nominee. In a bit of historical randomness, no vacancies occurred during the divided government between Clarence Thomas's confirmation in 1991 and Merrick Garland's 2016 nomination by

[17] See, e.g., Alex Badas and Elizabeth Simas, "The Supreme Court as an Electoral Issue: Evidence from Three Studies," *Political Science Research and Methods* 10, no. 1 (2022): 49–67; and Brandice Canes-Wrone, Jonathan P. Kastellec, and Nicolas Studen, "Mass versus Donor Attitudes on the Importance of Supreme Court Nominations," *Stanford University Working Paper*, accessed 30 September 2024, https://jkastellec.scholar.princeton.edu/sites/g/files/toruqf3871/files/documents/canes_wrone_kastellec_student_donors_SC_noms.pdf.

[18] The 2005 confirmation failure of Harriet Miers is the exception that proves the rule here. Miers' chances were doomed not because a few Republican senators were going to join the Democratic minority in opposing her but because a significant percentage of the Republican caucus, backed by important players in the conservative legal movement, opposed Miers due to fears she would not be a reliable vote on the Court, which eventually led to President George W. Bush and Miers withdrawing her nomination. (On the Miers nomination, see Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York: Penguin, 2007), chapter 12).

[19] McMahon, *A Supreme Court Unlike Any Other*, 62.

President Obama to replace Justice Antonin Scalia. Garland's nomination, of course, was famously declared dead on arrival by Senate Majority Leader Mitch McConnell, and the Senate did not even grant Garland a hearing. Donald Trump's shock victory later that year was the pivot point that led to the conservative supermajority, as he was able to replace Scalia, as well as Justices Kennedy and Ginsburg. Importantly, all four nominations since Garland have also been during unified government. However, it seems quite plausible that the majority party (either Democrats or Republicans) during future periods of divided government would follow the Garland example and refuse to confirm *any* nominee. How such a reality would shake out in terms of democratic legitimacy is unclear, but it has important implications for understanding the Court as governing body, given the likelihood of lengthy vacancies on the Court.[20]

Historical Institutionalism and Regime Politics

This quibble notwithstanding, *A Supreme Court Unlike Any Other* provides a convincing descriptive account of how the current Court came to be. But, beyond the individual arguments, where the book stands out is that McMahon—as he did in his earlier two books, *Reconsidering Roosevelt on Race* and *Nixon's Court*—deftly uses a historical intuitionalist approach to situate specific trends in Supreme Court nomination politics within the broader arc of American history and changes in American politics.[21] The value of this approach is two-fold.

First, while much of the book's evidence is quantitative, McMahon, to great effect, consistently uses qualitative accounts of both specific nominations and nominees themselves to enhance his arguments. For instance, in chapter 6, on the growing homogenization of nominees, McMahon provides wonderful vignettes of the lived experiences of Hugo Black and Thurgood Marshall as a counterpoint to the modern-day "cookie cutter" nominees.[22] Black, who grew up the youngest of eight children in a log cabin in Alabama, initially joined the Ku Klux Klan before resigning his membership a few years later. After becoming a U.S. senator in 1926, Black became an ardent supporter of FDR's New Deal programs, leading Roosevelt to make Black his first Supreme Court nominee, in 1937. As noted, the path of politician to justice has been foreclosed by as desire for presidents of both parties to pick well-credentialed and reliable ideologues. With respect to Marshall, McMahon evocatively relates how the legendary civil rights lawyer narrowly survived a lynching attempt in Tennessee in 1946; twenty-one years later, Lyndon Johnson made Marshall the first Black justice in the nation's history. These stories nicely pair with the biographical and experiential statistics on the current justices McMahon provides and collectively illustrate the distance between the old-style and new-style justices.

Second, and more importantly from an analytical perspective, McMahon situates the changes in nomination politics within the broader regime approach to understand the role of the Court in American politics, which was originated in

[20] See Cameron and Kastellec, *Making the Supreme Court*, chapter 13, for a simulation analysis examining both the effect of the Garland blockade plus Trump winning in 2016 on the future ideological trajectory of the Court, as well as an analysis of how often a reality of no divided government confirmations would lead to extended vacancies.

[21] Kevin J. McMahon, *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown* (Chicago: University of Chicago Press, 2004); Kevin J. McMahon, *Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences* (Chicago: University of Chicago Press, 2011).

[22] McMahon, *A Supreme Court Unlike Any Other*, ch. 6.

classic mid-twentieth-century works by the political scientists Robert Dahl and Robert McCloskey.[23] In response to increasing normative concerns that the Court was acting as a counter-majoritarian institution, Dahl and McCloskey argued that the nature of the appointment process—in particular, having popularly elected presidents routinely make new appointments to the Court—was sufficient most of the time to keep the Court in line with the "dominant regime." In perhaps one of the most quoted sentences about the Supreme Court (at least among political scientists), Dahl wrote, "The fact is, then, that the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[24] The regime thesis was never uncontested, because its theoretical underpinnings are somewhat unclear; moreover, it had close analogs to realignment theory, which, itself, has been shown to be rather conceptually and empirically fuzzy.[25] But still, it is fair to say that regime theory captured something important about the relationship between the Court and the American people in mid-century America. In particular, Dahl and McCloskey were writing at the nadir of American partisan polarization, with an effective three-party system of Republicans, northern Democrats, and southern Democrats.[26] This system, of course, featured deep divisions over race, but it is fair to say the post–New Deal consensus represented a dominant regime that the Court, after its initial opposition to FDR in his first term, eventually came into line with.

But, as McMahon notes, things are quite different now compared with the middle of the twentieth century. First, the United States is now at its historical apex in terms of elite partisan polarization; while the American public today is generally much less polarized than elites, it is still the case that the public is generally balanced across the ideological spectrum, and thus there is no dominant "regime" to speak of.[27] Second, as discussed above, presidents often used to win in landslide elections; moreover, the last candidate to become president while losing the popular vote before George W. Bush in 2000 was Benjamin Harrison in 1888. Third, with rare exceptions, Senate confirmation of Supreme Court nominees was all but ensured; somewhat astoundingly, between 1894 and 1968, only one confirmation was rejected in the Senate (John Parker in 1930). Finally, the "engine" that largely makes the regime approach go is frequent turnover on the Court, which allows popularly elected presidents (with the approval of popularly elected senators) to keep the Court in line with the dominant regime. But whereas justices would serve an average of 10–12 years in the middle of the twentieth century, it is now common for justices to stay on the bench for upward of three decades. Such lengthy tenures mean that vacancies are (obviously) rarer, but also more random, and can lead to a supermajority on the Court that is broadly out of step with what national election results would suggest the American people would prefer.

[23] Robert G. McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 1960); Robert A. Dahl, "Decision-making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6 (1957): 279–95.

[24] Dahl, "Decision-making in a Democracy," 285.

[25] For a critique of Dahl, see, e.g., Jonathan D. Casper, "The Supreme Court and National Policy Making," *American Political Science Review* 70, no. 1 (1976): 50–63. On realignment theory and its weaknesses, see David R. Mayhew, *Electoral Realignments: A Critique of an American Genre* (New Haven: Yale University Press, 2008).

[26] On historical trends in elite partisan polarization (specifically, members of Congress), see Nolan McCarty, Keith T. Poole, and Howard Rosenthal, *Polarized America: The Dance of Ideology and Unequal Riches* (Cambridge, MA: MIT Press, 2016).

[27] On mass versus elite polarization, see Morris P. Fiorina, *Unstable Majorities: Polarization, Party Sorting, and Political Stalemate* (Stanford: Hoover Press, 2017).

As McMahon convincingly argues, the disappearance of the political world that Dahl and McCloskey surveyed surely explains why we currently have a Supreme Court unlike any other.[28]

Institutional Design and the Emergence (and Consequences) of the Judicial Partisan Sort

Stepping back a bit, if we accept McMahon's quite persuasive descriptive account that the current Court is lacking in democratic legitimacy—or, at the least, that the democracy gap has grown in recent decades—then there are several conceptual questions this argument raises. In the remainder of this essay, I consider two such questions. First, given that the Court was designed, in large part, to lack democratic legitimacy, is the current Court more of a long-delayed normal than the outlier that McMahon posits it to be? Second, does a lack of democratic legitimacy necessarily translate into a loss of institutional legitimacy?

Let's begin with the institutional structure of all three branches. The framers made the fateful decision to endow federal judges with effectively unqualified life tenure, absent gross misconduct and corruption that could lead to the rare case of impeachment. No other democracy in the world grants such insulation to its apex judges, nor does any state constitution in the United States (save Rhode Island) provide neither a term limit nor a mandatory retirement age for its supreme court judges.[29] Thus, as discussed above, the connection between the justices and popular majorities will depend on the (often random, due to justices dying in office) timing of exits from and entrances to the Court. It is for this reason that proposals to introduce term limits for Supreme Court justices have received endorsement from politicians and scholars across the ideological spectrum; the idea is also broadly popular among the public.[30] Most term-limit plans, including the one endorsed by President Biden in July 2024, call for eighteen-year terms, which would allow every president to regularly make two appointments per term, thereby formalizing the Dahlian turnover mechanism for keeping the Court closer to the public.[31] But the likelihood of Congress passing term limits in the near future is close to zero; even if it did, most scholars agree that such a change would likely require a constitutional amendment, given the clause in Article III's statement stating that federal judges shall "hold their offices during good behavior."[32]

[28] For a succinct but quite forceful argument against applying Dahl's conception of what the Supreme Court does to the current court, see Paul Baumgardner and Calvin TerBeek, "The U.S. Supreme Court is a not a Dahlian Court," *Studies in American Political Development* 36 (2022): 148–50.

[29] Steven G. Calabresi and James Lindgren, "Term Limits for the Supreme Court: Life Tenure Reconsidered," *Harvard Journal of Law & Public Policy* 29 (2005): 769–877.

[30] For example, Steven Calabresi, a co-founder of the influential conservative legal group The Federal Society, was one of the earliest legal academics to publicly call for term limits. On the public appeal of term limits, see Alicia Bannon and Michael Milov-Cordoba, "Supreme Court Term Limits: A Path to a More Accountable High Court," Brennan Center for Justice Report (2023), accessed 30 September 2024, https://www.brennancenter.org/our-work/policy-solutions/supreme-court-term-limits. Page 12 reports the results of about 20 public opinion polls taken between 2014 and 2023; each poll found that at least two-thirds of the American public support some form of term limits for the justices.

[31] On the design of term limits, see Cameron and Kastellec, *Making the Supreme Court*, chapters 13 and 14; and Adam Chilton et al., "Designing Supreme Court Term Limits," *Southern California Law Review* 95 (2021): 1–72.

[32] See David C. Savage, "Term Limits for Supreme Court Are Popular But Would Require a Constitutional Amendment, Experts Say," *Los Angeles Times*, 29 July 2024, accessed 30 September 2024, https://www.latimes.com/world-nation/story/2024-07-29/term-limits-supreme-court-constitutional-amendment.

Moreover, if one would really wanted to privilege democratic legitimacy (we could also think of this concept as analogous to democratic representativeness) as a chief desideratum for the institutional design of the Court, then one would likely favor the implementation of some form of judicial elections, which is how the vast majority of state judges in the United States are selected. But judicial elections, of course, create their own normative problems of perhaps inducing too much democratic representativeness and thus too much democratic responsiveness to popular will. In general, there are no free lunches when it comes to institutional design, and that is certainly the case when it comes to the retention and selection of judges.[33] However, it seems safe to conclude that the federalist design of life-time tenured appointments places federal judges quite far on the side of the scale where democratic legitimacy will be hardest to sustain.

Turning to the presidency and Congress, the very possibility of democratically illegitimate justices based on election results also stems from constitutional structure. Without the electoral college, no justice could be appointed by a popular-vote-losing president. And, if either the Senate were not malapportioned and/or the House played a role in the confirmation of judges, the probability of having numerical minority justices would be much lower, compared with what we have seen with recent appointments by Republican presidents.

Moreover, if we compare the current Court with not just what nomination politics looked like in the middle of the twentieth century, but also going back to the nineteenth century, we start to see some echoes of a court featuring a democracy gap in the same ways of a current Court (even if the current Court is certainly more extreme on this front). Most obviously, three presidents before George W. Bush and Donald Trump won the presidency despite losing the popular vote: John Quincy Adams (1824), Rutherford B. Hayes (1876), and Benjamin Harrison (1888). Each of these three nominated at least one justice, with Harrison enjoying four appointments despite serving only one term. As Howard Gillman notes, the electoral college victories of Hayes and (particularly) Harrison—both Republicans—were particularly important, because they came at a time when Congress endowed federal courts with greater power as their caseload steadily increased in the post–Civil War era. "Republicans," Gillman argues, "were able to control the staffing of these newly empowered courts only because a resurgent Democratic Party was able to win the House but not the Senate, and because two Republican presidents (Hayes in 1876 and Harrison in 1888) were able to win the White House with fewer popular votes than their Democratic opponents."[34]

With respect to the Senate, as discussed above, Clarence Thomas was the first numerical minority justice (in 1991). But, as McMahon notes, before the ratification of the Seventeenth Amendment in 1913, it was impossible, by definition, to have numerical minority justices, because senators were selected by state

[33] For an excellent recent treatment of the relationship between judicial elections and judicial outcomes, see James L. Gibson and Michael J. Nelson, *Judging Inequality: State Supreme Courts and the Inequality Crisis* (New York: Russell Sage Foundation, 2021). For a normative framework evaluating the trade-offs across different judicial retention and selection institutions, see Cameron and Kastellec, *Making the Supreme Court*, chapter 14. Finally, for a useful primer comparing appointment systems versus judicial elections, see Sanford Gordon, "Elected vs. Appointed Judges," 2024, accessed 30 September 2024, https://blockyapp.s3.eu-west-2.amazonaws.com/store/db1ff8b44b110a0754289f15d7366504.pdf.

[34] Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891," *American Political Science Review* 96, no. 3 (2002): 511–24.

legislatures and not by popular vote.[35] Although until the 1970s, most nominees in the twentieth century generally received lopsided approval in the Senate, confirmation fights (and rejections) were common throughout much of the nineteenth century. (Indeed, in chapter 3, McMahon quite usefully discusses changes in roll call votes on nominees over time, as he sets forth six historical periods in which the "electoral-confirmation connection" differed over time[36]). Given the existence of nominees who narrowly won confirmation in the pre–Seventeenth Amendment Senate, it is quite possible that some of these nominees would have been numerical minority justices had there been popular Senate elections. In 1881, for example, Stanley Matthews was confirmed by a 24–23 vote. Of the five most populous states recorded in the 1880 census (New York, Pennsylvania, Ohio, Illinois, and Missouri), Matthews received nay votes from senators hailing from four of these states. Moreover, Matthews was originally appointed in Harrison's lame duck period in January 1881; after his nomination was not acted upon by the Senate, Matthews was renominated by newly installed President Garfield. If we consider Matthews to be Harrison's nominee in effect, then it is quite possible he was the first such justice both nominated by a popular-vote loser and a numerical minority justice in the Senate.

That last paragraph certainly falls under the category of historical trivia (though the tale of Matthews nomination is one of the more interesting ones in American history[37]). But the broader point is that the conditions for democratically illegitimate justices have always existed in the structure of American government. So, what changed? There are two new features of American politics that have paved the way for the current Court's democracy gap. First, as already discussed, the intense elite partisan polarization in American politics today exceeds even the levels of polarization seen in the late nineteenth century. Even in the nineteenth century periods when we saw many contested nominees who received significant opposition in the Senate, it was never the case where party line votes were regular occurrences, as they have been since 2005.[38]

But party-line roll-call votes alone, even if they create numerical minority justices, would not be a huge cause for concerns about democratic legitimacy if not for a core reason for the shift toward such party divisions. That reason is the second (and key) feature that distinguishes American politics broadly and Supreme Court nomination politics more specifically today: for the first time in American history, party and ideology are perfectly sorted on the Supreme Court. Democratic presidents reliably pick liberal justices, and Republican presidents reliably pick conservative justices.[39] This "partisan sort" on the Court goes hand-in-hand with the shift toward more reliable judges, as I discussed above; gone on the days when a Republican president might appoint a range of justices, including some moderates or liberals (like Chief Justice Warren and Justice Souter), and when a Democratic president might appoint a range of moderates or conservatives (like Justices Frankfurter and White).

[35] McMahon, *A Supreme Court Unlike Any Other*, 13, 14, 25, 60, 294 (fn. 1).

[36] McMahon, *A Supreme Court Unlike Any Other*, 26.

[37] See Scott H. Ainsworth and John Anthony Maltese, "National Grange Influence on the Supreme Court Confirmation of Stanley Matthews," *Social Science History* 20, no. 1 (1996): 41–62.

[38] See Cameron and Kastellec, *Making the Supreme Court*, 187.

[39] See Lee Epstein and Eric Posner, "If the Supreme Court Is Nakedly Political, Can It Be Just?," *New York Times*, 9 July 2018; Devins and Baum, *The Company They Keep*; and Cameron and Kastellec, *Making the Supreme Court*, 304–308.

One way to think about the emergence of the partisan sort is a puzzle. But the best way to frame this puzzle is not so much why did the partisan sort emerge, but rather why did it take so long to do so? After all, Supreme Court justices have always been powerful actors, and stark conflicts between the Court and the elected branches emerged within mere years after the founding. Yet, as discussed earlier, it was not until relatively recently that parties and presidents take seriously the importance of placing reliable ideologues on the Court, thereby creating the Court. For instance, in *Making the Supreme Court*, Cameron and I show that party platforms did not regularly emphasize Supreme Court appointments until the 1960s.[40] We argue there are several reasons for this shift in emphasis.[41] First, as the federal government grew in size, the Supreme Court (with its ability to check Congress and the executive branch via judicial review) saw an increase in its power, which politicians recognized. Second, and relatedly, with the growth of the administrative state, interest groups and activists became more interested in judicial politics and increasingly pushed the parties to emphasize judicial appointments.[42] Finally, as the visibility of Supreme Court nominations grew over time, presidents (and) senators increasingly saw the value of making appointments acceptable to their partisan bases.

As it turns out, all these forces crystalized at the exact moment in history when the two Republican presidents this century rode their electoral college luck into a plethora of appointments, creating the 6–3 conservative supermajority. But the sheer partisan breakdown does not tell the story. If President Trump had appointed a justice in the mold of a Stevens or Souter (or even a Kennedy or O'Connor), then *Roe* would almost certainly be on the books, and the Court would have not reached the conservative outcome in many of the landmark cases noted in the introduction to this essay. In this scenario, angst about the Court's legitimacy would be much more dialed down than it is now. But he did not, and here we are.

If the account of how the partisan sort came to exist is correct, there is no reason to think those same forces will not persist for at least the medium term, unless something significant changes in the overall structures of today's polarized politics (which is always possible). The current justices, of course, cannot help but be aware of the partisan sort; thus, it is likely that justices will increasingly engage in strategic retirements to ensure their seats remain within the partisan family. This, combined with the fact that justices now serve for so long, means that, barring a string of unlikely events, the conservative bloc is likely to remain in control of the Court for at least several decades.[43] As McMahon correctly notes, "Age and longevity on the Court have reshaped its place in American democracy; in short, they have widened the Court's democracy gap. With the justices serving far longer than ever before, opportunities to alter the Court's makeup through presidential elections—by

[40] Cameron and Kastellec, *Making the Supreme Court*, chapter 2.

[41] See Cameron and Kastellec, *Making the Supreme Court*, chapter 1, for a summary of these arguments.

[42] See also Nancy Scherer, *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process* (Stanford: Stanford University Press, 2005).

[43] See Cameron and Kastellec, *Making the Supreme Court*, chapter 13; as well as Charles M. Cameron and Jonathan P. Kastellec, "Conservatives May Control the Supreme Court until the 2050s," *Washington Post*, 14 December 2021, accessed 30 September 2024, https://www.washingtonpost.com/politics/2021/12/14/supreme-court-roe-conservatives/.

voting for specific candidates to secure desirable Court appointments—are blocked, and those who want to reform the Court are diverted down long detours, waiting for justices to die or retire".[44]

Democratic versus Institutional Legitimacy

Finally, it is useful to ask how the Court's apparent lack of democratic legitimacy might affect its institutional/judicial legitimacy—that is, its ability to see its decisions respected, enforced, and complied with by other political actors and the public, even if they disagree with some of those decisions.[45] Early in his book, McMahon sensibly brackets his focus on democratic legitimacy from judicial legitimacy.[46] For the most part, that divide holds, but, at certain points, McMahon (quite naturally) asks about the potential connection between the two:

> For this reason, the democratic legitimacy of the Roberts Court is at best uncertain. The Court treads on this judicial ice. If it continues to pursue an aggressively conservative course, overturning decades-old decisions a majority of Americans still support, it may very well become the most counter-majoritarian Court in the history of American democracy. It has already embarked on this path, most especially with the Dobbs decision upending Roe. The only question is how far it will go? How far will it "stray … from the mainstreams of American life," and how often will it overestimate its power resources?[47]

The question of whether the Court will overestimate its "power resources"[48] is one that inherently asks whether the Court will act in a way that threatens its judicial legitimacy. Yet, although it is natural to assume that a court lacking in democracy legitimacy might see its judicial legitimacy threatened, perhaps paradoxically, the very same forces that created the current Court mean that, in practice, it is unlikely to face any significant blowback from the elected branches, which historically has been the key predictor of when the Court will back down when it finds itself out of step with either Congress and/or the president.[49]

Even as the Court find itself under threat and criticism from the Democratic Party, and even as public support for it has declined precipitously in recent years, particularly among Democratic partisans, Republican elites have remained steadfast in their support the Court. Given the nature of the policy process in the Madisonian system, as long as Congress remains fairly evenly divided, Republicans then are likely to be able to block any attempts to rein in the Court. (In 2021 and 2022, Democrats controlled both the White House and

[44] McMahon, *A Supreme Court Unlike Any Other*, 266.

[45] For a useful taxonomy of different types of legitimacy as applied to courts, see Richard H. Fallon Jr, *Law and Legitimacy in the Supreme Court* (Cambridge, MA: Harvard University Press, 2018). The type of legitimacy I discuss in this section is analogous to what Fallon calls "sociological legitimacy." On p. 22, Fallon defines the question of sociological legitimacy as "the question of whether people (and, if so, how many of them) believe that the law or the constitution deserves to be respected or obeyed for reasons that go beyond fear of adverse consequences." For a (now somewhat dated) review of the political science literature on judicial legitimacy and the Supreme Court, see James L. Gibson and Michael J. Nelson, "The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto," *Annual Review of Law and Social Science* 10, no. 1 (2014): 201–19. The articles I cite in footnote 5 all make claims about the purported loss of the Court's intuitional legitimacy.

[46] McMahon, *A Supreme Court Unlike Any Other*, 293 (fn. 6).

[47] McMahon, *A Supreme Court Unlike Any Other*, 95 (ellipses in original); McMahon quoting McCloskey, *The American Supreme Court*, 225.

[48] McCloskey, *The American Supreme Court*, 225.

[49] See, e.g., Gerald N. Rosenberg, "Judicial Independence and the Reality of Political Power," The *Review of Politics* 54, no. 3 (1992): 369–98.

both chambers of Congress—albeit very narrowly—and had a theoretical opportunity to pass legislation to curb the Court, such as jurisdiction stripping or even court packing. But that would have required ending the filibuster, something most Democratic senators showed little appetite for. In addition, early in his presidency President Biden signaled little interest in significantly reforming the Court; he created a bipartisan commission to study the issue, but it seems clear his interest was in using the commission as a way to punt on the issue). Finally, despite deep disapproval with many of the Court's recent conservative decisions, most notably *Dobbs*, there has been little indication among Democratic politicians or the public at large that they have any intention of not complying with the Court, suggesting that its judicial legitimacy remains strong as an empirical matter.[50]

In summary, the core contribution of *A Supreme Court Unlike Any Other* is to describe both quantitatively and qualitatively how the current Court and its 6–3 conservative majority looks quite distinct from the Courts of earlier eras. McMahon does this exceedingly well, and anybody interested in the Supreme Court should read this book. But, for the purposes of understanding the Court's role in American politics, perhaps the more important lesson is that the "Court unlike any other" is quite likely to persist for quite some time.

[50] On the decline of public support for the Court, see Megan Brenan, "Views of Supreme Court Remain Near Record Lows," *Gallup*, accessed 30 September 2024, https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx.