THE FUTURE OF THE SUPREME COURT: EVALUATING ITS IDEOLOGICAL COMPOSITION AND POSSIBLE SELECTION REFORMS

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The current reality of a conservative Supreme Court supermajority, formed in part due to Senate Republicans' successful blockade of Merrick Garland in 2016, has raised the salience of proposals to reform the selection and retention institutions for justices to levels not seen since Franklin Roosevelt's court packing proposals in 1937. While the passage of any reforms seems unlikely in the near future, the Court's many high profile conservative rulings since 2020, including the overruling of Roe v. Wade*, 410 U.S. 113 (1973), in* Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022), have only intensified scrutiny on the justices and the current practice of lifetime tenure.*

In this Article, we contribute to the scholarly debate around court reform by employing computer simulations to project the future ideological composition of the Court and to evaluate the effect of potential reforms to the Court—as well as possible changes in norms surrounding appointment politics—on the ideology trajectory of the Court. In terms of reforms, we focus on the most widely discussed proposals: term limits and court packing. In terms of norms, we examine what would happen if the example of Garland in 2016—a Senate controlled by the opposite president of the party completing blockading any nominee—became commonplace.

We begin by producing a "baseline" prediction of the future ideological composition of the Court for the rest of the century. We show that the events of 2016—the Garland blockade and the election of Donald Trump—locked in place a solid conservative majority on the Court. Barring a string of unlikely events, this majority will persist for several decades into the middle of the 21st century. We also show that the Court is quite likely to remain polarized into two ideologically distinct blocs, with a near-empty center. As the conservative majority slowly dissipates, the median justice will probably swing regularly between the two blocs.

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Next, we go beyond existing simulation approaches by developing a normative framework for tradeoffs implicit in different judicial selection and retention institutions. These tradeoffs arise because different degrees of judicial independence, as embodied by lower responsiveness to election results and longer tenures on the Court, create both costs and benefits to society. In particular, we simulate the introduction of both court packing and fixed term limits for justices. We show that the introduction of staggered term limits would prevent any long-run ideological bias in the composition of the Court. Compared to the status quo, term limits would have the effect of increasing the frequency of appointment conflict by making appointments more regular (e.g., once every two years); this regularity would also have the desirable effect of lowering the intensity of appointments, since every president would be guaranteed an equal number of appointments per term.

INTRODUCTION

While the Supreme Court has always been a pivotal actor in American politics, the current moment stands out for generating an unusual amount of academic and public interest in reforming the institutions by which justices take—and leave—the bench. The salience of potential reforms—unseen since President Franklin D. Roosevelt's infamous and failed court packing plan in 1937—has been driven by a combination of events.[1] First, the Court handed down a series of high profile conservative decisions in the 2010s that seemed to advance Republican partisan interests, thereby generating interest in reform among liberal activists and politicians.[2] Notably, these cases soon appeared in Democratic presidential platforms as examples of judicial perfidy.[3] Second, in 2016, Senate Republicans (led by Senate Majority Leader Mitch McConnell) blocked the nomination of Merrick Garland, President Obama's choice to replace Justice Antonin Scalia, preventing Garland from getting so much as a hearing before the Senate Judiciary Committee. Subsequently, the shock victory of Donald Trump in the 2016 presidential election allowed Trump—and not Hillary Clinton—to replace Scalia with Justice Neil Gorsuch. The retirement of Anthony Kennedy in 2018 and death of Ruth Bader Ginsburg in 2020 then gave Trump two additional appointments, Brett Kavanaugh and Amy Coney Barrett. The confirmation of Barrett, just weeks before the 2020 presidential election, solidified a 6-3 conservative majority on the Court, despite Republican presidential candidates winning the popular vote once in the 21st century.[4]

This pronounced tilt in the judicial playing field led some liberal politicians and advocates in the 2020 campaign to call for a "hardball"

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[1] For an excellent history of the lead-up to and defeat of the Court packing plan, see JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2011).

[2] These decisions include *Citizens United*, 558 U.S. 310 (2010), prohibiting the government from restricting independent expenditures for political communications by corporations; *Shelby County v. Holder*, 570 U.S. 529 (2013), striking down key portions of the Voting Rights Act; and *Rucho v. Common Cause*, 588 U.S. ___ (2019), holding claims of partisan gerrymandering to be non-justiciable in federal courts.

[3] For systematic evidence on invocations of Supreme Court decisions—usually in opposition—in both parties' platforms, see CAMERON & KASTELLEC, *supra* note †, ch. 2. For example, the 2016 Democratic platform stated: "We will fight to end the broken campaign finance system, overturn the disastrous Citizens United decision, restore the full power of the Voting Rights Act, and return control of our elections to the American people." *2016 Democratic Party Platform*, AMERICAN PRESIDENCY PROJECT www.presidency.ucsb.edu/documents/2016-democratic-party-platform (last visited Dec. 20, 2023).

[4] Rounding out the conservative bloc are Chief Justice Roberts and Justices Thomas and Alito; the liberal bloc comprises Justices Sotomayor, Kagan and Jackson.

response if and when Democrats regained the White House. Indeed, the idea of packing the Court by adding additional seats emerged as a central talking point in the 2020 Democratic primary, with several candidates expressing support for such a proposal. Other Democrats supported instituting term limits for justices.[5] While Joe Biden himself seemed lukewarm about reforming the Court, once he took office he did appoint a bipartisan commission in 2021 to study the issue.[6]

The emergence of divided government following the 2022 elections, combined with a presidential election on the horizon, means that there is no realistic chance of any reforms to the Court's selection and retention institutions in the near future. Still, the salience of court reform is unlikely to fade. Indeed, high profile conservative rulings since 2020, including the overruling of *Roe v. Wade*, 410 U.S. 113, (1973), in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022), have only intensified scrutiny on the Court.

In this Article, we contribute to the scholarly debate around court reform by employing computer simulations to project the future ideological composition of the Court and to evaluate the effect of potential reforms to the Court—as well as possible changes in norms surrounding appointment politics—on the ideology trajectory of the Court. In terms of reforms, we focus on the most widely discussed proposals: term limits and court packing.

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[5] *See, e.g.*, Marin K. Levy, Packing and Unpacking State Courts, 61 WILLIAM & MARY L. REV. 1121 (2019); Ian Millhiser, *Let's Think About Court-Packing*, DEMOCRACY: A JOURNAL OF IDEAS (Winter 2019), available at https://democracyjournal.org/magazine/51/lets-think-about-court-packing-2/. Pete Buttigieg, for example, endorsed a plan (based on the proposal in Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019)) to increase the Court to 15 members, with a third of the Court selected by the other 10 justices (who would be selected via the existing selection procedure). So did presidential contenders Senator Kamala Harris, Senator Elizabeth Warren, Senator Cory Booker, and Governor Steve Bullock of Montana, in various versions. Joan Biskupic, *Democrats Look at Packing the Supreme Court to Pack the Vote*, CNN POLITICS (May 31, 2019), available at https://www.cnn.com/2019/05/31/politics/democrats-supreme-court-packing-politics/index.html; Rashaan Ayesh & Ursula Perano, *Court Packing: Where the 2020 Candidates Stand*, AXIOS (Oct. 2, 2019), available at https://www.axios.com/court-packing-where-2020-candidates-stand-aff0e431-7624-html. In addition, several candidates expressed openness to the idea of term limits. *See Where Democrats Stand*, WASH. POST, https://www.washingtonpost.com/graphics/politics/policy-2020/voting-changes/supreme-court-term-limits (2020).

[6] The final commission report is available at https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf. The commission did not make a formal recommendation, in part because the wisdom of court packing divided the members. Charlie Savage, *'Court Packing' Issue Divides Commission Appointed by Biden*, N.Y. TIMES (Dec. 7, 2021), available at https://www.nytimes.com/2021/12/07/us/politics/supreme-court-packing-expansion.html.

In terms of norms, we examine what would happen if the example of Merrick Garland in 2016—a Senate controlled by the opposite president of the party completing blockading any nominee—became commonplace.

As we discuss below, we join several other scholars in using simulations to understand the Court and potential institutional reforms. To the best of our knowledge, however, our research is the first effort to produce a "baseline accounting" by predicting the future ideological composition of the Court for the rest of the century.[7] Second, we go beyond existing simulation approaches by developing a normative framework for tradeoffs implicit in different judicial selection and retention institutions. These tradeoffs arise because different degrees of judicial independence, as embodied by lower responsiveness to election results and longer tenures on the Court, create both costs and benefits to society. To gauge the tradeoffs implied by potential reforms, we evaluate their likely effects on four substantively important outcomes. The first is *democratic responsiveness*—the degree to which the composition of the Court broadly tracks the electoral choices of the American public. The second is *judicial turnover*—the frequency with which new justices replace existing ones. The third is the frequency of *closely divided courts*—court with compositions in which a new justice would alter the Court's ideological balance. The fourth is the frequency of *out-of-step courts*—courts with a supermajority of justices appointed by one party facing unified elected branches controlled by the other party.

The key results are as follows:

- The events of 2016—the Garland blockade and the election of Donald Trump—locked in place a solid conservative majority on the Court. Barring a string of unlikely events, this majority will persist for several decades into the middle of the 21st century.
- The Court is quite likely to remain polarized into two ideologically distinct blocs, with a near-empty center. As the conservative majority slowly dissipates, the median justice will probably swing regularly between the two blocs.
- If the Garland scenario becomes the norm and Supreme Court appointments become impossible during instances of divided control between the presidency and the Senate, at least one seat is likely to be vacant a substantial portion of the time, and on occasion, multiple seats will sit empty.
- A one-time court packing of several seats under a Democratic president could offset the conservative lock-in. However, the

[7] We first publicized this research in a *Monkey Cage* post in the *Washington Post* in 2021. Charles M. Cameron & Jonathan P. Kastellec, *Conservatives Might Control the Supreme Court Until the 2050s*, WASH. POST (Dec. 14, 2021), https://www.washingtonpost.com/politics/2021/12/14/supreme-court-roe-conservatives/.

likelihood that the introduction of court packing would lead to tit-for-tat cycles by both parties could mean a court with as many as 30 members by the end of the century.

- The introduction of staggered term limits would prevent any long-run ideological bias in the composition of the Court.
- From a normative standpoint, compared to the status quo, term limits would have the effect of increasing the *frequency* of appointment conflict by making appointments more regular (e.g., once every two years); this regularity would also have the desirable effect of lowering the *intensity* of appointments, since every president would be guaranteed an equal number of appointments per term.

The Article proceeds as follows. Part I reviews related research that uses simulation methods to study Supreme Court appointment politics. We note both the commonalities with these efforts as well as how our approach diverges from them.

In Part II, we carefully lay out the key design choices in our simulations. These include: the composition of the initial (i.e., starting) court; modeling party control of the White House and Senate in future years; the assumed ideology and age of entering justices; and how and when justices exit the bench, due to death or retirement. We discuss how these choices result in an estimated set of ideal points for the justices on the Court at any point in time, which we can then aggregate into a measure of the overall ideological composition of the Court—e.g., the location of the median justice.

In Part III, we present what we call a "baseline" set of simulations. These projections simply examine what is likely to happen if the status quo surrounding appointments—that is, the current conservative majority, life tenure, and (likely) strategic retirements by the current justices—continues indefinitely. The key result is "conservative lock-in"—in all likelihood, as noted above, the 2021 conservative majority on the Court will persist for decades to come. We then explore the genesis of conservative lock-in. First, we examiner the importance of increased justice longevity and, more subtly, strategically timed retirements.

Part IV examines how the events of 2016 created a historical pivot point for the Court. Here we develop a counterfactual simulation that explores what would have happened had the Senate confirmed Merrick Garland in 2016 and if Hillary Clinton had defeated Donald Trump in the 2016 election. The results are dramatic: a Clinton win would likely have led to liberal Courts for many years to come. But of course that is not what happened. The 2016 election thus stands out as transformative for the likely future of the Supreme Court.

Part V presents a series of simulations that explore the consequences of potential changes in either norms or institutions. We first examine a very

plausible change: what if the Garland blockade of 2016 becomes the norm and confirmations grind to a halt under divided party government? What are the implications for extended vacancies and, perhaps, even the ability of the Court to reach a quorum? We then examine two potential institutional changes to selection and tenure. First, we examine how the short-term trajectory of the Court would have changed had the Democratic party pursued and implemented court packing in 2021. We then examine how the introduction of term limits would affect the long-run trajectory of the Court.

In Part VI, we develop a normative framework for evaluating the tradeoffs implicit in different judicial selection and retention institutions. These tradeoffs arise because different degrees of judicial independence, as embodied by lower responsiveness to election results and longer tenures on the Court, create both costs and benefits to society. One point we emphasize is the status quo is of life tenure for justices who are highly reliable ideologues falls on the maximum side of judicial independence; indeed, no other democracy uses such an institutional arrangement. While fixed term limits might induce some instability in the law by creating more frequent tradeoff, they would both reduce the intensity of political conflict over appointments and decrease the likelihood of a court that is drastically out-of-step with the elected branches.

We end with a brief conclusion.

I. STUDYING THE SUPREME COURT USING SIMULATIONS

In modeling the future of the Supreme Court using computer simulations, we build upon several earlier efforts. First, Professors Michael Bailey and Albert Yoon use simulations to examine how strategic retirements on the Court and term limits would affect the makeup of the Court.[8] They found modest overall effects from strategic retirements but larger potential effects from term limits.[9] More specifically, they found that the location of the median justice is more responsive to the president's party when justices face term limits (relative to life tenure) and when justices are more sensitive to ideology (so strategic retirement is more attractive to them).[10]

Second, Professors Jonathan Katz and Matthew Spitzer examine how the recent tendency of Republican presidents—in contrast to Democratic presidents—to appoint younger nominees influences the location of the

[8] Michael A. Bailey & Albert Yoon, *'While There's a Breath in My Body': The Systemic Effects of Politically Motivated Retirement from the Supreme Court*, 23 J. THEORETICAL POL. 293 (2011).

[9] *Id.* at 306.

[10] *Id.* at 308-9.

median justice in the long run.[11] They found, not surprisingly, that such an asymmetry would shift the median in a conservative direction.[12] However, they also found that the introduction of 18-year term limits would cancel out the effect of an appointing age imbalance.[13]

Finally, in a pair of papers, Professors Adam Chilton, Daniel Epps, Kyle Rozema, and Maya Sen use simulations to examine two policy interventions. The first paper examines how various term limit proposals might affect the composition of the Court,[14] while the second studies how tit-for-tat court packing would affect the size of the Court.[15] The term limits paper applies their simulations to the past, and thus takes historical elections as given;[16] as such, the simulations do not model control of the branches, which we do (as described below). A nice feature of the paper is the care in modeling specific proposals for implementing term limits, thereby allowing for a comparative assessment of the different proposals. In contrast to the term limits paper, the second paper does simulate the future, trying to predict the consequences of tit-for-tat court packing by both parties.[17]

Our simulations share some commonalities with the approaches in these papers but, we suggest, are richer and more ambitious. Rather than examining one or two "histories," we examine a range of counterfactuals based on potential changes in norms and practices. In addition, the empirical foundations of our simulations are tethered more closely to the realities of the modern confirmation process than some of the earlier efforts. For example, none of the previous simulations examine the fate of the Court if confirmations grind to a halt during divided party government. We regard this scenario as disturbingly plausible and explore it in some depth. Our most significant departure, however, is that we use the results of our simulations to develop a normative framework for evaluating the tradeoffs between judicial independence and accountability.

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[11] Jonathan N. Katz & Matthew L. Spitzer, *What's Age Got to Do with It? Supreme Court Appointees and the Long Run Location of the Supreme Court Median Justice*, 46 ARIZ. ST. L.J. 41 (2014).

[12] *Id.* at 71.

[13] *Id.* at 78-9.

[14] Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. 1 (2021) [hereinafter Chilton et al., *Term Limits*].

[15] Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, The Endgame of Court-Packing (May 4, 2023) (unpublished manuscript), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835502 [hereinafter Chilton et al., Court-Packing].

[16] Chilton et al., *Term Limits*, *supra* note __, at 35-6.

[17] Chilton et al., Court-Packing, *supra* note __, at 7-13. These brief descriptions only scratch the surface of the many design choices in each of these papers. Table A-1 in the Appendix presents a more complete summary, as well as comparisons with our approach.

II. MODELING THE FUTURE

Before turning to the details of our simulations, it is worth reviewing the basic properties behind the method of simulations.[18] Simulations are often used by statisticians and social scientists to check the bias and accuracy of estimates from empirical models or to construct certain estimates. Simulation techniques generally have two features. The first is the construction of a replica or model capturing how one think the real world works, by reducing it to its key moving parts. The second feature is repetition, particularly for models with a random element, so one can know how variable our observations are. To give a simple example, consider the problem of estimating the probability of the result of rolling a 7 with two, fair six-sided dice. One way would be to calculate the probability analytically, taking the possible outcomes that result in 7 divided by the total number of outcomes. Another way would be to simulate the rolling of two dice, perhaps at a craps table or on a computer, and simply count the proportion of rolls that sum to 7. Given enough simulations, this method produces an unbiased estimate of the probability. Alternatively, suppose we wanted to know whether a pair of dice are weighted. We could roll them many times to compare the results to what we know should be true analytically or to our observations of rolling dice we know to be fair. The latter is, in effect, what we are doing in this Article. The key advantage is that we can vary certain parameters (e.g., whether justices engage in strategic retirements) to see how such variations affect the projected ideological trajectory of the Supreme Court.[19]

A. The Basic Idea

Turning to the specifics of our simulations, the essential insight in simulating the future composition of the Supreme Court is that each seat is a *stochastic process*—that is, a family of random variables produced by the exit-and-replacement process of individual justices. A seat (one per justice) progresses through time, moving somewhat randomly from one "state" to another, with the transitions governed by exits from the Court (via death and retirement) and entrances (via appointments). Modeling the future composition of the Court means 1) conceptualizing the states, namely the ideology and age of the seat holder; 2) specifying the probabilities that govern exits and entrances and hence each seat's movement from state to state; 3) keeping track of all the seat-states as they move through time; and then 4)

[18] This paragraph is drawn from Jonathan P. Kastellec & Jeffrey R. Lax, *Case Selection and the Study of Judicial Politics*, 53 J. EMPIRICAL LEGAL STUD. 407, 416 (2008).

[19] For a general overview of simulation-based methods, see CHRISTIAN P. ROBERT & GEORGE CASELLA, MONTE CARLO STATISTICAL METHODS (2d ed. 2010).

investigating the dynamic properties of the system as a whole. These properties include the ideology of the median justice, the number of justices, and the long-run tendencies of each of those variables. Because the Court has nine seats (and, under court-packing, possibly many more), each step becomes increasingly complex. Fortunately, a computer can perform the intricate accounting with ease, and the simulations allow us to see the behavior of the court as a whole given the underlying design choices.

Our simulations examine several different scenarios in which the computer simulates every future year (extending to 2100) 1,000 times, generating various summary statistics across every analysis we perform. For linguistic clarity, we call each individual run of this procedure a "simulation," and we denote the collective scenario explored as a "scenario." For example, the baseline scenario employs 1,000 simulations, each of which contains information on the justices, and thus the Court as a whole, for every year through 2100.

The following technical points are worth noting. First, under almost any reasonable set of assumptions, the *near-future composition of the Court is extremely sensitive to its starting composition.* As we discuss in more detail below, the starting court in our simulations is the current Court (as of the 2023-24 term), which has six reliable conservatives and three reliable liberals. This composition affects the composition of the Court for years into the future in most of the simulations. The practical consequences are enormous.

Second, at any given time, we assume that the significance of the Court's composition is *state-dependent*, not path-dependent. In other words, the court's ideological tendency is well-captured by the current values of the median justice's ideology and the size of the Court's ideological blocs. The prior history of these variables does not matter as such, except as the path that led to the present.[20]

Third, the details of the entrance and exit processes are extremely consequential for the Court's path through time, but the processes themselves are assumed to be predictable and relatively stable; e.g., the death probability for 83 year-olds is constant. Furthermore, given the entrance and exit processes, it is theoretically possible for the Court to move from any given

[20] One might argue that a long series of (say) conservative medians limits the potential doctrinal impact of a later liberal median, due to stare decisis. Whether horizontal stare decisis *binds* the justices is a matter of long controversy among scholars of the Court. In our view, the bulk of the systematic empirical evidence suggests that prior precedents of the Court act at best as a weak constraint on the justices' exercise of their policy preferences. The most forceful form of this argument can be found in HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999), and JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

state to any other state over time. For example, a court with nine conservative justices could conceivably eventually transform into a court with nine liberal justices; such a dramatic change, however, is improbable in any reasonable length of time.

Together, these seemingly technical features imply a very practical consequence. The Court's composition tends to a unique long-run distribution over possible compositions—i.e., ideologies of the median justice. To be clear, this mathematical fact does not mean that the Court tends toward a *unique* ideology for the median justice. To foreshadow one key result, the baseline scenario shows that the long-run ideology of the median justice displays a bimodal distribution. So there is a smaller long-run probability of a liberal court and a larger long-run probability of a conservative court, with specific long-range probabilities.

In sum, as we present the results, the key questions are: 1) What are the implications for *the long-run distribution* of the Court's composition? 2) *How fast* will the Court tend to get there? and 3) *How variable* will the Court's composition be in the near-term and the long-term?

B. Key Design Choices

Design choices for any simulation of Supreme Court appointment politics fall into four broad categories. First, what is the initial Court (the starting place) and what are the relevant characteristics of its sitting justices (e.g., their ages and ideologies)? Second, which party controls the elected branches, especially the presidency and the Senate, and how will this control be determined over time? Third, what do entering justices probably look like, in terms of ideology, conditional on control of the elected branches? Fourth, how are exits from the Court due to death and retirement determined?[21] We walk through our choices in this sub-section.

[21] Of course, at a more meta level, could imagine entirely different systems for selecting justices, such as those used in the American states. According to the National Center for State courts, 87 percent of all state court judges face elections, and 39 states elect at least some of their judges. Adam Liptak, *U.S. Voting for Judges Perplexes Other Nations*, N.Y. TIMES (May 25, 2008). Among the states that employ judicial elections, one finds considerable institutional variation, including partisan, non-partisan, and retention elections. *See* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012) (providing an excellent historical review of the development of judicial elections in the American states). Perhaps because the federal system is ensconced in the U.S. Constitution, all existing simulations of the U.S. Supreme Court assume presidential selection with Senate confirmation, and take life-time tenure as a baseline, and we do the same.

1. *The Initial Court*

We take the initial court to be the Supreme Court as it actually existed in the 2023 term; the nine starting justices have exactly the same ages and the same ideology scores as the 2023 Court and its conservative 6-3 majority.[22] Table 1 provides for each justice their age, year confirmed, appointing president, and ideology score, which runs from -1 (most liberal) to 1 (most conservative).

For ideology scores, we use the NOMINATE-Scaled Perceptions (NSP) scores developed in Charles Cameron & Jee-Kwang Park, *How Will They Vote? Predicting the Future Behavior of Supreme Court Nominees, 1937-2006*, 6 J. EMPIRICAL LEGAL STUD. 485 (2009). These scores project the well-known "Segal-Cover" scores, Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989), based on the content of contemporary newspaper editorials, into DW-NOMINATE space. (DW-NOMINATE is the most frequently used set of ideal points for members of Congress. *See* NOLAN MCCARTY, KEITH POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2006) (describing and applying the scores).) Cameron and Park show that the NSP scores do a reasonable job predicting the subsequent voting by justices. Cameron & Park, *supra*. The NSP scores display some minor discrepancies with actual voting patterns among the conservatives, e.g., NSP inaccurately places Justice Thomas to the left of most his Republican colleagues. However, since we focus on the ideological structure of the Court as a whole, and not that of individual justices, these discrepancies are inconsequential for the results. (The advantage of the NSP scores is that NOMINATE's [-1,1] scale is intuitive for understanding the ideological tendency of the Court in the future, as we describe and visualize below.)

[22] Other simulations make somewhat different choices. For example, Professor Chilton and his coauthors take as their starting point the 1937 Court, then "re-create" the subsequent history of the Court, while changing key institutional features (mainly, the implementation of term limits). Chilton et al., *Term Limits*, *supra* note __. Bailey and Yoon utilize a kind of ideal baseline court, with justices evenly spaced by ideology and with a given age distribution. Bailey & Yoon, *supra* note __. In their second article, Professor Chilton and his coauthors start with the 2021 court, but then add four Democratic seats as an opening salvo of court packing.

TABLE 1: SUMMARY OF JUSTICES SERVING AS THE STARTING JUSTICES IN OUR SIMULATIONS

Justice	Age	Year confirmed	Appointing President	Ideology score
Thomas	75	1991	George H.W. Bush	0.54
Roberts	67	2005	George W. Bush	0.64
Alito	73	2006	George W. Bush	0.65
Sotomayor	69	2009	Obama	-0.30
Kagan	63	2010	Obama	-0.29
Gorsuch	56	2017	Trump	0.58
Kavanaugh	58	2018	Trump	0.67
Barrett	51	2020	Trump	0.45
Jackson	53	2022	Biden	-0.32

Note: The justices are ordered by year of confirmation.

2. *Control of the Presidency and the Senate*

The next key design choice is how to model control of the presidency and Senate going forward in time. One might expect the stochastic properties of party control of the U.S. presidency and the U.S. Senate to be well-studied and thoroughly understood. But this turns out not to be the case.[23] Consequently, designers of Supreme Court simulators must devise their own set of assumptions about the likelihoods of institutional control.[24]

We treat presidential party control as a straightforward process with well-governed transition properties based on the historical record. Specifically, in the 1948 to 2020 period, the historical record reveals the following transition probabilities:

- If a party controlled the White House for a single term, it had about a 78% chance of winning a second term.
- Correspondingly, if a party had been out of power for a single term, it had about a 22% chance of reclaiming the White House in the next election.
- If a party controlled the White House for two terms, it had about a

[23] There are few exceptions. *See, e.g.*, Donald E. Stokes & Gudmund R. Iversen, *On the Existence of Forces Restoring Party Competition*, 26 PUB. OPIN. Q. 159 (1962); Daniel J. Gans, *Persistence of Party Success in American Presidential Elections*, 16 J. INTERDISCIPLINARY HIST. 221 (1985); ROBERT S. ERIKSON, MICHAEL B. MACKUEN & JAMES A. STIMSON, THE MACRO POLITY (2002); Michael Geruso, Dean Spears & Ishaana Talesara, *Inversions in US Presidential Elections: 1836-2016*, Nat'l Bureau of Econ. Research Working Paper (2019), available at https://www.nber.org/papers/w26247.pdf.

[24] For example, Bailey and Yoon assume a 50-50 chance of party control of the presidency and do not directly model control of the Senate, but instead assume it imposes some randomness on the president's choice of nominee. Bailey & Yoon, *supra* note __.

20% chance of winning a third term.

- Correspondingly, if a party had been out of power for two terms, it had about a 80% of winning the next election.

These probabilities are hardly natural laws, but instead reflect the noticeably "thermostatic" quality of public sentiment, plus learning and re-calibration by the elites who control the political parties.[25] We implement these probabilities in every simulation. So, for example, a party in its second term of White House control has only a 20% chance of winning a third term. These assumptions allow a party to control the presidency for more than two consecutive terms, but such an occurrence is relatively rare.[26]

Second, we model Senate control as keyed to unified and divided party control and the Senate's relationship to the party in control of the White House. From this perspective, in each election year—presidential or midterm—the Senate is either controlled by the president's party or is not. Between 1948 and 2020, the historical probabilities of a switch in party control of the Senate during presidential election years were:[27]

- Unified government: 38% chance of switch
- Divided government: 18% chance of switch

During midterm election years, the historical probabilities of a switch in party control of the Senate were:

- Unified government: 42% chance of switch
- Divided government: 17% chance of switch

Unfortunately, we have too few elections to accurately calculate transition probabilities separately for each party. However, as has been

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[25] On the public as a thermostat, see Christopher Wlezien, *The Public as Thermostat: Dynamics of Preferences for Spending*, AM. J. POL. SCI., at 981 (1995), and Erikson, MacKuen & Stimson, *supra* note __.

[26] The transition probabilities do not distinguish Democratic from Republican presidents, due to limited data. The elections of 2000 and 2016—which saw George W. Bush and Donald Trump winning Electoral College despite losing the popular vote—has led to some claims that the Electoral College is systematically biased in favor of Republican presidential candidates; see e.g. Jordan Weissman, *The Electoral College Really Does Give Republicans a Massive Advantage in Close Elections, a New Paper Finds*, SLATE (Sept. 17, 2019), available at https://slate.com/business/2019/09/electoral-college-republican-advantage-texas-economics-paper.html . While the recent Republican advantage is quite real, Professor Geruso and his coauthors show that such partisan advantage depends sensitively on the closeness of the election and precisely which states are swing states; as such, partisan advantage in the Electoral College tends to be transitory. Geruso, Spears & Talesara, *supra* note __. Accordingly, we do not build such an advantage into our simulations.

[27] These probabilities are based on the incidence of unified and divided government in this period; the data on party control comes from Wikipedia: https://en.wikipedia.org/wiki/Party_divisions_of_United_States_Congresses (last visited 2 January 2024).

widely recognized, the Senate "map" has tilted noticeably in favor of the Republicans, due to the geographic distribution of party members across states. To capture this bias, in some simulations we allow an asymmetric likelihood of Senate control by Republicans.

For every simulation, we run "presidential elections" every four years and "Senate elections" every two years (i.e., in both president election and midterm years) to determine party control of the White House and the Senate. In other words, for every year in every simulation, the president is either a Democrat or a Republican, and the Senate is controlled by either the president's party or the opposition. The "election results" are draws from Bernoulli distributions, using the above transition probabilities.[28] Institutional control of the branches varies across simulations due to the random draws.

Figure 1 illustrates how the simulated elections work in practice. It displays the *average* probability of a Democratic president, a Democratic Senate, and unified party government across the 1000 simulations in the baseline scenario (the scenario is discussed further below). Figure 1A shows how in a majority of simulations the Democrats retain the presidency in 2024. But then, on average, control tends to switch to the Republicans in 2028, reflecting the difficulty of holding the presidency for more than two terms. Notably the long-run average Democratic control of the White House eventually fluctuates around 50 percent, but this process takes about 40 to 50 years. Thus, over the first few decades, party control of the presidency is quite sensitive to the initial reality of Democratic control in 2022. Figure 1B displays a similar average for Democratic control of the Senate. Here, the impact of the initial state is much less persistent, with the average probability of Democratic control more quickly converging to about a 50% probability. Finally, Figure 1C indicates the average probability of unified party government. Again, the average value rather quickly converges on a long-run figure of about 55% to 60%. The relative frequency of divided party government has significant implications if the Senate confirmations become unlikely or even impossible during divided government.

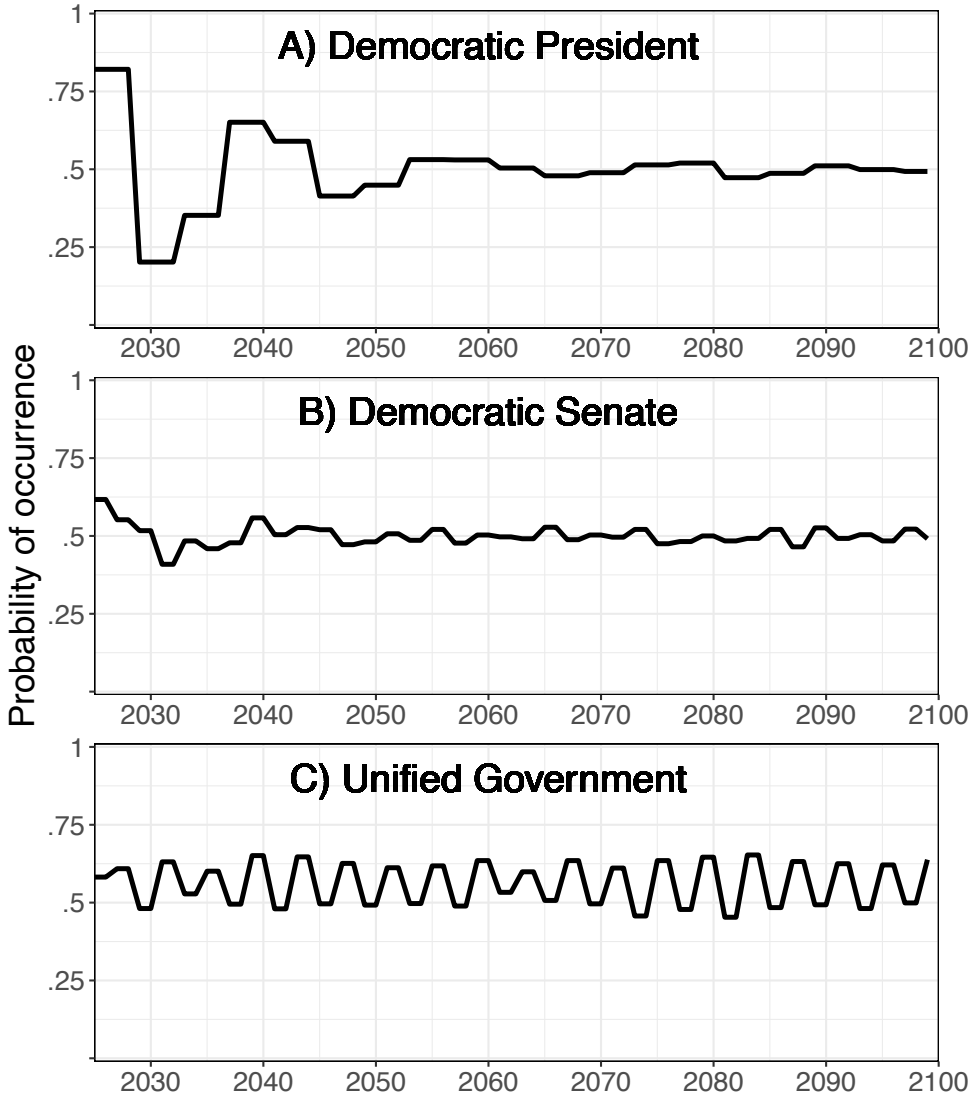
C. Exits

The next key design choice is how to model exits from the Court,

[28] A Bernoulli distribution is a special case of the Binomial distribution, which characterizes outcomes when the outcome of interest is binary. A Bernoulli distribution is a single trial, or draw, of a Binomial distribution. For a technical description of the Binomial and Bernoulli distributions, see MORRIS H. DEGROOT & MARK J. SCHERVISH, PROBABILITY AND STATISTICS, (3d ed. 2002), pp. 101-2.

combining the probabilities of retirement or death. That is, in every year, a simulation must account for both modes of departure.

FIGURE 1: AVERAGE PROBABILITY OF DEMOCRATIC CONTROL OF THE PRESIDENCY, DEMOCRATIC CONTROL OF THE SENATE, AND UNIFIED GOVERNMENT, BASED ON ASSUMED TRANSITION PROBABILITIES



Note: For each, the panels show the proportion of simulations in which the respective outcome occurs.

For death probabilities, we use actuarial data from the Social Security Administration.[29] For a justice of a given age, we utilize the probability of

[29] Specifically, we use the 2016 period life table for the Social Security area population. Actuarial Life Table, SOCIAL SECURITY ADMINISTRATION, https://www.ssa.gov/oact/STATS/table4c6.html#fn1 (last visited Nov. 28, 2019).

dying in a given year, conditional (of course) on having lived to that age.[30] For example, the probability that an 80-year old individual will die in the next year is about .05. This "death probability" is shown in Figure 2.[31]

We divide the probability of retirement into two components, baseline and strategic. First, we assume there is a "basic" probability that a justice of a given age will choose to leave the Court, either because of declining job appeal (e.g., David Souter) or because they simply believe it's time to depart. We assume this basic probability, which is also shown in Figure 2, is zero until age 65, then increases slowly and linearly through age 80, and more sharply after that.[32] (We graph the probabilities through age 120, but of course the actuarial tables will assert their iron logic for justices who steadfastly refuse to leave the Court and end up departing "feet first."[33])

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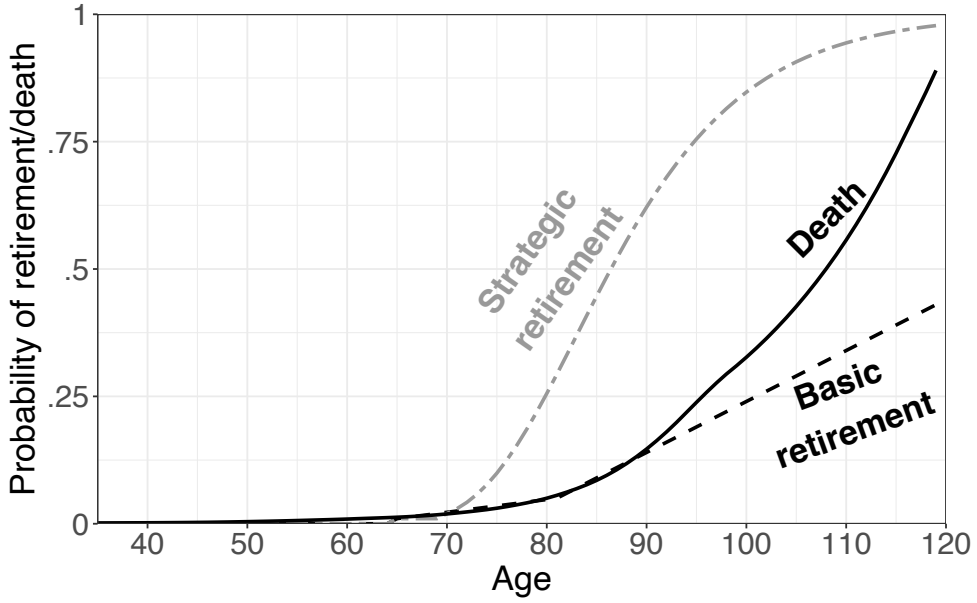
[30] The SSA provides separate probabilities for males and females, but the gender differences are small enough that, for simplicity, we use the average of the two for every given age.

[31] Higher socioeconomic status (SES) individuals display lower death rates than others, and of course Supreme Court justices are highly educated, high social class individuals. To account for such differences, Professor Chilton and his coauthors use death rates for a comparable SES group, federal judges, in their backcast simulation from 1937 to 2020. Chilton et al., *Term Limits*, *supra* note __. Therefore, our use of standard death tables may somewhat exaggerate death probabilities. Notably, however, SES differences compress dramatically for older individuals. Angela M. O'Rand & Scott M. Lynch, *Socioeconomic Status, Health, and Mortality in Aging Populations*, *in* FUTURE DIRECTIONS FOR THE DEMOGRAPHY OF AGING: PROCEEDINGS OF A WORKSHOP (2018). Consequently, the high-SES effect is likely quite small for those justices at greatest risk of mortality. In any case, using socioeconomic adjusted rates would simply result in slightly longer tenures (absent strategic retirement considerations), and would not affect the overall picture of our results.

[32] This assumption inherently makes it very unlikely that a justice will exit the Court very soon after joining, which accords with modern practice. However, up until the middle of the twentieth century, many justices served relatively short terms before resigning and moving to a different position. Justin Crowe & Christopher F. Karpowitz, *Where Have You Gone, Sherman Minton? The Decline of the Short-term Supreme Court Justice*, 5 PERSPECTIVES ON POLITICS 425 (2007). James Byrne, for example, served for just one year before resigning from the Court in 1942 to lead the Office of Economic Stabilization (*Id.* at 432). The last justice who (voluntarily) left the Court for a different position was Arthur Goldberg, who resigned in 1965 to become the ambassador to the United Nations (*Id.* at 428). Since then, every justice has either exited the Court via retirement or death; see Jordan Weissman, "*Legal History Highlight: Justices who left the Court for `Better" Positions"*, SCOTUSBLOG (March 25, 2016), available at https://www.scotusblog.com/2016/03/legal-history-highlight-justices-who-left-the-court-for-better-positions/ .

[33] We owe this colloquialism to Justice Brennan. According to Professor Barbara Perry, "As Justice William Brennan aged, inevitable questions about his retirement grew more insistent. With his Irish wit still intact, he quipped about his intention to leave the Court 'feet first.'" Barbara Perry, *There is Precedent for Ailing Ginsburg to Remain on Supreme Court*, THE HILL (Sept. 8, 2019), available at https://thehill.com/opinion/judiciary/460124-there-is-precedent-for-ailing-ginsburg-to-remain-on-supreme-court. In fact, Brennan's declining health compelled him to leave the Court "head first" in 1990, seven years before he died.

FIGURE 2: PROBABILITY OF DEATH BY AGE, ALONG WITH THE PROBABILITY OF "BASIC" AND "STRATEGIC" JUSTICE RETIREMENTS IN BASELINE SIMULATIONS



Next, we account for the possibility of strategic retirement, under which justices time their departure to coincide with favorable control of the presidency, to assure the selection of a comparable successor. Looking backwards, the evidence for whether Supreme Court justices have historically engaged in strategic retirements is ambiguous. Some studies find evidence that justices are more likely to retire when a president aligns with them, via party or ideology, while other studies find little evidence of strategic retirement.[34] Qualitatively, it is easy to find clear examples of strategic retirement. Justices Souter and Stevens both appeared to time their departures to allow a Democratic president to choose liberal successors (both justices,

[34] On the side finding evidence of strategic retirements, see Gary King, *Presidential Appointments to the Supreme Court: Adding Systematic Explanation to Probabilistic Description*, 15 AM. POL. Q. 373 (1987); Timothy M. Hagle, *Strategic Retirements: A Political Model of Turnover on the United States Supreme Court*, 15 POL. BEHAV. 25 (1993); Ross M. Stolzenberg & James Lindgren, *Retirement and Death in Office of US Supreme Court Justices*, 47 DEMOGRAPHY 269 (2010). On the other side, see Peverill Squire, *Politics and Personal Factors in Retirement from the United States Supreme Court*, 10 POL. BEHAV. 180 (1988); Saul Brenner, *The Myth that Justices Strategically Retire*, 36 THE SOC. SCI. J. 431 (1999); Christopher J.W. Zorn & Steven R. Van Winkle, *A Competing Risks Model of Supreme Court Vacancies, 1789-1992*, 22 POL. BEHAV. 145 (2000); Terri Peretti & Alan Rozzi, *Modern Departures from the US Supreme Court: Party, Pensions, or Power*, 30 QUINNIPIAC L. REV. 131 (2011).

somewhat ironically, were appointed by Republican presidents), while Justice Breyer stepped down in 2022 to allow President Biden to appoint his successor. But many counter-examples also exist. Chief Justice Rehnquist, for example, declined to retire before the 2004 election despite his rapidly declining health.[35] Most notoriously, Ruth Bader Ginsburg declined to retire when Democrats controlled both the White House and the Senate from 2009 to 2014, a decision that ultimately led to her replacement in 2020 by Amy Coney Barrett, a Trump appointee.

Despite this mixed record of strategic retirements in the past, going forward, it seems likely that more justices will opt for a strategic departure, given their strong ideological convictions and the high stakes of each appointment. Accordingly, we create a strategic retirement function that accounts for an increased tendency to retire by a justice when the current president is the same party as their appointing president. This function is "turned on" when this condition holds. (In one scenario we show how the Court's makeup would evolve in a world without strategic retirement.) The strategic retirement function, depicted in Figure 2, takes the value zero until age 65, increases to .01 through age 69 (conditional on a compatible president), then increases sharply after that. Thus, we assume the incentive for strategic retirement increases with a justice's age.[36]

Given these building blocks, we can construct the *total retirement probability* for any justice. With this probability in hand, in every year we draw the justice's retirement decision from a simple Bernoulli distribution; for example, if the total retirement probability is .2 in a given simulation for a given year, the justice will retire with a 20% probability and will remain on the Court onto the next year with an 80% probability. Finally, we can construct the total *exit probability* for any given justice. If a justice does not exit, the justice's service continues into the next year. If a justice exits, a vacancy occurs.[37]

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[35] President Bush's re-election nevertheless resulted in Rehnquist being replaced by a fellow Republican appointee, John Roberts, after Rehnquist died in 2005.

[36] Two caveats are worth noting here. First, a more nuanced strategic retirement function would allow for justices to not only retire strategically "early," but also to postpone their retirements in the hopes that a co-partisan president takes over in a future election. Such a function would affect the specific exit date for any given justice, but would not affect our overall results, since justices would still be more likely to retire under a co-partisan president. Second, if a norm of no-divided government confirmations took hold, as we examine below, justices might condition their retirement decisions on not just presidential control, but also Senate control. We leave this possibility for future research.

[37] To avoid the potential issue of "double-counting," we assume that when a justice exits, if his or her replacement is "confirmed," the replacement takes the bench *in the next year*. For instance, if a Democratic justice exits in 2028 during a Democratic presidency, the new Democratic justice enters the court in 2029—this is so even if a Republican president takes office that year. However, in some scenarios explored below, we assume vacancies remain

D. Entrances: Age and Ideology

The next key design choice is modeling the age and ideology of every new justice. We assume entering age is distributed normally around an age of 52—this choice reflects the likelihood that future presidents will emphasize the appointment of younger nominees to maximize their tenure).[38]

Assumptions about ideology require more thought. For the current justices, we use the measure of ideology presented in Table 1. For the baseline scenario we assume that the current era of polarization is here to stay, as is the extremely careful vetting of nominees designed to reduce the chance of any "surprises" in judicial ideology. Thus, while variation in ideology may exist among justices in the same party, the cross-party differentiation will be large, meaning little overlap between justices appointed by Democratic presidents and those appointed by Republicans. To reflect this assumption, we assume that judicial ideology is drawn from a beta distribution, with shape parameters $\alpha = 3$ and $\beta = 11$.[39] We rescale this distribution so that it is bounded by -1 and 1 (rather than 0 and 1), and adjust the parameters so Democrats and Republicans are symmetrically distributed around zero, with Republicans more conservative and Democrats more liberal. Figure 3 shows what these distributions looks like for Democratic and Republican appointees. The distributions do not rule out the possibility of "moderate" justices, but most of the density lies on the "wings" of the ideology space.[40]

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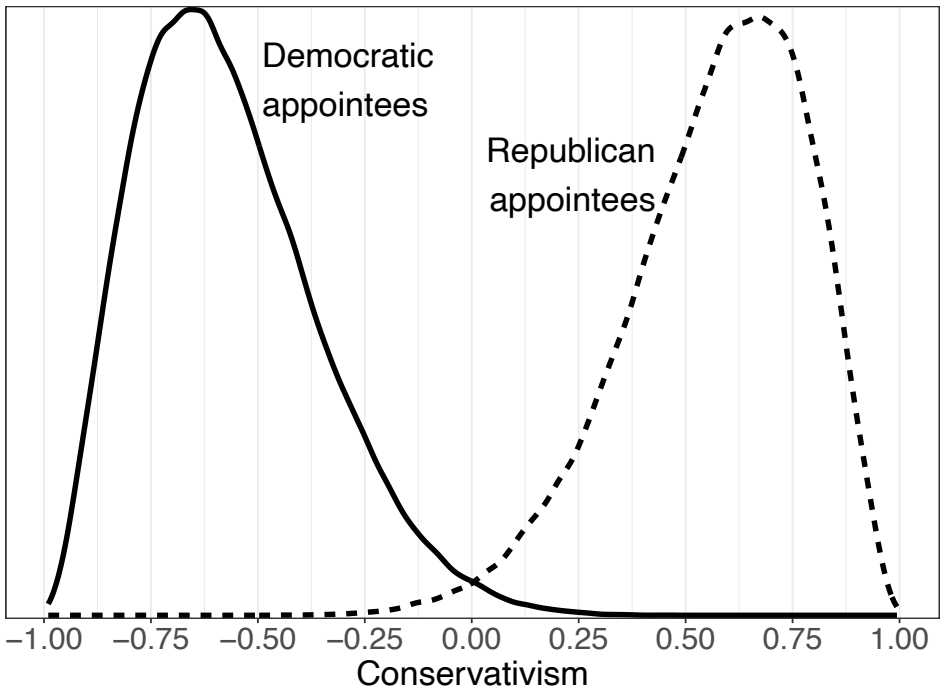
open during divided government, so in some years the Court may not have a full complement of justices.

[38] Specifically, we assume age is drawn from the distribution $\mathcal{N}(52,3)$. We show in Chapter 4 of CAMERON & KASTELLEC, *supra* note †, that the average age of nominees has been fairly steady over time, and tends to be in the range of 50-55 years old.

[39] The Beta distribution is a family of distributions for continuous probability distributions where the outcomes fall between 0 and 1. For a technical description of the Beta distribution, see MORRIS H. DEGROOT & MARK J. SCHERVISH, PROBABILITY AND STATISTICS, (3d ed. 2002), pp. 303-8.

[40] Specifically, the means of these Beta distributions are -.57 and .57 for Democratic and Republican justices, respectively, while the standard deviation for each is .21.

FIGURE 3: ASSUMED DISTRIBUTION OF IDEOLOGY FOR DEMOCRATIC AND REPUBLICAN APPOINTEES, BASED ON BASELINE ASSUMPTION



Note: The baseline assumption includes a Beta distribution with shape parameters $\alpha = 3$ and $\beta = 11$.

This procedure results in a simulated ideal point for each justice. Such ideal points are not so interesting in and of themselves; what is important is that changes in ideal points *on the Court as a whole* translate into changes in judicial policy.[41] So changes in the distribution of simulated ideal points therefore imply substantive changes in judicial policy—particularly the probability of liberal and conservative case dispositions and the ideological content of majority opinions.

Two final points about the ideology assumptions are worth noting. First, the means of these distributions produce future justices who are on average even more extreme than the current justices. Whether this tendency plays out in fact is, of course, unknowable—but our interest lies in describing how the central tendencies of the Court change *across* different counterfactual scenarios. Our assumptions about new justice ideology thus will not affect

[41] We show this quantitatively in Chapter 12 of CAMERON & KASTELLEC, *supra* note †, but undoubtedly few qualitative observers of the current Supreme Court would doubt this claim.

out cross-scenario comparisons.[42]

Second, while we assume that the initial ideology of a new justice is randomly drawn from a distribution with a mean and standard deviation, the ideology of a given justice is forever fixed by the draw. This assumption also encompasses the initial justices—we assume their ideology remains their assigned score until they exit the Court. This assumption rules out the possibility of random bumps in a given justice's ideology, as well as more systematic "drift" in a liberal or conservative direction.[43] Such possibilities can be substantively interesting, but we are primarily interested in the aggregate composition of the Court, as measured by the ideology of the median justice. Consequently, we opt for the simplicity of fixed ideology (although, to be clear, the ideology of a justice in a given scenario will vary stochastically *across* simulations).

E. Summary of Counterfactual Scenarios

For reference, Table 2 summarizes all the scenarios that appear in the Article; they are listed in the first column. The table shows the variation in the key parameters and design choices made in each scenario.

[42] The "Less predictable" scenario (described below) is the one scenario where we vary the ideology of new justices, relative to the baseline assumptions.

[43] On the issue of judicial drift and how we might detect it using ideal point methods, see Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important*, 101 NW. U. L. REV. 1483 (2007); Ward Farnsworth, *The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, with Special Attention to the Problem of Ideological Drift*, 101 NW. U. L. REV. 1891 (2007).

TABLE 2: SUMMARY OF COUNTERFACTUAL SCENARIOS

Scenario	**Starting court**	**Ideology**	**Strategic retirements**	**Senate control**	**Norms/ practices**	**Number of seats**	**Tenure**
Baseline	2023 term justices	Reliable ideologues ($\alpha = 3$) and ($\beta = 11$)	Standard	Historical	Standard	9	Life
No strategic retirements	–	–	None	–	–	–	–
Less predictable nominees	–	Heterogeneou nominees ($\alpha = 4$) and ($\beta = 6$)	–	–	–	–	–
2016 counterfactual	Garland + 2016 justices	–	–	–	–	–	–
No divided government confirmations	–	–	–	–	No confirmations under DG	–	–
No divided government confirmations, fixed Republican advantage	–	–	Fixed Republican advantage	Fixed Republican advantage	No confirmations under DG	–	–
No divided government confirmations, ↑ Republican advantage	–	–	Increasing Republican advantage	Increasing Republican advantage	No confirmations under DG	–	–
Democratic court packing, 2 seats	–	–	–	–	–	11	–
Democratic court packing, 4 seats	–	–	–	–	–	13	–
Democratic court packing, 6 seats	–	–	–	–	–	15	–
Tit-for-tat court packing	–	–	–	–	–	↑ over time	–
Term limits, 18 years	–	–	N/A	Irrelevant	–	–	18 years
Term limits, 9 years	–	–	N/A	Irrelevant	–	–	9 years

Note: If a cell is blank, that means it takes on the same value as in the baseline scenario.

III. THE BASELINE SCENARIO

We begin with the baseline scenario, a framework based on a continuation of current politics. Consequently, we assume polarized nomination politics, with Democratic and Republican presidents working hard to find and nominate consistently liberal and conservative justices, respectively. We also assume—for now—that confirmations occur during divided government. Of course, nothing in politics stays the same for decades! But the baseline scenario provides a useful benchmark for comparing the scenarios.

A. The Median Justice and Bloc Sizes

To summarize the results of the baseline scenario, we first present the year-by-year location of the Court's median justice. In a given year, this location will vary somewhat across the simulations, due to randomness in the

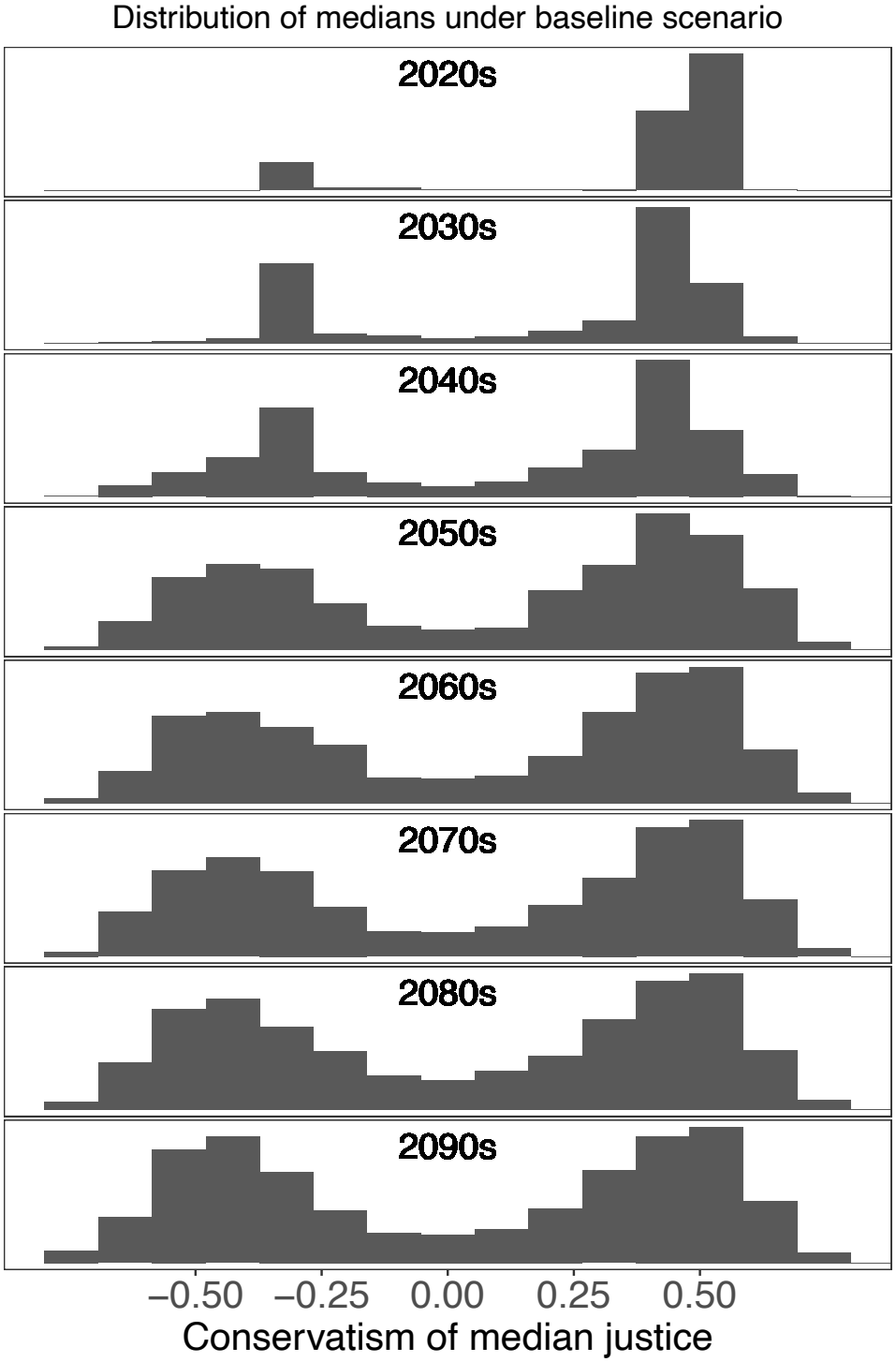
control of the presidency and the Senate, exits, and ideology of entrants. Figure 4 depicts histograms of the resulting distributions of the ideology of the median justice. To make the presentation manageable, we aggregate the results by decade. For each decade, the x-axis captures the conservatism of the median justice (recall our measures of ideology run most -1, most liberal, to 1, most conservative).

Figure 4 shows that in every decade the distribution of the median justice is noticeably bimodal, with peaks in the range of [-.5,-.25] on the liberal side and [.25,.5] on the conservative side.[44] This bimodality follows from our assumptions about the distributions generating ideal points for new justices. One important consequence of the bimodality is that the actual median justice at any point in time is almost always either a reliable liberal or a reliable conservative; very rarely is the median justice an ideological moderate. But even with bimodal distributions, it matters which outcomes are more likely—the relative peaks of the the bimodal distributions, and how they change over time, reflects the initial court, electoral outcomes in the future, and the timing of exits from the Court.

In what is arguably the single most important result in the baseline scenarios, the distribution of medians in the early decades tilts heavily to the conservative side of the ideological spectrum. The conservative domination of the current Court in effect "stacks the deck" for years to come. While observers of the Court might not be surprised that the Court is likely to remain in conservative hands for a while, the simulations go much further than this intuition, showing a persistent conservative "bias" in the location of the median justice *through the 2050s*. It is only in the 2060s that the distribution of medians becomes roughly symmetric; by this point the long-run electoral probabilities overtake the historical realities of the early years and the results converge to our baseline assumptions, as the initial ideological skew slowly vanishes.

[44] The sparseness of the 2020s histogram reflects the deterministic ideal points of the justices on the initial court. Greater heterogeneity in the histograms occurs as the initial justices exit and are replaced with simulated new justices.

FIGURE 4: DISTRIBUTION OF MEDIANS UNDER BASELINE SCENARIO, BY DECADE



Of course, averages are not destiny. Figure 4 shows that a minority of simulated courts do have liberal median justices, even in the decade of the 2020s (note the small block at about -.3 in that panel). Simulations yielding such a median typically involve Democratic presidents winning the 2024 and/or 2028 elections, combined with unusually early exits (via death or basic retirements) for several of the Republican justices. Such combinations can occur. However, the distinguished Princeton statistician J. Stuart Hunter used to admonish his students, "Remember: Rare events don't happen to me!"[45] Perhaps a string of rare events will play out and produce a liberal median justice in the not-too-distant future—but following Professor Hunter's mantra, Figure 4 shows that is unlikely.

B. Tenure Length and Strategic Retirements

What drives this predicted persistence of conservative control? One simple reason is the justices' longevity. Supreme Court justices now serve for extremely long periods—much longer than they used to. Figure 5 depicts this change in two ways.

First, for each year, we calculated the average tenure of the justices on the bench at that time. Then for each decade from the 1790s through the 2010s, we calculated the average tenure across that 10-year span. Figure 5A presents these results; the points show the decade-by-decade average, while the loess line summarizes the trend over time. Early on there is a "floor" effect, since the clock starts at zero for all of the initial justices in 1790. Interestingly, early on in the nineteenth century, the average tenure was quite long—about 18 years in the 1820s.[46] But after this period, average tenure hovered in the 8-to-12 year range, until the 1970s. Since then, the average length of service has increased significantly. In the 2010s, the average tenure was about 16 years, compared to a low of six years in the 1940s.

Figure 5B cuts the data slightly differently—it shows the average tenure among the justices who *exited the Court* in that decade. Here the results are even more dramatic. At the turn of the twentieth century, the average tenure of exiting justices was around 14 years. Since the 1940s, that number steadily increased, and in recent decades the average tenure has approached 30 years. This average longevity now encourages presidents to avoid older nominees in order to perpetuate presidents' influence far beyond their term in office.

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[45] This reflection is from Cameron, who took Hunter's class in the 1980s.

[46] Three justices served lengthy terms in this era: Bushrod Washington (1799-1829), John Marshall (1801-1835), and William Johnson (1804-1834).

FIGURE 5: AVERAGE SUPREME COURT TENURE, BY DECADE

Note: A) The average tenure length of justices on the bench in each decade. B) The average tenure among the justices who exited the Court in that decade.

Strategic retirements are a second key factor in the predicted persistence of the conservative majority. Strategic retirement dampens random turnover in individual seats, so an individual seat tends to remain "in the family." As we described above, the baseline scenario incorporates a strategic retirement parameter that increases the probability of a justice retiring from the bench, conditional on their age, at moments when the current president shares their partisan affiliation. To evaluate the long-term effects of strategic retirements,

we can run a scenario in which strategic retirements *never* occur; that is, the strategic retirement parameter is "turned off," meaning exits are only a function of "basic" retirements and death. We label this scenario *no strategic retirements*.

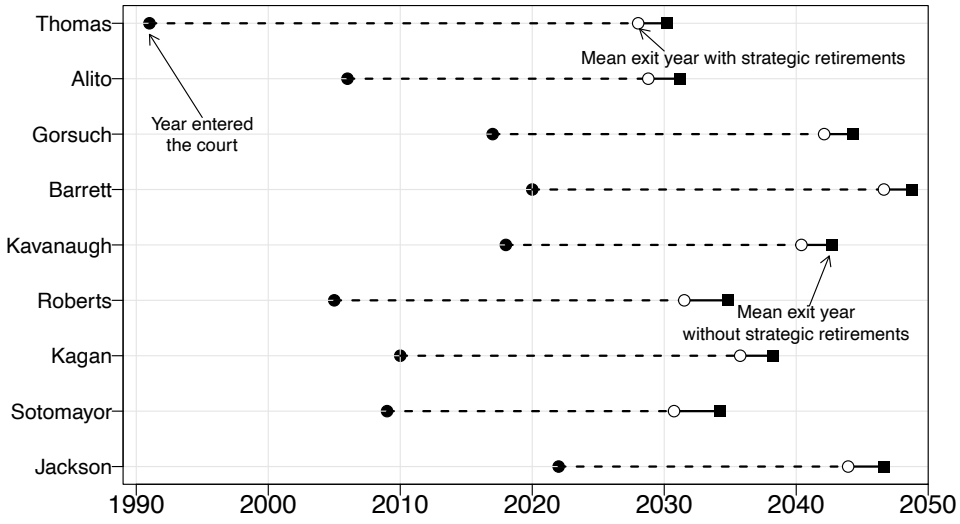
Figure 6 helps illustrate the interplay of tenure length and strategic retirements. We plot the nine justices on the Court as of the 2023 term, from most conservative to most liberal.[47] We calculate each justices' mean year of departure, across all the simulations, for both the baseline and no strategic retirement scenario. For example, Clarence Thomas holds the longest tenure of the Court, having taken the bench in 1991. In the baseline simulations, he is projected to serve on the Court, on average, until about 2028, when he would be 80. In the scenario without strategic retirements, he is projected to serve an additional two years on average, until 2030.

Two important patterns emerge from Figure 6. First, regardless of whether the justices engage in strategic retirements, they are projected to serve for many years. This pattern is particularly true of Trump's three appointees (Gorsuch, Kavanaugh, and Barrett), as well as Justice Jackson, none of whom were older than 52 when appointed. All four are likely to serve at least through the 2040s. The other three Republican appointees are significantly older, but still all three are projected to serve at least through the majority of the 2020s. Thus, in the majority of simulations in the baseline scenario, the Court remains dominated by the conservative bloc for the rest of the 2020s by virtue of the conservative justices' age and the mortality tables.

Second, under our assumptions, strategic retirement always leads to briefer tenures, since it induces justices to retire earlier under a co-partisan president than they would otherwise. If we compare the average exit year with and without strategic retirement in Figure 6, the difference between the two is larger for the younger justices. This reflects the fact these justices will have more opportunities over time for a strategic exit.

[47] This ordering is based on the justices' "Martin-Quinn" scores for the Court's 2020 term, which can be found at https://mqscores.lsa.umich.edu/measures.php . For a technical description of the Martin-Quinn scores, see Andrew D. Martin and Kevin M. Quinn. *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*. 10 Political Analysis 134 (2022).

FIGURE 6: PREDICTED EXIT YEAR FOR CURRENT JUSTICES, WITH AND WITHOUT STRATEGIC RETIREMENT



Note: The justices are ordered by ideology, from conservative (top) to more liberal (bottom).

Because strategic retirements by definition give co-partisan presidents greater opportunity to appoint successors, such retirements tend to stabilize both the location of the median justice and the Court's bloc structure. To illustrate this effect, we calculated the proportion of simulations in which each justice who was on the Court in the 2023 term leaves under a co-partisan president, for both the baseline and no strategic retirement scenarios. Table 3 presents the results. Consider the scenario without strategic retirements. Due to their more advanced age, Thomas and Alito are projected to retire under a Republican president only about 40% of the time. But without strategic retirements, the justices' retirement dates are random with respect to White House control of the White House. Thus, the rest of the justices cluster around 50%, meaning that they are be equally likely to retire under a Democratic or Republican president.

TABLE 3: PROPORTION OF EXITS OF CURRENT JUSTICES UNDER A CO-PARTISAN PRESIDENT, WITH AND WITHOUT STRATEGIC RETIREMENT

Nominee	Without strategic retirements	With strategic retirements
Thomas	0.42	0.55
Alito	0.41	0.60
Gorsuch	0.49	0.66
Barrett	0.49	0.63
Kavanaugh	0.50	0.65
Roberts	0.47	0.64
Kagan	0.51	0.68
Sotomayor	0.56	0.71
Jackson	0.51	0.66

Conversely, under the scenario with strategic retirements, the probability of an exit under a co-partisan president is always higher. For example, both Sotomayor and Kagan are predicted to leave the Court under a Democratic president about 70% of the time. To be sure, even under our assumptions, strategic retirements are hardly a guarantee of a co-partisan exit, for sometimes death intervenes (as with Justice Ginsburg) or health issues force a retirement even when a president of the opposite party is in the White House (as with Justice Thurgood Marshall).[48] The flip side of the Sotomayor and Kagan results is that in 30% of simulations they are replaced by Republican nominees. But, all told, the simulations demonstrate how strategic retirements help lock in the ideological status quo on the Court, thus contributing to the projected long dominance of conservatives in the baseline scenario.

C. The Importance of Ideological Reliability

A final reason for the predicted conservative domination of the Court for many years to come is entrant ideology. We assume future Democratic and Republican nominees will be highly ideologically reliable, and thus few justices will be moderates. As a counter-factual to this reality, we also develop a scenario in which future nominees are less predictable than in the baseline scenario—we call this scenario "less predictable nominees." The

[48] In 1991, Justice Marshall announced his retirement from the Supreme Court. Marshall, the legendary civil rights lawyer and the first African-American justice, presumably would have preferred to wait for a Democratic president to appoint his successor. Declining health, however, led him to leave office during President George H.W. Bush's tenure. (Somewhat ironically, Marshall died on January 24th, 1993—four days after President Bill Clinton, a Democrat, took the oath of office.) The sad story of Marshall's departure is well told in DAVID N. ATKINSON, LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END (1999).

idea here is a scenario where presidents returned to selected ideologically unreliable nominees, as they did in earlier eras. Under this (unlikely) scenario, the ideological trajectory of the Court would become much more moderate compared to the baseline scenario, and much less susceptible to wild swings in the median. We don't present the direct results of this scenario in the Article itself—it is hardly surprising that reliably extreme entrants translate into more ideological polarization on the Court. But we do reference them below in evaluating the normative tradeoffs among different selection and retention institutions.

IV. THE TRANSFORMATIVE ELECTION OF 2016

Simulations offer a new way to appraise the transformative impact of a presidential election; in particular, we can alter the outcome of a single presidential election and then construct explicit counterfactual paths of the Court's future composition. These alternative paths incorporate the likely subsequent trajectory of institutional control tripped off by the counterfactual election. The subsequent sequences of exits also incorporate different sets of strategic retirements, reflecting the altered future of institutional control.

We use this approach to appraise the impact of the events of 2016; namely, Senate Leader Mitch McConnell's success in blocking the confirmation of Merrick Garland, followed by the shock victory of Donald Trump in the 2016 presidential election. Suppose instead McConnell had allowed a floor vote on Garland, which quite plausibly would have led to his confirmation. Then, suppose Hillary Clinton had prevailed in the Electoral College, rather than just the popular vote. How might this alternative history have changed the Court's future composition?

The opening part of the story is well known. President Obama's first two nominees (Sotomayor and Kagan) replaced two liberal justices (Souter and Stevens, respectively), leaving the Court with either a 5-4 conservative majority, or a 4-1-4 split, depending on how one characterizes Justice Kennedy.[49] But regardless of Kennedy's exact characterization, the appointment of Kagan in 2010 marked the first time partisanship and ideology became perfectly correlated in aggregate voting on the Court.[50] The

[49] On the court having a 4-1-4 split following the appointment of Kagan, see Amelia Thomson-DeVeaux, *If Justice Kennedy Retires, His Replacement Could Undermine His Legacy*, 538.com (4/16/18), available at https://fivethirtyeight.com/features/if-justice-kennedy-retires-his-replacement-could-undermine-his-legacy/ .

[50] On this point, see Lee Epstein & Eric Posner, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), available at https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html; Cameron & Kastellec, *supra* note †, ch. 12.

subsequent death of Antonin Scalia in 2016 afforded Obama the chance to shift the Court's balance rather dramatically. These changes surely would have led to both more liberal dispositions and more liberal majority opinions and policy. McConnell's decisive action blocked these possibilities, at least in the short term. But what happened next depended on the outcome of the 2016 presidential election, and Trump's surprising victory meant that he, rather than Hillary Clinton, selected Scalia's replacement, as well as the successors to Kennedy in 2018 and Ginsburg in 2020. The result was a conservative-dominated court.

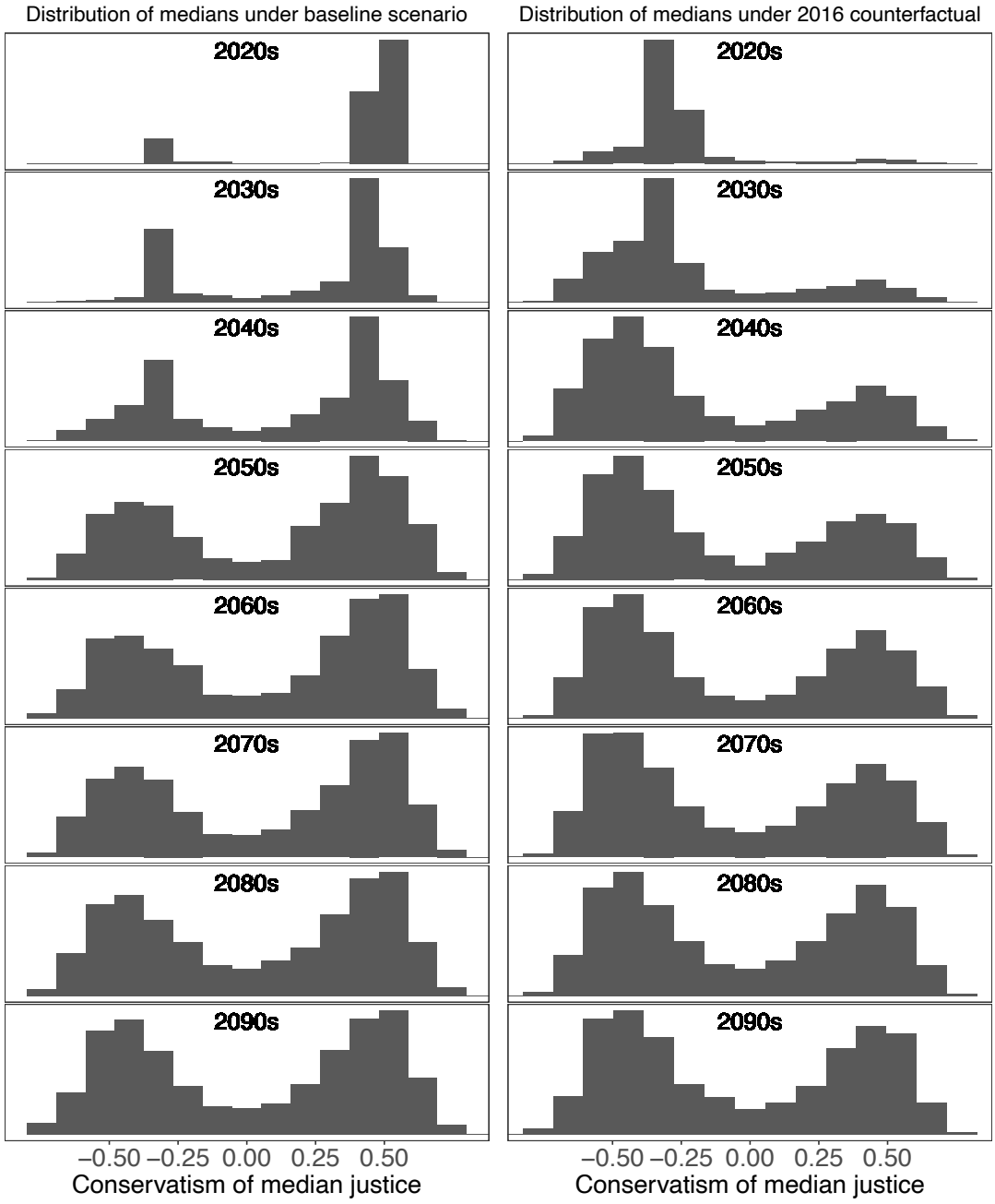
How much did the events of 2016 change the future trajectory of the Court? To answer the question, we developed a scenario that starts in 2017, but assumes confirmation of Garland, followed by a Clinton victory and a Republican Senate. Then, using the underlying assumptions of the baseline scenario, we run the simulations from that point forward, just as we did using the reality of the 2023 term in the baseline scenario. Of course, we can't know for sure what would have happened in a Clinton presidency. Justice Kennedy, for example, might have remained on the Court in the hopes of a Republican replacement in 2021. But the simulations handle these contingencies probabilistically, just as they do in the baseline scenario.[51]

Figure 7 shows the results of this counterfactual analysis. For comparison purposes, the left panel reproduces Figure 4, the distribution of median justices under the baseline scenario. The right panel shows the distribution under the 2016 counterfactual. Strikingly, the two columns display nearly mirror images of one another in the early years. Under the 2016 counterfactual, the Court's center is on average quite liberal, not conservative, in the majority of simulations of the 2020s. It remains so through the 2050s. At that point, the long steady-state emerges in both scenarios and two balanced wings confront one another.

The bottom line is clear: the events of 2016 were indeed a crossroads for the U.S. Supreme Court. One path led to likely liberal dominance of the Court for decades. The other path led to conservative dominance over the same horizon. The road taken arose from a bold gambit in the Senate, an unlikely electoral outcome, and a string of exits from the Court.

[51] Justice Ginsburg, who died in 2020, might have retired strategically in 2017 if Clinton had won (though it's by no means certain!). But whether she would have been replaced by a Democrat depends on whether the Republican Senate would have confirmed a Clinton-initiated replacement. We investigate the possibility of no divided government confirmations in Section V.A.

FIGURE 7: DISTRIBUTION OF MEDIANS UNDER BASELINE SCENARIO AND 2016 COUNTERFACTUAL, BY DECADE



V. POTENTIAL CHANGES IN NORMS AND INSTITUTIONS

In this Part, we turn to examining how the baseline trajectory might be

altered given changes in either norms surrounding appointments politics or in the formal institutions for selection and retention. Section A examines what we would happen if confirmations became only possible during unified government. Section B then turns to the two most discussed potential institutional reforms: court packing and term limits.

A. The End of Divided Government Appointments

In the baseline scenario, we assumed the Senate always allows the sitting president to fill a vacant seat. The events of 2016, however, raise the possibility that a Senate controlled by the opposition will categorically refuse to confirm the president's nominee. Under this permanent "Garland scenario," a vacant seat would remain vacant until a shift in either the presidency or Senate led to unified party control.[52] To see what might happen if such blanket opposition became the norm, we developed a scenario that assumes no entrances on the Court during periods of president-Senate divided party government. Any vacancies that arise under divided government remain unfilled until the next occurrence of unified government (regardless of party control), for as long as the transition takes. We label this scenario, *no divided government confirmations*.

How plausible is this scenario? During the Garland blockade, partisans on both sides combed history for justifications. Republicans claimed that divided party confirmations were rare in presidential election years.[53] Democrats called the blockade "unprecedented."[54] Both claims are somewhat contestable, but in either case this scenario goes much further than the 2016 blockade. It assumes no confirmations at any point in a president's tenure during divided party government. So a seat could remain vacant not just for

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[52] The Garland scenario did not arise with any of President Trump's three nominees, nor with President Biden's nomination of Jackson in 2022, because all occurred under unified government.

[53] See Aaron Blake. *How the GOP is Trying to Justify its Supreme Court Reversal.* Washington Post (Sept. 21, 2020). Available at https://www.washingtonpost.com/politics/2020/09/21/how-gop-is-trying-justify-its-supreme-court-reversal/

[54] For example, Democratic Senator Patrick Leahy of Vermont stated this in September 2016: It's unconscionable how long [Garland] has had to wait. I get the impression that he was as surprised as I was by this unprecedented — I mean totally unprecedented — action." See Mike DeBonis. *Democrats remind America that Merrick Garland is still not on the Supreme Court*. Washinton Post (Sept. 8, 2016). Available at https://www.washingtonpost.com/news/powerpost/wp/2016/09/08/democrats-remind-america-that-merrick-garland-is-still-not-on-the-supreme-court/. For a thorough evaluation of what was—and wasn't—unprecedented with respect to the Garland blockade, see Josh Chafetz, *Unprecedented: Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96 (2017).

a brief period, but from Inauguration Day until a president's final hours in office, and beyond. That would indeed be unprecedented and, until recently, unthinkable for the Supreme Court.

But if we look beyond the confines of Supreme Court appointment politics, a perpetual Garland scenario becomes more plausible. Take, for example, less sacrosanct independent agencies caught up in intense partisan polarization, such as the Federal Elections Commission (FEC) and the National Labor Relations Board (NLRB). The former regulates money in federal elections, while the latter sets the rules for labor-management disputes, so both agencies generate intense partisan warfare. In recent years, appointments to both agencies have often been held up during divided party government—so much so, that vacancies sometimes imperil their boards' ability to reach a quorum.[55] The political logic of hold-up is transparent: the party controlling the Senate calculates that it prefers the current board—with a vacancy or even without a quorum—to a board filled by the opposition president. Presidents respond with aggressive but temporary (and sometimes dubiously legal) recess appointments.[56] The ultimate result is agency chaos, incapacity, and a diminished American government. But the brutal partisan logic trumps concerns over good governance. The scenario we explore merely transports the appointment politics of those agencies to the U.S. Supreme Court. The confluence of extreme partisan polarization with the greatest period of divided party government in American history makes this scenario far from impossible.

1. *The Incredible Shrinking Supreme Court?*

Under a norm of no divided government appointments, vacancies could persist for long periods, leaving the Court without a full complement of nine justices. Indeed, such an event occurred in 2016-17, when the Court operated with eight members between Justice Scalia's death in February 2016 and Justice Gorsuch's confirmation in April 2017.

For each simulation under this counterfactual scenario, we calculated when a seat remains open due to divided government. Recall that in our

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[55] *See* Mark Lander & Steven Greenhouse, *Vacancies and Partisan Fighting Put Labor Relations Agency in Legal Limbo*, N.Y. TIMES (July 15, 2013); Kate Ackley, *Senate Panel Approves Nominees to Fill All FEC Vacancies*, ROLL CALL (Dec. 3, 2020), available at https://www.rollcall.com/2020/12/03/senate-panel-approves-nominees-to-fill-all-fec-vacancies/. Because the boards of the FEC and NLRB are small (five for the NLRB and six for the FEC), even a few vacancies can block a quorum. The Supreme Court's statutory quorum requirement is six.

[56] For example, in *National Labor Relations Board v. Noel Canning*, 573 U.S. 513 (2014), the Supreme Court ruled that recess appointments to agencies under very short Senate recesses were unconstitutional.

original baseline scenarios, there are technically no "vacancies" *per se*, since justices are counted as serving for an entire year if their tenures extends to a given year, with replacements counted as entering the year after an exit. With vacancies now possible under this no divided government confirmations, we count the number of seats filled in a given seat-year combination.

For the majority of the time (about 77%), the simulations predict a full nine-member court. This is because when vacancies occur, they "transition" into appointments upon the very next instance of unified government, which occur frequently in the simulations. Still, the results show that under the norm of no divided governments confirmations, courts with fewer than a full complement of nine justices occur more than 20% of the time, a huge change from historical practice. Moreover, while courts with fewer than seven members would be rare, they are predicted to occur about 3% of the time. And courts that that only minimally meet the statutory quorum of six justices occur about 1% of the time. Thus, while the Court would not empty out when unified government is needed to fill a vacancy, it could end up hearing cases with a bench of eight members or fewer.

2. *The Senate Map: Greater Republican Advantage*

Because our baseline assumption assumes symmetric election probabilities, divided government occurs on average equally under Democratic and Republican presidents; thus, having no divided government confirmations would not significantly privilege one side or the other, relative to the baseline scenarios. Yet there is good reason to believe that the baseline assumption of symmetric probabilities for controlling the Senate may prove untenable in future decades, as the Senate map seems increasingly likely to favor the Republican Party. This is because Democrats increasingly tend to cluster in a few large urban states, but the Constitution guarantees each state two senators. As the political scientist Jonathan Rodden notes, between 1990 and 2019, Democrats won more votes than Republicans in eleven of the fifteen Senate elections, but they held a majority of seats after only six of those elections.[57]

Indeed, this discrepancy between votes and seats became a talking point during the nominations of President Trump's three nominees. Ronald Brownstein, a political reporter, noted that if one assigned half of each state's population to each of its two senators, the 51 Republican senators at the time of Brett Kavanaugh's nominations represented about 143 million Americans, compared to the 182 million represented by the 49 Democratic senators.[58]

[57] JONATHAN RODDEN, WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE 2 (2019).

[58] Ronald Brownstein, *Small States are Getting a Much Bigger Say in Who Gets on*

Moreover, the electoral bias of the Senate is only likely to increase in the coming decades. In some sense, the Constitution destined the Senate to become a "rotten borough."[59]

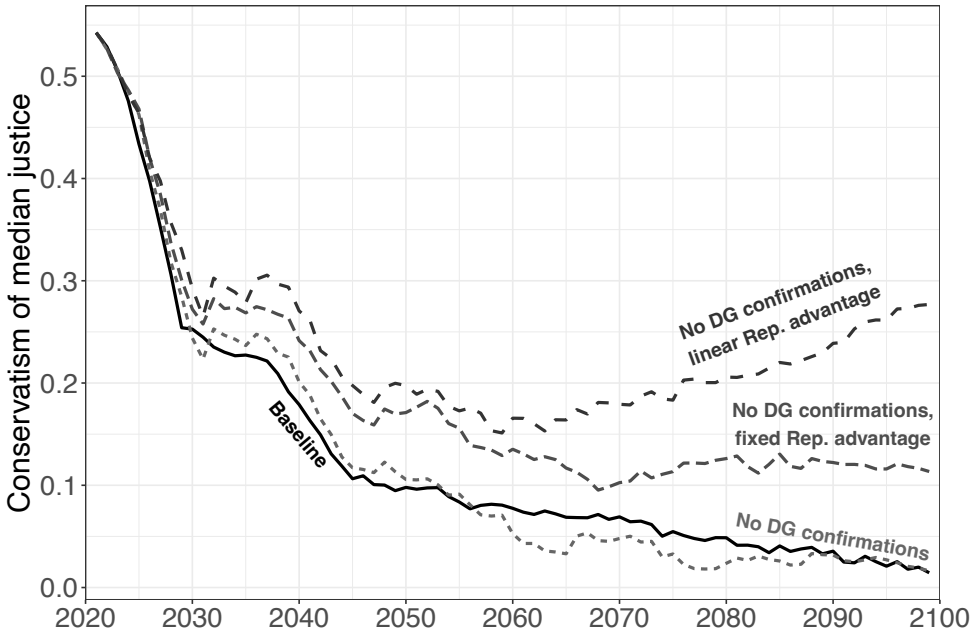
To understand the potential effects of the changing Senate dynamics, we modeled bias in Senate control in two ways. First, we simulated a fixed Republican bias by increasing each of the Senate transition probabilities described above by .05 towards Republicans. Second, we simulated a linearly increasing Republican bias by multiplying the transition probabilities by .005 and adding that amount to the base probability. For both of these scenarios, we also assume no divided government confirmations. We label these scenarios *No divided government confirmations, fixed Republican advantage* and *No divided government confirmations, increasing Republican advantage*.

We examine two related quantities of interest under these scenarios. The first is how often vacancies would occur under the Republican Senate advantage. Because divided government under a Republican Senate would become more likely, as time passes, the average number of vacancies would be systematically higher under Democratic presidents than Republican ones. This asymmetry in vacancies, in turn, affects the second quantity of interest– the partisan consequences for the composition of the Court. Figure 8 shows the average location of the median justice over time, under each of the three no divided government confirmation scenarios, as well as the results from the baseline scenario for reference. First, because the regular no divided government confirmation assumes symmetric Senate election probabilities, there is little difference in the average location of the median justice between the baseline scenario and the symmetric no divided government confirmation scenario; due to the timing of exits, the median under the baseline is slightly more conservative from about 2030 to 2050, but only by a substantively small amount.

Supreme Court, CNN POLITICS (July 10, 2018), available at https://www.cnn.com/2018/07/10/politics/small-states-supreme-court/index.html. In the end, Democratic Senator Joe Manchin of West Virginia voted to confirm Kavanaugh while Republican Senator Lisa Murkowski of Alaska opposed him, but the basic point holds.

[59] This term arose in the United Kingdom to refer to a depopulated election district that nonetheless retained its original representation. On increasing Republican bias of the Senate, see, e.g., Phillip Bump, *The Senate May be Developing an Electoral College Issue*, WASH. POST (Apr. 10, 2017), available at https://www.washingtonpost.com/news/politics/wp/2017/04/10/the-senate-may-be-developing-an-electoral-college-issue. One way to offset the Republican tilt would be to admit new Democrat-leaning states, e.g., Puerto Rico, the District of Columbia, and the Virgin Islands. We do not model this scenario, which we see as improbable. But the addition of new states would most likely alter future control of both the presidency and (especially) the Senate in some elections, with large implications for the Court's ultimate composition.

FIGURE 8: EFFECT OF AN INCREASING REPUBLICAN ADVANTAGE IN THE SENATE



Note: The graphs shows the average location of median justice, under the baseline scenarios and the three no divided government confirmation scenarios.

The picture is quite different once we assume a Republican advantage in the Senate. Because the fixed advantage is relatively small, in addition to the fact the Court is initially controlled by conservatives, little change occurs in the early decades, as seen in Figure 8. But in the future, after the initial court turns over, both the fixed Republican Senate advantage and especially the increasing advantage imply the likelihood of a conservative-dominated court in the majority of the simulations. Thus, the partisan advantage in vacancies translates into a substantial partisan advantage on the Court.

Crucially, this effect occurs *despite* symmetric probabilities for control of the presidency. Democratic and Republican presidents would be equally likely to make a *nomination* to the Court (conditional on the incidence of strategic retirements). But the Republican bias in Senate control means that Republican presidents would be more likely to see their nominees *confirmed* under a norm of no divided government appointments. In contrast, Democratic presidents would find themselves more hamstrung in actually filling vacancies, because divided government would be much more likely to occur in their administrations than in Republican ones.

B. Statutory and Constitutional Reforms

We can't say for sure, but a world in which divided government confirmations were not possible might increase the chance of institutional reforms, which we explore in this sub-section. In doing so, we continue the baseline assumption that presidents from both parties will appoint highly reliable ideologues, as we view a return to ideologically heterogeneous nominees (and a depolarized court) extremely unlikely. Consequently, the effects from changing formal selection institutions or tenure institutions, or both, are of great interest.

1. *Court Packing*

The first dramatic potential institutional change would be adding seats to the Supreme Court. The Constitution, of course, does not specify the size of the Court, leaving that discretion to Congress, which also has the power alter the size of the lower federal courts.[60] In fact, Congress has expanded the lower courts nearly 30 times since 1789; Professors John de Figueirdo and Emerson Tiller show that Congress has been much more likely to do so during unified government than divided government, even accounting for possible caseload concerns.[61] Unified government, of course, allows a president and Senate to work in tandem to appoint like-minded judges to the federal bench.[62]

By contrast, Congress has only rarely altered the size of the Supreme Court. Between 1789 and 1869 the number of seats on the Court fluctuated between six and ten.[63] Since 1869, however, the bench has remained at nine

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[60] U.S. CONST. art. III.

[61] John M. de Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435 (1996).

[62] Court packing has also been quite routine in the American states. Pema Levy, *How Court-Packing Went From a Fringe Idea to a Serious Democratic Proposal*, MOTHER JONES (Mar. 22, 2019), available at https://www.motherjones.com/politics/2019/03/court-packing-2020/.

[63] The politics in the 1860s were particularly dramatic, as outlined in Calvin Schermerhorn, *Packing the Court: Lincoln and his Republicans Remade the Supreme Court to Fit their Agenda*, available at https://www.virginiamercury.com/2020/10/13/packing-the-court-lincoln-and-his-republicans-remade-the-supreme-court-to-fit-their-agenda/ (2020). When President Lincoln took office in 1861, a majority of the justices were Southerners, including Chief Justice Roger B. Taney, who four years earlier had authored the Court's infamous decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857). While vacancies allowed Lincoln to make three appointments, the Court still contained several justices who were sympathetic to the South. In response, Congress in 1863 increased the size of the Court to 10 to give President Lincoln an extra appointment. Following Lincoln's assassination in

despite the introduction of many bills that would change its size.[64] The most serious threat came in 1937, when President Roosevelt famously proposed expanding the Court to break the majority's opposition to the New Deal. Roosevelt's plan proved extremely controversial even within his own party, and ultimately the Senate rejected it in a 70-20 vote.[65]

As we noted in the introduction, the prospects for modern-day court packing occurring in the near future seem dim. Still, it is useful to examine how the Court would be affected by court packing. Accordingly, we developed three scenarios in which we assume that the Court was expanded in 2021 under unified Democratic government. These scenarios respectively assume an increase of two, four, or six seats, bringing the total number of justices to 11, 13, and 15, respectively. These are assumed to have taken effect in 2022, meaning the additional justices would all be Democratic appointees. Other than this, we assume everything else remains as in the baseline scenario. For now, we assume (probably unrealistically) that court packing would be a one-time event, with the size of the Court forever fixed after the increase in seats. We consider tit-for-tat court packing momentarily.

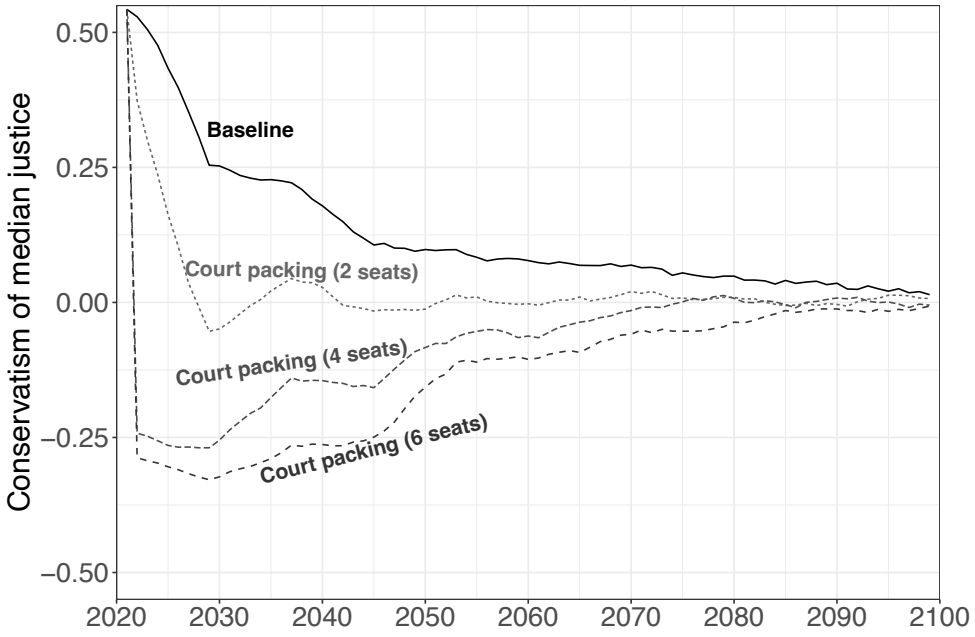
Figure 9 shows the average ideology of the median justice under each court-packing scenario; we also show the baseline results for comparison. Not surprisingly, Democratic court packing would shift the median of the Court to the left, compared to the baseline scenario of a conservative median justice.

1865, his replacement, Andrew Johnson, proved himself hostile to Reconstruction and thus was in constant battle with the Republican-controlled Congress. To thwart Johnson, Congress in 1866 passed a law stating that no Supreme Court vacancies would be filled until just seven justices remained, effectively reducing the number of seats to seven and thereby denying Johnson the ability to make new appointments. Finally, after Ulysses Grant became president in 1869, Congress increased the number of justices of Supreme Court seats back to nine, where it has remained since.

[64] For a theoretical and empirical investigation of court curbing, which includes court packing, see TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE (2011).

[65] For an excellent history of the lead-up to and defeat of the Court packing plan, see JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2011). Despite this humiliating legislative defeat, Roosevelt won the larger battle. First, a narrow majority on the Court softened its opposition to key New Deal measures. Then, several judges retired, allowing Roosevelt to appoint an astounding nine justices in his 15 years in office. Some of the retirements were encouraged by improvements in the justices' pension plan, a deft alternative to crude court packing. *Id.*

FIGURE 9: AVERAGE LOCATION OF THE COURT'S MEDIAN, UNDER BASELINE SCENARIOS AND THREE HYPOTHETICAL COURT PACKING PLANS IMPLEMENTED BY DEMOCRATS IN 2021



Because the real Court in 2021 had six conservatives and three liberals, allowing for either four or six new Democratic appointments would have caused immediate and lasting impact on the average location of the median, shifting it to the liberal wing of the Court. But even under the scenario where only two seats would be added, it would still take several years for the average median justice to approach the centrist zero mark. Moreover, from 2030 to 2060, while the median would be liberal for most years, the deviation from zero would actually be much smaller compared to the conservative bias seen in the baseline scenario. Thus, while adding more than two seats would likely produce a dramatic and prolonged liberal court, adding only two seats would yield a more balanced court.

Of course, politics is a dynamic process, so it seems likely—in fact, virtually certain—that a Democratic expansion would provoke a Republican response. To investigate the possibility of a cycle of tit-for-tat court-packing, we begin with the scenario in which the Democrats added two seats in 2021. We then suppose that every time a new unified government occurs in which the majority party is opposite from the one that existed at the last occurrence of unified government, two additional seats are added to the Court, filled by an ideological judge aligned with the sitting president (again using the baseline simulation). Because we assume court packing first occurs in 2021

under unified Democrat government, the implication is the subsequent round of court packing would occur when Republicans next gain unified control of the White House and Senate.[66] In simulations where the Democrats lose the White House in 2024 and Republicans control the Senate, the tit-for-tat occurs as early as 2025-26. This cycle continues with every switch.[67]

Modeling the composition and ideology of the Court under this cycle of tit-for-tat court packing quickly becomes quite involved and computationally taxing. Instead, we pursue a simpler but important question: how many seats would the Court have over this century? For every simulation, we recorded the number of seats in every year. Then, for every year we calculated the average number of seats, along with 95% confidence intervals. Figure 10 shows these results.[68]

The upshot is straightforward but nevertheless stark. The number of seats on the Court would rise in a roughly linear fashion, reaching nearly 30 seats by the end of the century. Courts of such size are not unknown; for example, the Indian Supreme Court currently has 30 judges. But such a bulky court would be a complete departure from the American experience. The largest state supreme court has nine members, and many are as small as five. A 30-member body would resemble less a traditional American court than a legislature, requiring radical changes in procedure and operation.

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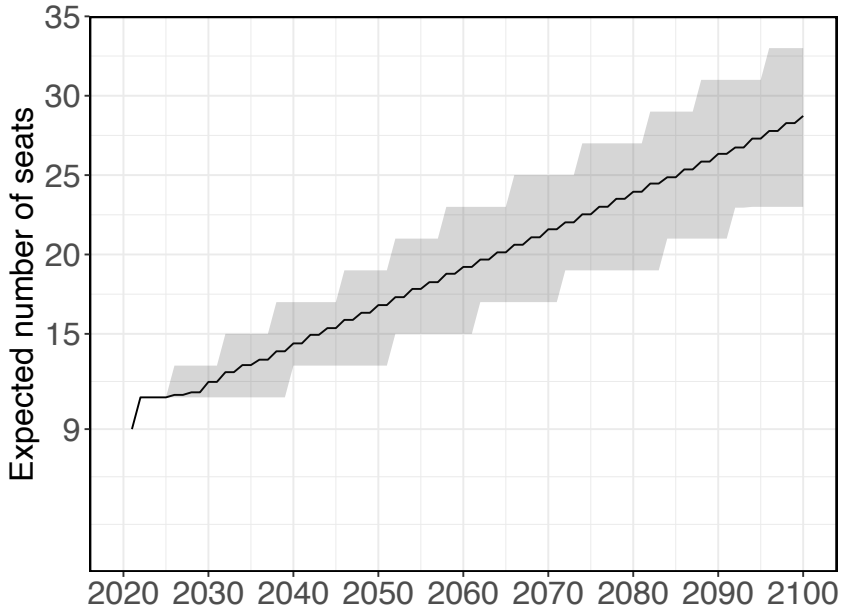
[66] Because we do not include the House in our simulations, they may overstate the frequency of tit-for-tat court packing occurs, since adding seats would also require the assent of the House. Nevertheless, our general point about tit-for-tat court packing would still hold, even if the overall number of seats added might be somewhat smaller.

[67] Thus, we assume court packing does *not* occur when there is a shift from divided government back to the type of unified government that previously existed. For instance, if Republicans take control of the Senate in 2023 and 2024, but then Democrats retake the Senate in 2025, court packing is not implemented in 2025, since Democrats were responsible for the last expansion in 2021.

[68] Professor Chilton and his coauthors perform a similar analysis and reach the same substantive conclusions, though our assumptions which conditions lead to court packing differ slightly from theirs. Chilton et al., Court-Packing, *supra* note __.

FIGURE 10: HOW TIT-FOR-TAT COURT PACKING WOULD AFFECT THE SIZE OF THE COURT



2. *Term Limits*

Court packing is and likely will remain highly contentious and bitterly partisan. There is, however, an alternative that is far less controversial, receiving endorsements from academics and politicians across the political spectrum: term limits for the justices.

Article III of the Constitution states that "the judges, both of the supreme and inferior courts, shall hold their offices during good behaviour,"[69] a clause that effectively provides Supreme Court judges with life tenure, short of impeachment. During the constitutional conventions, the institutions for selection and retention of federal judges were the subject of much debate—particularly the appointment mechanism. But the historical record suggests that there was little disagreement over the wisdom of life tenure.[70] Most famously, Alexander Hamilton argued in Federalist 78 that if "the Courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so

[69] U.S. CONST. art. III, s. 1.

[70] JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 26–28 (2012).

much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty."[71]

Whatever the wisdom of life tenure in 1789, several modern-day realities may suggest the wisdom of a reappraisal. First, almost no other judicial system at either the state level in the United States or in other countries provides for life tenure. Yet these courts appear to function reasonably well without it.

In addition, as Professors Steven Calabresi and James Lindgren note, many of Hamilton's empirical justifications no longer hold true today.[72] Perhaps most prominently, the institution that Hamilton called "the least dangerous branch"[73] now exercises sweeping authority and influence across a stunning range of policy domains. Accordingly, a somewhat greater degree of democratic accountability and responsiveness to the public may be warranted. Moreover, as we documented in Figure 5, the average tenure of Supreme Court justices has increased dramatically over time. Decades-long tenures substantially increases the political stakes of each appointment. Briefer tenures might dial down the heat in nominations, a point we return to in Part VI below.

Given these developments, many observers have called for an end to life tenure, replacing it either with a mandatory retirement age or, more commonly, fixed terms.[74] In addition, a number of 2020 Democratic presidential candidates either expressed outright support for term limits or openness to the idea, as have senators from both parties. Finally, a majority of the American public seems to support the idea: a poll taken in July 2018 (the month Brett Kavanaugh was nominated) found that 61% of registered

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[71] THE FEDERALIST NO. 78 (Alexander Hamilton).

[72] Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2005).

[73] THE FEDERALIST NO. 78 (Alexander Hamilton).

[74] To the best of our knowledge, the earliest term limit proposal in the modern era came from Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799 (1986). In recent years, similar calls have come from James E. DiTullio & John B. Schochet, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093 (2004), Calabresi et al., *supra* note __, Linda Greenhouse, *The 18-Year Bench: Linda Greenhouse Calls for Supreme Court Term Limits*, SLATE (June 7, 2012), available at https://slate.com/news-and-politics/2012/06/linda-greenhouse-calls-for-supreme-court-term-limits.html, Erwin Chemerinsky, *Erwin Chemerinsky: Supreme Court Needs Term Limits*, ORANGE COUNTY REGISTER (Aug. 4, 2013), available at https://www.ocregister.com/2013/08/04/erwin-chemerinsky-supreme-court-needs-term-limits, and Ezra Klein, *Ruth Bader Ginsburg and the Case for 18-year Supreme Court Terms*, VOX (Dec. 26, 2018), available at https://www.vox.com/policy-and-politics/2018/12/26/18155093/ruth-bader-ginsburg-supreme-court-term-limits, *inter alia*.

voters, including 67% of Democrats and 58% of Republicans, support term limits for the justices.[75]

Still, imposing term limits presents a constitutional difficulty. Given the "good behavior" clause in Article III, such a plan would likely require a constitutional amendment, a formidable hurdle in the American system.[76] Some scholars, however, have made ingenious arguments that it is possible to implement term limits via statute, and not through the amendment process.[77] Of course, a statutory plan would inevitably end up before the Supreme Court itself; it seems unlikely that a majority on the court—and the justices on it with life tenure—would endorse a term limits statute.

These uncertainties notwithstanding, our simulations offer a way to gauge the likely impact of term limits, if they are ever implemented. Implementing term limits requires many detailed design choices about phasing in staggered terms, filling incomplete terms, and so on. The precise details of various plans to implement fixed terms differ, and the details matter. However, all the proposals share some basic features. In place of life tenure, justices would serve fixed and non-renewable terms, typically 18 years. Most proposals take 18 years as the specified term, for two practical reasons. First, the relatively long term is similar to the current status quo, so the proposal seems less radical. Second, it dovetails neatly with a nine-member court and four-year presidential terms. Staggered 18-year terms give every president two appointments during every four-year term. Of course, just as Congress could dictate the size of the Supreme Court, so too could it set terms of any length. Lastly, while 18 years is by no means short, compared to the current justices' average tenure length, even a term of nearly two decades would reduce the chances of physical infirmity or mental incapacity impairing judicial performance.

To simulate the possible effects of term limits, we keep things simple and present two straightforward term limits scenarios, so that we can compare the Court's ideological composition under a basic term limit scheme to the other scenarios we examined above.[78] The first follows most existing plans and

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[75] On the popularity of term limits, see Lydia Wheeler, *Debate Over Term Limits for Supreme Court Gains New Life*, The Hill (Dec. 6, 2018), available at https://thehill.com/regulation/court-battles/419960-debate-over-term-limits-for-supreme-court-gains-new-life, and Washington Post, *We're Asking 2020 Democrats Where They Stand on Key Issues*, WASH. POST (2020), available at https://www.washingtonpost.com/graphics/politics/policy-2020.

[76] *See, e.g.*, Calabresi & Lindgren, *supra* note __.

[77] *See, e.g.*, Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313 (2007).

[78] Professor Chilton and his coauthors, by contrast, provide a more nuanced examination of the specifics of several different term limit proposals. Chilton et al., *Term Limits*, *supra* note __.

implements 18-year terms. The second implements 9-year terms; this allows us to examine how faster turnover on the Court would affect its ideological composition over time.

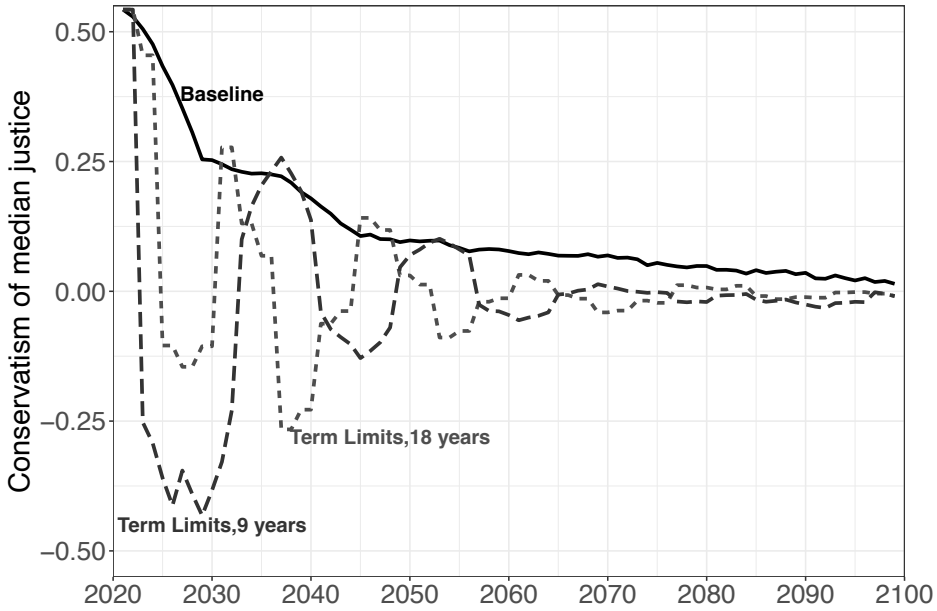
We describe the 18-year term scenario first. We imagine a constitutional amendment passed in 2022 and implemented in 2023, under which the sitting justices are ordered by their tenure on the bench. Under the plan, the current justices would be replaced in order of seniority by their tenure on the bench. So Clarence Thomas, the longest-tenured justice, would have left in 2022, with a new justice taking over in 2023. This process would be repeated sequentially every two years, until the current junior justice (Jackson) is replaced in 2039. Thus, this design implements rolling 18-year terms.

We make several simplifying assumptions. First, for each vacancy that arises at the start of a new term, the new justice is appointed by the sitting president. The outcomes of presidential elections are still important, because they determine which party makes an appointment when a vacancy arises. This is particularly true for the phase-in period when the current justices are replaced. For example, Samuel Alito would leave the Court in 2027 under this scenario, meaning the winner of the 2024 elections would choose his successor.

Second, we assume that once a seat transitions into the term limits phase, it is "assigned" to the appointing party for the duration of its 18-year term, even if the justice leaves the Court before her term expires. Take Justice Thomas, for instance, who under our assumptions would have been replaced by a Democratic justice in 2023. If Thomas' replacement left the bench before their term expires in 2041, we assume they would be replaced by a Democratic justice; this process could be part of the institutional design of the amendment.[79] To be clear, this rule does not mean that a seat is assigned to the Democrats or Republicans forever; which party fills the term that expires in, say, 2037 would be determined by the outcome of the 2036 election. Accordingly, this scenario does *not* specify that a certain number of Democratic or Republican justices will be on the Court at any one time, as that distribution is still determined by presidential elections. But it does mean, among other things, that sitting justices cannot strategically retire early under a co-partisan president to ensure their seat remains in the same party.

[79] Many quasi-judicial agencies such as the Federal Election Commission have partisan balance requirements that establish that some proportion of commissioners on the agency must be from one party or the other. Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9 (2018). A term limits plan could use these statutory designs as a model.

FIGURE 11: AVERAGE LOCATION OF THE COURT'S MEDIAN, UNDER BASELINE SCENARIOS AND 18- AND 9-YEAR TERM LIMITS

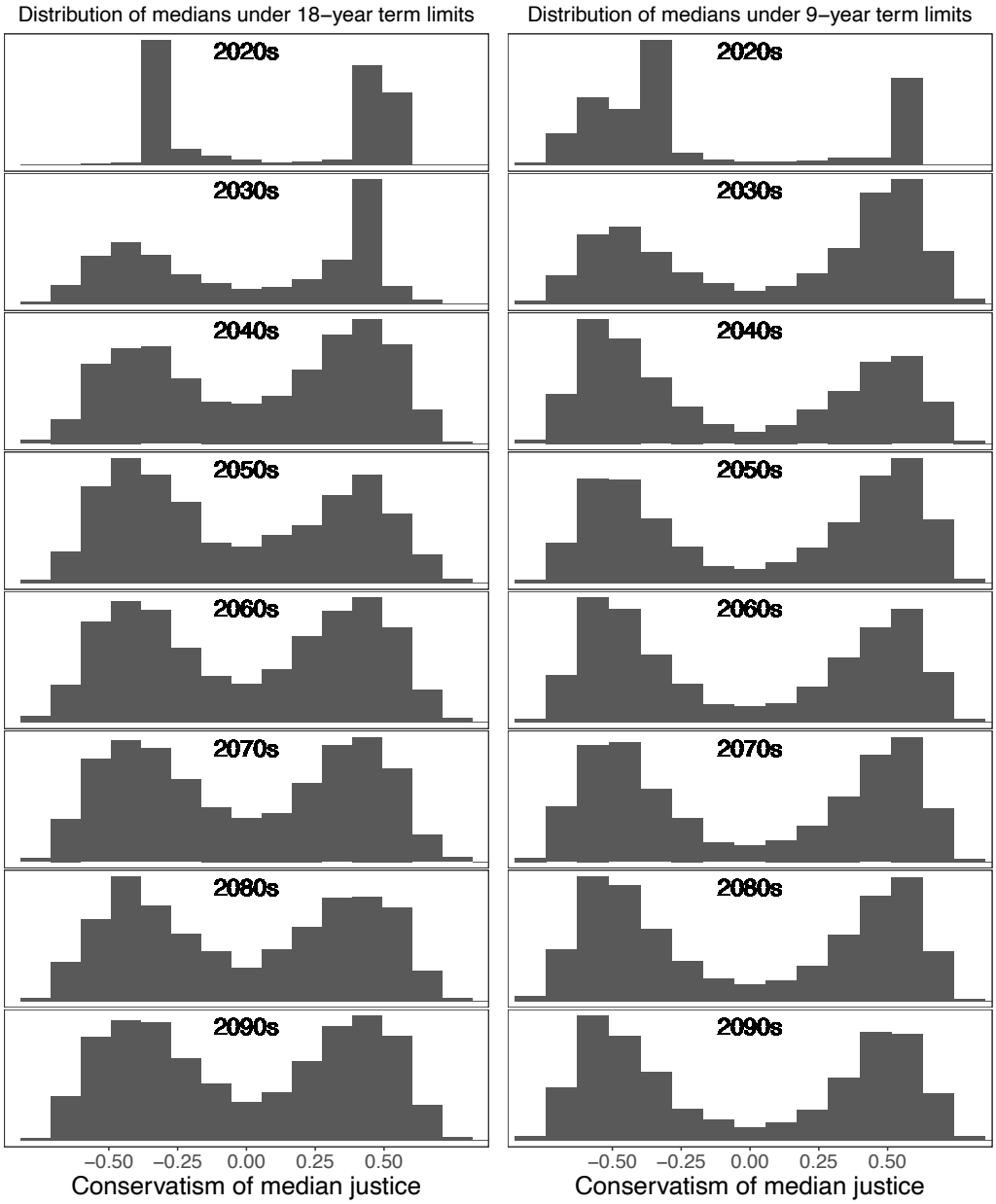


Third, we assume that all nominees are confirmed. In reality, a term limits design would have to deal with the possibility that divided government confirmations might cease, which would obviously frustrate the intended goals of term limits. One solution would be to remove the Senate's role in the confirmation process altogether. Another alternative would be to require a super-majority vote in the Senate to *reject* a nominee. Such a rule would likely not impede qualified nominees, but would prevent the president from appointing an unqualified crony or highly extreme ideologue, for example.

In the second scenario, everything is the same but instead we assume 9-year staggered terms. Presidents would have four appointments per term, beginning in 2025, and would make an appointment every year of their time in office. All other assumptions about replacements and party control within terms remains the same as in the 18-year scenarios.

Figure 11 displays the average median justice under both 18-year and 9-year term limits; we also show the results under the baseline scenario for comparison. The results are dramatic. Because the Democrats are predicted to retain control of the White House in 2024, in both the 9-year and 18-year term limits scenarios, the median swings to the liberal side, especially in the 9-year scenario. Thus, a quick introduction of term limits would effectively end the conservative lock-in under the baseline scenario. The swings continue for a few decades until both terms limits scenario converge (on average) to the baseline scenario around 2060.

FIGURE 12: DISTRIBUTION OF MEDIANS, BY DECADES, UNDER 18- AND 9-YEAR TERM LIMITS



Importantly, this convergence might suggest that term limits produce a more moderate court. But this is not the case; Figure 12 shows the distribution of median justices, by decade, for both term limits scenario. Because we assume the appointment of reliable ideologues, the more frequent turnover

under both of these scenarios will produce more *balanced* courts in terms of the number of liberal and conservative justices. But at any one point in time, the Court is likely to display a bimodal wing structure, with highly polarized ideological blocs. To be clear, this outcome is true in nearly all the simulations we have presented so far, due to our baseline assumptions about justice ideology. But it is important to emphasize exactly what term limits would—and would not—accomplish. This bimodality result, in turn, has implications for how we think about the "responsiveness" of the Court to the tides of elections, a topic to which we now turn.

VI. EVALUATING THE TRADEOFFS FROM DIFFERENT SELECTION INSTITUTIONS

"Never make predictions—especially about the future," as an old saying goes.[80] So far we violated this undoubtedly wise injunction with impunity. To discipline our predictions about future courts, we built them on clear and explicit micro-foundations, reflecting the historical experience and arguably plausible projections. One certainly might quibble with some or all of our design choices. But even so, a nice feature of using a simulation approach is that it can provide a foundation for a normative framework for evaluating possible changes to the way we select and retain Supreme Court justices, a task we turn to in the remainder of the Article.

In particular, we develop a simple normative framework to evaluate the tradeoffs implicit in different judicial selection and retention institutions. These tradeoffs arise because different degrees of judicial independence, as embodied by lower responsiveness to election results and longer tenures on the Court, create both costs and benefits to society. To gauge the tradeoffs implied in the different scenarios, we focus on four measurable quantities. The first is *democratic responsiveness*—the degree to which the composition of the Court broadly tracks the electoral choices of the American public. The second is *judicial turnover*—the frequency with which new justices replace existing ones. The third is the frequency of *closely divided courts*—courts with compositions in which a new justice would alter the Court's ideological balance. The fourth is the frequency of *out-of-step courts*—courts with a supermajority of justices appointed by one party facing unified elected branches controlled by the other party.

We examine all four quantities across the different scenarios we presented above. The normative framework suggests how one might weigh the revealed tradeoffs. We stop short of making definitive recommendations, for that

[80] See It's Difficult to Make Predictions, Especially About the Future, QUOTE INVESTIGATOR (Oct. 20, 2013), https://quoteinvestigator.com/2013/10/20/no-predict/, for the debated origins of this phrase.

would simply reflect our values. But one point stands out: the current system of life tenure for highly reliable ideologues falls on the maximum side of judicial independence; indeed no other democracy endows high court judges with such job security.[81] Among the scenarios we consider, 18-year term limits effectively reduce this independence by increasing democratic responsiveness and judicial turnover; they also would likely reduce the intensity of conflict over appointments by increasing their regularity. Whether these benefits mitigate the costs of reducing the independence of the Court is a value judgment. But readers can use our framework and the simulation results to probe their own values and consider the best path forward for selecting and replacing Supreme Court justices.

The design of high court selection and retention systems is a topic in constitutional engineering. In some sense, it resembles designing selection and retention systems for legislators, chief executives, heads of administrative agencies, the workers within those agencies, and the sub-contractors to the agencies.[82] But judicial selection and retention systems present special issues all their own. As a practical matter, the American states display a fairly limited variety of judicial selection and retention systems. In their pathbreaking work on state high courts, Professors James Gibson and Michael Nelson array four selection mechanisms against seven retention mechanisms to create a taxonomy of 28 different designs.[83] However, just five of the possible designs account for the majority of designs used in the states. Of these, one is the federal design; it combines selection by the chief executive with no formal retention system for appointed justices at all, effectively granting them life tenure. One might dub this the "federalist" design, since Hamilton advocated for it forcefully in Federalist 78, helping to ensure its enshrinement in the U.S. Constitution.

In fact, if we focus on state supreme courts, only three states

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[81] As Professors Calabresi and Lindgren state, "The American system of life tenure for Supreme Court Justices has been rejected by all other major democratic nations in setting up their highest constitutional courts." Calabresi & Lindgren, *supra* note __, at 819. In addition, as we discuss below, only one American state—Rhode Island—provides judges with life tenure with no mandatory age of retirement.

[82] The relevant literature is too vast to cite, but influential modern analyses focusing on elected officials include James D. Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance*, *in* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION (Susan Stokes, Adam Przeworski & Bernand Manin eds., 1999); Brandice Canes-Wrone, Michael C. Herron & Kenneth W. Shotts, *Leadership and Pandering: A Theory of Executive Policymaking*, AM. J. POL. SCI., at 532 (2001); Eric Maskin & Jean Tirole, *The Politician and the Judge: Accountability in Government*, 94 AM. ECON. REV. 1034 (2004). The latter contrasts elected and appointed officials and considers judges to be an archetype of an appointed, non-accountable official.

[83] JAMES L. GIBSON & MICHAEL J. NELSON, JUDGING INEQUALITY: STATE SUPREME COURTS AND THE INEQUALITY CRISIS 138 (2021).

(Massachusetts, New Hampshire, and Rhode Island) employ the federalist design of allowing the executive (i.e., the governor) to make judicial appointments that are not subject to any later retention decisions.[84] Moreover, only one of these—Rhode Island—employs the pure federalist design by awarding judges life tenure; state supreme court judges in the other two states face mandatory retirement ages. Instead, today most states select and retain judges via some form of elections.[85]

An extensive discussion of the merits of different judicial selection and retention system is beyond the scope of this Article.[86] But we can ask a narrower question: is there a simple modification to the federalist design for selecting and retaining Supreme Court justices that might improve its performance as benchmarked against a defensible normative standard (not short-term partisan advantage)?[87] What are the relevant considerations? We focus on responsiveness, the extent of closely balanced courts, and judicial

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[84] For a list of selection methods by states, see *Judicial Election Methods by State*, BALLOTPEDIA, ballotpedia.org/Judicial_election_methods_by_state (last visited Dec. 22, 2023). New Jersey and New York are similar to these three states, except their state supreme court judges are subject to gubernatorial re-appointment. While only these five states allow for unfettered gubernatorial appointments, several states employ "merit selection," under which the governor makes an initial appointment based on a list of candidates provided to her by a nominating commission. In addition, Professors Gibson and Nelson note that executive appointment to fill mid-election vacancies—a sort of a "loophole" in appointment regimes—also allows governors to have a great deal of influence over state judiciaries. Gibson & Nelson, *supra* note __.

[85] Most states initially used the federalist design, but switched to judicial elections beginning in the mid-nineteenth century, a fascinating evolution documented in SHUGERMAN, *supra* note __.

[86] Any normative discussion must be informed by facts about how the different systems actually perform. Here, Richard P. Caldarone, Brandice Canes-Wrone & Tom S. Clark, *Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions*, 71 J. POL. 560 (2009), Elliott Ash & W. Bentley MacLeod, *Intrinsic Motivation in Public Service: Theory and Evidence from State Supreme Courts*, 58 J.L. & ECON. 863 (2015)., and Gibson & Nelson, *supra* note __, are quite useful.

[87] With respect to partisan advantage, F. Andrew Hanssen, *Is There a Politically Optimal Level of Judicial Independence?*, 94 AM. ECON. REV. 712 (2004), presents a theory of judicial independence that investigates the optimal level of independence from the perspective of *policy makers*. The theory predicts (and the evidence supports) that politicians should favor selection and retention institutions that promote independent courts in states with higher levels of partisan competition, since the politicians in those states are more likely to be out of power. (See J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994), Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003), and Matthew C. Stephenson, *"When the Devil Turns...": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003), for similar arguments explaining cross-national variation in judicial independence.) While our search for the optimal level of judicial independence is theoretically similar to Professor Hanssen's, our benchmark for evaluating independence is the welfare of society as a whole, not politicians more narrowly.

turnover rates because these performance metrics are closely tied to the selection and retention system, are substantively important, and could be adjusted without a radical redesign of the federal judiciary.

A. Optimal Judicial Turnover: The Goldilocks Principle

Most Americans typically see democratic responsiveness and democratic accountability as good things, especially for legislators and chief executives.[88] In contrast, when it comes to judges many legal scholars prefer "judicial independence," which effectively means judges are neither democratically responsive nor democratically accountable.[89] A vast scholarly literature has interrogated the costs and benefits.[90]

One common defense of judicial independence is that democratically unresponsive and unaccountable judges are likely to protect the rights of minorities more vigorously than democratically responsive and accountable judges would. As an empirical proposition, however, this assertion lacks support.[91] As a logical proposition, it fails. Judges who answer to no one but themselves are free to do whatever they wish. They may support minority rights, but could just as easily could discriminate against minorities.[92] Absent judicial accountability, the crux becomes: what judicial preferences does the selection mechanism favor? Indeed, if the public as a whole increasingly supports minority welfare over time, as has been the case in the United States,

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[88] See Vincent L. Hutchings. PUBLIC OPINION AND DEMOCRATIC ACCOUNTABILITY: HOW CITIZENS LEARN ABOUT POLITICS (2005).

[89] See John Ferejohn. "*Independent Judges, Dependent Judiciary: Explaining Judicial Independence*." 72. S. Cal. L. Rev. 353 (1998).

[90] These questions are tackled from any number of standpoints in the famous debate in the legal and social science literatures on the "counter-majoritarian difficulty." This phrase, which dates to ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962), captures the potential normative problem when unelected and life-tenured judges strike down laws passed by the elected representatives of the American people. For a thorough historical and legal examination of how much the Supreme Court has been tethered to the preferences of the American public throughout its history, see BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

[91] Several studies compare the policy decisions of judges elected under different methods, but few compare decisions of elected and appointed judges. Gibson & Nelson, *supra* note __, which does, finds few differences.

[92] Indeed, several legal scholars have argued that the Supreme Court has been systematically *worse* at protecting the rights of minorities, compared to Congress. *See, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, YALE L.J. 1346 (2006); Nikolas Bowie, Testimony Before the Presidential Commission on the Supreme Court of the United States (2021), available at urlhttps://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf.

one might expect judges drawn disproportionately from older cohorts to be on average less supportive of minority rights than either average citizens or a younger cohort of judges. Notably, Hamilton did not rely on the minority rights arguments in his defense of the federalist design.

In contrast, we believe that a much stronger argument for low turnover (and thus less responsiveness, in all likelihood) relies on the economic gains from a stable set of laws. A good legal system offers individuals clear economic rules that support profitable exchanges today as well as the security they need to enter into long-term relationships and projects.[93] Without that security, society risks falling into a devastating poverty trap.[94] This insight is easiest to understand with respect to common law subjects such as contracts, torts, and property law, which are not primarily the business of the Supreme Court. But it applies with nearly equal cogency to antitrust, securities regulation, constitutional rights and obligations, and administrative law, which are. To get this security, tomorrow's courts must be willing to enforce today's law. But how can the legal system credibly commit to today's law? The federalist selection and retention system offers a way: select judges who favor today's law, then retain them for a long period. Slow judicial turnover supplies the credible commitment device needed for economic prosperity. Under slow turnover, membership on the Court is "sticky"—higher stickiness implies that the Court's membership in a prior period (say, five or 10 years) will be a very good predictor of its membership in the current period.

But stability in the law is not an absolute good. Instead, a good legal system must also respond to changes in technology, the economy, and social relations. Otherwise, law becomes the dead hand of the past strangling the future's well-being. This argument is often sharpest concerning patent and anti-trust law, but applies to social changes arising from new technology (e.g., contraception or cryptocurrency) and new moral sentiments (e.g., same-sex marriage). New phenomena may need genuinely new thinking, not just shoehorning the novel into ill-fitting categories from the past. Younger judges, more open to new ideas and more familiar with "the felt necessities of the time," may be more adept at adapting existing law to a brave new

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[93] *See, e.g.*, Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1 (1995); Stephan Haggard, Andrew MacIntyre & Lydia Tiede, *The Rule of Law and Economic Development*, 11 ANN. REV. POL. SCI. 205 (2008).

[94] A poverty trap is a "a set of self-reinforcing mechanisms whereby countries start poor and remain poor: poverty begets poverty, so that current poverty is itself a direct cause of poverty in the future." Aart Kraay & David McKenzie, *Do Poverty Traps Exist? Assessing the Evidence*, 28 J. ECON. PERSP. 127, 127 (2014). *See also* Costas Azariadis & John Stachurski, *Poverty Traps*, *in* HANDBOOK OF ECONOMIC GROWTH, Vol. 1, Part A (Philippe Aghion and Steven N. Durlauf eds., 2005).

world.[95] This argument favors more rapid judicial turnover, and thus retention mechanisms that would promote greater turnover than the status quo institutions on the Supreme Court of death and voluntary departure. A court with more turnover is less sticky—membership in years prior is less likely to predict the current composition of the Court.

The reader may already intuit what we call the "Goldilocks Principle" for judicial turnover—neither too much nor too little, but just right! Figure 13 illustrates the basic intuition. In the figure, the horizontal axis is the rate of judicial turnover, denoted by δ; higher values correspond to more turnover and shorter tenures, and thus greater responsiveness to control of the presidency. The lowest possible rate would arise under an institutional arrangement like the federalist design, while the highest possible rate would occur with (say) complete dismissal and replacement of the Court with each incoming presidential administration, as occurs with top officials in administrative agencies. The two upward sloping lines show the benefits and costs of turnover. As discussed above, an important benefit of greater judicial turnover is the greater "fit" of the law to changing social circumstances. We sketch the benefits curve as increasing but at a decreasing rate—moving from glacial turnover to a somewhat more rapid rates initially brings sizable benefits, but these benefits lessen with greater turnover.

An important cost of higher turnover is the reduced commitment power of the legal system. For example, Professor Mark Graber argues that the reality of polarized appointment politics portends a constitutional "yo-yo" in which doctrine swings back-and-forth wildly whenever the ideological majority of the court changes.[96] Professors Mark Bailey and Matthew Spitzer make a similar argument: "With a relatively empty middle on the Court, small changes in membership may lead to major swings in Court. When there are few moderates, replacing a liberal justice with a conservative justice can move the Court median from a moderate to strong conservative, or vice versa."[97] Such swings between polarized blocs could jeopardize long-term projects and endeavors in society if the law becomes too unpredictable. We sketch the cost curve as low for slow turnover rates but rising rapidly as turnover becomes extremely rapid. Here, law could become so volatile and

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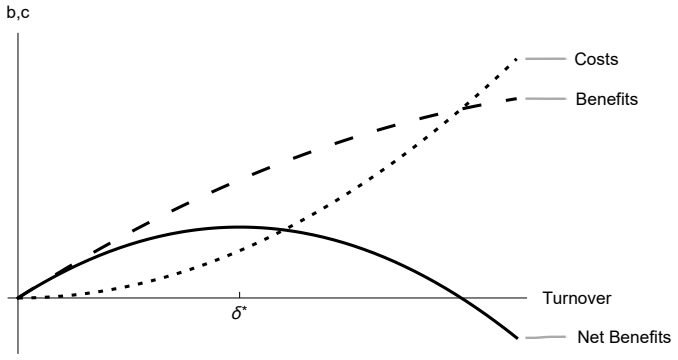
[95] This famous phrase comes from OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881). For a theoretical model of the tension between consistency in the law and adapting to changing societal circumstances, as well as several illustrations of cases where judges confronted this tension head on, see Mehdi Shadmehr, Sepehr Shahshahani & Charles Cameron, *Coordination and Innovation in Judiciaries: Correct Law Versus Consistent Law*, 17 Q.J. POL. SCI. 61 (2022).

[96] Mark A. Graber, *The Coming Constitutional Yo-Yo: Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOWARD L.J. 661 (2012).

[97] Michael A. Bailey & Matthew Spitzer, *Appointing Extremists*, 20 AM. L. & ECON. REV. 105, 129–30 (2017).

unpredictable that society slides into a poverty trap.

FIGURE 13: COSTS, BENEFITS, AND NET BENEFITS FROM VARYING TURNOVER RATES ON THE SUPREME COURT



Note: The optimal level of turnover is neither too high nor too low, but just right.

The third curve in Figure 13 is the *net benefits* curve, which captures the difference between the social benefits and social costs of turnover. The task of the constitutional engineer, in our simple framework, is to design a judicial selection and retention system that maximizes net social benefits from turnover.[98] The socially optimal level of turnover is the point labeled δ^*. As shown, this "Goldilocks Point" is not jammed against either the lowest possible turnover rate nor the highest. Of course, such extreme points could be optimal, given the shapes of the benefit and cost curves. But the figure illustrates that the Goldilocks Principle—neither too much turnover nor too little but just enough—will be optimal under many circumstances.

The shapes of the curves are not fixed. Factors like rapid technological progress will rotate the benefit curve upward; this would lead to a higher value for the optimal turnover rate, which would then favor institutions such as term limits or mandatory retirement ages that promote responsiveness and turnover. In contrast, if socially valuable projects require legal stability not just for a few years but over decades, then the cost curve rotates upward, leading to a leftward shift in the optimal turnover rate. This scenario would favor institutions that reduce responsiveness and turnover, such as lifetime appointment or a high retirement age.

B. Political Conflict, Polarization, and the Goldilocks Point

[98] Obviously, there are other desiderata as well—e.g., select and retain highly skilled and honest judges while avoiding or removing unskilled and dishonest ones. Skill and honesty could be folded into the costs and benefits of turnover without much difficulty.

We now turn to a factor missing from the economic efficiency-oriented framework of Figure 13, one that could dramatically affect the constitutional engineer's calculations: political conflict. Each turnover rate in Figure 13 also will be associated with a degree of political conflict, in particular, both a *frequency* and *intensity* of conflict. What factors determine the frequency and intensity of conflict associated with a turnover rate? Should we adjust the Goldilocks Point in light of likely political conflict?

If federal courts——like local traffic courts——made decisions with few broad-based policy consequences, then who sits on the bench would matter little, and thus selection would not engender much conflict. Turnover rates would then not link tightly to the frequency and intensity of conflict. Federal judges, of course, are not traffic court overseers but powerful policy makers. Still, suppose everyone in American society, including high court judges, agreed on judicial means and ends. If so, who sits on the Supreme Court would not matter much, vacancies would not lead to appointment battles, and turnover rates would not result in much conflict. But this supposition is quite unrealistic: federal judges are powerful actors, and politicians, organized interests, and activists on both sides now disagree intensely over means and ends and hence focus intensely on appointments.[99] As such, conflict over court appointments becomes inevitable. In such a world, turnover rates will dramatically shape the frequency and intensity of political conflict.

The baseline simulations above showed that if control of the presidency regularly alternates between the parties, in the long run the Court will feature two almost equally sized ideological blocs. At that point, one bloc may gain a transitory advantage over the other (e.g., a 5-4 majority). But soon the other bloc will have its turn, as the Court shifts regularly and predictably back to 5-4 with the other side in control. And so on *ad infinitum*. If this logic is correct, then frequent turnover on the Court will lead to frequent political conflict (lots of nominations) but relatively low intensity conflict because winning or losing is just a short-term affair. Today's defeat will be followed by tomorrow's victory, and vice versa. The stakes at each vacancy will be lower—though not as low as if the Court were not ideologically polarized.[100]

Suppose instead the Court features a low turnover rate. Appointments will

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[99] This is the argument developed in full in CAMERON & KASTELLEC, *supra* note †.

[100] Professors Cameron, Kornhauser, and Parameswaran show theoretically that *stare decisis* (deference to precedent) is easiest to sustain when polarized blocs frequently and predictably alternate in holding power. Charles M. Cameron, Lewis A. Kornhauser, Giri Parameswaran. *Stare Decisis and Judicial Log-rolls: a Gains-from-Trade Model.* 50 RAND JOURNAL OF ECONOMICS 504 (2019). The most problematic situation occurs when a large dominant bloc faces no reversal of fortune in the foreseeable future. Unfortunately, we know of few empirical studies of *stare decisis* that relate its prevalence to turnover and ideological polarization. *But see* THOMAS G. HANSFORD & JAMES F. SPRIGGS, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT (2018).

occur rarely, so the frequency of conflict from appointments will be low. But because ideological lock-in will be pronounced, the stakes of each appointment will be huge, and hence the intensity of conflict would likely be larger. Moreover, because appointments would be rare events, a few strategic retirements and a fluky run of presidential control could move the Court far from 5-4 configurations, and then stay there a long time. A durable court with an ideological split of 6-3, 7-2, or even greater is possible. Now a new threat of conflict arises, one arising not from appointments *per se* but from *elections*. When the inevitable turn in the electoral tide brings a unified party government of the opposite ideological persuasion, with a real working majority in the Senate, the Court will find itself the odd man out among the branches. Given the electoral outcome, the Court will probably lack public support. What happens then?

In fact, we have a glimmer of the answer because we have been there before.[101] This is precisely the scenarios of the Lincoln-Tawny confrontation during the Civil War and Reconstruction, and that of the Roosevelt-Hughes confrontation during the New Deal. There is only one likely outcome from such a confrontation. In a democracy, the will of the people propels forward, sometimes slowed but never stopped. A stubborn odd-man-out-court can find itself staring down an opposed public and its representatives, and the results can be devastating for the Court. Congress and the president can manipulate the Court's size in order to pack it, as happened during the Civil War and Reconstruction. Congress can also strip the Court of its jurisdiction over controversial issues, as also occurred during Reconstruction. Public regard for the institution may plummet and take decades to restore. And, extreme policies on one side can be replaced by equally extreme policies on the other side, a fate that moderation might have avoided.[102]

If this logic is correct, then high turnover will be associated with frequent political conflict but mostly low-to-moderate intensity conflict. Low

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[101] This paragraph and the succeeding one draw on the large literature on the Supreme Court at crisis moments like 1800, the Civil War and Reconstruction, and 1937. Some relevant sources include BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 2: TRANSFORMATIONS (200); RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC (1971); HAROLD MELVIN HYMAN & WILLIAM M WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875 (1982); Stanley I. Kutler, *Reconstruction and the Supreme Court: The Numbers Game Reconsidered*, J. S. HIST., at 42 (1966); CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, PART ONE (1971); Barry Friedman, *Reconstruction's Political Court: The History of the Countermajoritarian Difficulty, Part Two*, 91 GEO. L.J. 1 (2002); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1996).

[102] On the logic of selecting moderate, but less desirable policies, because they are more durable, see David P. Baron, *A Dynamic Theory of Collective Goods Programs*, 90 AM. POL. SCI. REV. 316 (1996).

turnover, in contrast, will be associated with less frequent conflict due to less frequent appointments, but possibly higher intensity conflict at each appointment, particularly when the Court is closely divided ideologically. And, even more dramatically, low turnover brings the threat of an odd-man-out court facing an angry public and unified elected branches poised to curb its power and independence.

C. Constitutional Engineering for Black Swans

Given the current electoral environment in which the two parties enjoy rough parity in national elections, it seems unlikely that the Court could find itself thoroughly out-of-step with both the public and the elected branches. Such an event may fall under the category of a rare event. Rare events that carry devastating consequences have received considerable scientific and popular attention, sometimes under the rubric of "black swans."[103] Black swans are seemingly near-impossible events that actually transpire. Examples of improbable but devastating events that actually occurred include the San Francisco earthquake of 1906, the Japanese Tohoku tsunami of 2011 with the accompanying Fukushima nuclear disaster, the 2008 financial meltdown, and the 2020 COVID pandemic.

Distributions of events like this have "fat tails" and are quite different from normal distributions. Figure 14 illustrates by showing two fat-tailed distributions.[104] In the figure, the x-axis is the intensity of political conflict, while the height of the curves shows the probability of that level of conflict. The curve labeled "high turnover" shows a distribution with a heavy left-hand tail. It features frequent low-to-moderate intensity conflict but very rare high intensity conflict of the odd-man-out variety. In contrast, the curve labeled "low turnover" displays a heavy right-hand tail. This curve features infrequent conflict due to infrequent appointments but much higher probabilities of a huge odd-man-out conflict.

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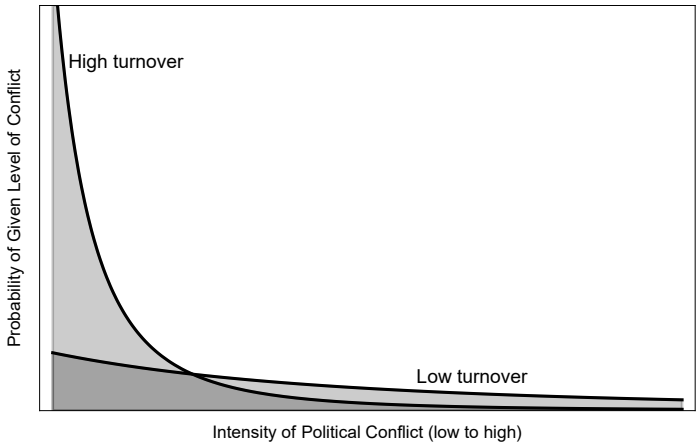
[103] See NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE, VOL. 2 (2007) for a popular account of black swans.

[104] For illustrative purposes, the figure displays the probability density functions for two Pareto distributions. Insurance companies use such distributions to predict losses from earthquakes and similar events. For a technical description of a Pareto distribution, see Barry C. Arnold. *Pareto distribution*. Statistics Reference Online (2014): 1-10. Available at https://onlinelibrary.wiley.com/doi/epdf/10.1002/9781118445112.stat01100.pub2

FIGURE 14: TURNOVER ON THE COURT AND THE FREQUENCY AND INTENSITY OF POLITICAL CONFLICT OVER APPOINTMENTS



Note: With fast turnover, conflict is frequent but mostly low intensity. With slow turnover, conflict is less frequent but can be extremely intense—a "black swan" distribution of events.

How should a constitutional engineer think about judicial black swans, particularly a constitutional crisis created by an odd-man-out court? Opting for a judicial selection and retention system that produces rather frequent judicial turnover produces more frequent but also smaller conflict. This path also introduces more instability in the law and possibly lower economic growth, but it also protects against "the big one"—a severely out-of-step court. In contrast, a selection and retention system that produces infrequent turnover and thus more stability in the law leads to less frequent conflict, but when appointments do occur, the conflict is more intense. Critically, this path would increase the chance of an odd-man-out crisis.

Reasonable people can reasonably disagree about which risks are better or which worse. Of course, partisan advocates myopically seek short term political advantage and thus ignore black swan risks altogether. But *risks ignored are not risks avoided*. Engineers understand that bridges in seismically active regions should be designed not on the basis of average risks, but instead over-engineered to survive rare major earthquakes. The same principle may apply in constitutional engineering. If so, the constitutional engineer would select a judicial selection and retention system with higher rates of judicial turnover rather than the simple Goldilocks Point in Figure 13. On the other hand, if one dismisses black swan risks, then one would favor a design with rates of turn-over at Figure 13's Goldilocks point.

Because one's view of the best compromise between competing objectives depends on values about society and one's attitude toward risk, our

simulations cannot indicate a definitive "right" answer in the responsiveness-stability tradeoff. But the simulations can provide valuable information about electoral responsiveness and ideological lock-in across the different scenarios; let us now return to them.

D. Evaluating the Tradeoffs

We now turn to evaluating these tradeoffs within the context of our simulation approach. Our earlier analyses focused on descriptively presenting the broad trends in the composition of the Court across scenarios. In the analyses that follow, we more systemically examine the outcomes of the simulations to explore the tradeoffs that the different paths create. While our theoretical framework emphasizes changes in selection and retention institutions, we also include the scenarios that posit changes in norms (e.g., no divided government appointments), since these provide useful points of comparison. (We exclude the 2016 counterfactual scenario, however.)

1. *Evaluating Responsiveness*

The first step toward evaluating the optimal level of judicial independence is the degree to which the composition of the Court is responsive to changes in the preferences of voters and their elected officials. To measure democratic responsiveness within the context of the simulations, we calculate the linkage between party control of the presidency and the ideological makeup of the Court. While the Senate has the important role of "advise and consent," the mapping between party control of the White House and the Court's ideological structure strikes us as the most direct gauge of the impact of the tides of democracy on the Court. The idea is simple: if the public selects a Democratic president, how much, if at all, does the Court move to the left? Conversely, if the public selects a Republican president, how much, if at all, does the Court move to the right?[105]

To evaluate democratic responsiveness across the scenarios, we treat each scenario as a data generating process whose output can be described and neatly summarized via simple regression models.[106] For these regressions, we

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[105] To be sure, this approach embodies a rather thin conception of democratic responsiveness, especially since the president is not elected by popular vote. Nevertheless, it presents a useful way to collectively analyze the simulations. For a classic study of democratic responsiveness across many institutions, including the Supreme Court, see Erikson, MacKuen & Stimson, *supra* note __.

[106] Within the simulation community, this approach—building a statistical "metamodel" of a simulation model—is standard. *See, e.g.*, Russell R. Barton & Martin Meckesheimer, *Metamodel-based Simulation Optimization*, 13 HANDBOOKS IN OPERATIONS RES. & MGMT. SCI. 535 (2006).

use as dependent variables the estimated location of the median justice in a given year. To set up the regressions, we treat every simulation in all the scenarios as a time series. So, for example, the baseline scenario has 1,000 time series, with an estimated median location in every year in each of the 1,000 simulations. Because presidential appointments are limited by circumstances, it makes little sense to examine the relationship between presidential control and court compositions in a year-to-year manner. Instead, for each simulation, we calculate five- and 10-year rolling averages of the proportion of years in which the president was a Republican. The five-year measure captures rather short-term responsiveness. Because by construction this measure includes fewer appointments on average, it is rather noisy. The 10-year measure, by contrast, expands the responsiveness window and captures somewhat longer-term responsiveness. However, because we can begin the 10-year averages only in 2030, this measure excludes observations from the 2020s.

Finally, in each regression, to capture the "stickiness" of membership on the Court, as discussed earlier, we also include lagged values of the dependent variable. We use the same lag structure as the number of years used to calculate the rolling average of the relevant dependent variable. For example, in the regressions in which the key predictor is the proportion of Republican presidents in the past 10 years, we also include as a predictor the location of the median lagged 10 years (i.e., the value of the median 10 years before the year under analysis). So, the regression indicates today's ideological structure as a function of the ideological structure from a decade ago, plus the proportion of Republican control of the White House during the ensuing decade. The coefficient on proportion of White House control provides the measure of the democratic responsiveness of the Court's ideological structure; the coefficient on lagged structure is a measure of the inherent persistence of ideological structure—i.e., "stickiness"—within a given scenario.

Thus, we have two sets of regressions, the structure of which is summarized in Table 4. Using each set of two, we analyze each of the 11 scenario, running one regression for every simulation. The end product is thus four sets × 11 scenarios × 1,000 simulations, resulting in a total of 44,000 regressions.

TABLE 4: SUMMARY OF STRUCTURE OF REGRESSIONS

Regression label	**Dependent variable**	**Responsiveness predictor**	**Lags included on right-hand side**
Medians, 5 years	Location of median justice	Proportion of years in past 5 with GOP president	Median, lagged 5 years
Medians, 10 years	Location of median justice	Proportion of years in past 10 with GOP president	Median, lagged 10 years

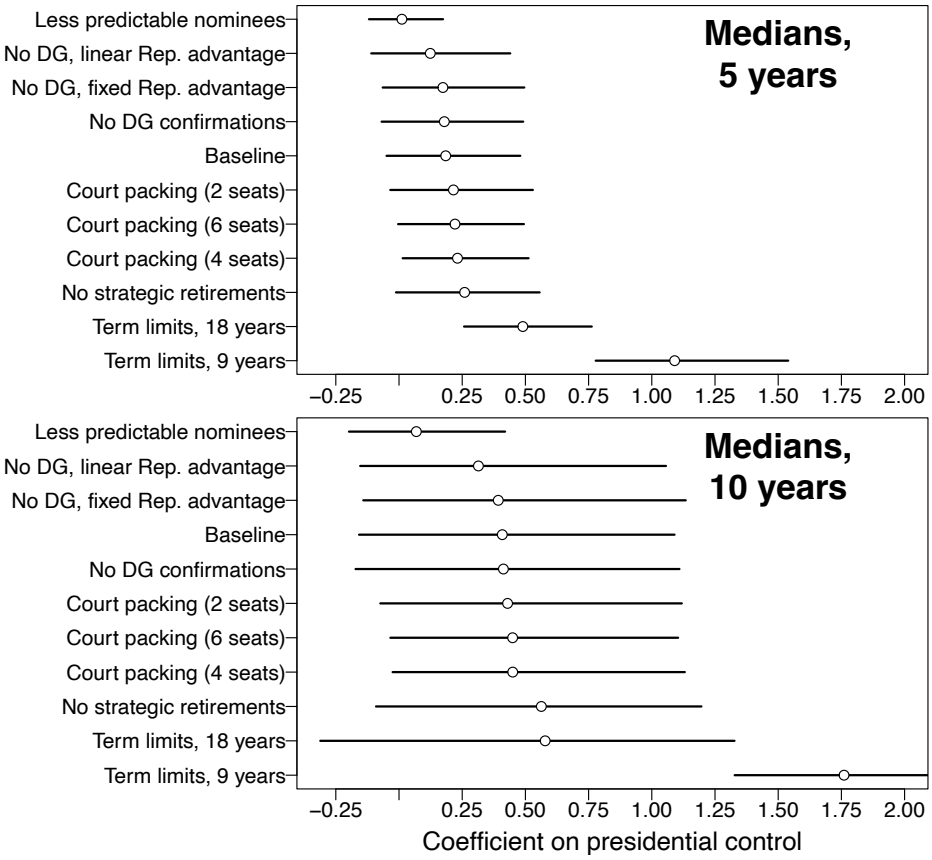
Figure 15 presents the results of the two sets of regressions.[107] For now we focus just on the responsiveness coefficients—that is, the coefficients on presidential control. (We will soon consider the results from the lagged coefficients.) Each plot presents the results from the respective sets of regressions. The points depict the median coefficient among the set of coefficients from the 1,000 regressions for a given analysis, while the horizontal lines connect the .025 percentile to the .975 percentile. Within each panel, we order the scenarios by increasing responsiveness from top to bottom; this means that the order of the scenarios varies across the panels.[108]

Across both analyses, each panel leads to the same substantive conclusions. First, *the baseline scenario generally displays low levels of democratic responsiveness*. As we discussed earlier, the Court's projected ideological makeup (especially in the near future) is extremely persistent under the baseline assumptions, driving down responsiveness. Perhaps surprisingly, in some of the analyses the no divided government confirmation scenarios actually display higher responsiveness on average, though the difference in the median coefficients is quite small.

[107] The complete regression results can be found in Appendix Table A-2.

[108] It is important to note that the figure does *not* display traditional confidence intervals. Rather, it summarizes the spread of the responsiveness coefficients, without regard to the standard errors of the individual coefficients. Because we are working with simulated data, a frequentist approach to statistical significance is not particularly interesting, in our view. Instead, the rank ordering of the scenarios by the median coefficient, along with the spread of the estimates, holds greater interest because it affords a summary descriptive comparison of the scenarios in terms of democratic responsiveness.

FIGURE 15: SUMMARY OF RESPONSIVENESS COEFFICIENTS FROM REGRESSION ANALYSES



Note: The points depict the median coefficient while the lines connect the .025 percentile to the .975 percentile. In each panel, the scenarios are order from least responsive (top) to most responsive (bot- tom).

Second, *the term limits scenarios always score highest on responsiveness.* For 9-year terms, the coefficients on presidential control are strikingly large. This makes intuitive sense, of course. Affording a president an appointment every year allows the president to quickly mold the Court in his own ideological image. To give a sense of the scale here, the median coefficient on presidential control in the "Medians, 10 years analysis" is 1.75. This means that a one-unit shift in the proportion of the last decade with a Republican president would predict a 1.75 increase in the location of the median justice. A one-unit shift means zero years with a Republican to 10 years with a Republican, meaning Republican presidents would have appointed all nine justices on the Court. The NOMINATE scale for medians runs from -1 to 1, so a 1.75 increase nearly covers the entire ideological

spectrum. The responsiveness coefficients from 18-year terms are much smaller in magnitude but still indicate a large increase in democratic responsiveness relative to the baseline. Conversely, court packing tends falls in the middle of the pack in terms of responsiveness.

Third, *less predictable nominees always produce the least amount of democratic responsiveness*. Under this scenario, presidents appoint nominees who are much more likely to be ideological moderates compared to the baseline assumptions. This is intuitive, because in the scenario the relationship between presidential control and nominee ideology is weak. The result is more heterogeneity in the composition of the Court relative to the baseline ideology assumptions. We view this scenario as quite unlikely in the future.

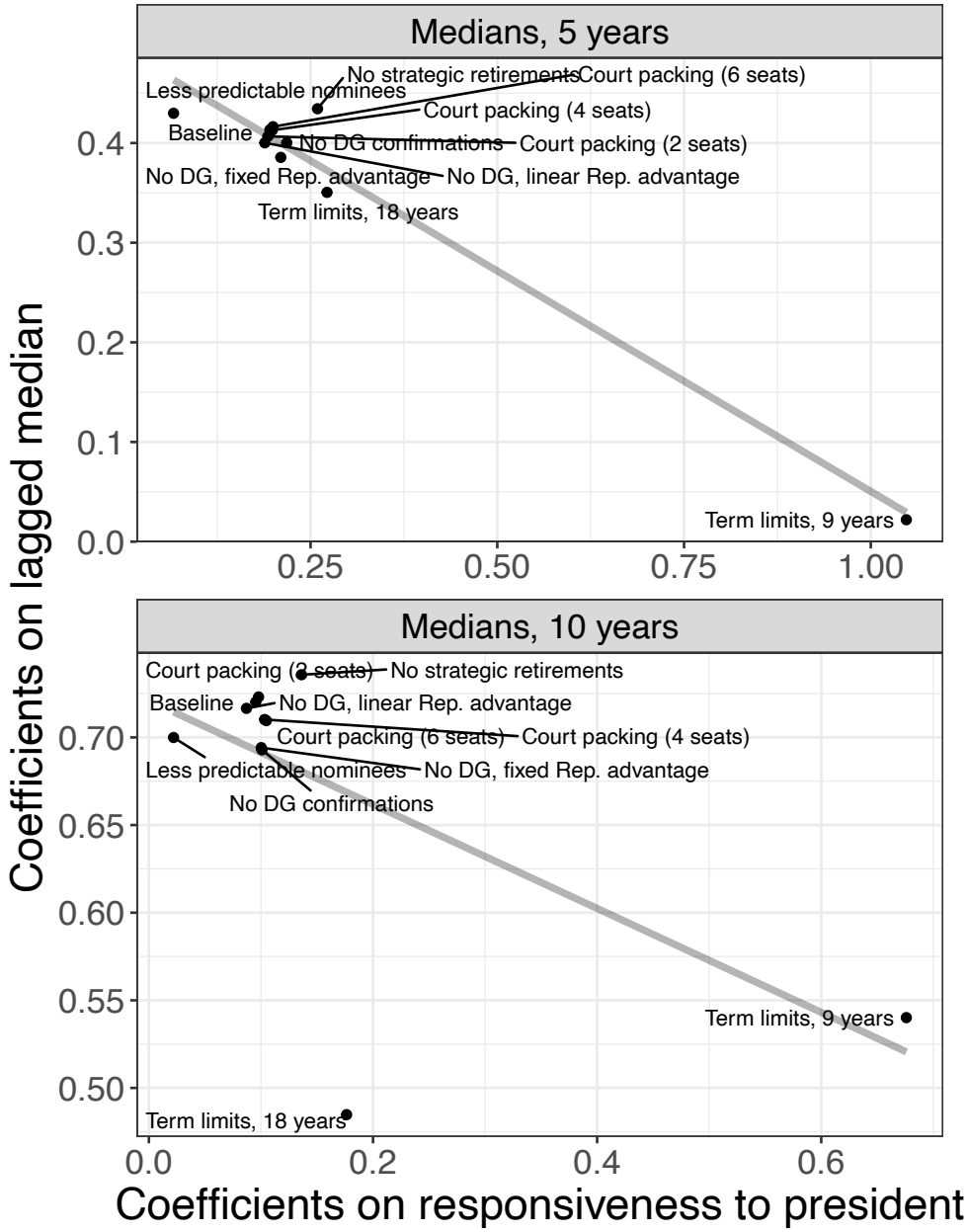
Finally, *the no strategic retirements scenario always ranks third on responsiveness*, out-ranking even court packing in every analysis. This result reinforces how strategic retirements effectively frustrate a president's ability to alter the composition of the Court. In a practical sense, strategic retirements remove some control over the Court's composition from the hands of the people (working through presidential elections), and place a portion of it in the hands of the justices themselves.

2. *The Stickiness of the Past*

The responsiveness analyses tell us how closely the composition of the Court tracks with changes in the party of the president. But by themselves the responsiveness coefficients ignore the stickiness of the membership of the Court. This quantity is essential for understanding how the past membership of the Court predicts the current composition, even after accounting for election outcomes.

Figure 16 extends the responsiveness analysis by comparing the responsiveness coefficients to the coefficients on the lagged median. Recall there are two sets of regressions, in which the length of the lagged median justice (5 and 10 years) are varied. For each set the figure depicts a scatterplot showing the relationship between the lagged coefficients (on the vertical axis) and the responsiveness coefficients (on the horizontal axis), which are based on the proportion of the past five or 10 years with a Republican president. The lines are linear regression lines that summarize the relationship between the two.

FIGURE 16: RELATIONSHIP BETWEEN RESPONSIVENESS AND "STICKINESS"



Note: The vertical axis depicts the coefficients on lagged membership, while the horizontal axis depicts the coefficients on the effect of presidential control (democratic responsiveness) on the Court. Note the scale of the horizontal and vertical axes differ.

At a conceptual level, responsiveness and stickiness should be negatively correlated: a court where past membership better predicts current membership is one that will fluctuate less with the changing tides of presidential elections. And that is exactly what Figure 16 shows: a consistent negative relationship between responsiveness and stickiness, the latter measured by how strongly the lagged median predicts the current median.

While this is not so surprising, of more interest is the "tradeoff frontier" between responsiveness and stickiness across the different scenarios. Figure 16 allows us to compare how the different scenarios rank on this frontier, which is summarized by the gray line in each panel. Notably, for all four sets of analyses, 9-year term limits are an outlier, falling far on the responsiveness side of the frontier. But even 18-year term limits—which would still allow for lengthy tenures—always rank second highest on responsiveness (that is, second largest on the x-axis), showing that they score higher on responsiveness than any of the other alternative scenarios. In contrast, the status quo of the baseline falls much closer to the stickiness side. Thus, enhanced responsiveness apparently requires an institutional departure from life-time appointments; term limits, in particular, would shift the scale toward responsiveness.

3. *Judicial Turnover*

The responsiveness analysis reveals how different design features lead in a practical way to a responsiveness-stickiness tradeoff in the Court's composition. This analysis implicates judicial turnover, since greater responsiveness will often require turnover to change the composition of the Court. However, it is also useful to explicitly compare turnover rates across the counterfactual scenarios. This, in turn, allows us to examine the likelihood of political conflict.

First, for each scenario, we calculated the average number of unique justices per scenarios, pooling across all simulations (that is, including all years). We normalize this measure by dividing by 10 years; this quantity is thus the average number of unique justices per decade. Figure 17 shows the results from these calculations, with the policy scenarios ordered from the highest average number of justices—and hence the most turnover—to the least. Not surprisingly, term limits produce greater turnover than most of the scenarios that retain life tenure; quite naturally, 9-year term limits would produce about nine unique justices every 10 years, on average. Court packing is the exception, but of course court packing by construction means more unique justices.[109]

[109] If we also normalized by the number of *seats* on the Courts, 18-year term limits would

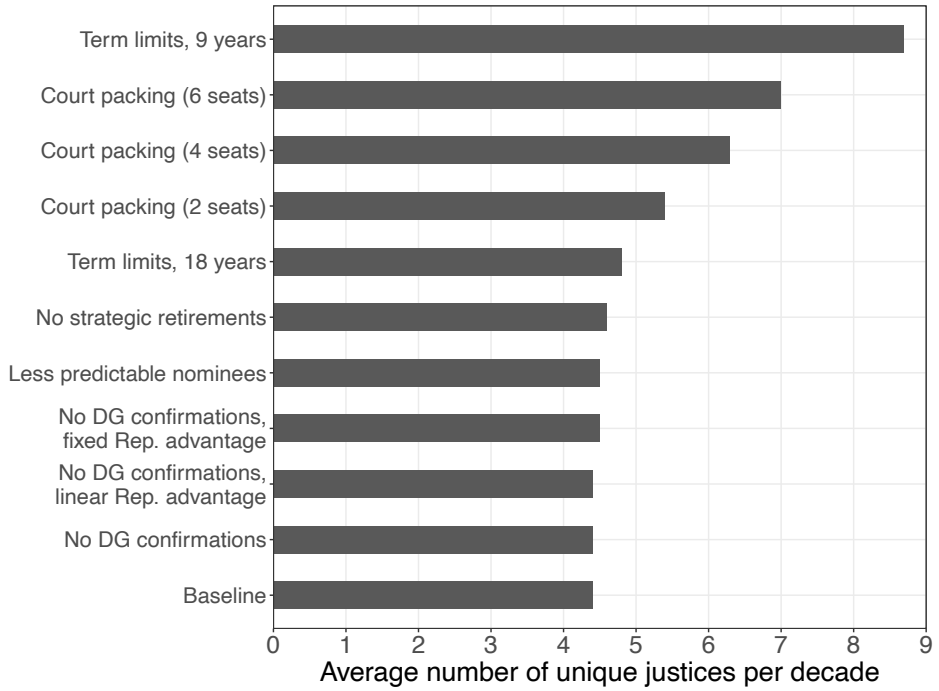
More justices per year, of course, means a higher *frequency* of appointment conflict. But as we discussed above, a key question is not just the frequency of conflict but the *intensity* of conflict as well. Given the existence of polarized blocs of justices, frequent alteration of majorities across them will increase the frequency of conflict but likely reduce its intensity. Conversely, less frequent turnover would likely increase the intensity of conflict.

To examine variation in the frequency of conflict, for each scenario we calculated the proportion of simulations in which the Court's partisan composition had no more than a one-seat margin; that is, either one more Democratic appointees than Republican appointees or vice-versa (e.g., on a nine-member court), or an equal number in each bloc (e.g., 4-4 on an eight-member court). When such a margin prevails, the next nomination can potentially change the partisan balance of the Court, depending on the partisanship of the exiting judge and the party of the president.

Figure 18 presents the results of this analysis. Not surprisingly, one-seat margins are maximized under 18-year term limits, because each president receives two appointments per term, and this leads on average to a balanced court. By contrast, 9-year term limits actually score low on this metric; this is because giving each president *one appointment per year* induces such rapid change in the Court that the margins will typically exceed one. Likewise, adding six seats to the Court would reduce the incidence of close margins, just by virtue of increasing the size of the Court.

feature higher turnover than any of the Court packing scenarios.

FIGURE 17: TURNOVER ON THE FUTURE SUPREME COURT, BY SCENARIO



4. *Political Conflicts and Out-of-Step Courts*

When is the intensity of conflict likely to reach its apex? As we discussed above, the biggest threat to the Court as an institution occurs when it is significantly out of step with the American public and its elected representatives. A key question then is how likely such scenarios are to occur across the scenarios, conditional on our assumptions about election outcomes going forward.

For each scenario, we calculated how often one party controls at least six seats on the Court and the Court faces the "opposite" unified presidency and Senate—that is, at least six Republican appointees and a Democratic president and Senate, or at least six Democratic appointees and a Republican president and Senate. Obviously, these simulations are rather skeletal because they ignore control of the House and the size of the Senate majority. For the Court to face a severe institutional backlash, unified control of all three branches plus lopsided majorities in the Senate would be necessary. The knife-edge margins of the Democratic majorities in the House and Senate that existed in 2021 and 2022, for example, would not be sufficient to allow radical interventions. Still, the simulation results are suggestive about which designs lead to a greater risk of the black swan.

FIGURE 18: NARROW PARTISAN MARGINS ON THE COURT, BY SCENARIO

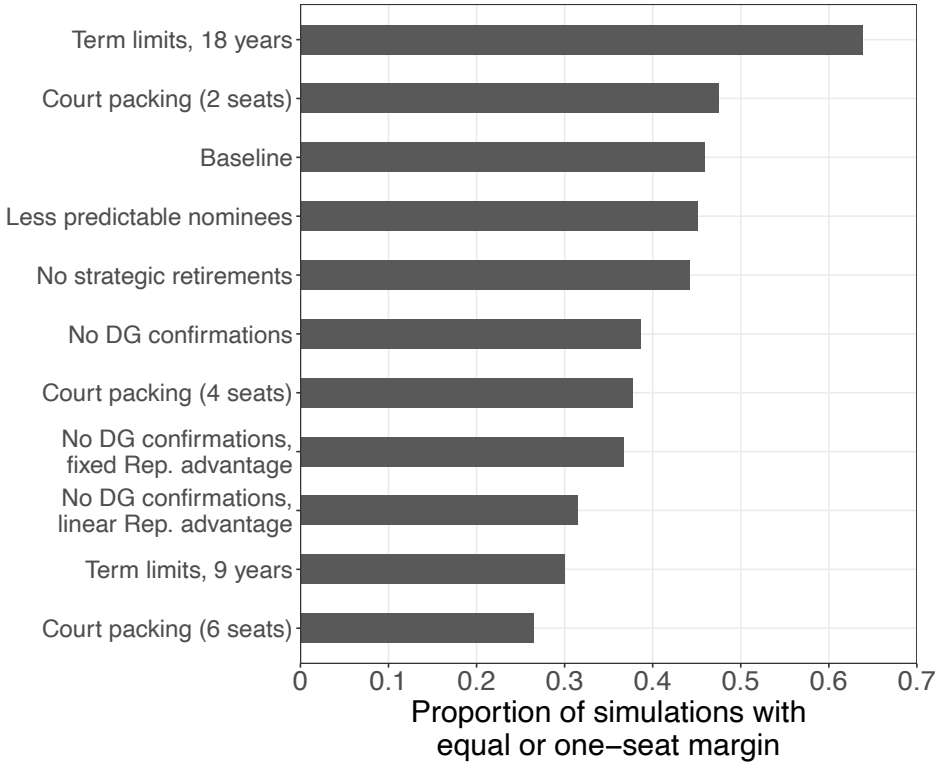
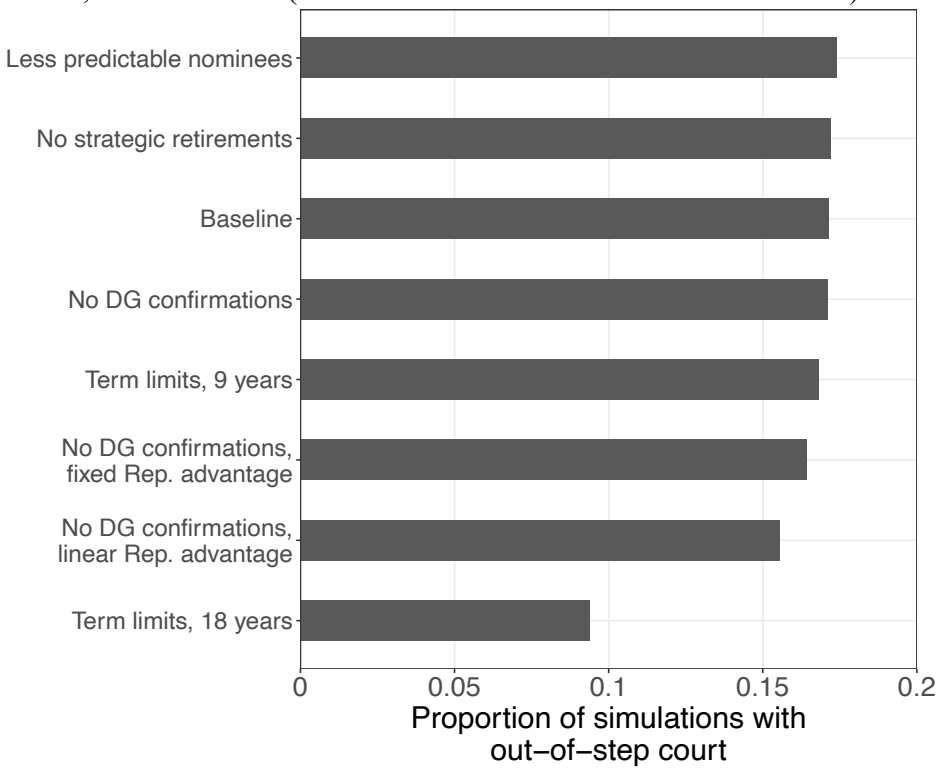


Figure 19 shows the results. Note that we exclude the Court packing scenario because, in some sense, court packing is "downstream" of being out of step. In the simulations, out-of-step courts are not really rare events, occurring upwards of 10% of the time. Although this rate is surely an exaggeration, over a long enough period truly rare events inevitably occur. But even if the levels of out-of-step courts predicted by the simulations are too high, the comparison *across* scenarios still reveals which are more or less likely to reduce the chance of the black swan. More interestingly, the two scenarios with the greatest likelihood of an out-of-step court are the baseline scenario and the no divided government scenario; the latter, as discussed above, seems quite likely to occur. The results thus suggest that the status quo of long tenures, competitive presidential elections, and more frequent strategic retirements (in all likelihood) stands the most chance of inducing an 1863- or 1937-like battle between the Court and the other branches. (Somewhat perversely, the scenario of no divided government confirmations with an increasing Republican advantage in the Senate also reduces out-of-step courts, because there would be many fewer *Democratic* majorities to be out-of-step with.)

FIGURE 19: PROPORTION OF SIMULATIONS WITH "OUT-OF-STEP" COURTS, BY SCENARIO (EXCLUDING COURT-PACKING SCENARIOS)



Note: A court is out of step if it contains at least six Democratic justices, and the president and Senate are both Republicans, or if the Court contains at least 6 Republican justices and the president and Senate are both Democrats.

On the other side of the ledger, 18-year term limits again stand out—the frequency of out-of-step courts is lowest when presidents regularly appoint justices to fixed terms. Cumulatively, we take these results to suggest that a prudential constitutional engineer would find 18-year term limits quite attractive. In contrast, those who favor stability in the law—even at the risk of rare but very serious conflict—would find the federalist system more attractive.

CONCLUSION

In this article, we analyzed the future of the Supreme Court, using cutting edge tools (micro-founded, replicable computer simulations). The simulations point to a strong and robust conclusion: the events of 2016—the Garland blockade and the election of Donald Trump—likely locked in place a solid conservative majority. Barring a series of unlikely events, this

majority is likely to persist for decades. In addition, the Court is likely to feature two ideologically polarized blocks; appointments during presidential-Senate divided party government may come to an end, resulting in extended vacancies in one or even more seats; court-packing (while unlikely in the near term) could result in a tit-for-tat dynamic resulting in a substantially larger Court—perhaps as large as 30 by the end of the century—requiring dramatic changes in its operating modes.

We also addressed the likely impact on the future of the Court from widely discussed reforms in the selection and retention process. Beyond impacts on partisan control, different reforms entail tradeoffs between valuable but conflicting objectives. Our normative discussion of constitutional engineering emphasized stability in the law versus adaptation to societal change, judicial independence versus democratic responsiveness, and frequent but small political conflict versus rare but potentially ferocious political conflict. The simulations provide information on the likely relative magnitudes of these trade-offs for different reforms. For example, the simulations suggest that the current system skews heavily toward low electoral responsiveness, very "sticky" court compositions, less frequent but potentially more intense political conflict, and a higher probability of a major confrontation between an out-of-step court and the rest of the government and society. Conversely, staggered 18-year terms limits favor the converse set of tradeoffs. To be clear, an awareness of the different magnitudes of tradeoffs does not identify the "best" reform, for that depends on one's own values. Nonetheless, grasping the nature of the trade-offs and perceiving their likely magnitudes facilitates an informed evaluation, given one's values.

Our discussion merely scratched the surface of what is possible to analyze, both positively and normatively. On the positive side lie further evaluation of specific topics, such as different forms of strategic retirements or alternative reform designs. On the normative side, a greater awareness of the economic consequences of reforms seems desirable. Similarly, an explicit consideration of political conflict and constitutional "black swans" may be overdue.

APPENDIX

Table A-1 presents a full summary of the design choices made in prior papers that use simulations to study the Supreme Court, as well the choices we make in designing our simulations.

Table A-2 presents the full regression results for the regressions summarized in Figures 15 and 16.

TABLE A-1: SUMMARY OF DESIGN CHOICES IN PAPERS USING SIMULATIONS TO STUDY THE SUPREME COURT

Design Element	Bailey & Yoon (2011)	Katz & Spitzer (2014)	Chilton et al (2021a)	Chilton et al (2021a)	Cameron & Kastellec
Court size	Fixed 9	9	Fixed at 9	Varies depending on unified control	May vary depending on unified control & court make-up
Initial Court make-up	Artificial (evenly spaced ideology age profile)	Random draws uniform distribution on [-1,1]	1937	2021 + 4 new Dem judges	2021
Probability of death	Life tables	Weibull distribution, tuned in some fashion	Historic + Federal judge historic age specific rate, for non-historic justices	Federal judge age specific historic rate	SSA age specific death tables
Probability of retirement	Increases with age, also strategic (a varying parameter)	Does not distinguish between retirement & death	Historic	Strategic after 18 years, depends on pres control	Strategic after 18, depends on pres control
Probability of filling vacancy	100%	100%	100%	100%	Depends on unified (scenarios)
Ideology of entering justice	Close to president, some randomness	MTM (so, weakly toward president but may not move median)	Historic + 2 bins (lib/con) corresponding to party of president	2 bins (lib/con) corresponding to party of president	Continuous random distribution depending on pres party
Probability of control of presidency	50-50	Pres ideal point drawn from uniform on [-1,1]	Historic	Simple Markov process (one term, two term)	Markov process (one term, 2 term)
Probability of control of Senate	No Senate	Median senator drawn from uniform on [-1,1] (no midterms)	Historic	Based on pres control, fixed 30% prob of unified	Markov process, midterm/pres election, increasing party advantages
Probability of unified party control	100% (with ad hoc randomness in justice ideology)	No party effects	Historic	Based on pres control, fixed 30% prob of unified	Endgoneous based on simulated presidential and Senate control
Measure of Ideological structure of Court	Median, sd of median	Median	2 Bin sizes, bin containing median	2 Bin sizes, bin containing median	Median, plus 3 bloc sizes
Doctrinal Implications	No				Dispositions & doctrine location conditional on disposition

TABLE A-2: FULL REGRESSION RESULTS FOR SIMULATIONS

	Baseline	Court packing (2 seats)	Court packing (4 seats)	Court packing (6 seats)	No DG confirmations	No DG, fixed Rep. advantage	No DG, linear Rep. advantage	Less predictable nominees	No strategic retirements	Term Limits,18 years	Term Limits,9 years
Medians, 5 years											
Intercept	-0.108	-0.156	-0.169	-0.184	-0.103	-0.06	-0.003	-0.009	-0.145	-0.257	-0.536
	(0.055)	(0.051)	(0.047)	(0.044)	(0.059)	(0.059)	(0.061)	(0.024)	(0.057)	(0.058)	(0.056)
Lag coef	0.652	0.587	0.597	0.621	0.605	0.606	0.589	0.62	0.648	0.303	0.461
	(0.091)	(0.091)	(0.09)	(0.087)	(0.094)	(0.096)	(0.098)	(0.067)	(0.089)	(0.096)	(0.079)
Response coef	(0.173)	(0.219)	(0.224)	(0.221)	(0.174)	(0.166)	(0.137)	(0.013)	(0.255)	(0.473)	(1.064)
	(0.077)	(0.077)	(0.073)	(0.068)	(0.082)	(0.078)	(0.08)	(0.035)	(0.083)	(0.091)	(0.095)
Medians, 10 years											
Intercept	-0.227	-0.302	-0.314	-0.349	-0.24	-0.146	-0.037	-0.041	-0.298	-0.326	-0.879
	(0.088)	(0.08)	(0.076)	(0.074)	(0.088)	(0.09)	(0.091)	(0.035)	(0.092)	(0.097)	(0.065)
Lag coef	0.345	0.297	0.325	0.355	0.308	0.289	0.282	0.326	0.352	0.189	0.016
	(0.107)	(0.105)	(0.107)	(0.104)	(0.109)	(0.113)	(0.114)	(0.072)	(0.107)	(0.119)	(0.062)
Response coef	(0.384)	(0.46)	(0.44)	(0.434)	(0.424)	(0.389)	(0.33)	(0.067)	(0.527)	(0.579)	(1.754)
	(0.143)	(0.14)	(0.136)	(0.13)	(0.149)	(0.142)	(0.145)	(0.061)	(0.154)	(0.176)	(0.121)

Note: The table displays the median coefficient and standard error for every set of regressions. The "response coef" rows display the coefficients that capture responsiveness to control of the presidency, while the "lag coef" rows displays the coefficients on the lagged dependent variables.