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Terri Peretti
Santa Clara University

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DEMOCRACY-ASSISTING JUDICIAL REVIEW AND THE CHALLENGE OF PARTISAN POLARIZATION

Terri Peretti*

INTRODUCTION

A new theme has emerged in scholarly commentary on the U.S. Supreme Court and its role in American democracy.¹ This theme, which this Article calls “democracy-assisting judicial review,” emphasizes the Court’s ability to offset or compensate for democratic deficits found in the other branches of government. With American policy-making increasingly plagued by polarization and gridlock, assessing the Court’s ability to overcome democratic dysfunctions is an important task. This Article seeks to contribute to this discussion by analyzing the potential for democracy-assisting judicial review and discussing reforms that might enhance the Court’s capacity to meet the challenge of today’s polarized politics.

Part I of this Article explains the idea of democracy-assisting judicial review as expressed by several scholars, including, most recently, Professor Corinna Lain.² Part II lays out a mostly negative assessment of this notion that courts can save the people from their democracy’s failings. It observes the dominance in American politics of interbranch partisan strategies that include the Court, which thereby limit the Court’s independence and, thus, its ability and desire to play a democracy-assisting role. This “regime politics” perspective, as the Article argues, enhances our understanding of Supreme Court decision making, even in a doctrinal area typically seen as a classic example of democracy-assisting judicial review—reapportionment. Part III discusses how the rise of partisan polarization increases the need for democracy-assisting judicial review while reducing the Court’s capacity to provide it, with recent election-law decisions offering persuasive evidence. Part IV examines a variety of reforms that might improve how electoral and partisan forces shape the Court and enhance constitutional consensus building in these polarized times.

I. DEMOCRACY-ASSISTING JUDICIAL REVIEW

Professor Alexander Bickel claimed that judicial review is, problematically, a deviant institution that inevitably blocks majority will.³ His “counter-majoritarian

* © 2014 Terri Peretti. Professor of Political Science at Santa Clara University. Comments and questions can be sent to the author at tperetti@scu.edu.

¹ “Re-emerged” is probably a more accurate term given John Hart Ely’s argument that judges should protect and enhance the democratic process. *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

² Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 *GEO. L.J.* 113 (2012).

³ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1962).

difficulty” construct dominated normative constitutional debate for decades. The contrary idea that courts can actually enhance democracy or advance majority will, thus, is unexpected and requires explanation. What follows is a brief review of the work of several different scholars who have advanced a democracy-assisting role for courts, with a more in-depth summary provided for the most recent contribution by Professor Lain.⁴

A. Representation-Reinforcing Judicial Review

It is impossible to begin a discussion of how courts can improve the functioning of American democracy without mentioning John Hart Ely. His process-perfecting or “representation-reinforcing” theory of judicial review famously argued that the Supreme Court’s sole legitimate role is to correct malfunctions in the democratic process.⁵ Instead of imposing substantive values in opposition to majority preferences, the Court should merely act as “a referee . . . interven[ing] only when one team is gaining an unfair advantage, not because the ‘wrong’ team has scored.”⁶ This approach, Ely argues, is more consistent with the U.S. Constitution (which is mostly concerned with process), with democracy (since the Court is helping the people express and enforce their preferences), and with judicial capacity (as judges are “outsiders” who can better detect and correct political malfunctions).⁷

Ely instructs the Court to engage in two types of representation-reinforcing activities. First, judicial review can legitimately be used to “facilitat[e] the representation of minorities”⁸ by striking down laws resulting from legislators’ prejudice or indifference. The Court also should act to “clear[] the channels of political change” by vigorously protecting free speech and the right to vote, ensuring equal and effective representation, and holding legislators responsible for making tough policy choices.⁹ Using these guides, Ely praises the Warren Court, particularly its reapportionment and civil rights decisions, and criticizes the Burger Court’s *Roe v. Wade*¹⁰ decision that imposed substantive, rather than participational, values.¹¹

B. Upside-Down Judicial Review

Professor Lain makes no such distinction between process and substance in her “upside-down” account of judicial review.¹² Turning Bickel’s

⁴ Lain, *supra* note 2.

⁵ ELY, *supra* note 1, at 102–04.

⁶ *Id.* at 103.

⁷ *See id.* at 90–104.

⁸ *Id.* at 135.

⁹ *Id.* at 105, 132–33.

¹⁰ 410 U.S. 113 (1973).

¹¹ ELY, *supra* note 1, at 73–75, 144–49.

¹² Lain, *supra* note 2, at 175.

“countermajoritarian difficulty on its head,”¹³ she emphasizes the Court’s ability to vindicate majority preferences that have been denied by a malfunctioning legislative process.¹⁴ Central to this argument is her reversal of the institutional roles assigned by Bickel, suggesting that “the branches most majoritarian in theory may be least majoritarian in practice” and “the branch least majoritarian in theory may be most majoritarian in practice.”¹⁵ With regard to the former, she disputes the democratic pedigree of policies enacted by the elective branches due to a variety of impediments that are structural (e.g., the electoral college and equal state representation in the Senate), functional (e.g., the filibuster and congressional committee system), political (e.g., interest group influence and soaring incumbent reelection rates), and topic-specific (e.g., avoidance of issues that are “too hot” or “too cold”).¹⁶ Most of these impediments, Lain notes, “favor inertia, rendering it difficult both to pass majoritarian legislation and to repeal legislation that has later lost majoritarian backing.”¹⁷

With regard to the Court being the least majoritarian institution theoretically but the most majoritarian in practice, Lain discusses various channels of democratic influence on the Court.¹⁸ Probably most important is an appointments process in which elected officials with “mainstream policy preferences” select Justices with similar “ideological leanings,” thereby ensuring that Justices will also have mainstream policy preferences.¹⁹ Unsurprisingly, the Court “has remained relatively ideologically balanced for decades, and there is reason to think it may well stay that way.”²⁰ Additionally, its lack of enforcement powers renders political support for the Court and its decisions critically important. Furthermore, Supreme Court Justices are a product of their time and, thus, can be expected to act with “the main current of public sentiment” rather than against it.²¹ There is also “the gravitational pull of dominant public opinion,” a force to which the Court’s moderate, swing Justices have been most responsive.²² All of these factors help to explain why “the Supreme Court, ironically enough, may be better positioned to effectuate majoritarian change.”²³

Democratic impediments in the elected branches and majoritarian influences on the Court both come into play in triggering the practice of upside-down judicial review. As Lain describes this dynamic, “[w]hen widespread attitudes change but the law does not, pressure builds to effectuate that change Free of the

¹³ *Id.* at 179.

¹⁴ *Id.* at 148, 179.

¹⁵ *Id.* at 145–46, 157.

¹⁶ *Id.* at 146–57.

¹⁷ *Id.* at 157.

¹⁸ *Id.* at 157–67.

¹⁹ *Id.* at 159.

²⁰ *Id.* at 165.

²¹ *Id.* at 163–64 (quoting ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 209 (2d ed. 1994)).

²² *Id.* at 164–65.

²³ *Id.* at 183.

legislative logjams that stymie the representative branches, and moved by majoritarian proclivities of its own, the Court responds to, and reflects, prevailing norms otherwise frustrated in the democratic process.”²⁴ The Court is not restricted to perfecting democratic processes, as in Ely’s approach, but instead actually “produc[es] majoritarian results.”²⁵

For supporting evidence, Lain examines three “classic cases of the countermajoritarian difficulty”²⁶—*Brown v. Board of Education*,²⁷ *Furman v. Georgia*,²⁸ and *Roe v. Wade*—and portrays them instead as examples of upside-down judicial review. *Brown* “presents a striking example of the Supreme Court responding to, and reflecting, deep shifts in prevailing norms when the democratic process would not.”²⁹ Even though *Furman* struck down the death penalty laws of thirty-nine states and the federal government and was repudiated by subsequent legislation in thirty-five states, there was considerable evidence that the justices “were applying[] upside-down judicial review.”³⁰ Majority support for capital punishment seemed to be disappearing, and the death penalty had fallen into disuse, with prosecutors rarely willing to seek it and juries rarely willing to impose it, except for executions in the South administered primarily against poor blacks.³¹ With *Roe*, Lain says, the Court actually sided with majority sentiment in opposing harsh, century-old abortion restrictions and more recent and modest abortion regulations, neither of which commanded public support by 1973.³² Additionally, the Catholic-led right-to-life lobby was successful in stalling legislative efforts to repeal existing laws, leading politicians to be greatly relieved when the Court took this divisive issue off their hands.³³ Although these are only three examples, they obviously are important ones, and in Lain’s view, they are not exceptional. “Upside-down judicial review happens, and it happens enough to merit consideration in our normative theorizing about judicial review.”³⁴

Lain’s normative appraisal of upside-down judicial review is mixed because “[s]ome problems it makes better, others it makes worse.”³⁵ She expresses concern about the Court intruding on states’ prerogatives and weakening federalism, imposing majoritarian values instead of constitutional principles, and enabling

²⁴ *Id.* at 168.

²⁵ *Id.* at 117.

²⁶ *Id.*

²⁷ 347 U.S. 483 (1954).

²⁸ 408 U.S. 238 (1972).

²⁹ Lain, *supra* note 2, at 125.

³⁰ *Id.* at 132.

³¹ *Id.* at 126–30.

³² *Id.* at 135–37 (citing public opinion poll data to demonstrate support for elective abortions and hypothesizing that public support was due to archaic laws that endangered women who sought abortions).

³³ *Id.* at 139–43; *see also id.* at 143 (“The Supreme Court in *Roe* had indeed taken an issue from the legislature—but it was not an issue that the legislature wanted to keep.”).

³⁴ *Id.* at 178.

³⁵ *Id.* at 179.

politicians to avoid responsibility.³⁶ In the end, however, her assessment is positive: the Court “facilitates” rather than “thwarts” majority will so that “in an unexpected and upside-down way, democracy never worked so well.”³⁷

C. Majoritarian Judicial Review

Lain is not alone in highlighting the Supreme Court’s ability to enhance American democracy. Professors Barry Friedman and Jeffrey Rosen have both portrayed the Court as an institution that is highly capable of satisfying the people with its majoritarian judgments. Friedman emphasizes the “dialogic system of determining constitutional meaning” in which the Court’s decisions align with public opinion “over time.”³⁸ For Rosen, the judiciary is “the most democratic branch” and, “[f]ar from protecting minorities against the tyranny of the majority or thwarting the will of the people, courts for most of American history have tended to reflect the constitutional views of majorities.”³⁹ Courts, furthermore, are most successful when practicing “democratic constitutionalism” and deferring to the public’s views.⁴⁰ This is especially important today as a polarized Congress no longer “court[s] the moderate center” and seeks to enlist the judiciary in their extremist causes.⁴¹ Judges must, in Rosen’s view, resist this “invitation to unilateralism” because “[t]he courts can best serve the country in the future as they have served it in the past: by reflecting and enforcing the constitutional views of the American people.”⁴²

D. Second-Best Constitutionalism

A somewhat different type of democracy-assisting judicial review comes from Professor Adrian Vermuele. His idea of “second-best constitutionalism” permits courts to tolerate a particular constitutional defect or imperfection if it compensates for another imperfection and helps to bring the nation closer to a constitutional ideal.⁴³ For example, while the legislative veto may not be constitutionally sanctioned by literalism or originalism, it could nevertheless be supported as an effective offset for another entrenched constitutional deformity: excessive legislative delegation of power to the executive branch. While neither excessive

³⁶ *Id.* at 179–81.

³⁷ *Id.* at 179.

³⁸ BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 382 (2009).

³⁹ JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* xii (2006).

⁴⁰ *Id.* at 210.

⁴¹ *Id.* at 4.

⁴² *Id.* at 210.

⁴³ Adrian Vermuele, *Hume’s Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 426 (2003).

delegations nor legislative vetoes are preferred, having both more effectively achieves the constitutional goal of balanced power between Congress and the executive. Vermuele expresses some concerns about second-best constitutionalism, particularly the pursuit of constitutional goals through unconstitutional means and the capacity of judges to assess second-best constitutional arguments. However, like Lain, Rosen, and Friedman, he believes that courts can enhance the operation and performance of American democracy and, thus, accepts the possibility of defensible, democracy-assisting judicial review.⁴⁴

II. DEMOCRACY-ASSISTING REVIEW, REGIME POLITICS, AND THE CASE OF REAPPORTIONMENT

This Article applauds the efforts of scholars like Lain and Rosen to challenge the countermajoritarian difficulty and think more realistically about the actual role the Supreme Court plays in the American political system. However, these works do not go far enough. Most importantly, they fail to acknowledge the critical role of interbranch partisan strategies in American policy making. Because these strategies include the Supreme Court, its independence and the likelihood of its acting in a democracy-assisting manner are reduced. As this Article explains, the regime-politics approach places interbranch partisan activities at its center, helping to provide a more complete understanding of the Court's decisions. This will be demonstrated in a doctrinal area that is typically seen as a model of democracy-assisting judicial review—reapportionment.

A. *The Regime-Politics Approach*

Regime politics is a school of thought claiming that judicial review is politically constructed.⁴⁵ In other words, politicians seek to enhance the regime's electoral and policy success by carefully structuring, empowering, and populating courts. As Professor Mark Graber explains,

Elected officials sponsor judicial review by establishing and expanding federal jurisdiction, by nominating and confirming justices known to be willing to declare laws unconstitutional, by easing access to courts and providing resources to litigants who are making constitutional attacks on courts, by adopting procedures that enable litigants to discover and prove constitutional violations, by adopting vague statutory language that must

⁴⁴ *Id.* at 436.

⁴⁵ See KEITH E. WHITTINGTON, *THE POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2007); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 36–37 (1993); Keith E. Whittington, “Interpose Your Friendly Hand”: *Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 *AM. POL. SCI. REV.* 583, 593–94 (2005) [hereinafter *Political Supports*].

be interpreted by courts, and by refusing to pass anticourt legislation in response to public attacks on courts.⁴⁶

According to this view, constitutional law becomes a collaborative project, with courts crafting legal doctrines that aid and advance the ideological commitments they share with their partisan allies in the other branches. Judicial assistance can come in a variety of forms:

Justices impose majoritarian policies on outlier states, provide insurance when dominant coalitions suffer electoral defeats, enable elected officials to avoid taking firm stands on hotly contested political issues, provide a policymaking alternative when elected institutions are gridlocked, resolve issues lacking the political salience necessary to attract legislative attention, and facilitate position taking by announcing policies that crucial elites support but cannot publicly endorse.⁴⁷

Given that the American political system is highly fragmented and replete with veto points that enable obstruction, the opportunities for judicial assistance are abundant.

Evidence supporting the regime-politics model comes mostly from case studies that reinterpret significant episodes in constitutional history. Professor Howard Gillman, for example, has described the efforts of the Republican Party in the post-bellum period to transform federal policy and institutions to facilitate national economic development; in the face of electoral vulnerability, they entrenched their economic policy preferences by enhancing the power of federal courts and staffing them with conservatives.⁴⁸ Professor Martin Shapiro has characterized *Carolene Products'* Footnote Four as a New Deal political bargain dressed up in constitutional language; after all, it directs courts to withhold assistance from New Deal enemies (businesses) and to extend it to New Deal allies (left-leaning intellectuals, racial and ethnic minorities, and the voting masses).⁴⁹ My previous research shows that the Court's state-action doctrine in the mid-twentieth century developed in collaboration with Democratic Party leaders, especially in the executive branch. The Court first stretched state-action rules in order to reach and forbid private race discrimination (e.g., in primary elections and housing); it then tightened them once the Democratic Party freed itself from conservative Southern control, enacted the Civil Rights Act of 1964, and no longer

⁴⁶ Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 364 (2008).

⁴⁷ *Id.*

⁴⁸ Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 521–22 (2002).

⁴⁹ Martin M. Shapiro, *The Constitution and Economic Rights*, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 74, 85 (M. Judd Harmon ed., 1978).

needed the Court's assistance to accomplish its policy goals.⁵⁰ Professor Kevin McMahon explains how President Richard Nixon successfully shifted the Supreme Court in a conservative direction on the issues of greatest concern to him—busing and law and order—as part of his electoral strategy of rebuilding the Republican coalition by appealing to conservative whites in the South and working-class Catholics in the urban Northeast.⁵¹ More recent work by Professors Cornell Clayton, J. Mitchell Pickerill, and Lucas McMillan has documented how the “New Right Republican regime,” beginning with President Nixon’s election in 1968 and consolidated with President Reagan’s two victories, employed a broad and intensive judicial strategy seeking conservative legal outcomes on a variety of issues like criminal justice, federalism, religion, abortion, and affirmative action.⁵² Scholars in the comparative law field also have offered evidence that the political construction of judicial review is not a uniquely American phenomenon.⁵³ Elites in emerging democracies also empower and shape courts as a way to consolidate and protect their power.⁵⁴

The activities of courts in these regime-politics accounts represent “friendly” judicial review, rather than majoritarian judicial review. This is an important distinction. Rather than acting independently to vindicate majority will in the face of legislative failure, courts have advanced the goals and interests of the partisan regime of which they are a part. The fact that their decisions were often consistent with majority preferences is unsurprising since party regimes attain power by winning popular support. Any congruence with public opinion, however, is incidental and a product of the Court’s political dependence rather than its political independence.

B. The Case of Reapportionment

A closer look at constitutional developments in the reapportionment field helps to demonstrate these points. The Court’s reapportionment decisions are often presented as a classic tale of democracy-assisting judicial review. In *Baker v.*

⁵⁰ Terri Peretti, *Constructing the State Action Doctrine, 1940–1990*, 35 L. & SOC. INQUIRY 273, 274–75 (2010).

⁵¹ KEVIN J. MCMAHON, NIXON’S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES 148–49 (2011).

⁵² Cornell W. Clayton & Lucas K. McMillan, *The Roberts Court in an Era of Polarized Politics*, 10 FORUM J. APPLIED RES. CONTEMP. POL. 132, 132–33 (2013); Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court’s Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1386–87 (2006); see also J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSP. ON POL. 233, 240–41 (2004).

⁵³ TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 3 (2003).

⁵⁴ See *id.* at 17–21; RAN HIRSCHL, TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 11–12 (2004).

Carr,⁵⁵ the Supreme Court intervened reluctantly, problematically, but out of necessity, to compensate for a deeply rooted malfunction in the political process and sought to achieve higher constitutional ideals of fair representation and political equality.⁵⁶ This account is incomplete, however, failing to answer critical questions regarding the particular timing of the Court's intervention and its strongly egalitarian character. A regime-politics perspective that highlights interbranch partisan strategies is better able to answer those questions.

The now-familiar story begins in 1946, with *Colegrove v. Green*.⁵⁷ There, the Supreme Court rejected a challenge to Illinois's congressional districts that gave voters in the most populous district one-ninth the voting power of those in the smallest district.⁵⁸ It dismissed the complaint in a 4–3 vote, with Justice Frankfurter asserting that it was “hostile to a democratic system to involve the judiciary in the politics of the people” and famously warning that courts “ought not to enter this political thicket.”⁵⁹ He advised underrepresented urban residents to pursue reform through the ballot box and the political process, not the courts.⁶⁰ A dramatic change occurred in 1962 in *Baker v. Carr*. Memphis residents had claimed a denial of equal protection due to the Tennessee legislature's failure to redistrict, despite major population shifts since the last redistricting in 1901 that rendered their vote one-tenth the value of that of rural residents.⁶¹ After a lengthy and discordant decision-making process,⁶² the Court ruled in a 6–2 vote that malapportionment was indeed a justiciable issue.⁶³ Justice Clark initially sided with Justice Frankfurter but switched his vote because, as explained in his concurrence, voters had no practical avenues for reform and were “caught up in a legislative strait jacket.”⁶⁴ Tennessee had no initiative or referendum,

⁵⁵ 369 U.S. 186 (1962).

⁵⁶ *See id.* at 236–37.

⁵⁷ 328 U.S. 549 (1946).

⁵⁸ *Id.* at 556; *id.* at 569 (Black, J., dissenting).

⁵⁹ *Id.* at 553–54, 556.

⁶⁰ *See id.* at 556.

⁶¹ *Id.* at 193–95.

⁶² Some accounts credit the *Baker* case for Justice Whittaker's health problems and early retirement, and Justice Frankfurter reportedly blamed *Baker* for the two strokes he suffered fewer than two weeks later. *See, e.g.,* Kim I. Esler, *A Defense of Activism*, 40 N.Y.L. SCH. L. REV. 911, 920 n.25 (1996) (“Whittaker quit and Frankfurter suffered a stroke, presumably related to the stress of the defeat.”); Carlo A. Pedrioli, *Instrumentalist and Holmesian Voices in the Rhetoric of Reapportionment: The Opinions of Justices Brennan and Frankfurter in Baker v. Carr*, 4 ALA. C.R. & C.L. L. REV. 1, 31 n.327 (2013) (“According to Solicitor General Archibald Cox, a former mentee of Justice Frankfurter, Frankfurter expressed to Cox that *Baker* had been responsible for the justice's deteriorating health.”).

⁶³ *Baker*, 369 U.S. at 237.

⁶⁴ *Id.* at 259 (Clark, J., concurring); Memorandum from Justice Tom C. Clark to Justice Felix Frankfurter (Mar. 7, 1962), available at http://tarlton.law.utexas.edu/clark/vie_w_doc.php?id=a120-02-02 (explaining the decision not to join the dissent in *Baker v. Carr*).

constitutional conventions could only be called by the legislature, and state courts had refused to intervene.⁶⁵

Questions quickly emerged over an appropriate judicial remedy, with the Court providing considerable clarity by 1964. In *Wesberry v. Sanders*,⁶⁶ the Court interpreted the requirement in Article I, Section 2, that representatives be chosen “by the People of the several States” to mean that “as nearly as is practicable[,] one man’s vote in a congressional election is to be worth as much as another’s.”⁶⁷ Thus, House districts were bound by the “one person, one vote” principle of equal representation. In *Reynolds v. Sims*,⁶⁸ the Court extended this principle to state legislatures, requiring districts in both houses to be “as nearly of equal population as is practicable.”⁶⁹ Even when overwhelmingly approved by voters themselves, deviation from this standard was not allowed.⁷⁰ The Court additionally required a very high degree of mathematical precision in the drawing of legislative districts, at least for the House of Representatives. For example, it struck down a plan in *Kirkpatrick v. Preisler*⁷¹ with an average interdistrict disparity of 1.6%⁷² and another in *Karcher v. Daggett*⁷³ where the largest disparity was 0.7%.⁷⁴ The Court’s remedy was clearly and strictly egalitarian.

Baker and its progeny appear to be a good fit for a democracy-assisting judicial review framework. First, there clearly existed an entrenched democratic malfunction. Massive migration had occurred from rural to urban areas in the first half of the twentieth century, and the traditional approach of representing geographic entities, such as towns and counties, produced severe malapportionment.⁷⁵ Additionally, legislative incumbents and their rural constituencies had no incentive to address this problem, and “inequities in representation . . . widened substantially;” in fact, the largest interdistrict disparity in terms of representation per resident grew “from 6 to 1 in 1910 to 20 to 1 in 1950, and then to 35 to 1 in 1960.”⁷⁶ Legislatures at the mid-twentieth century mark were, as Professor Lucas Powe writes, “ruled ‘by the hog lot and the cow

⁶⁵ *Baker*, 369 U.S. at 259 (Clark, J., concurring).

⁶⁶ 376 U.S. 1 (1964).

⁶⁷ *Id.* at 7–8.

⁶⁸ 377 U.S. 533 (1964).

⁶⁹ *Id.* at 577.

⁷⁰ See *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 739 (1964) (holding that the Equal Protection Clause guarantees an individual’s right to cast an equally weighted vote, even though the majority of Colorado’s electorate approved the apportionment scheme).

⁷¹ 394 U.S. 526 (1969).

⁷² *Id.* at 529 n.1.

⁷³ 462 U.S. 725 (1983).

⁷⁴ *Id.* at 728.

⁷⁵ See STEPHEN ANSOLABEHRE & JAMES M. SNYDER JR., *THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS* 39–40 (2008).

⁷⁶ *Id.* at 31.

pasture.”⁷⁷ The policy consequences were predictable: significantly lower per capita state spending in metropolitan areas and a nationwide failure to address pressing urban problems involving race, poverty, education, and housing.⁷⁸

Federal court intervention was seen as an imperfect but necessary “second-best” solution, with the Court itself employing democracy-assisting language in defending its decisions.

We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us. . . . To the extent that a citizen’s right to vote is debased, he is that much less a citizen. . . . A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains . . . the weight of a citizen’s vote cannot be made to depend on where he lives. . . . This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln’s vision of “government of the people, by the people, [and] for the people.”⁷⁹

Rather than careful analysis rooted in the text and its original meaning, the post-*Baker* cases offered the irrefutable logic of democratic principles. In *Reynolds*, for example, Chief Justice Earl Warren explained that it was only “logical[]” and “reasonable that a majority of the people of a State could elect a majority of that State’s legislators.”⁸⁰ Similarly, given that “the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system,” it was “inconceivable” that a state law that in effect multiplies some citizens’ votes “by two, five, or 10 . . . could be constitutionally sustainable.”⁸¹ Justice John Marshall Harlan’s persuasive historical analysis to the contrary would not stand in the way of such inexorable democratic commands.

The Court’s revolutionary reapportionment decisions were quickly accepted and widely praised. By 1967, “every state had complied with the philosophy expressed by the Court . . . [and] adopted state legislative and U.S. House districts with nearly equal populations.”⁸² Improved representational accuracy in turn helped to bring about a more equitable distribution of revenues within states and an increase in education and welfare spending in the Midwest and Northeast.⁸³ Perhaps it is not surprising then that former Chief Justice Earl Warren spoke of

⁷⁷ LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 200 (2000) (citation omitted).

⁷⁸ See ANSOLABEHRE & SNYDER, *supra* note 75, at 89–90.

⁷⁹ *Reynolds v. Sims*, 377 U.S. 533, 566–68 (1964).

⁸⁰ *Id.* at 565.

⁸¹ *Id.* at 562.

⁸² ANSOLABEHRE & SNYDER, *supra* note 75, at 95.

⁸³ *Id.* at 233–38.

Baker v. Carr as the “most important case of my tenure on the Court.”⁸⁴ The Court has also received mostly positive marks from legal scholars, including Ely, who regarded malapportionment as precisely the sort of representational defect the Court should correct, and Rosen, who viewed the Court’s efforts to “break the political logjam” over redistricting as evidence of its “ability to promote democracy.”⁸⁵

The democracy-assisting version of the reapportionment story has limitations, however. For example, it fails to help us answer a simple but important question: why 1962, rather than 1952 or 1942 or 1932 or 1922? After all, malapportionment was a serious nationwide problem well before 1962. In fact, Congress failed to reapportion House seats after the 1920 census, which had revealed majority status for urban residents for the first time in history.⁸⁶ Malapportionment then worsened considerably over the next four decades and existed in the House of Representatives and in nearly every state legislative house.⁸⁷ Why, then, had the Court waited until the 1960s to intercede and employ democracy-assisting review? And why did it choose such a strict egalitarian standard, despite the existence of “the federal analogy” (i.e., the Senate) and the absence of a clear equality mandate from the Constitution’s text and history?

The Court’s timing and its egalitarianism make sense, however, when we adopt a regime-politics lens and reflect on the electoral success, policy aims, and interbranch strategies of the Democratic regime. From 1932 through 1964, the Democratic Party experienced extraordinary success in national elections, winning the White House seven out of nine times and control of both houses of Congress sixteen out of eighteen times.⁸⁸ That success paid off handsomely in terms of partisan control of the judiciary. Especially relevant to the timing issue, President Kennedy’s replacement in 1962 of Justice Charles Whittaker with Justice Byron White and Justice Felix Frankfurter with Justice Arthur Goldberg had an enormous impact on the ideological composition and direction of the Supreme Court. The percentage of conservative decisions made by the Court fell from 42% in the 1960 term to 22% in the 1962 term.⁸⁹ Using Martin-Quinn ideology scores (with negative numbers indicating a liberal orientation and positive numbers indicating a conservative orientation), the ideological location and identity of the median Justice changed dramatically from 0.533 (Justice Stewart) in the 1960 term to -0.046 (Justice White) in the 1961 term, to -0.808 (Justice Goldberg) in the 1962

⁸⁴ EARL WARREN, *THE MEMOIRS OF EARL WARREN* 306 (1977).

⁸⁵ ELY, *supra* note 1, at 77–88, 116–25; ROSEN, *supra* note 39, at 126.

⁸⁶ ANSOLABEHRE & SNYDER, *supra* note 75, at 39 (“In 1920, for the first time, the Census counted more people in cities than in farms and rural towns.”).

⁸⁷ *See id.* at 30–31.

⁸⁸ Republicans won the presidential election in 1952 and 1956 and control of both houses of Congress in 1946 and 1952. *THE CONCISE PRINCETON ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY* 469–70 (Michael Kazin et al. eds., 2011).

⁸⁹ *Analysis Specifications*, SUPREME COURT DATABASE, <http://www.scdb.wustl.edu/analysis.php> (allowing analysis of case outcomes by term) (last visited Apr. 23, 2014).

term, and to -0.874 (Justice Brennan) in the 1963 term.⁹⁰ The Court's strong shift to the left should not be a surprise, given Democratic domination at the polls and, thus, Democratic control of judicial appointments.

The timing of the Court's intervention also makes sense when we look at the leadership and cooperation of the Kennedy administration with respect to redistricting. President Kennedy made "the crisis of the cities" an important part of his presidential campaign, and he wooed the urban vote, beginning when he was a senator in the late 1950s.⁹¹ He claimed that the litany of ills plaguing America's cities—crime, poverty, overcrowding, scarce housing, and inferior education—were caused by "political discrimination" against and underrepresentation of the urban majority.⁹² Once in power, President Kennedy lent support to the reapportionment cause. One of the lawyers in the *Baker* case knew Attorney General Robert Kennedy and had worked with Solicitor General Archibald Cox on President Kennedy's presidential campaign.⁹³ The *Baker* attorneys had hoped, but were unable, to discuss their case and cause with Attorney General Kennedy.⁹⁴ They nonetheless had a lengthy meeting with Solicitor General Cox and Deputy Attorney General Byron White.⁹⁵ After discussing the matter with the Attorney General, Cox decided to file an amicus brief in the *Baker* case.⁹⁶

The Kennedy administration vigorously argued in *Baker* for judicial assistance in correcting the representational distortions created by legislators' refusal to redistrict and offered enthusiastic support for the ruling after the decision was made.⁹⁷ President Kennedy expressed his approval of *Baker* at his first press conference following the decision, reminding the public and press that his administration had urged the Court to do the right thing and intervene since "the right to fair representation and to have each vote counted equally is, it seems to me, basic to the successful operation of a democracy."⁹⁸ Other executive branch officials publicly praised the ruling as well, including Robert Kennedy, who stated

⁹⁰ These data come from The 2012 Justice Data Files compiled by Professors Martin and Quinn, available at <http://mqscores.wustl.edu/media/2012/justices.xls>. Martin-Quinn scores provide a widely used measure of judicial ideology. Their Bayesian model generates ideal point estimates for each Justice that are dynamic—varying for each term—and which are derived from the Justices' actual votes and inferred from the patterns of voting coalitions. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 145–52 (2002); *Martin-Quinn Scores*, WASH. U., <http://mqscores.wustl.edu/measures.php> (last visited Apr. 23, 2014).

⁹¹ See ANSOLABEHERE & SNYDER, *supra* note 75, at 89.

⁹² John F. Kennedy, *The Shame of the States*, N.Y. TIMES MAG., May 18, 1958, at 12, 37.

⁹³ ANSOLABEHERE & SNYDER, *supra* note 75, at 1, 4.

⁹⁴ *Id.* at 4.

⁹⁵ *Id.*

⁹⁶ *Id.* at 5.

⁹⁷ Whittington, *Political Supports*, *supra* note 45, at 588–89.

⁹⁸ *Id.* at 589.

that *Baker* was “a landmark in the development of representative government.”⁹⁹ The administration stayed active in the reapportionment litigation that followed,¹⁰⁰ and President Kennedy’s view that each vote should count equally became Court doctrine.

Baker, *Wesberry*, and *Reynolds* are indeed majoritarian decisions, but not in the sense employed by Lain and Rosen. The Court did not respond directly to popular pressure or seek, virtuously and independently, to vindicate democratic values. Rosen’s complaint that the Court need not have been so rigidly egalitarian and could have used the Guarantee Clause to open a dialogue with state legislatures¹⁰¹ shows his misreading of the Court’s policy interventions in this area. By 1964, the Court consisted solidly of active and loyal members of the dominant Democratic regime. As Powe puts it, the Warren Court was “a functioning part of the Kennedy-Johnson liberalism”¹⁰² pursuing civil rights and the Great Society and battling Southern outliers on issues of race, religion, and criminal justice. Strict equality, imposed by the *judicial* members of this broad, powerful, and united Democratic coalition, should not be a surprising policy choice. Furthermore, and as Whittington points out, *Baker* is not an example of the Court “simply acting on behalf of popular majorities;” rather, it “cut[] through the ‘political thicket’” assisting “liberal Democrats who had long chafed [*sic*] at the legislative obstacle posed by entrenched conservatives.”¹⁰³

Finally, the implementation and impact of the Court’s reapportionment decisions had a decidedly Democratic cast, lending further support to a regime-politics interpretation. Professors Gary Cox and Jonathan Katz found significant effects resulting from the fact that redistricting plans were being evaluated and supervised by federal judges, who mostly belonged to the Democratic Party (again, a legacy of its longstanding electoral success).¹⁰⁴ With *Baker*, the Supreme Court changed the strategic redistricting game by introducing a new player: federal court judges. It was no longer the case that previous district lines would stay in place if the legislature and governor could not agree to a new plan. Now a federal judge, and most likely a Democratic judge, could impose a new plan. This “reversionary outcome” affected the negotiation process, with the legislature sometimes agreeing to a new plan to avoid a worse plan that a (probably) Democratic judge might impose.¹⁰⁵ In the end, three factors—the *Baker* decision, a predominantly Democratic federal judiciary, and the 1964 Democratic landslide—combined to produce “the abrupt eradication of a 6% pro-Republican bias in the translation of

⁹⁹ POWE, *supra* note 77, at 204.

¹⁰⁰ See Whittington, *Political Supports*, *supra* note 45, at 589.

¹⁰¹ See ROSEN, *supra* note 39, at 127–28.

¹⁰² POWE, *supra* note 77, at 494.

¹⁰³ Whittington, *Political Supports*, *supra* note 45, at 588.

¹⁰⁴ See GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY’S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* 72–81 (2002).

¹⁰⁵ See *id.* at 25–26, 32.

congressional votes into seats outside the South.”¹⁰⁶ Professors Cox and Katz convincingly portray judges, not as neutral democracy-assisting reformers, but as regime allies in a strategic partisan game.

III. DEMOCRACY-ASSISTING REVIEW IN THE MODERN POLARIZED ERA

What accounts for the persistence of the idea of democracy-assisting judicial review, given that it cannot adequately explain one of its presumably best examples? The timing of its reemergence in constitutional commentary is neither surprising nor accidental. The United States finds itself amid what many regard as a severe political crisis, with polarization among partisan elites playing a central role.¹⁰⁷ The hope that courts can resolve or ameliorate this crisis is understandable, but it is futile given that polarized elites construct and shape those judicial institutions. Recent election-law decisions are particularly instructive on this point.

A clear sign of the current political crisis is found in public opinion surveys showing that three-quarters of Americans are “dissatisfied with the way things are going in the United States at this time,”¹⁰⁸ and 14% of Americans approved of Congress’s job performance in 2013, the lowest annual average since Gallup began measuring it in 1974.¹⁰⁹ Many blame partisan polarization.¹¹⁰ The two major parties have become more internally united, while also becoming more ideologically distant from each other.¹¹¹ Put another way, there are very few moderates left in Congress to help forge a path to legislative compromise. As a result, many issues (most conspicuously, those involving the budget) spark heated debate and intractable disputes, with Republicans and Democrats unable to reach agreement and, at times, unwilling to talk to one another. The federal government was forced to shut down for sixteen days in October 2013, and a disastrous

¹⁰⁶ *Id.* at i. This partisan impact then persisted as a result of the pro-incumbent orientation of the redistricting that followed the 1970 and 1980 censuses.

¹⁰⁷ See generally THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 43–45 (2012) (describing the trend of political “hostage taking” by political elites during recent political crises, such as the debt limit crisis of 2011, where the country’s credit was put in jeopardy as a bargaining tactic).

¹⁰⁸ *Satisfaction with the United States*, GALLUP, <http://www.gallup.com/poll/1669/general-mood-country.aspx> (last visited Mar. 27, 2014).

¹⁰⁹ Frank Newport, *Congress Job Approval Drops to All-Time Low for 2013*, GALLUP (Dec. 10, 2013), <http://www.gallup.com/poll/166196/congress-job-approval-drops-time-low-2013.aspx>. In November 2013, public approval of congressional job performance dropped to 9%, a record low over the last forty years. *Id.*

¹¹⁰ Geoffrey Layman et al., *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 ANN. REV. POL. SCI. 83, 100–01 (2006).

¹¹¹ *Id.* at 87; see also MORRIS P. FIORINA & SAMUEL J. ABRAMS, *DISCONNECT: THE BREAKDOWN OF REPRESENTATION IN AMERICAN POLITICS* (2009); Richard Fleisher & Jon R. Bond, *Congress and the President in a Partisan Era*, in *POLARIZED POLITICS: CONGRESS & THE PRESIDENT IN A PARTISAN ERA* 2–6 (Jon R. Bond & Richard Fleisher eds., 2000).

financial default was narrowly averted with a last-minute extension of the federal debt limit.¹¹² Polarization, divided government, and the Senate filibuster have presented an extraordinary challenge even for ordinary lawmaking. Congressional gridlock, in turn, has triggered additional problems for democratic governance, including an increased likelihood of unilateral action by a frustrated president.¹¹³ Whether these dysfunctions are a product of an increase in partisan polarization or are constitutionally hardwired as some have argued,¹¹⁴ there are few who do not believe that the American political system is broken and in need of repair.

Given its traditional reputation for independence and impartiality, the judiciary presents an appealing savior. A special democracy-assisting function enables courts to rescue the people from their dysfunctional politics while easing concerns about the democratic legitimacy of the court's intervention. Relying on the judiciary, particularly the Supreme Court, to save America from its polarized politics, however, offers false hope. To the degree that the regime-politics model is valid, the Court is an integral part of the partisan coalitions that dominate American democracy, which means it is also an integral part of the polarized politics that currently dominate American democracy. How, then, could it have the capacity or motivation to fix the dysfunctional politics of which it is a part?¹¹⁵

Recent election-law decisions are illustrative. Professor Garrett Epps claimed that—whether in campaign finance, voting rights, or partisan gerrymandering—the Roberts Court has significantly contributed to “the train wreck that is 21st century American democracy. . . . [W]hen we lament polarization, the declining respect for democracy, the bitterness of the national dialogue, the dominance of money in politics, and the life-and-death struggle over the right to vote, we are lamenting trends either born in or enabled by the Supreme Court.”¹¹⁶ In support of Epps' claim, there is *Citizens United v. Federal Election Commission*,¹¹⁷ in which the Court removed limits on independent campaign expenditures by corporations and labor unions from the 2002 Bipartisan Campaign Finance Reform Act, allowing

¹¹² Tom Cohen et al., *Obama Signs Bill to End Partial Shutdown, Stave off Debt Ceiling Crisis*, CNN (Oct. 17, 2013, 12:51 AM), <http://www.cnn.com/2013/10/16/politics/s-hutdown-showdown/>.

¹¹³ Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLIAMETTE L. REV. 395, 408–11 (2009).

¹¹⁴ See FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* 3 (1999); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 77 (2006).

¹¹⁵ Justice Scalia's complaint in a 2013 *New York Magazine* interview about the nastiness in Washington, unaccompanied by any awareness of his contribution to it, is an excellent example. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/>.

¹¹⁶ Garrett Epps, *The Supreme Court's Key Role in Polarizing American Politics*, THE ATLANTIC (Sept. 27, 2013, 7:00 AM), <http://www.theatlantic.com/politics/archive/2013/09/the-supreme-courts-key-role-in-polarizing-american-politics/280014/>.

¹¹⁷ 558 U.S. 310 (2010).

nearly a billion dollars of independent spending to flow into the 2012 election process, half from super PACs and most invested in negative advertising.¹¹⁸ In *Crawford v. Marion County Board of Elections*,¹¹⁹ the Court upheld Indiana's photo identification law and opened the floodgates for new voter identification laws throughout the states.¹²⁰ And in *Shelby County v. Holder*,¹²¹ the Court effectively freed many states and localities of preclearance requirements under the Voting Rights Act by striking down Section 4(b)'s preclearance coverage formula, spawning new voting restrictions, particularly in the South.¹²² It is difficult to argue that the Roberts Court enhanced democracy with these decisions.

It is particularly difficult to claim that, with these decisions, the Roberts Court acted to rescue the people from political dysfunction or partisan stalemate, as suggested by Lain's version of democracy-assisting judicial review. Regarding *Shelby County*, for example, Congress had reauthorized the preclearance requirements of the Voting Rights Act on four occasions,¹²³ including in 2006 when it extended Section 5 for another twenty-five years.¹²⁴ Whether motivated by "racial entitlement" or not,¹²⁵ Congress voted overwhelmingly for the extension, with a 92% affirmative vote in the House and a unanimous vote in the Senate.¹²⁶ In contrast to this extraordinary congressional consensus, the Supreme Court's vote was sharply divided and highly partisan. The five Republican Justices, all appointed by Republican presidents, voted to invalidate the preclearance coverage formula, while the four Democratic Justices, all appointed by Democratic presidents, voted to uphold it.¹²⁷

¹¹⁸ SAMUEL KERNELL ET AL., *THE LOGIC OF AMERICAN POLITICS* 667 (6th ed. 2014).

¹¹⁹ 553 U.S. 181 (2008).

¹²⁰ *Id.* at 203–05.

¹²¹ 133 S. Ct. 2612 (2013).

¹²² *See id.* at 2631.

¹²³ Extensions were approved by Congress in 1970, 1975, 1982, and 2006. *Id.* at 2620–21.

¹²⁴ *See id.* at 2621.

¹²⁵ This was Justice Scalia's controversial characterization at oral argument. *See* Sean Lengell, *Scalia 'Racial' Comment on Voting Rights Law Draws Fire*, WASH. TIMES (Feb. 28, 2013), <http://www.washingtontimes.com/news/2013/feb/28/scalia-racial-comment-draws-fire/>.

¹²⁶ 152 CONG. REC. S8012 (daily ed. July 20, 2006); *see also* 152 CONG. REC. H5207 (daily ed. July 13, 2006) (reporting a vote count of 390 ayes, 33 nays, and 9 not voting); Charles Babington, *Voting Rights Act Extension Passes in Senate, 98 to 0*, WASH. POST (July 21, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/20/AR2006072001217.html>; Raymond Hernandez, *After Challenges, House Approves Renewal of Voting Act*, N.Y. TIMES (July 15, 2006), http://www.nytimes.com/2006/07/14/washington/14rights.html?_r=0 (stating the House voted 390–33 to renew the expiring provisions of the Voting Rights Act).

¹²⁷ *See Shelby Cnty.*, 133 S. Ct. at 2617 (Roberts, C.J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Alito, JJ., joined. Thomas, J., filed a concurring opinion. Ginsburg, J., filed a dissenting opinion, in which Breyer, Sotomayor, and Kagan, JJ. joined.).

While the Court's recent election-law decisions are difficult to characterize as democracy-assisting, they are much easier to characterize as partisan. It certainly appears that in *Crawford*, *Citizens United*, and *Shelby County*, a Republican-dominated Court decided consistently with policy positions advanced by the Republican Party, whether in its national platforms, amicus briefs, or legislative proposals.¹²⁸ This is an unsurprising result of the fact that party elites do not appoint democracy assisters to the bench. Especially in polarized times, politicians will seek to appoint copartisans who share the party's (increasingly off-center) ideological commitments and believe in its (increasingly off-center) constitutional vision. The Republican Party, furthermore, has over the last half-century strongly featured judicial philosophy in its "party brand."¹²⁹ In communicating that brand to voters and supporters, Republican presidents have mostly nominated strong conservatives to the Court—Warren Burger, William Rehnquist, Robert Bork, Douglas Ginsburg, Antonin Scalia, Clarence Thomas, John Roberts, and Samuel Alito. On rare occasion, they have made strategic mistakes, like Justices David Souter and Harry Blackmun. They have sometimes chosen moderates, like Justices Anthony Kennedy and John Paul Stevens, but only when forced to by a Democratic Senate. The result today, factoring in the White House victories of Presidents Clinton and Obama, is a Roberts Court that is both very conservative and very divided—exactly like the electoral politics that produced it.¹³⁰ Such a Court is unlikely and unable to act as an external and independent mechanism for fixing the dysfunctional politics of which it is a part.

IV. FINDING CONSTITUTIONAL CONSENSUS IN A POLARIZED POLITY

Given this reality, it seems wise to abandon the democracy-assisting idea and focus instead on more pressing challenges for judicial review in a polarized polity. One such challenge is how to protect the Court from being easily captured by extreme and unrepresentative partisan elements, a concern echoed by Rosen.¹³¹ Such a Court may risk its public legitimacy as it comes to look more and more like Congress in that it, too, is sharply divided into two distinct and distant partisan groupings.¹³² Such a Court might also produce what Mark Graber calls "constitutional yo-yos" or "dramatic swings in judicial policy making."¹³³

¹²⁸ This is not to claim that the Justices are engaging in crass partisan favoritism. Rather, the process by which Justices come to share the beliefs and preferences of their copartisans and express them in their decisions is a subtler one, which Professor Richard Hasen refers to as "subconscious bias." RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 34 (2012).

¹²⁹ James B. Cottrill & Terri J. Peretti, *The Partisan Dynamics of Supreme Court Confirmation Voting*, 34 JUST. SYS. J. 15, 15 (2013).

¹³⁰ Clayton & McMillan, *supra* note 52, at 132.

¹³¹ ROSEN, *supra* note 39, at 210.

¹³² Barry Friedman, *Why Are Americans Losing Trust in the Supreme Court?*, THE NATION (June 18, 2012), <http://www.thenation.com/article/168463/why-are-americans-losing-trust-supreme-court#>; David Paul Kuhn, *The Incredible Polarization and Politicization*

Partisan polarization threatens the ongoing (and endless) process of finding, building, and expressing consensual constitutional values in the United States. An important, though not exclusive, part of that process is the appointment of new Supreme Court Justices. The way the Constitution structures judicial appointments ensures that the party winning the White House and Senate also wins the right to influence the Supreme Court. The opportunity to plant its constitutional vision on the Court is one of its electoral prizes.¹³⁴ As popular preferences change and party fortunes ebb and flow, new Justices and new viewpoints are added to the Court. If a party is able to build a successful and durable electoral coalition, as the Democratic Party did with its New Deal coalition, it will be able to exert significant control over the courts and secure its desired constitutional policies. The problem with partisan polarization is that it can distort this process of planting constitutional values on the Court and building a constitutional consensus. An off-center, unrepresentative President will try to plant off-center, unrepresentative constitutional values on the Court. If an off-center, unrepresentative Senate cooperates with that endeavor, we face a significant problem for democracy and for constitutional consensus building, particularly given the increasingly lengthy terms served by the Justices.

This Symposium invited participants to think about reforms or adaptations that would improve institutional performance in polarized times. This Article does so without a concern for the likelihood of their adoption. This was, ironically, a product of an initial pessimism about the reform enterprise. After all, any reform would need to be adopted by America's gridlocked political process—a highly unlikely outcome. Instead of giving up and dispensing with the entire exercise, however, this Article chooses to accept the invitation and freely and openly consider a variety of reforms that could aid and support representational, consensus-building processes.

To that end, the remainder of this Part discusses three types of reforms that (a) increase and regularize turnover on the Court, (b) promote the appointment of more representative Justices, and (c) help to elect more representative presidents and senators. These reforms do not seek to weaken the partisan and electoral forces that operate on the Court since those forces help to keep judicial review democratically accountable. Rather, they aim to improve the way they work in an increasingly polarized environment.

Supreme Court Turnover. It seems logical to expect that successful party regimes will inevitably and regularly receive appointment opportunities that enable them to shape the Court. The historical record tells a different story. Because Article III leaves the Justices free to depart whenever they please, the timing of

of the Supreme Court, THE ATLANTIC (Nov. 6, 2013), <http://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/>.

¹³³ Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOW. L.J. 661, 665 (2013).

¹³⁴ I have more fully developed this argument elsewhere. TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999).

vacancies is left nearly to chance. That is especially true for “distal” vacancies—those in which a President is able to “move the Court median” because the departing Justice resides at or on the opposite side of the Court median from the president.¹³⁵ Some presidents have been granted no vacancies at all (President Carter) or no distal vacancies, even when winning two terms (Presidents Eisenhower, Clinton and, thus far, Obama). Other presidents have been blessed with multiple vacancies (President Reagan) or even multiple distal vacancies (President Kennedy), even when lacking partisan control of Congress (Presidents Nixon and H.W. Bush).

The problem with this unequal distribution of appointment opportunities is that the process by which the Court is regularly “refreshed” with new values either moves too fast or too slow. The values and preferences expressed in multiple elections might be underrepresented on the Court if no vacancies occur, as was the case during an eleven-year span from 1994 to 2005. Values and preferences expressed in a single election, like President Nixon’s in 1968, might receive more representation than they deserve, for example, with the four distal vacancies President Nixon received in his first term.¹³⁶ This is especially problematic if extreme party elites have momentarily gained power yet are able to gain long-term representation of their constitutional views.

Several law professors have proposed solving this problem by replacing life tenure with eighteen-year staggered terms, enabling a new Justice to be appointed every two years.¹³⁷ Regularized turnover would equalize presidential influence over the Court and tie its membership and policy direction directly and consistently to presidential election outcomes. It also offers a safeguard in polarized times; should extreme partisan elites momentarily gain power, chance could not bless them with multiple appointment opportunities since those must be earned with multiple election victories.

More Representative Supreme Court Appointees. There is sizable literature advancing the idea that the judicial selection process is broken; complaints mostly focus on Senate confirmation, especially the high level of partisan rancor; endless delays and gridlock; and the lack of meaningful dialogue and debate.¹³⁸ Reform

¹³⁵ Keith Krehbiel, *Supreme Court Appointments as a Move-the-Median Game*, 51 AM. J. POL. SCI. 231, 232–36 (2007).

¹³⁶ Terri Peretti, *Distal Vacancies, Partisan Regimes, and Supreme Court Ideology* 17, 26 tbl.1 (Apr. 21, 2011) (unpublished) (on file with the Utah Law Review).

¹³⁷ Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, in REFORMING THE SUPREME COURT 15, 17 (Roger C. Cramton & Paul D. Carrington eds., 2006); 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, 1096–97 (2004).

¹³⁸ STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS*, ix–xiii (1994); BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* 8–15 (2006).

proposals abound and include banning the judicial filibuster,¹³⁹ hiring expert counsel to question nominees,¹⁴⁰ generating better questions,¹⁴¹ expediting confirmation for nominees drawn from a Senate-approved list,¹⁴² eliminating televised Senate hearings,¹⁴³ adopting a supermajority requirement,¹⁴⁴ and even electing Supreme Court Justices.¹⁴⁵

If political feasibility is not an issue, we might first consider whether the Senate is even the appropriate institution to confirm judicial nominees. Equal state representation is a significant representational distortion, one that, according to Professors Frances Lee and Bruce Oppenheimer, has enabled more conservative Supreme Court Justices like Justices Clarence Thomas and Samuel Alito to be appointed than would have resulted from a more representative body.¹⁴⁶ Some might consider the House to be superior in this respect. However, it also suffers from partisan polarization and a strong localistic perspective that might render it even less effective than the Senate in a confirmation role. The better solution might be to improve the representational qualities of the Senate.

Of all the proposals to improve the Senate confirmation process, the most promising is a supermajority vote requirement of either three-fifths or two-thirds. This change is intended to encourage presidents to choose more confirmable and, thus, presumably more consensual, nominees. Some argue that we already have, in

¹³⁹ John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 188, 212 (2003).

¹⁴⁰ David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1519 (1992).

¹⁴¹ CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 164–77 (2007).

¹⁴² Glenn Harlan Reynolds, *Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process*, 65 S. CAL. L. REV. 1577, 1579–80 (1992); Michael Teter, *Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process*, 73 OHIO ST. L.J. 287, 303–04 (2012).

¹⁴³ See WITTES, *supra* note 138, at 13–14.

¹⁴⁴ Calvin R. Massey, *Commentary, Getting There: A Brief History of the Politics of Supreme Court Appointments*, 19 HASTINGS CONST. L.Q. 1, 14 (1991); Gary J. Simson, *Thomas's Supreme Unfitness—A Letter to the Senate on Advice and Consent*, 78 CORNELL L. REV. 619, 649–50 (1993); Brent Wible, *Filibuster vs. Supermajority Rule: From Polarization to a Consensus- and Moderation- Forcing Mechanism for Judicial Confirmations*, 13 WM. & MARY BILL RTS. J. 923, 958–59 (2005); Judith Resnik, *Supermajority Rule*, N.Y. TIMES, June 11, 2003, at A31.

¹⁴⁵ RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* 170–72 (2005).

¹⁴⁶ *Cf.* LEE & OPPENHEIMER, *supra* note 114, at 115–21 (finding that Senate apportionment creates a partisan bias that enables the party more favorable in small states to have disproportionate Senate representation, compared to the party's popularity among the general population, and noting that the Republican Party benefited from this partisan bias from 1959 to 1992).

effect, a two-thirds requirement given the ever-present filibuster threat.¹⁴⁷ With only one exception, however—the nomination of Associate Justice Abe Fortas for the Chief Justice seat in 1968—the filibuster has only been used for lower-court nominees, not Supreme Court nominees.¹⁴⁸ This has it exactly backwards. It is the Supreme Court, with its greater power to set constitutional policy, whose nominees demand a higher level of Senate approval compared to lower-court nominees.¹⁴⁹

So what difference would a supermajority requirement have made with respect to recent Supreme Court appointments? A three-fifths rule requiring sixty senators to confirm would have kept both Justices Alito and Thomas off the bench, as the former received only fifty-eight votes and the latter only fifty-two votes; perhaps those seats would have gone to more moderate nominees.¹⁵⁰ In addition to Justices Alito and Thomas, a two-thirds confirmation rule requiring sixty-seven votes would have kept Justice Kagan (with only sixty-three votes) off the Court, as well as Justice Rehnquist (with only sixty-five votes) out of the Chief Justice seat.¹⁵¹ Because a higher threshold would change the dynamics of the confirmation process, it could also have put Justices Sotomayor and Rehnquist (as associate Justice) at risk for Senate rejection, as they each received only sixty-eight votes.¹⁵²

A supermajority rule is intended to encourage presidents to avoid choosing extreme or controversial Supreme Court nominees and to favor more moderate and mainstream candidates who are likely to command Senate support. For example, even a three-fifths requirement could have convinced President Reagan not to nominate Robert Bork and offer instead a more moderate candidate, which of course the Senate ultimately required him to do.¹⁵³ An underlying assumption of

¹⁴⁷ See, e.g., John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 CARDOZO L. REV. 543, 546–47 (2005).

¹⁴⁸ See Christine Kexel Chabot, *A Long View of the Senate's Influence Over Supreme Court Appointments*, 64 HASTINGS L.J., 1229, 1242–43 (2013); Evan Harris, *First President in US History to Have Voted to Filibuster a Supreme Court Nominee Now Hopes for Clean Process*, ABC NEWS (May 30, 2009, 1:08 PM), <http://abcnews.go.com/blogs/politics/2009/05/first-president-in-us-history-to-have-voted-to-filibuster-a-supreme-court-nominee-now-hopes-for-clea/>; Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html (noting that obstruction of judicial nominees triggered rule change to disallow filibusters on judicial nominees).

¹⁴⁹ In any case, in late November 2013, the Senate banned the use of the filibuster for presidential nominees to the executive and judicial branches, although Supreme Court nominees were exempted. Kane, *supra* note 148. Unsurprisingly, the ban was approved in a straight-party vote. See *id.*

¹⁵⁰ See *Supreme Court Nominations, Present–1789*, SENATE.GOV, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Apr. 23, 2014).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See *id.* (reflecting that the Senate voted to reject Robert Bork with fifty-eight senators voting against his confirmation).

advocates of a supermajority rule is that it is the president's aggressive nomination practices that have triggered partisan warfare in the Senate confirmation process;¹⁵⁴ thus, it is his behavior that must be altered. The important question is whether a supermajority rule will result in moderate or consensual nominees or just more bloodshed and stalemate. As Professors Sarah Binder and Forrest Maltzman point out, that depends critically on the ideological distribution of senators.¹⁵⁵ A bell-shaped distribution would likely compel the President to select a more moderate nominee satisfactory to the sixtieth senator.¹⁵⁶ A more polarized (i.e., bipolar) distribution would not necessarily convince the President to select a more consensual nominee appealing to the sixtieth senator since that senator might, in addition to belonging to the opposite party, be significantly more distant ideologically.¹⁵⁷ Another reason a supermajority rule might not produce the desired effect is that some presidents may care more about appealing to their party's base than confirmation success; such presidents would not be affected by a supermajority rule.¹⁵⁸ Because of these uncertainties, a three-fifths requirement is a more modest and less risky change than a two-thirds rule.

Elect More Representative Presidents and Senators. The final set of reforms looks outside the courts, recognizing that changing courts requires changing the political institutions that construct them. The proposals of greatest interest here are those that seek to produce more representative elected officials, as they will in turn appoint more representative Justices. This might mean independent redistricting commissions that redraw House district lines with an eye toward electoral competition and effective representation, rather than incumbent safety and district homogeneity. Many scholars and commentators regard the representational distortions in the Senate as the most profound and enduring democratic defect in American politics. Abolishing the Senate outright or altering the basis of representation to promote greater equality in representation are both interesting possibilities. Another likely target of reformers concerned with growing polarization is the presidential nomination process. Currently, ideologically extreme voters and organized interests dominate the process, enhancing the prospects of candidates who are off-center and hurting the chances of those who are more moderate and representative. Finally, compulsory voting is advanced as a reform that could force more Americans to the polls, expanding the electorate and, thereby, diluting the influence of extreme voters.¹⁵⁹ All of these reforms aim in the right direction, helping to elect more representative presidents and senators.

¹⁵⁴ See MICHAEL COMISKEY, *SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES 1-9* (2004) (highlighting partisan ideological nominations as the source of contention in the confirmation process and impetus for reform efforts).

¹⁵⁵ SARAH A. BINDER & FORREST MALTZMAN, *ADVICE & DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY 155-56* (2009).

¹⁵⁶ *See id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 156.

¹⁵⁹ Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91 *AM. POL. SCI. REV.* 1, 2-3 (1997) (linking low voter turnout to unrepresented voting). *See*

CONCLUSION

Democracy-assisting judicial review is a theme that has recently reemerged in normative constitutional scholarship. It asks the Supreme Court to use its power to vindicate the people's views that have been stymied by a dysfunctional political process, a problem that has worsened in recent years. The main deficiency in this prescription is that it overstates the Court's ability to compensate for problems like polarization and gridlock since it is a part of the interbranch strategies employed by partisan regimes. This was demonstrated in the area of reapportionment, typically seen as a classic example of democracy-assisting judicial review. It is also evident in recent Roberts Court decisions in the election-law field.

This Article recommends abandoning the democracy-assisting idea and instead exploring ways to prevent the Court from being enlisted in extreme and unrepresentative causes. Reform ideas should focus on increasing and regularizing turnover on the Court and encouraging the selection of more representative Justices, an outcome made more likely by increasing the representativeness of the elected officials who choose the Justices. Absent a crisis, of course, it is highly unlikely that any such reforms will be adopted. Nonetheless, it is a worthwhile exercise to think about how to enhance representational and consensus-building processes in the presence of growing partisan polarization. And it is a more valuable exercise than simply imploring the Justices be less partisan or suggesting that they defer to today's laws that represent such fragile legislative compromises. Institutions and processes, and the incentives they create, must be changed if behavior is to be changed. The best we can do for the Court and for American democracy in 2020 and beyond is to construct better electoral processes that produce more representative leaders who, in turn, select more representative Justices, which aids the quest for true constitutional consensus.

generally MARTIN P. WATTENBERG, *IS VOTING FOR YOUNG PEOPLE?* (3rd ed. 2011) (advocating compulsory voting).