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Toward A Less Dangerous Judicial Branch

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According to the consortium conducting exit polls in the 2016 presidential election, 21 percent of voters viewed Supreme Court appointments as the "most important" factor in making their choice. These voters supported Donald Trump by a 15-point margin—more than enough to secure his victory, given the tightness of the race.

Among Trump's first moves in office was the nomination of Neil Gorsuch, confirmed by the Senate on April 7, 2017, to fill the Supreme Court vacancy created by the death of conservative stalwart Antonin Scalia in February 2016. Anthony Kennedy's retirement in June 2018 opened a second Court vacancy. President Trump's nominee to fill that seat, Brett Kavanaugh, seemed well on his way to certain confirmation when it was leaked that Christine Blasey Ford had accused him of assaulting her while in high school. Ultimately, now-Justice Kavanaugh was narrowly confirmed by a near-party-line vote. Trump has thus filled two of the nine seats on the nation's high court in his first two years in office.

It's too soon to know exactly what kind of justices Gorsuch and Kavanaugh will be, but both are legal superstars with clear conservative judicial records. Trump has delivered for voters who prioritized the Supreme Court as an issue.

Moreover, the Trump administration, to date, has significantly outpaced its recent predecessors in winning Senate confirmations to the U.S. Courts of Appeal. Federal appellate courts are the courts of last resort in far more cases than will ever find their way onto the Supreme Court docket. (The Supreme Court has typically issued 70 to 80 merits opinions per term in recent years; federal appellate courts receive tens of thousands of filings every year.) Through November, Trump had appointed 29 of the 166 authorized active judgeships in the 12 regional Courts of Appeals—compared with 11 by the same time in Barack Obama's presidency, 12 for George W. Bush, and 19 for Bill Clinton. And several more circuit court nominees await their confirmations.

Trump's nominees to federal district courts have been confirmed relatively less quickly. Through November 2018, the Senate had approved 53 of his nominees for district courts, compared with

30 for Obama, 83 for Bush, and 107 for Clinton at the same point in their presidencies. But Trump has more than 50 district-court nominees pending, and many are likely to be confirmed—if not during the lame-duck period after the election, then by the new Senate, with a slightly larger Republican majority.

The president's success in winning confirmation for his judicial nominees is a testament to the acumen and vetting process of the now-former White House counsel, Don McGahn, and the political skills of Senate Majority Leader Mitch McConnell. The Democrats' ability to obstruct confirmations has also been hampered by the 2013 decision of former Democratic Majority Leader Harry Reid to jettison the Senate filibuster rule for judicial nominations. Reid's decision secured confirmations for three Obama administration nominations to the D.C. Circuit Court of Appeals that Republicans had held up but left the Democrats with limited options for slowing or blocking nominations when in the minority, as they have been during Trump's presidency so far.

Democrats remain bitter about the Republican Senate's refusal to act on President Obama's nomination of Merrick Garland for the Supreme Court seat vacated by Scalia's death. Grassroots activists have pressured Senate Democratic leaders to block any and all Trump appointees. Some voices—even normally sensible scholars like Yale legal historian John Fabian Witt—have called on Democrats to increase the size of the Court, packing it with Democratic partisans to make up for Garland's failed nomination. The Constitution provides no fixed number of justices for the Supreme Court, though the number has remained at nine by custom since 1869. If "court-packing" were to ensue, there is no logical endpoint for the partisan retribution, short of an unlikely constitutional amendment.

Partisan wrangling over the Supreme Court has a long history, rooted in the decision of the Constitution's framers to vest authority over lifetime judicial appointments jointly with the president and the Senate. From 1881 through 1969, though, no Senate majority blocked an opposing-party president's Supreme Court nominee. The few contested nominations tended to be controversial for idiosyncratic rather than partisan reasons because for most of that period, every president nominating a Supreme Court justice did so when his party also controlled the Senate.

But even as Supreme Court confirmation fights became rare, the Court itself grew more active—and controversial. Most tragically, the Court refused to enforce postwar legislation and constitutional amendments designed to ensure newly freed slaves' civil and voting rights. (Congress offered little pushback, soon giving up on Reconstruction.) Beginning in the 1890s, as populist and then progressive movements led Congress to enact more sweeping laws governing economic concerns, the Supreme Court began striking some of them down—either as outside Congress's power to regulate commerce or under property-rights or liberty-of-contract rationales. After the Court overturned key legislative planks of President Franklin Roosevelt's New Deal, an infuriated Roosevelt introduced the Judicial Procedures Reform Bill of 1937, which would have packed the Supreme Court with more favorable justices.

Roosevelt's bill was not enacted, but he prevailed in another way. In the "switch in time that saved nine," a five-justice Court majority reversed its earlier jurisprudence and upheld the state of Washington's minimum-wage law (West Coast Hotel v. Parrish, 1937). That summer, the first

Court vacancy in Roosevelt's tenure opened up. As Roosevelt began filling seats, the Court's jurisprudence shifted. By 1943, FDR had nominated all but one of the Court's sitting justices, and the Court had enshrined a presumption of constitutionality for economic legislation and stretched the scope of Congress's power to regulate interstate commerce beyond recognition. And the Court's deference to the elected branches wasn't limited to the economic sphere; it upheld the Roosevelt administration's wartime internment of more than 100,000 individuals of Japanese descent, including American citizens, in Korematsu v. United States (1944).

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Soon, however, the Supreme Court began reasserting itself over the political branches, state and federal. Initially, the renewed Court action involved a long-overdue reversal of its earlier jurisprudence gutting civil rights for blacks—most famously, in its 1954 school-desegregation decision, Brown v. Board of Education of Topeka, Kansas. But in short order, the Court began assuming authority over many other disputes previously relegated to the political process. Over a ten-year period beginning in the early 1960s, the Court aggressively reshaped state criminal procedures; significantly scaled back expressions of religion in public schools; and even (for a time) forbade capital punishment for all crimes, notwithstanding express language contemplating such penalties in the text of the Constitution. In 1973, in Roe v. Wade, the Court found a woman's right to terminate a pregnancy in the Constitution. Roe's author, Justice Harry Blackmun, had been President Richard's Nixon's third-choice nominee for the Court in 1970; the Democrat-led Senate had scuttled Nixon's first two picks, the first partisan rejections of a Supreme Court nomination in almost nine decades.

While progressives had opposed the Supreme Court when it overrode economic legislation on constitutional grounds, conservative voices emerged as critics of the new judicial activism. Yale Law professor Alexander Bickel defended Brownbut began calling for "judicial restraint"; he pointed to the "countermajoritarian difficulty" of resolving contested policy questions through the unelected judiciary. Bickel's thinking would influence his Yale Law colleague Robert Bork, who, along with Harvard Law professor Raoul Berger, developed an affirmative methodology for conservatives to approach the countermajoritarian difficulty—namely, striking down statutes as unconstitutional only when warranted, based on the original public meaning of the constitutional text.

President Reagan's nomination of Bork to the Supreme Court sparked the modern judicial confirmation wars. The Democrats had retaken the Senate in the 1986 midterm election. Senator Ted Kennedy thundered on the Senate floor that "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, [and] schoolchildren could not be taught about evolution." Bork's nomination was defeated, and Reagan was able to win confirmation only for his third-choice pick, Anthony Kennedy, whom Brett Kavanaugh has now replaced.

Four years after the Bork nomination, Democrats rallied again, this time to stop President George H. W. Bush's nomination of Clarence Thomas, and fell just short: Thomas was confirmed by a 52–48 vote, in part based on the support of several Southern Democrats, including both from his home state of Georgia. With Democrats still controlling Senate majorities, Republicans largely supported President Bill Clinton's nominees, Ruth Bader Ginsburg (three votes against) and Stephen Breyer (nine votes against). But the comity didn't last. Republicans controlled both the Senate and the White House in 2005, when George W. Bush nominated John Roberts and Samuel Alito to be chief and associate justice, respectively; most Senate Democrats opposed Roberts, and 40 of 44 Democrats opposed Alito—including 25 who supported an attempted filibuster to deny his nomination a vote, among them future president Obama. Obama's subsequent nominees to the Court in the summers of 2009 and 2010, Sonia Sotomayor and Elena Kagan, did not prompt any reciprocal attempted filibuster from then-minority Senate Republicans, though his selections won the support of only nine of 40 and five of 41 members of the GOP caucus, respectively. But with Republicans back in the majority when Obama tapped Judge Garland for the Court in 2016, at the beginning of a presidential election year, the Senate refused to act on the nomination.

It's hard to see how to break the partisan impasse the next time a Supreme Court vacancy emerges when the Senate and president are of different parties. But unlike in the early days of the republic, when the Court almost never overturned legislative actions, the stakes are massive. Conservatives were understandably worried that replacing Scalia with Garland would jeopardize key constitutional liberties, given that Democrat-appointed justices dissented from recent decisions upholding the central concerns of the First and Second Amendments (Citizens United v. Federal Election Commission and McDonald v. City of Chicago, each in 2010). Progressives are understandably worried that the Court's decisions upholding abortion rights and race-based affirmative action could be jeopardized by a more conservative Court.

That Justice Gorsuch is a threat to progressive shibboleths is evident from the vitriol heaped upon him from observers on the left. Linda Greenhouse, the Court-watching doyen of the New York Times, was quick to pounce. In a July 2017 column dubbing the justice "Trump's Life-Tenured Judicial Avatar," she suggested that the "flamboyance of the junior justice's behavior" was alienating his colleagues, particularly the chief justice and Justice Kennedy.

It's true that Gorsuch has, at times, seemed to frustrate his senior colleague Ruth Bader Ginsburg with an insistence on going back to constitutional first principles. In Gill v. Whitford, a political gerrymandering case, Gorsuch pointedly suggested at oral argument that "maybe we can just for a second talk about the arcane matter of the Constitution." Ginsburg, to much progressive cheering, launched into a rebuttal of sorts, recounting the Court's 1960s-era "one person, one vote" line of precedents. (The Court ultimately punted the gerrymandering issue to a future date, returning the case to lower courts on procedural grounds.)

Gorsuch has indeed signaled a refreshing willingness to reconsider long-held Court precedents if they are unmoored from constitutional text and history. He alone dissented from the Court's decision in Sveen v. Melin, considering the Constitution's Contracts Clause. The Supreme Court has long interpreted this clause narrowly, allowing states substantially to alter private contract

terms by statute. Refusing to follow the line of cases supporting the Court's opinion, Gorsuch emphasized that "the Constitution does not speak of 'substantial' impairments—it bars 'any' impairment."

Yet the 2017–18 Court term, which ended last June, suggests anything but the view that Gorsuch is alienating his colleagues—at least, those likely to agree with him in deeply divided cases. Gorsuch aligned more often with Roberts and Kennedy than with his fellow staunch originalist, Thomas—as might be expected, given that originalism is a methodological rather than an ideological approach to constitutional jurisprudence. Overall, Gorsuch participated in 71 merits decisions on the Court, 19 of which were resolved in 5–4 "split" rulings. In 14 of those 19, Gorsuch sided with the other four "conservative" justices, Kennedy, Thomas, Alito, and Chief Justice Roberts—including two involving government-compelled speech at the core of the First Amendment (National Institute of Family and Life
Advocates v. Becerra and Janus v. AFSCME), as well as the president's highly controversial temporary ban on entry for foreign nationals from certain countries (Trump v. Hawaii). In five of the 14 split decisions along traditional left–right lines, Gorsuch wrote the majority opinion, including in Epic Systems Corp. v. Lewis, which rebuffed a novel power grab by the Obama National Labor Relations Board purporting to exempt labor law from the Federal Arbitration Act.

Gorsuch has displayed a willingness to write separate concurrences (four in total), as well as dissents (five in addition to Sveen). His ten such separate opinions are more than any other justice save Thomas, Sotomayor, and Breyer. Again, however, there is little evidence that this willingness to sketch out his own view of the law has alienated his natural allies on the Court. In Jesner v.Arab Bank, involving suits against foreign corporations under the Alien Tort Statute, Gorsuch wrote separately, joined by Alito, to argue that judicially created corporate liability under the statute was altogether unwarranted—without upsetting the majority of five conservative justices voting to strike down the foreign-company suit on differing grounds. In Masterpiece Cakeshop v.Colorado, involving a state decision to sanction a baker objecting on religious grounds to designing a custom cake for a same-sex wedding, Gorsuch wrote a strong concurrence, again joined by Alito, which articulated the First Amendment free-exercise principles at play. The overall Court majority agreeing with the baker's position on narrower grounds included not only the other four conservative justices but also Democratic appointees Breyer and Kagan.

In Brett Kavanaugh, Americans are likely to get another justice committed to originalist principles (even if a more "fainthearted" one, as the late Scalia once described himself, than Gorsuch and Thomas). Moreover, in his 12-year tenure on the D.C. Circuit Court of Appeals—the appellate court most responsible for reviewing the decisions of federal administrative agencies—Kavanaugh has authored multiple opinions limiting the growth of the federal administrative state. These opinions, both majority and dissenting, have often been vindicated by the high court. Among them: a 2012 dissent from a circuit decision that rubber-stamped the Obama Environmental Protection Agency's novel interpretation of the Clean Air Act to apply to "stationary-source" emitters of greenhouse gases (Coalition for Responsible Regulation v. EPA);

and a 2008 dissent from a decision upholding the constitutionality of the Public Company Accounting Oversight Board, a creation of the 2002 Sarbanes-Oxley Act, in Free Enterprise Fund v. PCAOB. With Chief Justice Roberts and Justices Thomas and Gorsuch already signaling a willingness to narrow the central decision underlying administrative-agency rulemaking—Chevron v. Natural Resources Defense Council (1984)—it's looking more plausible than ever that the Court may one day place boundaries on the national government's unaccountable regulatory behemoth, which has long since outgrown its constitutional moorings.

That conservative justices would push back against Congress's willingness to delegate its powers to independent agencies highlights an obvious tension between much modern originalist jurisprudence and the judicial restraint that Bickel championed during the Supreme Court's activist heyday 50 years ago. Indeed, Chief Justice Roberts is the only member of the Court's conservative bloc clearly falling into the restraint camp, as highlighted by his lone invocation of the doctrine of constitutional avoidance to save President Obama's central legislative achievement, the Affordable Care Act, in NFIB v. Sebelius (2012). The shift in conservative jurisprudence dovetails with the work of some constitutional scholars on the right who have developed originalism further since the early writings of Bork and Berger—notably, Georgetown Law School's Randy Barnett. Barnett and other libertarian-leaning thinkers such as the Cato Institute's Clark Neily have openly called for rejecting judicial restraint in favor of "judicial engagement" that wrestles with constitutional precepts, applying a "presumption of liberty."

These ideas are hardly universal on the right. The Supreme Court is highly unlikely to jettison its long-standing deference to economic regulations and return to the more searching scrutiny of government justifications for commercial laws that characterized the Court's early New Deal era, at least in the foreseeable future. But the Court's increasing willingness to bring back structural limits on federal government power when consistent with the Constitution's text and history does signal a break from more extreme versions of judicial deference championed in Bork's later writings.

The ideological tensions between the Right's restraint and engagement camps also gives the lie to left-leaning commentators' portrayal of the Trump administration's judicial appointments as monolithic jurists who have passed some ideological litmus test. Trump's appellate-court nominees—many of whom are on his list of potential jurists to be elevated to the Supreme Court in the case of a future vacancy—fall along the spectrum spanning the judicial-engagement and judicial-restraint camps.

Consider Don Willett, confirmed by the Senate to the Fifth Circuit Court of Appeals in December 2017. Judge Willett is well known for his wit, amassing an enormous Twitter following over the years. On the Texas Supreme Court, in a 2015 case concerning the state's occupational-licensing laws, Patel v. Texas Department of Licensing, Willett wrote a concurring opinion that aggressively criticized the "dogmatic majoritarianism" of courts' traditional deference to such laws in economic matters—at least, under the state constitution. Dissenting justices in the case denounced Willett's position as reviving doctrines of a bygone era—namely, the Supreme Court's pre-1937 economic-liberty jurisprudence—but Willett refused to back off: "Some observers liken judges to baseball umpires, calling legal balls and strikes, but when it

comes to restrictive licensing laws, just how generous is the constitutional strike zone? Must courts rubber-stamp even the most nonsensical encroachments on occupational freedom? Are the most patently farcical and protectionist restrictions nigh unchallengeable, or are there, in fact, judicially enforceable limits?"

The "balls and strikes" analogy was notably advanced by Chief Justice Roberts in his confirmation hearing. Given that Roberts had derided the Court's economic-liberty jurisprudence in his dissent in Obergefell v. Hodges (2015), which found a right to same-sex marriage in the Constitution, Willett's rebuke to the nation's highest judicial officer was not subtle. Such heterodoxy among conservative jurists serves as a reminder that getting the law right can be difficult.

The Trump administration's early record in appointing jurists should be heartening to conservatives, including the many who supported his candidacy for just this reason. Still, the justices being replaced by Gorsuch and Kavanaugh had broadly conservative records; the significance of these lifetime appointees should not be understated, but in the near term, they're likely to move the Court's jurisprudence only on the margins.

Similarly, the administration's early successes in winning confirmations to the Courts of Appeals haven't yet reshaped many of the critical circuits along the Atlantic and Pacific seaboards, where Democratic senators opposed to Trump have successfully stalled nominations in their home states (and, in one instance, for Oregon's Ryan Bounds, forced the nominee's withdrawal). Approximately one in six federal appeals court judges today is a Trump appointee, a remarkable statistic at this early juncture. But these new judges are concentrated in the Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits—essentially, America's heartland, where Republican senators predominate and support for Trump is strongest. Through the end of November, Trump had successfully nominated only two judges to the massive 29-judge Ninth Circuit Court of Appeals, which comprises the nine westernmost U.S. states and regularly generates the most Supreme Court cases; only one judge to the important 11-judge D.C. Circuit, the locus of federal administrative-law decisions; one to the 13-judge, New York–based Second Circuit; and none to the Massachusetts-based First Circuit.

Last fall's Senate elections were thus critical to ensuring that the Trump administration continues to reshape the federal judiciary—something that now seems highly likely through 2020. Partisan struggles over the Supreme Court's composition are nothing new, but the stakes have risen, and senatorial comity has eroded, across administrations of both parties. Real questions exist about what a future Democratic president and Congress might do in terms of adding new justices and judgeships to achieve their preferred jurisprudential results.

Much work remains to be done to constrain the growth of the administrative state, to solidify the Constitution's core liberty commitments, and to pare back judicial extraconstitutional adventurism in spheres better delegated to the political branches. But notwithstanding the partisan divide, the Trump administration, so far, has made good on its supporters' hopes that it can move federal law toward a place more rooted in the Constitution. Conservatives should hope

that this trend will continue and that the judiciary can return to limiting government and anchoring the liberties fairly deduced from the language of our nation's founding document, while otherwise leaving policymaking to elected legislatures—where it belongs.

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