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### Taking the Threat to Democracy Seriously

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# Taking the Threat to Democracy Seriously

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I. INTRODUCTION.....	1305
II. HOW WILL AMERICAN DEMOCRACY END?: TWO NIGHTMARE SCENARIOS .....	1307
A. <i>The Gathering Storm</i> .....	1307
B. <i>Fragmenting the Electoral College</i> .....	1314
C. <i>Packing the U.S. Supreme Court</i> .....	1319
III. SHOULD THE U.S. SUPREME COURT PLAY A ROLE IN THE PRESERVATION OF DEMOCRACY? .....	1326
IV. WHAT COURTS SHOULD AND SHOULD NOT DO TO PRESERVE DEMOCRACY .....	1333
V. A CALL FOR A PRO-DEMOCRACY CAUCUS AMONG AMERICAN LAW PROFESSORS .....	1341
VI. CONCLUSION: WHY DID WE GET HERE? .....	1345
VII. AN ADDENDUM IN LIGHT OF THE 2018 ELECTION RESULTS....	1347

## I. INTRODUCTION

During the summer of 2018, I had occasion to write a book review<sup>1</sup> of *How Democracies Die* by Steven Levitsky and Daniel Ziblatt.<sup>2</sup> The book has its flaws, including practicing the kind of partisanship that it highlights and claims to deplore. But, whatever the book's flaws, Levitsky and Ziblatt clearly demonstrate that *it can happen here*—our democracy can actually die—by contrasting the decline of democratic norms in America over the past forty-five years with countries in which

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1. Bruce Ledewitz, *What Has Gone Wrong and What Can We Do About It?*, 54 TULSA L. REV. (forthcoming 2019) (book review).

2. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).

similar experiences led to dictatorial rule.<sup>3</sup> According to the authors, the fundamental change that explains the end of democratic systems is the decline of tolerance for rule by the other side and the resulting end of forbearance against using all legal means to prevent that outcome.<sup>4</sup> When political competition becomes unremitting warfare, democracy may come to an end.

Who can doubt that this describes America today? Levitsky and Ziblatt demonstrate the various ways that American politicians do everything in their power to stymie effective government when the other side is in power and to entrench their rule when they are in office.<sup>5</sup>

The flaw in the book is the authors' tendency to associate all or most such actions with Republicans in the beginning of America's democratic decline and to ascribe to Democrats mere reaction. This partisanship in outlook is surely irrelevant today. The Democrats retook the House of Representatives in the 2018 congressional elections,<sup>6</sup> and they will probably eventually impeach President Donald Trump, however much or little actual evidence there is of his wrongdoing. If Democrats retake the Senate, they will block any Trump Administration, or other Republican Administration, Supreme Court nominees from confirmation.<sup>7</sup> These actions would be clear violations of the norms of tolerance and forbearance. Whoever started it, this is where we are now.

Generally, when I raise these concerns with others, my fears of democracy's end are ridiculed as overblown or met with the peculiar reassurance that since we have never really had democracy we could not be losing it. It is one purpose of this Article to show that actual dictatorship might be around the corner, whether by military coup or by a cancellation of elections that a substantial number of Americans might well support.<sup>8</sup> That, and not any theoretical construct, is what I

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3. *Id.* at 2–10.

4. *Id.* at 8–10.

5. *See id.* at 145–75.

6. *Live Midterm Results: House Races*, WASH. POST, [https://www.washingtonpost.com/election-results/house/?noredirect=on&utm\\_term=.1b4fcf0de418](https://www.washingtonpost.com/election-results/house/?noredirect=on&utm_term=.1b4fcf0de418) (last visited Mar. 20, 2019).

7. For a short response to the actual results of the November 2018 elections, *see infra* Addendum.

8. More than half of Republicans in theory, at least, support a cancellation of the 2020 election. *See* Jessica Estepa, *Poll: More than Half of Republicans Would*

mean by the end of democracy. However undemocratic our system of government has been in the past, we have not been a dictatorship.

If I am right that the end of democracy is possible, Americans should not be practicing business as usual. We should all be concentrating intensely on how to step back from the precipice. It is a second purpose of this Article to suggest that American law professors have a special obligation to address the crisis. I have made such suggestions before,<sup>9</sup> but now we are considering not merely the renewal of democracy, but actually saving it. This Article ends with a call for the creation of a pro-democracy, bipartisan caucus of American law professors that will not only defend democratic principles publicly but also will use its influence with the Justices on the United States Supreme Court (“U.S. Supreme Court”) to convince them to aid in the effort to save democracy.

The hour is late. I hope not too late.

## II. HOW WILL AMERICAN DEMOCRACY END?: TWO NIGHTMARE SCENARIOS

### A. *The Gathering Storm*<sup>10</sup>

As recently as Ronald Reagan’s Presidency, the notion of bipartisanship was alive and well. As controversial as Ronald Reagan was among many Democrats, he was a good friend of the Democratic Speaker of the House, Tip O’Neill.<sup>11</sup> Substantial numbers of Democrats in Congress voted for much of the Republican President’s agenda, including his tax cuts.<sup>12</sup> That kind of bipartisanship was also true of all

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*Support Postponing 2020 Election*, USA TODAY (Aug. 10, 2017, 3:00 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/08/10/52-percent-republicans-would-support-postponing-2020-election/555769001/>. Who can say what number of Democrats would support cancellation of the 2020 election if that were the only way to block President Trump’s reelection?

9. See Bruce Ledewitz, *The Role of Religiously Affiliated Law Schools in the Renewal of American Democracy*, 12 U. MASS. L. REV. 230, 258 (2017).

10. With apologies to Winston Churchill, 1 WINSTON S. CHURCHILL, *The Gathering Storm*, in THE SECOND WORLD WAR (1948).

11. See generally CHRIS MATTHEWS, TIP AND THE GIPPER: WHEN POLITICS WORKED (2013).

12. See Christopher Ingraham, *The Top Tax Rate Has Been Cut Six Times Since 1980—Usually with Democrats’ Help*, WASH. POST (Feb. 27, 2019),

other important policy initiatives in the twentieth century—the 1964 Civil Rights Act, the Endangered Species Act, and on and on.<sup>13</sup>

Obviously, something has changed. The Affordable Care Act passed Congress without a single Republican vote.<sup>14</sup> The recent Republican tax cut passed without a single Democratic vote.<sup>15</sup>

This revolution of hyper-partisanship is the reason that, after more than two centuries of use, the filibuster in the Senate, which effectively requires a 60-vote majority to pass a bill, has been restricted in considering judicial nominations and will probably eventually be eliminated altogether. The filibuster existed on the shared assumption that it would not be used routinely but would only be invoked when something truly threatening to a Senate minority was introduced.<sup>16</sup> The filibuster is not practical if both Parties invoke it for every important bill when the Party is in the minority. You cannot continue to have a filibuster if it is used, as the Democrats recently threatened to do, to try to frustrate an ordinary tax cut.<sup>17</sup> That tax cut may have been bad policy, but it was not any kind of threat to anyone. It could easily have

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[https://www.washingtonpost.com/us-policy/2019/02/27/top-tax-rate-has-been-cut-six-times-since-usually-with-democrats-help/?utm\\_term=.6e3763c73ace](https://www.washingtonpost.com/us-policy/2019/02/27/top-tax-rate-has-been-cut-six-times-since-usually-with-democrats-help/?utm_term=.6e3763c73ace).

13. Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*; Endangered Species Act, 16 U.S.C. §§ 1531–44 (1994).

14. See Shailagh Murray & Lori Montgomery, *House Passes Health-Care Reform Bill Without Republican Votes*, WASH. POST (March 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/21/AR2010032100943.html>.

15. See Thomas Kaplan & Alan Rappoport, *Republican Tax Bill Passes Senate in 51-48 Vote*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/2017/12/19/us/politics/tax-bill-vote-congress.html>.

16. See Senator Olympia J. Snowe, *The Effect of Modern Partisanship on Legislative Effectiveness in the 112th Congress*, 50 HARV. J. ON LEGIS. 21, 28 (2013) (“But to those who view the filibuster as a tool to slow the action of the Senate in order to provide appropriate time to consider legislation, eliminating or significantly changing the filibuster represents a threat to minority rights, essentially blocking the minority from having a say in the final passage of any legislation.”).

17. This is the reason that the Tax Cuts and Jobs Act of 2017 had to pass the Senate by means of budget reconciliation—to avoid a threatened Democratic Party filibuster. See Mike Debonis, Erica Werner & Damian Paletta, *Senate Republican Tax Plan Clears Hurdle with Help from Two Key GOP Holdouts*, CHI. TRIB. (Nov. 28, 2017, 8:21 PM), <http://www.chicagotribune.com/news/nationworld/politics/ct-trump-taxes-agenda-20171128-story.html>.

been reversed later. If majority rule means anything, you cannot require sixty votes to pass every important bill.

This increase in partisanship can also be seen in the current political attitude—that the most important thing for each Party is that the other Party’s president be brought to failure. The Republican Party began to manifest this attitude during Bill Clinton’s presidency, when Clinton’s first budget passed without a single Republican vote in Congress.<sup>18</sup> And this Republican attitude was perfectly symbolized by Mitch McConnell’s comment in 2010 that “[t]he single most important thing we want to achieve is for President Obama to be a one-term president.”<sup>19</sup>

But McConnell, in those same comments, at least held out the possibility of cooperation with President Obama, even if he regarded such cooperation as unlikely to happen.<sup>20</sup> The Democrats, in their turn, have now perfected this partisan attitude regarding President Trump. The New York Times reported on April 8, 2018, that the Republicans are now running their 2018 congressional campaign on the theme that the first thing a new Democratic majority in the House would do is impeach President Trump.<sup>21</sup> There is every reason to believe that this would be the case, even though there has not yet been any actual evidence of serious wrongdoing by President Trump. Many Democrats just hate President Trump and everything he stands for. That hatred is grounds for opposition, not impeachment.

The important question is, how did this revolution of hyper-partisanship happen? In a chapter fatefully entitled *The Unraveling*, Levitsky and Ziblatt bookend two events—the Senate’s failure to consider President Obama’s nomination of Judge Merrick Garland to replace the

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18. See David E. Rosenbaum, *The Budget Struggle; Clinton Wins Approval of His Budget Plan as Gore Votes to Break Senate Deadlock*, N.Y. TIMES, Aug. 7, 1993, at 1, <https://www.nytimes.com/1993/08/07/us/budget-struggle-clinton-wins-approval-his-budget-plan-gore-votes-break-senate.html>.

19. See Glenn Kessler, *When Did McConnell Say He Wanted to Make Obama a ‘One-Term President,’* WASH. POST (Sept. 25, 2012), [https://www.washingtonpost.com/blogs/fact-checker/post/when-did-mcconnell-say-he-wanted-to-make-obama-a-one-term-president/2012/09/24/79fd5cd8-0696-11e2-aff-d6c7f20a83bf\\_blog.html?utm\\_term=.8d23393ac435](https://www.washingtonpost.com/blogs/fact-checker/post/when-did-mcconnell-say-he-wanted-to-make-obama-a-one-term-president/2012/09/24/79fd5cd8-0696-11e2-aff-d6c7f20a83bf_blog.html?utm_term=.8d23393ac435).

20. *Id.*

21. See Jonathan Martin, *Republicans Seize on Impeachment for Edge in 2018 Midterms*, N.Y. TIMES (Apr. 8, 2018), <https://www.nytimes.com/2018/04/08/us/politics/trump-impeachment-midterms.html>.

late Justice Antonin Scalia in 2016 and the introduction of a new form of partisan warfare in 1978 by a young Newt Gingrich.<sup>22</sup> These evidenced the breakdown of the democratic norms of tolerance and forbearance.<sup>23</sup>

Much of that partisan conflict played out at the federal level, such as the first use of impeachment without bipartisan support against President Bill Clinton.<sup>24</sup> But the conflict at the national level basically intensified the tactics of existing political power relations between the Parties.

A more fundamental change, because it involved a deliberate strategy to obtain and keep power, occurred with the 2003 Texas legislature's gerrymander vote. The custom had been to redistrict only with a new census count, but the Republican majority in the legislature undertook a rare mid-decade redistricting, aimed "as they themselves admitted, . . . only at partisan advantage."<sup>25</sup> The goal was to help ensure continued Republican Party control of the House of Representatives, which succeeded; the Texas gerrymander was seen as ensuring that control "'no matter the national mood.'"<sup>26</sup>

Levitsky and Ziblatt omit the denouement of the story, which was the U.S. Supreme Court's refusal to find the gerrymander unconstitutional in *League of United Latin American Citizens v. Perry*.<sup>27</sup> Justice Kennedy found the issue of the partisan gerrymander to be justiciable but argued that no satisfactory standard for a constitutional violation had been developed.<sup>28</sup> Justice Kennedy failed to accept the plaintiffs' suggestion that, at the very least, a kind of presumptive unconstitutionality should be applied to such an unusual process as a mid-decade redistricting: "Under appellants' theory, a highly effective partisan gerrymander that coincided with decennial redistricting would receive less scrutiny than a bumbling, yet solely partisan, mid-decade redistricting."<sup>29</sup>

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22. LEVITSKY & ZIBLATT, *supra* note 2, at 145–175.

23. *See id.*

24. *See id.* at 150–51.

25. *Id.* at 154.

26. *Id.* at 155 (quoting an aide to Republican Congressman Joe Barton).

27. 548 U.S. 399 (2006).

28. *Id.* at 423.

29. *Id.* at 419.

Certainly it is true that acting against a redistricting plan that violates the norm of decennial redistricting would not have had any direct impact on equally partisan gerrymanders drawn at the usual time—in this case the 1991 Texas Democratic Party gerrymander, for example. But Justice Kennedy failed to consider that holding that this violation of American democratic life’s usual norms rendered the redistricting suspect would have had the effect of reinforcing those unwritten rules that Levitsky and Ziblatt identify as necessary to allow democratic practices to work. Yes, the Republicans would have had to wait another seven years to redistrict, but that would just have yielded the usual and long-standing result of previous political practices. Allowing the ten-year norm to be breached failed to restrain, if it did not actively encourage, politicians pushing against the unwritten rules to see how far they could go.<sup>30</sup>

By the time of the 2016 Presidential election, both sides were acting as if losing the election would yield the kind of catastrophic result that in other nations has encouraged extra-legal actions that result in democracy’s end.<sup>31</sup> Some on the American political Right called the 2016 election the “Flight 93” election, in an allusion to the desperate straits of the doomed flight on 9/11 that crashed when its passengers rose up against the airplane’s hijackers:

2016 is the Flight 93 election: charge the cockpit or you die. You may die anyway. You—or the leader of your party—may make it into the cockpit and not know how to fly or land the plane. There are no guarantees.

Except one: if you don’t try, death is certain. To compound the metaphor: a Hillary Clinton presidency is Russian Roulette with a semi-auto. With Trump, at least you can spin the cylinder and take your chances.<sup>32</sup>

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30. LEVITSKY & ZIBLATT, *supra* note 2, at 154 (“The plan was pure hardball. As one analyst posited, it ‘was as partisan as the Republicans thought the law would allow.’”).

31. One example is the violent takeover in Chile that ousted Salvador Allende. *Id.* at 2–6.

32. Michael Anton, *The Flight 93 Election*, CLAREMONT INST. (Sept. 5, 2016), <https://www.claremont.org/crb/basicpage/the-flight-93-election/> (writing under the pseudonym Publius Decius Mus).



And this same sense of desperation motivated religious believers to fear that a Hillary Clinton Supreme Court would allow tax exemptions to be stripped from any educational institution that refused to accept same-sex couples as married students.<sup>33</sup>

In form, all of this was just a plea for supporting candidate Trump despite his obvious shortcomings. But in tone, the sense was quite different. The underlying message was that eight more years of a progressive presidency would have left people on the Right feeling like strangers in their own country, with no way back to a decent society. It certainly sounded like a willingness to take a chance on some system other than democracy if the election went the other way.

As for the Democrats, it was clear they considered that Trump and his supporters were beyond the pale. Substantial numbers of Trump supporters—half in fact—were regarded as “deplorables,” in candidate Clinton’s memorable phrase.<sup>34</sup>

The Democrats would have been just as desperate as the Republicans during the election, except that they never expected Donald Trump to be elected President.<sup>35</sup> Since Trump’s election, however, the very same tone has been present on the Left as was the case with the Flight 93 rhetoric. For Vann R. Newkirk II at *The Atlantic*, for example, the Trump victory was “the embodiment of over 50 years of resistance to the policies Martin Luther King[,] Jr. fought to enact.”<sup>36</sup> The most common description of opposition to President Trump had

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33. See Bruce Ledewitz, *Is Religion a Non-Negotiable Aspect of Liberal Constitutionalism?*, 2017 MICH. ST. L. REV. 209, 228 (2017) (“The outpouring of white, religious votes for President Trump occurred in part because of a suggestion in oral argument in *Obergefell* that religious institutions might lose their tax exempt status if they failed to adapt a judicial decision constitutionalizing gay marriage.”).

34. See Katie Reilly, *Read Hillary Clinton’s ‘Basket of Deplorables’ Remarks About Donald Trump Supporters*, TIME (Sept. 10, 2016, 12:27 PM), <http://time.com/4486502/hillary-clinton-basket-of-deplorables-transcript/>.

35. See Eric Bradner, *5 Surprising Lessons from Trump’s Astonishing Win*, CNN (Nov. 9, 2016), <https://www.cnn.com/2016/11/09/politics/donald-trump-wins-biggest-surprises/index.html>.

36. Vann R. Newkirk II, *Five Decades of White Backlash*, THE ATLANTIC (Jan. 15, 2018), <https://www.theatlantic.com/politics/archive/2018/01/trump-massive-resistance-history-mlk/550544/>.

nothing to do with winning the next election against him—it was resistance.<sup>37</sup> Trump could not be allowed to be normalized.<sup>38</sup> He was “not my President.”<sup>39</sup>

From the beginning of President Trump’s ascension to power, there have been sporadic calls, even in mainstream forums, for actual violence in the streets.<sup>40</sup> There were street protests essentially from the day he was elected, culminating in the huge, worldwide Women’s March on January 17, 2017.<sup>41</sup> In a relatively new phenomenon in 2018, members of the Trump Administration and other prominent conservatives have been physically confronted in their daily activities and asked to leave some private businesses.<sup>42</sup>

It is shocking, but cannot be considered unexpected, therefore, that a poll in August 2017 found that 52% of Republican affiliated Americans would support postponing the 2020 election if President Trump said that was needed to prevent illegal voting.<sup>43</sup> There were

37. See, e.g., Rebecca Solnit, *The 11 Biggest Victories Against Trump by the Resistance*, THE GUARDIAN (Dec. 2, 2017), <https://www.theguardian.com/commentis-free/2017/dec/02/biggest-victories-trump-resistance>.

38. See, e.g., Zoe Williams, *The Dangerous Fantasy Behind Trump’s Normalisation*, THE GUARDIAN (Nov. 15, 2016), <https://www.theguardian.com/us-news/2016/nov/15/dangerous-fantasy-donald-trump-normalisation-us-president-elect-barbarism>.

39. Matea Gold et al., ‘Not My President’: Thousands Protest Trump in Rallies Across the U.S., WASH. POST (Nov. 11, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/11/10/not-my-president-thousand-protest-trump-in-rallies-across-the-u-s/?utm\\_term=.93c80de51f6d](https://www.washingtonpost.com/news/post-politics/wp/2016/11/10/not-my-president-thousand-protest-trump-in-rallies-across-the-u-s/?utm_term=.93c80de51f6d).

40. See, e.g., Jesse Benn, *Sorry Liberals, a Violent Response to Trump Is as Logical as Any*, HUFFINGTON POST (June 6, 2017), [https://www.huffingtonpost.com/jesse-benn/sorry-liberals-a-violent-\\_b\\_10316186.html](https://www.huffingtonpost.com/jesse-benn/sorry-liberals-a-violent-_b_10316186.html).

41. See Anemona Hartocollis & Yamiche Alcindor, *Women’s March Highlights as Huge Crowds Protest Trump: ‘We’re Not Going Away,’* N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/us/womens-march.html>.

42. See Mary Jordan, *The Latest Sign of Political Divide: Shaming and Shunning Public Officials*, CHI. TRIB. (June 24, 2018, 8:20 PM), <http://www.chicagotribune.com/news/nationworld/politics/ct-shaming-public-officials-20180624-story.html>.

43. Jessica Estepa, *Poll: More than Half of Republicans Would Support Postponing 2020 Election*, USA TODAY (Aug. 10, 2017, 3:00 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/08/10/52-percent-republicans-would-support-postponing-2020-election/555769001/>; see also LEVITSKY & ZIBLATT, *supra* note 2, at 2–10.

justified criticisms of the poll's methodology,<sup>44</sup> but the larger question of the popular commitment to democracy today remains. Even before Trump's election, there were questions about support for democracy and free expression, especially among the young.<sup>45</sup> In the prescient words of Yascha Mounk, published before the 2016 voting, "the American public has never been as skeptical of democracy or as open to authoritarian alternatives like military rule as it is right now."<sup>46</sup>

It is against this background that I present my two nightmare scenarios, in which the remaining tattered norms of democratic life might be finally, irreversibly torn.

### *B. Fragmenting the Electoral College*

One of the great ironies of American constitutional history is that Donald Trump lost the national popular vote by a pretty large margin—over 2.8 million votes—and received only 46.09% of the vote compared to Hillary Clinton's 48.18%, and yet was still elected President.<sup>47</sup> The reason, of course, was the Electoral College, in which Trump received 304 votes compared to 227 votes for Clinton.<sup>48</sup>

The Electoral College outcome differed from that of the national vote because Clinton won very large margins in some of the states she carried while narrowly losing important states in the Upper Midwest. The election essentially came down to approximately 77,000 votes in Pennsylvania, Michigan, and Wisconsin.<sup>49</sup> Since almost all states allot

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44. David A. Graham, *Do Republicans Actually Want to Postpone the 2020 Election?*, THE ATLANTIC (Aug. 10, 2017), <https://www.theatlantic.com/politics/archive/2017/08/poll-republicans/536472/>.

45. *Id.*

46. Yascha Mounk, *Yes, American Democracy Could Break Down*, POLITICO (Oct. 22, 2016), <https://www.politico.com/magazine/story/2016/10/trump-american-democracy-could-break-down-214383>.

47. FED. ELECTION COMM'N, OFFICIAL 2016 PRESIDENTIAL GENERAL ELECTION RESULTS (2016), <https://transition.fec.gov/pubrec/fe2016/2016presgeregresults.pdf>.

48. *Id.* Seven so-called faithless electors cast their votes for persons other than the one to whom they were pledged. Randy Yeip, *Tallying Up the 'Faithless Electors'*, WALL ST. J., <https://www.wsj.com/graphics/electoral-college-2016/> (last updated Dec. 20, 2016, 12:35 PM).

49. See John McCormack, *The Election Came Down to 77,744 Votes in Pennsylvania, Wisconsin, and Michigan*, WKLY. STANDARD (Nov. 10, 2016, 3:45 PM),

all their electoral votes to the candidate who wins the state's total vote—a winner-take-all system<sup>50</sup>—this kind of divergence in outcome is easy to understand.

The reason that this outcome was so ironic is that, as argued by Levitsky and Ziblatt, the Framers of the Constitution created the mechanism of the Electoral College precisely to keep the people from electing an outsider with authoritarian tendencies<sup>51</sup>—some would say precisely to keep someone like Donald Trump from becoming President. The Framers feared that the people would be seduced by “demagogues,” in the words of Hamilton.<sup>52</sup> Yet in 2016, it was this gatekeeping device that failed. In contrast, the people rejected Donald Trump.

For all the controversy about President Trump's election, there was substantially less bitterness about this minority candidate outcome in 2016 than there had been about the closely contested 2000 election because everyone could see how President Trump had won. Everyone knew going into the election that lopsided victories in big states could be offset by narrow losses elsewhere in terms of the Electoral College result. President Trump was not installed by the U.S. Supreme Court,<sup>53</sup> or any other outside factor, but won fair and square under the rules as they had always existed in the modern era.

But now imagine the reaction by Trump supporters if, prior to the voting, Democrats in Texas, Florida, and Pennsylvania had managed to change the method of distributing electoral votes from winner-take-all to distribution by congressional district wins. Secretary Clinton would still have had the strong starting base of California and New York as winner-take-all states, but the roughly 85 electoral votes that Trump should have won by winning those three states would instead have been divided between the candidates. If the divisions were close enough, Secretary Clinton could have won the Electoral Vote count and thus the presidency.

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<https://www.weeklystandard.com/john-mccormack/the-election-came-down-to-77-744-votes-in-pennsylvania-wisconsin-and-michigan-updated>.

50. Only Nebraska and Maine follow a different system. See *Maine & Nebraska*, FAIRVOTE, [https://www.fairvote.org/maine\\_nebraska](https://www.fairvote.org/maine_nebraska) (last visited Mar. 26, 2019), for a discussion of how Maine and Nebraska distribute their votes.

51. LEVITSKY & ZIBLATT, *supra* note 2, at 39–40.

52. *Id.* at 39 (quoting THE FEDERALIST NO. 1 (Alexander Hamilton)).

53. *Cf.* *Bush v. Gore*, 531 U.S. 98 (2000).

One can easily imagine what the reaction would have been from the Trump campaign to this manipulation of the preexisting rules. Even before the voting, Trump had predicted that the election would be “rigged.”<sup>54</sup> Undoubtedly, some of his supporters would have taken to the streets. Considering the strong support that gun rights groups gave to Trump, perhaps even armed supporters would have taken to the streets in protest.

Now combine this genuine political grievance with the Flight 93 rhetoric, and you can see the beginnings of an armed rebellion against the federal government that could have led to military intervention—first as ordered by Presidents Obama and Clinton, but after that, who knows? Perhaps disaffected army officers would have wanted a less liberal alternative government.

Of course, my hypothetical outcome to the 2016 voting is wildly unrealistic. Why would the Texas and Florida legislatures, which the Republican Party dominates, make a change that would be likely to harm a Republican presidential candidate? Texas is a reliably Republican state in national elections, and Florida is a part of most Republican Party plans to win the presidency.

But if we now change the scenario slightly, a much more realistic alternative emerges. Imagine that those 77,744 votes in Pennsylvania, Wisconsin, and Michigan had in fact changed from Trump to Clinton. Clinton, having won those three states, adds 46 electoral votes, Trump loses 46 votes, and Clinton narrowly wins the Electoral College with 273 votes. So, the winner of the national vote becomes president after all.

Except that in my hypothetical, she does not become president because all three state legislatures had previously changed the method of distributing electoral votes from winner-take-all to distribution by congressional district. Instead of winning all 46 Electoral votes in these states, she wins only a plurality and comes up short in the Electoral College. Now Clinton, the winner of the national vote, who would have won the presidency even under the normal operation of the Electoral College, loses to a man who lost the national vote and whose Party gamed the Electoral College to ensure the election of a Republican president. Now the slogan “he is not my President” becomes “he is not

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54. See *US Election 2016: Trump Says Election ‘Rigged at Polling Places,’* BBC NEWS (Oct. 17, 2016), <https://www.bbc.com/news/election-us-2016-37673797>.

really President,” and the grievance does not die away but festers. And now the controversial Trump Administration policies that divide America would have been foisted on the country not by a wily politician who fairly won a narrow victory but by a stolen presidency. If that would not be the end of democratic legitimacy in America, I don’t know what the end would look like.

This is not really a fantasy because Republican legislators in those three states actually did consider making the change to congressional district distribution after the 2012 election. In all three states, Republicans at that time controlled both Houses of the Legislature and the Governorship and had the opportunity to make such a change.<sup>55</sup> In fact, five states that often vote Democratic in national elections, including Virginia and Ohio, considered making this change during this period.<sup>56</sup>

A move toward congressional district selection is really just a Republican Party plan to ensure permanent Republican rule of the presidency. One can see this because, in late 2011, the American Legislative Exchange Council (“ALEC”), whose motto, “Limited Government, Free Markets, Federalism,”<sup>57</sup> renders its partisan sympathy for the Republican Party perfectly clear,<sup>58</sup> endorsed allocation of electoral votes based on congressional district results rather than by the winner-take-all method. This change, if enacted nationally before the 2012 election, would have resulted in the election of Mitt Romney over Barack Obama despite the national vote<sup>59</sup> and could be predicted to favor Republican presidential candidates going forward. Estimates are

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55. See Ed Kilgore, *Awarding Electoral Votes by Congressional District Is Becoming a Big Temptation for the GOP*, N.Y. MAG.: INTELLIGENCER (Jan. 25, 2017), <http://nymag.com/daily/intelligencer/2017/01/awarding-electoral-votes-by-district-temptation-for-gop.html>.

56. *Id.*

57. About ALEC, AM. LEGIS. EXCHANGE COUNCIL, <https://www.alec.org/about/> (last visited Mar. 26, 2019).

58. Salon calls it the GOP’s corporate front group. See Alex Seitz-Wald, *GOP’s Corporate Front Group*, SALON (Sept. 12, 2012, 12:27 AM), [https://www.salon.com/2012/09/11/alecs\\_new\\_partner\\_the\\_gop/](https://www.salon.com/2012/09/11/alecs_new_partner_the_gop/).

59. See *Gaming the Electoral College*, 270TOWIN, <https://www.270towin.com/alternative-electoral-college-allocation-methods/> (last visited Mar. 26, 2019).

that if all states had moved to congressional district distribution, Clinton could have won the national vote by 5% and still lost in the Electoral College.<sup>60</sup>

But the cynicism in this conspiracy is actually much worse than that because in actual political reality, there has been zero movement by Republican legislators in predictably Republican leaning states to make the change to congressional district distribution of Electoral votes. In other words, the real policy being pushed is that Texas and Florida remain winner-take-all, while five states the Democrats usually win in national elections will be encouraged to move to congressional district selection. ALEC and Republicans may claim that this is not their fault because each state makes this decision independently, but no effort will be made to limit the partisan impact by, for example, including in the legislation a stipulation that no state will make this change until all others do so.

All this activity is behind the scenes and involves the kind of legislative activity that ordinary Americans cannot be expected to follow. It will not become clear until the next presidential election is won by a Republican who loses the national vote, and the one after that, and the one after that. Eventually, many Americans will conclude that we don't have a democracy after all and will condone, if not support, the end of elections as, at least, a more candid approach. They will adopt the attitude of Abraham Lincoln: "When it comes to this I should prefer emigrating to some country where they make no pretense of loving liberty—to Russia, for instance, where despotism can be taken pure, and without the base alloy of [hypocrisy]."<sup>61</sup>

This nightmare scenario did not happen. First, political fortunes shifted—Virginia elected a Democratic governor in 2014,<sup>62</sup> for example—and honorable Republican politicians hesitated to manipulate the

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60. See Harry Enten, *Under a New System, Clinton Could Have Won the Popular Vote by 5 Points and Still Lost*, FIVETHIRTYEIGHT (Jan. 31, 2017, 10:28 AM), <https://fivethirtyeight.com/features/under-a-new-system-clinton-could-have-won-the-popular-vote-by-5-points-and-still-lost/>.

61. Letter from Abraham Lincoln to Joshua F. Speed (Aug. 24, 1855), <https://www.nps.gov/liho/learn/historyculture/knownothingparty.htm>.

62. Trip Gabriel, *Terry McAuliffe, Democrat, Is Elected Governor of Virginia in Tight Race*, N.Y. TIMES (Nov. 5, 2013), <https://www.nytimes.com/2013/11/06/us/politics/mcauliffe-is-elected-governor-in-virginia.html>.

Electoral College. I have already written about the rumors that Republican Governor Tom Corbett put a stop to all such efforts in Pennsylvania.<sup>63</sup> I'm sure there were other unsung patriots elsewhere who did the same.

But we came much closer to undermining American democracy than we realize. This nightmare scenario almost happened. Most discouraging of all, many ordinary Republican politicians participated in this effort to move towards congressional district selection, heedless of its meaning for American democracy. All they could see were partisan advantage and the illegitimate conduct of the Democrats that justified for them any measure that would prevent a loss of power. In the words of the title of Levitsky and Ziblatt's book, this is *how democracies die*.

### C. Packing the U.S. Supreme Court

As frightening as the previous scenario of fragmenting the Electoral College is, we can take solace from the fact that it did not happen, and it does not seem likely that anything will threaten the Electoral College again for the foreseeable future. Unfortunately, my second scenario, which is just as potentially dangerous to democracy as is the first, lies somewhere off in the future—and I judge that it is a fair bet to happen.<sup>64</sup> In this scenario, it is the Democrats, not the Republicans, who will undermine, perhaps fatally, American democracy.

The background for the second scenario is that the Republican Party has now engineered an ideological takeover of the U.S. Supreme Court by means of two strategies. First was the refusal of the Republican-controlled Senate to confirm any nominee of any Democratic president. I put the matter that way, instead of mentioning Judge Merrick Garland by name because it became clear from hints during the 2016 election campaign that a Republican Senate was not going to confirm any U.S. Supreme Court nominee of a potential President Clinton. In

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63. See Bruce Ledewitz, *The Five Days in June When Values Died in American Law*, 49 AKRON L. REV. 115, 171 n.195.

64. Indeed, the Court packing option is already being proposed. See generally DAVID FARIS, *IT'S TIME TO FIGHT DIRTY: HOW DEMOCRATS CAN BUILD A LASTING MAJORITY IN AMERICAN POLITICS* (2018). See Harry Cheadle, *The 'Neutron Option' Democrats Could Use to Retake the Supreme Court*, VICE (June 29, 2018, 12:44 AM), [https://www.vice.com/en\\_us/article/ywe88j/the-neutron-option-democrats-could-use-to-retake-the-supreme-court](https://www.vice.com/en_us/article/ywe88j/the-neutron-option-democrats-could-use-to-retake-the-supreme-court), for a discussion of this proposal with Faris.



the words of one strategist, the U.S. Supreme Court would just be allowed to shrink.<sup>65</sup> Thus, the number of Justices on the Court was in play and any means would be used to control the majority on the U.S. Supreme Court. Republicans might deny this now, but this is what was likely going to happen if Clinton had been elected.

The second strategy is coordination between the Trump Administration and ideologically committed organizations in the selection of U.S. Supreme Court nominees. In 2016, President Trump released a list of potential nominees, 21 persons in all, which had been prepared by the Federalist Society and the Heritage Foundation; eventual nominee Judge Neil Gorsuch was added to that list.<sup>66</sup> Essentially, President Trump outsourced his search for a U.S. Supreme Court Justice.<sup>67</sup>

In May 2017, President Trump stated that he would also select his next nominee from the same list,<sup>68</sup> but this did not turn out to be the case. In November 2017, President Trump announced an additional five names that he would consider, including Brett Kavanaugh, who became President Trump's next nominee when Justice Anthony Kennedy retired.<sup>69</sup> The additions to the list did not indicate any lessening of conservative organizations' influence, however. White House counsel Donald F. McGahn II announced the new names, as committed conservatives, at the Federalist Society's National Lawyers Convention to pronounced and obvious support.<sup>70</sup>

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65. See Bruce Ledewitz, *Has Nihilism Politicized the Supreme Court Nomination Process?*, 32 *BYU J. Pub. L.* 1, 39 (2017).

66. See Shane Goldmacher, Eliana Johnson & Josh Gerstein, *How Trump Got to Yes on Gorsuch*, *POLITICO* (Jan. 31, 2017, 11:09 PM), <https://www.politico.com/story/2017/01/trump-supreme-court-gorsuch-234474>.

67. *Id.*

68. See Joseph P. Williams, *Trump: Next Supreme Court Nominee Will Come from Conservative List*, *U.S. NEWS & WORLD REP.* (May 1, 2017, 11:23 AM), <https://www.usnews.com/news/politics/articles/2017-05-01/trump-next-supreme-court-nominee-will-come-from-conservative-list>.

69. See Mark Landler & Maggie Haberman, *Brett Kavanaugh Is Trump's Pick for Supreme Court*, *N.Y. TIMES* (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/politics/brett-kavanaugh-supreme-court.html>; Michael D. Shear, *Trump Names Supreme Court Candidates for a Nonexistent Vacancy*, *N.Y. TIMES* (Nov. 17, 2017), <https://www.nytimes.com/2017/11/17/us/politics/trump-supreme-court.html>.

70. Shear, *supra* note 69.

The point of this kind of organized coordination is to prevent the nomination of another Justice David Souter—a presumed conservative Republican who ends up voting with liberals on the Court.<sup>71</sup> Therefore, with the addition of Justice Kavanaugh to four already reliably conservative votes, Republicans have assured conservative control of the U.S. Supreme Court for the foreseeable future.

And that future can be expected to last a long time. Not only did the conservative groups that prepared President Trump’s lists try to ensure ideological consistency, they tried to ensure a long tenure by designating relatively young potential nominees. Thus, Justice Gorsuch is currently 51 years old and Justice Kavanaugh, 54.<sup>72</sup> You would expect them to serve at least 20 to 25 years on the Court. In contrast, Judge Garland was 63 years old when President Obama nominated him<sup>73</sup>—his relatively advanced age perhaps a kind of failed olive branch to the Republican majority in the Senate.

But what makes the Republicans think that this U.S. Supreme Court control is written in stone? In this second nightmare scenario, the Democrats retake the Senate in 2020, as they couldn’t in 2018. By then, President Trump might have even added one more U.S. Supreme Court Justice after Justice Kavanaugh. It is crystal clear that once installed, no U.S. Supreme Court nominee by a Republican president will be confirmed.<sup>74</sup> Democrats will invoke the sainted name of Judge Garland, who is apparently destined to become the *USS Maine* of judicial

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71. See Scott Lemieux, *Brett Kavanaugh’s Supreme Court Nomination Is the Result of Years of Unopposed Conservative Organizing*, NBC NEWS: THINK (July 10, 2018, 10:56 AM), <https://www.nbcnews.com/think/opinion/brett-kavanaugh-s-supreme-court-nomination-result-years-unopposed-conservative-ncna890226>.

72. See *Brett M. Kavanaugh*, OYEZ, [https://www.oyez.org/justices/brett\\_m\\_kavanaugh](https://www.oyez.org/justices/brett_m_kavanaugh) (last visited Apr. 12, 2019); *Neil Gorsuch*, OYEZ, [https://www.oyez.org/justices/neil\\_gorsuch](https://www.oyez.org/justices/neil_gorsuch) (last visited Apr. 12, 2019).

73. Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NAT’L PUB. RADIO (June 29, 2018, 5:00 AM), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now>.

74. Andrew Prokop, *5 Ways the 2018 Midterms Could Change American Politics*, VOX (Jan. 2, 2018, 7:30 AM), <https://www.vox.com/policy-and-politics/2018/1/2/16795804/elections-2018-midterms-consequences> (“[I]f Democrats retook the Senate, they could and likely would simply refuse to consider any Trump nominee for the seat—as Republicans did for Obama’s nominee Merrick Garland in 2016.”).

politics.<sup>75</sup> In terms of democratic norms' decline, there will be no confirmations for the U.S. Supreme Court until a president and a Senate majority are comprised of the same Party.

Obviously, that by itself would be bad enough, but a Democratic majority in the Congress would then be tempted to pack the U.S. Supreme Court because federal statute simply controls the number of Justices.<sup>76</sup> There is nothing to prevent this except a presidential veto. Eventually, the Democrats will control both Congress and the presidency. If they then expand the number of Justices, their justification will be both that the Republicans achieved their majority on the Court by unfair means, which will only be true in small part since only Justice Gorsuch will have been confirmed in what could be called an unfair way, and that the Republicans had been prepared to let the Court shrink, so why not expand it, which will be absolutely true whether the Republicans admit it or not.

Readers must remember that it was only the kind of informal, democratic norms underlying unwritten rules, which Levitsky and Ziblatt celebrate,<sup>77</sup> that kept President Roosevelt from packing the U.S. Supreme Court in the original Court-packing plan of 1937. FDR had large majorities in both Houses of Congress, and it was Democratic Party opposition that killed the plan.<sup>78</sup>

Those kinds of informal norms, however, no longer carry prohibitive weight. It is the same as the norms that underlie not redistricting in mid-decade or not manipulating the Electoral College for partisan purposes. These guardrails, as Levitsky and Ziblatt describe them,<sup>79</sup> are gone.

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75. *Id*; see also *The USS Maine Explodes in Cuba's Havana Harbor*, HIST. (Nov. 24, 2009), <https://www.history.com/this-day-in-history/the-maine-explodes>.

76. The Judiciary Act of 1869 was the latest change, setting the number of Justices at 9, including the Chief Justice. Judiciary Act of 1869, ch. 22, 16 Stat. 44, sec. 1.

77. LEVITSKY & ZIBLATT, *supra* note 2, at 8–10.

78. See L. Patrick Hughes, *Texas Democrats and the Court Fight of 1937*, AUSTIN COMMUNITY COLLEGE (1999), <http://www.austincc.edu/lpatrick/his2341/demo.html> (“It’s important to remember that the telling blow to FDR’s court reorganization bill was not the opposition of Republicans but the abandonment of the [P]resident by conservative Southerners of his own political party.”).

79. LEVITSKY & ZIBLATT, *supra* note 2, at 8–10.

If the Democrats really did expand the number of Justices on the U.S. Supreme Court to 13, let's say, to retake the Court, anything like a rule of law would be ended and would be understood as ended. The Republicans, in their turn, would be sorely tempted to do the same thing when they next controlled both branches. We could end up with a U.S. Supreme Court of 21 or 25 Justices. Order would not be restored until both sides agreed to end the warfare over the U.S. Supreme Court by, perhaps, a constitutional amendment freezing its size. And when would that happen?

What would provoke the Democrats to proceed in such a reckless fashion? Unfortunately, the answer might well be that nothing can prevent it, no matter how restrained and reasonable the new U.S. Supreme Court majority proves to be. There is a strong feeling among Democrats that the Republican majority in the Senate stole a U.S. Supreme Court seat and got away with it, thereby necessitating a response.<sup>80</sup>

But assuming that the Democrats are not determined, ruinously, to destroy the rule of law in this way, what decisions by the new conservative majority would lead Democrats to an action like expanding the U.S. Supreme Court?

For all the careful planning and execution involved in the conservative takeover of the U.S. Supreme Court, and for all the importance that President Trump's supporters placed on control of the U.S. Supreme Court, it is not at all clear just what the new majority will do that might invite a radical Democratic response. Surprisingly, since the point of the intense conservative push to identify reliable nominees is supposed to be to clone Justice Scalia,<sup>81</sup> the new majority seems unlikely to entrench originalism and textualism as a principled methodology of constitutional interpretation. After all, the first decision joined

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80. To get a sense of how Democrats feel about how the Merrick Garland nomination played out, see David S. Cohen, *Grand Theft Judiciary: How Republicans Stole the Supreme Court*, ROLLINGSTONE (Nov. 14, 2016, 6:35 PM), <https://www.rollingstone.com/politics/politics-features/grand-theft-judiciary-how-republicans-stole-the-supreme-court-128410/>.

81. See Larry Obhof, *This Is Easy: Trump Needs to Nominate a Scalia Clone for the Supreme Court*, DAILY CALLER (July 7, 2018, 1:29 AM), <http://dailycaller.com/2018/07/07/trump-should-nominate-scalia-clone-for-supreme-court/> (using the words "Scalia Clone" in the headline).

by Justice Gorsuch, *Trinity Lutheran Church*, held that the Free Exercise Clause requires a state to allow a church to participate in a state funded program.<sup>82</sup> Whatever the merits of this decision, forcing a state to give money to a church is not facially consistent with any form of originalism, and no Justice made any attempt to square the decision with the Free Exercise Clause's historic public meaning.<sup>83</sup> This episode suggests that judges are never principled in the sense of applying consistent interpretive strategies.

In terms of substantive decisions, the new conservative majority might overrule *Roe v. Wade*<sup>84</sup> and *Obergefell v. Hodges*,<sup>85</sup> but as significant as that would be, such decisions are by no means a certainty, and in any event, would only return the underlying policies to ordinary politics in the states. (There is zero indication that anyone on President Trump's list would actually protect unborn life under the due process clauses). In the consequent political struggle, abortion rights and same-sex marriage might fare extremely well.

Certainly, the new conservative majority on the U.S. Supreme Court will be much less inclined to give deference to interpretations of law by administrative agencies. But again, decisions of that sort just empower Congress to clarify its policy choices. No one is going to overturn American democratic life over the *Chevron Doctrine*.<sup>86</sup>

It seems to me that only the same issue that provoked FDR would be enough to cause the Democrats to consider packing the U.S. Supreme Court—the reach of basic federal power under the Commerce Clause and economic due process limits. If a new conservative majority were to hold that Congress lacked authority to regulate against climate change, for example, I believe that a Democratic majority in Congress would respond. There are certainly those who hope for such rulings from the U.S. Supreme Court—Randy Barnett comes to

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82. *Trinity Lutheran Church v. Mo. Dep't of Nat. Res.*, 137 S. Ct. 2012, 2015–16 (2017).

83. For criticism along these lines, see Bruce Ledewitz, '*Trinity*' Case Marks End of Originalism, PHILA. INQUIRER (July 7, 2017, 3:01 AM), [https://www.philly.com/philly/opinion/commentary/20170707\\_\\_Trinity\\_\\_case\\_marks\\_end\\_of\\_originalism.html](https://www.philly.com/philly/opinion/commentary/20170707__Trinity__case_marks_end_of_originalism.html).

84. 410 U.S. 113 (1973).

85. 135 S. Ct. 2584 (2015).

86. *See Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

mind<sup>87</sup>—but I am not sure the new Justices intend to go where Justice Scalia certainly never went,<sup>88</sup> which would be back toward *Lochner*<sup>89</sup> and *Carter Coal*.<sup>90</sup> Assuming that the Revolution of 1937 remains intact, we might never reach this second nightmare scenario.<sup>91</sup>

The issue that really unites the current conservative movement is protection of First Amendment rights—both in terms of speech, including prohibiting any form of campaign finance limits or mandatory unionization, and the protection of religious liberty from anti-discrimination laws. Decisions like those are not likely to provoke a crisis for two main reasons. First, the law is already trending in those directions—*Citizens United*,<sup>92</sup> *Janus*,<sup>93</sup> and *Hobby Lobby*<sup>94</sup> are already the law, for example. Second, marginal religious dissent is not having any real impact on the underlying rights in question, while Democrats are having some success in fighting against big money, and unions are growing.<sup>95</sup>

But if worst really were to come to worst, and the Democrats really did expand the U.S. Supreme Court to overturn its decisions, the

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87. See Brian Beutler, *The Rehabilitationists*, NEW REPUBLIC (Aug. 30, 2015), <https://newrepublic.com/article/122645/rehabilitationists-libertarian-movement-undo-new-deal>.

88. Justice Scalia regularly criticized the substantive due process approach of the *Lochner* era. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in part and dissenting in part).

89. *Lochner v. New York*, 198 U.S. 45 (1905); see Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 562 (2015).

90. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

91. The phrase “Revolution of 1937” is generally taken to refer to the dramatic diminishment of judicial invalidation of federal and state economic regulation after 1936 under both commerce clause and due process doctrines. See generally Keith E. Whittington, *State Constitutional Law in the New Deal Period*, 67 RUTGERS U.L. REV. 1141, 1144–50 (2015).

92. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (striking down limits on corporate campaign contributions).

93. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council*, 138 S. Ct. 2448 (2018) (striking down “agency fees” required to be paid by nonmembers of public employee unions).

94. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (vindicating a closely held, for-profit corporation’s free exercise exemption claim based on the religious objections of the company’s owners).

95. Dick Meister, *Unions Are Growing—Finally*, <http://www.dickmeister.com/id240.html> (last visited Mar. 26, 2019).

reaction from conservatives would be extreme. The rhetoric of Flight 93 would return.<sup>96</sup> There would be strong feelings of persecution. There undoubtedly would be at least some instances of armed resistance. A lot of people would feel they have nothing to lose. I don't think people would wait to see what an expanded U.S. Supreme Court would actually do. I don't believe democracy would survive.

### III. SHOULD THE U.S. SUPREME COURT PLAY A ROLE IN THE PRESERVATION OF DEMOCRACY?

The question heading this section will strike most readers as absurd. Of course, the U.S. Supreme Court should play a role in the preservation of democracy and would certainly do so in an appropriate situation.

As an example, President Trump has been referring to the press as the "enemy of the American people" since the beginning of his Administration.<sup>97</sup> Levitsky and Ziblatt consider his condemnations of a free press, to which one can add his threats to strengthen defamation law as applied to the media, as one indicator of President Trump's authoritarian tendencies.<sup>98</sup>

But if President Trump actually attempted to bring a defamation action against a media outlet such as CNN or the New York Times, all of the Justices would apply the *New York Times, Co. v. Sullivan* standard of actual malice,<sup>99</sup> which would not be satisfied in the sorts of instances of which President Trump complains.<sup>100</sup> On a matter like that,

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96. See Michael Anton, *supra* note 32 (discussing the Flight 93 rhetoric).

97. MARVIN KALB, ENEMY OF THE PEOPLE 1 (2018) (quoting a tweet by President Trump); Rebecca Morin, *Trump Administration Splits Over Journalists as 'Enemy of the People,'* POLITICO (Aug. 2, 2018, 5:50 PM), <https://www.politico.com/story/2018/08/02/trump-media-enemy-people-ivanka-white-house-760581>.

98. LEVITSKY & ZIBLATT, *supra* note 2, at 181–82.

99. 376 U.S. 254, 279–80 (1964) ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."). Maybe not all the Justices agree with that standard; see *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring in the denial of certiorari).

100. See Jasmine C. Lee & Kevin Quealy, *The 567 People, Places and Things Donald Trump Has Insulted on Twitter: A Complete List*, N.Y. TIMES,

the makeup of the Justices on the Court, thankfully, does not matter at all. The same result of protection of the press would occur with any of the names on the Federalist Society/Federalist Foundation nomination list discussed above. This shows the deep reserves of constitutional bulwarks in our tradition.

However, the point of this Article is that this kind of action by the Justices would not represent, and would not be understood as representing, the preservation of democracy, except in an indirect sense. Instead, the Justices would be vindicating the individual right of a speaker to criticize a governmental official. In other words, the protection would be individual and not structural. In the context of speech, the First Amendment preserves democracy, while the U.S. Supreme Court protects the First Amendment.

That may strike the reader as a distinction without a difference, which may be true in the area of speech. But the distinction between individual rights and structure mattered a great deal in the two gerrymander cases that the Court “ducked” in the 2017 term.<sup>101</sup>

The substantive issues that continue to arise for the U.S. Supreme Court are whether partisan gerrymanders are constitutional, whether that issue is justiciable, and if it is justiciable, what the standard should be for deciding it. Those are the issues the Justices did not decide in these two cases. In *Gill v. Whitford*, the Court unanimously held that the plaintiffs had not established standing<sup>102</sup> and so, did not reach the merits of the gerrymandering claim.<sup>103</sup> In *Benisek v. Lamone*, the Justices held in a *per curiam* opinion that the balance of equities and the public interest supported the refusal of the lower court judge to issue a preliminary injunction against a claimed gerrymandered Maryland congressional district.<sup>104</sup>

The reason for the lack of standing in *Gill* demonstrates that the Justices are not primarily thinking in terms of democracy itself but only

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<https://www.nytimes.com/interactive/2016/01/28/upshot/donald-trump-twitter-in-sults.html> (last updated Feb. 20, 2019).

101. See *Gill v. Whitford*, 138 S. Ct. 1916 (2018); see *Benisek v. Lamone*, 138 S. Ct. 1942 (2018).

102. *Gill*, 138 S. Ct. at 1926–34. Justices Thomas and Gorsuch did not join the portion of Chief Justice Roberts’s opinion that remanded the case to give the plaintiffs another chance to do so. See *id.* at 1941.

103. *Id.* at 1934.

104. *Benisek*, 138 S. Ct. at 1945.



in terms of individual rights. Chief Justice Roberts rejected statewide claims of harm from a statewide gerrymander scheme's operation because the right to vote is "individual and personal in nature."<sup>105</sup> A plaintiff therefore must allege that her own district is gerrymandered and may not complain that the districting plan as a whole alters the overall composition of the state legislature. The opinion does not even mention democracy as the value that an anti-gerrymandering holding is meant to bolster. Indeed, Chief Justice Roberts seems to hold specifically that harms to "group political interests"<sup>106</sup> are not injuries for purposes of constitutional standing: "[T]his Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it."<sup>107</sup>

Justice Kagan's concurrence, on the other hand, begins with a strong condemnation of partisan gerrymandering's effect on democracy—"that practice enables politicians to entrench themselves in power against the people's will."<sup>108</sup> But the thrust of her opinion is that standing in the case can be established pursuant to another individual, rights-based claim—the associational rights of individual voters to join together to form political parties and other associations.<sup>109</sup>

At the end of the concurrence, in a section seeming to summarize the gerrymandering issue, Justice Kagan again refers to the harms that "excessive partisan gerrymandering" do to the political system as a whole, including rendering "pragmatic, bipartisan solutions to the nation's problems" increasingly difficult to achieve.<sup>110</sup> "[Partisan gerrymandering] enables a party that happens to be in power at the right time to entrench itself there for a decade or more, no matter what the voters would prefer."<sup>111</sup>

But, of course, Justice Kagan was speaking only for the four liberals on the Court at that point. At least four Justices are thus open to a role for the Court as democracy's caretaker. The question for the

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105. *Gill*, 138 S. Ct. at 1929 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)).

106. *Id.* at 1933.

107. *Id.*

108. *Id.* at 1935 (Kagan, J., concurring).

109. *Id.* at 1938–40 (Kagan, J., concurring).

110. *Id.* at 1940 (Kagan, J., concurring).

111. *Id.*

future is whether the new conservative majority will begin to see its responsibility to democracy in systemic terms.

*Gill* is not an insurmountable barrier to raising a gerrymandering claim. Standing pursuant to the majority opinion is not that difficult to establish. So, the gap between an individualistic view and a structural view is not necessarily that significant in cases of this kind.

But the difference between these two starting points for standing would be dramatically illustrated in my first nightmare scenario—the manipulation of the Electoral College. Assume, for purposes of illustration, that Republican legislators in the five states previously mentioned—Virginia, Michigan, Pennsylvania, Wisconsin, and Ohio—pushed through the change to congressional district delegate selection from their current winner-take-all systems. Now assume further that during discovery in litigation filed to block this change, plaintiffs find a recording of an actual meeting between Republican legislative leaders in those states and Republican legislative leaders in Texas and Florida, in which it was specifically agreed that to “ensure permanent Republican Party rule at the Presidential level,” those five states would make this change, while Texas and Florida would not.<sup>112</sup>

Arguably, under the majority view in *Gill*, there would be no individualized injury and therefore no standing to challenge this conspiracy against democracy. After all, there is no constitutional requirement of a winner-take-all system, which is why the long-standing divergent arrangements in Maine and Nebraska are constitutional. Therefore, this plot could only be considered a constitutional injury from a “nationwide” perspective, which would be subject to the same kind of criticism leveled in *Gill* against claims of statewide impact on the overall composition of a legislature. The claim that the Republican

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112. Candid admissions like this do happen and are sometimes captured. Consider the 2012 statement by Pennsylvania state House Republican leader Mike Turzai seemingly admitting that the purpose of the voter ID law was to “allow” Mitt Romney to defeat Barack Obama in the 2012 Presidential election. Kelly Cernetich, *Turzai: Voter ID Law Means Romney Can Win PA*, POLITICS PA (June 25, 2012), <http://www.politicspa.com/turzai-voter-id-law-means-romney-can-win-pa/37153/>. These comments were widely reported in the media and were not denied by Turzai. Of course, Representative Turzai might have meant that voter ID would do this legitimately by keeping thousands of people from casting illegal votes, but I doubt it.

candidate will now always be elected president would be seen as representing a “generalized grievance” shared by all citizens, even those who vote in the rest of the nation.

There is merit in the understanding that the Supreme Court’s role does not extend to overall oversight of the political system and its outcomes. A detailed consideration of this view is beyond the scope of this Article, but one need only consider the effect of the *Bush v. Gore*<sup>113</sup> case on the perceived legitimacy of the Supreme Court to appreciate a modest judicial role. Alan Dershowitz memorably referred to the Justices’ decision to intervene in the outcome of the 2000 presidential election-voting in Florida, and then essentially award the presidency to George W. Bush on an equal protection theory in which the majority did not believe, as “the single most corrupt decision in Supreme Court history.”<sup>114</sup> In that decision, as would be the case in my hypothetical, the motivation of the Justices to intervene was to prevent a constitutional crisis, a crisis in democracy. But the result was a catastrophe from the perspective of judicial legitimacy—“Judicial Lawlessness” in the words of Ward Farnsworth.<sup>115</sup>

In my hypothetical, to head off an assault on democracy through the Electoral College’s manipulation, it would be necessary for the Justices to essentially do some constitutional architectural engineering. The fundamental problem is that the Electoral College was originally intended to perform a deliberative role<sup>116</sup> it has long since lost. Since a deliberative body no longer selects the President on personal merit, the only legitimacy that the presidential selection process can have in this modern age is some form of democratic imprimatur. One can imagine retaining the winner-take-all national system on the ground that it is usually democratic in outcome and that its peculiarities can be justified by reference to the need for some form of broad geographic appeal by a presidential candidate—a justification similar to that of the

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113. 531 U.S. 98 (2000).

114. ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HACKED ELECTION 2000*, at 174 (2001).

115. See generally Ward Farnsworth, “*To Do a Great Right, Do a Little Wrong*”: A User’s Guide to Judicial Lawlessness, 86 MINN. L. REV. 227 (2001) (describing *Bush v. Gore* as a “lawless” opinion).

116. See Cass R. Sunstein, *The Beard Thesis and Franklin Roosevelt*, 56 GEO. WASH. L. REV. 114, 118 (1987).

Senate. There is no reason to think the Framers would have chosen such a system, but they are not here to design a new one.

But no one could justify a nationwide conspiracy to manipulate voting rules in different states just to achieve the partisan result of electing Republican presidents. And once achieved, the corrupt scheme would not be easy to change. The change would require as much national coordination as did the plot in the first place. If the U.S. Supreme Court would have good reason not to interfere, therefore, there would also be compelling reasons for it to do so, even though the Justices would absolutely be in unchartered territory. Intervention would not be justified on a strictly originalist theory, but it would not be prohibited either.

Aside from stopping an assault on democracy, the possibility of judicial intervention in my hypothetical scenario would have another, entirely different, but salutary, effect—a prophylactic one.

Politicians may violate unwritten rules for partisan gain when democratic norms have disintegrated,<sup>117</sup> but generally speaking, they do not violate the law. Thus, Levitsky and Ziblatt describe the Republican effort in Texas in 2003 as determined to go as far as the law permitted, but presumably, no further.<sup>118</sup>

The same approach was present in the determined gerrymandering that occurred after the 2010 Census. As told by Michael Tomasky in reference to an account set forth in David Daley’s book, *Ratf\*\*ked*,<sup>119</sup> Republican operative Chris Jankowski realized that if a few state legislative seats were flipped in the 2010 election, the resulting gerrymandered House seats could practically assure Republican control of the House of Representatives for the next ten years.<sup>120</sup> So, Jankowski organized a big money effort to obtain strategic majorities in selected state legislatures.<sup>121</sup>

Now, in part, Daley’s breathless account amounts to nothing more than a political party trying to win elections and succeeding for a

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117. LEVITSKY & ZIBLATT, *supra* note 2, at 151 (describing one politician’s attitude toward paying lobbyists as “[i]f it wasn’t illegal, do it”).

118. *Id.* at 154.

119. DAVID DALEY, *RATF\*\*KED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA’S DEMOCRACY* (2016).

120. Michael Tomasky, *Ratfucked Again*, *NEW YORK REVIEW OF BOOKS* (June 7, 2018), <https://www.nybooks.com/articles/2018/06/07/on-gerrymandering/>.

121. *Id.*

variety of reasons, including dissatisfaction with the Democratic incumbent President and a decline in Democratic Party voter participation. If Jankowski could see what was at stake in the outcome of the 2010 election, there is no reason why Democratic Party operatives would not have seen the same thing. Jankowski had his epiphany after reading a story in the *New York Times*, not in a secret library.<sup>122</sup>

But from the point of view of democracy as a whole, the episode represented the kind of waste that economic theory associates with certain forms of government regulation of the market.<sup>123</sup> Simply put, there was too much at stake because of a failure of potential U.S. Supreme Court intervention. If Republican Party strategists had needed to consider a realistic possibility that the U.S. Supreme Court would invalidate at least extreme versions of gerrymandering, they would have had less incentive to set the entire scheme in motion.

That is something that a U.S. Supreme Court commitment to democracy would accomplish. In terms of my hypothetical Electoral College scheme, which remember was not so hypothetical, a fear that for all the effort, the U.S. Supreme Court might find a way to invalidate the result and announce that under current conditions, no wholesale changes in the Electoral College would be permitted for fear of democratic sabotage, the effort would never be made in the first place, and the crisis would never happen.

There is one more reason for the Justices to consider a much more active role in the preservation of democracy—times have changed; democratic norms have deteriorated; the unthinkable is now possible. As Abraham Lincoln also said: “As our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country.”<sup>124</sup>

The threat to democracy entailed by manipulation of the Electoral College could have happened at any time in our past. The reason

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122. DALEY, *supra* note 119, at xiii–iv.

123. Lobbying to acquire competitive advantage is referred to as rent seeking because it “does not add value to the larger marketplace.” David John Marotta, *What Is Rent-Seeking Behavior?*, *FORBES* (Feb. 24, 2013, 9:30 AM), <https://www.forbes.com/sites/davidmarotta/2013/02/24/what-is-rent-seeking-behavior/#6e32045c658a>.

124. President Abraham Lincoln, Annual Message to Congress: Concluding Remarks (Dec. 1, 1862), in 5 *COLLECTED WORKS OF ABRAHAM LINCOLN* 518, 537 (Roy P. Basler et al., ed. 1953).

it did not happen is simply that the unwritten rules created by adherence to the democratic norms of tolerance and forbearance prevented it. It is also the case that a U.S. Supreme Court in prior years would not have intervened in a change to state Electoral College delegate selection. These two considerations are linked. The fundamental reason for the U.S. Supreme Court to play a role in the preservation of democracy is that now such a role is necessary. It was not necessary before.

#### IV. WHAT COURTS SHOULD AND SHOULD NOT DO TO PRESERVE DEMOCRACY

Unfortunately, the Justices are likely to continue to practice business as usual. They probably will be among the last to recognize the emergency.<sup>125</sup> Part of the reason for that is that most law professors, some of whom are read by the Justices and are in communication with them, are also practicing business as usual, in the sense of not abandoning partisan commitments in favor of an overall commitment to democracy. I will return to that theme in the last section.

But if the Justices do become convinced, by recognition of the danger, to assume a new or more aggressive role as the guardians of democracy, the question will become: what should the U.S. Supreme Court, lower federal courts, and state courts actually do? Can the courts prevent the death of democracy?

Basically, the answer is no, which is why the last section of this Article addresses actions by law professors going beyond litigation and court cases. An important part of the analysis by Levitsky and Ziblatt is that democracies die by the decline of tolerance for rule by the other side and forbearance against taking all possible legal steps against one's political opponents.<sup>126</sup> Almost by definition, then, the actions

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125. A very good example of myopia by the Justices is *Abbott v. Perez*, 138 S. Ct. 2305, 2313, 2324–25 (2018), in which Justice Alito held that the three-Judge panel erred in reversing the presumption of legislative good faith in the context of racial discrimination in drawing district lines because the district court had required a showing of a “true change of heart” by the Texas legislature due to a finding of past discriminatory intent. But why should a legislature that has been shown to have discriminated intentionally in recent years be treated the same as a legislature that never had done so? Only a Court that is not really worried about electoral manipulation would rule this way.

126. LEVITSKY & ZIBLATT, *supra* note 2, at 136–38.

that destroy democracy tend, at least at first, to be technically legal and beyond the capacity of the courts to stop.

A perfect example of the decline of democratic forbearance, and one mentioned by Levitsky and Ziblatt, is the weaponization of impeachment.<sup>127</sup> Prior to the impeachment of President Clinton, impeachment was not used as a purely partisan maneuver. The authors say that no impeachments took place without at least some possibility of a conviction in the Senate; that convention was broken by the Clinton impeachment.<sup>128</sup>

Whether this claim is historically justified, and indeed whether impeachment should be treated as an independent responsibility of the House of Representatives so that the legitimacy of impeachment is judged by its own standard, are not my focus here. The point is that the decision by the House to impeach is undoubtedly a political question, with which the U.S. Supreme Court will not interfere under any circumstances.<sup>129</sup> Insofar as such an impeachment is a violation of democratic norms, it is a non-reviewable assault on democracy.

This conclusion might be put to the test very soon. At the moment, there are no valid grounds for impeachment of President Trump. Nevertheless, now that the Democrats have taken control of the House of Representatives after the 2018 election, I doubt they will practice forbearance. Such a majority would be likely to impeach even without any new evidence against the President. But, as I discussed above, the merits of such an action by the House would probably be considered a political question.

This scenario illustrates why courts cannot stop the deterioration in democratic norms. And any number of other examples could be given.<sup>130</sup> If our politicians are truly determined to destroy democracy, they will succeed.

But that reality shows only how important it is for courts to act, and to act aggressively, when they can. Perhaps the courts can restrain

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127. *Id.* at 150–51.

128. *See id.* (discussing how the investigation into President Clinton did not find anything reaching the level of “high crimes and misdemeanors”).

129. *Cf.* *United States v Nixon*, 506 U.S. 224, 237–38 (1993).

130. The Court cannot, for example, force a recalcitrant Senate majority to confirm a qualified U.S. Supreme Court nominee by a President of the other Party.

our politicians to some extent by mobilizing public support for democratic norms and by actually preventing some of the worst partisan abuses.

In what sorts of cases should the courts act? Serious arguments can be made that democracy is threatened in all sorts of ways—by overly activist courts nationalizing abortion rights or same-sex marriage, for example, or by judicial constitutionalizing of unlimited corporate and individual campaign expenditures. But these matters are not what Levitsky and Ziblatt mean by the death of democracy. They have in mind much more direct threats, such as trying to keep political opponents out of power by restricting the opponent’s supporters’ voting rights through voter ID laws or limiting the effectiveness of their votes through effective gerrymandering.<sup>131</sup> It is in terms of these kinds of threats that the court could help to preserve democracy, both directly, through case outcomes, and indirectly, through democratic rhetoric and deterrence.

The U.S. Supreme Court has been ineffective both in recognizing the danger to democracy in such practices and in formulating effective standards to restrict their use. Obviously those two failures are related. If the U.S. Supreme Court recognized the danger, the Justices would be more likely to act and to create the conditions in which lower courts would know how to act as well.

In upholding an Indiana voter ID law, in *Crawford v. Marion County*,<sup>132</sup> the Justices failed to take seriously the law’s impact on potential voters. This holding is in contrast to the approach of the U.S. Supreme Court to third-party candidate ballot access, where the Justices have not hesitated to strike down restrictive laws.<sup>133</sup> In *Crawford*, there was no majority opinion. The plurality opinion by Justice Stevens<sup>134</sup> and the concurrence in the judgment by Justice Scalia<sup>135</sup> made up a six-Justice bloc upholding Indiana’s requirement of government issued photo-identification for voting.

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131. LEVITSKY & ZIBLATT, *supra* note 2, at 183–86, 209–12.

132. 553 U.S. 181 (2008).

133. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (striking down unreasonably early filing deadlines for independent candidates running for President).

134. *Crawford*, 553 U.S. at 185–204 (plurality opinion) (joined by Roberts, C.J. & Kennedy, J.).

135. *Id.* at 204–09 (Scalia, J. concurring) (joined by Alito & Thomas, JJ.).



These two opinions treated the issue of intent very differently. For Justice Stevens, a voting regulation must be justified by “relevant and legitimate state interests,”<sup>136</sup> but if those interests are present, they justify a law even if “partisan interests . . . provided one motivation for” the law.<sup>137</sup> Justice Stevens acknowledged the possibility that the unique burdens imposed on individual voters might overcome the state’s general interests, but Justice Stevens doubted that showing could be made.<sup>138</sup>

For Justice Scalia, on the other hand, the burden on individual voters was completely irrelevant: “The Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes.”<sup>139</sup> But at least Justice Scalia did not denigrate the effect of proof of discriminatory intent, as Justice Stevens seemed to do. The problem for Justice Scalia was that there had been no actual proof in the case of discriminatory intent.<sup>140</sup>

In terms of intent, there was no reason for the U.S. Supreme Court to take Indiana’s neutral justifications seriously. Voter ID laws are nothing more than a partisan strategy to suppress some number of Democratic-leaning voters from voting.<sup>141</sup> That intent alone should be enough to trigger strict scrutiny. But, in 2008, not one Justice was willing or able to acknowledge the obvious partisan background of these laws.

It may be that the Justices are finally beginning to grapple seriously with partisan advantage as an illegitimate factor in voting rights cases. In *Harris v. Arizona Independent Redistricting Commission*,<sup>142</sup> a unanimous U.S. Supreme Court was willing to assume “without deciding, that partisanship is an illegitimate redistricting factor” in a case concerning population discrepancies among voting districts.<sup>143</sup>

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136. *Id.* at 191.

137. *Id.* at 204.

138. *See id.* at 200–01.

139. *Id.* at 205 (Scalia, J., concurring).

140. *Id.* at 207.

141. *See* Cernetich, *supra* note 112 (discussing a statement by House Representative Mike Turzai).

142. 136 S. Ct. 1301 (2016).

143. *Id.* at 1310.

In the context of partisan gerrymandering, reference was made above to the two most recent cases in which the U.S. Supreme Court continues to flounder, unable either to permit unrestricted partisan gerrymandering or to establish a standard by which lower courts could find such gerrymanders unconstitutional.<sup>144</sup> As stated above, the U.S. Supreme Court's failure at the very least to find departures from normal practices constitutionally suspect in *League of United Latin American Citizens*<sup>145</sup> was particularly obtuse. Departures from the norm are just the sort of behavior that Levitsky and Ziblatt are highlighting in the decline of democratic norms and the violation of respected conventions.

The failure of the Justices in *League of United Latin American Citizens* was especially hard to understand because in other cases, novelty does render a statute suspect. Thus, in *United States v. Windsor*,<sup>146</sup> one factor in striking down the Defense of Marriage Act was that its departure from the "history and tradition" of reliance on state law to define marriage suggested careful consideration in reviewing the law.<sup>147</sup> Similarly, in *Shelby County v. Holder*,<sup>148</sup> it was a "dramatic departure from the principle that all States enjoy equal sovereignty" that required a higher level of justification of Section 4 of the Voting Rights Act.<sup>149</sup>

In contrast to the U.S. Supreme Court's failure, Chief Justice Ronald Castille of the Pennsylvania Supreme Court took a more forthright stance toward both legislative redistricting and voter ID laws—one much more likely to preserve democracy, because of its outcome, its rhetoric, and because of his Party affiliation.

In the gerrymandering case, *Holt v. 2011 Legislative Reapportionment Commission*,<sup>150</sup> Chief Justice Castille recognized the inevitable political element in drawing district lines but pointed out that the limits and standards in the Pennsylvania Constitution "exist precisely

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144. See *Vieth v. Jubelirer*, 541 U.S. 267, 313 (2004) (Kennedy, J., concurring) (noting that as of yet, there is no standard to measure unconstitutional gerrymanders, but one may emerge in the future).

145. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 477 (2006).

146. 570 U.S. 744 (2013).

147. *Id.* at 768.

148. 570 U.S. 529 (2013).

149. *Id.* at 535.

150. 38 A.3d 711 (Pa. 2012).

as a brake on the most overt of potential excesses and abuse.”<sup>151</sup> Granted, the Chief Justice had the advantage of a constitutional process that includes review in the Pennsylvania Supreme Court,<sup>152</sup> thus conferring automatic legitimacy on such review. Nevertheless, his approach shows that there need be no discrete, either-or decision about whether a plan is excessive in its treatment of political factors, compared to traditional districting values, such as compactness and cohesion. A court can accept a certain level of partisan manipulation as long as the neutral and traditional criteria of districting are mainly followed. There is nothing wrong with a judge using common sense judgment even in this controversial arena.

In the voter ID case, *Applewhite v. Commonwealth*,<sup>153</sup> Chief Justice Castille did not rule on the ultimate merits but rather established the standard for judging new voting regulations. The Commonwealth must carry the burden of showing that there will be no substantial disenfranchisement—actually the opinion stated “no voter disenfranchisement”—before a new law can take effect.<sup>154</sup> All of Justice Scalia’s concerns about federal courts having to review details of voting regulations and the state being rigidly constricted in making changes in voting laws are brushed aside in *Applewhite* because “the population involved includes members of some of the most vulnerable segments of our society (the elderly, disabled members of our community, and the financially disadvantaged).”<sup>155</sup>

I know that Justice Scalia would point out that it is much more appropriate for a state supreme court to impose such burdens on state government than it is for a federal court to do so. There is certainly something to that argument. But the breakdown in American democracy is not taking place state-by-state. It is proceeding nationally.

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151. *Id.* at 745.

152. *See* PA. CONST. art. II, § 17(d) (“Any aggrieved person may file an appeal from the final plan directly to the Supreme Court within 30 days after the filing thereof. If the appellant establishes that the final plan is contrary to law, the Supreme Court shall issue an order remanding the plan to the commission and directing the commission to reapportion the Commonwealth in a manner not inconsistent with such order.”).

153. 54 A.3d 1 (Pa. 2012).

154. *Id.* at 5.

155. *Id.* at 4.

These two decisions were all the more important both because the Chief Justice's rhetoric was wholly accessible to the people of Pennsylvania and because he was a Republican Chief Justice elected on a partisan ballot. There was no partisan rancor after these decisions were announced. And they did strengthen democratic values, both in the results and in their endorsement of a fair and open political process, which would not be allowed to descend into warfare and ill-will.

Unfortunately, the Pennsylvania Supreme Court also furnished, more recently, a blueprint of what courts should not do to preserve democracy. In *League of Women Voters v. Commonwealth*, the court held that the current congressional district lines constitute an unconstitutional partisan gerrymander in violation of Article I, Section 5 of the Pennsylvania Constitution.<sup>156</sup> If the court had stopped there, this decision might have been unanimous, including Republican Chief Justice Thomas Saylor. Saylor dissented, not so much because he considered the Pennsylvania congressional map to be constitutional, but because of the court's failure to grant a stay pending the decisions of the U.S. Supreme Court in the gerrymandering cases discussed above and because of the extraordinary process utilized by the majority during the entire course of the litigation, including drawing a new congressional district map itself.<sup>157</sup> Criticism of the four Democratic justices in the case, who comprised the majority, is beyond my scope here.<sup>158</sup> The point is, though, that in contrast with the consensus and bipartisan opinions of Chief Justice Castille, this decision raised so much partisan rancor that the Pennsylvania Republican legislative leadership threatened impeachment of the four justices in the narrow majority.<sup>159</sup>

What judges should not do, therefore, however strong their commitment to the preservation of democracy substantively, is to make

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156. 178 A.3d 737, 803, 818 (Pa. 2018) (considering the language of the Pennsylvania constitution that “[e]lections shall be free and equal”) (citing PA. CONST. art. I, § 5).

157. *Id.* at 832–34 (Saylor, C.J., dissenting).

158. See Bruce Ledewitz, *A Lost Opportunity to Reach a Consensus on Gerrymandering*, JURIST (Feb. 13, 2018, 1:26 PM), <https://www.jurist.org/commentary/2018/02/pennsylvania-gerrymandering-bruce-ledewitz/>.

159. See Salena Zito, *Pennsylvania Republicans Threaten Impeachment Over Redrawn Electoral Map*, WASH. EXAMINER (Feb. 22, 2018, 11:42 AM), <https://www.washingtonexaminer.com/pennsylvania-republicans-threaten-impeachment-over-redrawn-electoral-map>.

things worse by rendering opinions that can be regarded as partisan. Obviously, the Justices in *League of Women Voters* felt they were upholding democratic values by taking effective action against gerrymandering. But that view was shortsighted. Today, unanimity in partisan matters is just as important as it was in *Brown v. Board of Education*.<sup>160</sup>

Beyond the particular issues of voter ID and gerrymandering, is there any general principle that the courts could apply to a range of issues, including aspects of my nightmare scenarios above? I believe the answer to that question is yes, and there is nothing particularly difficult about articulating the standard. The standard could simply be the one utilized by Chief Justice Castille above—partisan considerations are not inherently unconstitutional but are unconstitutional when they become excessive and abusive. And this standard could be applied in many different contexts. This standard resolves the problem that seemed to bedevil Justice Stevens in *Crawford* and was mentioned by Chief Justice Roberts in oral argument in *Gill*—that the Court has always accepted a ““certain degree of partisanship.””<sup>161</sup> Chief Justice Castille recognized that reality as a starting point, but announced a level of judicial oversight nevertheless.

The criticism of this kind of standard is that it is vague. Justice Scalia in *Crawford* was of the view that the states need clarity to govern elections.<sup>162</sup> But Justice Scalia was wrong. In a context in which politicians are tempted to go to the limit in taking advantage, the last thing that is desirable is clarity. In all political matters during this emergency, the law must be a terror and not a perch.<sup>163</sup> It is best that politicians know only that if they go too far, they run the risk of judicial intervention. More than that, we should not wish them to know.

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160. See 347 U.S. 483 (1954).

161. See Nina Totenberg, *Frustrated Supreme Court Looks for a Solution to Partisan Gerrymandering*, NAT'L. PUB. RADIO (Mar. 28, 2018, 5:00 AM), <https://www.npr.org/2018/03/28/596220408/extreme-partisan-gerrymandering-the-supreme-courts-play-in-3-acts> (quoting Chief Justice John Roberts).

162. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 208 (2018) (Scalia, J., concurring) (“This is an area where the dos and don'ts need to be known in advance of the election . . . .”)

163. Cf. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 1.

V. A CALL FOR A PRO-DEMOCRACY CAUCUS AMONG AMERICAN LAW PROFESSORS

Thus far, this Article has addressed issues involving what judges should do. But what should the rest of us do? Specifically, what should law professors do?

One thing that is needed is a bipartisan group of American law professors, perhaps in an organization, but probably in a loosely-defined grouping—a caucus—that promotes democratic values and urges the courts, especially the U.S. Supreme Court, to recognize the emergency and to rule accordingly. At the very least, the Justices would be urged to look more closely at voter ID laws, gerrymandering, and all other attempts by politicians to take partisan advantage.

Having had some preliminary discussions along these lines, I know how difficult it is going to be to create such a group. There are several reasons for the difficulty. First, American law professors are just like other politically interested Americans. That means that we are just as partisan as everybody else. In fact, because we often teach in areas of public law, we are even more aware of past wrongs by the other side—Democrats refusing to seat the Republican winner of an Indiana Congressional seat in 1985,<sup>164</sup> for example, or Judge Brett Kavanaugh's work for Ken Starr<sup>165</sup>—and are therefore tempted to excuse bad behavior by our fellow Party members. We law professors are participants in the threat to democracy, not mere observers. Second, law professors are argumentative. So, it will be difficult for law professors to concentrate on a single, narrowly defined approach. There will be many different points of view. Finally, a few of us are extremely involved in the activities that constitute today's toxic political environment. Doubtless there were Republican law professors who were consulted in creating the list from which President Trump chose his

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164. See *Republicans Protest Recount of Indiana Vote*, NY TIMES, Apr. 26, 1985, at B20, <https://www.nytimes.com/1985/04/26/us/republicans-protest-recount-of-indiana-vote.html>.

165. See Tamara Keith, *Brett Kavanaugh's Role in the Starr Investigation and How It Shaped Him*, NAT'L. PUB. RADIO (Aug. 17, 2018, 6:01 PM), <https://www.npr.org/2018/08/17/639670928/brett-kavanaughs-role-in-the-starr-investigation-and-how-it-shaped-him>.

Supreme Court nominees. Doubtless there were Democratic law professors who counseled Democrat Senators on how to effectively oppose Justice Kavanaugh's U.S. Supreme Court nomination.

But because of these very factors, a bipartisan caucus of law professors that called the political parties to account, reached out to the Justices on the U.S. Supreme Court, and created in the public mind a firm commitment to democratic values—in other words, a caucus that took the threat to democracy seriously—could be enormously influential.

Such a caucus could not be expected to erase the divisions among law professors over constitutional interpretation or substantive law. Although there would be much discussion, there could be no position on a “democratic” mode of constitutional interpretation—originalism could not be part of the values promoted—or in favor of certain rights, such as abortion or same-sex marriage—or even most free speech issues, such as the role of money in American public life. On all those matters, members of the caucus would have to agree to continue to disagree.<sup>166</sup>

As one potential participant said to me, this leaves the caucus concerned with only a very modest definition of democracy—practically that the military should not take over, and elections should not be cancelled. That is true, but it amounts to saying that America is closer to democracy's death than we realize and that we must earnestly revitalize the democratic norms of tolerance and forbearance. That is a narrow goal, but it may prove extremely difficult to accomplish.

Fortunately, the two tasks in which the caucus will be engaged tend to point in opposite partisan directions, which will give the group some claim to neutrality and legitimacy. In promoting tolerance and forbearance, the caucus for the moment will likely be urging Democrats not to raise the political stakes—not to impeach President Trump, for example, without some hint of bipartisan support in the Senate. But in terms of its work with the Justices, the caucus will often be urging the U.S. Supreme Court to undo actions by Republicans.

I can give some examples of the sort of role that such a caucus would play, versus the way things operate today.

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166. Perhaps the caucus would be a place of fruitful discussion that, over time, would narrow or re-conceptualize these differences.

I have no doubt that most Republican law professors deplored the treatment received by Judge Garland and thought, at least in a theoretical sense, that the Senate should have confirmed him to be seated on the U.S. Supreme Court. I heard Stanford law professor Michael McConnell, perhaps the dean of conservative American law professors, say these very things in a speech.<sup>167</sup>

I have to be realistic here. I don't mean that Republican law professors are angels. I'm sure they were also personally delighted with the prospect of preventing the establishment of a committed liberal, five Justice majority on the U.S. Supreme Court, which was at the time seen as likely to grow with the election of a Democratic President in 2016. I only mean that these professors recognized the norm violation that was going on and, on some level, had to have been worried about it. They knew that the only reason to oppose Judge Garland's nomination was a disagreement with his judicial philosophy and that this was not really a historically justified ground of opposition.

At the time, I am sure they did nothing on behalf of Judge Garland. They were not, after all, called upon to try to stop the Republican leadership from practicing the lack of tolerance and forbearance that rejecting Judge Garland represented. So, they probably just stood back.

I am actually confident about this because I was in the same situation concerning the nomination of Justice Neil Gorsuch to the U.S. Supreme Court. I knew that Justice Gorsuch's nomination should not be opposed simply because of how he might conscientiously vote in controversial cases. That kind of warfare is an example of democratic deterioration. The sitting President should be able to decide on the basic orientation of judicial nominees. That is why Justice Scalia, for example, was unanimously confirmed in 1986. So, without evidence that Judge Gorsuch was an extremist and rigidly unreasonable, I had no principled grounds to oppose his nomination. And, certainly, there were no evident grounds for a filibuster against him.

But I did not call the office of my Democratic Senator, Robert Casey, to whom I have made campaign contributions and, therefore, could have at least gotten a hearing from some staff member, to urge

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167. The speech was given at the opening address for the 2017 Symposium at Pepperdine Law School entitled "The Supreme Court, Politics and Reform" on April 8, 2017. See Pepperdine Law, *Pepperdine Law Review Symposium: Opening Address, Michael McConnell*, YOUTUBE (Apr. 21, 2017), <https://www.youtube.com/watch?v=1GwqNoPaRGs>.



the Senator not to filibuster the Gorsuch nomination. I had no obligation to do this, and I was happy that the Democrats were fighting back after the Republicans had stolen a seat on the U.S. Supreme Court. So, I did nothing.

In retrospect, however, I was as mistaken as the conservative law professors were in not urging the confirmation of Judge Garland. We were not taking the long view. We were not defending democratic values. By our passivity and willingness to take partisan advantage, we were part of the threat to democracy.

The work of the pro-democracy caucus would not just be behind the scenes, reaching out to politicians, but would also consist of pronouncing and defending publicly the norms of tolerance and forbearance. The idea of a politically active group of knowledgeable Americans reaching across the aisle to promote democracy in controversial contexts would receive a lot of attention.

In trying to convince the Justices, on the other hand, behind the scenes work would be more important than simply filing another amicus brief. The Justices undoubtedly are beginning to worry about democracy. They would also be aware of the creation of a bipartisan caucus of law professors condemning, for example, voter ID laws, gerrymandering, and if it came to that, manipulation of the Electoral College. But the Justices would also have to know that they would have support from “their side” if they broke Party ranks in important political cases. Contacts like these go on now between law professors and the chambers of Supreme Court Justices and in private conversations at meetings and events. Politically connected members of the caucus would urge the Justices to rethink their usual Party alignments. As stated above, originalism does not counsel allowing democracy to die, even if extraordinary judicial efforts to save it become necessary.

I don’t know whether establishing the caucus is possible or is just a pipe dream. It may even be that the attempt to create it, even just discussing it, will have some of the benefits that the caucus itself would have. All I know is that I don’t want to wake up one day to find that our democracy has ended and then wonder why I had not done more to try to prevent it.

## VI. CONCLUSION: WHY DID WE GET HERE?

Why do politicians, and then whole populations, cease to practice tolerance and forbearance? Once the process starts, it is demonstrably hard to stop. But why does it get started in the first place? Levitsky and Ziblatt do not have much to say about that—they tell us how democracies die, but not why. In Europe in the 1930s, decades of war and economic dislocation can be blamed. But this is not the case in all their historical examples, and it is certainly not the case with regard to America in the period they are studying—roughly 1978 to the present. Wage stagnation is not sufficient to explain how Americans came to be so deeply distrusting of each other.<sup>168</sup>

At a recent meeting I had with another potential participant in the pro-democracy caucus, this question of *why* came up. The professor's response was to lament the current unwillingness in American politics to take the long view. A lot of the things that are bothering us have happened before and there are ebbs and flows. Why is it that Americans are now so on edge and so unwilling to be patient?

Pondering that observation brought me back to a famous teaching by Dr. Martin Luther King, Jr.: “[E]ven though the arc of the moral universe is long, it bends toward justice.”<sup>169</sup> When you believe that, as did Dr. King, you can trust in the universe to eventually right current wrongs. This may be why Dr. King could work so patiently, actually loving his opponents and hoping for their eventual conversion.

This faith is also the reason that Dr. King never worried all that much about defining justice. From his perspective, justice had power in history, and so to speak, we did not have to define it because it would define us.

Something along the lines of Dr. King's teaching may be necessary for democracy to work. We must believe that our fellow citizens will have the wisdom to recognize justice and that our society will move in that direction. If instead we believe that our culture is captive

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168. The authors do suggest that to some extent tolerance and forbearance were premised on an agreement that white rule would be preserved and not challenged in certain states. LEVITSKY & ZIBLATT, *supra* note 2, at 124–25. Once this post-Reconstruction consensus began to break down, so did democratic norms.

169. *Love, Law, and Civil Disobedience*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 43, 52 (James Melvin Washington ed., 1986).

to the whims of modernity, which is what the Right tends to believe, or is captive to the lies of dark money, which is what the Left tends to believe, democracy is worthless and will eventually pass away. Our nihilism may be why our democracy is threatened.

I mention this because, while hard work is needed right now to shore up our tattered democratic tradition, when this work is completed, as hopefully it will be, and the emergency recedes, as hopefully it will, we must still ask, why did it almost happen here?

## VII. AN ADDENDUM IN LIGHT OF THE 2018 ELECTION RESULTS

The editors were kind enough to permit me to add a short reflection on the results of the November 2018 Midterm Election: those results were mixed. The Democrats narrowly retook the House of Representatives.<sup>170</sup> The Republicans slightly increased their majority in the Senate.<sup>171</sup> Neither side could claim popular vindication—or both could.

Behind that surface result, however, lay a troubling reality for Republicans. Despite a booming economy, President Trump was unable to enlarge his base of support. A very favorable political map of races mostly caused the positive Senate result. There had been 26 Democratic seats in play and only nine Republican seats.<sup>172</sup> In other words, nothing about the 2018 results could give Republicans confidence about 2020. It could appear to them that the 2020 election could result in Democratic majorities in both Houses of Congress and a Democratic President.<sup>173</sup> Since President Trump will almost certainly be the Republican nominee, only something very unexpected could change this scenario.

Given this likelihood, Republicans could respond by dramatically changing course. President Trump could reach across the political aisle. The Republicans could put some Democrats on the federal courts. They could even confirm Judge Garland to a seat on the U.S.

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170. *Live Midterm Results: House Races*, WASH. POST, [https://www.washingtonpost.com/election-results/house/?noredirect=on&utm\\_term=.1b4fcf0de418](https://www.washingtonpost.com/election-results/house/?noredirect=on&utm_term=.1b4fcf0de418) (last updated Mar. 7, 2019, 8:20 AM).

171. *Live Midterm Results: Senate Races*, WASH. POST, [https://www.washingtonpost.com/election-results/senate/?utm\\_term=.0559d9e92aeb](https://www.washingtonpost.com/election-results/senate/?utm_term=.0559d9e92aeb) (last updated Mar. 7, 2019, 8:20 AM).

172. Amber Phillips, *The Fix's Top 10 Senate Races Show Democrats with a (Narrow) Opening to Win the Senate*, WASH. POST (July 20, 2018), [https://www.washingtonpost.com/news/the-fix/wp/2018/07/20/the-top-10-senate-races-give-democrats-a-narrow-opening-to-win-the-senate/?utm\\_term=.32fc21b19e89](https://www.washingtonpost.com/news/the-fix/wp/2018/07/20/the-top-10-senate-races-give-democrats-a-narrow-opening-to-win-the-senate/?utm_term=.32fc21b19e89).

173. This is by no means a certainty. There are analysts who argue that it will be difficult for the Democrats to win back the Senate in 2020 even if the Party defeats President Trump and holds on to its House majority. See Philip Klein, *Republican Gains May Have Put Senate Out of Reach for 2020 Democrats*, WASH. EXAMINER, (Nov. 7, 2018, 8:24 AM), <https://www.washingtonexaminer.com/opinion/republican-gains-may-have-put-senate-out-of-reach-for-2020-democrats>.

Supreme Court, in a dramatic gesture of nonpartisanship, should one of the current liberals retire.

But given what the reader has read here, it is obvious that this is unlikely to happen. President Trump responded to the 2018 Election results by immediately firing Attorney General Jeff Sessions, in an apparent effort to limit the Russia Investigation.<sup>174</sup> Nor is there any reason to believe that the Democrats would respond in equal political good faith to any such Republican effort.

It is much more likely that the Republicans will react by taking every advantage while they still can. And the Democrats will respond in kind. In that event, the next year and a half will bring more recriminations and bitterness, more partisan and controversial judicial nominees whom the Democrats will be helpless to prevent, perhaps a failed presidential impeachment attempt, and in general, more national distrust.

The worst possibility of all would be the retirement of Justice Ruth Bader Ginsberg in early 2020. Republicans might cynically change their tune and quickly put one more ideological conservative on the U.S. Supreme Court before the 2020 election, mirroring the Judge Merrick Garland episode.<sup>175</sup> Such an event would render a Court-packing plan from the Democrats almost inevitable.<sup>176</sup>

The question remains, how do we save our constitutional democracy? In some ways, the problem is the same one that has prevented effective action regarding climate change. We humans tend to see immediate issues rather than long-term threats. In politics, we are

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174. Eric Lach, *Trump Fires Jeff Sessions, and Throws His Administration into Chaos*, THE NEW YORKER (Nov. 7, 2018), <https://www.newyorker.com/news/current/trump-fires-jeff-sessions-and-throws-his-administration-back-into-chaos>.

175. Following the February 2016 death of Justice Antonin Scalia, President Barack Obama nominated Federal Judge Merrick Garland to the Supreme Court on March 16, 2016. Almost immediately after Justice Scalia's death, Senate majority leader, Mitch McConnell, ruled out any vote on a successor before a new President was installed in January 2017. No vote was taken and no hearings were held on the Garland nomination. Elving, *supra* note 73.

176. Even before the Election, there were hints that Democrats were becoming more comfortable with the specter of Court packing as a response to Republican judicial nomination efforts. See Editorial Board, *The Supreme Court Confirmation Charade*, N.Y. TIMES (Sept. 1, 2018), <https://www.nytimes.com/2018/09/01/opinion/kavanaugh-supreme-court-confirmation.html>, for the extraordinarily offhand acceptance of this idea.

so fixated on winning in the short run that we forget that we might all be losing in the longer run. So, the first steps are to acknowledge the danger, admit our own complicity in causing it, and accept personal responsibility for preventing possible catastrophe. We can counsel restraint among our political allies.<sup>177</sup> We can urge the courts to forego Party loyalties. We can accept that the stakes are high and immediate. We can only save ourselves by acting as if there is an emergency in which business as usual is no longer acceptable. Because that is the case.

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177. In one very encouraging recent development, conservative academics and lawyers have joined together to form Checks and Balances, a group dedicated to calling President Trump to account for abuses of power. *About Checks & Balances*, CHECKS & BALANCES, <https://checks-and-balances.org/about/> (last visited Mar. 26, 2019). This development could lead to the formation of the larger type of group I call for in this paper in which law professors call their own “side” to account for violations of democratic norms. See *supra* Part V.