The Supreme Court is losing legitimacy

The Supreme Court's decision overturning Roe v. Wade has resulted in the steepest drop in respect for the U.S. Supreme Court in almost a century – the steepest since the Roosevelt court packing crisis of 1937.

James L. Gibson, a political science professor at Washington University and national expert on the subject, wrote in September that the Dobbs v. Jackson decision overturning Roe "may be the most legitimacy threatening decision since the 1930s…Dobbs produced a sizable dent in institutional support, perhaps an unprecedented dent, in part because abortion attitudes for many are infused with moral content."

Gibson added, "in light of the substantial tilt of the court to the right since 2020, the court's legitimacy may be at greater risk today than at any time since FDR's attack on the institution in the 1930s."

A Gallup poll shows that after Dobbs disapproval of the court rose to the highest point this century – 58 percent – and approval sank to the lowest – 40 percent.

If the five conservative justices in the Dobbs majority hold together to overturn other long-standing precedents, then the court will tip sharply to the right and could continue on that path for years. The current term's affirmative action cases involving college admissions at Harvard and the University of North Carolina, are likely to end affirmative action and deepen the impression that the court has taken a sharp right turn. The court's six most conservative justices also are more willing to allow religion in the public square than the courts of the past half century.

Gregory Magarian, a First Amendment scholar at Washington

University Law School and former Supreme Court clerk, says today could be the conservative political counterpoint to 1954 when Brown v. Board heralded the beginning of the Warren Court and its expansion of civil rights, civil liberties and criminal rights.

One difference, Magarian says, is that the agenda of the current five-justice majority is less popular than the Warren Court's, despite the "Impeach Earl Warren" signs that dotted highways in the 1950s and 60s. The reaction to the Dobbs decision, expressed by voters in the November 2022 midterm elections, appears to confirm the view that Dobbs is unpopular nationwide.

One major substantive difference between the Warren Court and Dobbs majority is that the Warren Court was expanding the rights of Blacks and women to fulfill promises of Equal Protection in the Constitution. But Dobbs was a major step in the opposite direction, requiring women in many states prove their lives were at risk before they could receive an abortion.

This was the biggest loss of liberty and equal rights in almost a century of steadily growing individual liberties.

If the court's conservative bloc holds together, the combination of a powerful Supreme Court and a hard to amend Constitution could mean the Constitution we celebrate in 2037 will be substantially different from what it was before former President Trump's justices tipped the scales of justice.

Other problems of legitimacy

About 85 percent of Americans favor abortion rights under all or some circumstances, according to a Gallup poll. But there are additional reasons for the court's legitimacy problem.

Scenes outside the Supreme Court and Dirksen as the Judiciary Committee hearings begin for the nomination of Amy Coney Barrett

One is the lack of respect for stare decisis, precedent. The Dobbs majority jettisoned a precedent of almost 50 years that had been reaffirmed 30 years ago. Respect for precedent is central to legitimacy because it provides a check on the justices simply voting their personal or political preferences.

Roberts seemed almost to be pleading with his conservative colleagues when he wrote in Dobbs: “Surely we should adhere closely to principles of judicial restraint here, where the broader path the court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of stare decisis.”

The Dobbs dissenters said: “The majority has overruled Roe and Casey for one and only one reason: because it has always

despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law."

In addition, President Trump's three judicial appointments – Justices Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett – had appeared to affirm Roe during confirmation hearings, never suggesting they were ready to overturn it.

Also, the Dobbs decision followed more than 40 years of Republican presidents from Ronald Reagan to George H.W. Bush, to George W. Bush to Donald Trump nominating justices they hoped would overturn Roe. Those Republican presidents were able to name 11 justices, while Democratic presidents elevated five. Six of the nine justices on the current court were appointed by Republicans even though Democrats held the presidency for 16 of the past 28 years and won the popular vote in six of the last seven presidential elections.

In addition, the Senate rushed Barrett through confirmation hearings immediately before the 2020 election even though Senate Majority Leader Mitch McConnell had refused to hold a confirmation hearing for Merrick Garland under similar circumstances four years earlier.

Altogether, this gave the appearance that Trump and McConnell had packed the court through hardball politics and counter to constitutional norms.

Plus, it appeared the court majority had weakened democratic means for changing the direction of the court any time soon. The Roberts Court found key parts of the Voting Rights Act unconstitutional, refused to block partisan gerrymanders that had helped Republicans control state legislatures and congressional reapportionment and finally had allowed Republicans to impose new restrictions after the 2020 election that limited voters in the name of election integrity. Democratic efforts to nationalize voting requirements have run

into the counter-majoritarian, and extra-constitutional constraint of the filibuster.

An additional blow to legitimacy has been Justice Clarence Thomas' refusal to recuse himself from cases involving the 2020 presidential election, even though his wife, Ginni, was deeply involved with the Trump White House in election denials.

Legal ethics experts say Thomas should recuse himself from cases involving the Jan. 6 insurrection at the Capitol. But Thomas did not recuse himself recently when the court refused to block the House Jan. 6 committee's subpoena for phone records of Kelli Ward, chairwoman of the Arizona Republic Party. Thomas dissented from the court's action without comment. So, he was taking the side of the election deniers and his wife.

The leak of the Dobbs draft opinion last spring was an unprecedented breach of court protocol and reflected deep divisions within the institution, undermining court legitimacy. The failure of the court's investigation to uncover the leaker and the investigation's tender handling of interviews with the justices has not helped and probably has hurt the court's reputation. Critics said the court's investigation should have subjected the justices to the same probing questioning as other court employees and pressed the justices to sign an affidavit of noninvolvement like other court employees.

In addition, last fall, The New York Times disclosed that a former abortion foe had orchestrated social contacts between wealthy abortion foes and Justices Alito and Thomas. That news unsettled the court because the man claimed Alito had leaked the outcome of a 2014 abortion-related decision at a dinner with anti-abortion fundraisers – a charge Alito denied.

Earlier in December, 2022, the House Judiciary Committee took

up these matters in a hearing on a bill that would require the Supreme Court to adopt an ethical code or adhere to the code that already applies to lower level federal judges. The Government Accountability Project and a host of other liberal groups called for passage of the bill, the Supreme Court Ethics, Recusal and Transparency Act of 2022.

Ironically, former President Trump himself doesn't think the Supreme Court has legitimacy. After the court turned down his attempt to keep his income taxes shielded, Trump wrote on Truth Social,

"Why would anybody be surprised that the Supreme Court has ruled against me, they always do! It is unprecedented to be handing over Tax Returns, & it creates [a] terrible precedent for future Presidents. The Supreme Court has lost its honor, prestige, and standing, & has become nothing more than a political body, with our Country paying the price. They refused to even look at the Election Hoax of 2020. Shame on them!"

Trump followed up that post in early December calling for termination of rules in the Constitution so he can be "declare(d) the RIGHTFUL WINNER" or "have a NEW ELECTION." He wrote: "A Massive Fraud of this type and magnitude allows for the termination of all rules, regulations, and articles, even those found in the Constitution. Our great 'Founders' did not want, and would not condone, False & Fraudulent Elections!"

The title on a conlaw professor's blog on Trump's post was tongue in cheek: "Trump Stands in the Middle of Fifth Avenue and Shoots the Constitution."

The legitimacy of the Supreme Court can only suffer when the former president, who has appointed one-third of the court's justices, charges that the court has lost its honor and that the Constitution should be set aside to reinstate him to power. Trump maintained a day after the post that he was

misunderstood.

Kavanaugh, the new middle?

The right turn that the court is taking might not end up as sharp as it now seems.

Women, many wearing black veils protesting the nomination of Brett Kavanaugh to the U.S. Supreme Court at the Hart Senate Office Building on Friday, Sept. 7, 2018. (Photo by Phil Roeder via Flickr)

The five-justice majority that overturned Roe may not be as doctrinaire and closely knit as has been portrayed in the media and political arena.

Justice Kavanaugh signed on to Justice Alito's majority opinion in Dobbs, but wrote a separate concurring opinion that suggested limitations. For one thing, he said Dobbs would not open the way for states that barred abortion to also criminalize a woman going out of state to get an abortion.

As he put it: "May a State bar a resident of that State from

traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel." (Skeptics note, however, that the Constitution is no more explicit in protecting a right to travel than it was protecting a right to abortion.)

Kavanaugh also emphasized that Dobbs did not jeopardize other decisions based on personal privacy – interracial marriage, access to birth control or same-sex marriage.

Kavanaugh wrote, "Overruling Roe does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents." That assurance contradicted Justice Thomas, who called on the court to reconsider its decisions upholding contraception and same-sex relations in future cases.

The reason that Kavanaugh's view is important is that he could be a fifth justice, along with the chief justice and the three justices appointed by Democrats to limit the court's movement to the right.

Chief Justice Roberts will certainly try to lure Kavanaugh to the middle as he apparently failed to do in Dobbs. Roberts would have discarded Roe's trimester formula but preserved an abortion right for a shorter period of several months to give women time to make a decision.

The legitimacy of the Supreme Court has long been Roberts' most important goal. Roberts is 67. The Roberts Court could last 20 or more years, even past the 250th anniversary of the Constitution. Roberts has demonstrated repeatedly, including in his decisive vote upholding Obamacare, that legitimacy is more important to him than ideology.

Lee Epstein, the former Ethan A. H. Shepley Professor and Distinguished Professor at Washington University, is the nation's leading expert on Supreme Court voting patterns. She says that last term's marquee decisions overturning Roe and protecting the right of people to have guns outside the home,

were predictable. But she adds that Kavanaugh, the new middle of the court, is unpredictable.

In a Slate interview this fall she put it this way: “It’s hard to believe that people didn’t see this (Dobbs) coming. Obama is president for eight years; he gets two appointments. Trump is president for four years; he gets three appointments, and he moves the center of the court toward Brett Kavanaugh, away from the chief justice. So, yeah, I told you so. There’s a lot of predictability here, and abortion and guns—not at all surprising.”

But she adds, “there’s another side to this story, and that’s from the data side. If you look at the data from last term, this doesn’t look like a really socially, culturally extreme court. And that’s what’s a little perplexing about last term …right now, there’s a side to this court that looks, kind of, standard issue Roberts Court.”

There was above average unanimity, with 50 percent of the decisions unanimous compared to the average of 33 percent in recent decades. And there weren’t a lot of 6-3 conservative-liberal splits. Just 15 percent of the decisions came out that way.

In the cases that got the most attention, last term’s decisions didn’t look much different than previous terms, she says. “Look at the 2020 election challenges. Look at the Trump tax records, Obamacare, the cheerleader case…NCAA, the student athlete case…. This was not a total blowout for the Democratic side, which to me was a little unexpected…So, I’m going to push back a little bit on that point, the term looks different; actually it doesn’t look that much different.”

The mystery is Kavanaugh. “If you look at the data, he’s normally, not always, but normally with the chief and why he didn’t join the chief here (in Dobbs) is perplexing to me.”

It’s as if there were two courts operating at the same time. A

Trump Court where the three Trump appointees join Alito and Thomas as they did in Dobbs. And then there's a Roberts court where Kavanaugh comes along with the chief justice and joins the Democratic appointees in a more moderate decision.

A signal of whether a Roberts/Kavanaugh middle bloc will check the more conservative justices could be the decision in Moore v. Harper, the "independent state legislature" case that was argued before the Supreme Court for three hours on Dec. 7. The case will determine how far state courts can go in overturning state legislatures on election rules.

The Republican controlled state legislature in North Carolina drew a congressional redistricting proposal that could have resulted in Republicans controlling 10 of 14 U.S. House seats in a state roughly equally divided between the parties. The state supreme court said this was a blatant partisan gerrymander and experts drew a new map that resulted in a 7-7 split in the 2022 Midterm elections.

The state legislature argues that the state supreme court could not interfere in its redistricting plan because the Constitution says, "Times, Places and Manner" of congressional elections "shall be prescribed in each State by the Legislature thereof." Common Cause and the Justice Department countered that past Supreme Court precedents have always recognized that legislative redistricting must comply with state constitutions and the state supreme court enforces those constitutions.

Rick Hasen, the nation's leading expert on election law, blogged the oral argument Dec. 7 in which it appeared the court was divided into thirds. The three most conservative justices – Thomas, Alito and Gorsuch – are ready to adopt the independent state legislature theory and cut out state supreme courts. The three Democratically appointed justices – Elena Kagan, Sonia Sotomayor and Ketanji Brown Jackson – oppose it. Chief Justice Roberts and Justices Kavanaugh and Barrett

looked for a compromise that would allow state supreme court involvement unless its decision was extraordinary.

If a conservative center blocks the conservative right's attempt to adopt the independent state legislature theory, then the court may appear more moderate.

A vibrant democratic response to Dobbs

One of the main criticisms of Roe from the time it was decided in 1973 was that it took the issue of abortion out of the democratic process at a time when a growing number of states were recognizing abortion rights. From 1967-73, four states repealed abortion bans and 13 others expanded abortion access in situations where a mother's life or health was at risk or in cases of rape and incest.

The late Justice Ruth Bader Ginsburg favored abortion rights but criticized Roe because "it seemed to have stopped the momentum on the side of change."

Because abortion rights advocates could always fall back on the courts and the constitutional right recognized in Roe, they didn't have to work as hard in the political arena. Meanwhile, Republican opponents of abortion rights built a powerful voting bloc that led to Republican presidents naming conservative, anti-abortion judges to the federal courts.

Justice Kavanaugh, in his opinion in Dobbs, said the decision "restores the people's authority to resolve the issue of abortion through the processes of democratic self-government established by the Constitution."

In the weeks after Dobbs, 12 states put abortion bans into place.

But arguably, the strength of the abortion-rights vote in the 2022 midterm election in helping Democratic candidates and passing abortion rights referenda illustrates that Dobbs

revitalized the abortion rights supporters in the democratic process.

In five states, abortion was on the ballot – Kentucky, Michigan, California, Vermont, and Montana. In all five, voters supported protecting abortion access. In three, California, Michigan and Vermont, they voted to put abortion rights in the state constitutions.

Dobbs may have unlocked the vibrancy of the democratic process in regards to abortion with the result that more states voted to protect these rights in the 2022 elections. Congressional passage in December of a law protecting same-sex and interracial marriage is another sign of the Dobbs backlash in the democratic process. The legislation was fueled by reaction to Justice Thomas' Dobbs concurrence calling for the court to reconsider other cases built on privacy, including same-sex marriage and contraception, although he didn't mention interracial marriage, also partly based on privacy.

Winning in the democratic arena in some states doesn't help those in states where abortion remains illegal. A majority of states ban or restrict abortion now, whereas abortion was available as a constitutional right in all states before Dobbs. Supporters say a woman's right to control her body should not be subject to a vote at the ballot box and for that reason is properly a constitutional right protected by liberty in the 14th Amendment.

Previous crises of legitimacy

The Supreme Court has had crises of legitimacy before. The crises have resulted from one of four situations:

–**Packing the court:** A meddling Congress or president or both have repeatedly changed the number of justices on the court to try to affect decisions.

– **Deciding a close presidential election:** The court has twice

become entwined in determining the results of a close presidential election, as it did in 1876 and 2000, taking actions that seemed to critics to be more political than principled.

– **Infamous decisions:** Some of the most infamous court decisions in history have inflicted long-term damage to the court's reputation. The 1857 Dred Scott decision denying Blacks constitutional rights led to the Civil War. Another was Lochner v. New York in 1905 during the Gilded Age of capitalist excess. The court elevated the right of contract over a law setting a 10-hour workday for bakers.

– **Forceful presidents:** Some of the most influential presidents in history – Jefferson, Jackson, Lincoln and Franklin D. Roosevelt – maintained that they could independently interpret the Constitution and were not bound by a contrary Supreme Court interpretation. As FDR put it, the Constitution is a "layman's document, not a lawyer's contract."

After President John Adams lost the 1800 election to Thomas Jefferson, Adams' Federalist Party tried to add new federal judges to be appointed by Adams as a lame duck – the so-called Midnight Justices. It also reduced the size of the Supreme Court from 6 to 5 to deny Jefferson a court appointment.

Jefferson's party promptly reversed direction on the size of the court and in 1807 bumped the court up to seven to give Jefferson another appointment. Plus, the appointment of the Midnight Justices backfired because it led to the famous Marbury v. Madison decision establishing the Supreme Court as the arbiter of what the law is.

Jefferson and Jackson, two powerful Democratic presidents, quarreled with the Chief Justice John Marshall, the great Federalist chief who authored Marbury and other key decisions establishing federal actions, including the constitutionality of the Bank of the United States.

Both Jefferson and Jackson thought the president and democratic majorities in Congress and state legislatures should take precedence over constitutional decisions of the court. Jefferson's views on state power led to the dangerous Nullification doctrine that eventually led to Southern secession and Civil War.

Congress gave Jackson two additional justices to increase the court to nine. Jackson appointed them and Congress confirmed them as the president was going out the door of the White House.

Lincoln gained prominence by attacking Chief Justice Roger Taney's Dred Scott decision, which had read Blacks out of the Constitution. The Lincoln-Douglas debates were all about the Dred Scott decision. Two years later, Lincoln was president and the Civil War had started before he made it to Washington.

Lincoln, as president, ignored Taney's decisions during the Civil War that would have required the president to abide by habeas corpus – the power of the court to free a prisoner. Also, Lincoln issued the Emancipation Proclamation on Jan. 1, 1863 even though most legal experts think he didn't have constitutional authority to do it on his own. He wasn't so sure himself.

Congress added a 10th vote for Lincoln to increase Republican control of the court, but after Lincoln's assassination the Republican Congress reduced the court to seven so that President Andrew Johnson could not appoint Southern sympathizers who would block their Reconstruction laws intended to give political rights to freed Blacks.

Congress increased the number of justices to nine giving President Grant two new appointments in 1869 – an action that led directly to overturning a Supreme Court decision denying the government the authority to issue paper money – greenbacks. The two new justices turned a 4-3 decision against

greenbacks into a 5-4 majority authorizing them to pay off Civil War debt.

In the election of 1876, Supreme Court justices were deciding votes in a compromise that elected Rutherford B. Hayes – the loser in the popular vote. As part of the compromise, Hayes agreed to withdraw federal troops from the South. That allowed segregationists to disenfranchise Black voters for decades into the 20th century.

For the next half century or more, the Supreme Court was no friend of Blacks, women or workers. At the same time that the court was blocking attempts to use Reconstruction amendments and legislation for the purpose they were intended – extending rights to free Blacks – the court found a way to use those amendments to benefit the economic prospects of the industrialists of the Gilded Age.

In Lochner v. New York, 1905, the court held that the 14th Amendment passed after the Civil War protected contract rights for the benefit of employers. Lochner came to stand for this entire era of Supreme Court decisions striking down minimum wage and maximum hour laws. In Lochner, the court ruled that New York's law setting a maximum 60 hour work week for baker's was unconstitutional.

Key elements of President Franklin D. Roosevelt's New Deal were struck down by the Supreme Court at a time of national emergency during the Depression – laws such as the Agricultural Adjustment Act and National Recovery Act. The court ruled that FDR and Congress violated the freedom to contract by regulating business and labor.

When FDR won by a landslide in 1936, winning all but two states and electing a heavily Democratic Congress, he sought to pack the court. He said the elderly court, where the average age was 71, was suffering from a judicial "hardening of the arteries." He wanted Congress to allow him to appoint

six new justices, one for each justice over 70.

Chief Justice Charles Evans Hughes opposed the plan but soon he and Justice Owen Roberts began approving New Deal laws, including the Social Security Act and the National Labor Relations Act. The flip flop was dubbed the "switch in time that saved nine." FDR still pushed for his justices but lost a Senate vote after the chief sponsor died after a hot July debate on the Senate floor.

The verdict of history was so final that no president has since proposed packing the court by adding multiple justices.

Today's crisis of legitimacy is the most severe since the court's challenge to the New Deal and FDR's failed court-packing.

The Biden commission finds no solutions

Liberal and progressive forces, in anticipation and then reaction to Dobbs, have proposed ways to undo the Trump/McConnell court packing, which they say violated accepted constitutional norms. President Joseph Biden appointed a commission that reviewed alternatives and did not make a final recommendation in a report issued a year ago.

Law school critiques have called upon progressives to give up their long-held reliance on the Supreme Court to protect rights from abusive majorities.

Brad Snyder, a professor at Georgetown University Law Center, argued in Politico that the Warren Court had misinterpreted Marbury v. Madison and seized unconstitutional powers in enforcing civil rights decisions. He would seize the tools of conservative legislators from the Warren era to bar the court from hearing appeals on abortion, affirmative action, campaign finance, gun rights and voting rights.

"It is not too late to put the genie of judicial supremacy

back in the bottle and to return policymaking and constitutional enforcement where it belongs – with the American people and their elected representatives," he wrote.

Samuel Moyn, a professor of history and law at Yale, agreed, arguing that, "the fact that the Supreme Court has seldom protected important rights flies in the face of the court's self-image and contradicts a romanticized view of the institution that arose during the mid-20th century" due to Brown and Roe. Moyn too thinks Congress should use jurisdiction stripping legislation.

In an essay with Ryan D. Doerfler of Harvard, Moyn goes on to argue that the Constitution is "broken." It should be made more "amendable," the nation should be "packed" with more states and the role of the Senate should, as a co-equal branch, be altered. All tall orders. The professors admit that in trying to fix the broken Constitution, Congress would be "pretty much openly defying the Constitution." For that reason, it would have to prevent the court from reviewing its fixes.

Jennifer Rubin, an influential columnist for the Washington Post, recently called for term limits on justices or adding new justices. At least, she said, there should be ethics reform, she wrote.

Congress clearly has the power to increase or decrease the number of justices on the court and to alter the court's appellate jurisdiction. One of the proposals considered by the Biden commission would expand the court to 13 as a response to Republicans breaking with constitutional norms in their refusal to consider Garland and then quickly confirming Barrett under similar circumstances.

But history's verdict on FDR's court packing effort provides a roadblock to this proposal. Packing the court to bring about more favorable results, itself, undermines the court's

legitimacy and its role as a check on other branches of government and to abusive majorities.

As the Biden commission put it in a quote that Rubin left out of her column of support: “For opponents of Court packing, the historical condemnation of the 1937 Court packing plan illustrates what they regard as a fundamental principle of American constitutional government…the 1937 reform has long been regarded as one of the most disgraceful assaults on the Supreme Court in American history.”

Another proposal considered by the Biden commission was term limits for justices. But those ideas run into the language of the Constitution which states justices shall “hold their offices good behavior” – in other words for life unless they do something impeachable.

Other proposals considered by the commission included reducing the power of the Supreme Court by stripping some jurisdiction. The Constitution expressly permits Congress to determine the appellate jurisdiction of the Supreme Court – in other words, the appeals that it can hear.

Limiting the appellate jurisdiction of the Supreme Court has more often been a tool of conservatives than liberals.

In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) withdrew the Supreme Court’s appellate jurisdiction to review decisions by the federal courts of appeals in death penality cases.

The Detainee Treatment Act of 2005 tried to strip all federal courts of jurisdiction to consider habeas corpus petitions from noncitizens detained as enemy combatants in the war on terrorism. But the Supreme Court ruled that law violated the Constitution’s provisions that limit the suspension of habeas corpus to cases of rebellion or invasion.

The Warren Court’s decisions integrating public schools and

ending mandatory state prayer in public schools led to a plethora of proposed constitutional amendments to take power away from the Supreme Court and turn it over to Congress or the states.

“Impeach Earl Warren” billboards were erected around the country by the right-wing John Birch Society.

The Supreme Court responded emphatically to the attack on its authority in the Cooper v. Aaron decision of 1958 requiring Arkansas officials to abide by the law after the Little Rock 9 disturbances. The court cited the Constitution’s Supremacy Clause and Marbury v. Madison establishing the court “as ultimate interpreter of the Constitution.”

By the beginning of the Reagan administration, dozens of bills had been introduced to strip the courts of jurisdiction over busing, school prayer and abortion.

Biden’s commission commented: “As this historical overview demonstrates, debates about the proper role of the Supreme Court are as old as the Constitution.”

It’s even older, given Alexander Hamilton’s observation in Federalist 78 that “nothing can contribute so much to [the judiciary’s] firmness and independence as permanency in office,” a quality he regarded as “an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.”

The bottom line is that none of the reforms proposed by progressives and Democrats is moving forward and there is no prospect they will given the verdicts of history and the absence of a democratic majority supporting them. The major surgery they propose would raise new and different legitimacy questions.

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