

# RED COURTS, BLUE COURTS<sup>1</sup>

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INTRODUCTION.....	143
I. THE GROWING DIVIDE IN JUDICIAL APPOINTMENTS.....	143
II. THE DIVIDED JUDICIARY AND THE RULE OF LAW .....	152
III. CAN WE FIX IT?.....	158

## INTRODUCTION

The federal judiciary is increasingly fragmented into Red Courts and Blue Courts. Democratic presidents overwhelmingly appoint judges in Blue States, while Republicans mostly appoint judges in Red States. This is a recent phenomenon; it was much less true even a decade ago. It is accelerating. It is likely to corrode both the rule of law and the public's perception of it. In this Essay I document the phenomenon, explain why it is dangerous, and offer some thoughts on how to fix it.

### I. THE GROWING DIVIDE IN JUDICIAL APPOINTMENTS

Much has been made of the relatively fast pace of judicial appointments in the first two years of the Biden administration.<sup>2</sup>

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<sup>1</sup> © 2023 Mark A. Lemley. Editor's Note: For a list of court's and judicial appointments used by the author in his analysis used in this article, see Appendix, [https://drive.google.com/file/d/184TloyuijOI-Z6LEord1Ny-KQd79gj7/view?usp=drive\\_link](https://drive.google.com/file/d/184TloyuijOI-Z6LEord1Ny-KQd79gj7/view?usp=drive_link) [https://perma.cc/VSE4-7SUE].

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While it is wrong to say that he has appointed more judges than his predecessors – George W. Bush had appointed about the same number and Clinton had appointed more by this point<sup>3</sup> – Biden has appointed a remarkable number of federal judges (ninety-nine as of December 31, 2022),<sup>4</sup> particularly given the fifty-fifty split in the Senate, which must confirm them, from 2021 to 2023.<sup>5</sup>

But lost in this discussion is a critical fact: Biden is appointing district judges almost exclusively in Blue States. As I show in this article, of his sixty-eight district court appointments as of the end of December 2022, fifty have been in Blue States (74%), twelve in purple or swing states (18%), and only six in Red States (9%).<sup>6</sup>

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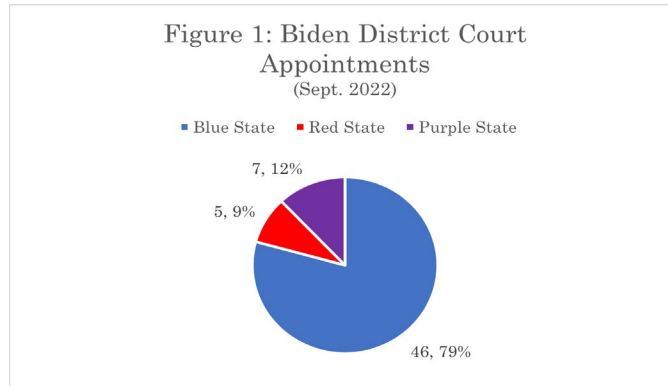
<sup>2</sup> See, e.g., Kayla Gallagher, *How Biden Outdid Trump, Obama and George W. Bush in Confirming Federal Judges by this Point in Office, a Feat Overshadowed by War and Inflation*, BUS. INSIDER (Aug. 28, 2022, 7:48 AM), <https://www.businessinsider.com/biden-sets-record-most-federal-court-judicial-confirmations-since-jfk-2022-8> [<https://perma.cc/7VUB-AS94>]; Sam Baker, *Biden Outpacing Trump with Blistering Pace of Judicial Confirmations*, AXIOS (Sept. 14, 2022), <https://www.axios.com/2022/09/14/biden-judicial-confirmations-trump> [<https://perma.cc/94JD-58SD>]; Catie Edmondson, *Senate Confirms Biden's 40th Judge, Tying a Reagan-Era Record*, N.Y. TIMES (Dec. 18, 2021), <https://www.nytimes.com/2021/12/18/us/politics/biden-judges-reagan-record.html> [<https://perma.cc/GL6B-HZ2K>].

<sup>3</sup> Russell Wheeler, *Based on Biden's Two Years of Judicial Appointments, Trump's Four-Year Records Seems Secure*, BROOKINGS INST. (Jan. 30, 2023), <https://www.brookings.edu/articles/based-on-bidens-two-years-of-judicial-appointments-trumps-four-year-record-seems-secure/> [<https://perma.cc/DNLA-2T7S>].

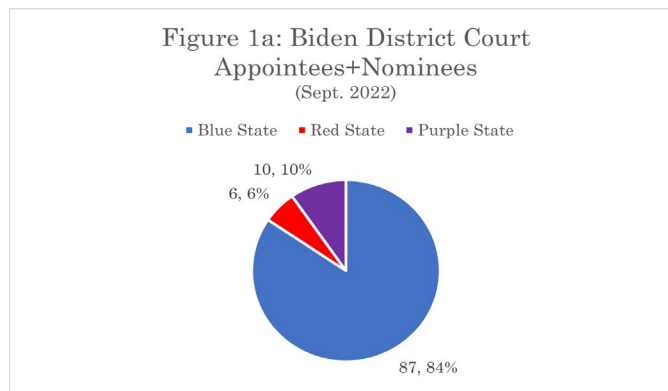
<sup>4</sup> *Judgeship Appointments by President*, US COURTS (last visited July 31, 2023), <https://www.uscourts.gov/sites/default/files/apptsbypres.pdf> [<https://perma.cc/LVD2-R9JL>]. The numbers in the text of this article are current through the end of December 2022 unless otherwise noted.

<sup>5</sup> Candice Norwood, *With Senate Split 50-50, Here's What Democrats Can and Can't Do*, PBS (Jan. 28, 2021, 12:05 PM), <https://www.pbs.org/newshour/politics/with-senate-split-50-50-heres-what-democrats-can-and-cant-do> [<https://perma.cc/Z4H2-N4R3>].

<sup>6</sup> For a full list of Biden's appointments, see *List of Federal Judges Appointed by Joe Biden*, WIKIPEDIA (July 27, 2023, 3:53 PM) [https://en.wikipedia.org/wiki/List\\_of\\_federal\\_judges\\_appointed\\_by\\_Joe\\_Biden](https://en.wikipedia.org/wiki/List_of_federal_judges_appointed_by_Joe_Biden) [<https://perma.cc/XMY6-556P>] [hereinafter *Biden Appointments*]. For purposes of this article, I identify nineteen states and the District of Columbia as reliably blue, six states and the territory of Puerto Rico as purple or swing states, and 25 states as reliably red. The swing states are Arizona, Colorado, Georgia, Michigan, Nevada, and Pennsylvania. One could make a case for moving states from one column to another. Perhaps Ohio (red) or Wisconsin (blue) should be swing states, for instance, and perhaps Nevada should be counted as blue. But those changes do not significantly affect the results of this study. For an appendix of the appointments



The disparity is even more extreme with respect to Biden's pending nominations. Of his forty-five pending district court nominations as of September 2022, forty-one (91%) are in Blue States, three (7%) in Purple States, and only one (2%) in Red States.<sup>7</sup> So even if all Biden's nominees had been confirmed during his first term, he would have appointed eighty-seven judges (84%) in Blue States, ten (10%) in Purple States, and six (6%) in Red States.<sup>8</sup>

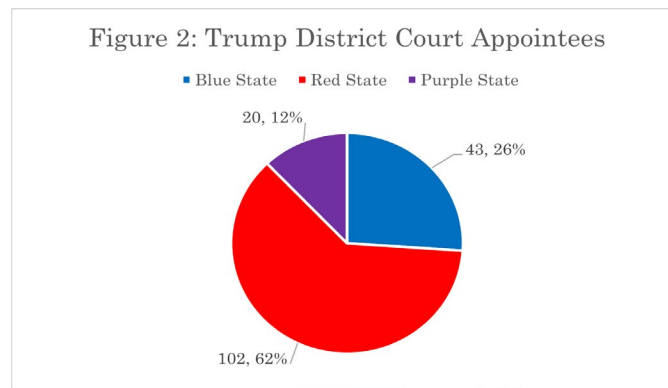


<sup>7</sup> See *Biden Appointments*, *supra* note 6.

<sup>8</sup> *Id.* Since the beginning of 2023, Biden has renominated some but not all of those individuals. *Id.* He has also added eight new nominations, two in Red States and six in Blue States. *Id.*

This disparity can be explained by strategic retirement or other demographic changes. There is surely some of that occurring. But the actual vacancies are much more balanced. Of the ninety-six district court vacancies, forty-seven (49%) are in Blue States, thirty-five (36%) in Red States, and fourteen (15%) in Purple States.<sup>9</sup> The problem isn't that there aren't vacancies in Red and Purple States; it is that Biden is not nominating judges to fill those vacancies.

Biden is not alone in appointing judges in states in which his party has solid support, though his record in appointing judges to Red States is the weakest. Trump did the same, though not to the same extent. Of Trump's 174 district court appointments, 110 were in Red States (63%), twenty-one were in Purple States (12%), and only forty-three were in Blue States (225%).<sup>10</sup>



While one might suspect there has always been a political valence to judicial appointments, in fact this is a dramatic and recent change. For various reasons it has always been somewhat easier to appoint judges in states with senators from the same party. And there are other factors to contend with, like strategic

<sup>9</sup> See Judges & Judgeships, *Current Judicial Vacancies*, US COURTS (July 31, 2023), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> [https://perma.cc/4UU8-X3LZ].

<sup>10</sup> See *List of Federal Judges Appointed by Donald Trump*, WIKIPEDIA (last visited July 31, 2023), [https://en.wikipedia.org/wiki/List\\_of\\_federal\\_judges\\_appointed\\_by\\_Donald\\_Trump](https://en.wikipedia.org/wiki/List_of_federal_judges_appointed_by_Donald_Trump) [https://perma.cc/3UEK-HV5V] [hereinafter *Trump Appointments*].

retirement decisions by judges who care which president appoints their successor. And some red-state vs. blue-state disparities have existed in the past, but they have never been this severe. By contrast, the Obama administration appointed 268 district judges in total, including 130 judges in Blue States (49%), forty-three in Purple States (16%), and ninety-five in Red States (35%).<sup>11</sup> And the George W. Bush administration appointed 261 district judges in total, including 117 judges in Red States (45%), fifty-one in Purple States (20%), and ninety-three in Blue States (36%).<sup>12</sup> Both administrations saw large-scale political infighting over judgeships, but both had appointment records that were much closer to parity than did Trump, and certainly than the Biden administration so far.

Another way to understand this change is by looking at the variance in the percentage points of nominees in states supporting the president's party and those opposed to it.<sup>13</sup> George W. Bush appointed 45% of judges in states aligned with his party and 36% in states opposed to his party, for a party affinity of +9 percentage points.<sup>14</sup> For Obama, the affinity score is +14 (49% vs. 35%).<sup>15</sup> For Trump it is +36 (62% vs. 26%).<sup>16</sup> And for Biden it is a whopping +70 (79% vs. 9%).<sup>17</sup>

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<sup>11</sup> See *List of Federal Judges Appointed by Barack Obama*, WIKIPEDIA (July 17, 2023, 6:49 AM), [https://en.wikipedia.org/wiki/List\\_of\\_federal\\_judges\\_appointed\\_by\\_Barack\\_Obama](https://en.wikipedia.org/wiki/List_of_federal_judges_appointed_by_Barack_Obama) [https://perma.cc/6PKV-DKJN] [hereinafter *Obama Appointments*]. One could reasonably question whether certain states belong in different categories today than they did in the Obama and George W. Bush eras. Florida looked more like a swing state then, for instance, while Michigan looked more blue and Arizona looked more solidly red. For simplicity of comparison, I have not changed the state categories, but the data are all available in the appendix for those who want to see if it makes a difference (it doesn't affect the overall results).

<sup>12</sup> See *List of Federal Judges Appointed by George W. Bush*, WIKIPEDIA (June 8, 2023, 9:23 PM), [https://en.wikipedia.org/wiki/List\\_of\\_federal\\_judges\\_appointed\\_by\\_George\\_W.\\_Bush](https://en.wikipedia.org/wiki/List_of_federal_judges_appointed_by_George_W._Bush) [https://perm.a.cc/6VSP-PSS5] [hereinafter *Bush Appointments*].

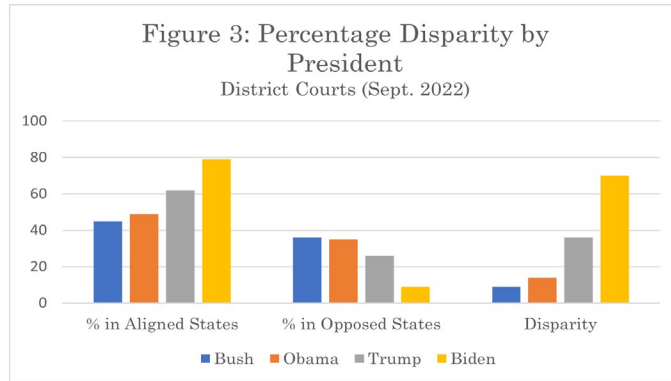
<sup>13</sup> For purposes of Figure 3 and Table 1, this Essay omits the purple state data.

<sup>14</sup> Calculated from data available online. See *Bush Appointments*, *supra* note 12.

<sup>15</sup> Calculated from data available online. See *Obama Appointments*, *supra* note 11.

<sup>16</sup> Calculated from data available online. See *Trump Appointments*, *supra* note 10.

<sup>17</sup> Calculated from data available online. See *Biden Appointments*, *supra* note 6.



These differences are statistically significant at the  $p < 0.00001$  level ( $\chi^2=30.638$ ,  $df = 3$ ).

TABLE 1: CHI-SQUARED ( $\chi^2$ ) TEST FOR DIFFERENCES			
	Same	Opposite	Total
Bush	117	93	210
Obama	130	43	173
Trump	102	43	145
Biden	46	5	51
TOTAL:	395	184	579
	0.682211		
EXPECTED TABLE IF EQUAL PROPORTIONS			
Bush	143.2642	66.73575	210
Obama	118.0225	54.97755	173
Trump	98.92055	46.07945	145
Biden	34.79275	16.20725	51
$(O - E)^2/E$			
Bush	4.814954	10.33645	
Obama	1.215545	2.609459	
Trump	0.095865	0.205797	
Biden	3.610021	7.749773	

$\chi^2= 30.63786$ ,  $df = 3$ ,  $p<0.00001$

The record for appellate judgeships is less extreme but shows a similar trend, as shown in figure 4. Appellate courts are more complicated because they cover multiple states; I have classed circuits into those that seem predominantly to cover red, blue, and purple state populations.<sup>18</sup> Obama appointed fifty-five circuit judges, of whom twenty-three (42%) were in red circuits, twenty (36%) were in blue circuits, and twelve (22%) were in purple circuits.<sup>19</sup> But he was the only president in the last two decades to appoint more circuit judges in states that opposed him politically.

George W. Bush appointed sixty-one circuit judges, of whom thirty-four (56%) were in red circuits, twenty (33%) were in blue circuits, and eight (13%) were in purple circuits.<sup>20</sup> Trump appointed fifty-four circuit judges, of whom twenty-seven (50%) were in red circuits, nineteen (35%) were in blue circuits, and eight (15%) were in purple circuits.<sup>21</sup> By the end of December 2022, Biden had appointed twenty-eight circuit judges, of whom only five (18%) were in red circuits; fifteen (54%) were in blue circuits and eight (29%) were in purple circuits.<sup>22</sup> So for appellate judges, the affinity scores are +23 for Bush, -6 for Obama, +15 for Trump, and +36 for Biden.<sup>23</sup>

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<sup>18</sup> Thus, this Essay treats the 1st, 2d, 3d, and 9th Circuits as “blue” circuits, the 4th, 5th, 6th, 8th, 10th, and 11th circuits as “red” circuits, and the 7th, D.C., and Federal Circuits as neutral. These are contestable decisions, of course. The 7th Circuit is arguably predominantly blue despite the presence of deep-red Indiana and southern Illinois. The 4th and 9th Circuits both include states that reliably vote in opposite ways. And D.C. itself is certainly blue; I class it as purple because the D.C. Circuit is far more about the administrative state than it is about legal issues that happen to arise in the district.

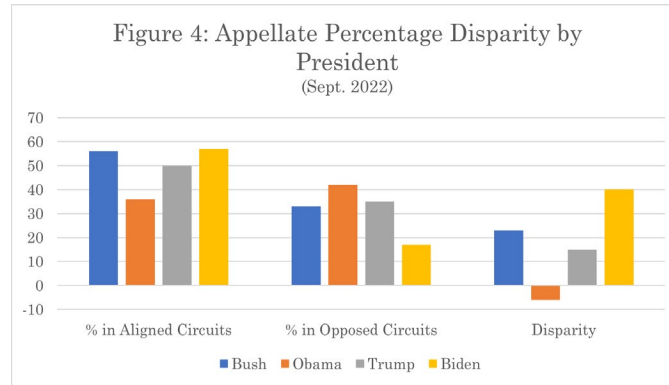
<sup>19</sup> See *Bush Appointments*, *supra* note 12.

<sup>20</sup> See *Obama Appointments*, *supra* note 11.

<sup>21</sup> See *Trump Appointments*, *supra* note 10.

<sup>22</sup> See *Biden Appointments*, *supra* note 6.

<sup>23</sup> This Essay discusses some reasons why appellate judges are less divided. See *infra* Part III.



The combined effect of this party-affinity bias by both Trump and Biden – who together have appointed 223 of the 606 active federal judges, more than one-third of the total – is that 62.5% of district judges in Red States have been appointed by Republican presidents, compared with 48% of district judges in Purple States and only 30% of district judges in Blue States.<sup>24</sup> But the overall disparity is likely to grow more pronounced because each president in the last two decades has been more likely than his predecessor to appoint judges primarily in states that back him politically.

Notably, even as presidents have increasingly retreated to appointing judges in states they control politically, confirmation of those judges has grown dramatically more contentious. With the exception of Supreme Court Justices and an occasional appellate nomination, historically most judges are confirmed unanimously or by lopsided votes.<sup>25</sup> That was true even in the George W. Bush and Obama presidencies, times when many complained the

<sup>24</sup> See *Trump Appointments*, *supra* note 10; *Biden Appointments*, *supra* note 6.

<sup>25</sup> Calculated from data available online. See *Biden Appointments*, *supra* note 6; *Trump Appointments*, *supra* note 10; *Obama Appointments*, *supra* note 11; *Bush Appointments*, *supra* note 12.



judicial nomination process was too politicized.<sup>26</sup> George W. Bush and Barack Obama each appointed 325 article III judges to the federal courts.<sup>27,28</sup>

As shown in the chart below, three hundred six of Bush's 325 judges (94%) were confirmed unanimously or with fewer than ten votes in opposition. Almost all the close cases were on the court of appeals; only two of Bush's 261 district court appointees had more than ten votes against them, and only four had *any* Senators vote against them.<sup>29</sup> Things were somewhat more contentious in the Obama administration, but not much more so. Two hundred sixty-six of Obama's 325 judges (82%) were confirmed unanimously or with fewer than ten votes in opposition.<sup>30</sup> By contrast, only seventy-six of Trump's 231 (33%) judges faced little or no opposition by this metric.<sup>31</sup> And the number for Biden? A mere two judges out of eighty-two (2%) faced little or no opposition.<sup>32</sup>

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<sup>26</sup> See, e.g. Thomas E. Mann, *Estrada Caught In 'Poisonous' War Based on Ideology*, BROOKINGS (Mar. 5, 2003), <https://www.brookings.edu/opinions/estrada-caught-in-poisonous-war-based-on-ideology/> [<https://perma.cc/6X5T-XFN7>]; David Greenberg, Comment, *The New Politics of Supreme Court Appointments*, DAEDLUS, July 1, 2005, [<https://perma.cc/D6Q6-5SE2>]; John M. Walker Jr., *The Unfortunate Politicization of Judicial Confirmation Hearings*, THE ATLANTIC (July 9, 2012), <https://www.theatlantic.com/national/archive/2012/07/the-unfortunate-politicization-of-judicial-confirmation-hearings/259445/> [<https://perma.cc/2Q6T-XFMG>]; Richard W. Rahn, *Politicizing the Judiciary*, CATO INST. (Nov. 25, 2013), <https://www.cato.org/commentary/politicizing-judiciary> [<https://perma.cc/X4C9-HRMC>].

<sup>27</sup> I am counting in this number Supreme Court justices, court of appeals judges, and district court judges, but not appointees to certain specialty courts like the Court of Claims or the Court of International Trade. Nor am I counting non-article III appointments such as magistrate or bankruptcy judges. Adding judges from those courts doesn't change the numbers significantly.

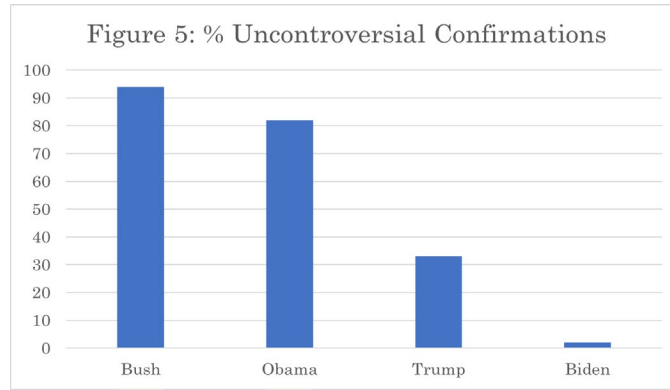
<sup>28</sup> See *Obama Appointees*, *supra* note 11; *Bush Appointees*, *supra* note 12.

<sup>29</sup> See *Bush Appointees*, *supra* note 12.

<sup>30</sup> See *Obama Appointees*, *supra* note 11.

<sup>31</sup> See *Trump Appointees*, *supra* note 10.

<sup>32</sup> See *Biden Appointees*, *supra* note 6. See also Figure 5.



## II. THE DIVIDED JUDICIARY AND THE RULE OF LAW

We are headed for a world in which we have not a single federal judiciary, but a system of Red Courts and Blue Courts that parallels our red-state, blue-state division. This is bad for several reasons.

First, it may mean that federal judges, who have long stood as a bulwark against states passing unconstitutional laws, are more likely to go along with those laws. Federal courts enforced integration orders in the south in the 1950s and 1960s because the judges there were willing to apply the law in the face of significant local hostility.<sup>33</sup> Many of them were Republican appointees, but they were outsiders in a political sense.<sup>34</sup> By contrast, courts that share the ideology of the states in which they sit may be more likely to do the locally and politically popular thing even if it isn't consistent with the law. If anything, we might want judges who act as a counterweight to the trends of local politics, or – better

<sup>33</sup> See, e.g., Robert J. Steamer, *The Role of the Federal District Courts in the Segregation Controversy*, 22 J. POL. 417 (1960).

<sup>34</sup> See Jack Bass, *The 'Fifth Circuit Four'* (Apr. 15, 2004), <https://www.thenation.com/article/archive/fifth-circuit-four/> [<https://perma.cc/L54U-EQVP>].

still – judges with a variety of backgrounds and perspectives.<sup>35</sup> Unfortunately, the data suggests increasing polarization. Ranked by JCS score – a well-respected measure of judicial ideology – Trump’s appellate judge picks are more extreme than any president in at least the last four decades.<sup>36</sup>

Second, the increasing Red Court, Blue Court divide leads to sloppy decisions. Judges that do not have to worry about persuading colleagues, responding to a dissent, or risking reversal, as long as they do the thing the local in-group likes, feel less need to justify what they are doing. When they do offer justifications, the fact that there isn’t someone with a different view challenging their arguments leads to some remarkably shoddy logic. We have seen numerous examples of this effect in just the past few months:

- A Trump-appointed judge ignored numerous procedural and substantive rules to rule for Trump down the line in his bizarre legal challenge to the government seizure of classified documents from Mar-a-Lago;<sup>37</sup>
- A panel of three Republican-appointed judges wrote an absurd opinion upholding Texas’s requirement that social media platforms must carry all content the Texas legislature approves of, reasoning that a private actor’s decision whether or not to host Nazi propaganda was “censorship,” but the government’s demand that sites

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<sup>35</sup> Joshua Zoffer and David Grewal find that an increasing number of judges are appointed and confirmed by presidents and senators who represent only a minority of the public. See generally Joshua P. Zoffer & David Singh Grewal, *The Counter-Majoritarian Difficulty of a Minoritarian Judiciary*, 11 CALIF. L. REV. ONLINE 437 (2020) (analyzing the extent of the constitutional power given to the people to have indirect influence over judicial selection by requiring presidential nomination and senatorial consent).

<sup>36</sup> Elena Mejia & Amelia Thomson-DeVeaux, *It Will Be Tough For Biden to Reverse Trump’s Legacy of a Whiter, More Conservative Judiciary*, FIVETHIRTYEIGHT (Jan. 21, 2021), [https://fivethirtyeight.com/features/trump-made-the-federal-courts-whiter-and-more-conservative-and-that-will-be-tough-for-biden-to-reverse/?ex\\_cid=story-twitter](https://fivethirtyeight.com/features/trump-made-the-federal-courts-whiter-and-more-conservative-and-that-will-be-tough-for-biden-to-reverse/?ex_cid=story-twitter) [https://perma.cc/R2NH-TYPZ].

<sup>37</sup> *Trump v. United States*, 625 F.Supp. 3d 1257 (S.D. Fla.), *vacated and remanded*, 54 F.4th 689 (11th Cir. 2022). For criticism, see, e.g., Charlie Savage, *‘Deeply Problematic’: Experts Question Judge’s Intervention in Trump Inquiry*, N.Y. TIMES (Sept. 5, 2022), <https://www.nytimes.com/2022/09/05/us/trump-special-master-aileen-cannon.html> [https://perma.cc/M62B-V9U2].

host certain types of speech didn't implicate the first amendment;<sup>38</sup>

- A notorious Trump appointee in Amarillo, Texas, who has struck down dozens of Biden Administration laws with little justification, granted a “preliminary” injunction against the FDA’s approval of mifepristone, an abortifacient, twenty-three years earlier. The opinion is expressly partisan and takes a number of positions that don’t pass the straight-face test, including holding that doctors who refuse to prescribe the abortion drug their patients request have standing because they represent the interests of those patients, and there is no conflict between them.<sup>39</sup>

The problem gets worse when judges, like Judge Ho on the Fifth Circuit, refuse to hire clerks who don’t share their ideology.<sup>40</sup> Having law clerks who will challenge a judge’s preconceptions is another way to prevent ideology from leading judges astray.

Judges with a variety of perspectives on a court of appeals are more likely to dissent, more likely to engage in conversation or compromise to avoid having to dissent, and less likely to incite extreme positions.<sup>41</sup> District judges who know they face an

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<sup>38</sup> See *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 490 (5th Cir. 2022).

<sup>39</sup> See *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 2:22-CV-223-Z, 2023 WL 2825871 (W.D. Tex. Apr. 7, 2023).

<sup>40</sup> Jesse O’Neill, *Federal Judges Say They Won’t Hire Clerks From ‘Intolerant’ Stanford Law School*, NEW YORK POST (Apr. 2, 2023, 9:51 AM), <https://nypost.com/2023/04/02/james-ho-and-elizabeth-branch-say-they-will-not-hire-clerks-from-stanford/> [<https://perma.cc/3DUA-WGJU>]. Judge Ho also previously refused to hire clerks from Yale because of the perceived liberal bias of the school. See Debra Cassens Weiss, *Why the conservative federal appeals judge will no longer hire clerks from Yale Law School*, ABA JOURNAL (Oct. 3, 2022, 11:44 AM), <https://www.abajournal.com/news/article/why-this-federal-appeals-judge-will-no-longer-hire-clerks-from-yale-law-school> [<https://perma.cc/N8NB-BEJQ>].

<sup>41</sup> Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1324 (2009) (“Clearly, then, the fact that federal appellate judges hear cases in panels of three makes a difference in their decision making.”); cf. Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 GEO. L.J. 1 (2009) (studying ways multi-judge courts build coalitions to support decisions). For a discussion about the random (or maybe not so random) assignment of appellate panels, see Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1 (2015).

ideologically diverse appellate bench similarly have incentives to moderate their decisions.<sup>42</sup>

The fact that there are increasingly ideologically pure courts in different parts of the country may mean that we get, not moderation and dispute within a court, but more splits across circuits: divisions between Red Courts and Blue Courts. While this potentially provides a way to resolve the conflicts – taking the circuit splits to the Supreme Court – that is unlikely to be a solution in very many cases. The Court takes only about sixty cases a year,<sup>43</sup> and there are many more circuit splits than that already, even before factoring in ideological differentiation by circuit. Few parties can afford to take their case all the way through appeal to the Supreme Court. The Court can not be counted on to resolve all those disputes, much less the individual decisions of every district court.<sup>44</sup> So the growth of unresolved circuit splits may cement the difference between Red and Blue Courts.

Those state-based and regional differences also raise the stakes in the long-standing debate over nationwide injunctions – whether injunctions against the federal government bind it nationwide, only in a circuit or district, or only in the case before it.<sup>45</sup> For years, conservatives derided nationwide injunctions as judicial overreach.<sup>46</sup> Things changed in the Obama era, as conservative judges began granting injunctions that restrained

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<sup>42</sup> See, e.g., Kevin M. Quinn, *The Academic Study of Decision Making on Multimember Courts*, 100 CALIF. L. REV. 1493 (2012); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

<sup>43</sup> Adam Feldman, *Empirical SCOTUS: Something We Haven't Seen in the Supreme Court Since the Civil War*, SCOTUSBLOG (Apr. 16, 2020, 5:22 PM), <https://www.scotusblog.com/2020/04/empirical-scotus-something-we-havent-seen-in-the-supreme-court-since-the-civil-war/> [https://perma.cc/3GZS-NF6B].

<sup>44</sup> The Supreme Court may also itself be a red court these days. See generally Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022).

<sup>45</sup> Compare Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020) (arguing that the history supports universal injunctions), with Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2120-35 (2017) (for a cataloguing of when injunctions have had nationwide versus more circumscribed scope).

<sup>46</sup> See, e.g., Brief of the Petitioners, *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (No. 07-463), 2008 WL 976399, at \*12 (Bush-era argument from the Solicitor General arguing against the validity of nationwide injunctions).

Obama policies nationwide.<sup>47</sup> During the Trump era, some courts started granting nationwide injunctions, but many were overruled by the Supreme Court.<sup>48</sup> Now that Biden is in office, conservative judges are once again granting nationwide injunctions, often on dubious grounds, against any number of administration initiatives.<sup>49</sup> Indeed, there are well-known Trump judges in Texas and Louisiana who regularly grant nationwide injunctions striking down Biden Administration policies, and conservative groups engage in judge-shopping, taking advantage of the fact that they reside in single-judge divisions, so filing a suit there essentially guarantees getting a friendly judge.<sup>50</sup>

The risk of nationwide injunctions is that one outlier judge ends up setting policy for the nation, at least temporarily. The division into Red and Blue Courts increases that risk, because plaintiffs can more reliably find friendly judges in particular jurisdictions. Indeed, they may be able to file suit in divisions where they are *guaranteed* to get a particular judge or a group of judges friendly to them, particularly in Texas, which has many single-judge divisions, and the Western District of Louisiana, most

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<sup>47</sup> Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1070 (“During the Obama administration, the roles were reversed, with conservatives seeking—and receiving—nationwide injunctions . . .”).

<sup>48</sup> See, e.g., *Rural & Migrant Ministry v. U.S. Env’t Prot. Agency*, 565 F.Supp. 3d 578, 585 (S.D.N.Y. 2020) (enjoining an environmental regulation nationally); *N. Plains Res. Couns. v. U.S. Army Corps of Eng’rs*, 454 F.Supp. 3d 985, 996 (D. Mont. 2020) (enjoining the permitting process for any pipe or pipeline across the country); *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 599 (2020) (staying a nationwide injunction against an immigration policy change); *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (staying an injunction against the Muslim ban). See generally JOANNA R. LAMPE, CONG. RSCH. SERV., R46902, NATIONWIDE INJUNCTIONS: LAW, HISTORY, AND PROPOSALS FOR REFORM (2021).

<sup>49</sup> See *Texas v. United States*, 524 F.Supp. 3d 598, 667 (S.D.Tex. 2021) (enjoining a pause on removals); *Faust v. Vilsack*, 519 F. Supp. 3d 470, 478 (E.D.Wis. 2021) (enjoining debt relief for farmers); *Louisiana v. Biden*, 543 F.Supp. 3d 388, 419 (W.D.La. 2021), *vacated and remanded sub nom. Louisiana v. Biden*, 45 F.4th 841, 845 (5th Cir. 2022) (enjoining a pause on new oil and gas leases).

<sup>50</sup> See Mark Joseph Stern, *Biden’s Justice Department Finally Stands Up to Out-of-Control Texas Judges*, SLATE (Jan. 27, 2023, 4:48 PM), <https://slate.com/news-and-politics/2023/01/biden-texas-justice-department-immigration-judges.html> [https://perma.cc/D23N-MBPE]. For discussion of single-judge divisions and their problems, see Daniel Klerman & Greg Reilly, *Forum Shopping*, 89 S. CAL. L. REV. 241, 254-57 (2016); J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 DUKE L.J. 419,429-37, 453 (2021).

of which is composed of divisions in which a single judge hears almost all the cases.<sup>51</sup> It also makes a potential compromise legal solution – giving injunctions nationwide effect only once the court of appeals has affirmed them – less effective. It has even led to different district courts issuing contradictory injunctions on the same day, as happened in the mifepristone case.<sup>52</sup>

Finally, and most importantly, the growing division into Red Courts and Blue Courts is corrosive to the perception of the rule of law. Even if it turned out to be the case that judges decided cases independently of who appointed them – and it doesn't<sup>53</sup> – the perception that politics influences outcomes is bad for the integrity of the judiciary. When I see a news report about an opinion and the first thing I look for is “who appointed the judges,” that's bad. When Donald Trump files a claim in the wrong district in order to get the case assigned to his own recent appointee, who

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<sup>51</sup> See Brief for Professor Stephen I. Vladeck as Amicus Curiae Supporting Petitioners, *United States v. Texas*, 143 S. Ct. 1964 (2023) (No. 22-58), 2022 WL 4485467 [hereinafter *Brief*] (amicus brief by Stephen Vladeck making this point); see also Lydia Wheeler & Madison Alder, *Republicans Find Home Court for Biden Suits in Western Louisiana*, BLOOMBERG (Dec. 20, 2022, 2:34 AM) <https://news.bloomberglaw.com/us-law-week/western-louisiana-becomes-gop-home-court-for-suits-against-biden-21> [<https://perma.cc/F8YZ-KKRE>] (“Picking the right trial judge is a key to success . . . The U.S. District Court for the Western District of Louisiana has emerged as a conduit for blunting President Joe Biden’s executive power in large part because it’s a place where Republicans can virtually guarantee their lawsuit will fall to a Republican-appointed judge.”). On the forum shopping problems this creates in nonpolitical areas of law like patents, see generally, e.g., Klerman & Reilly, *Forum Selling*, 89 S. CALIF. L. REV. 241 (2016) (in-depth analysis of forum selling in patent litigation); see also J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 DUKE L.J. 419, 428-34 (2021).

<sup>52</sup> Robin Levinson-King, *Mifepristone: US Abortion Pill Access in Doubt After Rival Rulings*, BBC (Apr. 8, 2023), <https://www.bbc.com/news/world-us-canada-65217437> [<https://perma.cc/7TX8-KM7G>]; see also, e.g., Paul J. Weber, et al., *Access to Abortion Pill in Limbo After Competing Rulings*, ASSOCIATED PRESS (Apr. 8, 2023, 1:08 AM), <https://apnews.com/article/abortion-pill-lawsuit-mifepristone-misoprostol-kacsmark-74cb1c4cfab2c04f6cf2696151bc86ef> [<https://perma.cc/4DUH-XEQM>].

<sup>53</sup> In many fields there is no obvious ideological bent to the decisions. See John R. Allison & Mark A. Lemley, *How Federal Circuit Judges Vote in Patent Validity Cases*, 27 FLA. ST. U. L. REV. 745 (2000) (finding no difference in decisions based on appointing party in the Federal Circuit, which hears patent, trade, veterans, and miscellaneous other cases). But see Matthew Sag, Tonja Jacobi & Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CALIF. L. REV. 801, 803 (2009) (finding a relationship between ideology and outcome in Supreme Court IP cases).

twists the law to support him,<sup>54</sup> that's bad. When the Texas attorney general or a right-wing interest group can guarantee that their suit seeking a nationwide injunction against yet another Biden Administration policy will be heard by a Trump-appointed judge who grants such injunctions as a matter of course,<sup>55</sup> that's bad. The judiciary ultimately exists on the credibility and impartiality of its judgments, and it has a number of rules around recusal and conflict of interest designed to avoid even the appearance of partiality. If the politicization of the judiciary damages that credibility enough, the federal or state governments may decide that they can simply ignore it.<sup>56</sup>

### III. CAN WE FIX IT?

It sometimes seems like there is no going back from the increasing polarization in the country. Perhaps the polarization of the judiciary is no exception. But I take some heart from the fact that this change is of such recent vintage, and that even in what seemed like a politically charged era for judicial appointments – the first fifteen years of this century<sup>57</sup> – we weren't divided into Red and Blue Courts, and almost all judges received lopsided, bipartisan or unanimous votes. This is a very recent change, and it isn't something cemented into Senate practice. So perhaps it can be turned around by the simple expedient of having presidents

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<sup>54</sup> To their credit, three Republican-appointed judges on the Eleventh Circuit, including two appointed by Trump, were not receptive to Trump's arguments or Judge Cannon's order. *See Trump v. United States*, 54 F.4th 689 (11th Cir. 2022).

<sup>55</sup> *See Stern*, *supra* note 50; Steven Vladeck has documented the repeated use of this practice in Texas in dozens of cases. *See Brief*, *supra* note 51; Stephen I. Vladeck, *Don't Let Republican 'Judge Shoppers' Thwart the Will of Voters*, N.Y. TIMES (Feb. 5, 2023), <https://www.nytimes.com/2023/02/05/opinion/republicans-judges-biden.html> [<https://perma.cc/H9UU-5M5V>].

<sup>56</sup> Noah Feldman has called *Dobbs* "institutional suicide" for the Supreme Court. Noah Feldman, *Abortion Ruling is Suicidal for the Supreme Court*, BLOOMBERG (Jun. 24, 2022, 10:29 AM), <https://news.bloomberglaw.com/us-law-week/abortion-ruling-is-suicidal-for-the-supreme-court-noah-feldman> [<https://perma.cc/W7B4-WQZ7>].

<sup>57</sup> *See* Theresa M. Beiner, *How the Contentious Nature of Federal Judicial Appointments Affects "Diversity" on the Bench*, 39 U. RICH. L. REV. 849 (2005) (discussing what seemed at the time like a contentious appointment process); Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CALIF. L. REV. 299 (2004) ("[T]he present level of partisan bickering has resulted in delays in judicial appointments as well as undermined the public's confidence in the objectivity of justices selected through such a process.").



focus more attention on appointing judges in states that didn't vote for them.

Alternatively, if we are now stuck with a world in which judicial confirmations are mostly done on partisan lines, we may need to change other Senate norms to deal with that fact. Biden may be shying away from appointing judges in Red States because of the strong historical norm that home-state senators get a quasi-veto (called a "blue slip") over at least district court judge nominations.<sup>58</sup> If a state has two Republican Senators, they may simply not be willing to allow a vote on a Biden nominee. And because all the votes today are so close, they depend on at least one judiciary committee Republican vote and generally one or two floor Republican votes.<sup>59</sup>

Losing a couple of Republican votes because the home state senators object might doom the nomination and will at the very least make it harder.<sup>60</sup> And at the very least the extra fight takes up time on the Senate floor, which is a precious commodity. We have seen that play out in the few cases in which Biden nominated a district judge in a red state. Senator Cindy Hyde-Smith withheld

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<sup>58</sup> The blue slip used to operate as a veto for appellate judges too, but that has changed in recent years, as noted below. But for district courts, the chair of the Judiciary Committee won't allow a committee hearing or vote unless both blue slips are returned.

<sup>59</sup> The Judiciary committee was divided 11-11 during the first two years Biden was in office, so a majority vote required at least one Republican to vote with the Democrats. *United States Senate Committee on the Judiciary*, BALLOTPEdia (last visited Aug. 1, 2023), [https://ballotpedia.org/United\\_States\\_Senate\\_Committee\\_on\\_the\\_Judiciary](https://ballotpedia.org/United_States_Senate_Committee_on_the_Judiciary) [<https://perma.cc/X9GT-X53N>]. The Senate can advance a nomination to the floor despite a tie in committee and has begun to do so with some regularity. Judge Charlotte Sweeney was confirmed to the District of Colorado, Judge Holly Thomas and Judge Jennifer Sung were confirmed to the Ninth Circuit, Judge Freeman was confirmed to the Third Circuit, and Justice Ketanji Brown Jackson was confirmed to the Supreme Court, all despite ties in committee. Judge Hernán Vera saw a tie vote in committee, had his nomination stall, was renominated, saw another tie in committee, and has had his nomination discharged to the Senate floor, where it is currently pending. *See Biden Appointments*, *supra* note 6; *see also supra* note 25.

<sup>60</sup> There is a process called a "discharge petition" by which the full Senate can take a nomination from a committee that has divided equally on it, but it is time-consuming and cumbersome.

a blue slip on a nominee in Mississippi because he did not share her anti-trans views.<sup>61</sup>

Blue slips have less power over appellate nominations, which don't come from a single state. And that power was weakened in the Trump administration, which confirmed seventeen appellate judges without blue slips.<sup>62</sup> That is one important reason appellate courts are less divided than district courts. (Another is that presidents care more about appellate judgeships and so may be willing to fight harder to appoint people to the appellate courts even in hostile jurisdictions).

The blue slip procedure is a problem in the modern, hyper-partisan world of judicial appointments. It's not clear it was ever a good idea to give individual senators that much power over judges in their home state.<sup>63</sup> But at least in the past it was mostly used to object to particular individuals, or perhaps as a delaying tactic, rather than as a way to prevent appointments from the opposite party altogether.<sup>64</sup> The Senate eliminated the filibuster for judges in 2013 after Republicans began using it to stop Obama's

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<sup>61</sup> James Arkin, *GOP Sen. Withholds Blue Slip, Opposes Miss. Court Pick*, LAW360 (Apr. 4, 2023, 7:54 PM), <https://www.law360.com/articles/1593683/gop-sen-withholds-blue-slip-opposes-miss-court-pick> [<https://perma.cc/69ZB-45LQ>].

<sup>62</sup> See Tierney Sneed, *Democrats Embrace Hardball Judicial Nomination Tactics GOP Adopted Under Trump*, CNN (Jan. 13, 2022, 11:31 AM), <https://www.cnn.com/2022/01/13/politics/senate-judicial-nominations-blue-slips-democrats/index.html> [<https://perma.cc/2FL7-BS2J>]. So far, Biden has only two. See Nate Raymond, *Few Biden Judicial Nominees at Senate Hearing as 'Blue Slip' Concerns Loom*, REUTERS (Mar. 22, 2023 3:05 PM) <https://www.reuters.com/legal/government/few-biden-judicial-nominees-senate-hearing-blue-slip-concerns-loom-2023-03-22/> [<https://perma.cc/7D87-GPRD>].

<sup>63</sup> Diego Zambrano has suggested to me in private conversation that the blue slip serves a valuable purpose by reducing the appointment of extremist judges by the party in power. If a home-state Senator can effectively veto a judge from the opposite party, that encourages the president to appoint more moderate or at least less controversial judges. And it may well be that the blue slip has served that purpose in the past. But it is currently being abused to stop any appointments, not merely to moderate who is appointed. Editor's Note: Conversation on file with Author.

<sup>64</sup> See, e.g., *History of Blue Slips in the Senate*, ALL FOR JUST. (2023), [https://www.afj.org/wp-content/uploads/2023/02/2023\\_0208\\_BlueSlipFactSheet.pdf](https://www.afj.org/wp-content/uploads/2023/02/2023_0208_BlueSlipFactSheet.pdf) [<https://perma.cc/VG3N-QXJ2>] ("The [blue slip] practice started as an informal courtesy to incentivize the President to collaborate with home-state senators during the nominations process. In modern day, the process has morphed into a political tool of obstruction, asymmetrically used by Republicans to arbitrarily block a Democratic administrations' nominee . . .").

appellate court appointments.<sup>65</sup> It would be straightforward to eliminate the blue slip procedure, particularly since it is a norm and not a formal rule. But the Democratic chair of the Senate Judiciary Committee, Senator Dick Durbin, is unwilling to do so.<sup>66</sup> Alternatively, the Senate could constrain the use of the rule, limiting how many times a particular Senator can put a hold on judicial candidates or how long that hold might delay a full Senate vote, or refusing to apply the rule to districts that have long sat vacant in declared “judicial emergencies.”<sup>67</sup>

There may be ways to restrict abuse of the blue slip without abolishing it altogether, but many of those ways – like limiting the number of times it can be used or changing the Senate norm that prevents a vote on a candidate until the blue slip is returned – are themselves potentially subject to gamesmanship. At a minimum, the Senate should guarantee an up or down-vote on a candidate within a reasonable period of time (say, three months) after the nomination is submitted. A home-state Senator who objects to a candidate can signal that objection, and perhaps others will heed them, but they shouldn’t be able to block the nomination single-handedly.<sup>68</sup>

Other historic norms, now lost, are worth recovering. Several states with senators from different parties historically had agreements that one-fourth of the president’s nominees from that state would be chosen by the out-of-power senator. New York had this rule, engineered by Alfonse D’Amato, for example. That rule

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<sup>65</sup> Paul Kane, *Reid, Democrats Trigger ‘Nuclear’ Option; Eliminate Most Filibusters on Nominees*, WASH. POST. (Nov. 21, 2013, 8:26 PM), [https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c\\_story.html](https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html) [https://perma.cc/L5DC-9VK2].

<sup>66</sup> Madison Alder & Zach C. Cohen, *Biden, GOP Should Deal on Red-State Judge Picks, Durbin Says*, BLOOMBERG (Dec. 21, 2022, 2:45 PM), <https://news.bloomberglaw.com/us-law-week/biden-gop-should-deal-on-red-state-judicial-picks-durbin-says> [https://perma.cc/AMU7-93X4].

<sup>67</sup> Brad Kutner, *‘We’ve Got to Make These a Priority’: Blue Slip Process May Be ‘Tested’ for Emergency Judicial Vacancies*, NAT’L L. J. (Mar. 9, 2023), <https://www.law.com/nationallawjournal/2023/03/09/weve-got-to-make-these-a-priority-blue-slip-process-may-be-tested-for-emergency-judicial-vacancies/?slreturn=20230619234110> [https://perma.cc/HM8B-MDJV].

<sup>68</sup> See The Editorial Board, *How to Stop a Senator From Blocking a Federal Judge*, N.Y. TIMES (Feb. 6, 2023), <https://www.nytimes.com/2023/02/06/opinion/editorials/biden-nominations-senate.html> [https://perma.cc/59EJ-36C9].

encouraged cooperation across party lines. But in the incoming Congress, only five states (or perhaps six) have senators from different parties. And even in those states the rule appears to be defunct.

Returning the judiciary to a more balanced state won't end polarization in the United States by any means. But it will help preserve an institution whose independence from partisan politics is more important now than perhaps ever before if we are to hold on to our democracy.