THE IRON RULE

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INTRODUCTION

This nomination is about more than who occupies one seat on the Supreme Court. It is about more than the legal status of *Roe v. Wade*[1] and reproductive rights and autonomy,[2] the constitutionality of Obamacare,[3] the recognition of LGBTQ+ rights,[4] or the future of

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1 Roe v. Wade, 410 U.S. 113 (1973).

2 *See, e.g.*, Sarah McCammon, *A Look at Amy Coney Barrett's Record on Abortion Rights*, NPR (Sept. 28, 2020, 5:18 PM), https://www.npr.org/2020/09/28/917827735/a-look-at-amy-coney-barretts-record-on-abortion-rights [https://perma.cc/4UTJ-6D5X].

3 *See, e.g.*, Andrew Koppelman, *The Real Danger Amy Coney Barrett Poses to Obamacare*, HILL (Sept. 27, 2020, 1:00 PM), https://thehill.com/opinion/judiciary/518485-the-real-danger-amy-coney-barrett-poses-to-obamacare [https://perma.cc/JDE8-QXFM]; Ramesh Ponnuru, *Amy Coney Barrett Is No Threat to Obamacare*, BLOOMBERG OPINION (Sept. 29, 2020, 11:00 AM), https://www.bloomberg.com/opinion/articles/2020-09-29/obamacare-will-be-safe-with-amy-coney-barrett-on-supreme-court [https://perma.cc/E3PL-96J8].

4 *See, e.g.*, Katelyn Burns, *How Amy Coney Barrett on the Supreme Court Could Affect LGBTQ Rights*, VOX (Sept. 26, 2020, 5:47 PM), https://www.vox.com/policy-and-politics/2020/9/26/21457343/amy-coney-barrett-supreme-court-lgbtq-rights [https://perma.cc/6TG5-QRQ9].

unions and the labor rights movement.[5] It is about more than the adherence and prominence of legal doctrines such as stare decisis and originalism.[6] It is even about more than who will control one of the three branches of government for a generation.[7] Make no mistake, this nomination *is* about all of these things. And that is a lot of things. But the nomination of Judge Amy Coney Barrett to Justice Ruth Bader Ginsburg's seat on the Supreme Court and the rhetoric employed by the G.O.P. to justify the nomination threaten to undermine the meaning and the continuing viability of institutional norms—in Senate judicial confirmations, in congressional interactions more generally, and maybe in all of our politics.

In embarking upon this fateful nomination, there are myriad legitimate considerations. First, as suggested above, the President and senators may be concerned with how a new Justice would impact a set of particular questions for our polity—inter alia on reproductive rights and autonomy, Obamacare, or religious freedoms.[8] Second, they may be concerned with how a new Justice would impact more systemic questions for the Court, like the interpretive methodology of the Court or the institutional position of the Court vis-à-vis the other branches of government. Third, they might also have concerns beyond the Court—for example, how proceeding with a nomination might deepen partisan divides and impact how the Senate, House of Representatives, and presidency interact. How these legitimate considerations balance in determining whether a nomination should proceed is a genuinely difficult problem. At the same time, there are also disingenuous arguments. For example, Senator Ted Cruz's assertion that the Supreme Court requires a full membership to decide any cases related to the

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5 *See, e.g.*, Alice Herman, *How Amy Coney Barrett's Appointment Would Escalate the War on Workers*, IN THESE TIMES (Sept. 28, 2020), https://inthesetimes.com/article/amy-coney-barrett-supreme-court-workers-labor-movement-unions [https://perma.cc/YV4R-SL89].

6 *See generally* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003); Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1 (2016); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017).

7 Jamie Gangel & Pamela Brown, *Sources: Trump Intends to Nominate Amy Coney Barrett for Supreme Court*, CNN (Sept. 26, 2020, 11:33 AM), https://www.cnn.com/2020/09/25/politics/donald-trump-amy-coney-barrett-supreme-court [https://perma.cc/USD8-SA7L] ("If her Senate confirmation is successful before the November election, the appointment would mark Trump's third Supreme Court pick in one presidential term, cementing a conservative stronghold in the court for a generation."); Michael W. McConnell, Opinion, *Amy Coney Barrett Wouldn't Transform the Court More than Any Other Justice*, WASH. POST (Sept. 29, 2020, 3:42 PM), https://www.washingtonpost.com/opinions/2020/09/29/amy-coney-barrett-wouldnt-transform-court-more-than-any-other-justice [https://perma.cc/EJD7-MQHU].

8 *See supra* notes 1–5 and accompanying text.

election seems particularly insincere.[9] The Senate G.O.P., including an outspoken Senator Cruz, had no problem braving the 2016 election with a short-handed Court,[10] even though the outcome was similarly imperiled with the risks of controversy.[11]

Nevertheless, a morass of legitimate, partisan, and disingenuous arguments in politics is typical. None of that threatens the republic, even if some of these claims might engender and deepen further enmity. One argument, however, is particularly pernicious, especially in the context of drastic partisan distrust, and it is here that we will focus our attention. The argument is the one suggested by Senator Lindsay Graham, Chairperson of the Judiciary Committee, in the parting line of his short letter to Senate Democrats informing them that the Majority intended on filling the seat during President Trump's term: "I am certain if the shoe were on the other foot, you would do the same."[12] President Trump used strikingly similar language a few weeks later during a televised town hall: "If you put the shoe on the other foot, if they had this, they would do it 100%."[13] The extracted rule then is thus: *If one's opponent would engage in the behavior, then it is permissible for one to engage in the behavior.*

Compare this to the Golden Rule: *Do unto others as you would have them do unto you*.[14] In sharp contrast, the extracted rule allows harsh treatment to those on the suspicion that they might do the same. We call this principle the "Iron Rule." We contend that the appeal to the Iron Rule in our political discourse is dangerous and that we ought to excise it from the menu of political justifications. Our political landscape is one predominated by partisan distrust. At the same time,

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9 Bill Hutchinson, *Sen. Ted Cruz, Contradicting 2016 Remarks, Cites Possible Contested Presidential Election in Urgent Push to Fill Ruth Bader Ginsburg's Seat*, ABC NEWS (Sept. 20, 2020), https://abcnews.go.com/Politics/sen-ted-cruz-cites-contested-presidential-election-rapid/story?id=73121715 [https://perma.cc/4WYL-JJZB] (Cruz stated, "An equally divided court, 4-4, can't decide anything . . . .That could make this presidential election drag on weeks and months and well into next year. That is an intolerable situation for the county. We need a full-court on Election Day given the very high likelihood that we're going to see litigation that goes to the court. We need a Supreme Court that can give a definitive answer for the count[r]y.").

10 *Id.*

11 Darren Samuelsohn & Josh Gerstein, *Can the Supreme Court Handle a Disputed Election?*, POLITICO (Nov. 7, 2016, 6:58 PM), https://www.politico.com/story/2016/11/supreme-court-election-clinton-trump-230910 [https://perma.cc/WQJ4-5Z8K].

12 *See infra* note 42.

13 *President Trump Town Hall* (NBC television broadcast Oct. 15, 2020), https://www.youtube.com/watch?v=rjwWG6kJ6io&ab_channel=CNBC (https://perma.cc/T6DS-M3XQ).

14 Norman Rockwell, *Golden Rule*, NORMAN ROCKWELL MUSEUM, https://www.nrm.org/2018/03/golden-rule-common-religions [https://perma.cc/45BY-4RNR].

the proper functioning of our political institutions and our government relies on the stable and predictable observance of various norms.[15] Indeed, at the level of constitutional discourse, the formal rules are not at all axiomatic or self-executing—they unavoidably require norm observance. But the logic of the Iron Rule—*they would do it, so we should do it first*—leaves all of this imperiled. The Iron Rule in a realm of reciprocally self-applied norms cannot reasonably be cabined or disciplined, leaving us vulnerable to the erosion or even annihilation of our political institutions.

The Iron Rule, once firmly established, is more powerful than a Supreme Court Justice or two. Republicans will regret this decision, as they underestimate the amount of discretion built into our political system, and thus the degree to which our institutions rely on good faith between the parties. The Supreme Court, for instance, cannot bring new states into the Union. But the Iron Rule can. As Democrats consider the legitimacy of statehood for Washington, D.C. and Puerto Rico,[16] the Iron Rule conceals all substantive considerations and whispers only one question: What would the Republicans do?

This Essay proceeds in three Parts. In Part I, we provide a recent history of norm breaking with respect to Supreme Court appointments that contextualizes Justice Barrett's nomination.[17] In Part II, we explain the importance and ubiquity of norms in our political institutions. In Part III, we discuss the rationality, and consequent dangers, of the Iron Rule in a system of norms.

I. A RECENT HISTORY

At this point, the bidding is familiar: Justice Antonin Scalia passed in 2016, about nine months before the close of President Obama's second term.[18] President Obama nominated Judge Merrick B. Garland

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15 *See, e.g.*, David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 33 (2014); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2189–94, 2204–41 (2018).

16 Marty Johnson & Rafael Bernal, *Hopes for DC, Puerto Rico Statehood Rise*, HILL (Oct. 18, 2020, 5:00 PM), https://thehill.com/latino/517921-hopes-for-dc-puerto-rico-statehood-rise (https://perma.cc/8MEX-HX7F).

17 While we drafted this piece before her confirmation, we refer to "Justice" Barrett to reflect her current position.

18 Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://nyti.ms/1XqvGem [https://perma.cc/VEZ7-EKCF].

to take the open seat on the Court.[19] Senate Republicans, who were in the majority, refused to take up Judge Garland's nomination and instead let it expire.[20] This was widely understood as an unprecedented violation of norms.[21] Consider that since the turn of the twentieth century, Republican Presidents have been presented with twelve Supreme Court openings while Democrats have been in control of the Senate.[22] Four for President Eisenhower.[23] Four for President Nixon.[24] One for President Ford.[25] One for President Reagan.[26] And two for the first President Bush.[27] All twelve openings were filled. While two nominees by President Nixon (Clement Haynsworth and G. Harold Carswell) and one nominee by President Reagan (Robert Bork) were rejected after a floor vote,[28] their replacement nominees were confirmed unanimously.[29] The Scalia opening was the first time in that period that a Democratic President was presented with a Supreme Court opening in the presence of a Republican-controlled Senate.[30]

The G.O.P. offered a number of putative justifications for their inaction. Some suggested that the Senate has full authority to do whatever it—or a majority of its senators—want. The Senate's "advice and consent" is of its own constitutional prerogative, and if it chooses

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19 Juliet Eilperin & Mike DeBonis, *President Obama Nominates Merrick Garland to the Supreme Court*, WASH. POST (Mar. 16, 2016), http://wapo.st/1QXF5I8 [https://perma.cc/7EAW-XADF].

20 Amy Howe, *Garland Nomination Officially Expires*, SCOTUSBLOG (Jan. 3, 2017, 6:47 PM), https://www.scotusblog.com/2017/01/garland-nomination-officially-expires [https://perma.cc/BC4C-A788].

21 Jon Huntsman & Joseph Lieberman, *The Republican SCOTUS Blockade Is 'Not Acceptable*,' TIME (Mar. 25, 2016, 10:11 AM), https://time.com/4271942/supreme-court-compromise [https://perma.cc/P42N-P69F] ("There is no modern precedent for the blockade that Senate Republicans have put in place."); *see also* Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 60 (2016).

22 *Supreme Court Nominations (1789-Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm [https://perma.cc/AGV7-SUBU] [hereinafter Nominations] (listing nominations); *Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm [https://perma.cc/6LRD-7TL9] [hereinafter Party Division] (listing which party controlled the Senate during each Congress).

23 Nominations, *supra* note 22; Party Division, *supra* note 22.

24 Nominations, *supra* note 22; Party Division, *supra* note 22.

25 Nominations, *supra* note 22; Party Division, *supra* note 22.

26 Nominations, *supra* note 22; Party Division, *supra* note 22.

27 Nominations, *supra* note 22; Party Division, *supra* note 22.

28 Nominations, *supra* note 22; Party Division, *supra* note 22.

29 Nominations, *supra* note 22; Party Division, *supra* note 22.

30 Nominations, *supra* note 22; Party Division, *supra* note 22.

to withhold that, the only response is at the ballot box.[31] Of course, that was not itself a reason for the inaction but merely an assertion of the formal powers of the Senate. The actual motivating reason, we might surmise, was simply that Judge Garland would have rendered unfavorable decisions. Others took a less ideological approach, arguing that because Justice Scalia passed in an election year, with presidential candidates already busy on the hustings, any replacement should wait till after the election. That was because, we were told, voters should have a say in the membership of the Court. This latter justification, sounding in principles of democracy, took foot as the G.O.P. party line, with Senate Majority Leader Mitch McConnell and Senator Graham leading the charge in this messaging.[32] Senator McConnell explained: "The American people may well elect a president who decides to nominate Judge Garland for Senate consideration . . . . The next president may also nominate someone very different. Either way, our view is this: Give the people a voice . . . ."[33]

Senator Graham concurred, stating on multiple occasions that both parties stood to reap the ideological benefits (or costs) of this new democratic norm:

> If an opening comes in the last year of President Trump's term, and the primary process has started, we'll wait till the next election.[34]
>
> I want you to use my words against me. If there's a Republican president in 2016 and a vacancy occurs in the last year of the first term, you can say Lindsey Graham said, "Let's let the next president, whoever it might be, make that nomination," . . . . And you could use my words against me and you'd be absolutely right.[35]

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31 *See, e.g.*, Michael D. Ramsey, *Why the Senate Doesn't Have to Act on Merrick Garland's Nomination*, ATLANTIC (May 15, 2016), https://www.theatlantic.com/politics/archive/2016/05/senate-obama-merrick-garland-supreme-court-nominee/482733 [https://perma.cc/F2JC-M4VY]; Ramesh Ponnuru, *Garland Revisited*, NAT'L REV. (June 29, 2018, 2:16 PM), https://www.nationalreview.com/corner/merrick-garland-supreme-court-seat-not-stolen [https://perma.cc/K7T6-MK3Q].

32 Matthew S. Schwartz, *'Use My Words Against Me': Lindsey Graham's Shifting Position on Court Vacancies*, NPR (Sept. 19, 2020, 3:09 PM), https://www.npr.org/914774433 [https://perma.cc/4UDQ-88DQ].

33 Adam Liptak & Sheryl Gay Stolberg, *Shadow of Merrick Garland Hangs over the next Supreme Court Fight*, N.Y. TIMES (Sept. 19, 2020), https://nyti.ms/3hMt22b [https://perma.cc/VPJ7-SAYP]; *see also* Mitch McConnell & Chuck Grassley, Opinion, *Democrats Shouldn't Rob Voters of Chance to Replace Scalia*, WASH. POST (Feb. 18, 2016), http://wapo.st/1LwcqoO [https://perma.cc/7VUL-HD2M].

34 *See* Schwartz, *supra* note 32.

35 *Id.*

Consequently, the Court was left without full strength for nearly a year, and the 2016 election was decided while the Court had only eight members.[36] President Trump won the election and in short order nominated then-Judge Neil M. Gorsuch to Justice Scalia's vacant seat.[37] Justice Gorsuch was confirmed shortly thereafter.[38]

Four years later, Justice Ruth Bader Ginsburg passed, leaving a vacancy on the Court a mere forty-six days away from the election.[39] Senator McConnell stated the intention of the Senate majority to act on any nomination put forth by President Trump in short order.[40] Obliging, President Trump stated that he would soon nominate someone to the seat.[41] As indicated above, Senator Graham wrote a one-page letter to Senate Democrats informing them that the Republicans intended to fill the seat.[42]

Reinterpreting the broad democratic justification for opposing Judge Garland's nomination in an election year, the letter explains that the opposition was in fact based on the narrow precedent that "no Senate ha[d] confirmed an opposite-party president's Supreme Court nominee during an election year."[43] Further, he surmised, the electorate had voted for a Republican Senate again in 2016 because of the G.O.P's election commitment to supporting President Trump's nominees.[44] The letter continued with a grievance about the treatment in confirmation of Republican nominees Robert Bork, Clarence Thomas, Samuel Alito,

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36 *See* Samuelsohn & Gerstein, *supra* note 11.

37 Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html [https://perma.cc/PZN5-WG9C].

38 Ariane de Vogue & Dan Berman, *Neil Gorsuch Confirmed to the Supreme Court*, CNN (Apr. 7, 2017), https://www.cnn.com/2017/04/07/politics/neil-gorsuch-senate-vote/index.html [https://perma.cc/C3ZV-RG53].

39 Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020, 7:28 PM), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [https://perma.cc/2MU7-LGYS].

40 Carl Hulse, *For McConnell, Ginsburg's Death Prompts Stark Turnabout from 2016 Stance*, N.Y. TIMES (Sept. 18, 2020), https://www.nytimes.com/2020/09/18/us/mitch-mcconnell-rbg-trump.html [https://perma.cc/L5HL-2UQ6].

41 Peter Baker & Maggie Haberman, *Trump and Democrats Brace for Showdown over Supreme Court Seat*, N.Y. TIMES (Sept. 25, 2020), https://www.nytimes.com/2020/09/20/us/politics/trump-supreme-court-rbg.html [https://perma.cc/W6V2-L8C2].

42 Letter from Sen. Lindsey Graham, Sen. Judiciary Comm. Chair, to Sens. Feinstein, Leahy, Durbin, Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Booker, and Harris (Sept. 21, 2020), https://www.judiciary.senate.gov/imo/media/doc/Hearing%20Letter%20Response%2009.21.2020.pdf [https://perma.cc/RPW3-JWKW] [hereinafter Graham Letter].

43 *Id.*

44 *Id.*

and Brett Kavanaugh in comparison to Democratic nominees—stating that there was already a partisan double standard.[45] The letter ended by invoking the Iron Rule, as suggested above, which President Trump later repeated in his televised town hall.[46] "*I am certain if the shoe were on the other foot, you would do the same*."[47]

This story is necessarily brief and incomplete. In their respective accounts, both parties would elongate the timeline, adding claims of "unprecedented" norm violations that gave rise to purportedly "just" reprisal. For example, Democrats may observe that in confirming Justice Gorsuch, the Senate G.O.P. bypassed the filibuster for Supreme Court appointments.[48] Republicans will retort that this was only a natural response to the fact that Democrats bypassed the filibuster for lower court nominations.[49] Democrats will respond that this was only due to an unprecedented refusal of Senate Republicans to consider any judicial appointments, leaving important judgeships languishing vacant.[50] And so on.[51] But importantly, the finger pointing must critically include Republican ire at the failed nomination of then-Judge Robert H. Bork, who received the support of forty out of forty-six Republicans, and two out of fifty-four Democrats.[52] Indeed, Senator Graham's letter, in citing the Democrats' aggressive opposition to Bork as representative of a purportedly unequal playing field, reflects that these wounds remained unhealed (even though, as indicated above, Judge Bork's replacement, Judge Anthony Kennedy, was unanimously confirmed, and a Democratic Senate later confirmed both of President George H. W. Bush's nominees).[53]

The recent history of partisanship goes beyond the judicial nomination process. As Joseph Fishkin and David Pozen demonstrate, there have been numerous instances of constitutional "hardball" in

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45 *Id.*

46 *See supra* note 13.

47 *Id.* (emphasis added).

48 Joseph Fishkin & David E. Pozen, Essay, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 918 (2018).

49 *Id.* at 935.

50 *Id.* at 932.

51 *Id.* at 930–38 (providing an exhaustive list of acts of constitutional hardball).

52 *Id.* at 933 n.76 ("Indeed, from the perspective of some Republicans, the Bork nomination's defeat remains the canonical act of modern constitutional hardball, from which many later iterations followed."); Linda Greenhouse, *Bork's Nomination Is Rejected, 58–42; Reagan 'Saddened'*, N.Y. TIMES (Oct. 24, 1987), https://www.nytimes.com/1987/10/24/politics/borks-nomination-is-rejected-5842-reagan-saddened.html [https://perma.cc/A2UR-VWVA].

53 *See* Graham Letter, *supra* note 42.

recent years.[54] Beyond the courts battles, there have been an increasing number of government shutdowns, fights over the "debt ceiling," issuance of a deluge of congressional subpoenas, exertions of executive privilege, heightened use of filibusters in stopping legislation, use of recess and acting appointments to circumvent congressional oversight, and so much more.[55] As a result, we live in an era of extreme partisan distrust, between politicians and the citizenry at large.[56]

II. THE IMPORTANCE AND UBIQUITY OF NORMS

Unwritten norms (or "conventions") are meant to enable trust and coordination amongst political actors so that our institutions can function smoothly when the formal text allows room for discretion and thus for self-interested behavior. As Pozen explains: "Conventions help to organize public life in . . . the vast domain in which the text underdetermines outcomes. They help to shape a normative order in which representative politics is transacted. When they are violated, they trigger responses and counter-responses that ultimately stabilize or destabilize that order."[57]

For example, with respect to budgetary issues, Congress is generally expected to keep various aspects of the government properly funded. At the same time, the executive treats congressional instructions on how to spend money as binding and authoritative. And even when formal authority would allow agencies to repurpose funds, they seek informal approval to do so from the appropriate congressional committees.[58] With respect to information transfer, agencies are expected to provide timely communications and updates to Congress

54 Fishkin & Pozen, *supra* note 48, at 930–38.

55 *Id.*

56 *See, e.g.*, Asher Stockler, *Democrats and Republicans Trust Each Other Less as Politics Continue to Be Deeply Partisan, Study Finds*, NEWSWEEK (Oct. 10, 2019, 5:13 PM), https://www.newsweek.com/republicans-democrats-partisan-divide-poll-1464511 [https://perma.cc/G2AZ-FX8E]. *See generally* EZRA KLEIN, WHY WE'RE POLARIZED (2020) (examining reasons for deepening polarization between the Republican and Democratic parties).

57 Pozen, *supra* note 15, at 33; *see also* Peter M. Shane, *When Inter-Branch Norms Break Down: Of Arms-for-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups*,*"* 12 CORNELL J.L. & PUB. POL'Y 503, 505 (2003) (arguing that democratic legitimacy in our system depends on cooperative norms); Henry E. Smith, *Property, Equity, and the Rule of Law*, *in* PRIVATE LAW AND THE RULE OF LAW 224, 239–46 (Lisa M. Austin & Dennis Klimchuk eds. 2014) (arguing that a formal system of law depends on a legal culture which opposes opportunistic evasion of the rules, which is endorsed by the wider society, and which is reflected in principles of equity).

58 Pozen, *supra* note 15, at 35.

on issues of note. And when Congress seeks sensitive information from the executive, it is generally supposed to engage in an accommodative process before pursuing other legal remedies like subpoenas.[59] For another example, the Senate itself depends on "unanimous consent" for a number of routine matters—without which, carrying out its duties would be time-consuming and inefficient.[60] These examples just scratch the surface: such norms are nearly ubiquitous in governing both inter-branch and intra-branch relationships. That is no accident, but rather it is inevitable with written rules. The text of the laws can only fix so much; there will be situations and subsidiary steps not explicated by the text, and there will be questions of how to interpret the text.[61] These gaps must be filled, and that is what these norms do.

We have seen the chaos that ensues when such norms are violated. As prime examples, on the budgetary front, congressional-led government shutdowns lead to the cessation of critical services for the public, drastic uncertainty for the federal workforce, and extraordinary waste.[62] Indeed, a failure to increase the debt ceiling and a subsequent default on the nation's debt would wreak havoc in financial markets in all parts of the globe.[63] Further, Congress and the executive branch have

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59 *Id.* at 36.

60 Adam Jentleson, *Senate Democrats Have the Power to Stop Trump. All They Have to Do Is Use It.*, WASH. POST (Jan. 27, 2017, 1:43 PM), https://www.washingtonpost.com/posteverything/wp/2017/01/27/democrats-in-congress-can-block-trumps-agenda-if-they-want-to-heres-how [https://perma.cc/T5PD-MCFC].

61 *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 124–27 (Joseph Raz & Penelope A. Bulloch eds., 3d ed. 2012); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 49, 63 (1983); Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1960 (2020) (explaining how internal congressional rules inevitably require interpretation).

62 *See, e.g.*, Terri Rupar, Sarah Dunton, Eric Yoder, Lisa Rein, & Katie Mettler, *Everything You Need to Know About the Government Shutdown*, WASH. POST (Jan. 18, 2019), https://www.washingtonpost.com/graphics/2018/politics/government-shutdown-faq/ [https://perma.cc/SS4E-RXUB]; Denise Lu & Anjali Singhvi, *Government Shutdown Timeline: See How the Effects Are Piling Up*, N.Y. TIMES (Jan. 28, 2019), https://www.nytimes.com/interactive/2019/01/08/us/politics/government-shutdown-calendar.html [https://perma.cc/GK4A-5C5E]; Abigail Abrams, *Here Are Some Unexpected Effects of the Government Shutdown*, TIME (Jan. 3, 2019, 1:49 PM), https://time.com/5492953/government-shutdown-effects [https://perma.cc/S9A6-KM6K].

63 *See, e.g.*, Brad Plumer, *Absolutely Everything You Need to Know About the Debt Ceiling*, WASH. POST (Oct. 14, 2013, 10:32 AM), https://www.washingtonpost.com/news/wonk/wp/2013/10/04/absolutely-everything-you-need-to-know-about-the-debt-ceiling [https://perma.cc/8PC8-6RMK] ("Many economists think it would be disastrous if the government ever missed an interest payment on the debt . . . . The global financial markets are structured around the notion that U.S. Treasuries are the safest asset in the world. If that assumption were ever called into question, havoc could ensue."); Matthew Yglesias, *The Looming Expiration of the Federal Debt Ceiling, Explained*, VOX (Feb. 21, 2019, 8:30 AM), https://www.vox.com/policy-and-politics/

warred with the weapons of onerous review and investigation, obdurate opacity and withholding of information, and failure to follow legally required instruction.[64] This has caused public spectacle and brought governmental function to a halt. Even when the breakdown of norms is not immediately disastrous, it leads to delays and inefficiencies that can undermine public confidence in government institutions and capabilities, which then reverberates into political malaise and dysfunction.

The ubiquity and importance of these norms lead to an important point: violations of norms can allow for responsive violations of consequence. For example, there are general norms that large structural changes to our institutions are off-limits. But formally, changes to the Supreme Court's structure and jurisdiction can be accomplished with simple legislation.[65] Congress could also refuse to fund the judiciary. Similarly, the makeup of the Senate could be drastically changed by admitting new states to the Union, and it can be done in a way that does not directly reflect the merits of democratic representation.[66] Perhaps, most drastically, the other branches could refuse to obey legally required orders from each other. Both branches, for example, could simply ignore Supreme Court judgments. They could do so openly and defiantly, or they could use other surreptitious methods. For example, they could continually misinterpret the Court's judgments, requiring continuous intervention by the Court—which may not be timely or forthcoming from the most deliberate branch.[67] Though we can agree that these are flagrant norm violations and that they may be disastrous

2019/2/21/18233169/debt-ceiling-explained [https://perma.cc/GLY4-3V5X] (stating that default on the debt would lead to "an unprecedented form of legal and economic chaos"); Jeanne Sahadi, *What the Chaos Looks like If Congress Fails to Raise Debt Ceiling by October*, CNN (Aug. 24, 2017, 11:40 AM), https://money.cnn.com/2017/08/24/news/economy/debt-ceiling/index.html [https://perma.cc/Z4AJ-TJB5].

64 Fishkin & Pozen, *supra* note 48, at 930–38.

65 Joshua Braver, *Court-Packing: An American Tradition?*, B.C. L. REV. (forthcoming 2021).

66 *See* Note, *Pack the Union: A Proposal to Admit New States for the Purpose of Amending the Constitution to Ensure Equal Representation*, 133 HARV. L. REV. 1049, 1050 (2020) (arguing for creating states out of D.C.'s 127 different neighborhoods in a way that could rebalance existing representations problems).

67 Some might suggest that the concerns about factions and partisan warfare were well understood by the framers and thus should not be overblown. FEDERALIST NO. 10 (James Madison); FEDERALIST NO. 51 (James Madison) (both discussing the dangers of factions and how they may be cabined). True, but the framers, and James Madison in particular, recognized the importance of structures, like check and balances, to protect against annihilation from partisan warfare. FEDERALIST NO. 10 (James Madison); FEDERALIST NO. 51 (James Madison) (identifying the diversity of a republic and checks and balances as ways to limit the dangers of factions and partisan warfare). What we aim to demonstrate is that the Iron Rule immediately endangers those structural supports.

in effect, in the context of extreme partisan distrust, none of these norm violations is clearly off-limits or beyond imagination.

III. A HIGHER RATIONALITY

Hobbes demonstrated the rationality of anarchy in the absence of sovereignty. Given people's relative physical and mental equality, he began, they each have the capacity to injure and kill one another. Even "the weakest has strength enough to kill the strongest, either by secret machination or by confederacy with others . . . ."[68] When you add people's conflicting desires over scarce resources, then, without "a common Power to keep them all in awe,"[69] people live in constant fear of attack. And the only rational strategy, then, is "Anticipation"[70]: to pre-emptively attack and subjugate as many individuals as possible before they attack and subjugate *you*. Anticipation is founded on the Iron Rule: *You would do it, so I will do it first*. Since Anticipation is everyone's rational strategy, the result is the horrible "warre of every man against every man,"[71] which only the presence of a domineering sovereign and system of law can prevent. In this way, Hobbes articulates the idea that the law—and, in particular, the criminal law—fosters social cooperation and enables the possibility of a peaceful and productive civil order.[72]

Hobbes's state of nature represents what (much) later theorists would describe as a Prisoners' Dilemma, a strategic "game" in which "players" seek to coordinate their conduct to obtain individually beneficial outcomes while facing a set of pressures that push them toward acting uncooperatively.[73] Hobbes's solution was to insert an external power (the sovereign) who would force the players to cooperate via the law. And, indeed, we use the law to resolve the Prisoners'

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68 *See* THOMAS HOBBES, LEVIATHAN 87 (Richard Tuck ed., 1996) (1651).

69 *Id.* at 88.

70 *Id.* at 87.

71 *Id.* at 96.

72 On the idea that the function of the criminal law is to maintain a civil order, rather than to inflict retribution, see generally LINDSAY FARMER, MAKING THE MODERN CRIMINAL LAW: CRIMINALIZATION AND CIVIL ORDER 37–60 (2016); VINCENT CHIAO, CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE 35–70 (2019); Jacob Bronsther, *The Corrective Justice Theory of Punishment,* 107 VA. L. REV. (forthcoming 2021); NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 169–201 (1988); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 261 (2d ed. 2011); NEIL MACCORMICK, Institutions of Law: An Essay in Legal Theory 293 (2007).

73 *See, e.g.*, ROBERT AXELROD, THE EVOLUTION OF COOPERATION 3–26 (rev. ed. 2006).

Dilemma in many contemporary settings. For example, we might predict that competitors in a market may engage in increasingly aggressive behaviors—like price manipulation, corporate espionage, or frivolous litigation—based on the desire to preemptively strike and gain the upper hand. *You would do it, so I will do it first.* Left alone, these kinds of actions can lead to tumult for the companies, the market, labor, and consumers. Consequently, we have antitrust and intellectual property laws, with remedies and punishments enforced by the state, to stop these deleterious actions.[74]

However, the law is not always available as a means of coordination. This is the case for Republicans and Democrats over a wide swath of issues; and, in these instances, extralegal norms represent the only hope for preventing the increasingly aggressive and selfish conduct of the parties. One might ask whether there cannot be a neutral arbiter to discipline the parties in their observance (or nonobservance) of norms. Indeed, at first glance, we might think that this is precisely the role of the judiciary. However, the courts cannot undertake this role. First, many of these norms cannot be formalized—that is, formalization will inevitably under-determine how to apply the norms in the very cases that we are concerned about.[75] In such cases, there will be discretion for judges, who are themselves partisan actors to some degree, and we can reasonably be skeptical that they can stay neutral.[76] Second, the judiciary is the weakest branch. Even if it did rise above the political fray, it would have to be genuinely able to render judgments against those in power. But it doubtfully has the resources and power to enforce those judgments.[77] Finally, as this very case shows, the operation of the judiciary itself is not immune to norm-breaking behavior. The more power the judiciary is given, the more it is a target for capture—*by, among other things, norm-breaking behavior.*

Without the courts as a possible disciplining authority, we are left with the electorate. But this too is no panacea. Ideally, an attentive

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74 *See, e.g.*, 15 U.S.C. §§ 1–7 (encoding the Sherman Antitrust Act of 1890); 15 U.S.C. §§ 12–27; 29 U.S.C. §§ 52–53 (encoding the Clayton Antitrust Act of 1914); Title 35 of the U.S. Patent Code (encoding the key provisions of patent law).

75 *See supra* note 61 and accompanying text; *see also* Pozen, *supra* note 15, at 33 (observing that there is a "vast domain in which the text underdetermines outcomes"); KARL N. LLEWELLYN, THE BRAMBLE BUSH 68 (11th prt. 2008) (observing that casuistic interpretation is subject to broad readings and narrow readings that can underdetermine results).

76 *See, e.g.*, Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601, 1601 (2015); Eric J. Segall, *Ideology and the Supreme Court: A Conversation with Judge Richard Posner and Professor Eric Segall*, 2013 CARDOZO L. REV. DE NOVO 258, 260 (2013).

77 THE FEDERALIST NO. 78 (Alexander Hamilton) (referring to the judiciary as the "weakest" branch).

electorate could observe the behavior of politicians, whether norm-breaking or norm-abiding, and decide what kinds of actions were warranted under the circumstances and what were out of bounds. And if the parties employed the Iron Rule to the detriment of the polity, citizens could put a stop to it. That is, whether out of sincere belief or opportunism, other politicians will challenge norm-breakers as causing chaos, and the electorate would get the genuine opportunity to decide on whether that kind of behavior was appropriate for our political interactions and relationships. They could rein in or unleash the parties as they see fit. Unfortunately, this picture is too rosy. First, the Iron Rule can and has infected an increasingly partisan and angry electorate. Further, the parties can impact the operation of democracy through various means.[78] Elections determine who is in power, and a thumb on the scale can perpetuate a party's power. Using the Iron Rule, the parties have no reason to leave the electorate untouched.

Thus, without the courts or the electorate available as a disciplining mechanism, the extralegal norms that our system relies upon for coordination and civility must be *self-applied* by the parties. To grasp the possibility, as well as the perilousness of using such norms as a means of coordination, consider a televised presidential debate.[79] It is suffused with norms such as *Don't Interrupt Your Opponent* and *Don't Engage in Ad Hominem Attacks*. We expect the parties and candidates to self-apply these norms, even though flouting them is surely *legal* (not least because of the First Amendment). Perhaps we ought to hold this expectation lightly, given the rational structure of the competition. As a purely rational matter, the best outcome for the Republicans would be for the Democrats to "cooperate," to scrupulously and quietly abide by these discursive norms, while they themselves "defect" and flout them tactically. (Of course, one could defect to such an extreme degree that it turns off voters expecting presidential candidates to exhibit some element of decorum.) Meanwhile, the second-best outcome would be for both parties to cooperate, such that there's a respectful and substantive discussion, and the third-best would be for both parties to defect. The worst outcome would be for Republicans to cooperate, while

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78 *See generally, e.g.*, RICHARD L. HASEN, ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY (2020) (describing various potential election manipulation techniques); Richard L. Hasen, *The 2016 U.S. Voting Wars: From Bad to Worse*, 26 WM. & MARY BILL RTS. J. 629 (2018); Fishkin & Pozen, *supra* note 48, at 930–38 (discussing deployment of constitutional hardball in elections).

79 Dan Balz, *Trump Sets the Tone for the Worst Presidential Debate in Living Memory*, WASH. POST (Sept. 29, 2020, 11:59 PM), https://www.washingtonpost.com/politics/trump-and-biden-stage-the-worst-presidential-debate-in-living-memory/2020/09/29/9cdbeb56-027e-11eb-b7ed-141dd88560ea_story.html [https://perma.cc/TV64-T3H2].

the Democrats defect. The situation is reversed for the Democrats, and thus we have our dilemma. If the other side plans to cooperate, then it is optimal to defect. And if the other side plans to defect, then it would *also* be optimal to defect.

Nonetheless, as a historical matter at least, the parties and candidates have generally upheld the debate norms.[80] Robert Axelrod, in his seminal work, *The Evolution of Cooperation*, explains how cooperative norms can stabilize outside of the law in such situations.[81] The key is that the "game" is repeated indefinitely, so that the players can learn from their mutual defections, and come to trust one another to uphold their side of the bargain over time. In such an ongoing competition, if the other side cooperates, then it is, in fact, rational to cooperate in turn.[82] A remarkable demonstration of the possibility of cooperation based on continuing interaction occurred in the trenches of World War I, where some combatants developed the "live-and-let-live system."[83] The troops would attack each other when ordered, but between the large battles they would deliberately avoid doing much harm to the other side, provided that their actions were reciprocated. Ironically, the Senate used to be another prime example of the possibility of extralegal coordination, with Donald Matthews uncovering the normative "folkways" of the chamber, such as "apprenticeship," "courtesy," and "reciprocity," which enabled cooperation amongst the Senators.[84] Notably, he studied the body from

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80 *See, e.g.*, Toluse Olorunnipa, *Acrimonious Debate Sparks Calls for New Rules to Rein in Trump and Questions About the Format's Usefulness for Voters*, WASH. POST (Sept. 30, 2020, 6:29 PM), https://www.washingtonpost.com/politics/debate-trump-biden-commission/2020/09/30/3385ff64-0334-11eb-897d-3a6201d6643f_story.html [https://perma.cc/UAA8-U9X9]; David Leonhardt, *A Debate Mess*, N.Y. TIMES (Sept. 30, 2020) https://www.nytimes.com/2020/09/30/briefing/debate-disney-nba-finals-your-wednesday-briefing.html [https://perma.cc/NAA9-JQDE] ("It was unlike any presidential debate before it.").

81 AXELROD, *supra* note 73; *see also* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 1–28 (1990); Elinor Ostrom, James Walker, & Roy Gardner, *Covenants with and Without a Sword: Self-Governance Is Possible*, 86 AM. POL. SCI. REV. 404 (1992); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996).

82 AXELROD, *supra* note 73, at 27–72.

83 *Id.* at 60.

84 DONALD R. MATTHEWS, U.S. SENATORS AND THEIR WORLD 92–117 (1960); *see also* Nelson W. Polsby, *The Institutionalization of the U.S. House of Representatives*, 62 AM. POL. SCI. REV. 144, 166–68 (1968) (explaining how these same principles of the U.S. Senate manifest in the U.S. House of Representatives).

1947 to 1957, a period of unusual collaboration within and between the parties as they sought to develop important postwar legislation.[85]

While extralegal coordination is thus possible between competitors over time, it is also delicate, given that its reciprocal foundations must constantly be restored. This is a crucial point. Incivilities are met in kind and the "courtesy" folkway withers as rancor and meanness come to rest in Washington, D.C. A nation raises tariffs in one area, a competitor follows suit, and then all of the sudden there's a trade war.[86] While the most famous instance of the "live-and-let-live" ethos in World War I was the Christmas Truce of 1914, when warring soldiers at the Western Front joined to celebrate the holiday, singing carols and playing soccer matches, the comity ultimately disintegrated as the war dragged on for almost four more brutal years.[87]

The Iron Rule is dangerous precisely because of the fragility of the extralegal social norms upon which our civil order is based. As expressed by Republicans in the context of Justice Barrett's nomination, the Iron Rule is not a subtle statement about when and to what degree the public ought to have a say in nominating Supreme Court Justices. It is not an attempt to *interpret* our reciprocal extralegal norms. It is a self-fulfilling denial that those norms exist anymore, and it is thereby a grave partisan escalation. If and when the Democrats regain power in the Senate, applying the Iron Rule in turn, they will lack any confidence that the Republicans will ever reciprocate and uphold a norm when doing so goes against their ideological interest. Rationality will kick in, the Democrats will flout a new set of norms—by packing[88] or restructuring[89] the Court and stripping the Court of jurisdiction over a

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85 MATTHEWS, *supra* note 84, at 243–60.

86 Ben Blanchard & Steve Holland, *China, U.S. Kick Off New Round of Tariffs in Trade War*, REUTERS (Aug. 31, 2019, 9:47 PM), https://www.reuters.com/article/us-usa-trade-china/china-u-s-kick-off-new-round-of-tariffs-in-trade-war-idUSKCN1VM0V9 [https://perma.cc/5QWJ-TKH8].

87 David Brown, *Remembering a Victory for Human Kindness*, WASH. POST (Dec. 25, 2004), https://www.washingtonpost.com/wp-dyn/articles/A25206-2004Dec24.html [https://perma.cc/R9G6-ARWW].

88 *See, e.g.*, DAVID FARIS, IT'S TIME TO FIGHT DIRTY: HOW DEMOCRATS CAN BUILD A LASTING MAJORITY IN AMERICAN POLITICS 92–102 (2018); Jamelle Bouie, *Mad About Kavanaugh and Gorsuch? The Best Way to Get Even Is to Pack the Court*, N.Y. TIMES (Sept. 17, 2019), https://www.nytimes.com/2019/09/17/opinion/kavanaugh-trump-packing-court.html [https://perma.cc/YMK8-GE22]. On the history of court-packing in America, see Braver, *supra* note 65.

89 *See, e.g.*, Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 893–94 (2003) (considering a requirement that a two-thirds majority be had on the Supreme Court before an act of Congress could be declared unconstitutional); Tracey E. George & Chris Guthrie, *"The Threes": Re-Imagining Supreme Court Decisionmaking*, 61 VAND. L. REV. 1825, 1825–27 (2008) (seeking to modestly expand the Court

swath of subject matters, for starters[90]—and partisanship will ratchet upwards. If the Democrats do, say, add seats to the Court and appoint favored Justices to fill them, upon what basis could the Republicans honestly complain? That Democrats are not respecting unwritten norms of partisan cooperation?

The Iron Rule is especially invidious in this context because of the reasons that the G.O.P offered in 2016 to justify flouting the sturdy extralegal norm that the Senate will bring a President's Supreme Court nominee to the floor for a vote (and ultimately confirm one of the President's nominees).[91] As indicated above, the Republicans largely appealed to democratic principles: the Presidential campaigns had already begun, and thus the people ought to make the decision in November. In so doing, the G.O.P. had effectively proposed (and unilaterally passed) an amendment to the nomination norm, which, as Senator Graham stated, they were happy to apply in the future, even if doing so went against their interests.[92] But now that it has come time to apply that norm against themselves, they propose *further* amendments, arguing that the Senate has no duty to nominate opposite-party Presidents in an election year, and so forth.

What this means is that the G.O.P. was not serious about installing a new norm in 2016 and that their justification was mere pretext for a partisan power grab. And what *that* means is that the opposite-party President rationale is not serious either.[93] Thus, the Iron Rule here not

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to fifteen Justices and use panels ranging anywhere from three to nine Justices with the possibility of hearing some cases en banc); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 175, 181 (2019) (offering a proposal that envisions converting all of the U.S. Court of Appeals judges into Associate Justices of the U.S. Supreme Court (resulting in over 180 Justices), selecting nine-Justice panels to hear cases, and offering a proposal of a partisan balanced Court); Guha Krishnamurthi, *For Judicial Majoritarianism*, 22 U. PA. J. CONST. L. 1201 (2020) (analyzing the strengths of various structural forms of apex courts).

90 *See* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. (forthcoming 2021).

91 Some may suggest that failing to bring Judge Garland's nomination to a vote did not constitute a norm and thus the G.O.P.'s behavior in 2016 was not norm breaking. We think that is belied by the evidence, *see supra* note 21, and by the fact that the G.O.P. sought to offer a neutral justification for their failure to act on the nomination. But our account is not dependent on that characterization of the events of 2016. At an absolute minimum, the G.O.P offered a pretextual, insincere justification that it paraded as a rule, which it then flouted in circumstances where the putative rule would apply *a fortiori*. This itself violates the sturdy norms of good-faith dealing and consistently applying rules. *See, e.g.*, David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 892 (2016).

92 *See* Schwartz, *supra* note 32.

93 It may be the case that at the time, the G.O.P., and its members, meant what they said, but that they did not reflect thoughtfully on the implications. And, when the tables were turned, they realized that their democratic concerns were outweighed by their specific interests. This may be

only legitimates flouting a weighty norm when it is in your interest, but it also legitimates flouting a *meta-norm* that regulates how we discuss and interpret the unwritten rules of our political world. In effect, the Republican decision to nominate Justice Barrett legitimates lying to one another about our reasons for interpreting these norms in a particular way. Here, then, is the message that Republicans are communicating to Democrats about meta-norms: *We were pretending to care about democracy when we defected from the nomination norm in 2016, and it is permissible to make such false arguments about norms when doing so is in your partisan interest. It is permissible because you would have done the same.*

Further, the G.O.P.'s new amended principle, that an election year confirmation is allowed when the President and Senate are held by the same party, lacks a coherent foundation. The question is when and why the Senate is entitled to pause its constitutional obligation to help fill open Supreme Court seats. As just indicated, the G.O.P.'s first articulation was that appointments should not happen in the last year of the presidency, as a means of enhancing the democratic character of the appointment and to let voters have a say. But why would the application of this principle depend on the party in control of the Senate? Why would the democratic reasons apply with any less force in that context?[94] The G.O.P. offers no *justification* to further refine the rule. Republican Senators have pointed to 18th and 19th Century precedents,[95] but that is not itself a rationale, especially given that the G.O.P. has not to our knowledge presented evidence that the historical Senators believed they were upholding or refining a norm regarding election year appointments. If it turned out that 18th and 19th Century Senates rejected a number of redheaded Supreme Court nominees during the first year of a President's term, that would not today lend any independent legitimacy to a party that wished to reject a redheaded nominee during the first year of a President's term. The G.O.P. has not explained why the "opposite party Senate in an election year" variable

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a variety of Harry Frankfurt's "bullshit." HARRY G. FRANKFURT, ON BULLSHIT (2005) (defining "bullshit" as speech that is intended to persuade without genuine concern for the truth). Even under this characterization, this behavior still leads to flouting important meta-norms relating to inter alia fairness, consistency, and stability.

94 *See* David Pozen, *What Is the McConnell Rule?*, BALKINIZATION (Sept. 21, 2020), https://balkin.blogspot.com/2020/09/what-is-mcconnell-rule.html [https://perma.cc/AL4B-MG8H] ("If the McConnell rule is to be even plausibly defensible on its supporters' chosen grounds of democratic theory, it cannot be understood as a principle applicable only to a specific sort of divided government.").

95 *See* Dan McLaughlin, *History is on the Side of Republicans Filling a Supreme Court Vacancy in 2020* (Aug. 7, 2020, 2:48 PM), https://www.nationalreview.com/2020/08/history-is-on-the-side-of-republicans-filling-a-supreme-court-vacancy-in-2020 [https://perma.cc/9JSJ-BB6T].

is different from the "redheaded nominee in the first year" variable. Thus, even if the G.O.P. *had* proposed the other party justification in 2016, they would still be in grave violation of the meta-norm, having presented an insincere and incoherent rationale for violating a foundational norm of partisan cooperation.

To be clear, we make no statement here as to whether the Democrats would have acted in the same manner. Let us assume, though, that they would have: while in control of the Senate during the final year of a Republican presidency, they would have offered a democratic justification for violating the nomination norm and refusing to consider the President's Supreme Court nominee; they would have appointed an ideologically friendly Justice during the beginning of the next President's term; and then they would have refused to apply the democratic principle during the closing weeks of her term, as they sought to appoint another ideologically friendly Justice. Given this assumption, we do appreciate the seductive quality of the Iron Rule. Why *not* take advantage, if they would have done the same? The reason, from a purely rational standpoint, is that the Iron Rule, once established, is more formidable than even the Supreme Court, as indicated at the outset. In addition to court packing and jurisdiction stripping, consider whether a Democratic Senate will now ever accept a Republican President's judicial nominees, regardless of the election cycle. And surely this skirmish will be on Democrats' minds as they consider statehood for Washington, D.C. and Puerto Rico, as mentioned above. Like all these potential changes, the question of extending statehood to the District and Puerto Rico is surely complex, with legitimate, non-partisan considerations both for and against.[96] But the Iron Rule drowns those out in favor of a much simpler calculus: Do

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96 *See* Johnson & Bernal, *supra* note 16; Nicole Hemmer, Opinion, *Why Democrats Need to Prioritize Statehood for DC and Puerto Rico*, CNN (June 26, 2020, 4:59 PM), https://www.cnn.com/2020/06/26/opinions/dc-statehood-puerto-rico-democrats-priority-hemmer/index.html [https://perma.cc/EPJ7-NRU7]; David Leonhardt, Opinion, *The Senate: Affirmative Action for White People*, N.Y. TIMES (Oct. 14, 2018), https://www.nytimes.com/2018/10/14/opinion/dc-puerto-rico-statehood-senate.html [https://perma.cc/A2TS-JXKK]; John Hawkins, *A Conservative Case against Statehood for Puerto Rico*, NAT'L REV. (Mar. 28, 2019, 6:30 AM), https://www.nationalreview.com/2019/03/puerto-rico-statehood-conservative-case-against [https://perma.cc/L8X3-H24L]; Julio Ricardo Varela, Opinion, *White Liberals Must Stop Pushing Puerto Rican Statehood for Their Own Benefit. Let Us Decide.*, THINK (Nov. 11, 2020, 3:44 PM), https://www.nbcnews.com/think/opinion/white-liberals-must-stop-pushing-puerto-rican-statehood-their-own-ncna1247419 [https://perma.cc/2KQD-9SGW]; *see generally* Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT'L L. 229 (2018); Larry Mirel & Joe Sternlieb, *". . . Chosen by the People of the Several States . . .": Statehood for the District of Columbia*, 23 WM. & MARY BILL RTS. J. 1 (2014); Jamin B. Raskin, *Is this America? The District of Columbia and the Right to Vote*, 34 HARV. C.R.-C.L. L. REV. 39 (1999).

the Democrats stand to benefit? If so, what would the Republicans do if the situation were reversed?

There is a higher rationality, which views the ideological competition amongst the parties for what it is: an ongoing and indefinite process. There are norms that enable this competitive system to run effectively and cooperatively over the long term, even as we disagree deeply over the substantive moral principles that ought to infuse our laws. These norms are not inviolable. There may be legitimate reasons to set aside norms, such as that the observance of these norms leads to inefficiencies in democratic representations or allows for other rights violations. The animating concerns for norm-breaking need not even be systemic or general in nature; it could be that a particular event raises such important concerns that it demands immediate norm-breaking, despite potentially drastic consequences.[97] However, the calculus on norm-breaking must be exacting. Given that we must reciprocally self-apply these norms, a good-faith and peaceful competition amongst the parties in Washington rests upon a fragile cultural foundation, as indicated above.[98] And the Iron Rule, feeding off of the partisan self-interest that perhaps we can characterize as *ideological greed*, seeks to dissolve that foundation.

CONCLUSION

The Mosul Dam is the largest in Iraq.[99] It controls the flow of the Tigris River and was completed in 1984 by a German and Italian consortium.[100] Thirty miles upstream from the city of Mosul, the dam

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97 *See* Guha Krishnamurthi, *Sitting One Out: Strategic Recusal on the Supreme Court*, 11 CALIF. L. REV. ONLINE 387, 401–02 (2020), https://www.californialawreview.org/strategic-recusal-supreme-court [https://perma.cc/JC7T-Y9XF] (setting forth a sufficiency test for when particular cases may demand norm violations, despite potential fallout).

98 Rejecting the Iron Rule, however, does not require non-retaliation or self-sacrificing behavior. Parties who suffer norm violations may respond proportionally to restore balance. In *The Evolution of Cooperation*, Axelrod examined different strategies of response in an iteration of prisoners'-dilemma-type scenarios. Of the various strategies proffered, Anatol Rapaport's simple strategy of tit for tat—which cooperates on the first move, and subsequently echoes (reciprocates) what the other player did on the previous move—performed best. Axelrod, *supra* note 73, at 47, 118.

99 Michael R. Gordon, *Neglect May Do What ISIS Didn't: Breach Iraqi Dam*, N.Y. TIMES (Jan. 10, 2016), https://www.nytimes.com/2016/01/11/world/middleeast/neglect-may-do-what-isis-didnt-breach-iraqi-dam.html [https://perma.cc/X3QQ-EWF4].

100 *Id.*

was built on a bed of gypsum, a mineral that easily dissolves in water.[101] Left alone, the water would dissolve the foundation, the dam would break, and hundreds of thousands of people would drown as Mosul is flooded by as much as seventy feet of water.[102] To prevent this calamity, engineers must carry out a "construction project that never ends," injecting the foundation continuously with a cement and clay mixture.[103] Similarly, the *normative* foundation of our political system must also be cared for everyday—especially by those in power who can prove the existence and reliability of a norm by applying it even when it goes against their short-term interest. A failure to tend to it for even a few weeks one fall could be ruinous, for the Iron Rule works on normative reciprocity like water works on gypsum. If the G.O.P. takes this step, we in the city below will look up to see a deep crack in the enormous dam wall that protects us from ourselves and the Hobbesian logic of Anticipation. And whether that wall will hold in the coming months and years will become the most pressing question for members of all parties.

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101 *Iraq's Biggest Dam Could Collapse at Any Time, Killing Thousands*, N.Y. TIMES (Mar. 1, 2016), https://www.nytimes.com/2016/03/02/world/middleeast/iraqs-biggest-dam-could-collapse-at-any-time-killing-thousands.html [https://perma.cc/2VPR-4XWQ].

102 *Id.*

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