



Presidential Commission  
on the  
Supreme Court of the United States

**DRAFT FINAL REPORT**

December 2021

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# Letter to the President

[To be added following the December 7th public meeting]

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# Preface

Executive Order 14023 established this Presidential Commission on the Supreme Court of the United States. The Order directed the Commission to provide an account of the current debate over the “role and operation of the Supreme Court in our constitutional system” and an “analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals.”

Consistent with the Executive Order, the Report identifies prominent proposals for reform and provides a critical evaluation of the strengths and weaknesses of the proposals. This appraisal includes consideration of whether specific proposals could reasonably be expected to achieve the objectives that their proponents desire. It also identifies other potential consequences that might result from the reforms, including whether and how they might affect: the critical role of the Court in our system of government, including as a guardian of the rule of law; the protection of constitutional rights, principles, or structures; the processes by which Justices are nominated and confirmed to the Court; and public opinion and perceptions of the Court.

The Report also analyzes the constitutional and other legal requirements that would have to be met or resolved to implement the reforms.

The President made plain in public statements and in his Executive Order that he was seeking a Report reflecting bipartisan, diverse perspectives from Commissioners “having experience with and knowledge of the Federal judiciary and the Supreme Court of the United States.” As would be expected, the Commissioners appointed by the President hold various and sometimes opposing views on the legal and policy issues raised in the Court reform debate, and disagreements are noted at various points in the analysis. The Executive Order does not call for the Commission to issue recommendations, but the Report does provide a critical appraisal of arguments in the reform debate.

Given the size and nature of the Commission and the complexity of the issues addressed, individual members of the Commission would have written the Report with different emphases and approaches. But the Commission submits this Report today in the belief that it represents a fair and constructive treatment of the complex and often highly controversial issues it was charged with examining.

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# Executive Summary

On April 9, 2021, President Joseph R. Biden, Jr. issued Executive Order 14023 establishing this Commission, to consist of “individuals having experience with and knowledge of the Federal judiciary and the Supreme Court of the United States.” The Order charged the Commission with producing a report for the President that addresses three sets of questions. First, the Report should include “[a]n account of the contemporary commentary and debate about the role and operation of the Supreme Court in our constitutional system and about the functioning of the constitutional process by which the President nominates and, by and with the advice and consent of the Senate, appoints Justices to the Supreme Court.” Second, the Report should consider the “historical background of other periods in the Nation’s history when the Supreme Court’s role and the nominations and advice-and-consent process were subject to critical assessment and prompted proposals for reform.” Third, the Report should provide an analysis of the principal arguments for and against particular proposals to reform the Supreme Court, “including an appraisal of [their] merits and legality,” and should be informed by “a broad spectrum of ideas.”

The Report begins by explaining the genesis of today’s Court reform debate, including by identifying developments that gave rise to President Biden’s decision to issue the April 2021 Executive Order, particularly the debates surrounding the most recent nominations. This Introduction emphasizes that the Court’s composition and jurisprudence long have been subjects of public controversy and debate in the nation’s civic life: The Court serves as a crucial guardian of the rule of law and also plays a central role in major social and political conflicts. Its decisions have profound effects on the life of the nation. Though conflict surrounding the processes by which the President nominates and the Senate confirms Justices is not new, it has become more intensely partisan in recent years.

The Introduction also articulates three common and interrelated ideas frequently invoked in reform debates and throughout the Chapters of the Report: the importance of protecting or enhancing the Court’s legitimacy; the role of judicial independence in our system of government; and the value of democracy and its relationship to the Supreme Court’s decisionmaking. These important ideas can mean different things to different people. The Introduction discusses the range of meanings ascribed to these terms, with the aim of clarifying how they are deployed in arguments for and against reform.

## Chapter 1

Chapter 1 provides a history of efforts to reform the Supreme Court dating back to the Founding. This history highlights how lawmakers and the public, throughout the Nation’s history, have been attentive to and engaged in debate about the role the Court plays within the constitutional system. Reform debates have reflected the institutional needs of an expanding nation, and they have involved partisan conflict and philosophical struggle over substantive constitutional values and the power of government to serve the needs of the people. We offer this history not to attempt to resolve today’s debate according to a particular historical standard, but rather to offer context for today’s discussions and to underscore that debates about Court reform are part and parcel of U.S. constitutional history and the development of the American political order.

## Chapter 2

Chapter 2 examines proposals to expand or otherwise alter the current structure of the Supreme Court. The Chapter begins by presenting a brief history of past efforts to alter the size of the Court, dating back to the nineteenth century. It then proceeds to consider the legality of Court expansion, concluding based on text, structure, and history that Congress has broad authority to modify the Court’s size.

The Chapter then describes arguments made in the public debate both for and against Court expansion. Supporters contend that Court expansion is necessary to address serious violations of norms governing the confirmation process and troubling developments in the Supreme Court’s jurisprudence that they see as undermining the democratic system. Opponents contend that expanding—or “packing”—the Court would significantly diminish its independence and legitimacy and establish a dangerous precedent that could be used by any future political force as a means of pressuring or intimidating the Court. The Commission takes no position on the validity or strength of these claims. Mirroring the broader public debate, there is profound disagreement among Commissioners on these issues. We present the arguments in order to fulfill our charge to provide a complete account of the contemporary Court reform debate.

The Chapter also considers other structural reforms to the Court, such as proposals to provide for rotation between the Supreme Court and the lower federal courts, divide the Supreme Court into panels, or ensure ideological balance on the Court. The Commission

concludes that some of these proposals rest on sounder constitutional ground than others. Nonetheless, most such proposals would require significant changes to our federal judicial system and offer uncertain practical benefits.

### Chapter 3

Chapter 3 considers proposals for establishing non-renewable term limits for Supreme Court Justices. Proponents of term limits argue that they would help ensure that the Court's membership is broadly responsive to the outcome of elections over time; make appointments to the Court more predictable and less arbitrary; reduce the chances that excess power might be concentrated in any single Justice for extended periods of time; and enhance the Court's decisionmaking by ensuring regular rotation in decisionmakers, while maintaining judicial independence by guaranteeing long terms and lifetime salaries. Opponents of term limits argue that eliminating life tenure would weaken the Constitution's express protection of judicial independence, which could undermine the Court's legitimacy; further politicize the selection and confirmation process by requiring confirmations every two years; heighten the perception that Justices are partisan or political actors; and destabilize Court doctrine. Opponents do not agree that long fixed terms and lifetime salaries would solve these problems.

Without taking a position on the merits of term limits, the Chapter considers design questions that would have to be addressed were term limits to be adopted. It begins by considering how to draft a constitutional amendment to establish term limits and then proceeds to consider whether a similar system could be adopted by statute. In this analysis, the Chapter addresses key implementation questions, including the length of terms; the number of appointments a President should be able to make in a four-year term; how to transition from our current system of life tenure to a term-limited system; whether to impose constraints on Justices' post-tenure employment; and the challenge presented by potential impasses in the Senate's confirmation process. Opponents of term limits cite what they believe to be the intractability of these implementation questions as reason not to pursue term limits. Proponents emphasize that the benefits of term limits warrant grappling with what they believe are difficult but soluble design questions.

### Chapter 4

Chapter 4 explores proposals that would reduce the power of the Supreme Court or of the judicial branch as a whole. Many proposals for reforming the Court accept the scope of its power more or less as a given. By contrast, the proposals canvassed in this Chapter would curb

the Justices' capacity to invalidate legislation. They are designed to shift power to resolve major social, political, and cultural issues from the Court to the political branches.

Without attempting to address all potential means of reducing the Court's power, this Chapter examines jurisdiction stripping; supermajority voting requirements for the invalidation of congressional or other government action, as well as other rules that would require courts to show greater deference to the political branches; and proposals for a constitutional amendment to authorize Congress, through legislation, to override decisions of the Supreme Court and other courts. The Chapter analyzes how such reforms might affect the role of the Supreme Court or other courts in relation to the elected branches of government; the potential benefits and costs of the proposals; and whether they would require constitutional amendment.

The Chapter concludes that the efficacy of proposals targeting the jurisdiction of the Supreme Court or otherwise constraining its decisionmaking depend on the details of the proposals, including whether they also affect lower court and state court decisionmaking. We also conclude that the reforms that would most directly reduce the Supreme Court's (and other courts') power over fundamental social questions are also ones that, absent constitutional amendment, the Court would most likely find to be unconstitutional. However, the Chapter highlights arguments regarding how Congress might engage in more robust constitutional interpretation and enforcement even without constitutional amendment. Without taking a position on the ultimate merits of such proposals, this Chapter aims to help inform further debate about whether reforms would be worth pursuing.

## Chapter 5

Chapter 5 addresses how the Supreme Court conducts its work and explains its decisions. Although much of the public discussion about Court reform has been focused on structural issues, the Court's internal procedures and practices also have been a part of contemporary debates about the Court's role and operations. Accordingly, Chapter 5 focuses on three sets of issues.

The first is the Court's use of emergency orders, which are issued without the rounds of briefing and oral argument that its merits cases receive, and often also without a written explanatory opinion—even in cases that can generate intense public debate, involving issues of national importance or great practical impact. The Chapter reviews recent controversies relating to emergency orders and apparent changes in the Court's approach to managing them.

It notes that the Court may well benefit from continuing to adjust its explanatory practices in important cases, with an eye toward providing insight into its reasoning, reinforcing procedural consistency, and avoiding any possible appearance of arbitrariness or bias. The Chapter also addresses issues presented by emergency orders in capital cases, where the Court often has the final word on whether a state or federal execution will go forward.

The second set of issues concerns judicial ethics. The Chapter reviews potential benefits and drawbacks of reforms that would impose on the Justices a code of conduct, a disciplinary framework, or recusal review. The Chapter explores the potential difficulties presented by a framework containing binding sanctions, but also notes that experience in other contexts suggests that the adoption of an advisory code of conduct would be a positive step on its own.

The third topic is public access to the Court's proceedings through the audio or video streaming of oral arguments and opinion announcements in real time. The Chapter acknowledges that several Justices have expressed opposition to the use of cameras, but suggests that the continuation of near-simultaneous audio would enable the media and interested members of the bar and the public to better follow the work of the Court.



# Acknowledgments

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# Introduction: The Genesis of the Reform Debate and the Commission’s Mission

On April 9, 2021, President Joseph R. Biden, Jr. issued an executive order establishing this Commission. The Order charged the Commission with producing a Report for the President that addresses three sets of questions. First, the Report should include “[a]n account of the contemporary commentary and debate about the role and operation of the Supreme Court in our constitutional system and about the functioning of the constitutional process by which the President nominates and, by and with the advice and consent of the Senate, appoints Justices to the Supreme Court.”<sup>1</sup> Second, the Report should consider the “historical background of other periods in the Nation’s history when the Supreme Court’s role and the nominations and advice-and-consent process were subject to critical assessment and prompted proposals for reform.”<sup>2</sup> Third, the Report should provide an analysis of the principal arguments for and against particular proposals to reform the Supreme Court, “including an appraisal of [their] merits and legality.”<sup>3</sup>

This Commission is the most recent of various committees and commissions established over the last fifty years to explore judicial reform. These have addressed a wide range of issues, such as caseload management and capacity, judicial disciplinary codes and administration, and the organization of the lower federal courts. Consistent with this history, President Biden’s Order charged this Commission to enlist experts, as well as the public, to “ensure that its work is informed by a broad spectrum of ideas” on the question of Supreme Court reform.<sup>4</sup>

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## I. The Genesis of Today’s Reform Debate

In October of 2020, then-presidential candidate Biden stated his intention, if elected, to create a bipartisan Commission to examine Supreme Court reform. In response to a question about whether he supported proposals to expand the number of Justices on the Court, Biden responded that “it’s not about court packing” and observed that constitutional scholars have debated a range of Court reform proposals.<sup>5</sup>

The President’s comments and the Commission’s subsequent creation underscore that the nation has been engaged for some time in an intense and ongoing debate about the Court’s composition, the direction of its jurisprudence, and whether one political party or the other has breached norms that guide the process of confirming new Justices. Political actors, lawmakers,

and commentators have articulated sharply divergent accounts of why conflict over the Court has escalated in recent years. And they disagree about whether these political struggles have undermined the Court’s legitimacy.<sup>6</sup>

The Commission does not purport to offer a consensus history of the last decades of conflict over the Supreme Court, nor does it come to a conclusion about whether the Court has suffered a loss or crisis of legitimacy. Commissioners hold very different views on these matters. Without purporting to resolve any of those differences, this introductory Chapter offers a set of observations that provide context for President Biden’s decision to issue the April 2021 Executive Order and discusses a set of criteria by which the broader debate might be appraised.

## A. Conflict Over the Court

The role the Court plays in major political and social conflicts has long made its composition and jurisprudence subjects of debate in the nation’s civic life. Throughout American history, including in recent decades, conflict over the Court has played out with varying degrees of intensity in the processes by which the President nominates and the Senate confirms new Justices. In recent decades, both Democrats and Republicans have lamented that nominees, prepared by the White House staff, have systematically sidestepped candid answers to questions about their records and judicial philosophies, although many also agree that nominees should not answer questions in ways that might be seen as pre-committing themselves to particular outcomes in future cases.

Nominations to the Court have been fiercely opposed for a range of reasons. President Woodrow Wilson’s nomination of Louis Brandeis generated aggressive opposition fueled by antisemitism.<sup>7</sup> President Herbert Hoover’s nomination of John J. Parker was opposed by civil rights groups and labor organizations, and was ultimately defeated at least in part because of Parker’s expressed opposition, while a candidate for Governor of North Carolina, to the participation of Black people in politics.<sup>8</sup> When President Lyndon Johnson nominated Judge Thurgood Marshall—a trailblazing civil rights lawyer, former federal appellate judge, and, at the time of his nomination, Solicitor General of the United States—to be the first Black member of the Court, Marshall was confronted with hostile and racist questions from segregationist Senators, and numerous Senators voted against his nomination or abstained from voting.<sup>9</sup> The Senate later rejected two of President Richard Nixon’s nominees—G. Harrold Carswell and Clement F. Haynsworth, Jr.—for reasons including their prior support for segregation, and also in each case because of other objections to their candidacies.<sup>10</sup>

Among the nomination contests still debated today is President Ronald Reagan’s failed attempt to place Judge Robert Bork on the Supreme Court in 1987. Judge Bork’s supporters contended that he was a highly qualified nominee who was subjected to deceptive and inflammatory partisan criticism; his record and views, supporters claimed, were mischaracterized by his opponents. Defenders of the Senate’s treatment of Judge Bork, by contrast, argued that he received an extensive hearing at which he had an opportunity to present and defend his views at length, and that his nomination failed by a bipartisan majority vote after a floor debate because of fundamental and legitimate disagreements with his legal views and judicial philosophy.

Three recent nominations have generated especially bitter partisan conflict. We explore those nomination battles in greater detail in Chapter 2 of this Report but note them here because of their role in the debates leading to the formation of this bipartisan Commission. First, after Justice Antonin Scalia died in February 2016, the Republican majority in the Senate refused to consider President Barack Obama’s March 2016 nomination of Chief Judge Merrick Garland to fill that seat. The Republican Senate leadership argued that the nation was poised in a matter of months to elect a new President, who should be able to appoint Justice Scalia’s successor. It thus declined to take any formal action, such as a hearing or a vote, on the Garland nomination. President Donald Trump later appointed Judge Neil Gorsuch to fill the vacant seat. Next, in the summer of 2018, Justice Anthony Kennedy—widely viewed as occupying the Court’s ideological center—announced his retirement. President Trump then nominated Judge Brett Kavanaugh, whom the Senate confirmed in October 2018 after contentious hearings and floor debate. Finally, Justice Ruth Bader Ginsburg died in September 2020, creating another election-year vacancy. Although the Senate’s Republican majority had opposed the election-year confirmation of Judge Garland for nearly eight months before the 2016 election, this time it took up President Trump’s nomination of Judge Amy Coney Barrett and confirmed her in one month, on October 26, after voting in the 2020 presidential election had already commenced. Senate Democrats participated in the Judiciary Committee hearings and final vote on Justice Barrett’s nomination, but most declined individual meetings with her, and the Democrats on the Judiciary Committee boycotted the final committee vote to express their objection to the timing of the nomination.

These events directly motivate some of the current calls for Supreme Court reform by those who argue that the seats previously occupied by Justices Scalia and Ginsburg were “stolen” by Republicans from Democrats. According to these critics, Republicans achieved the current conservative dominance of the Court by disregarding the norms that should govern

and have governed the appointments process in the past.<sup>11</sup> Critics of the treatment of the Garland nomination in particular emphasize that the Senate majority's refusal to take any formal action at all on that nomination broke important new ground, departing from historical practice dating back to the nineteenth century. In addition, according to critics, the fact that Republicans were willing to act on Justice Barrett's nomination just before the 2020 election undermines their claim that their refusal to consider Judge Garland's nomination was motivated by the principle that Supreme Court vacancies ought not be filled in an election year. In response, defenders of the Senate majority point out that Judge Garland was nominated when the White House and the Senate were controlled by different political parties, while Justice Barrett was nominated when both institutions were controlled by the same party. More broadly, these defenders assert that the Senate majority's actions during these two periods did not violate any well-established norms or disrupt any consistent historical practice. Over the course of American history, they note, Senate majorities periodically have declined to take up nominations in election years or have used the filibuster to deny a sitting President a confirmation, in order to reserve the choice for his successor.

Several witnesses who testified before or provided written submissions to the Commission observed that partisan conflict over nominations has occurred throughout the nation's history, particularly in election years.<sup>12</sup> According to one witness, historically the Senate has confirmed nearly ninety percent of Supreme Court nominees when the President's party is in power but "fewer than 60 percent of nominees under divided government."<sup>13</sup> Similarly, the same witness observed that over eighty percent of nominees are confirmed when nominated "in the first three years of a presidential term," but "barely more than half" when nominated "in the fourth (election) year."<sup>14</sup> Nonetheless, most witnesses agreed that conflict has intensified in recent years. One witness cited the history of confirmations since the Reagan Administration as one of a "continuous cycle of escalation" of partisan conflict over nominations to both lower courts and the Supreme Court.<sup>15</sup> This escalation originates in the belief, held by both parties, that "the other side plays dirty and will manipulate the rules to its own advantage," conferring on the party in power "a significant incentive to violate the current norms when it has the chance."<sup>16</sup> The witness summarized the current state of affairs: "[E]ach side . . . believ[es], probably rightly, that the other side would do the same as soon as it had the chance. It's a classic prisoner's dilemma, and it operates according to its own logic."<sup>17</sup> Another witness characterized this recent history as "decades of political circus."<sup>18</sup>

The Commission also received a survey of a bipartisan group of former Senate staffers, including those who have served the current and former leadership of the Senate Judiciary

Committee, documenting their views on the state of the confirmation process. The results reflected broad bipartisan agreement that the confirmation process has come under severe strain from partisan conflict, though Republican and Democratic staffers disagreed about the causes of the strain. Democrats cited the controversies surrounding the nominations of Judge Garland and Justice Barrett as evidence of Republican bad faith and disregard of longstanding norms. Republicans cited the hearings on the nominations of Judge Bork, Justice Clarence Thomas, and Justice Kavanaugh, and blamed Democrats for personal attacks on nominees designed to derail nominations for partisan or ideological reasons.<sup>19</sup>

The recent history of Senate confirmation votes supports witnesses' accounts of escalating partisanship. For seventy years until 1968, most Justices were confirmed by voice vote. Since then, roll call voting has become the norm, and votes have divided increasingly along party lines.<sup>20</sup> Justice Sonia Sotomayor received 68 votes (all Democrats and nine Republicans voting to confirm); Justice Elena Kagan, 63 (all but one Democrat and only five Republicans voting to confirm); Justice Gorsuch, 54 (all Republicans and only three Democrats voting to confirm); Justice Kavanaugh, 50 (all Republicans and just one Democrat voting to confirm); and Justice Barrett, 52 (all but one Republican and no Democrat voting to confirm).

To be sure, over the last fifty years, some nominees have received significant bipartisan support. Some of those nominations—including Justice Scalia (confirmed in 1986 with 98 votes), Justice Ginsburg (confirmed in 1993 with 96 votes), and Justice Stephen Breyer (confirmed in 1994 with 87 votes)—occurred when the Senate was controlled by the President's party. Others—including Justice Kennedy (confirmed unanimously in 1988, an election year, after Judge Bork's nomination was rejected) and Justice David Souter (confirmed in 1990 with 90 votes)—occurred when the Senate majority was not aligned with the President. Unmistakably, however, the trend over the last three decades has been toward more partisan conflict, which has affected nominations to the lower courts as well as to the Supreme Court.

The confirmation battles of recent years have given rise to multi-million dollar lobbying campaigns seeking to mobilize public pressure for or against particular nominations. Millions of dollars were spent for and against the nominations of Justices Kavanaugh and Barrett.<sup>21</sup> There is little reason to doubt that nominations will continue to trigger expensive campaigns to shape public opinion and pressure undecided Senators to vote in a particular way. Indeed, when vacancies arise, political and interest group allies now expect the President to thoroughly vet nominees for their substantive views in an effort to ensure that the nominee will advance the desired ideological outlook. Presidents are also expected to nominate individuals who, if

confirmed, will be young enough to serve for many decades. In short, political actors now perceive the stakes of each nomination to be exceedingly high, especially if confirmation is seen as likely to lead to an immediate shift in the balance of power between Court “liberals” and “conservatives.”

As witness testimony before the Commission suggested, the struggles over the confirmation process appear likely to persist, if not intensify. One witness testified that the partisan escalation of recent years may lead future Senate majorities to decline to take up any nomination from a President of the opposing party at any time at all, not just in the last year of the President’s term.<sup>22</sup> At various times and to different degrees, party leaders have expressed a readiness to resort to these kinds of tactics as a matter of course. In 2021, Republican Leader Mitch McConnell stated that if his party won a majority in the Senate in the 2022 midterm elections, he would not commit to acting on any Supreme Court nomination by President Biden in 2023 and indicated that it was “highly unlikely” he would agree to any such consideration in the 2024 presidential election year.<sup>23</sup> In 2007, Senator Chuck Schumer, then a member of the Senate Democratic leadership and now the Senate Majority Leader, observed in a speech that, for the eighteen months remaining in George W. Bush’s presidency, “[w]e should reverse the presumption of confirmation.”<sup>24</sup> He set the nomination of a “moderate” as a condition of confirmation, asserting that “the Supreme Court is dangerously out of balance” and that a Bush nomination should not be confirmed “except in extraordinary circumstances.”<sup>25</sup> Defenders of recent Republican actions point to these statements as evidence that both sides have engaged or have been prepared to engage in similar practices. They therefore contend that Republicans cannot fairly be charged with breaching any established norms. Critics of the Republicans’ approach see a distinction between Senator McConnell’s and Senator Schumer’s respective statements. They view it as improper for the Senate simply to refuse to consider a President’s nominees, but claim it is different, and appropriate, for a Senate majority that is not aligned with the President to insist that the President’s nominees be relatively moderate. Of course, what it means for a nominee to be “moderate,” and whether any given nominee is accurately described as such, are often matters of significant disagreement.

## B. The Stakes of the Reform Debate

The Court reform debate is not merely a byproduct of recent partisan conflict. Rather, it is a high-stakes debate because of the unique role and structure of the Supreme Court. The Court’s decisions have extraordinary impact on the lives of Americans generally. The Court also exercises enormous power within the U.S. system of government, as do the individual

Justices themselves, who serve for life. The sharp polarization in contemporary American politics only exacerbates the conflict over the Court.

The Court has long occupied a central and often contested role in shaping American political and civic life. In the modern era, its decisions continue to have both immediate and long-term effects on the welfare of individuals and communities throughout the country, including by affecting the rights of people of the same sex to marry, the right to bear arms, religious liberty, property ownership, women’s reproductive rights and freedoms, access to health care, participation in the political process and voting, the structure of government and the separation of powers, the operation of the criminal justice system, diversity in higher education, and the regulation of workplaces and the right to organize.<sup>26</sup> The stakes of the nomination process are so high precisely because they implicate matters of great public concern. Indeed, at various moments throughout history, conservatives and progressives alike have turned to the Court to protect the rights they most value and to define the authority of the elected branches of the federal government and of the states in accord with their understandings of the Constitution.

The controversies surrounding the Court are heightened by the combination of—as one witness put it—a “very powerful Supreme Court” and “a nearly-impossible-to-amend constitution.”<sup>27</sup> Consequently, when the Court generates “a firestorm of controversy, the only practical avenue for overturning decisions of the Court has been through changing the judges who sit on that Court.”<sup>28</sup> The fact that Justices have life tenure—and therefore often serve for upwards of thirty years in the modern era—only heightens the stakes of who joins the Court. Up until the late 1960s, the average term of service was fifteen years. It has now risen to roughly twenty-six years, and a number of Justices have served three or more decades, spanning numerous election cycles and presidential administrations. It is hardly a surprise, then, that key segments of the American public are so heavily invested in making sure that the “right” nominee is confirmed.

The highly polarized politics of the current era threaten to transform this already high-stakes process into one that is badly broken.<sup>29</sup> Political scientists generally agree that “the period since the 1980s has largely featured deepening dispute and standoff between the parties, accompanied by intensifying political and social polarization.”<sup>30</sup> This polarization is not simply a matter of partisan competition for its own sake, but also reflects a greater and more stable ideological divide between the two major political parties.<sup>31</sup> As the parties become more accurate proxies for deep ideological disagreements, the realistic potential for bipartisan compromise and cooperation decreases.<sup>32</sup> The depth and stakes of partisan polarization



increase accordingly.<sup>33</sup> Indeed, contemporary politics generally have developed the “distinctive character of high-stakes warfare” associated with the “breakdown of norms of cooperation and civility across the aisle.”<sup>34</sup> According to Chief Justice John Roberts, this extreme polarization has affected public perceptions of the Court: “When you live in a polarized political environment, people tend to see everything in those terms.”<sup>35</sup>

The Commission did not attempt to identify the sources of polarization or come to conclusions about any role the Court may have played in it. These, too, are matters about which individual Commissioners disagree. The Commission did hear testimony, however, that acute polarization is likely to continue to affect the debate over the Court’s role in the constitutional system, and to perpetuate partisan conflict over nominees to the Court.<sup>36</sup> On this point, there is consensus among Commissioners. Any account of the origins of the present debate about the role and operations of the Court, therefore, would be incomplete without taking note of how the deeply divided nature of our polity affects debates over the Court.

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Before we turn to discussing proposals for Court reform and how best to evaluate them, two caveats to the above picture of partisan conflict are in order. First, even as the Court is at the center of escalating partisanship, the Court’s rulings do not necessarily track the ideological differences between parties. Justices appointed by Republicans do not always vote in a predictably conservative fashion, and Justices appointed by Democrats do not always vote in a consistently liberal one. What is more, a significant portion of the Court’s work is not highly ideological. In these cases the Justices are often unanimous or aligned in ways that cannot be predicted by the political party affiliation of the President who appointed them or by the ideologies associated with that party.<sup>37</sup>

Second, the extent to which extreme political polarization affects the public standing of the Court is not clear. Historically, the Court has maintained levels of public confidence higher than those accorded the other branches.<sup>38</sup> Though public opinion may shift in the wake of particularly controversial decisions and nominations, commentators have argued that basic trust in the Court as an institution has exhibited significant resilience.<sup>39</sup> At the same time, there is some evidence that partisan differences shape judgments about the Court’s performance. Court “approval” among Democrats dropped to forty percent after President Trump assumed office and made his first appointment to the Court, while among Republicans it rose to nearly sixty-five percent.<sup>40</sup> And whether public trust in the Court will continue to be durable remains to be seen. One recent poll suggests the Court’s approval is waning, with forty-nine percent of

Americans disapproving of its performance and only thirty-seven percent approving—an all-time low.<sup>41</sup>

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## II. Proposals for Reform

### A. The Commission’s Process and Scope of Analysis

In considering the current reform debate, the Commission held six public meetings; heard oral testimony from forty-four witnesses; and received written statements from numerous additional experts and organizations, as well as more than 7,000 submissions in the form of public comment. The views expressed regarding the need for Court reform and evaluating proposals for such reform were wide-ranging and diverse.

Informed by that material and the broader public debate, the Commission divided its work into five parts: one devoted to providing a historical background and the other four devoted to analyzing the major categories of reform proposals.

- *The history of Supreme Court reform debates and proposals.* Debates about whether and how to adjust the size, role, and operation of the Supreme Court are as old as the Court itself. To put the present reform debates in context, in Chapter 1 we provide a historical overview of past efforts in favor of and opposed to Supreme Court reform.
- *The size and composition of the Court.* One prominent proposal would increase the number of Justices who sit on the Court. Other proposals suggest reorganizing the membership of the Court—for example, by having cases decided by panels instead of the entire Court, or by periodically rotating other Article III judges onto the Supreme Court. We address these proposals in Chapter 2.
- *The Justices’ tenure.* Justices currently serve “during good Behavior,” meaning for life, unless they voluntarily leave the Court or are impeached and removed from office. Another prominent proposal would limit the length of time that Justices serve on the Court and, relatedly, would define the intervals at which Justices are appointed. We consider these term-limits proposals in Chapter 3.
- *The powers of the Court and its role in the constitutional system.* Another set of proposals seeks to disempower the Court in relation to the political branches, particularly to limit the Court’s power to declare legislative acts unconstitutional. This category includes modifying the Court’s jurisdiction, as well as changing the Court’s

voting rules and the standards of review it uses when considering whether to invalidate the actions of elected officials. Finally, it includes proposals to allow Congress to override constitutional decisions of the Supreme Court and other courts. We analyze this category of proposals in Chapter 4.

- *Transparency and the Court's internal processes.* A final category of potential reforms includes proposals that would address internal operations of the Court. These proposals concern: the procedures and principles the Court applies to emergency applications; judicial ethics and transparency with respect to recusals and conflicts; and making the Court's proceedings widely accessible in real time through audio or video transmission. We take up this set of reforms in Chapter 5.

With regard to each of the four categories of Court reform, we consider relevant historical background (in addition to the more general historical background provided in Chapter 1); we evaluate the case for and against the reform as framed by proponents and critics; we explore whether the proposed reforms promote the goals of their proponents and what the potential consequences of the reforms might be; and we consider the legal requirements and obstacles that must be met or overcome to implement the reforms.

We do not analyze at length the confirmation process or proposals for how the Senate might reform it. The Commission recognizes that the processes by which individuals are nominated to the Court by the President and considered by the Senate are central to today's debate. However, the Commission's charge was to address proposals for reforming the Court itself, not for reforming the confirmation process. At the same time, given the extensive and bipartisan testimony we received concerning the intense conflict that now characterizes that process, generating widespread concern that it has become dysfunctional, we have attached an Appendix to this Report that discusses specific reform proposals presented to the Commission—proposals we believe merit close attention and consideration.<sup>42</sup>

## B. Evaluating Reform Proposals

Before proceeding to analyze particular reform proposals in subsequent Chapters, we consider the values and principles that might be brought to bear in evaluating whether reform is needed and whether a particular reform might be worth pursuing or could be counterproductive. Three common and interrelated themes are frequently invoked in discussions about reform: the perceived need to protect, or enhance, the Court's legitimacy; concerns about preserving the independence of the federal judiciary and the Supreme Court in particular; and the Court's relationship to democracy. One challenge in defining these concepts

is that they mean different things to different people. Thus, discussions cast in these terms sometimes create terminological confusion.

We do not try to assign specific meanings to any of these ideas. But we do think it is useful to articulate the values that underlie the ideas of legitimacy, judicial independence, and democracy, as those ideas pertain to the Court, with the hope of clarifying the terms of the debate and providing ways in which reform proposals might be evaluated.

## 1. Legitimacy

Nearly all of the matters now being debated—the size and composition of the Court, the Justices’ tenure, the Court’s role in the constitutional system, the propriety and transparency of the Court’s internal processes, and the way in which Justices are appointed and confirmed—are said to implicate questions of legitimacy. There are, however, different ways to understand the idea of legitimacy as it is used in reform debates. Legitimacy might refer to the general level of support that the Court has among the people of the United States, perhaps as reflected in public opinion polls. Or, in a related and more specific use of the term, it might refer to whether people who disagree with a decision by the Court are willing to comply with it.

Those who use legitimacy in one of these ways commonly say that the Court’s legitimacy is crucial to the institution because the federal judiciary has no military or other way to coerce people to comply;<sup>43</sup> the judiciary must rely on others to adhere to its decisions.<sup>44</sup> Alexander Hamilton formulated the point in *The Federalist* in a way that has become virtually a cliché: “The judiciary . . . has no influence over either the sword or the purse . . . and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”<sup>45</sup> The Supreme Court’s capacity to function in its accustomed way, at least in the long term, arguably depends on the Court retaining its legitimacy in this sense.<sup>46</sup>

Sometimes, though, legitimacy is used in these debates to mean something else—to express an evaluative judgment about the Court or its actions, not a prediction about whether it will be obeyed. In particular, people who believe that the Court is functionally a “political” or even partisan body might say that the Court is (or has become) illegitimate. That claim might be made irrespective of whether the Court has lost popular support or its ability to command obedience to its decisions. More generally, the assertion that the Court is illegitimate might be an evaluative judgment that the Court has made decisions that are seriously wrong. Of course, it would be rhetorical overkill, by any standard, to say that every mistaken decision

draws into question the Court’s legitimacy. But an observer who believes that the Court has made decisions that are wrong in some fundamental way might couch that criticism in terms of legitimacy.

Finally, assertions about illegitimacy might combine these two elements: both a criticism of the Court or its decisions and a commentary on its ability to command obedience. The claim may be that the Court has become so partisan, political, ideological, or that the Court’s decisions are so fundamentally wrong, that it is not entitled to obedience.

Because claims about legitimacy play a large role in debates about the Court—and because the term has different possible meanings—there is a risk that participants in these debates will talk past each other and not clarify their areas of agreement or disagreement. For example, a claim that the Court is illegitimate because of the way in which some of its members have been appointed or because it made a decision based on objectionable motivations might be met with an assertion that the Court still commands substantial popular support. However, the assertion about popular support is not truly responsive to the evaluative claim about the Court. Conversely, a weakening of the Court’s popularity might be taken as evidence that the Court has embarked on a misguided course of decisions—which need not be true.

In fact, the relationship between popular acceptance of the Court and the correctness of the Court’s decisions is a complex question that must be analyzed in its own right. Competing assertions about legitimacy that do not recognize the complexity of that term can obscure, rather than focus, the terms of debate.

## 2. Judicial Independence

Judicial independence is also invoked in varying ways. In one sense, judicial independence is commonly, and correctly, thought to be a core requirement of the rule of law. Judges must be free to decide cases without fear that they will be punished by the government or will suffer physical or financial harm at the hands of private individuals. They must not be corrupted by bribes. Their rulings must not be influenced by personal favoritism or family relationships.

In those ways, judicial independence is not different from what we expect of other government officials: that they be able to, and do, carry out the responsibilities of their office without fear or favor. But the ideal of judicial independence might be understood to include qualities that are distinctive and indispensable components of the work of judges in particular.

Judges should not be partisans. Other government officials, depending on their positions, might legitimately set out to promote the interests of the political party with which they are associated; one requirement of judicial independence is that judges not do that. And, importantly—because federal judges are appointed and confirmed by political actors—the belief that the judiciary is independent can be undermined if judges are perceived to be “playing on the team” of one party or another.

Beyond that, it is sometimes said that judicial independence requires that judges decide cases solely according to the law. Of course, it is incontrovertible that judges should decide cases according to law. But there are difficult questions—they have been debated, literally, for centuries—about what making decisions according to law means. In particular, legal decisions, especially those of a court like the Supreme Court that has responsibility to resolve the most challenging issues facing our system, will sometimes require the exercise of judgment on legal issues about which there can be reasonable disagreement and that may implicate—to quote Judge (later Justice) Benjamin Cardozo—“[h]istory or custom or social utility or some compelling sentiment of justice.”<sup>47</sup> Difficult decisions of those kinds, especially when they involve controversial social issues, can leave judges and Justices open to the accusation that they have compromised judicial independence by advancing a partisan or otherwise improper agenda. That makes some of the duties associated with the judicial role and judicial independence—candor, consistency, reasoned elaboration, attention to both the appearance and reality of impartiality—all the more important.

There is a different meaning of judicial independence that raises more complex questions about the role of the judiciary as a whole, and the Supreme Court in particular, in our constitutional system. Judges and Justices should undoubtedly be independent in the sense of making decisions that are unaffected by improper influences, whether those influences are imposed from the outside (by threats, for example) or are the result of their own approach to the job (if, for example, their decisions are influenced by an intention to run for office after they leave the judiciary or if they simply act as members of a partisan “team”).

But judicial independence might also refer to the separate idea that the judiciary as an institution has an independent role to play—a role that is distinct from that of the other branches. Some of the confusion in debates about Court reform may result from a blurring of these two different meanings of judicial independence—the unquestionable value of judges acting free from fear or favor and according to law, and the more complex issues raised by the relationship between the judiciary and the other institutions of our government. The question of how independent of the other branches the judiciary should be is not easy to answer.

On the one hand, especially because judges and Justices sometimes must decide issues about which reasonable people disagree, there is an argument that the judiciary must not be entirely independent of the elected branches of government. Some aspects of our system—including not only the appointment and confirmation process, but also Congress’s role in setting the Court’s budget, jurisdiction, and size, and its control of the impeachment process—ensure that the judiciary is not entirely independent but is to some degree responsive to elected officials and therefore to public opinion. On the other hand, the role of the judiciary, in any system, is to decide cases according to law and not according to the desires of political actors. Beyond that, in our constitutional system the judiciary has the responsibility to protect minorities against impermissible exercises of political power. The independence of the judiciary as an institution is crucial to the courts’ ability to carry out this responsibility. We consider this clash between ideals more fully in our discussion of the relationship of the Court to democracy.

### 3. Democracy

One far-reaching critique of the Court, also sometimes cast in terms of legitimacy, asserts that the Court is too willing to intrude into matters that should be left to democratic political processes. According to this line of criticism, many concerns about the Court are derivative of its outsized role in the system of government. When the Court’s decisions are so important, the confirmation process becomes more contentious and partisan; the incentives to attempt to use the Court for partisan purposes become greater; and worries that the Court will entrench views that the people have rejected become more acute.

This criticism highlights the tension between the role of an independent judiciary as a check on the political process and the idea that our constitutional democracy must provide a democratic check on the judiciary as well. The democratic check advocated by some critics takes a variety of forms, each of which has different implications for the relationship between the Court and democracy. Because each of these suggested ways of defining the relationship between the Court and democracy also implicates the values associated with legitimacy and judicial independence, we consider them in some detail.

#### *a. Deference to the Political Branches*

If the fundamental democratic goal is ensuring that decisions are made by relatively democratic institutions, such as the legislature, a goal of reform might be to ensure that the Supreme Court not interfere (or not interfere too readily) with the outcomes of the democratic process—by, for example, holding unconstitutional federal or state legislation. Some

advocates for reform thus contend that the Court should be more reluctant to declare legislation unconstitutional, or that Congress should limit the Court's power to do so. This understanding, in various forms, has been advocated by commentators, judges, and Justices at various points in history, and some of the witnesses before the Commission forcefully advanced this view.<sup>48</sup> In fact, it is difficult to think of any issue related to the Court that has been discussed more extensively.

This conception gives rise to various questions. What is the category of decisions to which the Court should be more deferential? Is the concern that the Court exercises too much power just about the invalidation of Acts of Congress, or does it extend to the much more common instances in which the Court declares unconstitutional the actions of states or local governments? Those two forms of judicial review raise significantly different issues, but both implicate the power of the Court to overturn enactments by democratically elected bodies. In addition, the Court exercises power over the other branches of the federal government in ways apart from its constitutional holdings. The Court interprets federal statutes and can declare unlawful the actions of executive branch agencies. Though these decisions, unlike constitutional holdings, can in principle be overturned by legislation, in practice the difficulty of enacting legislation routinely means that what the Court says is the last word.

Perhaps the more fundamental question—the one that has attracted so much discussion for so long—is when deference is justified and when it is not. In prominent cases, the Court has intervened to try to protect racial or religious minorities or political dissidents from the abusive actions of majorities.<sup>49</sup> If the Court were to adopt a posture of across-the-board deference, it would no longer play that role. But some critics of the Court assert that greater deference would be worth it—that the gains from those celebrated decisions are outweighed by the instances in which the Court has prevented democratically-elected branches of government from serving the nation's interests, including by recognizing and protecting individual rights and the rights of minority and disadvantaged groups.<sup>50</sup>

*b. A More Representative Court—and Avoiding Partisan Entrenchment*

A second democracy-related argument aims for a Court that reflects, in broad terms, the political makeup of the country. The assumption appears to be that such a Court would not issue decisions that diverge too greatly from the preferences of the broader public. The argument is that while the Court need not and should not be responsive to short-term swings in public opinion, it is not good for the Court or the country for the Court to be substantially out of line with public opinion for an extended period.



Some critics of the current system contend that it produces a persistent gap between the composition of the Court and long-term movements in popular opinion. This misalignment might occur by happenstance, because the fortuitous nature of vacancies enables some Presidents to make many more appointments to the Court than others and therefore to have a much greater influence on its direction.<sup>51</sup> It may also happen by design, if a transient governing majority, or one that is about to be superseded, succeeds in appointing to the judiciary a significant number of candidates whose legal philosophy matches that majority's preferences—a phenomenon sometimes referred to as partisan entrenchment. During such periods of misalignment, there may be a heightened risk that the Court's direction on political or social issues will be perceived as significantly or increasingly distant from the strongly held preferences of a large majority of the public.

Some commentators assert that such a misalignment exists today. They point to the fact that Republican Presidents have appointed fifteen of the last nineteen Justices and six of the current nine Justices, “even though Democrats have held the presidency for 16 of the last 28 years and have received more votes in six of the last seven presidential elections.”<sup>52</sup> President Trump, for example, appointed three Justices in his single four-year term; his immediate Democratic predecessors, Presidents Barack Obama, Bill Clinton, and Jimmy Carter, made only four appointments total in a combined twenty years in office.<sup>53</sup> This argument dovetails with some of the concerns about Supreme Court legitimacy. Observers worry that, absent a change in membership, the Court will reverse longstanding precedents that may be favored by a large segment of the public, such as those concerning reproductive rights.<sup>54</sup>

The prospect of misalignment arguably deepens in light of certain structural features of the Constitution and their relationship to the country's demographic development. As larger states grow relative to smaller ones, the power imbalance in the Senate increases; Senators from smaller states, who represent increasingly smaller portions of the electorate, nonetheless retain the same power to move or block nominations. In addition, the vagaries of the Electoral College will increasingly magnify the risk that candidates who do not secure the popular vote will nonetheless win the presidency and with it the opportunity to appoint Justices to the Court.

What some critics cite as misalignment, however, others view as serving important values or purposes of the constitutional system. It is by design that members of the Court (and the rest of the federal judiciary) do not stand for reelection. The protection of life tenure may help maintain judicial independence by providing a degree of insulation from the partisan politics of the moment. This insulation also helps the Court to serve as a check on majority opinion in order to protect constitutional rights and other principles that political majorities may not

favor. Indeed, some would contend that any concerted attempt to align the Court’s decisions with the preferences of political majorities tends to overlook that the Court’s obligation is to the Constitution and laws. From this point of view, if the Court’s decisions are not favored by current political majorities, that may simply be the unavoidable consequence of a system in which the judiciary is expected to interpret and apply the law, not to do politics. Indeed, some of the Court’s most consequential decisions on subjects ranging from school prayer to criminal justice were quite unpopular when first issued.<sup>55</sup> Even if misaligned with public opinion at first, the Court’s decisions may garner support as the “popular will” changes over time. *Brown v. Board of Education* was met with significant resistance when it was issued, for example, but is now one of the most respected Supreme Court decisions in history.<sup>56</sup>

Further, the severity of any misalignment between the Supreme Court and popular opinion is debatable. Some legal scholars argue that the Court has, for much of its history, issued decisions that generally reflect the wishes of the public.<sup>57</sup> Still, those who criticize the current Court on the basis of misalignment may see the present circumstances as meaningfully new and different from past ones, and thus may not see history as a reliable guide on this point. In any event, however, identifying whether misalignment exists is not straightforward. There is no obvious way of distinguishing between cases where the Justices have simply reflected the policy views of an earlier generation and those where they have provided a valuable and principled counterweight to majoritarian excesses. Moreover, there are historical examples of dominant political coalitions that tried to entrench themselves in the judiciary by systematically appointing Justices with certain views, only to have those very appointees decide cases in ways that diverged from the preferences or platforms of the appointing party.<sup>58</sup> This last point cuts against any assumption that nominees to the Court are nothing more than political instruments of the Presidents who nominate them.

Ultimately, Commissioners hold different views on the extent to which misalignment is a problem and on whether the Court is sufficiently deferential to the political branches. Throughout this Report, however, we address and take seriously these democracy-related concerns as we evaluate the various proposals that seek to advance different conceptions of democracy.

## Endnotes: Introduction

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- <sup>1</sup> Exec. Order No. 14023, 86 Fed. Reg. 19,569 (Apr. 14, 2021) [hereinafter Exec. Order].
- <sup>2</sup> *Id.*
- <sup>3</sup> *Id.*
- <sup>4</sup> *Id.*
- <sup>5</sup> *Joe Biden 60 Minutes Interview Transcript*, REV (Oct. 25, 2020), <https://www.rev.com/blog/transcripts/joe-biden-60-minutes-interview-transcript>.
- <sup>6</sup> See, e.g., Bruce Ackerman, Opinion, *Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html> (noting that partisan politics threaten to “destroy the court’s legitimacy in the coming decade”); Erwin Chemerinsky, *With Kavanaugh Confirmation Battle, the Supreme Court’s Legitimacy Is in Question*, SACRAMENTO BEE (Oct. 5, 2018), <https://www.sacbee.com/opinion/california-forum/article219317565.html> (noting a “cloud over the court’s legitimacy”); Press Release, Office of Sen. Mitch McConnell, *McConnell on Court-Packing Commission: Disdain for Judicial Independence* (Apr. 9, 2021), <https://www.republicanleader.senate.gov/newsroom/press-releases/mcconnell-on-court-packing-commission-disdain-for-judicial-independence-> (describing the Commission as “squarely within liberals’ years-long campaign to politicize the Court, intimidate its members, and subvert its independence”).
- <sup>7</sup> *Roll Call Vote on the Confirmation of Louis Brandeis, 1916*, U.S. CAPITOL VISITOR CTR., <https://www.visitthecapitol.gov/exhibitions/timeline/image/roll-call-vote-confirmation-louis-brandeis-1916#top>.
- <sup>8</sup> *Senate Rejects Judge John J. Parker for the Supreme Court*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/nominations/judge-parker-nomination-rejected.htm>.
- <sup>9</sup> Matt Ford, *Thurgood Marshall’s Patient but Relentless War*, ATLANTIC (Sept. 6, 2017), <https://www.theatlantic.com/membership/archive/2017/09/thurgood-marshalls-patient-but-relentless-war/538854/> (describing Justice Marshall’s confirmation process as a “national embarrassment”).
- <sup>10</sup> See LAURA KALMAN, *THE LONG REACH OF THE SIXTIES: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT* 209-45 (2017); Alfonso A. Narvaez, *Clement Haynsworth Dies at 77; Lost Struggle for High Court Seat*, N.Y. TIMES (Nov. 23, 1989), <https://www.nytimes.com/1989/11/23/obituaries/clement-haynsworth-dies-at-77-lost-struggle-for-high-court-seat.html> (describing “a tense battle between the Nixon Administration and a coalition of labor and civil rights groups” that led to the failed confirmation of Judge Clement Haynsworth to the Supreme Court).
- <sup>11</sup> See, e.g., Jackie Calmes, *How Republicans Have Packed the Court for Years*, TIME (June 22, 2021), <https://time.com/6074707/republicans-courts-congress-mcconnell> (describing “bare-knuckle tactics in the Senate” by Republicans to “stock . . . the federal bench at all levels with conservatives”).
- <sup>12</sup> *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Ilya Shapiro, Vice President & Dir., Robert A. Levy Ctr. for Const. Stud.), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Shapiro-Testimony.pdf>.
- <sup>13</sup> *Id.*
- <sup>14</sup> *Id.*
- <sup>15</sup> *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Benjamin Wittes, Senior Fellow in Governance Studies, Brookings Inst.) [hereinafter Wittes Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Wittes-Testimony.pdf>.
- <sup>16</sup> *Id.*

- <sup>17</sup> *Id.*
- <sup>18</sup> *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Curt Levey, President, Comm. for Just.), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Levey-testimony.pdf>.
- <sup>19</sup> *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Jeffrey J. Peck) <https://www.whitehouse.gov/wp-content/uploads/2021/07/Peck-Testimony.pdf>.
- <sup>20</sup> The Democratic vote count includes independents who caucus with the Senate Democrats.
- <sup>21</sup> Peter Overby, *Kavanaugh Nomination Battle Is Fought with Millions in Secret Cash*, NPR (Oct. 4, 2018, 5:00 AM), <https://www.npr.org/2018/10/04/654187465/kavanaugh-nomination-battle-is-fought-with-millions-in-secret-cash>; Jordan Fabian, *Trump-Allied Groups Pour \$30 Million into Barrett Confirmation*, BLOOMBERG (Oct. 22, 2020, 4:00 AM), <https://www.bloomberg.com/news/articles/2020-10-22/trump-allied-groups-pour-30-million-into-barrett-confirmation>.
- <sup>22</sup> *Presidential Commission on the Supreme Court of the United States* 2 (June 30, 2021) (written testimony of Noah Feldman, Felix Frankfurter Professor of Law, Harvard Law School) <https://www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf>.
- <sup>23</sup> Carl Hulse, *McConnell Suggests He Would Block a Biden Nominee for the Supreme Court in 2024*, N.Y. TIMES (June 14, 2021), <https://www.nytimes.com/2021/06/14/us/politics/mcconnell-biden-supreme-court.html>.
- <sup>24</sup> Senator Charles Schumer, Remarks at the American Constitution Society (July 27, 2007), <https://www.acslaw.org/expertforum/text-of-senator-schumers-speech/>.
- <sup>25</sup> *Id.*
- <sup>26</sup> *See, e.g., Presidential Commission on the Supreme Court of the United States* (Aug. 26, 2021) (written testimony of David D. Cole, National Legal Director, ACLU), <https://www.whitehouse.gov/wp-content/uploads/2021/08/ACLU.pdf> (describing the federal judiciary as “the primary guarantor of the Bill of Rights”); *Presidential Commission on the Supreme Court of the United States* (July 26, 2021) (written testimony of Federal Capital Habeas Project), <https://www.whitehouse.gov/wp-content/uploads/2021/08/Federal-Capital-Habeas-Project.pdf> (describing the Court’s crucial role in death penalty cases).
- <sup>27</sup> *Presidential Commission on the Supreme Court of the United States* 2 (June 30, 2021) (written testimony of Kim Lane Scheppelle, Laurance S. Rockefeller Professor of Sociology and International Affairs, Princeton University), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Scheppelle-Written-Testimony.pdf>. Some commentators have suggested that, as a practical matter, the infrequency of constitutional amendments may in part be a function of the Court’s willingness to interpret the Constitution in ways that, from an originalist perspective, amount to amending the Constitution informally. *See, e.g.,* John O. McGinnis & Mike Rappaport, *Where Have all the Amendments Gone?*, LAW & LIBERTY (Nov. 1, 2021), <https://lawliberty.org/forum/where-have-all-the-amendments-gone/>.
- <sup>28</sup> *Presidential Commission on the Supreme Court of the United States* 2 (July 5, 2021) (appendix to written testimony of Kim Lane Scheppelle, Laurance S. Rockefeller Professor of Sociology and International Affairs, Princeton University), <https://www.whitehouse.gov/wp-content/uploads/2021/09/Scheppelle-Followup-response.pdf>.
- <sup>29</sup> Neal Devins & Lawrence Baum, *The Company They Keep: How Partisan Divisions Came to the Supreme Court* 149 (2019).
- <sup>30</sup> Donald Alexander Downs, *Supreme Court Nominations at the Bar of Political Conflict: The Strange and Uncertain Career of the Liberal Consensus in Law*, 46 LAW & SOC. INQUIRY 540, 542 (2021) (discussing KALMAN, *supra* note 10).
- <sup>31</sup> *See* Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. POL. 545 (2008); MATTHEW LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS* (2009); Joseph Bafumi & Robert Y. Shapiro, *A New Partisan Voter*, 71 J. POL. 1 (2009).

- <sup>32</sup> See, e.g., Lee Drutman, *Why Bipartisanship in the Senate Is Dying*, FIVETHIRTYEIGHT (Sept. 27, 2021), <https://fivethirtyeight.com/features/why-bipartisanship-in-the-senate-is-dying/> (“[A] bipartisan record has become a liability in today’s electoral environment.”).
- <sup>33</sup> See, e.g., FRANCES E. LEE, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN* (2016) (arguing that because of our polarized environment, both parties can reasonably believe in their prospects of controlling Congress, and have no incentive to compromise on legislation); Sarah A. Binder, *The Dynamics of Legislative Gridlock, 1947-96*, 93 AM. POL. SCI. REV. 519 (1999) (finding that less legislation passes under divided legislatures); James N. Druckman, Erik Peterson & Rune Slothuus, *How Elite Partisan Polarization Affects Public Opinion Formation*, 107 AM. POL. SCI. REV. 57 (2013) (showing that the way individuals make decisions fundamentally changes in polarized environments); Anne E. Wilson, Victoria A. Parker & Matthew Feinberg, *Polarization in the Contemporary Political and Media Landscape*, 34 CURRENT OPINION BEHAV. SCIS. 223, 223 (2020) (“[P]eople’s misperceptions of division among the electorate . . . can contribute to a self-perpetuating cycle fueling animosity (affective polarization) and actual ideological polarization over time.”).
- <sup>34</sup> Sam Rosenfeld, *The Polarizers: Postwar Architects of Our Partisan Era 3* (2018).
- <sup>35</sup> Andrew Chung, *U.S. Supreme Court Not Politicized, Says Chief Justice Roberts*, REUTERS (Sept. 24, 2019), <https://www.reuters.com/article/us-usa-court-chiefjustice/u-s-supreme-court-not-politicized-says-chief-justice-roberts-idUSKBN1WA08F>.
- <sup>36</sup> Wittes Testimony, *supra* note 15, at 5.
- <sup>37</sup> *Stat Pack for the Supreme Court’s 2020-21 Term*, SCOTUSBLOG (July 2, 2021), <https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-07.02.2021.pdf> (showing that forty-three percent of the October Term 2020 cases were decided unanimously, with only fifteen percent of cases neatly polarized along ideological lines).
- <sup>38</sup> See Ephrat Livni, *Americans Trust the Supreme Court More than Other Government Branches*, QUARTZ (Oct. 26, 2019), <https://qz.com/1735709/americans-trust-supreme-court-more-than-other-government-branches>; Frank Newport, *Americans Trust Judicial Branch Most, Legislative Least*, GALLUP (Sept. 26, 2012), <https://news.gallup.com/poll/157685/americans-trust-judicial-branch-legislative-least.aspx>.
- <sup>39</sup> Justin McCarthy, *Approval of the Supreme Court Is Highest Since 2009*, GALLUP (Aug. 5, 2020), <https://news.gallup.com/poll/316817/approval-supreme-court-highest-2009.aspx>.
- <sup>40</sup> *Id.* (showing a table where the trend lines cross for Democrats and Republicans in early 2017).
- <sup>41</sup> Nearly 7 in 10 Say Recent Rise in COVID-19 Deaths Was Preventable, Quinnipiac University National Poll Finds; Job Approval for Supreme Court Drops to All-Time Low, QUINNIPIAC POLL (Sept. 15, 2021), <https://poll.qu.edu/poll-release?releaseid=3820>.
- <sup>42</sup> Peck Testimony, *supra* note 19.
- <sup>43</sup> See Mark D. Ramirez, *Procedural Perceptions and Support for the U.S. Supreme Court*, 29 POL. PSYCH. 675, 675 (2008) (“[T]he Supreme Court does not possess the budgetary power of Congress or the enforcement power of the President.”).
- <sup>44</sup> See, e.g., Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 184 (2013) (“For an institution like the U.S. Supreme Court to render rulings that carry authoritative force, it must maintain a sufficient reservoir of institutional legitimacy.”).
- <sup>45</sup> THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).
- <sup>46</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992) (“The Court’s power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”).
- <sup>47</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process* 43 (1921).
- <sup>48</sup> See, e.g., Dylan Matthews, *The Supreme Court Is Too Powerful and Anti-Democratic. Here’s How We Can Scale Back Its Influence.*, VOX (Sept. 29, 2020), <https://www.vox.com/policy-and-politics/21451471/supreme-court-justice-constitution-ryan-doerfler>; *Presidential Commission on the Supreme Court of the United States 2* (June 30,

2021) (written testimony of Samuel Moyn, Henry R. Luce Professor of Jurisprudence and Professor of History, Yale University), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf>.

- <sup>49</sup> See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (finding that the First Amendment protected Jehovah’s Witness students from compulsorily saluting the American flag in public schools); *Brown v. Bd. Of Educ.*, 347 U.S. 483 (1954) (finding public school segregation unconstitutional under the Equal Protection Clause); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 393 U.S. 503 (1969) (finding that the First Amendment prevented a public school from punishing students for peacefully protesting the Vietnam War through the wearing of black armbands); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (striking down a Pennsylvania abortion restriction as creating an undue burden on women seeking abortions); *Obergefell v. Hodges*, 576 U.S. 664 (2015) (finding that the Fourteenth Amendment requires states to license and recognize same-sex marriages).
- <sup>50</sup> See, e.g., *Presidential Commission on the Supreme Court of the United States* 2, 12 (June 30, 2021) (written testimony of Nikolas Bowie, Assistant Professor of Law, Harvard Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf> (“[A]s Tocqueville observed even before this history began, judicial review is also antidemocratic as a matter of theory.”); Adrienne Stone, *Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law*, 60 U. TORONTO L. REV. 109 (2010).
- <sup>51</sup> See, e.g., *Presidential Commission on the Supreme Court of the United States* 3, 16 (July 20, 2021) (written testimony of Vicki C. Jackson, Laurence H. Tribe Professor of Constitutional Law, Harvard Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf> (“[T]he current system makes vacancies depend on contingent, random events.”).
- <sup>52</sup> *Presidential Commission on the Supreme Court of the United States* 3, 1 n.2 (July 20, 2021) (written testimony of Jamal Greene, Dwight Professor of Law, Columbia Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Greene-Testimony.pdf>.
- <sup>53</sup> *Supreme Court Nominations (1789-Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm>.
- <sup>54</sup> See, e.g., *Presidential Commission on the Supreme Court of the United States* 3, 15 (July 20, 2021) (written testimony of Nan Aron, President, Alliance for Justice), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Aron-Testimony.pdf> (“If the Court proceeds to wipe away reproductive rights, in spite of decades of precedent and overwhelming public support for those rights, then the only possible conclusion is that reform is imperative.”).
- <sup>55</sup> See Alison Gash & Angelo Gonzales, *School Prayer*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 62, 68-70, 77 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (showing that, in the 1970s, over seventy percent of the public disapproved of the Court’s school prayer decisions); Amy E. Lerman, *The Rights of the Accused*, in PUBLIC OPINION, *supra*, at 42-43 (noting that “[i]n many ways” the Warren Court’s criminal procedure decisions “were out of step with public opinion and may even have shifted public opinion against the Court’s pro-rights position”).
- <sup>56</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“Separate educational facilities are inherently unequal.”); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1016 (1998) (describing *Brown* as “[t]he classic example” of a canonical case); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011) (describing “the constitutional canon” as “the set of decisions whose correctness participants in constitutional argument must always assume” and naming *Brown* as “the classic example”). For discussions of the resistance to school desegregation, see JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 242-314 (2018); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 290-442 (2004).
- <sup>57</sup> See Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 16 (2009) (arguing that the Supreme Court “ratif[ies] the American people’s considered views about the . . . Constitution”); Jeffrey Rosen, *The Most Democratic Branch: How the Courts Save America* 3 (2006) (arguing that Supreme Court decisions often reflect public opinion better than Congress). *But see* Devins & Baum, *supra* note 29, at xi (arguing that the Justices are “elites who seek to win favor with other elites,” rather than with the general public); Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 757-58 (2011) (doubting that Supreme Court decisions “reflect[] the ‘consensus’ views of the American public,”

because the public rarely has a united position on controversial constitutional issues); Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 Sup. Ct. Rev. 103 (2010).

<sup>58</sup> See, e.g., Jeff Greenfield, *The Justice Who Built the Trump Court*, POLITICO MAG. (July 9, 2018), <https://www.politico.com/magazine/story/2018/07/09/david-souter-the-supreme-court-justice-who-built-the-trump-court-218953> (noting how Justice Souter, a Republican appointee, “began to drift left” soon after his Court tenure began, ultimately becoming a “more reliable champion of liberal causes than Clinton appointees Ruth Bader Ginsburg and Stephen Breyer”); Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, *2020 Supreme Court Database, Version 2021 Release 01*, <http://supremecourtdatabase.org> (tracking the leftward drift of numerous Republican-appointed Justices).

# Chapter 1: The History of Reforms and Reform Debates

Any account of what has precipitated today’s debate about the role and operation of the Supreme Court would be incomplete without an understanding of the long history of political debate and institutional reform surrounding the Court. This history, which dates back to the Founding and encompasses formative periods of the nation’s history, highlights how lawmakers and the public frequently have been keenly attentive to and engaged in debate about the role the Court plays within the constitutional system. Reform debates have reflected the institutional needs of an expanding nation, and they have involved partisan conflict and philosophical struggle over substantive constitutional values and the power of government to serve the needs of the people. We offer this history not to explain away or attempt to resolve today’s debate according to a particular historical standard, but rather to underscore the fact that debates about Court reform are part and parcel of U.S. constitutional history and the development of the American political order.

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## I. The Origins of Federal Judicial Power

In the spring of 1788, Alexander Hamilton published an essay titled *The Federalist No. 78* under the pseudonym “Publius.” The piece was one of a “Collection of Essays, written in favour of the New Constitution” and addressed to “the People of the State of New York.” In it, Hamilton offered “an examination of the judiciary department of the proposed government.” Describing the role of the Supreme Court in the constitutional structure, he wrote:

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be



said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>1</sup>

The Constitution’s separation-of-powers principle, Hamilton argued, gave courts the power of “judgment” so that they could act as “an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”<sup>2</sup>

*Federalist 78* was one of many political commentaries that were printed in newspapers and sold as pamphlets while the ratification debates were taking place. Tracts defending and criticizing the Constitution circulated through the markets, coffeehouses, shops, and parlors of American towns. Not everyone who read *Federalist 78* agreed with it. Some readers preferred the writings of “Brutus,” who “found the Constitution flawed in its ‘fundamental principles’ and advocated its rejection,” while others agreed with the “Federal Farmer,” in whose view the Constitution “included ‘many good things’ as well as ‘many important defects,’ and that ‘with several alterations’ it could create a ‘tolerably good’ federal system.”<sup>3</sup> By the time the Constitution began operating in 1789, Americans were already engaged in a broad and lively public debate about the role that courts should play in the new republic.<sup>4</sup>

The Constitution creates the fundamental law of the nation, understood to embody the will of the people. But as a written document, it depends on actual governmental institutions for its articulation and enforcement. Beginning in the founding era and continuing to the present day, the role of the Court in carrying out this fundamental law has been contested. Over the intervening centuries, the place of the Court in the American system has changed.

Four themes are especially vital to understanding modern debates concerning the current role of, and potential reforms to, the Supreme Court:

- the persistence of debates over restructuring or reforming the Court, even as the nature and content of these debates have varied over time;
- the tension in the Court’s role, insofar as it is both one of three co-equal branches of the federal government and also the arbiter that sees itself as responsible for resolving disputes among the branches and otherwise determining the meaning of the Constitution;

- the connection between the Court’s organization and deeper structural concerns (e.g., the connection between the Justices’ circuit-riding duties, the size of the Court, and regional representation); and
- the relationship between the Court and politics.

Here, we trace the history of debates over potential reforms to the Supreme Court from the early national period through the twentieth century. The discussion proceeds chronologically in order to explicate the ways in which the themes just mentioned shaped, and were shaped by, changing conceptions of the Court’s role in the American constitutional system.

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## II. The Origins of the Supreme Court: The Constitution and the Judiciary Act of 1789

The Court’s origins are inextricably bound up with existential questions concerning the structure of the judicial power of the United States. On March 4, 1789, the new government created by the Constitution began operating. Many elements of the system remained uncertain and disputed despite the preceding twenty-two months of discussion and drafting, first in the Constitutional Convention and then in the state ratifying conventions.<sup>5</sup> The Constitution’s beginning raised a host of new questions, the stakes of which were understood to be tremendously high.<sup>6</sup>

Chief among the issues still to be settled were the scope of the federal judicial power and the practical details of how that power would function. Article III of the Constitution established the Supreme Court. But the drafters of the Constitution had been unable to agree on key points—most importantly, whether to create inferior federal courts, what types of cases the federal courts would be able to hear, and what sort of relationship the Supreme Court would have with the state courts.<sup>7</sup> The Constitution was also silent on the number of Justices who would sit on the Court. The drafters therefore left to Congress the task of addressing many of these questions as it saw fit, subject to the boundaries set forth in Article III.<sup>8</sup> The drafters’ decision to postpone the question of the inferior federal courts has been termed by modern commentators the “Madisonian Compromise.”<sup>9</sup>

When the First Congress convened in New York’s Federal Hall in April 1789, its members immediately began debating a bill to establish the federal courts. “The importance of the judiciary bill was obvious to contemporary observers both inside and outside Congress,” according to several historians.<sup>10</sup>

In March 1789, weeks before a Senate committee had even been formed to draft a bill, an anxious James Sullivan—soon to become the attorney general of Massachusetts—wrote to his friend Representative Elbridge Gerry pleading for more news about the formation of the judiciary. “[T]he freedom of the people depends so much upon the proper arrangement of this part of the government,” he explained. James Monroe, not yet in Congress, told Representative James Madison that the judiciary bill “will occasion more difficulty, I apprehend, than any other, as it will form an exposition of the powers of the gov[ernment] itself, and sh[o]w in the opinion of those who organize it, how far it can discharge its own functions.” Senator Richard Bassett, a member of the committee drafting the bill, ventured to say that “our happiness as a people very much depends on this System.”<sup>11</sup>

A Senate committee comprising ten members (one from each state that had both ratified the Constitution and sent senators by that point) produced a first version of the Act. The committee then sent its draft to leading lawyers, jurists, and officials around the nation, requesting their comments. What resulted was a compromise bill that attempted to balance competing interests, most notably the Federalists’ focus on establishing a strong federal judiciary with the Anti-Federalists’ desire to preserve state autonomy.<sup>12</sup> Following several rounds of revisions and amendments, the bill won approval from the Senate and the House. On September 24, the Judiciary Act of 1789 was signed into law by President George Washington.<sup>13</sup>

The Judiciary Act was far more than a restatement of Article III of the Constitution.<sup>14</sup> As the intense debates surrounding the bill suggest, the provisions of the Act were hard fought, and the final version represented a set of choices about how the judicial power of the nation would be shaped.<sup>15</sup> Even its supporters expressed reservations about the bill. James Madison wrote that the act was “pregnant with difficulties.”<sup>16</sup> On the floor of Congress a few weeks later, however, he praised the bill as “as good as we can at present make it,” while noting that it “may not exactly suit any one member of the House, in all its parts.”<sup>17</sup>

The Act provided for a six-justice Supreme Court: one Chief Justice and five associate Justices. It established the Court’s jurisdiction, both original and appellate. It also placed the Court at the top of the hierarchy of courts in the nation, state as well as federal. Section 25 of the Act granted the Court the power to review certain decisions of the highest courts of the states. This provision was viewed by some as particularly delicate, insofar as it placed the Supreme Court in the position of overseeing—and potentially overruling—the decisions of state court judges.

Proponents of the Act, including Senator Oliver Ellsworth of Connecticut, its primary drafter (and a future Chief Justice of the United States), maintained that a robust system of inferior federal courts with jurisdiction to hear cases arising under federal law would be a more effective method of vindicating constitutionally secured rights and guarantees than relying on state courts alone.<sup>18</sup> The Act thus established a system of inferior federal courts, which it broke down into two categories: district courts and circuit courts. The thirteen district courts, each with a single district judge, were apportioned along state lines, including one each for Maine and Kentucky, which had not yet become independent states. The jurisdiction of the district courts extended primarily to admiralty cases and cases involving minor federal crimes. The three circuits—eastern, middle, and southern—were each staffed by the district judge and two Justices of the Supreme Court, whom the Act charged with “riding circuit” to hold sessions in each district of the circuit twice each year.<sup>19</sup> Both the district courts and the circuit courts were primarily trial courts, with jurisdiction depending on the nature of the suit, the citizenship of the parties, and the amount in controversy. The circuit courts also possessed limited appellate jurisdiction.

The Act’s assignment of circuit-riding duties to the Justices of the Supreme Court proved one of the most significant and controversial features of the U.S. judicial system for its first century of existence. The circuit-riding system tied the Court to the circuits, in both numerical and geographic terms. The original number of seats on the Court was set at six, allowing an even division among the three circuits. Although it required substantial and difficult travel, drawing complaints from the Justices,<sup>20</sup> the practice of circuit riding compelled the Justices to leave the capital and travel to the nation’s periphery, where they mixed with a broad array of lawyers and litigants. When hearing cases on circuit, the Justices acted as trial-court judges, requiring them to deal with issues of fact, instruct juries, and issue rulings on procedure and evidence.

Four months after Congress passed the Judiciary Act, the Supreme Court began operations. On February 2, 1790, Chief Justice John Jay convened the initial session at New York’s Royal Exchange, at which only three associate Justices were present.

The Court started its work amid intense arguments about the Judiciary Act. Within a year of the Court’s first session, reform of the federal judiciary returned to the center of public debate because of dissatisfaction with the allocations of authority between the district and circuit courts, and between the federal and the state courts.<sup>21</sup> In 1790, President Washington’s Attorney General, Edmund Randolph, submitted a report to Congress that recommended restructuring the federal courts. Randolph’s report was soon followed by a set of proposed

amendments to Article III drawn up by New York congressman Egbert Benson. Among the proposed reforms in Randolph's and Benson's plans were ending circuit riding, creating circuit judgeships, and vesting the inferior federal courts with jurisdiction to hear all cases arising under federal law.<sup>22</sup> Neither plan gained sufficient support to bring about change. Yet reform of the federal courts was a constant topic of political debate in the early years of the Republic.

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### III. The Court and Politics in the Early National Period

Throughout the 1790s, Congress continued to debate reform of the federal judiciary, with much criticism focusing on the Justices' circuit-riding duties. In his annual message to Congress in 1799, President John Adams urged members to begin "a revision and amendment of the judiciary system," which he argued was "indispensably necessary" to "give due effect to the civil administration of Government and to insure a just execution of the laws."<sup>23</sup>

In February 1800, a House committee met with Justices William Paterson and Bushrod Washington to solicit their recommendations for reform. The following month, Congressman Robert Goodloe Harper of South Carolina introduced a draft bill recommending substantial reforms to the federal judiciary. The bill expanded the jurisdiction of the inferior federal courts to include all cases arising under federal law, increased the number of districts and circuits, and created sixteen new circuit judgeships, thereby ending the Justices' circuit-riding duties.<sup>24</sup> The bill reduced the number of Supreme Court Justices from six to five upon the next vacancy, likely to limit the ability of a future President who was not Adams to shape the Court.<sup>25</sup> It also added a new, sixth circuit, comprising Tennessee, Kentucky, and the Indiana and Ohio territories. Following debate and minor modifications, the bill passed the House on January 20 and the Senate on February 7, 1801, and was signed into law by Adams on February 13, 1801. Officially titled "An Act to Provide for the More Convenient Organization of the Courts of the United States," the Act became known as the Judiciary Act of 1801.<sup>26</sup>

The Judiciary Act of 1801 is sometimes assumed to have been entirely motivated by Thomas Jefferson's victory in the presidential election of 1800. Four days after the 1801 Act was passed, on February 17, 1801, the House settled the disputed contest by electing Jefferson on the thirty-sixth ballot. Jefferson's Republican Party swept into power in Congress as well. But reforms to the federal judiciary, including ending circuit riding and expanding the courts' jurisdiction, had been debated since the 1790s, and the movement that led to the 1801 Act predated the election by several months.<sup>27</sup>

Nevertheless, the election of 1800 clearly heightened political polarization, and with it the politicization of the judiciary. When Jefferson and the Republicans took control of the presidency and Congress in March 1801, they quickly moved to undo the Federalists' judicial reforms. On March 8, 1802, the Judiciary Act of 1801 was repealed. The new Act, known as the Judiciary Act of 1802, revoked the grant of general federal question jurisdiction, abolished the new circuit judgeships, and reinstated the Supreme Court Justices' circuit-riding duties.<sup>28</sup> The 1802 Act also retained the enlarged number of circuits (six) but reversed the planned reduction of the number of seats on the Court, bringing it back to six. For the third time in a dozen years, the Founders adjusted the number of Justices on the Supreme Court. Consequently, after 1802, the number of circuits matched the number of Justices, and the Justices continued to ride circuit.

The 1802 repeal of the 1801 Judiciary Act further inflamed debate surrounding the federal courts. All sides accused the others of using the judiciary for political gain. Jefferson charged the Federalists with having “retired into the Judiciary as a strong hold” in order to entrench themselves in the face of electoral losses.<sup>29</sup> Alexander Hamilton, influential among Federalists even though out of office, warned that “if the bill for the repeal passed, and the independence of the Judiciary was destroyed,” the nation would before long “be divided into separate confederacies, turning our arms against each other.”<sup>30</sup>

The substance as well as the structure of federal judicial power was deeply contested during the early national period. One of Adams's most lasting achievements as President was his appointment of John Marshall as Chief Justice in January 1801. During Marshall's thirty-four-year tenure as Chief Justice, the Court became stronger as an institution, claimed the power to interpret the Constitution, and asserted with increasing force a particular vision of the United States as a union rather than a confederation. Under Chief Justice Marshall's leadership, the Court positioned itself as an arbiter of the constitutional order.

In the early months of 1803, the Marshall Court issued two important rulings on key constitutional issues. In both cases, *Marbury v. Madison* and *Stuart v. Laird*, the Court demonstrated a notable ability to claim power while also appearing to limit that power. Both cases were also deeply political, having arisen out of the election of 1800, and both had been delayed when the Jeffersonian Congress postponed the Court's 1802 term.

In *Marbury v. Madison*, the Court held that it lacked the authority to order Secretary of State James Madison to issue a commission to William Marbury for a position as justice of the peace, even though Marbury clearly had a right to the commission, and the remedy he

sought—a writ of mandamus—was the proper remedy.<sup>31</sup> The problem, Chief Justice Marshall held, was that the statutory provision on which Marbury relied to establish the Court’s jurisdiction to grant the remedy was invalid because it exceeded Congress’s authority. The Court therefore lacked the ability to grant Marbury his remedy, Chief Justice Marshall determined.

The reason for this seeming weakness, however, was that the Court possessed a far stronger weapon: the ability to declare acts of Congress unconstitutional. This was the power of judicial review. The authority that Congress sought to give the Court in Section 13 of the Judiciary Act of 1789 “appears not to be warranted by the constitution,” Chief Justice Marshall stated.<sup>32</sup> Then followed what became one of the most quoted passages in American constitutional law:

It is emphatically the province and duty of the judicial department to say what the law is. . . . So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.<sup>33</sup>

As many scholars have noted, judicial review was not new to American law in 1803.<sup>34</sup> Courts—including the Supreme Court, state courts, and, even earlier, colonial courts—had long claimed the authority to invalidate legislation. The Constitution did not refer explicitly to judicial review. But the combined force of Article III, the Supremacy Clause of Article VI, longstanding Anglo-American practice, and the nature of the written Constitution suggested to Chief Justice Marshall and others that judicial review was within the Court’s power.<sup>35</sup> In *Marbury*, Chief Justice Marshall established judicial review as a principle of American law, claiming for the Court—in the name of the Constitution and the people—the power “to say what the law is.”<sup>36</sup> Yet Chief Justice Marshall’s opinion in *Marbury* was ambivalent, insofar as it paired this claim of interpretive power with a disavowal of the power to order Madison to deliver Marbury’s commission.

In addition, the power of judicial *review* that Chief Justice Marshall asserted did not necessarily amount to judicial *supremacy*. As one leading constitutional law casebook puts it, judicial review “means that a federal court can review statutes (or executive actions) for constitutionality and refuse to enforce them in court proceedings if it finds them unconstitutional.” Judicial supremacy, in contrast, “means that the federal courts’

interpretation of the Constitution is supreme over the other branches.”<sup>37</sup> The boundaries between the two concepts, and the Court’s claim on each, have been the subject of debate since the founding era.

One week after the Court handed down its ruling in *Marbury*, it decided another case that also carried important consequences for the role of the judiciary in the constitutional system. That case, *Stuart v. Laird*, required the Court to rule on the constitutionality of the Jeffersonian Congress’s 1802 repeal of the Judiciary Act of 1801. The questions presented asked, first, whether Congress could validly abolish the circuit courts created under the 1801 Act without violating Article III of the Constitution, which stated that federal judges were to hold their offices “during good Behaviour,” and second, whether the Justices could be required to sit as circuit judges.<sup>38</sup> The Court upheld the constitutionality of the 1802 Act, found that the reorganization of the inferior federal courts was within Congress’s power, and held that the validity of circuit riding had been settled by “practice and acquiescence.”<sup>39</sup>

Some commentators have characterized *Stuart* as a more overtly political—and perhaps more consequential—decision than *Marbury*. *Stuart* forced the Court to confront existential questions about the balance between judicial independence and congressional control of the courts. One scholar has argued that “Marshall and his brethren apparently calculated that to invalidate this statute was to guarantee Jeffersonian political retaliation against the Court,”<sup>40</sup> while another called the *Stuart* decision “an exercise in self-preservation.”<sup>41</sup> Chief Justice Marshall himself seems to have remained skeptical about the basis of the decision, referring in an 1823 letter, in ironic tones, to “the memorable distinction as to tenure of office, between removing the Judge from the office, and removing the office from the Judge.”<sup>42</sup>

As the *Marbury* and *Stuart* decisions demonstrate, the Court was at the center of negotiations about both law and politics during the early nineteenth century. Through its substantive decisions, the Court established its power even as it showed itself attentive to political context. As the Court gained stature under Chief Justice Marshall’s leadership, structural reforms to the judiciary continued to be a perpetual topic of discussion. In 1807, Congress both increased the size of the Court to seven Justices and added a seventh circuit comprising Ohio, Kentucky, and Tennessee.<sup>43</sup> The size of the Court and the number of circuits were still understood as necessarily linked. Other changes to the Court’s jurisdiction were periodically proposed. These included stripping the Court of its power under Section 25 of the 1789 Judiciary Act to hear appeals from state courts, an effort that was linked to specific policy issues, including treaty enforcement, land sales, bank regulation, and internal improvements.<sup>44</sup>



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## IV. The Jacksonian Era: National Expansion, Court Expansion, and Partisan Strife

The antebellum decades saw continuing disputes over the federal judiciary's structure; the balance between political control of the Court and judicial independence; and the orientation of the Court toward pressing political issues, including commerce, migration, and slavery.

The election of Andrew Jackson as President in 1828, and the related rise of the Democratic Party to national political dominance, was viewed by many contemporaries as “a kind of revolution” akin to that which had swept Jefferson into office in 1800.<sup>45</sup> Jackson's two terms as President, from 1829 to 1837, brought a bold Executive who claimed broad powers, the rise of modern party politics, and the entrenchment of sectionalism. Jacksonian nationalism aimed, in the words of one historian, to “maintain white supremacy and expand the white empire, to evict the Indian tribes, [and] to support and extend slavery.”<sup>46</sup>

These imperatives had important consequences for the federal judiciary in three distinct areas: the role of the Supreme Court and its relationship to contemporary politics; the structure of the federal courts, in particular the ongoing debate over the Justices' circuit riding; and the related issue of the size of the Court. Throughout this period, the Court was embroiled in important issues relating to the separation of powers (the Court's relationship to the President and Congress) and federalism (the relationship between the Court and the states, including both state courts and legislatures).

First, the Supreme Court continued to be viewed by contemporaries as an institution that was necessarily involved in politics. Prior to Chief Justice Marshall's death in 1835, the Court took stances in a few high-profile cases that appeared to be carefully calculated acts of resistance to Jeffersonian-Republican policies. In *McCulloch v. Maryland* (1819) and *Osborn v. Bank of the United States* (1824), the Court upheld the constitutionality of the Second Bank of the United States against attacks on it by several states and by then-candidate Jackson.<sup>47</sup> Chief Justice Marshall published a series of newspaper essays under a pseudonym in which he defended the *McCulloch* decision against arguments that the Bank represented an overreach by Congress and an invasion of state sovereignty.<sup>48</sup> During Jackson's presidency, the Marshall Court heard a pair of cases brought by the Cherokee Nation in which the tribe sought to vindicate its jurisdiction and ownership of lands against the state of Georgia. Jackson had campaigned for the presidency on a promise of “Indian removal,” and, in 1830, a closely

divided Congress had passed the Indian Removal Act.<sup>49</sup> In the 1831 case of *Cherokee Nation v. Georgia*, the Court held that it lacked jurisdiction to hear the tribe's case.<sup>50</sup> In 1832, however, the Court ruled in *Worcester v. Georgia* that Georgia did not have authority to extend its criminal laws over the Cherokee Nation.<sup>51</sup> The Court's ability to compel the state to carry out its decision was limited, however, by the procedures set forth in the Judiciary Act of 1789. Contemporaries also speculated that the Court was leery of provoking Georgia at the same moment that South Carolina was claiming the power to nullify federal law.<sup>52</sup>

Following Chief Justice Marshall's death in July 1835, President Jackson nominated as his successor Roger Brooke Taney, who had previously served as Jackson's Attorney General and Treasury Secretary (the latter via a recess appointment which was subsequently rejected by the Whig-dominated Senate). Earlier in 1835, President Jackson had nominated Taney to an associate justiceship on the Court. At that time, the Senate had refused to confirm Taney based on his removal of deposits from the Bank of the United States at President Jackson's direction.<sup>53</sup> Taney had removed the deposits following Jackson's 1832 veto of the Bank's recharter, in which Jackson had rejected the Court's power to decide with finality the issue of the Bank's constitutionality.<sup>54</sup> By 1836, Democrats had regained sufficient control of the Senate to confirm him.<sup>55</sup>

Contemporaries noted the interaction of politics with the structure of the federal courts and the size of the Supreme Court. Territorial expansion and regional affiliations were important factors with respect to these issues. By 1837, the Union comprised twenty-six states, nine of which had been admitted since the addition of the most recent circuit in 1807. Since then, the number of circuits and Justices had remained at seven. But residents of the six most recently added states increasingly demanded that their states be incorporated into circuits, rather than having district courts exercise both district- and circuit-court jurisdiction (and without ever being visited by a circuit-riding Justice).<sup>56</sup> Jackson was the first western president, and the West was an important piece of the Democratic political coalition. An increasingly widespread belief held that the Court should represent the regions of the nation. Relatedly, some observers felt that, for all its problems, circuit riding was valuable because it ensured that the Justices were exposed to the issues and debates on the periphery, and that Americans on the nation's periphery felt connected to the center. Another view, however, held that the Court was already too large, and that the quest for regional balance was either not worth pursuing or doomed to failure.<sup>57</sup>

While these arguments over the structure of the federal judiciary were churning, the Court's membership was shifting, in part due to deaths and retirements among the Justices and

in part due to politics. During his first term in office, President Jackson appointed two Justices to the Court. During his second term, he nominated five additional Justices, including Taney as Chief Justice, bringing to seven his total number of nominees to the Court, of whom six served as Justices. The last five of President Jackson's appointments came from slaveholding states.<sup>58</sup> President Jackson thus "made more Supreme Court appointments than any other president between Washington and Taft."<sup>59</sup>

President Jackson was able to appoint so many Justices to the Court because on March 3, 1837—his last day in office—Congress, which was controlled by Jackson's Democratic Party, passed a new Judiciary Act.<sup>60</sup> The Act of 1837 created two new circuits and added two new seats to the Court, bringing the total for both to nine for the first time in the nation's history. The Act also took effect immediately, allowing outgoing President Jackson to nominate two Justices: John Catron, whose circuit-riding duties would cover the newly created Eighth Circuit, and William Smith for the new Ninth Circuit. When President Jackson's successor Martin Van Buren (who had previously served as Jackson's Vice President and Secretary of State) took office on March 4, 1837, the Senate confirmed both Catron's and Smith's nominations. Smith, however, declined, and Van Buren nominated John McKinley through a recess appointment.<sup>61</sup>

After decades of wrangling over Court expansion, circuit riding, and western representation, Congress ultimately restructured the federal judiciary in 1837 because it was possible to do so in a way that consolidated the Democratic Party's control. "The two events which finally induced both Houses to agree were the election of Van Buren, bringing with it the prospect of a four-year Democratic rule, and the Supreme Court appointments made by Jackson in 1835 and 1836," which eliminated "the fear that the addition of two new judges would change the complexion of the Court."<sup>62</sup> Describing Jackson's impact on the Court, one contemporary magazine characterized the "late *renovation* of the constitution of this august body, by the creation of seven of the nine members under the auspices of the present democratic ascendancy" as "the closing of an old, and the opening of a new, era in its history."<sup>63</sup> For the first time in the nation's history, the Court comprised nine Justices. The expansion had come about through a combination of factors: pragmatic concerns about the federal courts' efficacy; sectional demands; and political imperatives.

## V. The Upheavals of the Civil War and Reconstruction: Transforming the Constitution

The Civil War and Reconstruction launched a series of constitutional transformations that were accompanied by fundamental changes in the operation of the federal judiciary. At the heart of this “second founding” were the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.<sup>64</sup> The Thirteenth Amendment abolished slavery.<sup>65</sup> The Fourteenth Amendment “constitutionalized the principles of birthright citizenship and equality before the law and sought to settle key issues arising from the war, such as the future political role of Confederate leaders and the fate of Confederate debt.”<sup>66</sup> The Fifteenth Amendment granted Black men the right to vote.<sup>67</sup> Each of the Reconstruction Amendments also vested Congress with the power to enforce these rights. In the realm of judicial power, the trend was toward stronger federal courts with more robust jurisdiction. Beginning in the 1870s, however, a series of narrow decisions from the Court severely limited Reconstruction’s revolutionary potential.

Prior to the war, in 1857, the Supreme Court had drawn attack from growing numbers of Americans for its immediately infamous decision in *Dred Scott v. Sandford*, in which Chief Justice Taney wrote for the Court that “that class of persons” whose “ancestors were negroes of the African race, and imported into this country and sold and held as slaves” were “not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”<sup>68</sup> To support his holding, Taney presented his own version of Founding-era history:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.<sup>69</sup>

Frederick Douglass, the great abolitionist political leader, excoriated the decision in a series of public addresses. “You may close your Supreme Court against the black man’s cry for justice, but you cannot, thank God, close against him the ear of a sympathising world, nor shut up the Court of Heaven. All that is merciful and just, on earth and in Heaven, will execrate

and despise this edict of Taney,” Douglass told a New York audience in May 1857. “Judge Taney can do many things, but he cannot change the essential nature of things—making evil good, and good evil.”<sup>70</sup>

As part of his campaign for the U.S. Senate in 1858, Abraham Lincoln decried the *Dred Scott* decision, calling it “erroneous” as a matter of law and warning that it would lead to “the spread of the black man’s bondage.”<sup>71</sup> In his first inaugural address in March 1861, Lincoln continued his criticism of the Court, suggesting that such judicial overreach as the *Dred Scott* decision—which he did not mention by name—threatened democracy:

[T]he candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.<sup>72</sup>

Following the secession of the eleven states that formed the Confederacy between December 1860 and May 1861, the Republican-controlled Congress set about reshaping the federal judiciary as “a partner against the South.”<sup>73</sup> Many contemporaries also hoped that these efforts would redeem the Court from the stain of the *Dred Scott* decision.

The start of the Civil War witnessed a series of reforms to the circuit courts. In his first message to Congress in 1861, President Lincoln observed that “the country has outgrown our present judicial system” and called for the circuit system to be overhauled.<sup>74</sup> Eight states that had been admitted over the past two decades had never had circuit courts visited by a Supreme Court Justice. Yet Lincoln did not advocate expanding the size of the Court. Instead, he urged that Congress sever the connection between the Court and the circuits, setting the size of the Court at a “convenient number” and then establishing circuits of “convenient size,” with circuit-judging duties to be handled by some combination of Justices and circuit judges.<sup>75</sup>

Congress enacted some of Lincoln’s recommended reforms. In 1862 and 1863, enabled by the exodus of southern Democrats from the federal government, Congress reorganized the circuits in order to limit southern influence. Instead of five circuits composed entirely of slaveholding states, there were now only three such circuits. The total number of circuits was now ten, and a tenth seat was added to the Court. As in the eighteenth century, when the Court had comprised six seats, reformers appeared unbothered by the prospect of an even number of

Justices. The Justices responsible for the Eighth, Ninth, and Tenth Circuits now all hailed from northern states.<sup>76</sup>

In 1866, after the war had ended, Congress once more reorganized the circuits and the Court, again with the objective of limiting the influence of the former Confederate and other slaveholding states. The statute reduced the number of circuits to nine and mandated a gradual reduction of the number of seats on the Court from ten to seven, via attrition.<sup>77</sup> Congressional Republicans sought to reduce the size of the Court in order to prevent President Andrew Johnson, a foe of Reconstruction, from nominating Justices to fill any vacancies.<sup>78</sup>

The judicial power of the United States was even more profoundly transformed in this period by a series of statutes enlarging the federal courts' jurisdiction. As one historian writes, "[i]n no comparable period of our nation's history have the federal courts, lower and Supreme, enjoyed as great an expansion of their jurisdiction as they did in the years of Reconstruction, 1863 to 1876."<sup>79</sup> Although Congress did on a few notable occasions strip the Supreme Court of jurisdiction in specific sets of cases,<sup>80</sup> the broader movement was toward expanding the judicial power of the United States.<sup>81</sup> The most important reforms were in three areas: first, removal jurisdiction, which allowed certain cases that began in state court to be taken to federal court;<sup>82</sup> second, the habeas corpus power, permitting federal courts to issue writs on behalf of prisoners held by state authorities in violation of federal law;<sup>83</sup> and third, federal question or "arising under" jurisdiction.<sup>84</sup>

This growth in jurisdiction was accompanied by substantive legislation from Congress that created new federal rights and causes of action, many of which were aimed at protecting the rights of African-Americans.<sup>85</sup> As a result of these reforms, the inferior federal courts "became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."<sup>86</sup>

Despite Congress's expansion of federal jurisdiction during the post-Civil War era, the Court issued a series of decisions that significantly limited the reach of both civil rights legislation and the Reconstruction Amendments. In the *Slaughter-House Cases*, the Court interpreted the Privileges or Immunities Clause of the Fourteenth Amendment narrowly, holding that the Clause covered only certain rights of national citizenship that did not include the economic protections claimed by the plaintiffs, a group of white butchers in New Orleans.<sup>87</sup> Three years later, the Court reaffirmed this constrained view of the Fourteenth Amendment in *United States v. Cruikshank*, a case arising out of the infamous Colfax Massacre in Louisiana, in which a mob of white vigilantes killed between 60 and 150 African-

Americans, as well as three white men.<sup>88</sup> In *Cruikshank*, the Court overturned the federal convictions of the vigilantes, holding that the Bill of Rights protected citizens only against deprivations of rights by the federal government, not by states or private parties.<sup>89</sup>

The next several years saw frequent litigation of the Reconstruction legislation and Amendments. In the words of one historian, “[t]he opening of each term of the Court, beginning in 1876, caused a buildup of anxiety regarding possible decisions in the civil rights cases.”<sup>90</sup> The Civil Rights Act of 1875 was regarded by many contemporaries as the most far-reaching piece of Reconstruction legislation.<sup>91</sup> The Act’s stated aim was “to protect all citizens in their civil and legal rights,” and it guaranteed to all citizens, regardless of color, access to public accommodations, including public schools, churches, theatres, and transportation, as well as jury service.<sup>92</sup> In 1883, in the *Civil Rights Cases*, the Court invalidated key provisions of the Act, ruling that neither the Thirteenth nor the Fourteenth Amendment permitted the federal government to proscribe discriminatory behavior by private actors.<sup>93</sup> Many scholars regard the *Civil Rights Cases* as the culmination of a decade-long shift by the Court toward a narrow interpretation of the Reconstruction statutes and Amendments. As one historian observes, “[t]he rights of the individual took precedence over obvious social inequalities that federal officials sought to address.”<sup>94</sup> With the erosion of northern support for robust Reconstruction policies, “[t]hat same narrow, highly individualized interpretation of rights also allowed legal segregation to flourish.”<sup>95</sup>

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## VI. The Progressive Era: Structural Reforms and Democracy-Based Critiques of the Courts

### A. Reorganization of the Federal Courts

As a result of the structural reforms of the Reconstruction era, the dockets of the federal courts—and in particular the Supreme Court—became crowded “beyond all control.”<sup>96</sup> A small reprieve came from Congress in an 1869 statute that created circuit judgeships, one for each of the nine circuits.<sup>97</sup> The circuit-riding obligations of the Justices were also reduced. But it was not enough to stem the tide of litigation in federal court. The number of cases pending in the federal district and circuit courts rose from 29,013 in 1873 to 54,194 in 1890—an increase of eighty-six percent.<sup>98</sup> Yet over the same period, the number of inferior federal court judges rose only slightly, from sixty-two in 1873 to sixty-nine in 1890.<sup>99</sup>

Moreover, the booming dockets in the district and circuit courts meant a concomitant surge in the Supreme Court's caseload. "[W]ith no other exclusively appellate court and an automatic right of appeal to the Court in many instances, the losing parties in such cases inevitably brought their claims to the justices."<sup>100</sup> The Court's docket in 1860 numbered 310 cases. In 1890, the number was 1,816 cases—623 of which had been filed in 1890 alone.<sup>101</sup>

Dissatisfaction with the federal courts' organization and functioning spawned numerous reform proposals. These included calls for an intermediate level of appeals courts, an innovation that had been discussed for decades but had never gained sufficient support to be attempted. Other proposals included expanding the Court to eighteen Justices, half of whom would operate as a "National Court of Appeals." Another proposal would have segmented the Court into three "divisional" panels, each responsible for common-law, equity, and admiralty and revenue cases, and with the entire Court hearing constitutional cases.<sup>102</sup>

Finally, in 1891, Congress passed the Circuit Court of Appeals Act, known as the Evarts Act in honor of its chief architect, Senate Judiciary Committee Chairman William Evarts of New York.<sup>103</sup> The Evarts Act "fundamentally reshaped the federal judicial system" and "substantially established the framework of the contemporary system."<sup>104</sup> For the first time since 1802, the Justices were no longer obliged to ride circuit. The Act also created intermediate courts of appeals, which "shifted the appellate caseload burden from the Supreme Court to new courts of appeals, and, in so doing, made the federal district courts the system's primary trial courts."<sup>105</sup> The reforms also drastically decreased the Court's caseload by limiting the right of automatic appeal, and by making the decisions of the courts of appeals final in several categories of cases, including diversity suits and criminal prosecutions. The courts of appeals could certify questions to the Supreme Court, or the Supreme Court could grant review by certiorari; for state court cases, the review mechanism remained the writ of error.<sup>106</sup> Whereas the number of new cases filed before the Court in 1890 was 623, that number dropped to 379 in 1891 and then to 275 in 1892.<sup>107</sup> Three decades later, Harvard law professor and future Supreme Court Justice Felix Frankfurter, along with his former student James M. Landis, offered the following characterization of the Evarts Act: "The remedy was decisive. The Supreme Court at once felt its benefits. A flood of litigation had indeed been shut off."<sup>108</sup>

## B. The Progressive Critique of the Court

The end of federally enforced Reconstruction by 1877 also redirected Republican energies from civil rights for African-Americans toward new forms of nationalism that prioritized economic development, property rights, and the interests of large-scale enterprise.<sup>109</sup> Critics



of the Court, especially those associated with the progressive movement (and the related Progressive Party), charged the federal courts with favoring business interests, in part due to the expansion of the courts' diversity jurisdiction, the frequency of removal from state to federal court by corporate defendants, and the application of a substantive body of law known as "general federal common law."<sup>110</sup> These critics charged the Court with deploying its power of judicial review more often and in accordance with conservative policy preferences. Chief among these preferences was the curtailing of legislation and regulations, especially those that protected workers and consumers. Between 1864 and 1895, the Court invalidated an average of three state laws each year, a sharp contrast with the pre-Civil War rate of less than one law per year.<sup>111</sup>

By the 1890s, what one scholar has described as a "muted fury" toward the federal courts had developed among some reformers, many of whom mobilized as the Populist and later the Progressive parties.<sup>112</sup> Three decisions that the Court handed down in 1895 drew particular criticism: *United States v. E.C. Knight Co.* (holding that the federal commerce power did not reach manufacturing);<sup>113</sup> *Pollock v. Farmers' Loan & Trust Co.* (invalidating the federal income tax);<sup>114</sup> and *In re Debs* (upholding a labor injunction against striking railroad workers).<sup>115</sup>

Progressive anger at the courts became a defining issue in the 1912 presidential election. After having left office and embarked on a worldwide tour, former president Theodore Roosevelt reentered the political fray with a blistering attack on the courts, focusing his ire on the Supreme Court's recent decision in *Lochner v. New York*.<sup>116</sup> Addressing a joint session of the Colorado legislature, as well as an audience of thousands who had gathered outside, Roosevelt decried the Court's decisions in *Lochner* and *E.C. Knight*.<sup>117</sup> In print, Roosevelt argued that the Justices had "strained to the utmost (and, indeed, in my judgement, violated) the Constitution in order to sustain a do-nothing philosophy which has everywhere completely broken down when applied to the actual conditions of modern life."<sup>118</sup>

Upon launching his presidential campaign in February 1912, Roosevelt proposed that state judicial decisions invalidating a statute as unconstitutional (either under the Federal Constitution or the state constitution) should be "recalled" by a vote of the citizens.<sup>119</sup> "[W]hen a judge decides a constitutional question, when he decides what the people as a whole can or cannot do, the people should have the right to recall that decision if they think it wrong," Roosevelt argued.<sup>120</sup> The former President's proposal focused on rulings by state courts, and he disavowed the notion that it would apply to federal courts. But one commentator notes that despite his public statements, Roosevelt "confided to [progressive journalist Herbert] Croly

that he believed the people would ultimately obtain the power to interpret even the federal Constitution.”<sup>121</sup>

Roosevelt’s recall initiative became a dominant issue during the 1912 presidential election, a four-way contest that pitted Roosevelt, running as a Progressive, against Republican incumbent William Howard Taft, Democrat Woodrow Wilson, and Socialist Eugene V. Debs.<sup>122</sup> Ultimately, Roosevelt’s attacks on the judiciary failed to win him the Republican nomination, repelling party conservatives and energizing Taft’s reelection campaign, which focused on protecting judicial independence.<sup>123</sup> President Wilson, who prevailed in the contest, did not support recall of court decisions, and the frontal attack on the judiciary faded after Roosevelt’s defeat.

During and after Roosevelt’s unsuccessful presidential campaign in 1912, a group of U.S. Senators continued to press the progressive critique of the Court. Led by Robert La Follette of Wisconsin, William Borah of Idaho, George Norris of Nebraska, and Robert Owen of Oklahoma, these western and midwestern lawmakers argued that the federal courts, especially the Supreme Court, stood in the way of reforms that the Senators viewed as necessary remedies for social and economic ills caused by industrialization. Arguing that the courts were unduly solicitous of corporate interests and thus hostile to workplace regulation and the labor movement, progressives sought tools to limit judicial power. In the name of popular accountability, they proposed a number of mechanisms to constrain the judiciary, including recalls, supermajority voting requirements, and legislative overrides.<sup>124</sup>

In 1912, Senator Owen proposed that Congress be empowered to recall and remove federal judges from office by a majority vote of both houses. In 1918, he sought to write into a piece of legislation a provision shielding it from judicial review—as in a renewed federal ban on child labor, after the Court had invalidated a similar ban. Inveighing against “judicial usurpations” a few years later, Senator La Follette argued for a constitutional amendment that would permit Congress to override the Court by passing again laws that the Court had invalidated. Senator Borah, for his part, objected to decisions in which the Court decided by a 5–4 or 6–3 vote to strike down a statute. He therefore sponsored a bill in 1923 that would have required the assent of at least seven Justices to hold a statute unconstitutional.<sup>125</sup> Though none of these proposals ultimately succeeded, their numerosity and the seriousness with which they were debated, both within Congress and among the broader public, demonstrates the force and appeal of the progressive critiques.

## C. Nominations to the Court: Increasing Controversy

During the same period, the process by which Justices were appointed to the Court became increasingly public and controversial. The first significantly contested nomination, and the first time that the Senate held a confirmation hearing for a nominee to the Court, was President Wilson's nomination of Louis D. Brandeis to the Court in 1916.<sup>126</sup> Brandeis, who was one of Wilson's informal legal advisers, was a leading progressive who had become known as "the people's attorney" for his successful and high-profile attacks on corporate interests and his dedication to bringing the social and economic impact of regulation to bear on legal arguments.<sup>127</sup>

Brandeis's nomination was strenuously opposed by many luminaries of the legal and business establishment: former President William Howard Taft; Harvard President A. Lawrence Lowell; former Attorney General George Wickersham; and former Secretary of State and War (and current American Bar Association President) Elihu Root, among others. President Wilson defended his nominee, charging that the opposition stemmed from Brandeis's refusal "to be serviceable to them in the promotion of their own selfish interests."<sup>128</sup> Another factor in the attacks on Brandeis was bigotry: He was the first Jewish person to be nominated to the Court.<sup>129</sup> After four months of debate, including hearings that Brandeis did not attend, the Democratic-controlled Senate voted along party lines to confirm Brandeis in June 1916.

Fourteen years later, another nomination that was controversial for very different reasons failed to win Senate confirmation. In 1930, President Hoover nominated federal appeals court judge John J. Parker to the Court. Given that Parker was a sitting federal judge, the nomination was initially expected by many observers to yield a smooth confirmation process.

Parker's nomination ultimately failed, however, because it was vocally and effectively opposed by civil rights groups, led by the NAACP, as well as labor organizations—groups that also shared the progressive sensibility. As a circuit judge, Parker had issued a strongly worded opinion upholding an injunction against the United Mine Workers, earning him the ire of organized labor. The NAACP and other organizations, meanwhile, condemned racially inflammatory remarks Parker had made a decade earlier while running for governor of North Carolina. "The participation of the Negro in politics is a source of evil and danger to both races and is not desired by the wise men in either race or by the Republican Party of North Carolina," Parker had stated in 1920.<sup>130</sup> Two months after Hoover named Parker, the nomination was rejected by a vote of 39 to 41. It was the Senate's only rejection of a nominee to the Court in

the seventy-four years between 1894 and 1968. For perspective, however, it is worth noting that for most of the nineteenth century, the Senate had rejected or otherwise blocked an average of nearly one out of every three nominees to the Court.<sup>131</sup>

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## VII. 1937, FDR, and the Court: Existential Challenges

Populist and Progressive critiques of the Court continued to circulate through the early decades of the twentieth century. By 1936, when the nation was in the grip of the Great Depression, these criticisms gained new salience. After President Franklin D. Roosevelt won reelection to a second term by an overwhelming margin, he turned his attention to the Court. In a series of decisions in 1935 and 1936, the Court had invalidated key New Deal legislation introduced by the Roosevelt Administration and supported by Democrats in Congress.<sup>132</sup> “A majority of the Court seemed to have turned decisively against the Administration’s programs,” notes one prominent casebook, adding that “constitutional challenges to a new spate of laws—the Fair Labor Standards Act, the National Labor Relations Act, and the Social Security Act—loomed in the coming months.”<sup>133</sup>

In February 1937, Roosevelt presented a package of reforms to Congress that he described as a remedy for overcrowded federal court dockets. The proposal authorized the President to appoint one additional judge to the federal courts, including the Supreme Court, to supplement any federal judge who reached the age of seventy and did not retire. The size of the Court would be limited to fifteen Justices. “The significant fact was that the plan would permit the president to appoint six new Supreme Court justices, and thus to insure approval of the New Deal programs. It was, as it was called, a ‘court-packing plan.’”<sup>134</sup> On March 9, 1937, Roosevelt took to the national airwaves to present the reforms to the American people in a “Fireside Chat.”

Roosevelt’s plan sparked a robust national discussion about the Court, its decisions, and its and the President’s respective roles in the constitutional system. “Day after day for the next half-year, stories about the Supreme Court conflict rated banner headlines.”<sup>135</sup>

The question was debated at town meetings in New England, at crossroads country stores in North Carolina, at a large rally around the Tulsa courthouse, by the Chatterbox Club of Rochester, New York, the Thursday Study Club of La Crosse, Wisconsin, the Veteran Fire Fighters’ Association of New Orleans, and the Baptist Young People’s Union of Lime Rock, Rhode Island. In Beaumont, Texas, a movie

audience broke out in applause for rival arguments on the plan when they were shown on the screen.<sup>136</sup>

While the public as well as members of Congress debated the merits and flaws of the President's plan, the Court itself took action in a manner that surprised many observers. "Within weeks of the bill's introduction . . . the Supreme Court began prudently to change course by upholding New Deal measures that months earlier it seemed prepared to invalidate."<sup>137</sup> On March 29, 1937, the Supreme Court handed down its decision in *West Coast Hotel Co. v. Parrish*, upholding a state minimum-wage statute for women that was nearly identical to one that it had struck down a year earlier.<sup>138</sup> On April 12, the Court decided *NLRB v. Jones & Laughlin Steel Corp.*, in which it held the National Labor Relations Act to be a valid exercise of Congress's power to regulate interstate commerce, appearing to diverge from its position in a similar case from 1936.<sup>139</sup> And on May 24, in *Steward Machine Co. v. Davis*, the Court upheld the unemployment compensation provisions of the Social Security Act of 1935—again seemingly taking a broader view of congressional power than in previous cases.<sup>140</sup> All three were 5–4 decisions. This seeming about-face was dubbed the "switch in time that saved nine" by some observers<sup>141</sup> and "the constitutional revolution of 1937" by others.<sup>142</sup> Also in May 1937, Justice Willis Van Devanter—one of the so-called "Four Horsemen" who had steadfastly opposed most New Deal legislation—announced his retirement from the Court.<sup>143</sup>

By the summer of 1937, however, Roosevelt's proposal was foundering in Congress. It was ultimately defeated in July 1937. The controversy over the Court "helped weld together a bipartisan coalition of anti-New Deal Senators"; it also led to a "deeply divided" Democratic party.<sup>144</sup> Henry Wallace, a member of Roosevelt's cabinet during the Court-packing controversy, opined that "[t]he whole New Deal really went up in smoke as a result of the Supreme Court fight."<sup>145</sup> But the battle over the Court was not the only factor in this diminution of support for the President's plan. Other pressures included "dismay at the harsh recession of 1937–1938, anxiety over relief spending, and resentment at sit-down strikes."<sup>146</sup>

Many observers—at the time and since—charged Roosevelt with overreaching.<sup>147</sup> They argue that had the plan succeeded, its passage would have "set a precedent from which the institution of judicial review might never recover."<sup>148</sup> On this view, Roosevelt's effort to expand the Court failed on two fronts: It was voted down in Congress and it hobbled Roosevelt and the Democratic Party in their efforts to consolidate the progressive reforms that formed the core of the New Deal agenda.<sup>149</sup> "[A]lthough the battle was won, the war was lost."<sup>150</sup>

Court packing divided Democrats and undermined middle-class and bipartisan support for the New Deal. It shattered FDR’s aura of invincibility, helped “blunt the most important drive for social reform in American history,” and “squandered” the president’s 1936 triumph by welding together a coalition of conservative Southern Democrats and Republicans that blocked reform in Congress until 1964.<sup>151</sup>

Other commentators contend, however, that the plan in fact achieved some of its objectives. The Supreme Court’s constitutional doctrine did undergo changes in 1937, and certain of those changes proved enduring. That spring, the Court began upholding major pieces of New Deal legislation, despite challenges that the statutes exceeded Congress’s Article I powers—in particular, the commerce power and the taxing and spending power. Roosevelt did not succeed in “packing” the Court, but neither did he have to abandon his New Deal agenda. Nor did he have to launch an effort for a constitutional amendment to limit the Court’s power, as some in his administration had urged.<sup>152</sup>

Scholars disagree regarding both the magnitude and the causes of these doctrinal shifts. The Justices might well have viewed the Court-packing plan as a threat and altered their views accordingly, engaging in “self-salvation by self-reversal.”<sup>153</sup> On this view, “[w]hile the president lost the skirmish with the Court, he won the battle.”<sup>154</sup> Gradual shifts in specific Justices’ doctrinal approaches might explain the Court’s shift in 1937.<sup>155</sup> The New Deal “did not reconstruct constitutional law out of thin air.”<sup>156</sup> But “the doctrinal revolution would not have happened without sustained Presidential leadership.”<sup>157</sup> Clearly, the struggle over the Court “exact[ed] an enormous toll” on Roosevelt and impeded the legislative momentum for comprehensive economic and social reform. Yet, as one leading historian of the era notes, these costs “should not obscure the President’s one huge success in the Court fight—the legitimation of a vast expansion of the power of government in American life.”<sup>158</sup>

The public debate surrounding the President’s plan placed undeniable pressure on the Court in the late winter and spring of 1937. More than twenty-five bills regulating the Court were introduced in Congress between January 8 and May 20, 1937.<sup>159</sup> Justice Owen Roberts, the Justice whom many conventional accounts of the crisis identify as switching his views in 1937, recalled years later, in testimony before the Senate, “the tremendous strain and the threat to the existing Court, of which I was fully conscious.”<sup>160</sup>

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## VIII. The Postwar Period: *Brown v. Board of Education* and the Warren Court

The middle decades of the twentieth century witnessed revived debates about the role of the Court in American public life, its ability to protect individual rights, and the relationship between the federal courts and state officials, particularly in the context of the civil rights movement.

In the wake of *Brown v. Board of Education*,<sup>161</sup> in which the Court unanimously held that racial segregation in public schools was unconstitutional, some southern officials challenged the authority of the Court's decisions on issues concerning African-Americans' civil rights under the Fourteenth Amendment, and school desegregation in particular. Some southern state legislatures passed "interposition" resolutions asserting that a given issue—typically, public education—was within the exclusive control of the state.<sup>162</sup> In 1956, nineteen senators and seventy-seven congressmen, all from former Confederate states, signed onto a document titled "The Declaration of Constitutional Principles," but which became known as the "Southern Manifesto."<sup>163</sup> Such efforts at blocking the implementation of the Court's decisions explicitly borrowed from eighteenth- and nineteenth-century theories of state sovereignty associated with James Madison and John C. Calhoun, among others.<sup>164</sup>

The reaction against the *Brown* decision sparked a number of proposals for constitutional amendments. Among the amendments presented to Congress by various state legislatures were the following:

- An amendment making the Senate the final appellate court with power to review decisions of the Supreme Court in cases "where questions of the powers reserved to the States, or the people, are either directly or indirectly involved and decided, and a State is a party or anyway interested in such question."<sup>165</sup>
- An amendment setting term limits for federal judges and revising the method of selecting them.<sup>166</sup>
- A procedure according to which if one-fourth of the states disapproved of a decision by the Court that weakens states' rights, the decision would be rendered null unless three-fourths of the states approved it.<sup>167</sup>

- A proposed “Court of the Union” drawn from judges of state supreme courts, with the power to review decisions of the Supreme Court with respect to “the rights reserved to the States or to the people” by the Constitution.<sup>168</sup>
- An amendment reserving to the states “the right to sole, and exclusive jurisdiction of public-school systems in the separate States.”<sup>169</sup>

None of these proposed amendments came to pass. But they demonstrate the broad range of Supreme Court reforms that have been proposed from across the political spectrum by critics of its decisions, its procedures, and, in some cases, its authority. In response to continued and frequently violent southern resistance to federal court decisions that sought to dismantle racial segregation, the Court explicitly claimed the mantle of judicial supremacy. “The major act of the Supreme Court, in the ten years after *Brown*, was defending its newly self-appointed role as ‘ultimate interpreter of the Constitution’ in *Cooper v. Aaron*.”<sup>170</sup> *Cooper* was a 1958 case in which the Court held that Arkansas officials were bound by federal court orders mandating desegregation in public schools.<sup>171</sup> The joint opinion, authored by all nine Justices, stated that the Supremacy Clause of the Constitution made the Court’s decisions binding on every state, overriding any state laws to the contrary.<sup>172</sup> The Court’s decision in *Brown* could “neither be nullified openly and directly by state legislators or state executive or judicial officers nor nullified indirectly by them through evasive schemes for segregation,” the Court wrote.<sup>173</sup>

Under Chief Justice Earl Warren’s tenure from 1953 to 1969, the Court became a focus of public debate because “it displayed a willingness to confront a host of important issues head-on and become, in important ways, a significant agenda setter for domestic policy.”<sup>174</sup> For some observers, the Warren Court stood for the protection of civil rights and civil liberties, including the rights of criminal defendants as well as due process rights within the administrative state. Others took a more skeptical view, warning of the risks that judicial activism might pose when pitted against policies adopted by the people’s elected representatives. An “Impeach Earl Warren” movement, led by several newly formed right-wing groups, placed advertisements and planted billboards throughout the U.S.<sup>175</sup>

The Court was met with unusually sustained and pointed criticism in response to a set of six cases that were argued together in November 1963 and decided in June 1964. Known collectively as “the Reapportionment Cases,” the most prominent of which were *Reynolds v. Sims*<sup>176</sup> and *Lucas v. Forty-Fourth General Assembly of Colorado*,<sup>177</sup> the decisions effectively invalidated the apportionment of nearly every state legislature. Rather than allocating representatives by political subdivisions such as the county, the Constitution required a



principle of “one person, one vote”—in other words, that any chamber of a state legislature must be based on equal population districts.

In response to these decisions, the House of Representatives passed a bill stripping the federal courts of jurisdiction over cases involving legislative apportionment. Members of Congress, led by Senator Everett Dirksen of Illinois, spearheaded a movement for a constitutional amendment overriding the Court’s decisions. The effort ultimately fell short of the two-thirds of the states required under Article V of the Constitution to compel Congress to call a convention to propose amendments. “The newly reapportioned legislatures, after all, had no desire to return to the status quo ante the *Reapportionment Cases*.”<sup>178</sup>

Debates about the role of, and potential reforms to, the Court continued through the decades following the retirement of Chief Justice Warren in 1969. Many of these controversies are, of course, pertinent to the Commission’s mission. They are discussed in the following Chapters in the context of the specific structural issues they presented.

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## IX. Conclusion

As this historical overview demonstrates, debates about the proper role of the Supreme Court are as old as the Constitution. Though the focus of today’s discussions is, appropriately, on current events and the immediate recent past, taking a longer view across 234 years of the Republic’s existence allows for a deeper and more contextualized analysis of complex imperatives of text, structure, politics, and reform. The combination of these factors was present when the Constitution was drafted in 1787; when it was fundamentally reshaped through the Reconstruction Amendments of 1865, 1868, and 1870; in the controversy between the President, Congress, and the judiciary over Court-packing in 1937; and in the civil rights struggles and victories of the 1950s and 1960s. The current debates require us to draw on the strengths and insights of these previous conflicts while also recognizing the distinctiveness of each moment across the history of the courts, the country, and the Constitution.

## Endnotes: Chapter 1

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<sup>1</sup> THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).

<sup>2</sup> *Id.* at 392, 394.

<sup>3</sup> PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 83 (2010).

<sup>4</sup> See JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 154 (2018) (noting that although the *Federalist* essays “were not yet cloaked in national mystique, and were far from being deemed the authoritative constitutional commentary they would later become, as early as the spring of 1789 they enjoyed wide purchase”); see also MAIER, *supra* note 3, at 84 (“The series’ reach and the number of people who testified to its distinction expanded substantially after the spring of 1788, when the essays were collected and printed together in two volumes of some 600 pages (with Hamilton picking up over half the cost) . . .”).

<sup>5</sup> See generally JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); MAIER, *supra* note 3; BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY (Richard Beeman, Stephen Botein & Edward C. Carter II, eds., 1987).

<sup>6</sup> See GIENAPP, *supra* note 4, at 4 (2018) (“The Constitution was born without many of its defining attributes; these had to be provided through acts of imagination.”).

<sup>7</sup> See also Alison L. LaCroix, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, 2007 SUP. CT. REV. 345, 393 (2007) [hereinafter *The New Wheel in the Federal Machine*] (“The language of Article III, combined with the Madisonian compromise, had deliberately left a lacuna in the constitutional structure.”). See generally 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911).

<sup>8</sup> U.S. CONST. art. III, § 2, cl. 2 (“In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

<sup>9</sup> See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 8 (7th ed. 2015).

<sup>10</sup> Maeve Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, in ORIGINS OF THE FEDERAL JUDICIARY 13, 14 (Maeve Marcus ed., 1992).

<sup>11</sup> *Id.* (alteration added) (footnotes omitted).

<sup>12</sup> See ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 182-85 (2010) [hereinafter IDEOLOGICAL ORIGINS].

<sup>13</sup> An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789).

<sup>14</sup> See Marcus & Wexler, *supra* note 10, at 27 (noting that “politics had a greater influence than the language of the Constitution on the decisions Congress made with regard to a new judicial system”).

<sup>15</sup> See IDEOLOGICAL ORIGINS, *supra* note 12, at 201 (noting that “beginning in 1789, judicial power emerged as the focus of both practical and theoretical disputes about the nature of multilayered authority” in the American federal republic).

<sup>16</sup> Letter from James Madison to Samuel Johnston (July 31, 1789), in 4 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 491 (Maeve Marcus, ed., 1992) [hereinafter DHSC].

<sup>17</sup> See IDEOLOGICAL ORIGINS, *supra* note 12, at 186.

- <sup>18</sup> Similar arguments for expansive federal jurisdiction continued to be made well into the nineteenth century, even as Congress declined to grant the full scope of decisional authority permitted by the Constitution. *See generally* Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 *LAW & HIST. REV.* 205 (2012).
- <sup>19</sup> *See* RUSSELL R. WHEELER & CYNTHIA HARRISON, *FED. JUD. CTR., CREATING THE FEDERAL JUDICIAL SYSTEM* 5-8 (3d ed. 2005). In 1793, the Act was amended to require only one Justice, along with the district judge, to hold circuit court.
- <sup>20</sup> In 1791, while riding circuit in Virginia, Justice James Iredell wrote to his wife Hannah of “a very rascally house where I had the misfortune to be obliged to put up on Saturday night” at which “a parcel of worthless young Fellows” were “sitting up drinking gaming & cursing & swearing all night.” Letter from James Iredell to Hannah Iredell (Sept. 19, 1791), *in* 2 *DHSC*, *supra* note 16, at 210.
- <sup>21</sup> *See* Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 *WM. & MARY Q.* 3 (1965).
- <sup>22</sup> *See* *IDEOLOGICAL ORIGINS*, *supra* note 12, at 194-97.
- <sup>23</sup> John Adams, Third Annual Message (Dec. 3, 1799), <https://millercenter.org/the-presidency/presidential-speeches/december-3-1799-third-annual-message>.
- <sup>24</sup> Harper Judiciary Bill of 1800, *reprinted in* 4 *DHSC*, *supra* note 16, at 310, 317.
- <sup>25</sup> On March 28, 1800, arguing against congressional Republicans’ motion to postpone the bill’s consideration, one Federalist congressman contended “that the close of the present Executive’s authority was at hand, and from his experience, he was more capable to choose suitable persons to fill the offices than another.” Turner, *supra* note 21, at 13.
- <sup>26</sup> An Act to Provide for the More Convenient Organization of the Courts of the United States, ch. 4, 2 Stat. 89 (1801).
- <sup>27</sup> *See* *IDEOLOGICAL ORIGINS*, *supra* note 12, at 202-03 (“[T]he source of the conflict was political gain and power as well as ongoing and fundamental disagreement about just what the ‘federal’ in ‘federal republic’ was to mean, and what role the judiciary would play in that federal republic.”); LINDA K. KERBER, *FEDERALISTS IN DISSENT: IMAGERY AND IDEOLOGY IN JEFFERSONIAN AMERICA* 136 (1970) (“Contrary to its subsequent reputation, the Judiciary Act of 1801 had been the subject of a full and responsible debate during the preceding session of Congress, and its terms represented an attempt to correct the inadequacies of the first Judiciary Act of twelve years before.”).
- <sup>28</sup> An Act to Repeal Certain Acts Respecting the Organization of the Courts of the United States; and For Other Purposes, ch. 8, 2 Stat. 132 (1802).
- <sup>29</sup> Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), *in* 36 *THE PAPERS OF THOMAS JEFFERSON* 165-66 (Barbara B. Oberg ed., 2009).
- <sup>30</sup> Alexander Hamilton, *Remarks on the Repeal of the Judiciary Act*, *NEW-YORK GAZETTE & GEN. ADVERTISER* (Feb. 13, 1802), *reprinted in* 25 *THE PAPERS OF ALEXANDER HAMILTON* 523 (Harold C. Syrett ed., 1976).
- <sup>31</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
- <sup>32</sup> *Id.* at 176.
- <sup>33</sup> *Id.* at 177-78.
- <sup>34</sup> *See* Mary Sarah Bilder, *Idea or Practice: A Brief Historiography of Judicial Review*, 20 *J. POL’Y HIST.* 6, 6 (2008); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7 (2004).
- <sup>35</sup> The Supremacy Clause states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.
- <sup>36</sup> *Marbury*, 5 U.S. (1 Cranch) at 177.
- <sup>37</sup> *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 134-35 (Paul Brest et al. eds., 7th ed. 2018).

- <sup>38</sup> *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803). Justice William Paterson wrote the opinion for the Court; Chief Justice Marshall had recused himself from hearing the case when it came before the Court, perhaps because he had heard the case when it was before his circuit court. See JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* 76 (2012).
- <sup>39</sup> *Stuart*, 5 U.S. (1 Cranch) at 309.
- <sup>40</sup> Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1124-25 (2001).
- <sup>41</sup> DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 78 n.102 (1985).
- <sup>42</sup> Letter from Chief Justice Marshall to Henry Clay (Dec. 22, 1823), reprinted in Ruth Wedgwood, *Cousin Humphrey*, 14 CONST. COMMENT 247, 267-69 (1997).
- <sup>43</sup> Act of Feb. 24, 1807, ch. 16, 2 Stat. 420.
- <sup>44</sup> See William M. Wiecek, *Murdock v. Memphis: Section 25 of the 1789 Judiciary Act and Judicial Federalism*, in *ORIGINS OF THE FEDERAL JUDICIARY*, *supra* note 10, at 225-29.
- <sup>45</sup> Carl B. Swisher, *The Taney Period, 1836-1864*, in 5 *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 4 (2010).
- <sup>46</sup> DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848*, at 280 (2007).
- <sup>47</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824).
- <sup>48</sup> See JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND* (Gerald Gunther ed., 1969).
- <sup>49</sup> Ch. 148, 4 Stat. 411 (1830).
- <sup>50</sup> 30 U.S. (5 Pet.) 1 (1831).
- <sup>51</sup> 31 U.S. (6 Pet.) 515 (1832).
- <sup>52</sup> See RICHARD E. ELLIS, *THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES’ RIGHTS, AND THE NULLIFICATION CRISIS* 116 (1987) (quoting the observations of William Wirt, attorney for the Cherokee Nation, regarding “public considerations connected with the state of the country (particularly the open resistance of South Carolina), and the extremely ticklish predicament of Georgia”).
- <sup>53</sup> See HOWE, *supra* note 46, at 441.
- <sup>54</sup> Andrew Jackson, Veto Message (July 10, 1832), reprinted in 2 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897*, at 576, 582 (James D. Richardson ed., 1898) (“The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.”).
- <sup>55</sup> See HOWE, *supra* note 46, at 441.
- <sup>56</sup> See Curtis Nettels, *The Mississippi Valley and the Federal Judiciary, 1807-1837*, 12 MISS. VALLEY HIST. REV. 202 (1925).
- <sup>57</sup> *Id.* at 210 (“Extension of the circuit courts was delayed until 1837 because it entailed a decision as to the permanent structure of the whole judiciary upon which all parts of the country could not agree.”).
- <sup>58</sup> *Id.* at 226; HOWE, *supra* note 46 at 441 (“All five of [President Jackson’s] last round of appointees came from the slave states . . .”).
- <sup>59</sup> HOWE, *supra* note 46, at 441.
- <sup>60</sup> Act of Mar. 3, 1837, ch. 34, 5 Stat. 176. The Act is also known as the Eighth and Ninth Circuits Act.
- <sup>61</sup> See Swisher, *supra* note 45, at 62-65.
- <sup>62</sup> Nettels, *supra* note 56, at 225.
- <sup>63</sup> *The Supreme Court of the United States*, 1 U.S. MAG. & DEMOCRATIC REV. 143, 143 (1838).

- <sup>64</sup> See generally ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).
- <sup>65</sup> U.S. CONST. amend. XIII.
- <sup>66</sup> U.S. CONST. amend. XIV; FONER, *supra* note 64, at xix.
- <sup>67</sup> U.S. CONST. amend. XV.
- <sup>68</sup> 60 U.S. (19 How.) 393, 403, 404 (1856); see also DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 322 (1978) (“Only one thing was absolutely certain. Dred Scott had lost his eleven-year legal battle for freedom in the last court of appeal. Seven of the nine justices agreed that at law he was still a slave.”).
- <sup>69</sup> *Dred Scott*, 60 U.S. (19 How.) at 407. On Taney’s misuse of Founding-era history, see MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* 131 (2018) (noting, in a monograph documenting the ways in which free Black Baltimoreans seized rights in the courtroom and in everyday life, that “Chief Justice Taney concluded that only those who had been citizens of the individual states at the time of the Constitution’s adoption could be citizens of the United States. To reach this decision, he set forth his own view of history”).
- <sup>70</sup> Frederick Douglass, *The Dred Scott Decision: Speech, Delivered, in Part, at the Anniversary of the American Abolition Society, Held in New York, May 14th, 1857*, in *TWO SPEECHES BY FREDERICK DOUGLASS* 25, 31-32 (1857), <https://www.loc.gov/resource/mfd.21039/?sp=25>.
- <sup>71</sup> Speech at Springfield, Ill. (June 26, 1857), in *2 COLLECTED WORKS OF ABRAHAM LINCOLN* 398, 401, 404 (Roy P. Basler ed., 1953).
- <sup>72</sup> First Inaugural Address (Mar. 4, 1861), in *4 COLLECTED WORKS OF ABRAHAM LINCOLN*, *supra* note 71, at 262, 268.
- <sup>73</sup> CROWE, *supra* note 38, at 133.
- <sup>74</sup> See WHEELER & HARRISON, *supra* note 19, at 12.
- <sup>75</sup> *Id.*
- <sup>76</sup> Act of July 15, 1862, ch. 178, 12 Stat. 576 (Eighth and Ninth Circuits); Act of Mar. 3, 1863, ch. 100, 12 Stat. 794 (Tenth Circuit). The Justices were David Davis of Illinois (Eighth Circuit), Samuel Miller of Iowa (Ninth), and Stephen Field of California (Tenth).
- <sup>77</sup> Act of July 23, 1866, ch. 210, 14 Stat. 209.
- <sup>78</sup> See FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 9, at 27 n.44.
- <sup>79</sup> William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333, 333 (1969).
- <sup>80</sup> See, e.g., *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869) (upholding jurisdiction-stripping legislation). *But see* *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871) (invalidating jurisdiction-stripping legislation).
- <sup>81</sup> See CROWE, *supra* note 38, at 132 (“Contrary to the view that the election of Abraham Lincoln and the ascendance of the Radical Republicans effectively resulted in a circumscribed and cowering Supreme Court, the events of the Civil War and Reconstruction empowered rather than dismantled the federal courts.” (citations omitted)).
- <sup>82</sup> See Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.
- <sup>83</sup> See Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.
- <sup>84</sup> See Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.
- <sup>85</sup> See Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Enforcement Act of 1870, ch. 114, 16 Stat. 140; Enforcement (Ku Klux Klan) Act of 1871, ch. 22, 17 Stat. 13; Civil Rights Act of 1875, ch. 114, 18 Stat. 335.
- <sup>86</sup> *Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (emphasis omitted) (quoting FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65 (1928)).
- <sup>87</sup> 83 U.S. (16 Wall.) 36 (1873).

- <sup>88</sup> 92 U.S. 542 (1876). *See generally* LEEANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION* (2008).
- <sup>89</sup> 92 U.S. 542.
- <sup>90</sup> John Hope Franklin, *The Enforcement of the Civil Rights Act of 1875*, 6 *PROLOGUE* 225, 234 (1974).
- <sup>91</sup> *See* WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION, 1869-1879*, at 273-74 (1982).
- <sup>92</sup> Ch. 114, 18 Stat. 335.
- <sup>93</sup> 109 U.S. 3 (1883).
- <sup>94</sup> LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION* 164 (2015).
- <sup>95</sup> *Id.*
- <sup>96</sup> FRANKFURTER & LANDIS, *supra* note 86, at 86.
- <sup>97</sup> Act of April 10, 1869, ch. 22, 16 Stat. 44.
- <sup>98</sup> FRANKFURTER & LANDIS, *supra* note 86, at 60.
- <sup>99</sup> WHEELER & HARRISON, *supra* note 19, at 16.
- <sup>100</sup> CROWE, *supra* note 38, at 174.
- <sup>101</sup> FRANKFURTER & LANDIS, *supra* note 86 at 60, 102.
- <sup>102</sup> *See Id.* at 82-83; WHEELER & HARRISON, *supra* note 19, at 16.
- <sup>103</sup> Act of March 3, 1891, ch. 517, 26 Stat. 826.
- <sup>104</sup> FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 9, at 29.
- <sup>105</sup> WHEELER & HARRISON, *supra* note 19, at 18.
- <sup>106</sup> *See Id.*; FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 9, at 30 & n.67.
- <sup>107</sup> FRANKFURTER & LANDIS, *supra* note 86, at 102.
- <sup>108</sup> *Id.* at 101.
- <sup>109</sup> *See* ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877*, at 517, 522 (1988); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 *AM. POL. SCI. REV.* 511, 512 (2002).
- <sup>110</sup> *See generally* EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958* (1992).
- <sup>111</sup> Gillman, *supra* note 109, at 512.
- <sup>112</sup> *See generally* WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937* (1994).
- <sup>113</sup> 156 U.S. 1 (1895). The case was also known as the “Sugar Trust Case.”
- <sup>114</sup> 157 U.S. 429 (1895).
- <sup>115</sup> 158 U.S. 564 (1895).
- <sup>116</sup> 198 U.S. 45 (1905) (invalidating a New York statute regulating bakers’ working hours on the ground that the statute violated the Due Process Clause of the Fourteenth Amendment).
- <sup>117</sup> *See Roosevelt in 1912 The Cry in Denver*, *N.Y. TIMES*, Aug. 30, 1910, at 1.
- <sup>118</sup> Theodore Roosevelt, *Judges and Progress*, *OUTLOOK*, JAN. 6, 1912 at 40, 44.
- <sup>119</sup> *See* ROSS, *supra* note 112, at 130-54.
- <sup>120</sup> Theodore Roosevelt, *A Charter of Democracy: Address Before the Ohio Constitutional Convention* (Feb. 21, 1912).
- <sup>121</sup> ROSS, *supra* note 112, at 144.

- <sup>122</sup> JAMES CHASE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY 105 (2004).
- <sup>123</sup> SIDNEY M. MILKIS, THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY 56 (2009).
- <sup>124</sup> *See also infra* Chapter Four.
- <sup>125</sup> Senate Historical Office, *Senate Progressives vs. the Federal Courts*, US SENATE: SENATE STORIES (May 3, 2021), <https://www.senate.gov/artandhistory/senate-stories/senate-progressives-vs-the-federal-courts.htm>.
- <sup>126</sup> *A History of Supreme Court Confirmation Hearings*, NPR (July 12, 2009), <https://www.npr.org/templates/story/story.php?storyId=106528133> (interview with Lucas Powe).
- <sup>127</sup> Melvin I. Urofsky, *Brandeis, Louis Dembitz, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 98 (Kermit L. Hall ed., 2d ed. 2005).
- <sup>128</sup> Letter from President Woodrow Wilson to U.S. Senate (May 9, 1916), <https://www.brandeis.edu/library/archives/exhibits/ldb-100/career/president.shtml>.
- <sup>129</sup> *See* LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008, at 180 (2009) (“Brandeis’s take-no-prisoners approach to his public interest practice had something to do with [his opposition], too—as did raw anti-Semitism. He simply was not clubbable.”).
- <sup>130</sup> *Senate Rejects Judge John J. Parker for the Supreme Court*, U.S. SENATE (May 7, 1930), <https://www.senate.gov/about/powers-procedures/nominations/judge-parker-nomination-rejected.htm>.
- <sup>131</sup> *Id.*
- <sup>132</sup> *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (voiding the National Industrial Recovery Act of 1933); *United States v. Butler*, 297 U.S. 1 (1936) (voiding the Agricultural Adjustment Act of 1933).
- <sup>133</sup> PROCESSES OF CONSTITUTIONAL DECISIONMAKING, *supra* note 37, at 602; *see also* William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt’s “Court-Packing” Plan*, 1966 SUP. CT. REV. 347; Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052 (2005).
- <sup>134</sup> ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 113 (Sanford Levinson ed., 6th ed. 2005).
- <sup>135</sup> WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 134 (1995).
- <sup>136</sup> *Id.*
- <sup>137</sup> ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 19 (1995).
- <sup>138</sup> 300 U.S. 379 (1937).
- <sup>139</sup> 301 U.S. 1 (1937).
- <sup>140</sup> 301 U.S. 548 (1937).
- <sup>141</sup> *See* LEUCHTENBURG, *supra* note 135, at 177.
- <sup>142</sup> *See* Kalman, *supra* note 133, at 1055.
- <sup>143</sup> *Justice Van Devanter Retires*, LIBR. CONG. (May 19, 1937), <https://www.loc.gov/item/2016871705/>.
- <sup>144</sup> LEUCHTENBURG, *supra* note 135, at 157-58.
- <sup>145</sup> William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal* 239 (1963) (quoting Henry Wallace).
- <sup>146</sup> *Id.* at 156.
- <sup>147</sup> *See* Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 POL. SCI. Q. 267, 293 (1988).
- <sup>148</sup> MCCLOSKEY, *supra* note 134, at 113.
- <sup>149</sup> LEUCHTENBURG, *supra* note 135 at 156 (noting several respects in which “FDR lost the war”).
- <sup>150</sup> Kalman, *supra* note 133, at 1057.

- <sup>151</sup> *Id.* at 1057 (quoting LEUCHTENBURG, *supra* note 135, at 157).
- <sup>152</sup> See Jane Perry Clark, *Some Recent Proposals for Constitutional Amendment*, 12 WIS. L. REV. 313, 316 (1937) (discussing, among others, proposals from the National Committee for Clarifying the Constitution by Amendment aimed at ensuring that “the right will be clear for the federal and the state governments to enact labor and social legislation in accordance with the needs of the complicated industrial and economic system today”).
- <sup>153</sup> JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* 147 (1938).
- <sup>154</sup> Kalman, *supra* note 133, at 1056.
- <sup>155</sup> See, e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998).
- <sup>156</sup> BRUCE ACKERMAN, *2 WE THE PEOPLE: TRANSFORMATIONS* 291 (1998).
- <sup>157</sup> *Id.*
- <sup>158</sup> LEUCHTENBURG, *supra* note 135, at 161.
- <sup>159</sup> See Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt’s Court-Packing Plan*, 12 INT’L REV. L. & ECON. 45, 58-59 (1992).
- <sup>160</sup> Edward A. Purcell, Jr., *Rethinking Constitutional Change*, 80 VA. L. REV. 277, 279 (1994) (quoting *Composition and Jurisdiction of the Supreme Court: Hearings on S.J. Res. 44 Before the Subcomm. on Const. Amendments of the S. Comm. on the Judiciary*, 83d Cong. 9 (statement of Justice Owen J. Roberts)).
- <sup>161</sup> 347 U.S. 483 (1954).
- <sup>162</sup> See, e.g., *Bush v. Orleans Parish Sch. Bd.*, 364 U.S. 500, 501 (1960) (rejecting the state of Louisiana’s assertion that certain state statutes were valid because the state “has interposed itself in the field of public education over which it has exclusive control” (quotations omitted)).
- <sup>163</sup> See generally Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053 (2014) (noting that although the debates over the Southern Manifesto challenged the Court’s authority, they also suggest widespread popular belief in judicial supremacy by 1956, two years before the Court’s decision in *Cooper v. Aaron*, 358 U.S. 1 (1958), which scholars often identify as establishing judicial supremacy).
- <sup>164</sup> See James Madison, *Virginia Resolutions*, Dec. 21, 1798, in 17 THE PAPERS OF JAMES MADISON 189 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991) (describing “the powers of the federal government” as “resulting from the compact, to which the states are parties” and stating that “in case of a deliberate, palpable and dangerous exercise of other powers, not granted by the said compact, the states who are parties there-to, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them”).
- <sup>165</sup> 103 CONG. REC. S12787 (daily ed. July 26, 1957) (Res. of the Leg. of Fla. to the S. Comm. on the Judiciary).
- <sup>166</sup> 103 CONG. REC. S10863 (daily ed. July 3, 1957) (Res. of the Leg. of Ala. to the S. Comm. on the Judiciary).
- <sup>167</sup> 107 CONG. REC. S2154 (daily ed. Feb. 16, 1961) (Res. of the Leg. of Ark. to the S. Comm. on the Judiciary).
- <sup>168</sup> 109 CONG. REC. S2071-72 (daily ed. Feb. 11, 1963) (Res. of the Leg. of Fla. to the S. Comm. on the Judiciary).
- <sup>169</sup> 111 CONG. REC. S15769-70 (daily ed. July 7, 1965) (Res. of the Leg. of Miss. to the S. Comm. on the Judiciary).
- <sup>170</sup> MCCLOSKEY, *supra* note 134, at 255.
- <sup>171</sup> 358 U.S. 1 (1958)
- <sup>172</sup> *Id.* at 18; see U.S. CONST. art. VI.
- <sup>173</sup> 358 U.S. at 17.
- <sup>174</sup> MCCLOSKEY, *supra* note 134, at 149.
- <sup>175</sup> See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 141 (2000).
- <sup>176</sup> 377 U.S. 533 (1964).
- <sup>177</sup> 377 U.S. 713 (1964).
- <sup>178</sup> J.W. Peltason, *Reapportionment Cases*, in OXFORD COMPANION TO THE SUPREME COURT, *supra* note 127, at 826-27.



## Chapter 2: Membership and Size of the Court

In recent years, calls to expand the size of the Supreme Court have become a significant part of the debate over the Court and its role in American government. Although there is widespread agreement among legal scholars that Congress has the constitutional authority to expand the Court’s size, there is profound disagreement over whether Court expansion at this moment in time would be wise. We do not seek to evaluate or judge the weight of any of these arguments, and the Commission takes no position on the wisdom of expansion. In this Chapter, we begin in Part I by presenting an account of past efforts to expand or contract the size of the Court, which occurred at various points in the nineteenth century and perhaps most famously during the New Deal era. In Part II, we consider whether Congress has the authority to expand the size of the Court. In Part III, we articulate the arguments made by proponents of expansion, as well as the arguments made by those who oppose any such efforts. In Part IV, we consider other proposals that have been made during recent reform debates to restructure the Supreme Court.

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### I. A Brief History of Efforts to Alter the Size of the Court

Although debates about Court expansion and restructuring have become increasingly salient in recent years, there is a long history of similar disputes earlier in U.S. history. Congress contracted or expanded the size of the Supreme Court several times in the nineteenth century, and President Franklin Roosevelt sought to expand the Court during the New Deal era. But the size of the Court has remained at nine Justices since 1869. This section details the history of efforts to alter the size of the Court.

#### A. Nineteenth-Century Changes to the Court’s Size

Article III provides that the “judicial Power of the United States, shall be vested in one supreme Court.”<sup>1</sup> But the constitutional text does not specify how many Justices should be on that Court. Congress on several occasions in the country’s first century altered the size of the Court. In 1789, Congress fixed the size of the Court at six members.<sup>2</sup> A decade later, Congress began to make changes. After Thomas Jefferson defeated John Adams for the presidency in 1800, but before the newly elected President Jefferson took office, the outgoing Federalist Congress in 1801 reduced the Court’s future size to five members.<sup>3</sup> (The Federalists did not

terminate the position of any existing Justice; the law provided that, whenever the next Justice left the Court, the vacancy would not be filled.) In 1802, the new Democratic Republican Congress then repealed that 1801 law and restored the Court to six members.<sup>4</sup> In 1807, Congress added one Justice to increase the size to seven members,<sup>5</sup> and in 1837, Congress expanded the size to nine members.<sup>6</sup>

Each reform seems to have been motivated by a mix of institutional and political concerns. During the early years of the Court, each Justice had two duties: both to sit on the Supreme Court and to serve as a judge on a lower federal court (a practice known as “circuit riding”).<sup>7</sup> In 1789, Congress created a six-member Supreme Court to serve the existing federal circuits. Over the next several decades, as the country grew in size, it became clear that more judges were needed, particularly in newly admitted states such as Kentucky, Tennessee, and Ohio, and (later) Louisiana, Illinois, Alabama, and Missouri.<sup>8</sup> In 1807, Congress added a seventh circuit, and in 1837, an eighth and a ninth circuit. Each time, Congress expanded the size of the Supreme Court accordingly.<sup>9</sup> These expansions served an institutional purpose: providing sufficient judicial machinery for a growing nation. But each expansion also served the interests of a political party. In 1807, the Democratic Republicans controlled Congress and trusted their party leader—President Jefferson—to appoint the seventh Justice. In 1837, the Democrats who controlled Congress had similar confidence in their party leader President Andrew Jackson.<sup>10</sup> The new courts created also ensured that a majority of circuits would cover slave-holding territory and therefore that a majority of Justices would be friendly to slavery.<sup>11</sup>

The reforms in 1801 and 1802 can also be explained by a mix of institutional and political concerns. In 1801, the Federalist Congress temporarily ended circuit riding,<sup>12</sup> and so its reduction of the Court to five Justices could have been justified by the fact that the Court could now function effectively with only five members. But the reduction in size was also likely attributable to the Federalists’ desire to prevent their incoming political rival—President-elect Jefferson—from filling a Supreme Court vacancy.<sup>13</sup> When the Democratic Republicans repealed the 1801 law and returned the Court to six Justices, they also re-established circuit riding and thus the link between the number of Justices and the number of circuits.<sup>14</sup> But their re-expansion of the Court also coincided with their political interest in giving President Jefferson an opportunity to shape the future of the Court.

In the 1860s, Congress made several changes to the size of the Supreme Court in fairly short order. These changes were not tied as closely to the number of lower circuit courts and are often said to have had a primarily political motivation.<sup>15</sup> Many lawmakers were deeply skeptical of the Court after its 1857 decision in *Dred Scott v. Sanford*, which held that African-

Americans were not “citizens,” and that Congress could not prohibit slavery in the territories.<sup>16</sup> Accordingly, there was a strong sense that the Court was in need of reform. During the Civil War, the Republican Congress in 1863 created a new tenth circuit and added a tenth seat to the Supreme Court for its new circuit Justice, enabling President Lincoln to appoint a pro-Union, anti-slavery Justice.<sup>17</sup> Soon thereafter, Congress again modified the Supreme Court’s size. In 1866, after the assassination of Lincoln led to the presidency of Democrat Andrew Johnson, Congress reduced the Court’s future membership to seven.<sup>18</sup> The conventional view is that the Republicans who controlled Congress in the post-Civil War era—and whose primary goal was to reconstruct the South—did not trust Johnson to nominate Justices sympathetic to those reconstruction efforts.<sup>19</sup> By contrast, in 1869, the Republican Congress was willing to return the Supreme Court to nine members, once fellow Republican (and former Union army general) President Grant was in charge.<sup>20</sup> But other historical experts conclude that these changes “were motivated by practical and mundane performance goals,” including returning the Court to a workable (and odd) number of Justices.<sup>21</sup>

## B. The Court-Packing Plan of 1937

The size of the Supreme Court has remained at nine members since 1869. But there was a prominent attempt to remake the Court in 1937: President Franklin Roosevelt’s so-called “Court-packing plan.”<sup>22</sup> As we explain in some detail in Chapter 1, the proposal was a response to a series of decisions by the Supreme Court in 1935 and 1936 invalidating major New Deal legislation enacted by Congress and championed by Roosevelt, as well as myriad state labor and social welfare laws, all directed at bringing the nation out of the economic and social calamity of the Great Depression.<sup>23</sup> With still more constitutional challenges to major New Deal enactments on the horizon, and after his commanding victory in the election of 1936, Roosevelt and his administration turned to protect the progressive New Deal from the courts.<sup>24</sup>

Under Roosevelt’s plan, the President would be authorized to appoint one additional Justice to the Supreme Court for each Justice over seventy years of age (who did not retire within six months)—for a possible total of fifteen members.<sup>25</sup> The legislative proposal grew out of a nearly two-year study in the Department of Justice as to the proper means of reforming the Supreme Court. Justice Department officials considered a variety of proposals, including constitutional amendments, measures to restrict federal jurisdiction, and proposals to expand the Supreme Court.<sup>26</sup> Ultimately, officials advised that “the proposal to enlarge the Supreme Court, while not without flaw, was ‘the only one which is certainly constitutional and . . . may be done quickly and with a fair assurance of success.’ . . . [I]t was the ‘only undoubtedly constitutional method by which to obtain a more sympathetic majority of the Court.’”<sup>27</sup>

In public, President Roosevelt initially asserted that the Court reform was designed to promote judicial efficiency. The Supreme Court, he argued, needed additional and younger personnel to handle its growing caseload.<sup>28</sup> But Roosevelt soon acknowledged that the real purpose was to alter the future course of the Court's decisions.<sup>29</sup> In his Fireside Chat on March 9, 1937, the President urged that "new blood" was needed, because the Supreme Court was "acting not as a judicial body, but as a policy-making body" in invalidating New Deal programs.<sup>30</sup> "[W]e must take action to save the Constitution from the Court and the Court from itself,"<sup>31</sup> he proclaimed.

In congressional testimony, executive officials defended the plan as a constitutional and desirable method of Court reform. Then-Assistant Attorney General (and later Supreme Court Justice) Robert Jackson argued that "[o]ur forebears" placed certain mechanisms in the Constitution to "enable Congress to check judicial abuses and usurpations."<sup>32</sup> One of those checks was the power of Congress to alter the size of the Supreme Court. Jackson insisted that Congress had throughout the nineteenth century changed the Court's size "to keep the divergence between the Court and the elective branches from becoming so wide as to threaten the stability of the Government."<sup>33</sup> Jackson declared: "When immediate and effective action has been necessary" to prevent the judiciary from "impos[ing] . . . its unsympathetic predilections on the country," "the method which the President now proposes has been used throughout our constitutional history."<sup>34</sup>

Some modern observers assume that Roosevelt's proposal was quickly rejected.<sup>35</sup> But at least in Congress, that appears not to have been the case. To be sure, the plan faced considerable opposition from Roosevelt's fellow Democrats (notably, at a time when the Democrats controlled over 70% of the seats in both the House of Representatives and the Senate)<sup>36</sup> and prompted widespread media condemnation.<sup>37</sup> Some opponents saw the plan as an effort to consolidate presidential control over the judiciary and "compar[ed] Roosevelt to Stuart tyrants and European dictators."<sup>38</sup> Chief Justice Hughes sent a letter to Senator Burton Wheeler which sought to refute President Roosevelt's initial claim that enlarging the Court would improve judicial efficiency. The Chief Justice argued that "[a]n increase in the number of Justices . . . would impair that efficiency so long as the Court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide. The present number of Justices is thought to be large enough so far as the prompt, adequate, and efficient conduct of the work of the Court is concerned."<sup>39</sup>

But there was also considerable support in Congress for Roosevelt's plan, and many in Congress expected throughout much of the debate that the legislation would succeed in some

form.<sup>40</sup> Democratic Senate Majority Leader Joe Robinson pushed hard for Court expansion, with the enthusiastic support of many other Democrats, including then-Senator (and later Supreme Court Justice) Hugo Black.<sup>41</sup> Initially, the measure seemed likely to get through the Senate, and many participants assumed that it would pass the House of Representatives by a wide margin.<sup>42</sup>

The political debate, which took place in the halls of Congress, across the editorial pages, and in numerous local venues throughout the country, was then significantly affected by the Supreme Court itself. Soon after the plan was announced, the Supreme Court issued a series of decisions upholding state and federal regulation of the economy.<sup>43</sup> Although scholars disagree as to why the Supreme Court changed its approach,<sup>44</sup> there is no question that this apparent “switch in time” in the spring of 1937 dampened the congressional support for the President’s plan. The Court’s decisions signaled that it might be more receptive to New Deal programs, even absent a change in membership.<sup>45</sup>

In June 1937, the Senate Judiciary Committee, voting 10 to 8, issued a strongly worded report recommending against the plan.<sup>46</sup> The majority of the Committee denounced Roosevelt’s plan as “a needless, futile, and utterly dangerous abandonment of constitutional principle.”<sup>47</sup> The bill was “an attempt to impose upon the courts . . . a line of decision” and thus “would undermine the independence of the courts.”<sup>48</sup> The report declared:

Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power or factional passion, approves any measure we may enact.<sup>49</sup>

Neither the Court’s decisions upholding New Deal legislation nor this vociferous criticism in Congress ended debate over the Court-packing plan in Congress. Considerable support for some type of Court expansion remained, and some historians contend that the harsh rebuke by the Judiciary Committee backfired by leading some Democrats, who thought the attack intemperate, to support the administration.<sup>50</sup> And it appeared for a time that Congress in fact would authorize the President to appoint four additional Justices (one for every member over age seventy-five).<sup>51</sup> It was not until after additional debates—and the sudden death of the bill’s staunch proponent Senate Majority Leader Robinson—that political support for the measure finally ran out, with the defeat of the plan in July 1937.<sup>52</sup>

As we note in Chapter 1, scholars and commentators disagree about how to put the long debate over Court packing during the New Deal era into perspective. On some accounts, the plan and the debate surrounding it prompted changes in the Court’s doctrine that left in place Roosevelt’s existing New Deal and ended an era in which the Court frequently invalidated laws designed to protect workers, consumers, and the public. In that doctrine, the Court established that Congress and state legislatures have broad authority to regulate the economy. But the political controversy over the Court-packing plan clearly divided Democrats and took a major toll on the once broad political support Roosevelt enjoyed. According to some historians, this “undermined bipartisan support for the New Deal,” which along with numerous other developments of the time helped bring about the end of major social reform until the 1960s.<sup>53</sup>

### C. A Failed Constitutional Amendment to Fix the Court at Nine

In the ensuing decades, a strong constitutional norm against any measure that might be deemed “Court packing” developed, leading some commentators today to describe Court expansion as a “third rail in American politics.”<sup>54</sup> Members of Congress sought in the 1950s to amend the Constitution to fix the size of the Supreme Court at nine members.<sup>55</sup> (The proposed amendment would also have prevented Congress from restricting the Supreme Court’s appellate jurisdiction over constitutional claims.)<sup>56</sup> Senator John Butler led the charge, declaring that the goal of the amendment was to “forestall future attempts to undermine the integrity and independence of the Supreme Court.”<sup>57</sup>

Supporters argued that the amendment would close “loopholes” in the constitutional structure.<sup>58</sup> Senator Butler emphasized that Roosevelt was not the first to propose a change in the Supreme Court’s size in order to influence the future course of its decisions: “The Congress . . . in 1866, was guilty of the same wrong . . . except that in 1866, the attempt was successful” at “prevent[ing] President Johnson from having an opportunity to fill the vacancies with persons who were friendly to his policies.”<sup>59</sup> Butler asserted: “We cannot know, with these historical illustrations fresh in our minds from what quarter and at what time the next attempt to influence the judgment of the Supreme Court may come.”<sup>60</sup>

Senator Butler’s amendment easily mustered the two-thirds supermajority needed to make it through the Senate.<sup>61</sup> But the measure failed in the House of Representatives. Some lawmakers worried that freezing the Supreme Court’s size would be unwise.<sup>62</sup> Congress might, the legislators argued, need to modify the Court’s size for institutional reasons, such as to enable it to tackle a larger workload. Representative Emmanuel Celler stated that, although he

had protested “President Roosevelt’s proposal to pack the Supreme Court . . . with such vehemence that Roosevelt never forgave me for it,” Congress should not “force upon ourselves a rigidity which can in the future make much mischief. . . . In the event there is another such move to increase the members of the Court, the then Congress, in the final analysis, can approve or reject, as is deemed best in the national interest.”<sup>63</sup>

Significantly, both supporters and opponents of this proposed constitutional amendment shared one assumption: Congress has broad formal power to expand or contract the Supreme Court, such that the only way to freeze the size of the Court in place was through a constitutional amendment. But significant disagreement arose over whether fixing the size of the Court at nine members would be wise. Some observers see these congressional debates as reflecting a view that expanding the Court for partisan or ideological purposes is inappropriate, but that changing the size of the Court for reasons of institutional efficiency is legitimate.

Since these efforts and until recently, no other attempts have been made in Congress to fix or expand the size of the Court. But the longstanding norm against Court expansion is being challenged today, and bills that would expand the size of the Court and those that propose a constitutional amendment to fix the Court at nine have again re-emerged.<sup>64</sup> As we describe in Part III of this Chapter, the reasons for this re-emergence are specific to our time. But understanding the contested history of efforts at Court expansion is valuable in highlighting the myriad institutional and political interests relevant to evaluating this turn of constitutional events. As one witness before the Commission observed: “[S]eeking guidance from the past can mislead policymakers” but it also “provides a way to make sense of the world.”<sup>65</sup>

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## II. The Legality of Court Expansion

Article III of the Constitution, which establishes the judiciary, requires that there be “one supreme Court” but does not specify the number of Justices that shall serve on that Court.<sup>66</sup> Article I authorizes Congress to make all laws that are “necessary and proper” to carry out the powers conferred on various institutions of government, which include the Supreme Court.<sup>67</sup> Determining the size of the Court that might be “necessary and proper” to its functioning seems well within Congress’s formal discretion.<sup>68</sup>

The historical practice we recount above also supports the conclusion that Congress has broad authority to establish and change the Court’s size: Congress exercised that power on

numerous occasions in the nation’s first century (in 1789, 1801, 1802, 1807, 1837, 1863, 1866, and 1869), expanding or contracting the Supreme Court’s size for both institutional and political reasons. On several occasions, Congress adjusted the Court’s size in large part to influence the future course of its decisions: The Federalists in 1801, the Democratic Republicans in 1802, the Republicans in the 1860s, and the Roosevelt administration in 1937 had this objective. President Roosevelt explained a few years after the failure of his 1937 plan that he turned to Court expansion to influence the Court in part because of its “undoubted constitutionality.”<sup>69</sup> Two decades later, in the early 1950s, members of Congress continued to assume that the only way to permanently fix the size of the Supreme Court at nine members was through a constitutional amendment.

During the Commission’s public hearings, one witness argued that, although Congress has broad power to modify the size of the Supreme Court for many purposes, it cannot do so for “partisan” reasons.<sup>70</sup> This argument faces a few challenges.<sup>71</sup> First, it is doubtful that “partisan” reasons can be disentangled from “good-government” reasons. For example, the changes to the Supreme Court in 1807 and 1837 by the Democratic Republicans and Jacksonian Democrats, respectively, had both institutional and political motives;<sup>72</sup> lawmakers not only sought to give the Court more personnel to serve a growing nation but also enabled their party leaders—Presidents Jefferson and Jackson—to shape the Supreme Court.<sup>73</sup> Second, and relatedly, the argument has little historical support; as discussed in Part I, *every* change to the Supreme Court’s size has tended, at least in part, to serve the interests of one political party.

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### III. Arguments in Support of and Opposition to Court Expansion

In order to fulfill our charge to provide a complete account of the contemporary Court reform debate, this Part sets out arguments made by proponents and opponents of expansion. The Commission as a whole takes no position on the validity or strength of these claims. Mirroring the broader public debate, there is profound disagreement among Commissioners on this issue. Accordingly, we present arguments for and against expansion independently of each other.

#### A. The Case for Expanding the Court

The current calls to expand the size of the Court stem most immediately from the Senate’s refusal to act on President Obama’s nomination of Judge Garland to the Supreme Court, as



well as its confirmation of the three Justices nominated by President Trump—and the effect those norm violations may have on both the health of the democratic process and the scope of bedrock constitutional rights. Proponents motivated by these developments contend that the Senate’s actions violated norms governing the confirmation process and that expansion of the Court would serve to counteract these violations and bring the Court’s jurisprudence into better alignment with prevailing values and views of the American public. Other proponents of expansion regard it as critical to prevent the continued undermining of our democratic system of government, which they regard as exacerbated by the Court’s jurisprudence. They view recent changes in the composition of the Court as accelerating these jurisprudential developments that began even before these most recent confirmations. On their view, expanding the size of the Court represents a constitutional and immediately achievable response to this threat to democracy that should not go unaddressed, even in the short term. Still others who believe expansion of the Court may be warranted cite the reform as a possible means of enhancing the diversity of the Court’s membership and assisting it to hear more cases each year.

## 1. Responding to Norm Violations

In recent times, arguments to expand the Supreme Court have been relatively rare, but not nonexistent.<sup>74</sup> In 2017, an academic’s call for congressional Republicans to expand the lower federal courts spurred an historian of President Roosevelt’s Court-packing plan to worry that President Trump would adopt such a proposal.<sup>75</sup> Supreme Court reform also became a pivotal topic in the 2020 Democratic primary, as several Democratic candidates endorsed significant reforms.<sup>76</sup> The Democratic Party Platform for the election of 2020 ultimately called for “structural court reforms to increase transparency and accountability,”<sup>77</sup> and candidates Trump and Biden debated the merits of Court expansion.<sup>78</sup> Events surrounding the last three nominations to the Supreme Court have helped spark the now-prominent calls for expansion of the Court.

Some proponents of Supreme Court expansion charge that Republican lawmakers since 2016 have disregarded institutional norms in order to secure a conservative supermajority on the Court.<sup>79</sup> They see expansion of the Court as particularly justified in light of Senate Republicans’ handling of the election-year nominations of Judge Garland and Justice Barrett. When Justice Scalia died unexpectedly on February 13, 2016, 269 days—more than 38 weeks—before the 2016 presidential election, the Senate held neither a hearing nor a vote on President Obama’s nomination of Judge Garland.<sup>80</sup> Yet when Justice Ginsburg died only 46

days before the election of 2020, Republicans quickly confirmed President Trump’s nomination of Justice Barrett to fill the seat.<sup>81</sup>

Calls for expansion in response to these developments did not begin immediately. Even after Republican Senators refused to act on the Garland nomination and eventually confirmed Justice Gorsuch instead, Democratic critics who accused Republicans of “stealing” a Supreme Court seat largely refrained from calling for Democrats to respond with a Court-expansion plan. Indeed, references to “Court packing” consisted primarily of arguments that Republicans themselves had in fact “packed the courts” by refusing to act on the Garland nomination and by moving swiftly to confirm President Trump’s nominations to the lower federal courts.<sup>82</sup>

Calls for and by Democrats to expand the size of the Court first appeared in substantial numbers upon the announcement of his retirement by Justice Kennedy, who had long been seen as the median Justice on a closely divided Court, and during the subsequent controversial nomination process of Justice Kavanaugh.<sup>83</sup> These calls increased in late 2020 when Senate Republicans confirmed Justice Barrett, with Democrats arguing that Republicans had contradicted their own prior arguments that Justices should not be confirmed in close proximity to a presidential election.<sup>84</sup> According to news accounts, “[a]s soon as it became clear that the Republican-controlled Senate would almost certainly confirm Judge Amy Coney Barrett, creating a 6-3 conservative majority on the court,” a number of Democrats “argued that if Democrats won in November, they should seriously consider increasing the number of justices.”<sup>85</sup> Public discussion of Court expansion surged noticeably between 2019 and 2020. In 2020, more than 400 articles appeared in the *New York Times*, *Wall Street Journal*, *Washington Post*, and *USA Today* invoking the term “Court packing” in the context of the Supreme Court, in contrast to approximately 100 articles in 2019.<sup>86</sup>

Proponents of expansion who point to this series of events argue that the addition of new seats to the Supreme Court, at the next opportunity, by a Democratic President and Congress, could help restore the balance on the Court that was disrupted by significant norm violations in the confirmation process, thus protecting the legitimacy of the Court.<sup>87</sup> Some of those who argue for expansion in light of recent events emphasize that they are not motivated by partisan politics but rather by a commitment to the protection of longstanding norms and important constitutional rights. They worry that the current conservative supermajority established by the recent norm violations threatens to take the law, and particularly federal constitutional law, in a still more troubling direction than where it was already moving—perhaps by reversing or continuing to revise longstanding precedents in the areas of reproductive rights, racial justice, workers’ rights, the regulation of guns, religion, administrative law, voting rights, and

campaign finance law.<sup>88</sup> But for the improper confirmation tactics of Republican lawmakers, the argument goes, the Court’s doctrinal trajectory might have been considerably different.<sup>89</sup>

Others emphasize that a failure to respond to what they regard as confirmation “hardball” by Republicans since 2016—as well as a failure to advance expansion as a viable option in the political process—might encourage future aggressive measures in the confirmation process, such as a refusal to hold hearings on any judicial nominee put forward by a President of the opposite party.<sup>90</sup> The judicial selection process has already become, in the view of many, a partisan spectacle.<sup>91</sup> Further escalation of the battles surrounding the Supreme Court could put additional pressure on the long-term legitimacy of the institution. On this account, a significant reform such as Court expansion may be needed to calm the controversy surrounding the Court, by attaching consequences to the Senate’s actions during the Trump years in order to deter future conduct of this kind.<sup>92</sup>

## 2. Preventing the Erosion of Democracy

Some proponents of expansion believe it to be essential to address the urgent circumstances brought on by developments in the Court’s jurisprudence that predate recent confirmation controversies but that have been accelerated by those appointments. They believe that these developments threaten to seriously and perhaps irreversibly damage the democratic process. These critics maintain that the Supreme Court has been complicit in and partially responsible for the “degradation of American democracy” writ large.<sup>93</sup> On this view, the Court has whittled away the Voting Rights Act and other cornerstones of democracy, and affirmed state laws and practices that restrict voting and disenfranchise certain constituencies, such as people of color, the poor, and the young.<sup>94</sup> This has contributed to circumstances that threaten to give outsized power over the future of the presidency and therefore the Court to one political party and to entrench that power.<sup>95</sup> As one witness before the Commission put it, the current Court “could easily invalidate federal legislation containing . . . democracy-entrenching measures . . . Those same Justices could easily invalidate measures designed to reduce the influence of money in politics, increase the transparency of political spending, restore the preclearance provision of the Voting Rights Act, and ameliorate economic inequality.”<sup>96</sup> Those holding this view regard expansion as required to ensure a Court more likely to uphold future voting rights and democracy-enhancing legislation constitutionally enacted by Congress and to prevent state legislatures from undermining or destroying the democratic process.<sup>97</sup> In arguing the case for expansion, proponents contend this moment is unlike any of the others in which this reform has been debated: Antidemocratic developments risk

entrenching the judicial philosophy of the current Court majority for generations, while advantaging one political party.

Those who advance arguments for expansion along these lines emphasize that maintaining the status quo would amount to a failure to pursue available reforms with the potential to restore the Court’s role as ensuring the representativeness of government and the operation of democracy. On this view, any risks associated with expanding the Court at this time would not compare in severity to the failure to take action.

For some proponents of expansion, even the calls for such reform could help prevent further democratic backsliding. As some of the testimony before the Commission suggested, an *attempted* expansion—or even just the prospect of expansion—could lead the Supreme Court to be restrained in its jurisprudence and more respectful of the role of the political branches, at least in the short term.<sup>98</sup> Soon after President Roosevelt unveiled his Court-reform plan in 1937, the Supreme Court began to uphold New Deal programs. Although scholars continue to debate the reason for this “switch,” a few years after the failure of his plan, Roosevelt described it as “among the most important domestic achievements of [his] first two terms in office,” because it led to changes in the Court’s jurisprudence.<sup>99</sup>

### 3. Strengthening the Court

Some participants in the debate over Court reform also regard expansion as worth considering because of its potential to strengthen the Court as an institution.<sup>100</sup> An expanded Court might better incorporate diverse personal and professional perspectives. That diversity could come from the inclusion of Justices with experience in different sectors of the legal community or even the public sphere more generally. It also might include individuals of diverse religious, socioeconomic, racial, geographical, or other demographic backgrounds. Expanded diversity could enrich the Court’s decisionmaking, and a Court that was drawn from a broader cross-section of society would be well received by the public.<sup>101</sup> A larger Supreme Court might also be able to decide more cases and to spend more time on emergency applications—an element of the Court’s work that has attracted considerable attention as is discussed in Chapter 5 of this Report.<sup>102</sup> The Supreme Court’s rulings in merits cases have decreased considerably in recent decades. In the 1980s, the Court decided around 150 cases per year.<sup>103</sup> In recent years, that number has fallen to seventy or eighty cases.<sup>104</sup> To the extent the public or lawmakers would like the Court to resolve more cases, expanding the size of the Court might prompt the Justices to do so,<sup>105</sup> though other means to this end also could include expanding the Court’s mandatory appellate jurisdiction.

Most proponents of Court expansion have focused on the possibility of an immediate increase in the number of Justices sitting on the Supreme Court. But as noted in public testimony before the Commission, proposals for Court expansion need not involve congressional action to expand the Court all at once.<sup>106</sup> Congress could enact a law providing for the expansion of the Supreme Court over time. For example, the Court could be increased by one Justice during each four-year presidential term until the Court reached some maximum size (say, thirteen members). Alternatively, the Court could be expanded by two Justices immediately, followed by two more Justices after an intervening presidential election. Proponents of expansion note that, though the longstanding convention has been for the Court to have nine members, it is possible for a high court to be productive and functional with significantly more than nine Justices. They note that other jurisdictions have larger courts that function efficiently and collegially, and that countries other than the United States have tended to settle on more than nine seats and have not necessarily maintained an odd number of seats on their high bench.<sup>107</sup>

The table below puts the U.S. Supreme Court in context with other constitutional courts.

7 Judges	Australia
9 Judges	Canada, United States
10 Judges	Chile
11 Judges	France, South Africa
12 Judges	Belgium, Ireland, Spain, United Kingdom
14 Judges	Austria, South Korea
15 Judges	Italy, Japan
16 Judges	Germany, Sweden
18 Judges	Denmark

## B. The Case Against Packing the Supreme Court

Opponents of efforts to expand—or “pack”—the Court at this time hold a range of views. Some critics of the calls for expansion regard the recent nominations to the Court as appropriate reflections of electoral outcomes and as fully consistent with constitutional processes and historical Senate practice.<sup>108</sup> They view the Court’s changing doctrine as

reflecting a principled approach to constitutional interpretation. Meanwhile, other critics of expansion, including some who take issue with the current Court and its jurisprudence and conclude that other reforms of the Court would be beneficial,<sup>109</sup> believe efforts to expand the Court or otherwise alter its structure at this moment would threaten the independence of the Court. Critics of Court expansion worry that such efforts would pose considerable risk to our constitutional system, including by spurring parties able to take control of the White House and Congress at the same time to routinely add Justices to bring the Court more into line with their ideological stances or partisan political aims. Court packing, in the critics' view, would compromise the Court's long-term capacity to perform its essential role of policing the excesses of the other branches and protecting individual rights. Opponents also conclude that packing the Court would not serve democratic values because such reforms would not address the Court's power to resolve questions better left to the political process. Still other opponents argue that the reform would be contrary to rule of law principles and that what they see as an enduring bipartisan norm against Court packing should be reaffirmed and protected.

## 1. Protecting Judicial Independence

Opponents of Court packing contend that it would significantly undermine the Supreme Court's independence. Courts cannot serve as effective checks on government officials if their personnel can be altered by those same government officials. In a system that permitted Court packing, any time the Supreme Court issued a decision that was at odds with the preferences of those in power—whether the matter related to the U.S. census,<sup>110</sup> immigration policy,<sup>111</sup> or the validity of a presidential election<sup>112</sup>—the party in power could respond by stacking the Court with loyalists. One witness before the Commission further explained: “Court-packing risks undermining the *willingness* of the Justices to maintain their independence” from “the very political forces they are supposed to police in the name of the Constitution.”<sup>113</sup>

Given these concerns, opponents underscore, it is crucial that for much of the past century, there has been a strong—and bipartisan—constitutional norm or convention treating Court packing as “something that just isn’t done.”<sup>114</sup> As one scholar wrote a few years ago, one could say confidently that “court packing is essentially considered a wholly illegitimate means of seeking to alter existing Supreme Court doctrine. No serious person, in either major political party, suggests court packing as a means of overturning disliked Supreme Court decisions, whether the decision in question is *Roe v. Wade* or *Citizens United*.”<sup>115</sup> Scholars could say, until very recently, that even as compared to other Court reform efforts, “‘Court packing’ is especially out of bounds. This is part of the convention of judicial independence.”<sup>116</sup>

For opponents of Court packing, the historical condemnation of the 1937 Court packing plan illustrates what they regard as a fundamental principle of American constitutional government. For example, in 2004, Democratic lawmakers celebrated how “President Franklin Roosevelt’s efforts to control the outcome of the Supreme Court by packing it with loyalists was rejected by Congress in the 1930s, thereby preserving the independence of the federal judiciary.”<sup>117</sup> Republican lawmakers have also repeatedly denounced Roosevelt’s Court-packing plan.<sup>118</sup> On this view, the 1937 reform has long been regarded as one of the most disgraceful assaults on the Supreme Court in American history.<sup>119</sup> Opponents of Court packing also emphasize that those who resisted Court packing in 1937—particularly those who stood up to the President and leader of their own party—are seen as having shown tremendous political courage.

Opponents of Court packing argue that the strong bipartisan rejection of it has helped to preserve the Supreme Court’s constitutional role for much of the past century. There has been considerable pressure on this norm in recent years—as evidenced by the fact that the issue has come before this Commission. But one witness during the Commission’s public hearings noted opposition to expansion on the ground that there continues to be “[a] strong norm . . . that the political branches do not threaten or change the Court’s membership because of unhappiness with its decisions.”<sup>120</sup>

For opponents, the United States’ fidelity to this norm has particular significance in light of developments in other parts of the world where manipulation of the composition of the judiciary has been a worrying sign of democratic backsliding.<sup>121</sup> After his election in 1989, for example, Argentinian president Carlos Menem worked to draw greater power into the executive branch, and in 1990 he successfully added four new members to a formerly five-member supreme court.<sup>122</sup> In 2004, Hugo Chavez in Venezuela reined in judicial independence by expanding the size of the constitutional court from twenty to thirty-two.<sup>123</sup> In 2010, Turkish leader Recep Tayyip Erdogan’s populist party consolidated control over the Turkish constitutional court by expanding its membership from ten to seventeen and altering the process by which judges were selected.<sup>124</sup> In 2010, the populist Fidesz Party won a narrow majority in the Hungarian Parliament and quickly went about consolidating power, including through the addition of several new seats to the constitutional court.<sup>125</sup> In 2018, a package of judicial reforms in Poland forced sitting judges off the bench and dramatically expanded the size of the supreme court.<sup>126</sup> By contrast, these critics argue, stable democracies since the mid-twentieth century have retained a strong commitment to judicial independence and have not

tended to make such moves.<sup>127</sup> For these opponents of expansion, it is important that the United States remain firmly in the ranks of democracies standing behind this commitment.

## 2. Safeguarding the Court's Legitimacy

Opponents also cite a concern related to the threat to judicial independence, underscored by witnesses before the Commission: that Court packing would almost certainly undermine or destroy the Supreme Court's legitimacy.<sup>128</sup> Some witnesses testified that the reform would be perceived by many as a partisan maneuver,<sup>129</sup> or a dangerous power grab by one political party—a move that would render the decisions of the resulting (larger) Supreme Court of questionable legitimacy to much of the public.<sup>130</sup> Critics argue that the public is less likely to treat the decisions of a packed Court as authoritative, diminishing the Court's capacity to protect individual rights, equality, or constrain abuses of executive power.

Opponents of Court packing in this moment warn that it would also almost certainly generate a continuous cycle of future expansions. Expanding the Court would be on the agenda of every administration under unified government.<sup>131</sup> One (purportedly modest) estimate of the consequences of expansions as parties gain Senate majorities and add Justices concludes that the Supreme Court could expand to twenty-three or twenty-nine Justices in the next fifty years, and thirty-nine or possibly sixty-three Justices over the next century.<sup>132</sup> Critics worry that these repeated fights over the Court could lead the public to see the Court as a “political football”—a pawn in a continuing partisan game.<sup>133</sup>

Relatedly, critics of Court packing argue that it would further degrade the confirmation process—a process that has already become a partisan spectacle.<sup>134</sup> There would be significant battles over any Justice added by a Court-expansion measure. And past examples of Court packing would easily become an excuse for blocking the confirmation of any nominee.

Critics of Court packing emphasize that it is hard to predict which forces will find themselves at odds with the Court in the future. At some points in our history, the Court has faced resistance from progressive groups—as illustrated by President Roosevelt's effort to pack the Court in 1937. By contrast, in the mid-to-late twentieth and early twenty-first centuries, the Court was repeatedly attacked by conservatives who objected to the Court's jurisprudence on abortion, school prayer, desegregation, protections for criminal defendants, and other civil rights issues.<sup>135</sup> This uncertainty leads even some who fundamentally disagree with aspects of the current Supreme Court's jurisprudence to believe it is better to preserve



the Court’s long-term legitimacy and independence than to open up the Court to be packed by potentially dangerous and even authoritarian political movements going forward.

### 3. Defending Democracy

Opponents of Court packing emphasize that polls show that large majorities of the public oppose expanding the Supreme Court.<sup>136</sup> For that reason alone, they argue, it is difficult to justify Court packing on grounds that it might serve democratic interests. Moreover, to the extent that one goal of Supreme Court reform is to enhance the power of democratic bodies, Court packing would not serve that end. Expansion would leave the Supreme Court’s existing jurisdiction in place, as well as its existing approach to judicial review. An expanded Court could just as easily hold unconstitutional federal and state government conduct as the current Court. In addition, as noted above, given that Court packing could lead to cycles of Court expansion, critics of the measure believe it to be questionable that it would “balance” the Court to more closely align it with popular opinion over time.<sup>137</sup>

Other critics of Court expansion contend that, to the extent it aims to align the outcomes of Court decisions with the policy preferences and values of the country, the reform is misguided and misconceives the role of the Court.<sup>138</sup> They emphasize that no single American public exists and that popular views and opinions are divided across a range of issues the Court addresses. Moreover, opponents contend, some of the Court’s most prominent decisions on subjects ranging from school prayer to criminal justice were quite unpopular,<sup>139</sup> and that decisions that meet with considerable political backlash sometimes become “canonical,” as with *Brown v. Board of Education*.<sup>140</sup> These critics emphasize that, as *Brown* underscores, the Supreme Court may play its best role in our democracy when it polices the political process by working to ensure that the process is more open and responsive to *all* members of society—whether by helping to dismantle racial segregation; invalidating laws that discriminate upon the basis of gender or sexual orientation;<sup>141</sup> or requiring that each person’s vote be given equal weight.<sup>142</sup> Opponents conclude that Court packing would so deeply compromise the Court’s legitimacy and independence as to impede its capacity to serve this vital role.<sup>143</sup> In the long run, they argue, putting judges under the thumb of sitting politicians is unlikely to serve the broader interests of a democratic constitutional order.<sup>144</sup>

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As we noted at the outset of this Part, there is profound disagreement among Commissioners over whether adding Justices to the Supreme Court at this moment in time

would be wise. As a Commission we have endeavored to articulate the contours of that debate as best as we understand them, without purporting to judge the weight of any of the arguments offered in favor or against calls to increase the size of the Court.

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## IV. Other Structural Reforms

At points in history, and in today’s debate over Supreme Court reform, lawmakers and commentators have proposed different schemes for altering the composition of the Court beyond its basic expansion. In this Chapter, we focus on three categories of such reforms: proposals that would rotate the Court’s membership; proposals that would introduce panels into the Court’s decisionmaking; and proposals designed to ensure partisan or ideological balance on the Court.

The first set of reforms would structure the Supreme Court as a shifting or rotating set of nine (or more) Justices from among a larger set of Article III judges. The details of rotation schemes vary, but generally speaking, they would provide that judges rotate between service on the Supreme Court and the lower federal courts. Some subset of these judges would constitute “the Supreme Court” in a given case or controversy, or for designated periods of time.<sup>145</sup>

The second type of reform would have the Justices sit on panels to hear cases. A panel system could take a variety of forms: For instance, one subset of Justices might be entrusted to decide questions falling within the Court’s “original Jurisdiction” and another subset of Justices might be empowered to hear appeals (that is, cases reviewing decisions of the lower courts).<sup>146</sup> Or, one subset of Justices might be entrusted to resolve statutory questions and another subset could be entrusted to decide constitutional issues.<sup>147</sup> Or, the Justices might sit in randomly assigned panels on any given case, much like the judges of the courts of appeals today. Such a panel system could be instituted with the Court as currently constituted with nine Justices, or it could be employed as a way to manage the decisionmaking of an expanded Court. In either case, the system could be designed to enable all of the Justices to sit en banc, or all together, to review the decisions of a single panel when necessary.

The final set of reforms would distribute partisan or ideological influence over the Court’s composition in an attempt to achieve evenhandedness. One such proposal would authorize each President to appoint two Justices to the Court during a four-year term. Another proposal would design the appointments process to ensure that a roughly even number of Justices would

be affiliated with each of the two major political parties. One version of this idea would expand the Court to fifteen seats, with five Justices “affiliated with the Democratic Party” and “five with the Republican Party.”<sup>148</sup> These initial ten Justices would then choose five additional judges from the courts of appeals to serve for a short-term period.<sup>149</sup>

In assessing these reforms, we begin by assessing the constitutional questions they raise. This analysis entails consideration of past efforts in U.S. history to implement similar reforms. We then proceed to consider the potential benefits of these different calls to alter the Court’s structure. We ultimately find that these reforms may present more serious constitutional questions than basic Court expansion, but that they are not all clearly foreclosed by the Constitution. They may, however, offer uncertain practical benefits.

## A. Legality

### 1. Rotation and Panel Systems and the Requirement of “one supreme Court”

The first two reforms—rotation and panel systems—raise similar legal questions. Both proposals, if enacted through statute, face a potential constitutional obstacle in the Constitution’s command in Article III, Section 1, that “[t]he judicial Power of the United States, shall be vested in *one supreme Court*, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>150</sup> The rotation proposals, because they would alter the duties currently performed by the Justices of the Supreme Court, also could give rise to distinct constitutional concerns, both under the “good Behaviour” Clause of Article III, Section 1, and the Appointments Clause of Article II, Section 2.<sup>151</sup> Because some of the proposals for term limits raise similar concerns, we address these particular constitutional issues in Chapter 3. We focus here on the meaning of “one supreme Court.”

As a textual and structural matter, the “one supreme Court” provision requires an apex juridical body that operates in some meaningful sense as a single court and not merely as a scattering of individual jurists occasionally called upon to resolve questions of federal law. The Constitution thus would almost certainly not permit treating all Article III judges sitting at any given time as “*the*” Supreme Court of the United States and either polling that entire mass or randomly sampling individual judges’ votes in order to emerge with a single result, without mutual consultation or collaboration (and with no true opinion of the whole Court) in each case.

The Commission is not prepared, however, to conclude that rotation and panel systems are clearly unconstitutional simply on the ground that each would entail having less than the

full set of sitting Justices making initial decisions in individual cases for the Court as a whole.<sup>152</sup> One could reasonably read the text of Article III to suggest that the Supreme Court must be a unitary apex court whose members sit together in every case the Court takes up on the merits. But the text is also arguably consistent with having a large apex body that is nonetheless organized into panels, at least as long as a mechanism exists to enable en banc hearings, or some other form of review that would ensure that the Court produces a single, authoritative answer to whatever questions of fact or law the “Judges of the supreme Court” are charged with resolving. Such a structure could plausibly be considered “one supreme Court.” The operation of the thirteen United States Courts of Appeals supports this understanding. They are understood to constitute thirteen unitary courts even though each of them typically sits in panels of three, treating each panel’s decision as binding on all future panels of the same circuit unless and until the full circuit court, sitting en banc, reverses that opinion.<sup>153</sup> In contrast, a system under which groups of Justices were drawn, on a bi-weekly or other constantly rotating basis, from among all federal judges would raise more serious constitutional concerns, because it would be difficult to identify any single complement of Justices, sitting en banc or otherwise, to provide review as “one supreme Court.”

The history of the “one supreme Court” language at the Founding and its interpretation over subsequent centuries supports the view that the Court must operate in some meaningful sense as a single court. But nothing in the history the Commission has reviewed surrounding the drafting or adoption of this “one supreme Court” provision reveals the thinking that underlay the creation of one Supreme Court or resolves the question whether the Court could sit in smaller panels or rotating groups, subject to a potential en banc review process.

During the Constitutional Convention of 1787, James Madison initially proposed “that a National Judiciary be established to consist of *one or more supreme tribunals*, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services. . . .”<sup>154</sup> But a few days later, the Convention opted for a “national judiciary . . . to consist of *One supreme tribunal*, and of one or more inferior tribunals.”<sup>155</sup> Subsequent versions of the constitutional text then consistently referred to “*one* supreme Court.”<sup>156</sup> Historians debate the significance of this textual change.<sup>157</sup> There is evidence that at least some Framers anticipated that the Supreme Court could divide into panels to complete its work more efficiently, while others anticipated that the Court would only hear cases as a single unit. For example, later in the Convention, when the participants debated how Congress could address workload concerns in the judiciary, Madison argued that Congress could simply add more judges.<sup>158</sup> Gouverneur

Morris responded that such an approach might work for the inferior federal courts but not for the Supreme Court, because “[a]ll the business of a certain description whether more or less must be done in that single tribunal.”<sup>159</sup>

In the nineteenth century, Congress on a few occasions considered a rotation or a panel system for the Supreme Court. Each time, some lawmakers supported the scheme in question and others cast doubt on its constitutionality. In 1869, for example, when Congress increased the size of the Supreme Court from seven to nine members, it also considered expanding the size of the lower federal judiciary.<sup>160</sup> But one lawmaker suggested an alternative: Congress could add sufficient personnel to the federal judiciary by greatly expanding the Supreme Court (whose members were still at the time expected to serve in part as lower circuit court judges). Under the proposed system, the Court would consist of eighteen members; nine members would serve on the Supreme Court at any given time, while the other nine would serve as circuit court judges (“riding circuit”).<sup>161</sup> That is, the judges would rotate between the Supreme Court and the circuit courts.

Several lawmakers objected that this rotation system would be inconsistent with the constitutional requirement for “one supreme Court.”<sup>162</sup> “The Constitution establishes the Supreme Court. . . . [Y]ou have no right to say that half of those judges shall take no part in the adjudications of that court.”<sup>163</sup> Opponents also worried that this system might lead to instability in the law: “[A] court that was varying every year could never have stable decisions upon which the people of the country could rely. . . .”<sup>164</sup> Supporters of the measure countered that Congress had the power to say how many Justices could speak for the Court as a whole; after all, Congress had long established a quorum for the Supreme Court.<sup>165</sup> Moreover, supporters argued, past precedents had not proven unstable simply because they were decided by less than the full Court (but still a quorum).<sup>166</sup> Opponents countered that establishing a quorum—*permitting* fewer than the full number to issue a decision—was very different from *prohibiting* some number of Justices from serving on the Supreme Court at any given time, if they so chose.<sup>167</sup> Ultimately, the proposal for an eighteen-member Court died in Congress.<sup>168</sup>

A few decades later, Congress considered a proposal for a panel system. The issue arose as lawmakers sought to address a caseload crisis at the Supreme Court. The Court’s appellate jurisdiction was still largely defined by the Judiciary Act of 1789, which required it to review every case properly before it on appeal.<sup>169</sup> By 1890, the Court’s mandatory appellate docket had swelled to over 1,800 cases, only four or five hundred of which it could dispose of in a given year.<sup>170</sup> To address this caseload crisis, Congress considered a number of options. Senator William Evarts proposed a plan to create a scheme of federal appellate courts and to

give the Supreme Court the discretion to review certain classes of cases via writs of certiorari. A version of this proposal was ultimately enacted as the Judiciary Act of 1891.<sup>171</sup>

During the debates over this 1891 measure, several members of the Senate Judiciary Committee proposed that the Court hear cases in panels. Under the proposal, the Court would hear most appeals in three-Justice panels, but the full Court would resolve federal constitutional questions and (at its discretion) other cases of “unusual difficulty or importance.”<sup>172</sup> Observing that such panel systems existed in some states and other countries, the Senators asserted that the Supreme Court could likewise “dispose speedily of all causes that may be upon its calendar . . . by acting in separate divisions of three or more [J]ustices,” all hearing cases “at the same time.”<sup>173</sup>

The Senators argued that Congress could enact the proposal as part of its power to make exceptions and regulations to the Supreme Court’s appellate jurisdiction.<sup>174</sup> Much like their predecessors in 1869, they pointed out that Congress had long exercised the power to declare how many Justices constituted a quorum and, thus, how many Justices were required to speak for the Court as a whole. Congress could, by extension, direct the Court to decide cases in panels.<sup>175</sup> Nor, according to the proponents, was such an arrangement at odds with the constitutional requirement for “one supreme Court.” The Justices would “proceed at the same time to hear arguments and pronounce decisions, not as three separate Supreme Courts, but as one Supreme Court, exercising its appellate jurisdiction in a twofold or threefold manner at the same time.”<sup>176</sup> The Senators added that, if a panel was presented with “a question of extraordinary difficulty or high consideration, . . . provision should be, and can be, made for the matter being heard before all.”<sup>177</sup>

Other lawmakers were skeptical of the reform. Some insisted that a panel system would violate the constitutional requirement for one Supreme Court. “The power of Congress [to regulate the Court’s appellate jurisdiction] can not be held to extend to legislation which would break up the Supreme Court into fragments and substitute several courts with power to hear and finally determine causes for the one Supreme Court provided by the Constitution.”<sup>178</sup> Some lawmakers also worried that a decision rendered by less than the full Court would lack legitimacy with the public.<sup>179</sup> Ultimately, the proposal was rejected by the Senate.<sup>180</sup>

Congress does not appear to have debated the validity or legality of rotation or panel systems after these various efforts at reform. But on several occasions, when Congress has considered reforms to deal with the Supreme Court’s capacity constraints, individual Justices have noted—and expressed concerns about—the possibility of splitting the Court into subsets.

For example, in the 1920s, Chief Justice Taft insisted that Congress “could not adopt” the panel approach that existed in some states, “because our Constitution provides that there shall be one Supreme Court, and it is doubtful whether you could constitutionally divide the court into two parts.”<sup>181</sup> Likewise, in responding to President Roosevelt’s 1937 Court-packing plan, Chief Justice Hughes expressed doubts about the wisdom and the constitutionality of a panel system. He argued that the proposed expansion would “impair [the Court’s] efficiency so long as the Court acts as a unit” but noted that a decision by less than the full Supreme Court may not be seen as legitimate or consistent with Article III.<sup>182</sup> In the 1970s and 1980s, Congress debated reforms that eventually led to the Judiciary Act of 1988, which granted the Supreme Court the discretion to decide whether to review virtually every appeal.<sup>183</sup> During the debates, Chief Justice Burger asserted that a panel system was not a viable alternative: “Such a change would appear to alter the basic concept of ‘one supreme Court’ under Article III.”<sup>184</sup>

It is arguably of some significance that individual lawmakers and Justices in the past have questioned the legality of structural reforms such as rotation and panel systems; these views underscore that the claims should be taken seriously. But lawmakers have reached different conclusions, and the statements of the Justices made outside of the context of judicial opinions, and in favor of preserving the existing structure, are not authoritative in establishing the meaning of Article III. Ultimately, we cannot conclude that the Constitution precludes rotation and panel reforms, at least as long as processes exist to ensure that a juridical body operates in some meaningful sense as a single “Court.”

## 2. Proposals to Distribute Partisan or Ideological Influence

Reforms designed to secure partisan or ideological balance on the Court present at least two potential constitutional difficulties. First, such reforms may be in some tension with core First Amendment freedoms of political speech, association, and thought, as they may be seen as locking the major parties as they exist today into control over Court appointments. Second, proposals that would have the Justices select part of the Court’s membership would seem to be on a collision course with the Constitution’s clear specification in Article II, Section 2, of how “Judges of the supreme Court” are to be selected—namely, by presidential nomination and Senate confirmation.<sup>185</sup> Article II does not permit “Judges of the supreme Court” to be selected by other members of that Court.

### B. The Value of Rotation, Panel, and Balance Systems

The rotation and panel proposals might enhance the Court’s operations by injecting vitality and diversity of various kinds into the Court or better enabling the Court to hear greater

numbers of cases. These reforms also would reduce the power of any single individual on the Court, though by themselves they would not meaningfully reduce the power of the Court as a whole within the U.S. system of constitutional government. The proposals aimed more directly at distributing the partisan or ideological affiliations and identities of the Justices could help reduce the stakes of the nomination and confirmation processes and in turn make the Court less of a source of political acrimony, particularly proposals that would give each President a specific number of appointments each term. These types of reforms also squarely acknowledge the political implications of the Court’s decisionmaking, but they do not directly address the scope of the Court’s power. Ultimately, however, though these proposals may have real benefits, those benefits may not be sufficiently significant or assured to justify the dramatic reconceptualization of the Article III judiciary they would require.

## 1. Policy Analysis of Rotation and Panel Proposals

*a. Rotation Proposals.* Proposals that would call for the rotation of Justices on and off the Supreme Court involve changing the membership of the Court on some sort of semi-regular basis; judges would alternate between actively hearing the cases of the Supreme Court and serving on the courts of appeals. Justices would be drawn according to a sorting process from a considerably larger collection of Article III judges—a set that could include all Article III judges or a prescribed subset of those judges. That larger set of Justices would be formally designated Supreme Court Justices serving during good behavior from the time of their appointment, but only a smaller subset of these judges would function as the Supreme Court of the United States in any given “case” or “controversy.”<sup>186</sup>

By expanding the number of Justices who would sit on the Court, rotation proposals reduce the power of any single individual over the outcomes of the Court’s cases. Rotation would thus address the need for litigants to gear their strategies toward the predilections of a single Justice perceived as the swing vote and would reduce the power of a single swing voter on the Court (though not necessarily a moderate swing “bloc”) from shaping the trajectory of the Court’s doctrine.<sup>187</sup> In addition, by incorporating a greater number of judges, these proposals could help regularly rejuvenate the Court by consistently introducing greater diversity of perspective, interpretive approach, and professional and geographic background, among other things, into its decisionmaking. Taken together, these features of rotation systems might enhance the quality of the Court’s decisionmaking or the Court’s legitimacy in the eyes of the public by extending decisionmaking power over matters of great consequence beyond the same nine individuals, though the Court would still be composed of Article III judges with



life tenure. And rotation might lower the stakes of any single confirmation and thus help to ameliorate the partisan warfare that characterizes the nomination and appointment process.<sup>188</sup>

Each of these potential benefits, however, may well be offset by significant costs. A rotation system could introduce inefficiencies into the Court's work or otherwise undermine the supervisory and unifying functions it performs within the U.S. legal system.<sup>189</sup> The utility of these proposals would depend in part on the size of the pool from which the Justices would be drawn; a pool that is too small or chosen by partisan actors would produce little advantage over the status quo. But the larger that pool, the more unwieldy and unstable the Supreme Court's decisionmaking processes would become. A regularly fluctuating Court might also undermine the collegiality and familiarity that enables the Justices to manage contentious cases, including the resolution of hard cases through compromise. A lack of consistency in the Court's personnel could compromise its ability to provide guidance to lower courts and state courts as the result of more rapid doctrinal change on the Court. Most importantly, a rotation system that does not otherwise address the power of the Court could well heighten the stakes of confirmation processes for appellate judges.

Proponents of rotation contend, however, that Justices under this model would prioritize restraint and narrow decisionmaking for fear that a subsequent collection of Justices might overrule extreme or outlying precedent,<sup>190</sup> which in turn would lower the stakes of Supreme Court judgments and therefore judicial confirmations. But it is not clear that having a larger Court whose personnel churns will lead the Court to accept fewer cases of great import or otherwise exercise the power of judicial review more modestly.

*b. Panel Proposals.* The need for the Justices to sit on panels could well arise as a consequence of other reform proposals that would lead to significant expansion of the Court's numbers. If an initial attempt at Court expansion were to prompt future expansions as the result of partisan competition in the political branches, or if the transition to a system of term limits were to temporarily expand the size of the Court, there could be too many Justices to efficiently hear cases in all instances. Size would thus necessitate panels, with a potential en banc procedure for resolving significant disputes or conflicts between panels in order to provide adequate guidance to the lower courts, as discussed in Chapter 3 of this Report.

The question then becomes whether there would be virtues in the first instance in establishing a panel system. It is possible that this model would introduce some inefficiencies into the Court's decisionmaking. But constitutional and high courts in other jurisdictions function effectively on this model, whether by assigning particular types of cases to different

panels or to different courts (constitutional vs. statutory cases, or criminal vs. civil cases, for example).<sup>191</sup> The Commission heard persuasive testimony suggesting that some apex courts in other nations manage to function with panels or layers, suggesting that complaints about the inherent infeasibility or inoperability of such systems are overdrawn.<sup>192</sup>

A Court structured in this way would have to be sensitive to the need for the clear development of doctrine so as to provide adequate supervision of the lower courts. The often fractured decisionmaking of the U.S. Supreme Court underscores that even the current composition can produce inefficiencies, however; such challenges might simply be an unavoidable aspect of any system in which a set of individuals who hold different theories of interpretation and of the Constitution's meaning is tasked with deciding complex and novel cases. A panel system that accompanied an increase in the number of Justices on the Court would certainly expand perspectives and representation on the Court, as discussed in Part III.A, though the extent of these benefits would be limited by the need to keep the overall size of the Court reasonable and manageable. Structuring panels along substantive lines might also produce specialization benefits, which might be especially useful when the Court deals with technical matters whose resolution would benefit from particularized expertise. And yet, the current Court's non-specialized character is itself a virtue; at least in theory, it facilitates fresh and open judgment about cases. More importantly, substantive areas of the law intersect and are deeply interrelated; it would be difficult, for example, to bifurcate constitutional and statutory analysis, since constitutional presumptions frequently inform how courts evaluate statutes.

## 2. Proposals to Distribute Partisan or Ideological Influence

As the Commission heard from numerous witnesses, and as we discuss throughout this Report, calls for reform have been motivated in significant part by the perceived mismatch between the ideological composition of the Court and the views of the public as reflected in election outcomes at particular points in time.<sup>193</sup> The fact that the Court's membership is often determined by the contingencies of the Justices' retirement or death exacerbates this concern and raises the stakes of the nomination and confirmation processes. It is not surprising, then, that some reform proposals would attempt to ameliorate this problem by distributing appointments more predictably and by trying to ensure rough alignment between the Court and electoral majorities.

One such proposal, closely related to the term limits proposal and discussed in Chapter 3, would give each President two nominations per term.<sup>194</sup> This proposal could reduce the

partisan rancor of the confirmation process and lower the stakes of appointments by ensuring that a party controlling the White House need not wait for happenstance to be able to influence the Court. This proposal also would address the anomaly of some Presidents appointing as many as three Justices in one term and others having no opportunities to make appointments in the same amount of time. As noted in Chapter 3, this particular benefit would depend on a functional confirmation process to ensure that each President could in fact make two nominations. And ultimately this sort of proposal is most productively considered alongside term limits; unlike a system of term limits, which could eventually stabilize at a particular number of Justices, this proposal could lead to an irregularly expanding and contracting Court.

The other type of proposal that would introduce partisan or ideological balance onto the Court as a matter of design would require an even or roughly even number of Justices with affiliations from the two major political parties, on the model of independent commissions, with additional judges to be chosen from the circuit or district courts by the party-affiliated Justices.<sup>195</sup> This approach—sometimes called the balanced bench—might ensure some form of ideological even-handedness, and therefore moderation, which could help to keep the outcomes of Court decisions in line with public opinion. This form of balance could help induce compromise among the Justices, especially under those proposals that would set the size of the Court at an even number.<sup>196</sup> These virtues might in turn temper the confirmation wars by ensuring that both parties have roughly equal influence over the Court.

But it is far from clear that ideological balance is in and of itself a desirable goal. If there is no such balance in the political branches, requiring such balance on the Court could make the Court insufficiently reflective of or connected to electoral outcomes. In other words, if the goal were to ensure that the Court roughly reflects the public will and exhibits a degree of responsiveness to the political composition of the people at a given time, artificial balance between the two political parties would not achieve that objective. A balanced bench could be preferable to the status quo for those observers of the Court who perceive a significant mismatch between its composition today and the body politic.<sup>197</sup> But institutionalizing such a requirement would block farther-reaching change.

What is more, an explicit requirement that Justices be affiliated with particular parties would constrain the pool of potential nominees and reinforce the notion that Justices are partisan actors. Even if we accept the fact that the Justices' judgments have political implications and ideological motivations, this close identification of Justices with political party could undermine the perception of judicial independence, which is important to the acceptance of and compliance with the Court's decisions. It also seems likely that a "balanced

bench” would continue to produce a significant number of divided results in contested cases, even on an evenly divided Court, keeping the Court at the center of charged political debates, for better or worse. Unless the types of cases the Court hears were to change markedly, its decisions would continue to have major political significance. Even the sort of more moderated outcomes that could result from these balancing proposals would still keep the Court central to political life.

## Endnotes: Chapter 2

- <sup>1</sup> U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).
- <sup>2</sup> See Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73.
- <sup>3</sup> See Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89, 89.
- <sup>4</sup> See Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.
- <sup>5</sup> See Act of Feb. 24, 1807, ch. 16, § 5, 2 Stat. 420, 421.
- <sup>6</sup> See Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176, 176.
- <sup>7</sup> At the time, the federal judiciary consisted of district court judges and Supreme Court Justices. A federal district judge would sit alongside a Supreme Court Justice (riding circuit) to constitute a circuit court. For a description of this system, see Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1390-91 (2006) (“Beginning in 1789, each circuit court was staffed with two Supreme Court Justices and one local district judge. In 1793, the system was reformed so that only one Justice . . . was required.”); David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1714-26 (2007). Congress abolished the circuit riding practice in 1911. See Judicial Code of 1911, ch. 231, § 289, 36 Stat. 1087, 1167.
- <sup>8</sup> See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 33-37, 47-49 (Transaction Publishers 2007) (1928).
- <sup>9</sup> See Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2759-63 (2020).
- <sup>10</sup> See *Id.* at 2761-63.
- <sup>11</sup> See Mark Graber, “No Better Than They Deserve:” *Dred Scott and Constitutional Democracy*, 34 N. KY. L. REV. 589, 604 (2007) (“Federal law . . . structured the federal judicial system in ways that guaranteed that a majority of the justices on the Supreme Court would be citizens from slave states.”); *Id.* at 609-10 (“The Court that decided *Dred Scott* had a southern majority because Jacksonians in the executive and legislative branches of the government passed legislation placing five of the nine federal circuit court districts entirely within the slave states, and presidents who depended on southern votes ensured that one representative from each federal circuit district sat on the Supreme Court.”); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 514 (2002) (“[T]o ensure the protection of Southern regional interests . . . the slave states were divided into five circuits, meaning that they would enjoy a majority on the Supreme Court.”).
- <sup>12</sup> The 1801 law established a system of lower federal circuit courts to handle appeals (in lieu of the circuits staffed by a Supreme Court Justice and a federal district judge). See Judiciary Act of 1801, §§ 7, 27, 2 Stat. 89, 90, 98.
- <sup>13</sup> CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 189 (Beard Books ed. 1999) (1922) (noting Jefferson viewed this provision “as aimed directly at himself and as an intentional diminution of his powers”).
- <sup>14</sup> See Act of Apr. 29, 1802, ch. 31, §§ 4, 5, 2 Stat. 156, 157-58.
- <sup>15</sup> The tight connection between the number of circuits and the number of Justices had begun to break down. In 1855, Congress created a circuit court for California, without creating a new position on the Supreme Court. JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* 133-34 (2012). But when Congress added a Justice in 1863, it transformed the California circuit into the Tenth Circuit and gave the new Justice the job of serving on that court. *Id.* at 138; see also Braver, *supra* note 9, at

2768-73 (arguing that the 1863 example can be seen as “the last example of the circuit-riding system at work” but asserting that subsequent changes were not tied to the circuit system).

<sup>16</sup> 60 U.S. (19 How.) 393 (1857); see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 415-17 (1998).

<sup>17</sup> See Act of March 3, 1863, ch. 100, § 1, 12 Stat. 794, 794; CROWE, *supra* note 15, at 138-39, 143-46.

<sup>18</sup> See Judiciary Act of 1866, ch. 210, 14 Stat. 209, 209. As in 1802, Congress did not terminate the position of any Justice but instead provided that the next three vacancies would not be filled. *Id.*

<sup>19</sup> See 3 WARREN, *supra* note 13, at 143-45. The reduction to seven Justices was not tied to the then-existing circuit court system; see Braver, *supra* note 9, at 2785 (“Reducing the number of Supreme Court Justices meant that the circuit courts would not be adequately staffed.”).

<sup>20</sup> See Circuit Judges Act of 1869, ch. 22, 16 Stat. 44, 44; 3 WARREN, *supra* note 13, at 223.

<sup>21</sup> See CROWE, *supra* note 15, at 153-59 (noting the 1866 and 1869 changes are often seen as partisan attempts to manipulate the Court’s size but urging that the laws had more neutral purposes).

<sup>22</sup> There has been a great deal of scholarship on President Roosevelt’s Court-packing plan. For a few of the accounts, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 217-29 (2009); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 82-162 (1996); JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010).

<sup>23</sup> See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 317 (1936) (invalidating the Bituminous Coal Conservation Act); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542-51 (1935) (holding unconstitutional provisions of the National Industrial Recovery Act). These decisions by the Court also followed decades in which the Court struck down numerous laws enacted to protect workers, consumers, and the public. See, e.g., *Lochner v. New York*, 198 U.S. 45, 64-65 (1905) (invalidating a New York state maximum-hour and minimum-wage law regulating the baking industry on grounds that it violated the freedom to contract); *Adkins v. Child. ’s Hosp. of D.C.*, 261 U.S. 525, 561-63 (1923) (holding that a federal minimum-wage law for women was unconstitutional because it violated the freedom of contract and did not advance a compelling state interest).

<sup>24</sup> In 1936, Roosevelt won every state in the electoral college other than Maine and Vermont, with 61% of the popular vote, and Democrats won an overwhelming majority in Congress. E.g., *Presidential Commission on the Supreme Court of the United States* 6 (June 25, 2021) (written testimony of Laura Kalman, University of California, Santa Barbara) [hereinafter Kalman Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Kalman-06.25.2021.pdf> (“Roosevelt had won every state except Maine and Vermont and nearly 61% of the popular vote. If Americans had voted against Herbert Hoover in 1932, they had given FDR a mandate in 1936, as in the 1934 midterm elections.”).

<sup>25</sup> See Message from the President of the United States: A Recommendation to Reorganize the Judicial Branch of the Federal Government, H.R. DOC. NO. 75-142, at 9-10 (1937).

<sup>26</sup> See Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 269-73 (2012).

<sup>27</sup> *Id.* at 273 (quoting Memorandum from Warner W. Gardner, Att’y, Dep’t of Just., to Stanley Forman Reed, U.S. Solic. Gen. 56-57, 65 (Dec. 10, 1936)).

<sup>28</sup> See H.R. DOC. NO. 75-142, at 1-3 (“The Judiciary has often found itself handicapped by insufficient personnel[.]”).

<sup>29</sup> See *Franklin D. Roosevelt, Fireside Chat (Mar. 9, 1937)*, AM. PRESIDENCY PROJ., <https://www.presidency.ucsb.edu/documents/fireside-chat-17> (last visited Nov. 14, 2021).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Reorganization of the Federal Judiciary, Part 1: Hearing Before the S. Comm. on the Judiciary, 75th Cong.* 38 (1937) (statement of Robert H. Jackson, Assistant Att’y Gen. of the United States).

<sup>33</sup> *Id.* at 40.

<sup>34</sup> *Id.* at 41.

<sup>35</sup> Kalman Testimony, *supra* note 24, at 1-3 (noting that, although Roosevelt’s Court fight has often “been portrayed as the idiotic brainchild of a hubristic FDR destined from its inception for defeat, . . . the *history* of the Court fight tells a different story” and Roosevelt could reasonably have anticipated some success); *see also* Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR’s Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1148-49 (1987) (finding that public opinion did not turn decisively against Roosevelt’s proposal until the Court showed greater support for the New Deal); William D. Blake, “Justice Under the Constitution, Not Over It”: *Public Perceptions of FDR’s Court-Packing Plan*, 49 PRESIDENTIAL STUD. Q. 204, 205 (2019) (finding broad support among the general public for more liberal constitutional rules in 1937 but less support for Court-expansion as a means for getting that outcome).

<sup>36</sup> *See* LEUCHTENBURG, *supra* note 22, at 137-39; SHESOL, *supra* note 22, at 467; 5 Historical Statistics of the United States 201, tbl. Eb296-308 (Susan B. Carter et al. eds., 2006) (showing that the Democrats controlled the House 331–89 and the Senate 76–16 over Republicans in 1937–38).

<sup>37</sup> Kalman Testimony, *supra* note 24, at 17.

<sup>38</sup> LEUCHTENBURG, *supra* note 22, at 138; SHESOL, *supra* note 22, at 315 (“The idea of giving any president, particularly Roosevelt, the authority to remake the Supreme Court virtually overnight was abhorrent to Senate progressives.”).

<sup>39</sup> Letter from Charles Evans Hughes, C.J., to Burton K. Wheeler, U.S. Sen. (Mar. 21, 1937), *reprinted in* S. REP. NO. 75–711, app. c at 40 (1937) [hereinafter Hughes Letter].

<sup>40</sup> *See also* Kalman Testimony, *supra* note 24, at 21; Laura Kalman, *Court Packing and Its Legacy* 498 (2021) (unpublished manuscript) (on file with author) (observing that for much of the spring and summer of 1937, it appeared that Roosevelt might succeed to some degree in enlarging the Court).

<sup>41</sup> *See* LEUCHTENBURG, *supra* note 22, at 135 (“In the first week, numbers of Democratic Senators announced themselves for the bill.”); SHESOL, *supra* note 22, at 514.

<sup>42</sup> *See* LEUCHTENBURG, *supra* note 22 at 135, 137-54 (“Despite all the antagonism, though, it still seemed highly likely in the last week of March [1937] that FDR’s proposal would be adopted.”).

<sup>43</sup> *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937) (upholding the National Labor Relations Act); Steward Mach. Co. v. Davis, 301 U.S. 548, 578-98 (1937) (upholding provisions of the Social Security Act); Helvering v. Davis, 301 U.S. 619, 639-46 (1937) (same); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 390-400 (1937) (upholding a state minimum wage law for women).

<sup>44</sup> *Compare* JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* 141-43 (1938) (“It seems probable . . . that all the justices realized that their only chance to save the Court lay in more self-reversals.”), *and* LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 19 (1996) (arguing that the Court “blinked” in response to the Court-packing plan), *with* BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 3-7 (1998) (challenging the view that the Court’s decisions were a “political response to political pressure”), *and* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, Ch. 8, § 8-6, 449 n.18 (1978) (casting doubt on the myth that a Justice changed his vote in response to the 1937 Court-packing plan).

<sup>45</sup> *See* FRIEDMAN, *supra* note 22, at 226 (“The Court’s apparent change of direction [in *West Coast Hotel v. Parrish* and two weeks later in *NLRB v. Jones & Laughlin Steel Corp.*] was a major turning point for the plan, and everyone knew it.”); LEUCHTENBURG, *supra* note 22, at 143 (arguing that Justice “Roberts’ ‘somersault’ [in *West Coast Hotel*] gravely damaged the chances of the Court plan.”).

<sup>46</sup> *See* S. REP. NO. 75-711, at 9 (1937); SHESOL, *supra* note 22, at 467.

<sup>47</sup> S. REP. NO. 75-711, at 23.

<sup>48</sup> *Id.* at 3, 8.

<sup>49</sup> *Id.* at 14.

<sup>50</sup> Kalman, *supra* note 40, at 417-19.

- <sup>51</sup> See LEUCHTENBURG, *supra* note 22, at 147-48 (“The prospects for enacting this new bill appeared very promising.”).
- <sup>52</sup> See SHESOL, *supra* note 22, at 481-89, 497-500.
- <sup>53</sup> LEUCHTENBERG, *supra* note 22, at 160; Chapter 1, *supra*; see also Shesol, *supra* note 22, at 525 (observing of the Court-packing plan that it was “not the cause, but the catalyst that helped fracture the New Deal coalition; reawaken the GOP; unite conservatives across party lines; and shatter the myth of FDR’s omnipotence.”).
- <sup>54</sup> Garrett Epps & Ganesh Sitaraman, Essay, *Supreme Court Reform and American Democracy*, Yale L.J.F. 821, 822 (2021); see also Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 269-87 (2017); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 505-17, 538-44 (2018).
- <sup>55</sup> See 99 CONG. REC. 1106 (1953) (statement of Sen. John Butler, R-MD).
- <sup>56</sup> *Id.*
- <sup>57</sup> 100 CONG. REC. 6256 (1954) (statement of Sen. John Butler, R-MD).
- <sup>58</sup> 99 CONG. REC. 1106 (1953) (statement of Sen. John Butler, R-MD) (emphasizing that the amendment would “plug[] the loopholes in the Constitution’s protection for the Supreme Court”); *Id.* at 1108 (statement of Sen. Russell Long, D-LA) (“Undoubtedly, one of the weak links is the possibility that the Supreme Court could be packed. . . . [T]hat is one loophole which we should close in order to protect ourselves in the future.”).
- <sup>59</sup> See 100 CONG. REC. 6256 (1954) (statement of Sen. John Butler, R-MD).
- <sup>60</sup> *Id.*
- <sup>61</sup> See *id.* at 6347 (showing that the Senate voted 58 to 19 in favor of the amendment). A constitutional amendment requires a two-thirds supermajority vote in the House of Representatives and the Senate, and then ratification by three-fourths of the states. U.S. CONST. art. V.
- <sup>62</sup> See C.P. Trussell, *Court Amendment Tabled in House*, N.Y. TIMES, Aug. 4, 1954, at 11.
- <sup>63</sup> 100 CONG. REC. 10,454 (1954) (statement of Rep. Emmanuel Celler, D-NY). A similar objection was raised in the Senate. *Id.* at 6342 (statement of Sen. Thomas Hennings, D-MO) (arguing that Congress might in the future decide that the Supreme Court should be either larger or smaller, depending on its workload, and for that reason a constitutional amendment was “undesirable”).
- <sup>64</sup> Judiciary Act of 2021, H.R. 2584, 117th Cong. (2021); H.R.J. Res. 95, 116th Cong. (2020).
- <sup>65</sup> Kalman Testimony, *supra* note 24, at 28.
- <sup>66</sup> U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).
- <sup>67</sup> See U.S. CONST. art. I, § 8, cl. 18 (“[The Congress shall have power] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).
- <sup>68</sup> See *id.*
- <sup>69</sup> Franklin Delano Roosevelt, *The Fight Goes On*, COLLIER’S WKLY., Sept. 20, 1941, at 16, 37 (also arguing that the approach “seemed . . . to have the best chance of passing both Houses of the Congress most quickly”).
- <sup>70</sup> *Presidential Commission on the Supreme Court of the United States 2*, 4 (July 20, 2021) (written testimony of Randy E. Barnett, Georgetown University Law Center), [hereinafter Barnett Testimony] <https://www.whitehouse.gov/wp-content/uploads/2021/07/Barnett-Testimony.pdf> (arguing that “partisan court packing” is unconstitutional, because “seeking a partisan advantage on the Supreme Court is not a legitimate end” under the Necessary and Proper Clause). Most scholars who have considered the issue, by contrast, have concluded that Congress has broad power to modify the Court’s size. See, e.g., AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 354-55 (2012) (“[I]f Congress has a sincere good-government reason for altering the Court’s size, it is hard to see why Congress’s views should not prevail, even if the Court sincerely disagrees about what size would be best for achieving good government . . . Even if . . . Congress was retaliating against what it perceived as Court abuses—say, a string of dubious rulings



and judicial overreaches—the legislature should still prevail.”); Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1062-63 (2014); Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2134 (2002); *Presidential Commission on the Supreme Court of the United States* 19 (Aug. 9, 2021) (written testimony of Michael J. Gerhardt, University of North Carolina at Chapel Hill) (“There is little doubt about the constitutionality of the Congress’s authority to expand or contract the size of the Court.”); *Presidential Commission on the Supreme Court of the United States* 3 (Aug. 9, 2021) (written testimony of G. Edward White, University of Virginia School of Law) (“There is no question that Congress can constitutionally change the size of the Court . . .”).

- <sup>71</sup> *But see* Mike Rappaport, *Is Court Packing Constitutional?*, ORIGINALISM BLOG (Nov. 9, 2020), <https://originalismblog.typepad.com/the-originalism-blog/2020/11/is-court-packing-constitutionalmike-rappaport.html>.
- <sup>72</sup> The witness recognized this point but asserted that the political motives were “suppressed” in 1807 and 1837, such that these Court reforms were valid. Barnett Testimony, *supra* note 70, at 4 (asserting that though “political motives may have existed with each change to the number of justices” in 1807 and 1837, “these motives were suppressed and there was a demonstrable justification for altering the number of judges as the number of states expanded”).
- <sup>73</sup> *See* HOWARD GILLMAN, MARK A. GRABER, & KEITH E. WHITTINGTON, 1 AMERICAN CONSTITUTIONALISM 191-92, 248-51 (2d ed. 2017); *supra* notes 2-10 and accompanying text.
- <sup>74</sup> *See, e.g.*, Jean Edward Smith, *Stacking the Court*, N.Y. TIMES (July 26, 2007), <https://www.nytimes.com/2007/07/26/opinion/26smith.html> (“If the current five-man majority persists in thumbing its nose at popular values, the election of a Democratic president and Congress could provide a corrective.”); Jonathan Turley, *A Bigger, Better Supreme Court: The Case for Reform*, GUARDIAN (June 27, 2012), <https://www.theguardian.com/commentisfree/2012/jun/27/bigger-better-supreme-court-reform>; Mark Tushnet, “*For a Generation*”? BALKINIZATION (July 5, 2017), <https://balkin.blogspot.com/2017/07/for-generation.html> (“Suppose Democrats regain control of the Presidency and Congress after the 2020 elections. . . . One item on their legislative agenda might be expanding the Supreme Court to eleven (or more).”).
- <sup>75</sup> Jeff Shesol, *Would Trump Consider a Court-Packing Scheme?*, NEW YORKER (Dec. 5, 2017), <https://www.newyorker.com/news/news-desk/would-trump-consider-a-court-packing-scheme>; *see also* Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), <https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal>.
- <sup>76</sup> Benjy Sarlin & Lauren Egan, *The Hot New Dem Plan to Score Policy Wins: Change the Rules of the Game*, NBC NEWS (Mar. 16 2019, 7:31 AM EDT), <https://www.nbcnews.com/politics/2020-election/hot-new-dem-plan-score-policy-wins-change-rules-game-n983456>.
- <sup>77</sup> *2020 Democratic Party Platform*, DEMOCRATIC PARTY 58 (2020), <https://democrats.org/where-we-stand/party-platform>.
- <sup>78</sup> Barbara Sprung, *Biden Says He’s ‘Not A Fan’ of Expanding the Supreme Court*, NPR (Oct. 13, 2020), <https://www.npr.org/2020/10/13/923213582/biden-says-hes-not-a-fan-of-expanding-the-supreme-court> (quoting then-candidate Biden as saying: “I’ve already spoken: I’m not a fan of court packing, but I don’t want to get off on that whole issue. I want to keep focused.”). Later, though he called the court system “out of whack,” he noted that “the last thing we need to do is turn the Supreme Court into just a political football, whoever has the most votes gets whatever they want.” Sam Gringlas, *Asked About Court Packing, Biden Says He Will Convene Commission to Study Reforms*, NPR (Oct. 22, 2020), <https://www.npr.org/2020/10/22/926607920/asked-about-court-packing-biden-says-he-will-convene-commission-to-study-reforms>. In a tweet, then-President Trump said that court-packing would “permanently destroy the Court.” *Donald J. Trump, Tweets of October 11, 2020*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/tweets-october-11-2020> (last visited Sept. 19, 2021).
- <sup>79</sup> *See Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Christopher Kang, Demand Justice) [hereinafter Kang Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Kang-Testimony.pdf> (“In the past five years, Republicans have used their political

power to: [c]hange the size of the Supreme Court for more than a year by stealing a Supreme Court seat from President Obama in 2016[;] . . . [u]nilaterally change the Senate Rules to confirm Neil Gorsuch[;] . . . [d]iscard multiple credible allegations of sexual assault and perjury against Brett Kavanaugh and confirm him without legitimate investigation, and[;] [d]eny the will of the voters and confirm Amy Coney Barrett . . .”); *Presidential Commission on the Supreme Court of the United States* 12-13 (July 20, 2021) (written testimony of Michael J. Klarman) [hereinafter Klarman Testimony] (discussing the confirmation tactics of the Republican-controlled Senate).

<sup>80</sup> Adam Liptak & Sheryl Gay Stolberg, *Shadow of Merrick Garland Hangs Over the Next Supreme Court Fight*, N.Y. TIMES (June 11, 2021), <https://www.nytimes.com/2020/09/19/us/ginsburg-vacancy-garland.html>.

<sup>81</sup> See Lisa Mascaro, *Barrett Confirmed as Supreme Court Justice in Partisan Vote*, ASSOCIATED PRESS (Oct. 26, 2020), <https://apnews.com/article/election-2020-donald-trump-virus-outbreak-ruth-bader-ginsburg-amy-coney-barrett-82a02a618343c98b80ca2b6bf9eafe07>; David Cohen & Josh Gerstein, *Justice Ruth Bader Ginsburg Dies at 87*, POLITICO (Sept. 18, 2020), <https://www.politico.com/news/2020/09/18/justice-ruth-bader-ginsburg-034990>.

<sup>82</sup> See, e.g., 163 CONG. REC. S6914 (daily ed. Oct. 31, 2017) (statement of Sen. Jeff Merkley, D-OR) (“We are seeing the President engaged in a zeal to pack the court with extreme rightwing ideologues and to ram them through this confirmation process without due review.”). Such efforts to apply the “court packing” label to actions other than the outright addition of seats to courts were contrarian, but they were not altogether unprecedented. The term “court packing” had been invoked to criticize President Obama’s swift appointment of three judges to the D.C. Circuit upon the Senate’s elimination of filibusters for lower court nominations. See Louis Jacobson, *Is Barack Obama Trying to ‘Pack’ the D.C. Circuit Court of Appeals?*, POLITIFACT (June 5, 2013), <https://www.politifact.com/factchecks/2013/jun/05/chuck-grassley/barack-obama-trying-pack-dc-circuit-court-appeals>. The term was also used to criticize President Ronald Reagan’s and President George H.W. Bush’s nominations to the Supreme Court. See Grove, *supra* note 54, at 514; see also *Id.* at 512-17 (tracing the use of “court packing” as a political epithet from the 1950s through 2017). See generally HERMAN SCHWARTZ, PACKING THE COURTS (1988).

<sup>83</sup> See Charlie Savage, *On the Left, Eyeing More Radical Ways to Fight Kavanaugh*, N.Y. TIMES (Oct. 7, 2018), <https://www.nytimes.com/2018/10/07/us/politics/democrats-kavanaugh-supreme-court.html>.

<sup>84</sup> See E.J. Dionne, Opinion, *Enlarging the Supreme Court Is the Only Answer to the Right’s Judicial Radicalism*, WASH. POST (Oct. 28, 2020), [https://www.washingtonpost.com/opinions/the-high-cost-of-confirming-amy-coney-barrett/2020/10/24/8d5a236a-156f-11eb-bc10-40b25382f1be\\_story.html](https://www.washingtonpost.com/opinions/the-high-cost-of-confirming-amy-coney-barrett/2020/10/24/8d5a236a-156f-11eb-bc10-40b25382f1be_story.html); Press Release, Sen. Ed Markey, Expand the Supreme Court: Sen. Markey and Reps. Nadler, Johnson, and Jones Introduce Legislation to Restore Justice and Democracy to Judicial System (Apr. 15, 2021), <https://www.markey.senate.gov/news/press-releases/expand-the-supreme-court-senator-markey-and-reps-nadler-johnson-and-jones-introduce-legislation-to-restore-justice-and-democracy-to-judicial-system>; Michael Hiltzik, *How a New Court-Packing Scheme Could Save the Supreme Court from Right-Wing Domination*, L.A. TIMES (July 2, 2018, 6:30 AM PT), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-scotus-20180629-story.html>.

<sup>85</sup> Astead W. Herndon & Maggie Astor, *Ruth Bader Ginsburg’s Death Revives Talk of Court Packing*, N.Y. TIMES (Sept. 19, 2020), <https://www.nytimes.com/2020/09/19/us/politics/what-is-court-packing.html>.

<sup>86</sup> In addition to greater media coverage, the topic of Court reform also captured the public’s attention during that period. Google Trends, which captures patterns in Google search queries, recorded dramatic spikes in searches for “Court packing” and related terms between Justice Ginsburg’s death and Justice Barrett’s confirmation. See *Google Trends: “Court Packing,” “Pack the Court,” “Pack the Supreme Court,”* GOOGLE, <https://trends.google.com/trends/explore?date=today%205y&geo=US&q=court%20packing,pack%20the%20court,pack%20the%20supreme%20court> (last visited Nov. 14, 2021).

<sup>87</sup> *Presidential Commission on the Supreme Court of the United States* 1-2 (July 20, 2021) (written testimony of Nan Aron, Alliance for Justice) [hereinafter Aron Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Aron-Testimony.pdf> (“[T]he Court’s legitimacy has already been tarnished [] after decades of partisan takeover. . . . Given this reality, it is clear that reform is in fact necessary to restore.”); *Id.* at 1-5, 11-12 (further arguing that “the most effective way to restore balance to our Court is through expansion”).

<sup>88</sup> See *id.* at 3-4, 7, 15 (asserting that the Court could, among other things, “wipe away reproductive rights, in spite of decades of precedent and overwhelming public support for those rights,” “continually block[] the people’s

efforts to protect themselves and their loved ones from the scourge of gun violence,” and undermine other important precedents related to campaign finance reform, administrative law, and religion); Kang Testimony, *supra* note 79, at 3 (“The problem is not that Democrats are unable to understand the impact of the courts on reproductive rights, LGBTQ+ equality, voting rights, gun violence prevention, labor, the environment, racial justice, immigration, and more. We hold our collective breath every June to see what rights the Republican justices will allow to survive another year.”); Sahil Kapur, *Some Republicans Feel Protected by 6-3 Supreme Court, Even if Biden Wins*, NBC NEWS (Nov. 3, 2020, 12:15 PM), <https://www.nbcnews.com/politics/2020-election/some-republicans-feel-protected-6-3-supreme-court-even-if-n1245838>; Moira Donegan, *Enough Playing Nice. It’s Time to Pack the Courts*, GUARDIAN (Apr. 19, 2019, 6:00 AM), <https://www.theguardian.com/commentisfree/2019/apr/19/pack-the-courts-democrats-2020>; Elie Mystal, *The Democrats Need to Prepare for the Supreme Court to Overturn ‘Roe v. Wade,’* NATION (Oct. 7, 2020), <https://www.thenation.com/article/politics/biden-abortion-supreme-court>; Jeff Taylor, *How Safe is Gay Marriage? Advocates Fear Increasingly Conservative Court*, NBC NEWS (Oct. 6, 2020, 1:48 PM), <https://www.nbcnews.com/feature/nbc-out/fight-against-gay-marriage-still-alive-well-u-s-advocates-n1242272>; Adam Serwer, *The Supreme Court Is Helping Republicans Rig Elections*, ATLANTIC (Oct. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/dont-let-supreme-court-choose-its-own-electorate/616808>; Adam Gopnik, *The New, Conservative Supreme Court Is Returning to the Second Amendment*, NEW YORKER (May 7, 2021), <https://www.newyorker.com/news/daily-comment/the-new-conservative-supreme-court-is-returning-to-the-second-amendment>.

<sup>89</sup> Cf. JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* 43-44 (2009) (“[O]ver the long haul, the repeated failure of an institution to meet policy expectations can weaken and even destroy that institution’s legitimacy in the eyes of disaffected groups. . . . From this perspective, Court support can change fairly quickly over time. . . .”); James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 206-07 (2014) (noting this risk to “diffuse [public] support”).

<sup>90</sup> Cf. Carl Hulse, *McConnell Suggests He Would Block a Biden Nominee for the Supreme Court in 2024*, N.Y. TIMES (June 14, 2021), <https://www.nytimes.com/2021/06/14/us/politics/mcconnell-biden-supreme-court.html> (noting that then-Senate Majority Leader McConnell “threatened on Monday to block any Supreme Court nominee put forward by President Biden in 2024 if Republicans regain control of the Senate” and that McConnell declined to say whether a Republican-controlled Senate would confirm a nominee in 2023).

<sup>91</sup> See *Presidential Commission on the Supreme Court of the United States* 5 (July 20, 2021) (written testimony of Jeffrey J. Peck) [hereinafter Peck Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Peck-Testimony.pdf> (noting, and proposing reforms to address, “the level of partisanship and tribalism associated with Senate processes on Supreme Court nominations”); *Presidential Commission on the Supreme Court of the United States* 1 (July 20, 2021) (written testimony of Benjamin Wittes, the Brookings Institution) [hereinafter Wittes Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Wittes-Testimony.pdf> (emphasizing “the decay of the confirmation process”); see also *Presidential Commission on the Supreme Court of the United States* 8:31:32-8:34:27 (July 20, 2021) (oral testimony of Randy E. Barnett, Georgetown University Law Center), <https://www.whitehouse.gov/pscscotus/public-meetings/> (suggesting that the Senate’s repeated refusal to confirm a nominee could violate the spirit of the Constitution, given that “all discretionary power can be abused”).

<sup>92</sup> See *Presidential Commission on the Supreme Court of the United States* 9-10 (July 20, 2021) (written testimony of Larry Kramer, William & Flora Hewlett Foundation) [hereinafter Kramer Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Kramer-Testimony.pdf> (“Paradoxical as it sounds, enlarging the Court now might actually offer a way back to a less politicized process. . . . [F]aced with a credible threat that ‘tit’ really will be matched by ‘tat,’ opposing parties learn to cooperate.”).

<sup>93</sup> Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 1 (2020).

<sup>94</sup> See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200-01 (2008) (upholding an Indiana voter identification law); *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (upholding Arizona laws that excluded ballots for being deposited at the wrong precinct and criminalizing ballot harvesting, respectively); *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) (striking down the Voting Rights Act’s preclearance regime);

*Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (holding that extreme partisan gerrymanders implicate non-justiciable political questions that courts cannot hear); *Democratic Nat’l Comm. v. Wis. State Leg.*, 141 S. Ct. 28 (2020) (reversing a federal district court’s decision to permit counting of ballots post-stamped after Election Day despite unclear instructions from state officials).

<sup>95</sup> See *infra* Section III.B.1-3; see also Klarman Testimony, *supra* note 79, at 10-12; cf. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1996).

<sup>96</sup> See Klarman Testimony, *supra* note 79, at 16-17.

<sup>97</sup> See Kang Testimony, *supra* note 79, at 6-7.

<sup>98</sup> See *Presidential Commission on the Supreme Court of the United States* 11 (June 30, 2021) (written testimony of Noah Feldman, Harvard Law School) [hereinafter Feldman Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf> (noting “the implicit threat of court-packing” and stating “if their interpretations over time go so far away from mainstream constitutional opinion that they cause the court to lose legitimacy, the justices know that it could lead to substantial loss of independence in the form of court-packing”); Kramer Testimony, *supra* note 92, at 6-7 (“Roosevelt’s effort was also *entirely* successful in getting him exactly what he sought: the Court reversed course and upheld the second New Deal. . . . As with any tool of deterrence, making clear that the other branches can and will push back against an overreaching Court makes it less necessary to do so. . . . [T]he Court adjusts its behavior to greater sensitivity in the other branches.”).

<sup>99</sup> See *supra* note 98 and accompanying text; Kramer Testimony, *supra* note 92, at 6.

<sup>100</sup> See, e.g., *Presidential Commission on the Supreme Court of the United States* 23 (June 30, 2021) (written testimony of Judith Resnik, Yale Law School) [hereinafter Resnik Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Resnik-PDF-Presidential-Commission.pdf> (“[I]ncreasing the number of sitting Justices and shifting to a system of panels would mitigate the undue impact of any one appointment. . . . These proposals are but a few of the many ideas that aim to constrain a small group of people from entrenching their views of the law’s obligations.”); *Presidential Commission on the Supreme Court of the United States* 9 (July 20, 2021) (written testimony of Jamal Greene, Columbia Law School) [hereinafter Greene Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Greene-Testimony.pdf> (“Increasing the Court’s size could significantly reduce the influence of particular justices, thereby lowering the stakes that attach to their appointment and increasing the Court’s diversity along multiple dimensions.”).

<sup>101</sup> See *Presidential Commission on the Supreme Court of the United States* 4 (July 20, 2021) (written testimony of Wade Henderson, Leadership Conference on Civil Rights), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Henderson-Testimony.pdf>; *Id.* at 10 (“Courts rely on public trust for legitimacy, and diversity among judges and justices helps improve both public trust and balanced judicial decisionmaking.”); Aron Testimony, *supra* note 87, at 12 (“By expanding the Court, we can ensure that it actually looks like America, and includes Justices with diverse backgrounds and experiences who will bring important perspectives to major decisions.”).

<sup>102</sup> Emergency petitions are discussed at length in Chapter 5 of this Report.

<sup>103</sup> See LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS* 74 tbls.2-6 (6th ed. 2015) (showing that the Court granted review in 184 cases in 1980; 149 cases in 1983; 186 cases in 1985; and 122 cases in 1989).

<sup>104</sup> We include statistics from the pre-pandemic era, given that more recent statistics may reflect the complexities of the past eighteen months. See JOHN G. ROBERTS, JR., 2019 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5-6 (2019), <https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf> (reporting that the Supreme Court decided sixty-nine cases in the 2018 term, and sixty-three in the 2017 term); JOHN G. ROBERTS, JR., 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY 13 (2017), <https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf> (reporting that the Supreme Court decided sixty-eight cases in the 2016 term, and seventy in the 2015 term); JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 13 (2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> (reporting that the Supreme Court decided seventy-five cases in the 2014 term and seventy-seven in the 2013 term).

- <sup>105</sup> See Greene Testimony, *supra* note 100, at 9 (“Workload alone provides good and sufficient reason for the U.S. Supreme Court to have more than nine members.”); *Id.* at 10 (listing the various ways in which a larger Court could increase the pace and enhance the quality of its work, including through more attention to testing legislative facts and answering certified questions from lower courts).
- <sup>106</sup> See *Presidential Commission on the Supreme Court of the United States 2*, 16-17 (July 20, 2021) (written testimony of Vicki C. Jackson, Harvard Law School) [hereinafter Jackson Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf> (“I urge the Commission to consider proposals to provide for fluctuating Court membership, or a ‘decoupling’ of appointments from vacancies, by guaranteeing one, or two, presidential appointments each term, while letting the overall numbers on the Court fluctuate. . . . Such a mechanism could be capped (e.g. at 11) to keep the Court to a workable number.”); see also Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. ECON. PERSPS. 119, 136-38 (2021) (making a similar proposal, albeit without fixing an upper boundary on the number of Justices).
- <sup>107</sup> See Resnik Testimony, *supra* note 100, at 23; Greene Testimony, *supra* note 100, at 9.
- <sup>108</sup> See Thomas E. Griffith, *The Degradation of Civic Charity*, 134 HARV. L. REV. F. 119, 122, 136 (2021).
- <sup>109</sup> For example, during the Commission’s public hearings, some witnesses who opposed Court packing asserted that term limits could be a beneficial reform. See Jackson Testimony, *supra* note 106, at 2; *Presidential Commission on the Supreme Court of the United States 17-20* (July 20, 2021) (written testimony of Neil S. Siegel, Duke Law School) [hereinafter Siegel testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Siegel-Testimony.pdf>.
- <sup>110</sup> See *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2575-76 (2019) (holding that the federal executive branch failed to adequately explain its decision to add a citizenship question to the U.S. Census, and concluding that the matter must be sent back to the agency for further explanation).
- <sup>111</sup> See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020) (holding that the rescission of the Deferred Action for Childhood Arrivals program was arbitrary and capricious under the Administrative Procedure Act because DHS did not “provide a reasoned explanation for its action”).
- <sup>112</sup> See, e.g., *Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020) (rejecting, on standing grounds, an original action brought by a state to prevent several other states—Georgia, Michigan, Pennsylvania, and Wisconsin—from certifying presidential electors); see also Siegel Testimony, *supra* note 109, at 6 (“[B]y most accounts, the federal courts—including the Justices—performed well during the controversies surrounding the 2020 presidential elections, regardless of the political affiliations of the judges.”).
- <sup>113</sup> Siegel Testimony, *supra* note 109, at 5-6. This position has considerable historical support. See TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 15-16, 193 (2011) (arguing, based on a statistical analysis of judicial reactions to legislative proposals to curb the Supreme Court from 1877-2008, that “when Court-curbing bills are introduced in Congress, the justices will exercise self-restraint by attenuating their use of judicial review to invalidate federal legislation”); see also WALTER F. MURPHY, *CONGRESS AND THE COURT* 62 (1962) (arguing that, historically, the Justices have been “acutely aware of the attacks against their decisions, and . . . willing to make concessions when they felt that danger had become too threatening”).
- <sup>114</sup> Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 69, 79-81 (Matthew D. Adler & Kenneth Einer Himma eds., 2009) (“[W]hat Roosevelt had proposed to do was *something that just isn’t done*. It violated the customary norm obligatory on Congress even though not formally part of the Constitution.”); see Bradley & Siegel, *supra* note 54, at 269-87; Grove, *supra* note 54, at 505-17, 538-44; see also Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 OXFORD J. LEGAL STUD. 421, 424 (2012) (noting that “the rejection of Roosevelt’s court-packing plan in 1937 . . . is said by many to have created an unwritten constitutional norm against court-packing”); Tom Donnelly, Note, *Popular Constitutionalism, Civic Education and the Stories We Tell Our Children*, 118 YALE L.J. 948, 994 (2008) (“No contemporary textbook presents an account that even subtly suggests the potential legitimacy of an argument in favor of ‘packing’ the Court under similar circumstances.”); *infra* notes 108-144 and accompanying text.
- <sup>115</sup> Krotoszynski, Jr., *supra* note 70, at 1063-64.
- <sup>116</sup> David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 34 (2014).

- <sup>117</sup> H.R. REP. NO. 108-691, at 110 (2004) (Minority Report) (invoking Roosevelt’s plan to criticize bills that would have restricted federal jurisdiction over challenges to the Defense of Marriage Act and to the use of “under God” in the Pledge of Allegiance, and arguing that, just as Roosevelt’s plan failed, “so too must this modern day effort to show the courts ‘who is boss’ fail as well”).
- <sup>118</sup> See Grove, *supra* note 54, at 512-17 (recounting how, beginning in the 1950s, both Republican and Democratic lawmakers treated “Court packing” as a political epithet and repeatedly denounced Roosevelt’s plan).
- <sup>119</sup> *Id.* at 532-33.
- <sup>120</sup> Jackson Testimony, *supra* note 106, at 20-21.
- <sup>121</sup> David Kosar & Katarina Sipulova, *How to Fight Court-Packing?*, 6 CONST. STUD. 133 (2020).
- <sup>122</sup> Jodi Finkel, *Judicial Reform in Argentina in the 1990s: How Electoral Incentives Shape Institutional Change*, 39 LAT. AM. RSCH. REV. 56, 63-64 (2004).
- <sup>123</sup> Steven Levitsky & James Loxton, *Populism and Competitive Authoritarianism in Latin America*, in ROUTLEDGE HANDBOOK OF GLOBAL POPULISM (Carlos de la Torre ed., 2018).
- <sup>124</sup> Ozan O. Varol, Lucia Dalla Pellegrina & Nuno Garoupa, *An Empirical Analysis of Judicial Transformation in Turkey*, 65 AM. J. COMPAR. L. 187, 197-99 (2017).
- <sup>125</sup> David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 209 (2013); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 551-52 (2018).
- <sup>126</sup> Michał Ziółkowski, *Two Faces of the Polish Supreme Court After “Reforms” of the Judiciary System in Poland: The Question of Judicial Independence and Appointments*, 5 EUR. PAPERS 347, 350 (2020).
- <sup>127</sup> Skeptics of expansion also argue that the American example in the world matters and that politicians at home and abroad who might wish to control their courts might find themselves emboldened to take such actions if the United States engages in Court packing, regardless of the reasons for the U.S. reform. See *Presidential Commission on the Supreme Court of the United States* 8:15:20-8:17:15 (July 20, 2021) (oral testimony of Marin K. Levy, Duke University School of Law), <https://www.whitehouse.gov/pscotus/public-meetings> (stating that “[c]ertainly if we were to see expansion of the Supreme Court, that could be seen as some sort of green light” at the state level, although also noting that any such impact would be uncertain); *Presidential Commission on the Supreme Court of the United States* 10-11 (June 30, 2021) (written testimony of Rosalind Dixon, University of New South Wales, Sydney) [hereinafter Dixon Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf> (noting that “[c]omparative scholars . . . highlight the potential for renewed use of court-packing in the US to be seen as legitimating new and expanded attempts at court-packing in a range of democracies under threat” while suggesting that the risk of such borrowing with respect to “court-packing” may be less severe because authoritarians are already able to rely on Roosevelt’s 1937 plan).
- <sup>128</sup> Feldman Testimony, *supra* note 98, at 8 (“Under almost all ordinary circumstances, court-packing would seriously undermine the legitimacy of the Supreme Court.”); *Presidential Commission on the Supreme Court of the United States* 1 (June 30, 2021) (written testimony of Michael W. McConnell, Stanford Law School) [hereinafter McConnell Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/McConnell-SCOTUS-Commission-Testimony.pdf> (“Any attempt to increase the size of the Court . . . would be a severe blow to the reputation of the Court as a legal institution . . . .”); Siegel Testimony, *supra* note 109, at 2 (“Court-packing would significantly undermine the Court’s independence and, in almost all circumstances, risk its legal and public legitimacy.”); *Presidential Commission on the Supreme Court of the United States* 90 (July 20, 2021) (written testimony of Supreme Court Practitioners’ Committee, co-chaired by Kenneth Geller and Maureen Mahoney) [hereinafter Supreme Court Practitioners’ Committee Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Geller-Mahoney-Testimony.pdf> (“[T]he independence of the Court and its standing with the public would be gravely compromised if Congresses were to add seats for the purpose of affecting the Court’s jurisprudence . . . .”).
- <sup>129</sup> See *Presidential Commission on the Supreme Court of the United States* 2:58:15-2:58:44 (June 30, 2021) (oral testimony of Maya Sen, John F. Kennedy School of Government, Harvard University), <https://www.whitehouse.gov/pscotus/public-meetings/june-30-2021> (“How would the public perceive court expansion? . . . [I]t’s going to be filtered through partisan concerns at the public opinion level.”).

- <sup>130</sup> McConnell Testimony, *supra* note 128, at 1 (“Any attempt to increase the size of the Court would be widely, and correctly, regarded as a partisan interference with the independence of the Court. This would be a severe blow to the reputation of the Court as a legal institution . . . .”); *Presidential Commission on the Supreme Court of the United States* 16 (July 20, 2021) (written testimony of Stephen E. Sachs, Harvard Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Sachs-Testimony.pdf> (“[R]eforms that are not perceived by both sides as enhancing the courts’ legitimacy will never succeed in doing so.”).
- <sup>131</sup> See Feldman Testimony, *supra* note 98, at 9 (“Court-packing would likely become a tit-for-tat practice” and would “drastically reduc[e] the court’s institutional legitimacy.”).
- <sup>132</sup> See Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *The Endgame of Court-Packing 2-3* (May 3, 2021) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3835502](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835502) (“We find that the median result of repeated partisan court-packing would be to increase the size of the Court to 23 justices within 50 years and to 39 justices within 100 years. . . . [I]f court-packing happens every time the president’s party has appointed a minority of justices on the Supreme Court and there is unified government—the worst-case tit-for-tat scenario cited by opponents of court-packing—we find that the median size of the Court across the simulations is 29 justices after 50 years and 63 justices after 100 years.”).
- <sup>133</sup> Jackson Testimony, *supra* note 106, at 20-21 (“[E]xpanding the Court simply to give one specific President the power to fill seats . . . risks turning the Court into even more of a perceived political football.”); see also Supreme Court Practitioners’ Committee Testimony, *supra* note 128, at 90 (“If Democrats were to [add seats for the purpose of affecting the Court’s jurisprudence] now, Republicans would surely adopt the same tactic when they next have the opportunity. This would exacerbate the public perception that the Court is a mere political body.”).
- <sup>134</sup> See Peck Testimony, *supra* note 91, at 5 (noting, and proposing reforms to address, “the level of partisanship and tribalism associated with Senate processes on Supreme Court nominations”); Wittes Testimony, *supra* note 91, at 1 (emphasizing “the decay of the confirmation process”); see also *Presidential Commission on the Supreme Court of the United States* 8:31:32-8:34:27 (July 20, 2021) (oral testimony of Randy E. Barnett, Georgetown University Law Center), <https://www.whitehouse.gov/pscscotus/public-meetings/> (suggesting that the Senate’s repeated refusal to confirm a nominee could violate the spirit of the Constitution, given that “all discretionary power can be abused”).
- <sup>135</sup> See FRIEDMAN, *supra* note 22, at 237-79 (2009); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 900-16 (2011).
- <sup>136</sup> See *Presidential Commission on the Supreme Court of the United States* 7-8 (June 30, 2021) (written testimony of Maya Sen, John F. Kennedy School of Government, Harvard University), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Sen-Written-Testimony.pdf> (noting that “simply expanding the size of the Supreme Court is unpopular among the public” and citing polls showing that only 26% or 32% of Americans favor increasing the number of Justices).
- <sup>137</sup> Critics who reject democracy-based arguments for Court expansion also note that Supreme Court Justices are selected by the President, with the advice and consent of the Senate, and the constitutional methods of selecting the President and the Senate do not guarantee that those bodies will reflect the popular will. The President is selected through the Electoral College, and on five occasions, a President has been elected without winning the popular vote. And the Senate is designed to provide equal representation to the states, not to reflect a broad national mandate. See U.S. CONST. art. II, § 1, cl. 2-4, amended by U.S. CONST. amend. XII. *Electoral College Fast Facts*, HIST., ART, & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Electoral-College/Electoral-College/> (last visited Sept. 17, 2021) (“Five times a candidate has won the popular vote and lost the election. Andrew Jackson in 1824 (to John Quincy Adams); Samuel Tilden in 1876 (to Rutherford B. Hayes); Grover Cleveland in 1888 (to Benjamin Harrison); Al Gore in 2000 (to George W. Bush); Hillary Clinton in 2016 (to Donald J. Trump).”).
- <sup>138</sup> Cf. THE FEDERALIST No. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009) (“This independence of the judges is equally requisite to guard the [C]onstitution and the rights of individuals from the effects of those ill humors, which the arts of designing men . . . sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the

meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.”).

- <sup>139</sup> See Alison Gash & Angelo Gonzales, *School Prayer*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 62, 68-70, 77 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) [hereinafter PUBLIC OPINION] (showing that, in the 1970s, over seventy percent of the public disapproved of the Court’s school prayer decisions); Amy E. Lerman, *The Rights of the Accused*, in PUBLIC OPINION, *supra*, at 42-43 (“In many ways,” the Warren Court’s criminal procedure decisions “were out of step with public opinion and may even have shifted public opinion against the Court’s pro-rights position.”).
- <sup>140</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“Separate educational facilities are inherently unequal.”); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018 (1998) (describing *Brown* as “[t]he classic example” of a canonical case); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011) (“[T]he constitutional canon” is “the set of decisions whose correctness participants in constitutional argument must always assume. *Brown* . . . is the classic example.”). For discussions of the resistance to school desegregation, see JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 242-314 (2019); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 290-442 (2004).
- <sup>141</sup> See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 675-76 (2015) (holding that “under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of” the right to marry); *United States v. Windsor*, 570 U.S. 744, 774-75 (2013) (holding invalid the Defense of Marriage Act, which allowed states to refuse to recognize same-sex marriages that were lawful under another state’s law); *United States v. Virginia*, 518 U.S. 515, 556-58 (1996) (holding that a state university could not lawfully exclude women).
- <sup>142</sup> See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (establishing the one-person, one-vote rule for legislative apportionment).
- <sup>143</sup> Siegel Testimony, *supra* note 109, at 20 (“Repeated Court-packing, or repeated threats of it, would make it increasingly difficult for the Supreme Court to perform functions that no other governmental institution is likely to perform better.”).
- <sup>144</sup> See Guillermo O’Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 55, 55, 60 (1994) (asserting that elections, when elections exist at all, in political systems where courts are treated as “nuisances” and “impediments” to be overcome, “are [] very emotional and high-stakes events: candidates compete for a chance to rule virtually free of all constraints save those imposed by naked, noninstitutionalized power relations”); see also Whittington, *supra* note 70, at 2134 (asserting that Roosevelt’s 1937 “Court-packing plan might have indicated that the President no longer took constitutional constraints seriously, that the Constitution was suffering a crisis of fidelity.”).
- <sup>145</sup> Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 181 (2019); see also John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 541 (1999) (making a similar proposal with six- to twelve-month stints on the Court); Greene Testimony, *supra* note 100, at 17 (“[T]he suggestion is for a 16-member Court whose members serve 16-year terms and are drawn from what are now designated as the courts of appeals. . . . [T]he first step in the proposal would be to expand the formal size of the Supreme Court to equal the size of the Article III appellate bench—currently 179 authorized positions. . . . The second step would be to enact, via statute, an appointment procedure that would designate which judges of the formally expanded Supreme Court exercise the powers of the functional Supreme Court. The remaining judges of the formal Supreme Court would exercise roughly the same powers, including appeals of right from federal district courts, that the courts of appeals enjoy today.”).
- <sup>146</sup> E.g., Jack Balkin, *Don’t Pack the Court. Regularize Appointments*, BALKINIZATION (Oct. 5, 2020), <https://balkin.blogspot.com/2020/10/dont-pack-court-regularize-appointments.html>.
- <sup>147</sup> E.g., Bruce Ackerman, *Trust in the Justices of the Supreme Court is Waning. Here are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018, 3:15 AM), <https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html>.
- <sup>148</sup> See Epps & Sitaraman, *supra* note 145, at 193.



<sup>149</sup> *Id.*

<sup>150</sup> U.S. CONST. art. III, § 1 (emphasis added).

<sup>151</sup> Article III, Section 1 of the U.S. Constitution provides that: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” The Appointments Clause of Article II, Section 2 provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .” *Id.* § 2. The concern under the “good Behaviour” Clause is that a statute that would have judges sit on the Supreme Court for only brief periods, interspersed with service on the lower federal courts, would significantly change the nature of the office. The concern under the Appointments Clause is that the Clause creates an office of Supreme Court Justice separate and apart from the office of lower federal court judge. These constitutional issues are complex, and scholars disagree over their appropriate resolution. If these rotation reforms were to be pursued via a constitutional amendment, these concerns would not arise.

<sup>152</sup> See Lisa T. McElroy & Michael C. Dorf, *Coming off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 110 (2011) (“The Court sitting en banc would be the ‘real’ indivisible Supreme Court, while the panels could be understood as lower federal courts.”); see also Tracey E. George & Chris Guthrie, “The Threes”: *Re-Imagining Supreme Court Decisionmaking*, 61 VAND. L. REV. 1825, 1847 n.85 (2008) (providing several justifications for the constitutionality of panel proposals).

<sup>153</sup> Some circuits are more numerous than others, and the size of the court might affect how often it might sit en banc to resolve disagreements on the Court: The number currently ranges from six judges on the First Circuit to twenty-nine on the Ninth.

<sup>154</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21-22 (Max Farrand ed., 1911) (emphasis added) [hereinafter RECORDS]; see Ross E. Davies, *A Certain Mongrel Court: Congress’s Past Power and Present Potential to Reinforce the Supreme Court*, 90 MINN. L. REV. 678, 684 (2006) (noting that this proposal was “[t]he ninth ‘Resolve’ in the ‘Virginia Plan’ presented at the opening of the Philadelphia convention in late May 1787”).

<sup>155</sup> 1 RECORDS, *supra* note 154, at 95 (emphasis added).

<sup>156</sup> The only change was the capitalization. See 2 RECORDS, *supra* note 154, at 186 (showing that the draft from the Committee of Detail on August 6 provided that “[t]he Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.” (emphasis added)); *Id.* at 600 (showing that the draft from the Committee of Style in mid-September provided that “[t]he judicial power of the United States, both in law and equity, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. . . .” (emphasis added)); *Id.* at 660 (showing the final text adopted on September 17, 1787, which provided for “one supreme Court”).

<sup>157</sup> See, e.g., James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1452-53 (2000) (“In providing for one supreme court and ruling out the possibility of multiple supreme courts, the Framers appear to have contemplated that the Supreme Court was to play a distinctive role as the hierarchical leader of the judicial department.”). But see David E. Engdahl, *What’s in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 IND. L.J. 457, 465 (1991) (disputing this understanding of the “wording change”).

<sup>158</sup> See 2 RECORDS, *supra* note 154, at 44-45; *Id.* at 45 (statement of James Madison) (“The increase of business will be provided for by an increase of the number who are to do it.”).

<sup>159</sup> *Id.* (statement of Gouverneur Morris); see Davies, *supra* note 154, at 685-86 (“In other words, [Morris was asserting that,] because the work of the Supreme Court could not be divided up among the members of the Court, adding Justices would only add to the number of people involved in each decision and every other piece of Court business.”).

- <sup>160</sup> See FRANKFURTER & LANDIS, *supra* note 8, at 73-76 (discussing the efforts of Senator Lyman Trumbull, R-IL, to establish a nine circuit-judge panel that would “ride circuit,” thus easing the circuit-riding burdens placed on Supreme Court Justices).
- <sup>161</sup> CONG. GLOBE, 41st Cong., 1st Sess. 208-09 (1869) (statement of Sen. George Williams, R-OR); see FRANKFURTER & LANDIS, *supra* note 8, at 74-75.
- <sup>162</sup> See CONG. GLOBE, 41st Cong., 1st Sess. 213-14 (1869) (statement of Sen. William Stewart, R-NV) (“The Constitution says there shall be one Supreme Court. You make a man a justice of that court and can you say that he shall not sit there after you have made him a justice of the Supreme Court? That raises a grave doubt.”); see also *Id.* at 210 (statement of Sen. Allen Thurman, D-OH) (“[W]hile I am inclined to think that the very best model of a court in the world is the French court of cassation, consisting of twenty-four judges divided into three sections, yet with my understanding of the Constitution of the United States it is not competent for us to provide such a system.”).
- <sup>163</sup> *Id.* at 214-15 (statement of Sen. Lyman Trumbull, R-IL) (predicting that “such a law would be held unconstitutional by that court, and then you would have eighteen judges of your Supreme Court of the United States”).
- <sup>164</sup> *Id.* at 215.
- <sup>165</sup> See *id.* at 212 (statement of Sen. George Williams, R-OR) (stating that “this bill, reported from the Judiciary Committee, provides that six of the judges shall constitute a quorum. . . . [And t]here is nothing in the Constitution that restricts the power of Congress [to set a quorum for the Supreme Court]”); *Id.* at 217 (statement of Sen. George Edmunds, R-VT) (“[M]y friend says that the Constitution of the United States declares that there shall be one Supreme Court. I agree to that; but it does not declare how it shall be composed . . . . It leaves . . . that to general principles of legislation, where it ought to be left.”).
- <sup>166</sup> See *id.* at 216 (statement of Sen. George Edmunds, R-VT) (noting that, under current law, “only a majority of th[e Court’s] quorum are necessary to make a decision. . . . Do you find that when the whole number get together at the next meeting of the court they reverse that [decision]? Not by any means.”).
- <sup>167</sup> See *id.* at 213 (statement of Sen. William Stewart, R-NV) (“[W]e can fix the quorum. But that does not meet the point. After you have fixed the quorum, the question arises, have not all the justices of the Supreme Court the right to sit there all the time?”); *Id.* at 215 (statement of Sen. Lyman Trumbull, R-IL) (agreeing with this point and noting that “a law that should declare that the rest of the Senate besides the quorum had no right to vote and participate in [its] decisions would be utterly void”).
- <sup>168</sup> See FRANKFURTER & LANDIS, *supra* note 8, at 75-76 (noting Congress instead passed a proposal by Senator Lyman Trumbull, R-IL, for additional circuit judges).
- <sup>169</sup> See Eugene Gressman, *Requiem for the Supreme Court’s Obligatory Jurisdiction*, 65 A.B.A. J. 1325, 1327 (1979).
- <sup>170</sup> FRANKFURTER & LANDIS, *supra* note 8, at 60-61 (noting that, from 1850 to 1890, the Court’s docket grew from 253 to 1,816 cases); see H.R. REP. NO. 51-1295, at 3 (1890) (noting that, according to Justice Harlan, the Court disposed of 451 out of 1,396 cases on its docket in 1886).
- <sup>171</sup> See Evarts Act, ch. 517, §§ 1, 2, 5-6, 26 Stat. 826, 826-28 (1891) (authorizing discretionary review over cases from new appellate courts involving diversity, revenue laws, patent laws, federal criminal laws, and admiralty law). For discussions of the history behind this law, see Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 948-50, 952-59 (2013); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1649-57 (2000).
- <sup>172</sup> S. REP. NO. 51-1571, at 3-5 (1890) (describing the views of a minority of senators).
- <sup>173</sup> *Id.* at 3.
- <sup>174</sup> See U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”); S. REP. NO. 51-1571, at 3 (“It is true that

the Constitution provides that there shall be ‘one Supreme Court;’ but it also provides that the appellate jurisdiction of that court shall be exerted ‘both as to law and as to fact with such exceptions, and *under such regulations as Congress may make.*’”).

<sup>175</sup> See S. REP. NO. 51-1571, at 3 (“Congress has from the beginning, from time to time, declared what number out of and less than the whole number of justices shall be such a quorum.”).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 4.

<sup>178</sup> 21 CONG. REC. 10,227 (1890) (statement of Sen. Joseph Dolph, R-OR).

<sup>179</sup> See, e.g., *Id.* (stating that he “sympathize[d]” with the notion held by some senators that such a division “would detract from [the Court’s] dignity and importance and from the weight, if not from the authority, of its decisions”).

<sup>180</sup> See 21 CONG. REC. 10,316 (1890) (showing that the proposal was rejected by a vote of 36-10).

<sup>181</sup> *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the House Comm. on the Judiciary, 67th Cong. 3* (1922) (statement of Chief Justice Taft). To address the Court’s growing caseload, Congress instead expanded the scope of discretionary certiorari review. See Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936.

<sup>182</sup> Letter from Charles Evans Hughes, C.J., to Burton K. Wheeler, U.S. Sen., *supra* note 39.

<sup>183</sup> See Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662; Grove, *supra* note 171, at 968-78 (discussing the legislative debates leading up to this measure).

<sup>184</sup> Letter from Warren E. Burger, C.J., to Roman L. Hruska, U.S. Sen. (May 29, 1975), *reprinted in* COMM’N ON REVISION OF FED. CT. APP. SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) app. d at 173 (“It has occasionally been proposed that the Supreme Court be enlarged so that the Court could sit in divisions or panels, but any such proposals would meet with almost universal opposition, even assuming their constitutionality. Such a change would appear to alter the basic concept of ‘one supreme Court’ under Article III.”).

<sup>185</sup> U.S. CONST. art. II, § 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.”).

<sup>186</sup> One prominent proposal of this type would establish a system by which every judge on the courts of appeals also would be appointed as an Associate Justice of the Supreme Court. The Court would hear cases as a panel of nine Justices, and the Court’s membership would be replenished every two weeks through random assignment. See Epps & Sitaraman, *supra* note 145, at 181-82 (2019). Proponents of this reform combine it with other significant changes, including a prohibition on having more than five Justices nominated by a single political party at one time; a rule that only a 6-3 majority of Justices could invalidate federal legislation; and a provision that would have the Justices select cases for review for future, unknown panels, but not their own.

<sup>187</sup> See Epps & Sitaraman, *supra* note 145, at 182-83; Resnik Testimony, *supra* note 100, at 23; Greene Testimony, *supra* note 100, at 9.

<sup>188</sup> See *id.* at 182-83; see also John G. Grove, *Reforming the Court*, NAT’L AFFS. (2020), <https://www.nationalaffairs.com/publications/detail/reforming-the-court>.

<sup>189</sup> See *Presidential Commission on the Supreme Court of the United States* 1-5 (Aug. 2021) (written testimony of Erin F. Delaney, Northwestern University Pritzker School of Law), <https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Erin-Delaney.pdf> (arguing that federalism and the two-party political system are responsible for the Supreme Court’s status as a “federal apex court,” but that apex courts need not be “overly politicized”).

<sup>190</sup> See Epps & Sitaraman, *supra* note 145, at 183; Grove, *supra* note 188.

<sup>191</sup> See *Presidential Commission on the Supreme Court of the United States* 10 (June 30, 2021) (written testimony of Kim Lane Scheppelle, Princeton University) [hereinafter Scheppelle Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Scheppelle-Written-Testimony.pdf>; Dixon Testimony, *supra* note 127, at 12. Texas and Oklahoma “maintain[] a bifurcated structure of civil and criminal courts of last

resort.” Brent M. Hanson, *Judicial Hot Potato: An Analysis of Bifurcated Courts of Last Resort in Texas and Oklahoma*, 12 TENN. J.L. & POL’Y 161, 164-65 (2018).

<sup>192</sup> See Scheppele Testimony, *supra* note 191, at 9-14 (providing examples of high courts that sit in panels, and arguing that such a structure may be preferable).

<sup>193</sup> Jackson Testimony, *supra* note 106, at 2, 19, 21-23; Greene Testimony, *supra* note 100, at 3-5.

<sup>194</sup> See Hemel, *supra* note 106.

<sup>195</sup> For different versions of this proposal, see Epps & Sitaraman, *supra* note 145, at 193 (proposing a Supreme Court of 15 Justices, with five Democrats, five Republicans, and five Justices to be chosen, with a unanimity requirement, from the lower courts by the sitting Justices); Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547, 550 (2018) (proposing that Congress set the number of Justices at eight, with four Democrats and four Republicans).

<sup>196</sup> See Segall, *supra* note 195, at 561-62. Some proponents of this approach note the likelihood of greater plurality opinions, which carry less weight as precedent. See Grove, *supra* note 188. This prospect could lower the stakes of any one decision by the Court. See Grove, *supra*.

<sup>197</sup> See Epps & Sitaraman, *supra* note 145, at 199-200.

## Chapter 3: Term Limits

Among the proposals for reforming the Supreme Court, non-renewable limited terms—or “term limits”—for Supreme Court Justices have enjoyed considerable, bipartisan support. Advocacy groups, nonprofits, and membership organizations have expressed their support for term limits. In testimony before the Commission, a bipartisan group of experienced Supreme Court practitioners concluded that an eighteen-year non-renewable term “warrants serious consideration.”<sup>1</sup> Major think tanks and their leaders have also endorsed the concept,<sup>2</sup> as have both liberal and conservative constitutional scholars.<sup>3</sup> When the National Constitution Center organized separate groups of “conservative” scholars and “progressive” scholars to draft their own proposals for improving the Constitution, both groups concluded that Supreme Court Justices should be limited to eighteen-year terms.<sup>4</sup> Yet other scholars and commentators have questioned the idea of altering the system of life tenure,<sup>5</sup> which has been in place since the Constitution established the Supreme Court and the judicial power.

This Chapter considers the full range of debate over term limits and addresses numerous design questions that policymakers would need to take into account if they were to develop such a system, including the question of whether implementation would require constitutional amendment or could be achieved by statute. Consistent with its charge, the Commission does not take a position on whether or how term limits ought to be implemented but rather seeks to define and inform the debate over these questions.

Part I presents a series of arguments for term limits, explaining how, in the view of proponents, term limits would enable a regularized system of appointments to the Court that would preserve the value of judicial independence, make it more likely all Justices would serve for roughly equal numbers of years, and ensure that the Court’s membership would be broadly responsive to the outcome of democratic elections over time. Part II then sets out a series of objections to term limits and articulates the harms opponents of the proposal believe it might have on judicial independence and legitimacy. In Part III, we consider the design questions presented by a constitutional amendment that would institute a system of term limits. In Part IV, we consider whether and how such a system would be achievable by statute. Throughout Parts III and IV, we consider questions about the design of a system of limits, such as the length of Supreme Court Justices’ terms, the number of appointments each President should be able to make in four years’ time, and how transitioning to a term-limited system would be accomplished. We conclude in Parts V and VI by addressing some additional concerns: first, the potential impasse in the Senate’s confirmation process that would stymie a new system of

term limits; second, the possibility that the adoption of term limits through statute would invite further intervention in the judiciary by Congress.

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## I. The Justifications for Term Limits

U.S. Supreme Court Justices have always had life tenure. But as proponents of term limits point out, life tenure is virtually unique to the U.S. federal judiciary. Defined terms for high court justices are commonplace at the state level. Since the Founding, states have decidedly moved away from life tenure for justices of their highest courts. Thirty-one states and the District of Columbia have some form of mandatory retirement,<sup>6</sup> with the majority of states setting the retirement age at 70.<sup>7</sup> Almost all states also establish terms for high court justices, ranging from six to fifteen years. Though these terms are renewable through elections in many states and reappointment in others, mandatory retirement applies in the majority of such systems. Rhode Island is the only state that currently has neither term limits nor a mandatory retirement age for its supreme court justices.<sup>8</sup>

The United States is the only major constitutional democracy in the world that has neither a retirement age nor a fixed term limit for its high court Justices.<sup>9</sup> Among the world's democracies, at least 27 have term limits for their constitutional courts. And those that do not have term limits, such as the Supreme Court of the United Kingdom, typically impose age limits.<sup>10</sup> In light of this contrast, one scholar who testified before the Commission opined that, “were we writing the United States Constitution anew, there is no way we would adopt the particular institutional structure that we have for judicial tenure. No other country has true lifetime tenure for its justices, and for good reason.”<sup>11</sup>

In the view of proponents of term limits, the existing system lacks adequate justification beyond the fact that it has always been in place. Currently, the number of appointments available to a President can vary greatly because of random chance; when a vacancy arises depends on when Justices leave the bench due to illness or death, or when they themselves choose to retire. As elaborated in more detail below, some Presidents are able to make three (or more) appointments in a term while others make none. These differences in opportunities, term limits proponents argue, serve no obvious structural purpose.

Proponents of term limits argue that regularizing the appointments process would address these arbitrary consequences of life tenure by making judicial appointments more predictable and the composition of the U.S. Supreme Court more rationally related to the outcome of

democratic elections over time. Proposals for staggered eighteen-year terms, for example, discussed in detail in Parts III and IV, would ensure that all Presidents have the opportunity to appoint two Justices to the Supreme Court in each term they serve. This predictability, proponents argue, would strike a more appropriate balance than the current system between two important features of our constitutional system of checks and balances: judicial independence on the one hand and long-term responsiveness of the judiciary to our democratic system of representation on the other.

By providing for tenure during “good Behaviour,” Article III of the Constitution provides judges with independence from direct and inappropriate external pressures and political influence when they interpret laws, review executive actions and administrative regulations, and consider the constitutionality of state and federal legislation.<sup>12</sup> Article II of the Constitution authorizes the elected branches to affect the composition of the judiciary through appointments over time; the Constitution gives the President and Senate power over appointments to the federal judiciary, and it gives Congress power over the structure and jurisdiction of the federal courts. Proponents of term limits emphasize that the influence of elections on the composition of the Court and its work is thus indirect, but that it is nevertheless an important element of the constitutional system. From the perspective of those who urge term limits, these various provisions of the Constitution aim to make the individual members of the judiciary *independent* at any given point in time, but the composition of the judiciary as a whole *responsive* over time to the people’s will, as expressed through its electoral decisions about who occupies the presidency and the Senate.

Proponents of term limits contend that the reform would better strike this balance than the current system in two respects. Long fixed terms, such as terms of eighteen years, coupled with post-service guarantees of financial security, would insulate individual Justices from political pressure and financial temptation and function as effectively as life tenure to safeguard judicial independence. At the same time, such fixed terms enable democratic majorities, as reflected in who is elected to the presidency and the Senate, to have the same or a roughly equal opportunity to influence who sits on the Supreme Court through new nominations—an objective that is poorly served by the current system of life tenure. Relatedly, proponents stress, lifetime tenure does not comport with the ideal of limited government authority. The nine individuals who sit on the Supreme Court wield extraordinary power over critical social and political questions, often for several decades. Though judicial independence requires them to be insulated from the same forms of accountability imposed on the political branches, life tenure arguably arrogates too much power to single individuals.

Proponents of term limits caution that one should not confuse the argument that the Court’s composition should reflect electoral outcomes over time with a claim that Presidents have a right to make the Supreme Court generate a particular set of results. In our constitutional system, judges and Justices are not and should not be considered the mere representatives of political parties or the creatures of a particular President, and the argument for term limits does not rest on such assumptions. Moreover, Presidents may appoint Justices for many reasons other than the hope or expectation that the Justice will support the President’s particular policy agenda or constitutional philosophy. Presidents may wish to achieve geographic or demographic diversity on the Court, attract new voters through the selection of a nominee, or choose a Justice with a particular set of professional experiences. And history shows that Presidents cannot necessarily predict the path a Justice will pursue; Justices often confront new issues in contexts quite different from the circumstances in which they were appointed. Thus, the argument for regularized appointments is not an argument for making Justices the representatives of Presidents or a particular ideology. Rather, according to proponents, the ability of Presidents to nominate Justices at regular intervals that would be afforded by term limits, coupled with the Senate’s authority to advise and consent, would help ensure, at least in the long run, that “[t]he political balance of the Court would reflect the opinions of the people over time as expressed in their choice of presidents and senators, rather than the happenstance of health or accident or the strategic timing of the justices.”<sup>13</sup>

Proponents underscore that the value of term limits in advancing these constitutional principles is heightened by various ways in which the consequences of life tenure have changed over time. In particular, the average length of Justices’ terms has expanded.<sup>14</sup> Life spans have lengthened and modern Justices may increasingly delay retirement.<sup>15</sup> Up until the late 1960s, the average term of service was around fifteen years. By contrast, the average tenure of the Justices who have left the Court since 1970 has been roughly twenty-six years.<sup>16</sup> In the future, it’s quite possible that tenure will continue to lengthen, as several recent Justices have been younger than their predecessors and life spans generally continue to grow. The increasing length of the Justices’ terms, in turn, raises the stakes of each nomination. Political partisans may press for nominating younger candidates in the hope that they will serve longer and thus allow for the entrenchment of particular views on the Court for three or more decades into the future.<sup>17</sup>

Proponents also note that the variation in the number of each President’s opportunities to nominate a Justice has become more pronounced. Throughout history, the median, modal, and mean number of chances for a Supreme Court appointment has been approximately two per



four-year term.<sup>18</sup> Most Presidents have had either one or two opportunities, and a small number have been very lucky and received four or more. But sometimes Presidents get none at all. This situation has occurred more frequently since the mid-1970s. In the 188 years from the presidency of George Washington to the presidency of Gerald Ford, there were only five presidential terms out of forty-seven (just eleven percent) in which Presidents did not get an opportunity to make a Supreme Court appointment.<sup>19</sup> But in the forty-four years from Jimmy Carter to Donald Trump, Presidents did not make a single appointment in three out of eleven terms (twenty-seven percent)—and four out of eleven terms if we include Senate Republicans’ refusal to consider the nomination of Judge Merrick Garland during President Barack Obama’s second term.

Again, proponents of term limits do not seek partisan balance. According to proponents, if a party wins the White House more often, its Presidents should have the opportunity to nominate more Justices, though this opportunity may be checked, as with all judicial appointments, by the Senate’s advice and consent. But, proponents emphasize, our current system allows parties to shape the composition and influence the direction of the Court to a degree that does not necessarily reflect their record of electoral success over time.<sup>20</sup> They argue that the existing system—buffeted by chance illness or deaths, possible strategic behavior, and aggressive political tactics—makes it easier than it should be for parties that lose elections to nevertheless have outsized impact on who sits on the Court and on its general direction.

Another justification offered for term limits is that they would largely eliminate the possibility of “strategic retirements” and, just as importantly, the *perception* that Justices retire for strategic reasons. Through strategic retirements, Justices attempt to control the future direction of the Court by creating openings when there is a particular President or Senate majority. Conversely, Justices may remain on the Court, even if they are no longer up to the job, because they are waiting for a different President to select their replacement on the Court. This kind of strategic calculation, or the perception of it, can fuel public beliefs that the Court is a partisan institution. It can contribute to the perception that the system is unfair or rigged, in part because strategic retirements prevent Presidents from receiving a roughly equal number of appointments for each term in office. Moreover, the possibility that Justices might retire strategically can lead to public relations campaigns to push a Justice to retire precisely so that a particular President can appoint a successor. Though it may be impossible to know why any particular Justice chooses to retire at a particular moment, term limits could put a stop to both the possibility and perception of strategic retirements. Under one possible design of term limits

that we discuss further below, Presidents (with Senate advice and consent) would only be able to fill out the remaining years of the term for a retiring Justice, eliminating much of the advantage of, and hence the motivation for, retiring strategically. Proponents do not claim that term limits are a panacea for polarization, nor that they would stop political parties from fighting over judicial appointments. But by regularizing Supreme Court appointments, term limits would make the system of Supreme Court appointments fairer, less arbitrary, and more predictable, and therefore enhance the Court's legitimacy in the eyes of the public.

Finally, in addition to these arguments based in constitutional structure and principle, proponents of term limits also believe that they would enhance the Court's decisionmaking, on the ground that a regular rotation in personnel tends to improve the quality of decisionmaking over time.<sup>21</sup> Judges, like others, are inevitably a product of their time. After distinguished professional careers and eighteen-year terms on the Court, judges may tend to grow more distant from the experiences and contexts to which their legal decisions apply. Judges, like others, can also become set in their ways, making fresh perspectives on issues more difficult to achieve. Rotation in office introduces new voices and new interpersonal dynamics into the deliberations of multimember bodies, as well as more generational diversity, which may bring valuable perspectives.<sup>22</sup> Ensuring that there are regular changes in composition can be especially important for bodies where a small number of people hold considerable power. Indeed, given how powerful the Court has become as an institution—certainly more powerful than the Framers of our Constitution expected—relying on Justices to voluntarily make way for other figures who can help revitalize the Court is asking a great deal. These are some of the reasons that rules and norms governing the leadership of other organizations often require a change of leadership after many years.<sup>23</sup> These are also some of the reasons that other systems that appoint judges through non-political mechanisms, such as through committees of judges and lawyers, nonetheless impose either term limits or mandatory retirement ages on their judges.<sup>24</sup>

The possibility of imposing a mandatory retirement age on Justices is sometimes offered as an alternative to term limits, and the Commission heard testimony on this possibility.<sup>25</sup> Mandatory retirements would arguably improve the quality of decisionmaking for the reasons stated above and provide some degree of responsiveness to elections over time, while preserving judicial independence by allowing for long terms. As with term limits, a mandatory retirement age would make it possible to know when a given Justice will retire (assuming that the Justice does not die or leave the bench early). But, according to term limit proponents, a mandatory retirement age is inferior to term limits in important respects. It would not

guarantee regular appointments. It would still encourage parties to nominate ever younger candidates in order to squeeze the maximum number of years out of each appointment. Thus, if the goal is to regularize appointments and to ensure that political parties that win elections get a predictable number of opportunities to appoint new Justices, term limits offer a better option.

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## II. Objections to Term Limits

The Commission also heard and considered arguments against term limits. In the main, the opponents argue that the current system of appointing and protecting the independence and neutrality of federal judges and Justices, through life tenure, has worked well for over 230 years. The independent federal judiciary, protected by lifetime tenure, is one of the most signal accomplishments of our constitutional system. Opponents of term limits for Supreme Court Justices argue that proponents therefore have a heavy burden of persuasion when they seek to remove what opponents regard as an important pillar of judicial independence. Opponents point to the Constitution’s provision that judges serve for “good Behaviour,” which they regard as providing for life tenure, as one of only two express protections of judicial independence.<sup>26</sup> Opponents contend that far from meeting the burden of persuasion, term limits are likely to worsen existing problems, such as the partisanship of the confirmation process, while at the same time introducing new problems. In addition, opponents argue that term limits would be extraordinarily difficult to implement.

Most fundamentally, term limit opponents deny that it would be good for each President to receive two appointments to the Court. They are concerned that the proposal would further politicize appointments and heighten the belief that Justices are allies of the President and the President’s party—developments they think could do great damage to the Court. Because they believe that term limits could be perceived as founded on the view that judges are partisan, political actors, opponents of term limits believe that inestimable damage could be done to the federal courts by adoption of this reform proposal.

Opponents also raise a number of more specific objections to term limit proposals and their justifications.

First, opponents see term limits as setting up a dynamic in which the presidential election focuses not just on Court appointments in general but on the two guaranteed vacancies and appointments specifically. If two seats on the Supreme Court are guaranteed to open every

four years, the Court might become even more of an issue in electoral politics than it currently is. Presidential candidates might have even greater incentives to make promises about whom they will appoint, and presidential elections might increasingly appear to the public to also be elections of specific identified persons—now candidates—to the Supreme Court. In a highly polarized environment, it might be especially harmful to reinforce connections between the Court and presidential politics. Such an electoral process might change not just the public’s perception of the Court, but also how the Justices view themselves and behave, making the institution more partisan. Moreover, introducing term limits might reinforce the erroneous message that appointments to the Supreme Court are the spoils of politics or the property of a particular President or party. Relatedly, one critic of term limits worries that the Justices “will be Republican appointees or Democratic appointees in a more explicit sense than they are now,” and that some Justices “may . . . view their own roles in a manner a little more political and a little less law-like.”<sup>27</sup>

Second, opponents of term limits point out that if one of the failings of the current system is a bitterly partisan confirmation process, then prescribing yet more regular confirmation hearings, as term limits would, simply worsens an already bad situation. While there is sometimes the suggestion that eighteen-year terms might engender less partisanship than lifetime appointments, opponents of term limits think a reduction of such partisanship in the United States is unlikely given the underlying dynamics of the current confirmation process and the incentives of interest groups.<sup>28</sup>

Third, some commentators and scholars have also expressed concern that term limits (whether through constitutional amendment or by statute) would threaten the basic structural principle of judicial independence.<sup>29</sup> They argue that life tenure is essential to that independence, as evidenced in our longstanding historical practice. Opponents are not comforted by citations to foreign courts, or to the state supreme courts where judicial terms are renewable through different systems of election or reappointment. Opponents note that it is perilous to draw conclusions from systems that are so fundamentally different. They also argue that the federal system of life tenure is the gold standard for judicial independence.

Opponents of term limits further believe that even long, non-renewable terms could undermine judicial independence by virtue of the fact that at least some Justices would have to consider what they would do after their terms expire. Their plans for the future might affect either their performance as Justices or public perceptions of that performance. One might worry that a Justice who is eyeing future positions in government might try to curry favor with political constituencies, or that a Justice who is eyeing future positions in industry or at a law

firm might decide cases in light of those plans or might appear to do so. While it might be thought that term limits reduce the pressure for Presidents to appoint younger people, such that most Justices who serve eighteen-year terms may still view their positions on the Court as their last major position, other Justices who have served some portion of the eighteen-year term might decide that they would prefer to take a different unlimited position in government or the private sector rather than filling out the rest of the term. In order to address this problem, term limits proposals would have to be coupled with what opponents see as troubling restrictions on post-Court employment.<sup>30</sup>

Fourth, by design, term limits would produce more turnover on the Supreme Court than has been typical in recent decades. Opponents argue that this turnover could have costs as well as benefits. At the outset, one might object that term limits would deprive the Court of certain benefits that can result from Justices serving for several decades. Some might believe life tenure tends to improve the judgment of the Justices because wisdom and, perhaps, open-mindedness come with age and experience. Moreover, several of the greatest Justices in American history—Chief Justice Marshall comes quickly to mind—served on the Court for a very long time. Opponents argue that a system of term limits would make such distinguished careers less possible—or at least shorter—in the future and might reduce the stature of the Court as a whole, including its stature with the public, the bar, and the lower courts. Moreover, the concern for the advanced age of long-serving Justices ignores, in the view of critics, that the most pronounced divisions on the Court are not by age, but by judicial philosophy.

Another concern about increased turnover is that it might destabilize the Court's doctrine. To the extent that new Justices have different views of the law than their predecessors, and to the extent that they are willing to overrule or narrow precedents with which they disagree, more turnover on the Supreme Court could lead to more frequent doctrinal shifts, or even cycles in which major precedents are discarded only to be reinstated later, perhaps in very short order. To opponents of term limits, the current system provides sufficient turnover and there is little reason to adopt a new and untried system simply to generate more turnover.<sup>31</sup>

Fifth, those who object to term limits fear that such limits would give the President too much power, an especially worrying concern given how powerful the modern presidency has become. If Presidents make new appointments to the Supreme Court every two years, two-term Presidents will have appointed four of the nine active Justices by the final year of their administrations. The power to appoint four-ninths of the Supreme Court is a substantial power; term limits would lock in that power and make it less subject to the vagaries of chance.<sup>32</sup> Critics might therefore argue that the randomness of presidential opportunities to make

Supreme Court appointments throughout history has actually been an advantage, because it limits presidential power and ambitions, and thereby helps preserve the Court’s independence. And over time, opponents argue, we might expect a “balancing out,” such that the randomness of appointments over more limited periods is not a sufficient source of concern to justify the institution of a system of term limits. Opponents also argue that a focus on the presidency and presidential politics in structuring regularized appointments mistakenly minimizes the role of the Senate. These concerns would be heightened were the term limit reduced to twelve years; in the course of two terms, a single President would have appointed a majority of the Court.

Sixth, a different type of objection involves the incentives for gamesmanship in particular cases. If it is known that a swing Justice will lose the power to participate in cases on a specific date, either litigants or lower court judges might try to time a case accordingly.<sup>33</sup> Conversely, Justices who want to weigh in on a question while they still have the power to do so might be inclined to grant certiorari before the question has fully “percolate[d]” through the lower courts, and they might also face temptations to accept cases that are not ideal “vehicle[s]” for presenting and deciding the question.<sup>34</sup> Similarly, other Justices might vote to defer hearing a case or an issue until their colleague had been forced to leave the Court.

A final objection returns to the premises of the proposal. Proponents ground their support for term limits on the principles and values that underlie the original constitutional structure. Opponents emphasize, however, that the Constitution expressly provides for judicial service during “good Behaviour.” Opponents of term limits point to Hamilton’s observation in Federalist 78 that “nothing can contribute so much to [the judiciary’s] firmness and independence as permanency in office,” a quality he regarded as “an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.”<sup>35</sup> In the view of those who oppose term limits, life tenure as guaranteed by the Constitution helps protect both the decisional and institutional independence of the third branch from being “overpowered, awed, or influenced” by the other branches.<sup>36</sup>

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Opponents of term limits caution that any such proposal should not appear as a settling of scores, as an attack on particular Justices, or an effort to change the substantive opinions and direction of the current Court. And term limits by themselves cannot ensure that the President will nominate high-quality individuals. Those who object to term limits believe that the Supreme Court has functioned with life tenure ever since the Founding, and switching to a system of term limits poses major design challenges and could well further politicize the

confirmation and selection process while also affecting the culture and standing of the Court. A broader concern they hold is less about term limits than about any reform that weakens one of the Constitution's two express protections of judicial independence. In our current polarized environment, opponents argue, *any* change to the structure of the Supreme Court might be regarded with suspicion, and the risks of unintended consequences are significant. Opponents further contend that, if pursued by statute rather than constitutional amendment, such reform might open the door to further structural changes, such as an overreaching President's attempt in collaboration with Congress to remove life tenure from all Article III judges, with considerable risk to the stability of the judiciary. In short, say opponents of term limits, the current system of life tenure is not broken, and term limit proponents have not met their heavy burden of persuasion.

Term limit proponents acknowledge that the risk of unintended consequences is an important point to consider, but they argue that it is not a conclusive argument for inertia, particularly because the status quo has significant problems. Indeed, they argue, inertia too can have unintended consequences, as illustrated by the gradually lengthening tenure of Justices over time and the increased perception that Justices retire strategically. Responding to the costs and risks asserted by opponents, they note that the average tenure of the Justices who left the Supreme Court from the Founding until 1970 was less than eighteen years.<sup>37</sup> So, proponents argue, the Court has historically experienced greater turnover than a system of eighteen-year terms would be likely to produce now. They argue that concerns over judicial independence or increased executive power are not supported by actual experience in courts that have term limits or mandatory retirement ages, nor are they supported more generally by the empirical literature.<sup>38</sup> Moreover, these concerns can and should be addressed through the careful design of the system, such as through long and non-renewable term limits, a guaranteed lifetime of judicial office and compensation while performing other judicial duties, and the coupling of term limits with some restrictions on the types of post-Court employment. Even some critics of term limits, they note, think it fair to expect that "long fixed terms followed by assignment to a court of appeals" would give individual Justices a degree of independence comparable to the status quo.<sup>39</sup> And they respond to opponents' concerns about politicization of the appointments process by pointing out that the process is already highly politicized and that an eighteen-year term is long enough to avoid any increase in the heat of confirmation battles.

### III. Analyzing a Constitutional Amendment for Term Limits

This section identifies the major issues to consider in designing a system of term limits. These issues include the size of the Court, the length of the Justices' terms, how to fill vacancies that arise before a set term ends, and how to transition from the current system.

Many of these issues arise under either a proposed constitutional amendment creating term limits or a statutory term limit proposal. But the options for addressing them differ depending on which path is being considered. In this Part, we discuss these issues in the context of a constitutional amendment to adopt term limits. In Part IV, we do so in the context of a statutory term limits proposal, and we also discuss whether these reforms would require constitutional amendment or whether they could be enacted by Congress. While our aim is not to recommend a specific proposal, we believe it is necessary to discuss plausible reform options in order to ground our analysis.

#### A. Setting the Court's Size and the Appropriate Term Length

A system of term limits ought to specify the appropriate size of the Court. One major justification for a staggered, term-limited system of appointment is that such a system would bring about less randomness and greater equality across presidential terms in the number of Justices a President would have the opportunity to appoint. That aim would be drastically undermined, however, were Congress free to vary the size of the Court. We separately evaluate proposals to expand the size of the Court in Chapter 2 of this Report. For purposes of our analysis here, we assume that an amendment would fix the Court's size at nine Justices.

With a nine-member Court, the two likeliest options for term limits would be a twelve-year term or an eighteen-year term, as both would create a roughly equal number of appointment opportunities in each presidential term. In recent decades, the overwhelming majority of term limit proposals have endorsed the eighteen-year version. In that version, each President would have two regular appointments in a single presidential term. In the twelve-year version, each President would have three such appointments.

Important tradeoffs are involved in this choice. As we noted at the outset of this Chapter, from the perspective of the state courts and international peers, an eighteen-year term is quite long. Of the forty-seven states that impose term limits for their highest court judges, only one state has a term longer than twelve years.<sup>40</sup> Similarly, of the twenty-seven countries that impose a term limit, those limits range between five and fifteen years.<sup>41</sup> The German



constitutional court, considered one of the strongest constitutional courts in Europe, is composed of judges who serve twelve-year non-renewable terms and who must retire at age sixty-eight.<sup>42</sup>

As this experience in the states and other countries suggests, there is a case to be made for twelve-year, non-renewable terms if the structure of the Court is considered in isolation from the larger political circumstances of the appointments process. With twelve-year terms, each presidential term would involve three regularly scheduled appointments. In addition, a President elected for two terms would have the power to appoint six regularly appointed Justices. Even if a constitutional amendment for term limits would to some extent reduce the intensity of political conflict over Court appointments, however, three appointments every four years would put the Court at the center of the political process on an almost yearly basis. There are also reasons to be concerned that enabling a single two-term President to make six appointments gives one person too much power to reshape the Court. This tradeoff has led most proponents of term limits in the United States to endorse an eighteen-year term. For simplicity's sake, and in the light of these considerations, we will use an eighteen-year term limit to ground our analysis.

That said, circumstances could change, making potential turbulence less of a risk. If so, the costs and benefits of a twelve-year term as opposed to an eighteen-year term might be weighted differently than at present. For this reason, the designers of a constitutional amendment might consider whether the amendment should give Congress the power to adopt prospectively a twelve-year term (that is, to adopt a statute that would take effect for Justices appointed after the date of enactment). Drafters should take care to hew to the core purpose of such an amendment by ensuring that each President receives the same number of regularly scheduled appointments.

## B. Effective Date and Timing of Appointments

The designers of a constitutional amendment to implement a term limit system must make several choices related to the timing of the reform.

First, drafters must decide when the amendment would take effect. The amendment could, of course, take effect upon adoption. If there is concern that knowledge of who the sitting President is at the time the amendment takes effect would make it more difficult for the amendment to be adopted, the amendment could be structured to take effect starting at some

later date. For instance, it could begin in the first presidential administration elected after the amendment is approved.

Second, drafters must also determine the timing of appointments. The amendment could specify when during a presidential term the President's two appointments would arise. If the drafters wished to avoid appointments arising during an election year, they could specify that appointments would arise in years one and three of a presidential term. To avoid disrupting an ongoing Supreme Court term, the amendment could specify that the outgoing Justice's term ends on a specific date that typically falls after the Court has issued all its opinions in argued cases. The incoming Justice's term can be made to run from that date, in which case Justices might serve slightly fewer than eighteen years, given the time it would take for confirmation.

Third, drafters must also address how to fill seats that become vacant due to retirement, death, or impeachment before the end of a Justice's eighteen-year term. Once every Justice has been appointed to an eighteen-year seat, this situation is not likely to occur often. Only one Justice appointed in the last fifty years has served fewer than eighteen years.<sup>43</sup>

We identify three options for how to fill seats that become vacant:

The first is to leave those seats unfilled for the remainder of any retiring Justice's term, thereby preventing any President from having more than two appointments in a presidential term. That option would leave the Court to function without a full complement of Justices for what might be extended periods; it would also mean the Court would likely have to function for periods with an even number of Justices. The Court has functioned occasionally with an even number of Justices, as it did for fourteen months after Justice Scalia's death. Some argue that an even-numbered Court encourages the Justices to deliberate more to find common ground, in an effort to avoid leaving the Court unable to decide a case. In addition, the Court would not be able to find state or national action unconstitutional absent greater consensus than a five-to-four decision entails. But a significant cost of having an evenly divided Court is that it could prevent the Court from ensuring that federal law is uniform throughout the country. If the courts of appeals are divided on an issue, for example, there would be no higher judicial authority to resolve that difference if the Court itself is evenly divided on the issue. The same law could be held constitutional in one part of the country and unconstitutional in another.

A second option is that the sitting President, with Senate confirmation, would have the power to appoint a candidate to fill out only the remainder of the original eighteen-year term.

Some witnesses testified that confirmation in this context should require a supermajority Senate vote.<sup>44</sup> The justification for that higher hurdle is that seats that become vacant before the end of an eighteen-year term reintroduce a random element into the timing of appointments by allowing certain Presidents to make more than two appointments. On this view, those appointments should succeed only if they are backed by a significant consensus in the Senate. Although a supermajority requirement might lead some seats to remain vacant (as in the first option), no President would be deprived of the right to make two regularly scheduled appointments in a presidential term. If the amendment does permit the President to fill out the term of a seat that becomes vacant prematurely, the drafters might consider prohibiting the person appointed from being reappointed to a full eighteen-year term.

A third option depends on how the amendment treats Justices who have reached the end of their eighteen-year terms. The amendment might define these individuals as “Senior Justices,” who continue to hold offices as Article III judges but no longer participate in the day-to-day operation of the Court. Given that these Justices have all been confirmed by the Senate, the amendment could give the President the option to designate a Senior Justice, if one is available, to fill out an eighteen-year term that has become vacant prematurely. If unilateral presidential designation is undesirable, the amendment could instead require the Senate to confirm the President’s choice (if no Senior Justices are available, one of the first two options would have to apply).

## C. Designing the Transition to Fixed-Term Appointments

How to structure the Court’s transition to fixed-term appointments presents significant practical challenges. The most significant options that have been proposed are discussed below. For purposes of this analysis, our discussion will assume an eighteen-year term with regular presidential nominations in years one and three of a President’s term.

### 1. Sitting Justices Retire on a Fixed Schedule That the Amendment Establishes

Under this approach, once the amendment takes effect, the longest-serving Justice would retire in year one of the first presidential term in which the amendment takes effect. The next most senior Justice would retire in year three, and so on. This strategy is the conceptually cleanest structure for the transition. Were this approach adopted, sixteen years after the first Justice is appointed to a term-limited seat, the full Court would consist entirely of Justices serving eighteen-year terms. For instance, if the amendment took effect in 2025, the most junior Justice on the current Court would retire in 2041, after twenty-one years of service. If

this were done through a constitutional amendment, the Commission does not perceive there to be any significant constitutional issues in applying the amendment to sitting Justices.

## 2. Sitting Justices Remain on the Court as New Term-Limited Justices Are Appointed

The Commission is aware that while the simplest approach would be to apply a term limits amendment to the sitting Justices, this strategy might generate political conflict that would make passage of an amendment difficult.

If the amendment is designed not to apply to currently sitting Justices, the Court could expand temporarily. New Justices would start being appointed every two years for eighteen-year terms after the amendment's effective date. As legacy Justices leave, their seats would not be filled as long as at least nine Justices would remain on the Court. It is likely that the Court would never drop below nine Justices. One study concludes that, under this approach, it would take around thirty-five years until the full Court consisted entirely of Justices serving for fixed terms.<sup>45</sup>

This approach does come with potential costs, however. It would likely produce a considerably expanded Court for a period of years. In Chapter 2, we consider some of the consequences of a larger bench, including that it could hamper the Court's decisionmaking (depending on how large the expansion is). That said, many of the highest courts in other democracies have eleven or more members, and in many cases they function effectively by sitting in panels, a prospect we also explore in Chapter 2.<sup>46</sup> On the other hand, no state supreme court has more than nine judges and only seven are even that large; most have seven judges and seventeen have five.<sup>47</sup> As one former federal judge testified to the Commission, above a certain size, effective collective deliberation becomes more difficult.<sup>48</sup> In addition, in some years, the Court might also have an even number of Justices, which would raise the issues discussed above about the pros and cons of an even-numbered Court.<sup>49</sup> It is also uncertain how the public would perceive the Court if its size fluctuated from year to year for many years. Closely divided decisions on a Court that sometimes has nine members, sometimes eleven, sometimes thirteen, might make the Court appear less stable and generate perceptions that outcomes turn on the fortuity of how many Justices happen to be on the Court at any particular moment.

### 3. New Term-Limited Justices Are Appointed Only When Currently Sitting Justices Vacate Their Seats

Another alternative proposed in academic work on this issue is that current Justices continue to serve for life and new appointments are made only when the seat of a currently sitting Justice becomes vacant.<sup>50</sup> The amendment would still establish a schedule of regular eighteen-year appointments, into which retirements of currently sitting Justices would then have to be integrated. For example, if a currently sitting Justice retires before the date for vacating that seat occurs, the President nominates a Justice who would serve the next eighteen-year slot that is scheduled to become available. Suppose under the amendment the first three eighteen-year terms would arise in 2025, 2027, and 2029. If a currently sitting Justice leaves the bench in 2024, the President would nominate a Justice whose term would be nineteen years (2024-2025 plus the eighteen-year term that begins in 2025). If the next sitting Justice leaves in 2025, the President would nominate a Justice whose term would be twenty years (2025-2027 plus the eighteen-year term that begins in 2027). If another seat does not open up until 2031, the President would nominate a Justice who would serve for only sixteen years (filling the term that was scheduled to begin in 2029 and end in 2047).

This proposal would avoid temporary expansion of the Court, but it would also generate the longest time interval before the full Court was composed of Justices serving eighteen-year terms. One study estimates that, under this proposal, it might take around fifty-two years before the Court reached the point that all Justices were serving eighteen-year terms.<sup>51</sup> The additional complexities just noted about timing of appointments might also be considered a cost of this proposal.

### 4. Addressing Seats Held by Currently Sitting Justices That Become Vacated Prematurely

If the amendment applies to currently sitting Justices, as in the first option above, a distinct issue arises concerning the seats of those Justices that might become vacant prematurely. For example, a currently sitting Justice whose term would be scheduled to end in 2033 might vacate the seat in 2025. This may be a more likely scenario than that a new Justice appointed to an eighteen-year term would vacate that seat prematurely. Simply for reasons of age, it seems more likely that a Justice on the current Court would leave office eight years before a scheduled end-of-term date than would a newly appointed eighteen-year term Justice.

One option is the same as discussed earlier: the seat could remain vacant. But in this context, that could leave the Court with fewer than nine Justices, and possibly an even number of Justices, for an extended time—eight years, in the example above.

If the seat that becomes vacant is the next one the sitting President would be entitled to fill in any event during the four-year term, the President could be given the power to nominate the Justice to fill that seat. That Justice would then serve eighteen years plus the small amount of additional time involved; if a currently sitting Justice’s term is scheduled to end in 2027, but ends in 2026, the new Justice would serve one year plus the new eighteen-year term. Given that a new Justice under this scenario would never serve more than twenty years, the normal presidential nomination and Senate confirmation process might be appropriate (that is, without a supermajority requirement).

If the President has not yet filled any of the two allocated seats, and the Justice who leaves is the one whose term would expire in year three of the administration, there are two options for addressing that scenario. In the first, the amendment would treat this situation as if the President is filling the first of two seats. The Justice who would otherwise be scheduled to retire first during that term would instead stay on until the term ends of the Justice scheduled to retire in year three—the Justice who has left prematurely. At that point, that Justice retires and the President fills the second seat. The second option is that the President appoints a Justice to fill out the remainder of the term for the Justice who left early plus eighteen years. When the term of the Justice scheduled to retire in year one of the administration ends, the President fills that term as well. The first option reduces possibilities of strategic retirements, but might be considered overly complex.

In any other context, the current President should at most have the authority to appoint a replacement only for the rest of the term that the departing Justice was scheduled to serve. Under the theory behind the term limits amendment, no President should get to make more than two eighteen-year appointments in any single presidential term. With respect to the replacement Justice, moreover, the options discussed earlier might be appropriate. First, a supermajority vote requirement in the Senate might be appropriate. Second, if there are “senior” Supreme Court Justices, one could be designated to serve out the remainder of the scheduled term.

## D. Constraints on Justices Who Have Fully Retired After Finishing Their Term of Service

Many countries that impose term limits or retirement ages on judges of their highest courts also impose constraints on the post-service activities of those judges. There are two main reasons for imposing such constraints. The most important is to avoid undermining the fact and appearance of judicial independence by eliminating the likelihood of Justices' altering their behavior in their last years of their service on the Court to enhance certain post-service employment opportunities. In addition, certain post-service positions might be detrimental to the public's sense of the integrity and professionalism of the Court. At the same time, it is important that former Justices who choose to retire from judicial service altogether after their term ends have appropriate opportunities to pursue other professional interests.

In order to address these concerns, the amendment could specify that at the end of their service, Justices have the option of retaining the office of an Article III judge and remaining available to serve by designation on any of the lower federal courts; to serve by designation on the Supreme Court if a Justice in an eighteen-year seat vacates that seat prematurely; or to perform other federal judicial functions. The amendment could also specify that upon completion of their terms, Justices would continue to receive a pension for life commensurate with their salaries on the bench.<sup>52</sup> But these two provisions would not solve the problem fully. With term limits, some Justices would complete service at younger ages than the current average age at which Justices leave the Court. Some might prefer to relinquish their Article III commission and work in other capacities.

Former Justices who have chosen to retire fully from the bench could be barred from certain kinds of employment for a certain period of time. The prospect of high-level government employment is a particular concern, given the risk of public perceptions that a Justice will have ruled in certain ways late in their term to curry favor with the sitting government. Retired Justices could be prohibited from involvement in legal matters that had been the subject of proceedings before the Court and, perhaps, closely related matters.<sup>53</sup> Former Justices could also be barred from working on any matters before the Court. Service in roles such as mediator, arbitrator, or law school lecturer, on the other hand, are most compatible with the role of a retired Justice. While some of these concerns should be addressed in any constitutional amendment—such as whether term-limited Justices retain the option of remaining Article III judges—others might be appropriately handled through legislation.

## IV. Enacting Term Limits through Statute

Members of the Commission are divided about whether Congress has the power under the Constitution to create the equivalent of term limits by statute. Some believe that a statutory solution is within Congress's powers. Others believe that no statutory solution is constitutional, or that any statute would raise so many difficult constitutional and implementation questions that it would be unwise to proceed through statute. Opponents of term limits cite these complexities as reasons to eschew term limits altogether.

In this Part, we consider the primary statutory approach and two alternative approaches. In all three proposals, Presidents appoint new Justices in the first and third years of their terms in office. As noted in the introduction to this Chapter, we focus on these proposals to ground our analysis rather than to endorse these proposals over all others. In addition, because the Commissioners are divided as to whether it would be constitutional to implement term limits via statute, we offer what we take to be the best argument for each position but do not seek to resolve the matter. We also examine some of the prudential concerns arising from these proposals. If Congress were contemplating imposing term limits by statute, a constitutional amendment that simply specified the size of the Court might still be advisable, for the reasons discussed above.

The main focus of our analysis is the so-called Junior/Senior Justice proposal. It creates the functional equivalent of term limits by providing that, after eighteen years of service, Justices become Senior Justices and stop participating in the ordinary work of the Court. This proposal features elements common to other proposals that scholars and advocates have offered,<sup>54</sup> and the constitutional issues we discuss here are also common to those proposals. The two alternative solutions—the Original/Appellate Jurisdiction proposal and the Designated Justices proposal—attempt to address potential constitutional problems with the Junior/Senior Justice proposal, but they raise their own sets of constitutional issues.

In all three proposals, Justices would spend an eighteen-year nonrenewable term participating in the ordinary work of the Supreme Court. After that period, they would perform a different or a subsidiary set of duties.

### A. The Junior and Senior Justices Proposal

In the Junior/Senior Justice proposal, Congress passes a statute that provides that, after eighteen years of service as a “Junior Justice” deciding cases, each Justice would assume



senior status. Thereafter, these “Senior Justices” would no longer participate regularly in the ordinary work of the Court. But they would perform other duties, including sitting by designation in the lower federal courts and assisting the Chief Justice with administrative duties. Congress could specify these duties by statute, or it could leave it to the Justices themselves to decide on them through an internal rule.<sup>55</sup>

If the duties of Senior Justices were not sufficiently germane to the office of a Supreme Court Justice, the change in duties might amount to appointment to a new office. This would require a new nomination by the President and confirmation by the Senate. However, it is not clear that the germaneness requirement applies to the prospective redefinition of an office. In any case, the Supreme Court’s understanding of germaneness appears to be very broad. In *Weiss v. United States*,<sup>56</sup> for example, the Court held that the duties of a military judge were sufficiently germane to the duties of a commissioned officer that the officer could be designated to serve as a judge without going through the appointments process.

The Justices already perform the duties listed above and that would pertain to Senior Justices under the proposal. Current federal law authorizes Justices to sit on circuit courts.<sup>57</sup> And as a historical matter, federal law long *required* the Justices to sit on other federal courts in addition to hearing cases on the Supreme Court. For almost all of the first hundred years of the Republic, Supreme Court Justices “rode circuit”: they heard and decided cases in the lower federal courts. With the Judiciary Act of 1801, Congress abolished circuit riding, only to reinstate it in the Repeal Act of 1802 after control of Congress changed hands. The Supreme Court rejected a constitutional challenge to the 1802 Act in *Stuart v. Laird*,<sup>58</sup> in which the challenger sought to reverse a circuit court’s judgment partly on the ground that “the judges of the supreme court have no right to sit as circuit judges, not being appointed as such.”<sup>59</sup> The Supreme Court responded that circuit riding was so well established that its validity was no longer open to question: “[P]ractice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.”<sup>60</sup> Justices continued to have circuit-riding duties until the late nineteenth century.<sup>61</sup>

Existing practice and precedent offer a model for the types of duties Senior Justices might perform. A federal statute, 28 U.S.C. § 371, provides two options for federal judges, including Supreme Court Justices, who meet certain service and age requirements. They may “retire from the office” under § 371(a), at which point they no longer hold the office of federal judge or Justice but continue to receive an annuity equivalent to their salary at the time of retirement. Or they may “retain the office but retire from regular active service” under § 371(b) and

“continue to receive the salary of the office” if they perform a different set of duties, which they may select from a list set out in later sections. Listed duties include “a caseload involving courtroom participation,” “substantial judicial duties not involving courtroom participation,” “substantial administrative duties directly related to the operation of the courts,” or “substantial duties for a Federal or State governmental entity.” For lower court judges, the status created in § 371(b) is usually called senior status.

Under the current rules, judges who take senior status need not sit on any cases at all. They may, however, sit by designation within their own circuit at the discretion of the chief judge or judicial council of their circuit. They may also sit by designation in other circuits at the discretion of the Chief Justice upon presentation of a certificate of necessity by the chief judge or circuit justice of the other circuit. Supreme Court Justices who retire from regular active service (and take the analogue of senior status for lower court judges) are not allowed to participate in any decisions or actions of the Supreme Court, but they may sit by designation in the lower federal courts.<sup>62</sup>

As with a constitutional amendment, drafters of a Junior/Senior Justice statute would have to make decisions about whether it would apply to sitting Justices, when the appointments of term-limited Justices would begin, how to handle vacancies that arose outside of the scheduled process, and whether there should be restrictions on the future employment of former Justices. The discussion of these issues in the constitutional amendment section applies equally to such a statute, with the caveat that applying the statute to sitting Justices might raise additional constitutional questions, as noted below.

## 1. Constitutional Issues Raised by the Junior/Senior Justice Proposal: The Good Behavior and Appointments Clauses

Article III, Section 1 provides that: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”<sup>63</sup> The Appointments Clause of Article II, Section 2 provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .”<sup>64</sup> The issues raised under these constitutional provisions by any term limits statute are complex, and what follows is a brief review of the relevant considerations. Commissioners disagree about the proper resolution of the questions raised.

Those who believe that the Junior/Senior Justice proposal is unconstitutional start with the Good Behavior Clause, which is conventionally interpreted to give federal judges “life tenure”: Federal judges hold their offices for an indefinite period that ends only when they die, voluntarily resign, or are involuntarily removed through the process of impeachment and conviction. Although the Good Behavior Clause does not specify the details of the “Offices” that federal judges hold, the Appointments Clause arguably recognizes a separate office of “Judge[] of the supreme Court” that is different from other federal judicial offices. If so, people who have been appointed to the Supreme Court must remain “Judges of the supreme Court.” Those who believe that the Junior/Senior Justice proposal is unconstitutional argue that Senior Justices (who would be barred from participating in the ordinary work of the Court after eighteen years) do not remain “Judges of the supreme Court” in the sense that the Constitution requires. Indeed, given the enormously consequential constitutional decisions of the Court that this Chapter emphasizes, these critics argue it is implausible to claim that individual Justices can be involuntarily removed from most of the Court’s constitutional work without being deemed to have lost their “office.” In addition, some believe that these specific textual provisions should be understood in the context of more general separation of powers principles, including the principle of judicial independence. Part of the reason the Good Behavior and Appointments Clauses are best understood to deny Congress the power to modify life tenure by statute, in this view, is to protect the structural principle of judicial independence that underwrites Article III of the Constitution.

Proponents of the Junior/Senior Justice proposal believe that Congress may redefine the office prospectively. Thus, for all new appointments made after the statute takes effect, the office of Justice of the Supreme Court would mean serving as a Junior Justice for the first eighteen years and serving as a Senior Justice thereafter. All Justices would have the same duties and powers, but the nature of these duties would change over time. Under this approach, every Justice, unless they retire, would eventually become a Senior Justice if they stay on the Court for more than eighteen years. Note that under the terms of this argument, the statutory changes would not apply to sitting Justices.

The debate hinges on the nature of the “office” of Justice of the Supreme Court that the Constitution creates and whether a statute that contemplates that the Justices’ duties will change after eighteen years removes them from that office in violation of the Good Behavior Clause. Proponents, relying on the senior status statute, 28 U.S.C. § 371(b) and (e), conclude that a change in duties does not necessarily involve a change in office because senior status judges still hold their office. For the same reason, they believe that deciding cases is not

essential to continuing to hold office as a federal judge, and that deciding Supreme Court cases is not essential to continuing to hold the office of a Supreme Court Justice.

In support of this conclusion, proponents argue that the Supreme Court approved this system for senior judges in *Booth v. United States*.<sup>65</sup> In *Booth*, a unanimous Supreme Court held that a lower court federal judge who retired under the predecessor of § 371(b) “remains in office” within the meaning of Article III, Section 1.<sup>66</sup> The Court pointed out that senior judges exercise the judicial power of the United States in deciding cases when designated to do so. “It is scarcely necessary to say that a retired judge’s judicial acts would be illegal unless he who performed them held the office of judge. It is a contradiction in terms to assert that one who has retired in accordance with the statute may continue to function as a federal judge and yet not hold the office of a judge.”<sup>67</sup> On one reading of *Booth*, a statutory change of duties does not remove a judge from office as long as “[t]he purpose is . . . that he shall continue . . . to perform judicial service.”<sup>68</sup> The Supreme Court reaffirmed this reasoning in 2003 in *Nguyen v. United States*.<sup>69</sup>

*Booth* thus distinguishes between a *change in duties*, which is within the power of Congress, and *removal from office* or *reduction in compensation*, which are not: “Congress may lighten judicial duties, though it is without power to abolish the office or to diminish the compensation appertaining to it.”<sup>70</sup> Moreover, those who believe statutory term limits are constitutional argue that the reasoning of *Booth* and *Nguyen* also extends to retired Justices. Retired Justices such as David Souter and Sandra Day O’Connor have often participated in courts of appeals decisions pursuant to 28 U.S.C. § 294. When they do, proponents of the Junior/Senior Justice proposal believe they are best understood as having retained their office as Supreme Court Justices because they are exercising federal power and they have not been appointed to any new office. Hence, proponents conclude, Senior Justices retain the office of Justice of the Supreme Court even if their duties have changed and no longer include participation in the ordinary work of the Court. Critics, however, believe that retired Justices still hold federal judicial office, which is required under *Booth* if they are to exercise federal judicial power, but that they do not necessarily continue to occupy the constitutional office of Supreme Court Justice.<sup>71</sup>

Setting *Booth* aside, critics believe that the best understanding of the Constitution forbids the change in duties that the Junior/Senior Justice proposal entails. One constitutional scholar puts the argument this way: “To say there is a particular office of Supreme Court Justice, as opposed to federal judge in general, is to say that the Constitution contemplates some connection between the justices and the work of the Court.”<sup>72</sup> On one view, because the Court

is a decisionmaking body in which members participate and deliberate together, the ability to “participat[e] in substantially all the body’s final decisions” is a necessary constitutional feature of holding the office of “Judge[] of the supreme Court.”<sup>73</sup> Because the Junior/Senior Justice proposal eliminates the right to participate in the Court’s decisions after eighteen years, some think it marks a change in office that violates the Good Behavior Clause.

Commentators have also discussed an alternative understanding of what it means to be a “Judge[] of the supreme Court”: Instead of participating in substantially all of the Court’s final decisions, perhaps each Justice must be able to participate in *an equal share* of the Court’s work. There is a sense in which the Junior/Senior Justice proposal establishes equality among the Justices, because each Justice has the same powers for the same period of time. But even so, critics argue that “the proposal is not consistent with the Constitution’s idea of a term” (and with the prevailing view that the Good Behavior Clause prevents Congress from imposing straightforward term limits).<sup>74</sup> In the critics’ view, Congress cannot establish a time limit after which Justices lose the ability to participate equally in the Court’s decisions, even if all Justices are subject to the same time limit.

To the extent that the proponents’ argument rests on the precedential authority of *Booth*, critics believe that the precedent is limited. *Booth* involved the Compensation Clause of Article III and the issue was whether Congress could cut the pay of lower federal court judges who had *voluntarily* taken what we now call senior status. As permitted by a 1919 amendment to the Judicial Code, they had chosen to “retire . . . from regular active service on the bench” but had not “resign[ed] [their] office,”<sup>75</sup> and they continued to hear cases or perform other judicial duties. The Court held that Congress could not constitutionally reduce their compensation because they still remained in office and exercised federal judicial power. Thus, critics of statutory term limits argue, *Booth* only holds that when judges *voluntarily* take senior status, but continue to hear cases, Congress may not reduce their compensation under the Compensation Clause. According to critics, it does not follow that Congress can *require* life-tenured Supreme Court Justices to stop participating in the Supreme Court’s exercises of judicial power after eighteen years.<sup>76</sup>

Proponents argue that if judges who have elected senior status “[c]ontinu[e] in Office” within the meaning of the Compensation Clause, then a statute requiring judges to take senior status after eighteen years would not deprive them of their “Offices” within the meaning of the Good Behavior Clause. In the proponents’ view, moreover, *Booth* and subsequent established practice with respect to retired Justices foreclose the critics’ arguments about the essential nature of the offices of “Judges of the supreme Court.” According to proponents,

there is no meaningful legal distinction between Supreme Court Justices and other federal judges as to whether they retain their judicial office after senior status, and whether or not that status is voluntarily chosen or imposed by statute. On this view, substantial participation or equal participation in all merits decisions is therefore not “inherent” in the nature of the office of Supreme Court Justice. The critics’ assertion to the contrary, proponents argue, is belied by practice.

Critics respond that practice does not support allowing Congress to *mandate* a reduction in duties after a certain number of years. And the fact that our current practices make a reasonable accommodation for voluntary decisions does not mean that those practices establish a general principle that extends to a new set of arrangements in which Justices have no say in the matter.

Indeed, critics believe that the argument from history favors their position. Throughout most of American history, members of Congress have assumed that the only constitutional way to achieve term limits for Supreme Court Justices is through constitutional amendment. Starting as early as 1807,<sup>77</sup> and continuing to the present, more than two hundred proposals have been introduced in Congress to amend the Constitution to establish term limits for Supreme Court Justices or for federal judges more generally—sometimes in conjunction with other changes, sometimes as a stand-alone measure. But the first bill to establish the functional equivalent of term limits by statute was not introduced until 2020.<sup>78</sup> The very idea of mandating term limits by statute is a recent innovation.

## B. An Alternative Proposal: Original/Appellate Jurisdiction

An alternative to the Junior/Senior Justice proposal is the Original/Appellate Jurisdiction proposal, under which all Justices continue to hear original jurisdiction cases throughout their tenure in office, but only the nine most junior Justices in service hear cases brought to the Court under its appellate jurisdiction.<sup>79</sup> The Court hears only a small number of cases through original jurisdiction every year. Most cases, and almost all of the controversial cases, come before the Court through its discretionary appellate jurisdiction. In addition to participating in cases involving original jurisdiction, Senior Justices may also perform other duties, as in the Junior/Senior Justice proposal above or under the current retirement statute. This proposal does not separate appellate jurisdiction cases for reasons of efficiency. Rather, the proposal offers another way of creating the effective equivalent of term limits that might avoid some of the constitutional problems of the main proposal.

The central argument for the Original/Appellate proposal is that it can be linked to a specific textual provision in the Constitution. Article III, Section 2 of the Constitution gives Congress the power to regulate the Court’s appellate jurisdiction: “[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”<sup>80</sup> In *Marbury v. Madison*,<sup>81</sup> the Court held that the Exceptions and Regulations Clause applied only to the Court’s appellate jurisdiction and that Congress could not alter the Court’s original jurisdiction.<sup>82</sup> The proposal argues, accordingly, that although Congress must allow all Justices to hear all cases arising out of original jurisdiction, it may provide, as a regulation of appellate jurisdiction, that only Junior Justices hear appeals.

Although this proposal invokes a different congressional power, it raises some of the same constitutional issues discussed above. No matter which enumerated power Congress is exercising, Congress’s statutes must comport with the Good Behavior Clause and the Appointments Clause. If critics are correct that everyone who holds the office of “Judge[] of the supreme Court” must be able to participate in substantially all of the Court’s final decisions, or must remain eligible to participate in an equal share of the Court’s work, then the Original/Appellate proposal would be vulnerable to the same objections as the Junior/Senior Justice proposal.

Critics may raise several additional objections. First, critics will argue that the Exceptions and Regulations Clause gives Congress the power to change the *scope* of the Supreme Court’s appellate jurisdiction, but not the *personnel* who decide appeals. Put another way, the Clause allows Congress to decide *what* appeals the Court can hear, but not *who* hears the appeals.

Proponents, in turn, will argue this does not attend to the distinction between “exceptions” to and “regulations” of appellate jurisdiction that appears in the text of Article III. “Exceptions” to appellate jurisdiction involve limiting *what* cases the Court may hear. But “regulations” of appellate jurisdiction may also include deciding *how* the Court hears appeals and *who* hears them. The Supreme Court has never addressed this precise issue.

A second objection is that the Original/Appellate proposal creates two panels. One panel, consisting of all of the Justices, hears original jurisdiction cases. The other, consisting only of the nine Justices most junior in service, hears appellate cases. As we discuss in Chapter 2 at greater length, there is an argument that this aspect of the proposal would violate the provision in Article III, Section 1 that “[t]he judicial Power of the United States, shall be vested in one supreme Court.”<sup>83</sup> From a textual point of view, if there is “one” Supreme Court, then perhaps

the Justices must participate together in deciding merits cases and may not decide cases in separate panels.

A third objection to the Original/Appellate proposal is that, like all other proposals for Supreme Court panels, it gives Congress too much power to gerrymander the Justices by subject matter to attempt to manipulate the outcome of particular cases. If Congress may divide cases in this way, why not in other ways that would undermine the Court's integrity and independence? For example, Congress might create a special panel that heard only cases involving abortion or the environment.

Proponents might respond that whether or not a general power to divide the Court into panels poses dangers, the Constitution itself creates a distinction between the Supreme Court's original and appellate jurisdiction. This provision offers a bright-line rule, which, according to *Marbury v. Madison*, Congress may not vary. When Congress follows this bright-line rule, there is no danger to judicial independence. Congress cannot expand or contract the Court's original jurisdiction. Therefore, the proposal does not assume that Congress has a general power to create panels of the Court. It simply argues that this one, which matches distinctions already present in the text of Article III, is constitutionally valid.

### C. An Alternative Proposal: Designated Supreme Court Justices

The third proposal attempts to respond to the concern that the Junior/Senior Justice proposal effectively removes Justices from their offices. Instead, it proposes that Presidents henceforth only appoint judges from the lower federal courts to sit by designation on the Supreme Court for a non-renewable term of eighteen years. The relevant statute will specify that one of the duties of lower federal court judges (or some statutorily demarcated subset of these judges) is that they may be called upon to serve by designation on the Supreme Court for eighteen years, after which they would return to their original court.<sup>84</sup>

Under this proposal, Presidents would no longer appoint anyone to the office of "Judge[] of the supreme Court." Instead, Presidents would simply designate lower court judges to serve on the Court temporarily. The statute could provide that the designation is subject to the ordinary advice-and-consent process. If the designation does not amount to appointment to a different office (see the discussion below), advice and consent would not be required by the Constitution, but Congress might nevertheless provide for it.

One main objection to the Designated Justices proposal is a textual argument. As noted previously, the Appointments Clause of Article II contemplates a separate office of "Judge[]"



of the supreme Court.” Therefore, critics will assert that the judges who sit and decide cases on the Supreme Court must hold the office of “Judges of the supreme Court.”

Proponents will respond that the existence of a separate office of “Judge[] of the supreme Court” does not mean that someone not appointed to that office is forbidden to serve on the Supreme Court by designation. Federal judges often serve on different courts by designation without receiving new commissions. Retired Supreme Court Justices serve on appellate and district courts; appellate judges serve as district judges, and district judges serve as appellate judges by designation. In addition, Supreme Court seats have been filled on a temporary basis through recess appointments without a lifetime appointment, and even without Senate confirmation. The Vacancies Clause of Article II, Section 2, Clause 3, which applies to federal offices generally, provides that “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”<sup>85</sup> Over three hundred federal judges, including fifteen Supreme Court Justices, have been appointed through this process.<sup>86</sup> Lower federal courts have approved of its constitutionality.<sup>87</sup> If Presidents may temporarily fill Supreme Court vacancies without the Senate’s advice and consent, the argument goes, *a fortiori* they should be permitted to do so with the Senate’s advice and consent.<sup>88</sup>

Critics will say that the Constitution distinguishes the Supreme Court from other federal courts and that everyone who sits on the Supreme Court must hold the office of “Judge[] of the supreme Court” (whether pursuant to a regular appointment under the Appointments Clause, which lasts during good behavior, or a recess appointment under the Vacancies Clause, which lasts for at most two years). Critics may also note that in the vast majority of cases, when a President has made recess appointments to either the lower courts or the Supreme Court, Congress has subsequently confirmed these judges and Justices to lifetime appointments.<sup>89</sup> And when judges sit by designation on other courts, they usually remain only for a short time, and sometimes only for a single case. This practice, critics of this proposal will argue, is very different than a statutory designation lasting eighteen years, which would cover a sizeable proportion—and often a majority—of any federal judge’s career. There is nothing temporary about such appointments, and hence they cannot be justified by existing practice.

A second main objection to the Designated Justices proposal is rooted in past practice: No person who does not hold the office of Justice of the Supreme Court has ever sat on or decided a case before the Supreme Court.<sup>90</sup> Justices have indeed sat on lower federal courts from the beginning of the Republic, and Justices who take senior status sit by designation

today. Nevertheless, the opposite has never occurred—lower federal court judges have never sat by designation on the Supreme Court. The novelty of the practice suggests that it is unconstitutional.

Proponents will respond that if Justices may “move down” and sit on lower courts by designation, there is no reason why lower court judges may not “move up” by designation. In fact, district court judges often sit by designation on circuit courts of appeals. Proponents would assert, therefore, that district and circuit court judges should also be able to sit by designation on the Supreme Court. The novelty of a practice does not by itself prove that it is unconstitutional; otherwise, a host of federal laws that exercised constitutional powers in new ways would be unconstitutional.<sup>91</sup>

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## V. Addressing the Risk of Repeated Confirmation Impasse

It is essential that any term limits proposal provide an acceptable mechanism for resolving the problem of repeated confirmation impasses. Absent such a mechanism, the repeated failure of the Senate to confirm any nominee would undermine a major justification for staggered term limits: that each President be entitled to the same number of regular nominations. Designing a structure to address the risk of impasse, however, is not an easy matter. That structure must not give too much effective power to the President but also address the risk of repeated confirmation impasses. And the difficulty of reforming the confirmation process is among the reasons opponents of term limits reject the reform.

Reform of the general structure of presidential nomination and Senate confirmation is not squarely within the Commission’s remit. In this Part we consider some means by which to address potential confirmation impasses under a system of term limits. In addition, in an Appendix to this Report we summarize some helpful testimony regarding potential reforms to the confirmation process more generally.

### A. Term Limits by Constitutional Amendment and the Confirmation Process

The options for designing a mechanism to avoid a confirmation impasse are different and broader in the context of designing an amendment as opposed to a statute. Some have suggested that a constitutional amendment should provide that a nominee will be deemed confirmed if the Senate does not vote to disapprove within a specified time, such as four

months after nomination.<sup>92</sup> (This proposal is somewhat similar to Madison’s initial proposal at the Constitutional Convention that judges be deemed confirmed if they were not rejected by a two-thirds vote of the Senate by a date certain, a proposal that the Convention rejected.<sup>93</sup>) This might be a good idea as a starting point, but more is required to address the risk of the Senate repeatedly voting down successive nominees for a particular eighteen-year seat.

To begin to address this potential concern, the amendment would first have to define the circumstances that trigger any fallback mechanism. For instance, the trigger might be the Senate voting down two consecutive nominees. This trigger may be particularly apt if the amendment also adopts the provision deeming a nominee automatically confirmed if the Senate fails to vote at all after a set time. If that time is set at four months, then this fallback mechanism would come into play after roughly eight months of a confirmation impasse. Another option would be to trigger the fallback mechanism at a set amount of time after the date the President nominates a person for the particular eighteen-year position.

The Commission is not aware of any scholarship that explores in-depth the issue of an appropriate design for a fallback mechanism. Witnesses offered a few brief suggestions. One is that the President present three nominees to the Senate; if the Senate rejects all three, the President is then empowered to choose one of those to sit on the Court.<sup>94</sup> But Presidents could easily game this system, choosing two figures the Senate would never approve and thereby effectively gaining unilateral power to fill the seat. Another possibility would be for the amendment to specify that the Senate cannot conduct other business while a nomination is pending.<sup>95</sup> But this approach would preclude the Senate from acting on any number of urgent issues that might arise, including those involving our national security.

From an institutional-design perspective, the challenge is that any backup mechanism that stays within the traditional President-Senate framework risks giving either too much unilateral power to the President or too much blocking power to the Senate. The solution might need to rest with an institution that sits outside this framework. One possibility is that, in case of a prolonged impasse, the chief judges of the twelve non-specialized federal courts of appeals (or a subset of them) could be assigned one of two roles.<sup>96</sup> On one approach, once this fallback mechanism is triggered, this body of chief judges would become the confirmation body for the President’s choice. Two institutions of the government would thus still be required to confirm a Justice. A subsidiary issue to consider is whether the President should be precluded from nominating any individual whose appointment to the Court the Senate has affirmatively rejected.

A second option would be to give the chief judges (or a subset of them) the power to directly designate a Justice after a prolonged impasse. The amendment could also limit the chief judges to selecting a sitting federal court of appeals judge. These are the individuals with appropriate experience whose fitness for the Court the chief judges would be in the best position to evaluate. Good reasons might exist to appoint to the Court persons other than federal court of appeals judges. But empowering the chief judges to directly appoint anyone in the country to the Court would put enormous discretion in the hands of this body. Limiting the set of potential appointees to existing court of appeals judges would substantially constrain this power. Because this fallback mechanism would come into play only when the Senate repeatedly rejects a President's nominees, it is not likely to affect the majority of seats on the Court.

If one worries that the knowledge of the sitting chief judges' identities would shape the actions of the President or the Senate, this power could be given to a random selection of seven or five of the chief judges. An advantage of using the chief judges (or a subset of them) is that the amendment would not have to design from scratch a new, independent institution to serve as the fallback mechanism. Given the complexities of designing such a new institution, as well as questions about how well the public would accept that institution, the easier course may be to use a set of actors who have been Senate confirmed already and for whom a selection mechanism also already exists.<sup>97</sup>

An amendment could instead provide that if the Senate rejected one nominee, the threshold for confirmation of the next nominee for that seat would decrease. Alternatively, the amendment could provide that if the Senate fails to confirm a nominee by a certain point, the President would have the power to designate any sitting federal judge (or any circuit judge) to fill that eighteen-year seat. But both of these options might be thought to give too much power to the President.

## **B. Term Limits by Statute and the Confirmation Process**

If term limits are implemented by a statute rather than a constitutional amendment, modifications to the confirmation process must be consistent with the current constitutional framework, which gives the President the power to select a nominee and the Senate the power to approve or disapprove. It might still be possible to create a backup mechanism of the sort discussed above, but such a mechanism would have to be understood as a delegation of authority by the Senate and/or the President. The constitutionality of such a delegation is not

clear, and the relevant actor might also be able to revoke it unilaterally, undoing most of its benefits.

Another means of dealing with the possibility of a prolonged impasse might include a statute that prescribes that the threshold number of votes for confirmation decreases each time the Senate refuses to confirm a nominee. The constitutionality of such a statute is unclear, however, given that the Constitution gives each chamber the power over its own rules and procedures.<sup>98</sup> The Senate could instead incorporate such a policy into its own Senate rules; a later Senate, however, could change that rule. Alternatively, consistent with the Designated Justices proposal set out above, a statute might provide that in the event of an impasse, the President could designate a lower court judge to fill the Supreme Court vacancy for an eighteen-year term without Senate confirmation. This statute would be subject to many of the same constitutional concerns as the Designated Justices proposal, although it would operate with respect to only some seats rather than all of them.

Last, a statute might provide that if the Senate fails to confirm one or both of a President's scheduled appointments, the next President of a different party would lose a corresponding number of appointments. While this approach might occasion substantial constitutional debate, its justification might be grounded in the view that Congress has authority to determine the timing of judicial appointments, as well as the size of the Court. But even if constitutionally defensible and reasonably effective, making party affiliation relevant to the operation of the statute is arguably problematic. Such a statute also poses the risk that an extended impasse would shrink the Court. And because what is effected by statute can also be undone by statute, this alternative could also become another front in the polarized and destabilizing partisan contestation of the times.

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## VI. Concluding Considerations

A final set of concerns about enacting term limits via statute rather than constitutional amendment can be viewed as prudential or grounded in the separation of powers. If Congress has the power to change the composition of the Court by statute, it could mean that Congress has considerable flexibility in altering the duties of the Justices in other ways. Once Congress has exercised the power to change the Court's composition by statute in order to regularize appointments, Congress might seek to do so for other purposes. If federal statutes can validly restrict members of the Supreme Court to a very limited set of duties after a certain number of years, Congress might try to establish other criteria for imposing similar limits on a subset of

Justices. Even if one focuses entirely on term limits, moreover, the group of Supreme Court practitioners cited in the introduction to this Chapter warns that “a statutory solution would be inherently unstable”; over the years, Congress might amend the system depending on whether Congress and the White House are in the same hands at the moment.<sup>99</sup> Opponents of term limits are especially critical of a statutory approach, arguing that if term limits may be changed by statute, then an angry Congress could punish the Court by reducing the term of office anytime it chose to do so. Critics of the statutory approach argue that it is precisely to avoid such risks that the Constitution does not permit Congress to impose term limits by statute. On this view, the degree of consensus required for a constitutional amendment provides important security against the composition of the Court being manipulated for partisan or ideological reasons.

For some members of the Commission, the existence of constitutional doubt, as well as the significance and complexity of adopting a system of term limits, are themselves reasons to pursue the reform through constitutional amendment. They worry that a statute altering the Court’s composition will generate greater uncertainty and mistrust than other constitutional questions. When litigants eventually challenge a term limits statute, the Court would have to decide on the constitutionality of a law that restructures the Court itself. There might also be strong disagreements about which Justices should participate in the decision. No matter which way the Court came out on the question, these Commissioners worry that the Court’s legitimacy, or perceptions of its legitimacy, would be undermined.

Members of the Commission who support a statutory solution believe these concerns are overblown. They do not believe that a term limits statute would be any more destabilizing than a host of other issues that the Court has confronted over the years. They also think that inaction carries its own risks, and that the appointments process now displays a degree of dysfunction that makes remedial action urgent. Given the powers that Congress and the President already have to regulate the Court, proponents believe that recognizing the power of Congress to regularize appointments would not add more risk than it is worth—and as a practical matter, if the reform were adopted with strong bipartisan support, the precedent established by the statute might not carry over to other situations.

At a minimum, the contestability of statutory approaches counsels in favor of serious deliberation by Congress if it chooses to consider this route. In these deliberations, we hope that Congress would keep in mind the central structural values of our Constitution, particularly the principle of judicial independence, and consider what future Congresses, armed with the same constitutional powers, might someday attempt. Indeed, in recent years, we have seen

democratic governments “regress” or “backslide” with respect to judicial independence. This has come about through electoral majorities using their power to restructure previously independent institutions, including courts, to favor the political agendas of those governments. Comparative political scientists have concluded that the democratic systems most resistant to this prospect are those in which an electoral majority is not sufficient to change the fundamental structure of institutions such as the courts.

## Endnotes: Chapter 3

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- <sup>1</sup> *Presidential Commission on the Supreme Court of the United States 5* (July 16, 2021) (written testimony of the Supreme Court Practitioners' Committee), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Geller-Mahoney-Testimony.pdf>.
- <sup>2</sup> See, e.g., Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, CTR. FOR AM. PROGRESS (Aug. 3, 2020), <https://www.americanprogress.org/issues/courts/reports/2020/08/03/488518/need-supreme-court-term-limits>; Lee Drutman, *It's Time for Term Limits for Supreme Court justices*, VOX (June 27, 2018), <https://www.vox.com/platform/amp/polyarchy/2018/6/27/17511030/supreme-court-term-limits-retirement>.
- <sup>3</sup> See, e.g., *Presidential Commission on the Supreme Court of the United States 2* (July 20, 2021) (written testimony of Akhil Amar, Yale Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Amar-Testimony.pdf>; *Presidential Commission on the Supreme Court of the United States 6* (June 30, 2021) (written testimony of Michael W. McConnell, Stanford Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/06/McConnell-SCOTUS-Commission-Testimony.pdf>. One scholar who testified to the Commission, and had been against term limits for the Court in the mid-2000s, now favored term limits and explained why her view had changed since then. See *Presidential Commission on the Supreme Court of the United States 1-2* (July 20, 2021) (written testimony of Vicki C. Jackson, Harvard Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf> (citing Vicki C. Jackson, *Packages of Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 1007-08 (2007)).
- <sup>4</sup> Compare Robert P. George, Michael W. McConnell, Colleen A. Sheehan & Ilan Wurman, *The Conservative Constitution*, NAT'L CONST. CTR. (2020), [https://constitutioncenter.org/media/files/The\\_Conservative\\_Constitution.pdf](https://constitutioncenter.org/media/files/The_Conservative_Constitution.pdf), with Caroline Fredrickson, Jamal Greene & Melissa Murray, *The Progressive Constitution*, NAT'L CONST. CTR. (2020), [https://constitutioncenter.org/media/files/The\\_Progressive\\_Constitution.pdf](https://constitutioncenter.org/media/files/The_Progressive_Constitution.pdf).
- <sup>5</sup> See, e.g., J. Harvie Wilkinson III, *Supreme Court Term Limits Wouldn't Solve Anything*, WASH. POST (Oct. 17, 2021), <https://www.washingtonpost.com/opinions/2021/10/18/supreme-court-term-limits-wouldnt-solve-anything/>; Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511 (2006) (offering criticisms of the main reform proposals and the critiques of life tenure); Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407 (2005) (defending the system of life tenure); William G. Ross, *The Hazards of Proposals to Limit the Tenure of Federal Judges and to Permit Judicial Removal Without Impeachment*, 35 VILL. L. REV. 1063 (1990); David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute,"* 83 WASH. U. L.Q. 1397, 1397 (2005).
- <sup>6</sup> See *State Supreme Courts*, BALLOTPEDIA, [https://ballotpedia.org/State\\_supreme\\_courts](https://ballotpedia.org/State_supreme_courts) (detailing the election or appointment procedure for each state); D.C. Code § 11-1502 (2021) (exemplifying a law with a mandatory retirement age and renewable terms); Francis X. Shen, *Aging Judges*, 81 OHIO STATE L.J. 235 app. (2020) (providing mandatory retirement age data); COUNCIL OF STATE GOV'TS, *THE BOOK OF THE STATES* 189 tbl.5.1 (2019) (furnishing term length data); Sandra Schultz Newman & Daniel Mark Isaacs, *Historical Overview of the Judicial Selection Process in the United States: Is the Electoral System in Pennsylvania Unjustified?*, 49 VILL. L. REV. 1 app. (2004) (providing state-by-state data on selection processes, term lengths, and retirement requirements).
- <sup>7</sup> See *State Supreme Courts*, *supra* note 6; D.C. CODE § 11-1502 (2021).
- <sup>8</sup> See *State Supreme Courts*, *supra* note 6.



- <sup>9</sup> See Jackson Testimony, *supra* note 3, at 1; *Presidential Commission on the Supreme Court of the United States 3* (June 25, 2021) (written testimony of Rosalind Dixon, University of New South Wales), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf> (“[T]he Justices continue to enjoy lifetime appointment, without being subject to any form of term limit or mandatory retirement age, in ways that are increasingly unusual in global terms.”).
- <sup>10</sup> *Presidential Commission on the Supreme Court of the United States 3* (July 20, 2021) (written testimony of Tom Ginsburg, University of Chicago Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Ginsburg-Testimony.pdf>.
- <sup>11</sup> *Id.* at 2.
- <sup>12</sup> U.S. CONST. art. III, § 1. This formula does not mean that judges, once in office, are entirely immune from consequences or professional incentives. Judges may, of course, be impeached for high crimes and misdemeanors, lower court judges may be elevated to higher courts, and Associate Justices may be appointed Chief Justice.
- <sup>13</sup> McConnell Testimony, *supra* note 3, at 7.
- <sup>14</sup> See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 778-79 (2006). Nevertheless, Supreme Court vacancies have always occurred irregularly. See Allison Rabkin Golden, David Herman, Alexander Nocks, Ayoub Ouederni & Kaveri Sharma, *Vacancies and Tenures on the Supreme Court: A Response to Calabresi and Lindgren* (2021) (on file with the Presidential Commission on the Supreme Court of the United States).
- <sup>15</sup> Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313, 1316-20 (2007).
- <sup>16</sup> Supreme Court Practitioners’ Committee Testimony, *supra* note 1, at 78-82; *Justices 1789 to Present*, SUP. CT. U.S., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx).
- <sup>17</sup> David Ingold, *Eighty Is the New 70 as Supreme Court Justices Serve Longer and Longer*, BLOOMBERG (Apr. 7, 2017), <https://www.bloomberg.com/graphics/2017-supreme-court-justice-tenure> (“In 1900, justices tended to be in their late 50s when they joined the court. Today, the average age is about five years younger, and President Donald Trump’s nomination of Gorsuch, currently 49 years old, only furthers that trend.”); see also *Presidential Commission on the Supreme Court of the United States 5* (June 30, 2021) (written testimony of Maya Sen, John F. Kennedy School of Government, Harvard University), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Sen-Written-Testimony.pdf>.
- <sup>18</sup> Both the median and modal number of appointments are 2, and the mean is 1.83. See *Justices 1789 to Present*, *supra* note 16.
- <sup>19</sup> There have been only six if we include the Reconstruction period, in which Republicans, following Abraham Lincoln’s assassination, refused to allow any appointments by his successor, Andrew Johnson.
- <sup>20</sup> See generally Terri L. Peretti, *Promoting Equity in the Distribution of Supreme Court Appointments*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 435 (Roger C. Cramton & Paul D. Carrington eds., 2006).
- <sup>21</sup> Cf. Jason P. Davis & Kathleen M. Eisenhardt, *Rotating Leadership and Collaborative Innovation: Recombination Processes in Symbiotic Relationships*, 56 ADMIN. SCI. Q. 159, 194 (2011) (linking rotating personnel and innovation in decisionmaking); Amir Erez, Jeffrey A. Lepine & Heather Elms, *Effects of Rotated Leadership and Peer Evaluation on the Functioning and Effectiveness of Self-Managed Teams: A Quasi-Experiment*, 55 PERSONNEL PSYCH. 929, 929 (2002) (“[T]eams that rotated leadership among members had higher levels of voice, cooperation, and performance.”).
- <sup>22</sup> David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV. (Nov. 4, 2016), <https://hbr.org/2016/11/why-diverse-teams-are-smarter>; Steven A. Ramirez, *Diversity, Compliance, Ethics & In-House Counsel*, 48 U. TOL. L. REV. 465, 483 (2017).
- <sup>23</sup> Darren Rosenblum & Yaron Nili, *Board Diversity by Term Limits?*, 71 ALA. L. REV. 211, 242-44 (2019) (describing various businesses that have implemented term limits for members of their boards of directors, and the accompanying decline in the median age of members serving on these boards).

- <sup>24</sup> In Japan, for instance, judges are appointed by the Cabinet from lists of candidates nominated by the Supreme Court and serve for a term of ten years. *Courts in Japan*, SUP. CT. JAPAN (2020), [https://www.courts.go.jp/english/vc-files/courts-en/file/2020\\_Courts\\_in\\_Japan.pdf](https://www.courts.go.jp/english/vc-files/courts-en/file/2020_Courts_in_Japan.pdf).
- <sup>25</sup> See *Presidential Commission on the Supreme Court of the United States* (July 16, 2021) (written testimony of Margaret H. Marshall, Choate Hall & Stewart LLP), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Marshall-Testimony.pdf>.
- <sup>26</sup> In addition to providing that the Justices shall hold their office for “good Behaviour,” Article III, Section 1 of the Constitution provides that they shall, “at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 1. *Cf. infra* notes 63-83 and accompanying text.
- <sup>27</sup> Farnsworth, *supra* note 5, at 437-38.
- <sup>28</sup> See Burbank, *supra* note 5, at 1548; Arthur D. Hellman, *Reining in the Supreme Court: Are Term Limits the Answer?*, in *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES* 291, 298-303 (Roger C. Cramton & Paul D. Carrington eds., 2006).
- <sup>29</sup> See *Presidential Commission on the Supreme Court of the United States* 12 (Oct. 2021) (written testimony of Philip Bobbitt, Columbia Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/10/Professor-Philip-Bobbitt.pdf>; *Presidential Commission on the Supreme Court of the United States* 5 (Aug. 2, 2021) (written testimony of Michael Stokes Paulsen, University of St. Thomas School of Law), <https://www.regulations.gov/comment/PCSCOTUS-2021-0001-2159>; *Presidential Commission on the Supreme Court of the United States* 18 (July 20, 2021) (written testimony of Randy E. Barnett, Georgetown University Law Center), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Barnett-Testimony.pdf>.
- <sup>30</sup> Farnsworth, *supra* note 5, at 411.
- <sup>31</sup> Empirical studies modeling the effects of term limits on doctrinal change suggest different possibilities. See Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. (forthcoming 2021) (manuscript at 40-42) (on file with the Presidential Commission on the Supreme Court of the United States) (finding that all but one of the most prominent proposals for term limits would likely have produced fewer flips than actually occurred in the real world); Christopher Sundby & Suzanna Sherry, *Term Limits and Turmoil: Roe v. Wade’s Whiplash*, 98 TEX. L. REV. 121, 160 (2019) (concluding that “the danger of increased instability due to term limits is very real” and needs to be weighed against the potential benefits of term limits); *cf.* Stefanie A. Lindquist, *Judicial Activism in State Supreme Courts: Institutional Design and Judicial Behavior*, 28 STAN. L. & POL’Y REV. 61, 102 fig. 6 (2017) (indicating that the state supreme courts with either life tenure or tenure until age 70 overrule fewer precedents than state supreme courts with most other judicial retention methods).
- <sup>32</sup> *Cf.* Farnsworth, *supra* note 5, at 416 (“A two-term president may reflect a single national mood, and there may be value in a Court that cannot be remade by one such gust.”).
- <sup>33</sup> According to a committee of distinguished Supreme Court practitioners, however, “orchestrating timing within two-year windows would still often prove difficult,” and “[t]he fact that more Justices would have shorter track records” could also impede predictions. Supreme Court Practitioners’ Committee Testimony, *supra* note 1, at 86.
- <sup>34</sup> See Hellman, *supra* note 28, at 303-08.
- <sup>35</sup> THE FEDERALIST NO. 78, at 393 (Alexander Hamilton) (Ian Shapiro ed., 2009).
- <sup>36</sup> *Id.* at 392-93.
- <sup>37</sup> Supreme Court Practitioners’ Committee Testimony, *supra* note 1, at 78-82; *Justices 1789 to Present*, *supra* note 16.
- <sup>38</sup> See Lee Epstein, Jack C. Knight & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 36 (2001) (“Our analysis of non-renewable terms—an institution used quite frequently in the European context—suggests . . . it may be more effective [than life tenure] at encouraging sincere behavior on the part of justices.”); MICHAEL S. KANG & JOANNA M. SHEPHERD, *FREE TO JUDGE? HOW CAMPAIGN FINANCE MONEY BIASES JUDGES* (Stanford Univ. Press, forthcoming 2023) (discussing the experience of state courts with respect to term limits and mandatory retirement ages).

- <sup>39</sup> Farnsworth, *supra* note 5, at 411.
- <sup>40</sup> See Jackson Testimony, *supra* note 3, at 5; *State Supreme Courts*, *supra* note 6.
- <sup>41</sup> See Ginsburg Testimony, *supra* note 10, at 3; Zachary Elkins & Tom Ginsburg, *Characteristics of National Constitutions, Version 3.0*, COMPAR. CONSTS. PROJECT (May 20, 2021), <https://comparativeconstitutionsproject.org/download-data/#>.
- <sup>42</sup> Jackson Testimony, *supra* note 3, at 5.
- <sup>43</sup> See *Justices 1789 to Present*, *supra* note 16.
- <sup>44</sup> McConnell Testimony, *supra* note 3, at 7.
- <sup>45</sup> See Chilton, Epps, Rozema & Sen, *supra* note 31.
- <sup>46</sup> Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1461 (2009).
- <sup>47</sup> McConnell Testimony, *supra* note 3, at 5.
- <sup>48</sup> *Id.*
- <sup>49</sup> See Chapter 2, at 93.
- <sup>50</sup> Calabresi & Lindgren, *supra* note 14, at 826-31.
- <sup>51</sup> Chilton, Epps, Rozema & Sen, *supra* note 31, at 3.
- <sup>52</sup> Designers would have to consider how a term limits system would operate in relation to the existing set of retirement statutes and whether those would need to be changed.
- <sup>53</sup> See Jackson Testimony, *supra* note 3, at 18.
- <sup>54</sup> See, e.g., Amar Testimony, *supra* note 3, at 3-4; Cramton, *supra* note 15, at 1323-25; H.R. 8424, 116th Cong. (2020); H.R. 5140, 117th Cong. (2021); *Term Limits*, FIX CT. (Sep. 29, 2020), <https://fixthecourt.com/fix/term-limits>.
- <sup>55</sup> Amar Testimony, *supra* note 3.
- <sup>56</sup> 510 U.S. 163 (1994).
- <sup>57</sup> 28 U.S.C. § 43(b).
- <sup>58</sup> 5 U.S. (1 Cranch) 299 (1803).
- <sup>59</sup> *Id.* at 309.
- <sup>60</sup> *Id.*
- <sup>61</sup> See generally Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003).
- <sup>62</sup> See 28 U.S.C. § 294.
- <sup>63</sup> U.S. CONST. art. III, § 1.
- <sup>64</sup> U.S. CONST. art. II, § 2.
- <sup>65</sup> 291 U.S. 339 (1934).
- <sup>66</sup> *Id.* at 351.
- <sup>67</sup> *Id.* at 350.
- <sup>68</sup> *Id.*
- <sup>69</sup> 539 U.S. 69, 72 (2003) (noting that while judges of the District Court for the Northern Mariana Islands cannot be designated to sit on a federal court of appeals because they are not Article III judges, senior circuit judges “are, of course, life-tenured Article III judges who serve during ‘good Behaviour’ for compensation that may not be diminished while in office”).
- <sup>70</sup> *Booth*, 291 U.S. at 351.

- <sup>71</sup> In the alternative, one might argue that they retain judicial office, but not office as Supreme Court Justices, or that they hold multiple judicial offices, and give up one when they take senior status. See David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 475-78 (2007) (suggesting that both *Booth* and 28 U.S.C. § 371 could be read to mean that senior status judges retain judicial office without still holding the same offices that they served in before they retired); cf. William Baude, *The Unconstitutionality of Justice Black*, 98 TEX. L. REV. 327, 338-42 (2019) (focusing specifically on the retirement of Supreme Court Justices, and discussing the possibilities that they retain their old office, that they move into a new office, or that they started off with two offices and surrender one upon retirement).
- <sup>72</sup> John Harrison, *The Power of Congress Over the Terms of Justices of the Supreme Court*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 361, 366 (Roger C. Cramton & Paul D. Carrington eds., 2006).
- <sup>73</sup> *Id.*
- <sup>74</sup> *Id.* at 367; cf. Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 697 (1969) (“I am quite convinced that it would be unconstitutional for the Congress to attempt, by legislation, to establish a fixed term of office for judges of the federal constitutional courts.”).
- <sup>75</sup> Act of Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1156, 1157 (codified as amended at 28 U.S.C. § 375 (1934)).
- <sup>76</sup> Because *Booth* involved the 1919 federal statute under which lower federal court judges had been deciding cases as senior judges, *Booth* also concluded that it was “too late to contend that services so performed were extra-legal and unconstitutional.” *Booth*, 291 U.S. at 351. It is unclear what weight that factor—or the practice of retired Justices sitting by designation on lower federal courts—would carry in a statute that imposes for the first time on Supreme Court Justices the new status of Senior Justices.
- <sup>77</sup> See 17 ANNALS OF CONG. 22 (1807).
- <sup>78</sup> See *First-Ever Measure to End Life Tenure on the Supreme Court Via Statute, Not Amendment, To Be Introduced*, FIX CT. (Sept. 29, 2020), <https://fixthecourt.com/2020/09/first-ever-measure-end-life-tenure-supreme-court-via-statute-not-amendment-introduced> (referring to H.R. 8424, 116th Cong. (2020)).
- <sup>79</sup> See Jack M. Balkin, *Don’t Pack the Court. Regularize Appointments.*, BALKINIZATION (Oct. 5, 2020), <https://balkin.blogspot.com/2020/10/dont-pack-court-regularize-appointments.html>.
- <sup>80</sup> U.S. CONST. art. III, § 2.
- <sup>81</sup> 5 U.S. 137 (1803).
- <sup>82</sup> *Id.* at 175.
- <sup>83</sup> U.S. CONST. art. III, § 1.
- <sup>84</sup> See Calabresi & Lindgren, *supra* note 14, at 855-58, 860 (2006) (considering the proposal but rejecting it because the work of a Supreme Court Justice is not germane to the duties of a lower court judge).
- <sup>85</sup> U.S. CONST. art. II, § 2, cl. 3.
- <sup>86</sup> Diana Gribbon Motz, *The Constitutionality and Advisability of Recess Appointments of Article III Judges*, 97 VA. L. REV. 1665, 1670 (2011).
- <sup>87</sup> See, e.g., *United States v. Woodley*, 751 F.2d 1008, 1014 (9<sup>th</sup> Cir. 1985) (stating that “a recess appointment to the federal bench [] could exercise the judicial power of the United States”).
- <sup>88</sup> Following President Eisenhower’s recess appointments of three Justices, the Senate passed a resolution discouraging the practice of Supreme Court recess appointments, but the primary concern there was that recess appointments bypass the advice and consent process, not that they are temporary.
- <sup>89</sup> Motz, *supra* note 86, at 1670 (“By 2000, Presidents had made more than 300 recess appointments of Article III judges, and of those, only thirty-four had not been confirmed.”).
- <sup>90</sup> Harrison, *supra* note 72, at 365.
- <sup>91</sup> A final objection to the Designated Justices proposal is that it adds new duties to the office of lower federal court judge, perhaps triggering the germaneness analysis set out in *Weiss v. United States*, 510 U.S. 163 (1994), discussed above. See Calabresi & Lindgren, *supra* 14, at 860 (2006) (raising this concern). This analysis might or

might not apply to judges appointed after the proposal's enactment—*Weiss* assumes without deciding that germaneness also governs the prospective addition of duties for unknown future officeholders.

<sup>92</sup> McConnell Testimony, *supra* note 3, at 6.

<sup>93</sup> Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL'Y 103 (2005).

<sup>94</sup> Ginsburg Testimony, *supra* note 10, at 10.

<sup>95</sup> See Steven G. Calabresi, *End the Poisonous Process of Picking Supreme Court Justices*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/opinion/ginsburg-supreme-court-confirmation.html> (arguing that “the Senate [should] be forbidden from taking action whatsoever on any of its calendars” in the event of “[f]ailure to confirm a justice by July 1 of a president’s first or third year”).

<sup>96</sup> Jackson Testimony, *supra* note 3, at 11 n.30.

<sup>97</sup> The current federal statute that determines who serves as chief judge of a court of appeals, 28 U.S.C. § 45, is well-designed and has served the country well. To the extent there is any concern Congress might modify the statute for partisan reasons to game this fallback mechanism for Supreme Court appointments, the amendment could include the provisions of the current statute.

<sup>98</sup> U.S. CONST. art. I, § 5.

<sup>99</sup> Supreme Court Practitioners’ Testimony, *supra* note 1, at 82; see also Harrison, *supra* note 72, at 372 (providing examples of “gamesmanship” that could be attempted).

## Chapter 4: The Court's Role in the Constitutional System

Many observers view the judiciary and especially the Supreme Court as vital to the preservation of individual rights, democracy, federalism, and other constitutional values.<sup>1</sup> On this account, the Court serves as an important counterweight to majoritarian impulses, safeguards the Constitution, and helps ensure the rule of law. But others argue that the Supreme Court has exerted too much power in our system of constitutional governance by interfering with or taking control of matters that should be resolved by the elected branches and the political process. Under this view, the Court has emerged as an obstacle to the realization of important social goals and undermined the ability of Congress and other political actors to protect rights.<sup>2</sup>

Proposals to disempower the Court generally rest on two interrelated assumptions. First, Court rulings that statutes violate the Constitution typically require exercising judgment about the meaning of the Constitution, over which reasonable people might disagree, as is often illustrated by divisions among the Justices themselves in constitutional cases. Second, in cases of reasonable disagreement over whether a law comports with the Constitution, principles of democracy necessitate that Congress and the executive branch have opportunities to check the judgments of an unelected judiciary and to advance their own views about what the Constitution requires. In the view of some proponents of judicial disempowerment, the modern Supreme Court has injected itself into spheres appropriately left to democratic argument and resolution—for example, by invalidating laws that prohibit or restrict abortion or legislation designed to protect voting rights. For these critics, the Court's fundamentally "countermajoritarian" character is in tension with the basic commitments of a democracy; an unelected judiciary, in this view, acts undemocratically when it invalidates the acts of democratically elected representative bodies.<sup>3</sup> For some, the problem is also that Supreme Court Justices are nearly always drawn from the elite and are therefore insufficiently representative of the population as a whole.<sup>4</sup>

Those who critique the Supreme Court's power emphasize that when the Court acts to invalidate statutes, its decisions "have an unusually high degree of finality or 'strength'[] by global standards."<sup>5</sup> This high degree of finality derives in part from the Court's approach to judicial review, known as "judicial supremacy."<sup>6</sup> That is, the Court has held that it has the last word on constitutional interpretation and that its decisions bind not only the parties in a particular case but also future action by the President, Congress, and the states.<sup>7</sup> The Court has

embraced judicial supremacy since at least the 1950s, when it asserted that “the federal judiciary is supreme in the exposition of the law of the Constitution.”<sup>8</sup> Yet, as discussed below in Part III of this Chapter, this approach to judicial review is not explicitly required by the text of the Constitution or by the Court’s early precedents establishing the power of judicial review. Indeed, judicial supremacy has long been contested, sometimes by Congress and the President and sometimes even within the Court. Critics argue that the Court was not intended to be the *exclusive* interpreter of the Constitution; rather, as long as legislative and executive branch actors obey specific Court orders in specific cases, they can act in their spheres on a contrary interpretation of the Constitution.<sup>9</sup>

Two other features of our constitutional system combine with judicial supremacy to insulate the Court’s constitutional judgments from the will of the people as it evolves over time. First, the U.S. Constitution is very difficult to amend—much more so than most state and foreign constitutions.<sup>10</sup> Second, as discussed in Chapter 3 of this Report, because Justices serve for life, the timing of nominations is unpredictable. Some Justices serve for many decades and some Presidents have few or no opportunities to make appointments. According to some observers, the result is that the Court may not be reflective of, or responsive to, the people, as expressed through electoral preferences over time.

Proposals to curb judicial power are diverse. Without purporting to be comprehensive, this Chapter examines proposals (1) to strip the Supreme Court and other federal courts of jurisdiction to hear certain kinds of cases, (2) to impose supermajority voting requirements or require courts to give deference to legislative judgments about constitutionality, and (3) to authorize congressional overrides of judicial decisions striking down legislation. As we emphasize, some disempowering proposals specifically target the Supreme Court, while others would apply to lower courts as well. Some would insulate broad categories of legislation from judicial review; others would limit judicial power only with respect to specifically identified issues.

We consider the extent to which such proposals would affect the Supreme Court’s role, or that of the judiciary as a whole, in relation to the other branches of government in the resolution of major social, political, and cultural issues. We also highlight the counterarguments advanced by those who defend the existing role of the Court in our constitutional system. Among other concerns, critics of proposals to disempower the courts worry that such reforms might undermine protections for individual rights, particularly minority rights, or that as more constitutional interpretation is performed by the political branches, the law could become less settled or well-reasoned. Critics also emphasize that

disempowerment reforms could undermine the rule of law by eliminating the courts' role in ensuring officials' accountability. Some also question whether courts necessarily operate in ways that are antidemocratic.<sup>11</sup>

Our discussion is predominantly analytical. We do not purport to resolve the fundamental questions of democratic and political theory that any substantial disempowering of the courts would raise. Instead, we analyze the extent to which the various proposals to disempower the courts would in fact realize their stated goals. We also identify some of the potential costs of various proposals, including from the perspective of those who emphasize the importance of the courts in protecting individual rights, federalism, or other constitutional values and structures. Finally, we discuss the constitutional issues to which leading proposals would give rise and evaluate whether the proposals could be achieved without constitutional amendment. Given the importance of concerns about the Court's power in relation to the elected branches—and given the relative lack of attention disempowering proposals have received compared to some of the other reforms discussed in this Report—a key aim of this Chapter is to inform future debate on these topics.<sup>12</sup>

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## I. Proposals to Restrict the Supreme Court's Jurisdiction

One set of proposals to reduce the power of the Supreme Court involves limiting the Court's jurisdiction to hear and decide certain types of cases. Over the last fifty years, various members of Congress have proposed bills that would strip the jurisdiction or authority of the Supreme Court—sometimes in conjunction with the jurisdiction of other courts—to rule on the constitutionality of anti-abortion legislation,<sup>13</sup> school prayer,<sup>14</sup> the Affordable Care Act,<sup>15</sup> prohibitions against pornography,<sup>16</sup> local mandates to recite the Pledge of Allegiance,<sup>17</sup> and the now-invalidated Defense of Marriage Act.<sup>18</sup> Proponents of such jurisdiction-stripping measures may hope that limiting the Court's power in this way would shift control over affected public policies to the political and democratic processes. However, we note that jurisdiction stripping has no inherent partisan valence and could be utilized to serve the ideological goals of nearly any constituency with the political capacity to enact it.

Jurisdiction stripping has long been a topic of debate among legal academics as well, and it has drawn new attention in the last few years. For example, one commentator recently suggested that Congress might use jurisdiction stripping to protect specific legislation, such as a hypothetical federal wealth tax, from judicial invalidation.<sup>19</sup> Others have proposed jurisdiction stripping as a general means of disempowering the Court and shifting authority to



more democratically accountable institutions.<sup>20</sup> Jurisdiction stripping is also a mechanism that has been used in other countries to make apex courts more politically accountable.<sup>21</sup>

Though the academic debate has been robust, no recent commentator has offered a programmatic blueprint for jurisdiction stripping. In the analysis that follows, we provide a brief historical background concerning congressional efforts to strip courts of their jurisdiction, an evaluation of various types of jurisdiction-stripping proposals, and an assessment of the constitutionality of jurisdiction stripping in its various forms.

At bottom, one cannot assess the constitutionality of jurisdiction stripping in the abstract. Congress certainly has some power to impose limits on the appellate jurisdiction of the Supreme Court. However, the extent of that power is unclear, and the constitutionality of specific proposals would depend upon the particular details of those proposals. The Commission does not have a firm view on the overall merits of jurisdiction stripping, but we are skeptical that the aim of promoting more democratically accountable control of public policy can be achieved solely by limiting the jurisdiction of the Supreme Court.

## A. Constitutional and Historical Background

The Constitution undisputedly gives Congress power to grant and withhold the jurisdiction of the federal courts, though the precise scope of that power is much debated. Article III of the Constitution vests the Supreme Court with “original” jurisdiction in a small category of cases. Article III then specifies that “[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*”<sup>22</sup> Although the scope of Congress’s power under the Exceptions Clause has never been settled definitively, Congress always has made some exceptions to the Court’s appellate jurisdiction. The 1789 Judiciary Act, for example, made no provision for Supreme Court review of criminal cases tried in the lower federal courts.<sup>23</sup>

The Constitution also contemplates broad congressional power to determine and adjust the jurisdiction of the lower federal courts. As the result of a deliberate compromise at the Constitutional Convention, Article III authorizes Congress to create lower federal courts but does not require it to do so. It provides instead that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>24</sup> This language has always been understood to authorize Congress to create or not create lower courts, and to vest the lower courts with less jurisdiction than the maximum amount that Article III would permit.

In the 1789 Judiciary Act, Congress accepted the Constitution's invitation to create lower federal courts and gave them broad jurisdiction, but Congress also imposed significant limitations. For example, the Act included jurisdictional dollar-amount requirements not only for cases brought by parties from different states (what is known as diversity jurisdiction), but also for civil actions brought by the United States.<sup>25</sup> The 1789 Judiciary Act also omitted any general grant of jurisdiction to the lower federal courts to address suits arising under the Constitution, laws, and treaties of the United States. Such cases could be filed only if they happened to fall within other more specific grants of jurisdiction, which many did not.

From the beginning, moreover, the federal courts' exercise of their jurisdiction conferred by Congress provoked occasional controversy and calls for statutory revision. In the early decades of constitutional history, contention surrounded the Supreme Court's appellate jurisdiction under Section 25 of the 1789 Judiciary Act to review the decisions of state supreme courts. Throughout the antebellum era, a number of states and state courts objected that Supreme Court review of state court decisions was incompatible with the partial sovereignty of states and their institutions as guaranteed by the Constitution. In 1831, the House Judiciary Committee reported out a bill that would have stripped the Supreme Court's jurisdiction to review state court judgments, but that measure failed on the floor amid concerns about asserted state authority to nullify acts of Congress.<sup>26</sup>

Following the Civil War, fearing that the Supreme Court might invalidate the Military Reconstruction Act,<sup>27</sup> Congress enacted a statute depriving the Court of appellate jurisdiction over a pending habeas corpus case that presented important constitutional questions concerning Reconstruction. The Court upheld this deprivation of its appellate jurisdiction in *Ex parte McCordle*.<sup>28</sup> However, in upholding this jurisdiction-stripping statute, the Court's view of Congress's power remained ambiguous. The Court noted that although Congress had eliminated one avenue for parties to bring their challenges to the Military Reconstruction Act to the Court, it had potentially left open another avenue that could be used in future cases.

In another case from the Reconstruction Era, *United States v. Klein*, the Supreme Court invalidated a statute that made it harder for pardoned rebels to receive compensation from the United States.<sup>29</sup> Formally, the statute directed both the Court of Claims and the Supreme Court to dismiss "for want of jurisdiction" certain claims against the United States in which a party relied on a presidential pardon to establish proof of loyalty during the Civil War. The Court issued an opinion whose rationale, to this day, has inspired uncertainty and debate. It held that a statute that confers Supreme Court jurisdiction up to "a given point" in a case, but then requires the Court to dismiss that case "when it ascertains that a certain state of things exists,"

is “not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.”<sup>30</sup> In other words, limits exist on Congress’s power to make exceptions, though there is debate about what these limits are.

Congress enacted a small spate of legislation restricting the jurisdiction of the federal courts during the 1930s, primarily to limit the remedies lower federal courts could issue for violations of the law. The Norris-LaGuardia Act of 1932 sharply limited the capacity of “the courts of the United States” to issue injunctions “in a case involving or growing out of a labor dispute.”<sup>31</sup> The Supreme Court upheld that restriction against a constitutional challenge in *Lauf v. E.G. Shinner & Co.*<sup>32</sup> The Johnson Act of 1934 stripped the federal courts of jurisdiction to enjoin state orders fixing rates for public utilities whenever certain conditions were satisfied, including where “[a] plain, speedy and efficient remedy” for illegality was available in state court.<sup>33</sup> The Tax Injunction Act of 1937 similarly provided that “[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”<sup>34</sup>

Since at least the 1950s, members of Congress regularly have introduced legislation that would strip the Supreme Court, the lower federal courts, or both, of jurisdiction to resolve particular hotly contested and politically salient constitutional issues.<sup>35</sup> Only one of these proposals, the Military Commissions Act of 2006, has ever been enacted into law (and that statute was subsequently invalidated, as noted below). In the 1950s, Congress gave serious consideration to bills that would have restricted the Supreme Court’s jurisdiction to review challenges to national-security legislation.<sup>36</sup> In the 1970s, a number of proposals sought to limit federal jurisdiction to order busing as a remedy for school segregation.<sup>37</sup> The 1980s witnessed repeated failed proposals to limit federal jurisdiction over challenges to abortion restrictions and school prayer.<sup>38</sup> In 2004, the House of Representatives enacted bills that would have deprived both the lower federal courts and the Supreme Court of jurisdiction over suits challenging the Defense of Marriage Act,<sup>39</sup> as well as over suits against laws requiring students to recite the Pledge of Allegiance in school.<sup>40</sup> But those measures died in the Senate. In more recent years, members of Congress have introduced jurisdiction-stripping legislation involving abortion, religious liberty, and other matters.

In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) withdrew the Supreme Court’s certiorari jurisdiction to review decisions by the federal courts of appeals denying prisoners convicted by state courts the permission to file second or “successive” petitions for federal writs of habeas corpus.<sup>41</sup> The Court upheld that limitation in *Felker v. Turpin*.<sup>42</sup> In doing so, however, it emphasized that the AEDPA provision curbing the Court’s

certiorari jurisdiction did not deprive it of jurisdiction to consider original petitions for habeas. AEDPA would “inform” its consideration of such petitions, the Court said, but not exert a preclusive effect.

The Detainee Treatment Act of 2005, as amended by the Military Commissions Act of 2006, purported to strip all courts of the United States, including the Supreme Court, of habeas corpus jurisdiction in all cases brought by noncitizens being detained as enemy combatants. (Congress instead tried to provide a substitute for habeas corpus: providing the D.C. Circuit with limited review of detention decisions made by non-Article III military tribunals.) But the Supreme Court held in *Boumediene v. Bush*<sup>43</sup> that the withdrawal of habeas jurisdiction violated the Suspension Clause of Article I, Section 9 of the Constitution, which provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>44</sup> The Court did not opine on jurisdiction stripping outside of the habeas context.

Overall, the Constitution gives Congress power to limit the Supreme Court’s appellate jurisdiction. This was the conclusion of the various experts who testified before this Commission on the issue.<sup>45</sup> However, Congress’s jurisdiction-stripping power is not unlimited, and neither the Court’s jurisprudence nor past practice fully defines its reach or scope. Thus, the constitutionality and policy merits or demerits of jurisdiction-stripping proposals are contingent on the proposals’ details. We evaluate those details below.

## B. Evaluation of Current Jurisdiction-Stripping Proposals

In this Section, we consider proposals to strip courts of their jurisdiction to review the constitutionality of federal and state legislation. Jurisdiction-stripping legislation might also seek to shield executive action from judicial review, though we are aware of fewer proposals to do so. Our analysis necessarily takes a selective approach, given the many possible kinds of jurisdiction-stripping measures. We focus mostly on issue-specific jurisdiction-stripping legislation that would seek to disempower courts from ruling on a specific law or type of law. Examples include proposals that would bar jurisdiction over challenges to a wealth tax or to a law regulating abortion. We omit discussion of most general jurisdiction-stripping bills, such as those that exclude relatively unimportant cases (as measured by dollar amount, for example) from the federal courts. We do consider general jurisdiction-stripping efforts insofar as they would seek to temper or eliminate the federal courts’ authority to declare legislation unconstitutional, and thereby to decrease the courts’ power relative to other institutions of government.

In evaluating jurisdiction stripping, we also differentiate among proposals based on the courts they would affect: Some proposals would restrict the appellate jurisdiction of the Supreme Court alone, while leaving lower court jurisdiction intact. Others would withdraw jurisdiction from all federal courts, including the district courts and courts of appeals, while leaving state court jurisdiction intact. Still others would withdraw jurisdiction not only from the Supreme Court, but also from all other federal and state courts. The merits and consequences of each type of proposal would differ, as we explain.

To organize our analysis, we begin by considering the goals of jurisdiction-stripping proposals and the proposals' likely efficacy in achieving those goals. We then consider the consequences that successfully implementing the proposals might have for the functioning of the constitutional system.<sup>46</sup> We defer consideration of the constitutional issues that their enactment would present until Section I.C. We do not evaluate the specific policy goals that any jurisdiction-stripping proposal might serve.

## 1. Goals and Efficacy

Most prominent jurisdiction-stripping proposals today would shield specific, substantively defined issues, legislation, or policies from judicial review by the Supreme Court, by all federal courts, or by all federal and state courts. The goals of such proposals are overwhelmingly substantive in nature—to protect the particular laws in question from judicial invalidation. Nevertheless, proposals to curb judicial jurisdiction can also have more abstract goals, involving the redistribution of decisionmaking authority within our scheme of government. More specifically, some proponents of jurisdiction stripping regard it as a means of promoting greater democratic accountability by transferring power from the Supreme Court to more democratically responsive institutions.<sup>47</sup>

The Commission does not take a position on the desirability of any particular substantive proposal. These issues are ones over which Commissioners disagree. However, in analyzing the issue of jurisdiction stripping, we are skeptical that jurisdiction stripping could promote meaningful democratic accountability if Congress were to restrict the appellate jurisdiction of the Supreme Court alone.

The reallocation of authority would be most dramatic if Congress were to strip jurisdiction from all courts, including state as well as federal courts, to entertain constitutional challenges to particular substantive legislation. In foreclosing all judicial review of legislation, Congress might be viewed as effectively claiming authority to determine that any covered statutes—such as one imposing a wealth tax or those banning abortions—were constitutionally valid.

Proponents of such legislation, moreover, would likely defend it as enhancing political democracy and accountability by enabling Congress, as a democratically accountable institution, to authoritatively resolve a constitutional issue about which reasonable minds could be expected to differ.<sup>48</sup>

However, the ability of issue-specific jurisdiction-stripping legislation to promote political democracy seems by definition limited, since legislation of this kind would still leave responsibility for the overwhelming bulk of constitutional interpretation in the courts, despite stripping it from discrete contexts. Similarly, general jurisdiction-stripping bills that affect a smaller subset of courts rather than the full set of federal and state courts would have limited effect in enhancing democratic accountability in the domain of constitutional interpretation.

Measures that would restrict the appellate jurisdiction of the Supreme Court alone, for example, would not straightforwardly transfer interpretive authority from the judiciary to Congress or to any other democratically accountable institution. They would instead reallocate power from the Supreme Court to the lower courts. There seems to be little reason to preclude Supreme Court jurisdiction over specific constitutional questions that remain subject to decision by the lower courts. Precluding Supreme Court review alone would do little or nothing to enhance political democracy. Nor would it advance interests in justice or accuracy to permit different courts to issue incompatible rulings on the same substantive constitutional issue with no possibility of Supreme Court review.

Proposals that would withdraw jurisdiction from all federal courts but allow continued adjudication of a constitutional issue in the state courts might more plausibly aspire to promote a democracy-enhancing goal. They would leave responsibility for constitutional decisions in the hands of state judges who are, in many instances, democratically elected or otherwise amenable to the influence of public opinion. By contrast, Article III of the federal Constitution seeks to insulate federal judges from political influence through guarantees of life tenure and protection against salary reduction.

We are uncertain, however, about the precise extent to which a transfer of adjudicative power from federal to state courts would enhance the influence of political majorities over the resolution of constitutional issues. To reach such a conclusion would require resolution of myriad empirical and normative issues. State court judges would remain bound by the Supremacy Clause, which provides that the Constitution is the “supreme Law of the Land” and that “the Judges in every State shall be bound thereby,”<sup>49</sup> but it is not clear whether state court judges would be bound by preexisting Supreme Court precedents speaking to the

constitutional question over which Congress had precluded formal Supreme Court review. If state courts found that prior Supreme Court precedents tied their hands, then this sort of jurisdiction stripping would be limited as a means of promoting democratization of authority over constitutional interpretation. An unintended effect might even be to freeze in place the Supreme Court doctrine on the books at the time of the jurisdiction stripping.

Proposals that would strip the jurisdiction of all courts to rule on the constitutionality of federal (and possibly also state) legislation would undoubtedly have a major effect in allowing Congress and state legislatures to insulate their preferences and judgments of constitutional validity from judicial review. Whether congressional preclusion of all judicial review of specific legislation or policies could fairly be described as injecting political accountability into the process of constitutional interpretation would depend on (a) whether Congress actually purported to conclude that the legislation or policies that it shielded from judicial review were constitutionally valid and (b), if so, whether it took its responsibilities to apply and interpret the Constitution seriously. Some commentators believe that legislatures in countries that do not have judicial review discharge their responsibilities to protect individual rights with impressive conscientiousness.<sup>50</sup> It is also imaginable, however, that legislation precluding all judicial challenges to particular statutes or programs could have the purpose and effect of undermining constitutional rights, because Congress and state legislatures might not feel bound to protect them.

## 2. Consequences for the Functioning of the Federal System

The systemic consequences of jurisdiction-stripping legislation would similarly depend on the details of any particular measure that Congress might adopt. Legislation that withdrew appellate jurisdiction from the Supreme Court but retained jurisdiction in the lower federal courts and in state courts would obviously diminish the capacity of the Supreme Court to ensure uniformity in constitutional interpretation (and consistency in constitutional outcomes) across federal courts of appeals and state supreme courts. The courts of appeals and state supreme courts could become the courts of last resort with respect to the constitutional status of federal legislation. Thus, a federal statute could be held constitutional by one circuit and unconstitutional by another, with no apex court to resolve the circuit split. We would regard this resulting lack of uniformity on matters of great political or constitutional salience as a significant cost.

In some cases, moreover, the absence of opportunity for appeal to the Supreme Court could result in a single lower court having the capacity to utter the last, controlling word on

an important constitutional issue. This result would occur if, for example, a court of appeals upheld a nationwide injunction against the enforcement of a federal statute or policy based on a constitutional ruling. Partial jurisdiction stripping would thus empower the lower courts.

A statute that simultaneously withdrew jurisdiction from both the Supreme Court and the lower federal courts could have similar effects in producing unreconciled disagreements among state courts about important constitutional issues, leading to variation in the U.S. Constitution's reach and effects. Furthermore, many courts have concluded that state courts lack the power to issue injunctions against federal officials, which would contribute to further disagreement and tension.<sup>51</sup>

A jurisdiction-stripping statute that bars state as well as federal courts from exercising jurisdiction over constitutional challenges to legislation would have even farther-reaching systemic consequences. Whether by accident or design, it would impliedly reject longstanding assumptions about what it means to possess a constitutional right in the United States. More specifically, it would make rights more dependent on legislative exposition, a task that legislatures may not currently be well-positioned to undertake. Legislatures are not currently adept at anticipating all possible future applications of a statute and crafting exceptions for cases that would present constitutional difficulties. It is possible that legislatures might enhance their relevant skills and resources if courts no longer played such a dominant role, for example by expanding legal staff dedicated to constitutional analysis. To the extent that jurisdiction stripping reflects majoritarian impulses while depriving individuals of any right to seek redress in court, it might also make it harder for minorities to vindicate individual rights that, in some instances, are essential to constitutional democracy itself.

A final systemic consequence that merits consideration is the extent to which a particular jurisdiction-stripping measure would tend to contribute to partisan polarization and institutional instability.<sup>52</sup> There is little empirical data on this point.<sup>53</sup> One might worry that the turn by transient majorities in Congress to jurisdiction stripping to insulate their preferred policy objectives from judicial scrutiny could give rise to escalating jurisdiction stripping as control of Congress changes hands, ultimately resulting in serious abuses of power. Against this worry, it might be argued that the fact that Congress has long had this tool at its disposal and has used it infrequently suggests this concern is more hypothetical than real. However, we cannot rule out the possibility that in the current era, lawmakers might resort to jurisdiction stripping with increasing frequency in partisan political struggles.



## C. The Constitutional Permissibility of Jurisdiction Stripping

Debates about the constitutional limits on Congress’s power to restrict the jurisdiction of the Supreme Court, the lower federal courts, and the state courts have generated an enormous literature that was described decades ago as already “choking on redundancy.”<sup>54</sup> Here we can do no more than highlight some areas of virtual consensus among scholars and identify some of the issues that different types of jurisdiction-stripping legislation would pose.

### 1. Sources of Congress’s Regulatory Power

In order to enact jurisdiction-stripping legislation, Congress must be able to point to a specific source of authority within the Constitution. Insofar as legislation restricting the appellate jurisdiction of the Supreme Court is concerned, power would come from the Exceptions Clause, as discussed in Section I.A, possibly in conjunction with the Necessary and Proper Clause.<sup>55</sup>

Where jurisdiction-stripping legislation also extends to the lower federal courts, a *prima facie* source of authority lies in Article III’s Judicial Vesting Clause, which provides that Congress “may from time to time ordain and establish” tribunals “inferior” to the Supreme Court.<sup>56</sup> Traditional understandings hold that the power to create lower courts includes a power to prescribe and limit their jurisdiction. If a further source of authority were needed, the Necessary and Proper Clause may provide it.

Insofar as Congress might seek to restrict state court jurisdiction in conjunction with a restriction on the appellate jurisdiction of the Supreme Court, its authority would rest solely on the Necessary and Proper Clause. Congress could deprive the state courts of jurisdiction to entertain a constitutional challenge to state or federal legislation only if doing so was “necessary and proper for carrying into Execution” one of the powers of the federal government,<sup>57</sup> which presumably would include making effective or viable Congress’s restraints on the Court’s appellate jurisdiction.

Finally, we note that jurisdiction-stripping legislation might have a spillover impact on the Supreme Court’s original jurisdiction. Because the Supreme Court’s Article III original jurisdiction extends to cases “in which a State shall be [a] Party,” any case brought by a state could potentially be filed under the Court’s original jurisdiction.<sup>58</sup> For instance, the landmark voting rights case of *South Carolina v. Katzenbach*,<sup>59</sup> which upheld the Voting Rights Act against a broad constitutional challenge, was brought within the Court’s original jurisdiction. We note that states have filed several high-profile challenges to federal policies in recent

years.<sup>60</sup> While few of these challenges have been brought as original jurisdiction suits, the practice could take on more importance if politically salient jurisdiction-stripping legislation were enacted. The prospect of states filing original actions is significant partly because it is questionable whether Congress can restrict the *original* jurisdiction of the Supreme Court; the Article III exceptions power does not extend to Supreme Court original jurisdiction. Although the current original jurisdiction statute does not authorize the full extent of jurisdiction that the Article III appears to contemplate, some Justices and commenters have expressed doubts about Congress’s capacity to confine the Court’s original jurisdiction short of its constitutionally specified bounds.<sup>61</sup> In other words, original jurisdiction could potentially be an important loophole in many jurisdiction-stripping proposals.

## 2. Sources of Limitations on Congress’s Jurisdiction-Stripping Power

For analytical purposes, it is helpful to distinguish two kinds of limitations on Congress’s powers to restrict the jurisdiction of the Supreme Court, the lower federal courts, and state courts. One category includes limitations that are inherent in, or “internal” to, Article III’s grant of jurisdiction-limiting powers to Congress. Another category of limitations arises from constitutional provisions that circumscribe congressional power by creating individual rights. In scholarly literature, such limits are often referred to as “external” limits on congressional power.

### a. *Limits from Within Article III*

It is difficult to identify specific examples of clear and noncontroversial internal limits, because each possible limit is much debated among scholars. That said, it is easy to give general examples that illustrate the idea. In perhaps the best-known example, Professor Henry M. Hart, Jr., argued in a much-celebrated contribution to the federal courts literature that the Constitution’s provision that “the judicial Power of the United States shall be vested in one supreme Court” establishes an implicit limit, internal to Article III, on Congress’s power to make exceptions to the Court’s appellate jurisdiction.<sup>62</sup> Constitutionally authorized restrictions, Hart maintained, cannot go so far as to “destroy the essential role of the Supreme Court in the constitutional plan.” To offer an illustration of this concern, a statute that limited the Court’s appellate jurisdiction to cases presenting issues of statutory interpretation only—and thus excluded all constitutional issues—might be thought to destroy the Court’s essential role and thus overreach Congress’s power under the Exceptions Clause. We note, however, that some scholars and commentators appear unpersuaded by Hart’s argument on this point.<sup>63</sup>

In another controversial example, some have argued that a jurisdiction-limiting statute would exceed Congress’s powers if it were enacted for constitutionally forbidden purposes, whatever those might be.<sup>64</sup> Whether such an inquiry into purpose is appropriate is a subject of debate. *Ex parte McCardle* contains a dictum clearly precluding the inquiry. In response to the argument that Congress had withdrawn the Court’s appellate jurisdiction for the forbidden purpose of preventing the enforcement of a constitutional right, the Court answered that “[w]e are not at liberty to inquire into the motives of the legislature.”<sup>65</sup> But there is arguably language in *United States v. Klein* that supports the inquiry into forbidden purposes; there, the Court stated that jurisdiction-stripping legislation that is enacted “as a means to an end” that is not constitutionally valid “is not an exercise of the acknowledged power of Congress to make exceptions . . . to the appellate power.”<sup>66</sup> In addition, Supreme Court decisions in the twentieth and twenty-first centuries have made legislative motives relevant to the assessment of statutes’ constitutional validity under a broad range of other constitutional provisions, such as the First Amendment.<sup>67</sup> In light of those decisions, it is arguable that motive-based analysis could now be invoked.

#### b. *Limits from Elsewhere in the Constitution*

No one doubts that rights under some provisions of the Constitution define limits on Congress’s power to restrict the jurisdiction of the Supreme Court and other courts. In *Boumediene v. Bush*, the Supreme Court affirmed that the Suspension Clause constitutes a rights-based limit on congressional power to curb jurisdiction over petitions for the writ of habeas corpus.<sup>68</sup> Although *Boumediene* was decided by a narrowly divided Court, it should be uncontroversial to say that a statute stripping jurisdiction over suits brought by racial minorities or adherents of a particular religion or political party would violate constitutional guarantees against discrimination.

Henry Hart famously argued that jurisdiction-limiting legislation would violate the Due Process Clause if it removed all grants of jurisdiction and all judicial remedies through which those rights might be vindicated, because a law of that kind would effectively destroy constitutional rights. According to Hart, it would be “monstrous illogic” to construe Congress’s power to limit jurisdiction and withhold judicial remedies as a de facto power to destroy constitutional rights.<sup>69</sup> But there is little case law or other authority identifying where exactly the lines between the permissible and the impermissible are drawn.

Hart did not believe—and the Supreme Court has denied—that the Constitution guarantees an effective remedy in court to every person whose constitutional rights have been

violated. Hart’s concern about the nullification of rights appears to have involved systemic effects, such as those of imagined legislation that would make it impossible for anyone ever to judicially vindicate a particular constitutional right at all. But Hart again did not attempt line drawing of his own and ultimately equivocated even with regard to the question of whether and when a total deprivation of jurisdiction and remedies to enforce a right might violate the Constitution. “The multiplicity of remedies, and the fact that Congress has seldom if ever tried to take them all away, has prevented the issue from ever being squarely presented,” he wrote.<sup>70</sup>

### 3. The Constitutionality of Particular Jurisdiction-Curbing Proposals

It would be infeasible to attempt to apply the principles delineated above—many of which, as we acknowledged, are disputed anyway—to all of the specific types of jurisdiction-curbing legislation that Congress might enact. Instead, we analyze some of the general issues that would arise from jurisdiction-curbing legislation within each of the three categories that we distinguished at the outset of Section I.B. First, we consider proposals that would restrict the appellate jurisdiction of the Supreme Court alone, while leaving lower court jurisdiction intact. Second, we consider proposals that would withdraw jurisdiction from all federal courts, while leaving state court jurisdiction intact. Finally, we consider proposals that would withdraw jurisdiction from all federal and state courts, including the Supreme Court, to rule on the constitutionality of federal (and possibly also state) legislation.

#### a. *Restricting the Jurisdiction of Only the Supreme Court*

If Congress were to withdraw the appellate jurisdiction of the Supreme Court over a class of cases—such as those challenging the constitutionality of a wealth tax or of prohibitions against abortion—while allowing such challenges to be litigated in other courts, including federal district courts and courts of appeals, challengers would likely argue that the restriction overstepped congressional power under the Exceptions Clause by precluding the Court from performing a function essential to its status as the nation’s “one supreme Court.” The argument would be that the Court is deprived of an aspect of its “supreme” status when it is denied the opportunity to pronounce authoritatively on a justiciable issue with respect to which the decisions of lower courts may diverge and might even (from the Court’s perspective) err egregiously.<sup>71</sup> Proponents of this argument could acknowledge Congress’s authority to withdraw rights to de novo appellate review by the Supreme Court, but insist that the Court must retain some minimal capacity to correct clear lower court errors—capacity that traditionally existed through “discretionary writs, such as mandamus, habeas corpus, and prohibition.”<sup>72</sup>

When the Supreme Court confronted a statute that deprived it of appellate jurisdiction over a narrow class of court of appeals decisions in the habeas corpus case of *Felker v. Turpin*, the Court upheld the statute, but it emphasized—as it had more than a century earlier in *Ex parte McCardle*<sup>73</sup>—that it retained jurisdiction to oversee the courts of appeals by entertaining original applications for the writ.<sup>74</sup> As a result, there appears to be no squarely on-point precedent deciding whether Congress could more categorically strip the Supreme Court of all jurisdiction over a particular issue or set of issues that the lower courts could continue to decide. Perhaps the only clear conclusion is this: A total preclusion of all opportunity for Supreme Court oversight of lower court decisions involving specific issues, statutes, or policies would run a greater risk of judicial invalidation than a less-than-total preclusion.

*b. Restricting the Jurisdiction of All Federal Courts, but Not State Courts*

There also appears to be no authoritative ruling and no consensus among scholars on the permissibility of Congress’s stripping all federal courts of jurisdiction over a class of cases—which again might be cases challenging the constitutionality of a wealth tax or prohibitions against abortion—while permitting those specified issues to be litigated in the state courts. Reviving an argument that Justice Joseph Story advanced in the iconic case of *Martin v. Hunter’s Lessee*,<sup>75</sup> one prominent modern commentator has argued energetically that legislation of this kind would violate the provision of Article III, Section 2, Clause 1 that “[t]he judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”<sup>76</sup> Under this principally text-based argument, the Exceptions Clause permits elimination of the Supreme Court’s appellate jurisdiction in cases “arising under” federal law if and only if they are subject to the jurisdiction of the lower federal courts. Similarly, Congress can divest the lower federal courts of jurisdiction over cases presenting federal questions that remain within the Supreme Court’s appellate jurisdiction to review state court judgments. But, the argument maintains, Congress cannot simultaneously preclude the exercise of jurisdiction by both the Supreme Court and the lower federal courts in cases arising under the Constitution, laws, and treaties of the United States.

Other distinguished modern scholars have disagreed with this argument on both originalist and precedent-based grounds.<sup>77</sup> Among other arguments, they maintain that Article III’s provision that the judicial power shall extend to “all cases” under the Constitution serves mainly to clarify that Congress can provide for federal jurisdiction over both civil and criminal actions if it chooses to do so.<sup>78</sup>

*c. Restricting the Jurisdiction of All Courts, Including State Courts*

Simultaneous preclusion of jurisdiction by all courts to consider challenges to the constitutional validity of legislation would present a plethora of serious constitutional issues. Among other things, because a statute precluding all judicial jurisdiction would necessarily be invalid if a preclusion of all federal jurisdiction would be invalid, the grounds for constitutional objection cumulate as the scope of an attempted issue-specific preclusion of judicial review expands. Here we identify a few of the distinctive issues that a preclusion of all judicial jurisdiction would present, though without pretense of exhaustive treatment.

If Congress sought to deprive state courts of jurisdiction to rule on challenges to the constitutional validity of state legislation under the U.S. Constitution, there would be a serious question about the source of Congress's authority to do so. It is not obvious that a federal statute divesting state courts of jurisdiction to rule on the constitutionality of state legislation, for purposes other than granting exclusive jurisdiction to the federal courts, would be "necessary and proper" for carrying any federal power into execution.

If Congress sought to deprive all courts of jurisdiction to rule on the constitutional validity of federal legislation, a similar question would arise about the source of Congress's power. It might be argued that legislation of this kind would be "necessary and proper" to implement whatever substantive power supported the enactment of the federal legislation that Congress sought to shield from judicial scrutiny—for example, a statute imposing a wealth tax or barring abortions. But that conclusion would be disputable. The Necessary and Proper Clause, and the doctrine interpreting it, leave room for an argument that a categorical bar on judicial challenges to arguably unconstitutional legislation is not necessary and proper because of its adverse impact on constitutional rights.

Depending on the details of any particular measure that Congress might enact, rights-based restrictions on congressional authority would likely come into play, as well. The restrictions would perhaps be plainest if Congress sought to provide for coercive enforcement of a statute by the courts while purporting to withdraw judicial jurisdiction to entertain constitutional objections to the statute that courts were charged with enforcing. Consider, for example, if a doctor were prosecuted for violating a statute that forbade performing abortions, or a taxpayer were prosecuted for refusing to pay a wealth tax. If Congress purported to bar a court from entertaining defenses that the abortion prohibition or the wealth tax were unconstitutional, the doctor or the taxpayer would have a more than colorable argument that

the “jurisdictional” statute violated the Due Process Clause or otherwise intruded on the courts’ exercise of an irreducibly judicial function.

d. *Conclusion on Constitutionality*

Given the Exceptions Clause, Congress undoubtedly has some capacity to disempower the Supreme Court by restricting its jurisdiction if Congress should choose to do so. But the precise scope of congressional power is uncertain. Moreover, even if we were prepared to make conclusions about the proper resolution of disputed issues, the requisite judgments would depend on the fine-grained details of particular proposals.

That said, we offer three general conclusions: First, congressional legislation aimed at disempowering the Supreme Court by limiting its jurisdiction to resolve particular constitutional issues would likely trigger constitutional challenges. Second, depending on the precise form that jurisdiction-limiting legislation might take, the Supreme Court could plausibly find some of the possible challenges to be meritorious. Third, the more that jurisdiction-limiting legislation leaves open alternative avenues for judicial enforcement—such as through state courts and lower federal courts—the more likely it is to survive constitutional challenges. However, leaving open alternative avenues for judicial enforcement might also hinder jurisdiction-stripping legislation from achieving the ends that its proponents would wish to realize.

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## II. Proposals for Supermajority Rules or Deference Rules at the Supreme Court

A second way to reduce the Supreme Court’s power would be to impose a supermajority voting requirement for decisions finding actions of the political branches unconstitutional, or alternatively, to require the Court to apply a deferential standard of review in constitutional cases. These proposals would make it more difficult than it is today for the Supreme Court to invalidate legislation and other acts of the elected branches on constitutional grounds. Like other proposals discussed in this Chapter, they therefore would shift some power away from the Court, although they would still leave the Court as the ultimate authority over constitutional matters.

This Part provides an overview of supermajority voting requirements and deferential standards of review as potential reforms. It begins with a historical and comparative look at proposals for supermajority voting requirements advanced at earlier times in U.S. history and

approaches adopted in foreign and state courts. It next considers the advantages and potential drawbacks of a supermajority voting rule and assesses the feasibility of particular approaches to implementation, particularly by considering the implications for the lower courts of a supermajority rule at the Supreme Court. It then considers the advantages and drawbacks of reducing the Court's power by requiring a deferential standard of review. Finally, this Part concludes by examining Congress's power under the Constitution to impose either type of reform.

## A. Supermajority Voting Requirements—Historical and Comparative Context

Proposals for supermajority voting requirements generally focus on the U.S. Supreme Court. Federal district judges preside alone, or on three-judge panels, such that decisions by the district courts are either unanimous or by 2-1 panel vote. Similarly, federal courts of appeals typically preside in three-judge panels, deciding cases either unanimously or by 2-1 panel vote, though when they sit en banc, a supermajority requirement could be applied to change their current simple majority voting practice. Congress might prescribe supermajority voting rules for state courts, but this is an uncommon suggestion and, as discussed below, it may be subject to substantial constitutional objections.

By longstanding practice, the U.S. Supreme Court decides cases by simple majority vote. Neither Article III of the Constitution nor Congress in the 1789 Judiciary Act directly specified how the Supreme Court's cases should be decided. From the beginning, however, the Court appears to have assumed that a simple majority vote was sufficient to determine its rulings—a conclusion generally consistent with the practices of Anglo-American multimember courts of the time.

The first proposal in Congress for a supermajority voting requirement at the Supreme Court seems to have been made in 1823, and over sixty such proposals have been offered at various times since then.<sup>79</sup> During the Reconstruction Era, the Republican-controlled House of Representatives passed a bill imposing a supermajority vote requirement for invalidating federal legislation, but the Senate did not act on it.<sup>80</sup> In the 1920s, Idaho Senator William Borah made an influential proposal to require that:

in all suits now pending, or which may hereafter be pending, in the Supreme Court of the United States, except cases affecting ambassadors, other public ministers, and consuls and those in which a State shall be a party, where is drawn in question an Act



of Congress on the ground of repugnancy to the Constitution of the United States, at least seven members of the court concur before pronouncing said law unconstitutional.<sup>81</sup>

A more recent proposal, from 1967, encompassed rulings against both state and federal law:

The Supreme Court may not in any case hold that any provision of an Act of Congress, an Act of the legislature of any State, or a constitution of a State is invalid because it violates a provision of the Constitution of the United States unless at least six Justices of the Supreme Court concur in that holding.<sup>82</sup>

Many (perhaps all) of these proposals appear to have been reactions to particular rulings or lines of rulings of the Court, or concerns about particular rulings the Court might issue. For example, in the 1820s, members of Congress were principally concerned about Supreme Court decisions invalidating state laws.<sup>83</sup> After the Civil War, Congress worried that the Court might invalidate Reconstruction legislation or even question the validity of the Fourteenth Amendment itself; in the early twentieth century, Senator Borah and his supporters were reacting to pro-business decisions issued by narrow majorities of the Court.<sup>84</sup>

Although Congress never enacted a supermajority rule for Supreme Court voting, North Dakota, Nebraska, and Ohio each adopted supermajority voting for their supreme courts in the early twentieth century. The North Dakota Constitution provides that the state supreme court “shall not declare a legislative enactment unconstitutional unless at least four of the [five] members of the court so decide.”<sup>85</sup> Similarly, the Nebraska Constitution provides: “No legislative act shall be held unconstitutional except by the concurrence of five [of seven] judges.”<sup>86</sup> A scholarly examination of experience under these provisions suggests that they have not posed significant operational difficulties.<sup>87</sup> Ohio adopted a similar constitutional amendment in 1912, which it repealed in 1968 after experiencing difficulties in practice.<sup>88</sup>

Although majority voting is the most common practice among multimember courts worldwide, a number of high courts outside the United States (including in Mexico and South Korea) operate under a supermajority voting requirement for constitutional adjudication. According to a recent study, at least ten countries have such a requirement, typically imposed in their constitutions.<sup>89</sup> Some of these countries have substantial experience with constitutional litigation under supermajority voting rules. For example, South Korea adopted the current version of its supermajority rule for its constitutional court in 1987, requiring the votes of six

out of nine justices to find a statute unconstitutional. A study of the South Korean constitutional court counted sixty-two cases from 1987 to 2016 decided by a 4-5 vote (that is, in which five, but not more than five, justices thought the statute was unconstitutional), along with a substantial docket of constitutional cases in which the votes were not so closely divided.<sup>90</sup> The study does not suggest significant tensions arising in Korean law or in the conduct of the court as a result of the supermajority voting rule, although it identifies a few issues of implementation.<sup>91</sup> Comparative experience also indicates that a supermajority voting rule does not necessarily prevent a constitutional court from issuing important rulings finding statutes to be unconstitutional. For example, Mexico’s Supreme Court—despite operating under a rule generally requiring the vote of 8 of 11 justices to invalidate legislation—has issued a number of important constitutional rulings against the government.<sup>92</sup>

## B. Evaluating Supermajority Voting Requirements

In this section, we begin by articulating the arguments made by proponents of supermajority voting requirements as well as those made by skeptics. We then evaluate the extent to which supermajority voting rules would achieve the goals of their proponents and identify some implementation concerns that must be taken into account when considering these proposals.

### 1. Goals and Risks

The principal goal of proposals for supermajority voting requirements is to make it more difficult for the Court to invalidate laws or other government actions on constitutional grounds. A supermajority voting requirement would require broader agreement among the Justices with the judgment of unconstitutionality than under a simple majority voting rule. In the view of advocates of these proposals, the Court today is not sufficiently deferential to lawmakers by historical standards; it is too prone to overturning laws and thwarting the outcomes of the democratic process.<sup>93</sup> Relatedly, proponents emphasize that the Court has resolved too many disputed constitutional issues by narrow 5-4 majorities, particularly in the modern era.<sup>94</sup> This observation sometimes centers specifically on the Court’s perceived willingness to overturn acts of Congress, while other times it is raised more generally about the Court’s resolution of disputed matters of social policy. Some proponents of these proposals view supermajority voting requirements as a bright-line, readily enforceable means of approximating the kind of deference to legislative judgment that James Bradley Thayer sought to achieve through a “rule of [judicial] administration” under which courts would invalidate congressional legislation only in cases of “clear” unconstitutionality.<sup>95</sup>

Some scholars also ground their support for supermajority voting on the greater likelihood that the Court will reach correct constitutional decisions if a supermajority must agree that a law is unconstitutional.<sup>96</sup> Supermajority requirements would, in their view, also enhance deliberation and consensus-building among the Justices, leading on balance to superior outcomes.<sup>97</sup>

For skeptics of supermajority voting rules, a central concern is that such measures would undercut judicial capacity to protect constitutional rights against majoritarian overreach. One longstanding, conventional view of the courts and constitutional review is that they serve as a valuable countermajoritarian check on the political branches by vindicating individual and structural rights in constitutional cases, limiting the abuse of power by overweening legislatures and executive officers.<sup>98</sup> A supermajority voting requirement would make it more difficult for courts to protect constitutional rights as they interpret them. A related concern is that a supermajority voting rule would weaken courts' ability to protect the constitutional structures of federalism and separation of powers against encroachment by Congress. Supermajority voting rules thus might not only enhance congressional power as compared to the courts; they might also enhance congressional power as compared to the states and the executive branch.

Supporters of disempowering proposals counter that supermajority voting requirements actually may bolster constitutional rights precisely by restricting the Supreme Court, on the ground that “rights protection may well be available in superior form through political branches.”<sup>99</sup> Instead of looking exclusively to courts as protectors of individual rights and legislatures as threats to those rights, such commentators admire legislative efforts like the Voting Rights Act as protective of constitutional rights and criticize the Court's decision to invalidate Section 4 of the Voting Rights Act in *Shelby County v. Holder*.<sup>100</sup> They see an important role for the political branches in promoting constitutional freedom that courts recently, in their view, have undercut.<sup>101</sup> Moreover, if one thinks the courts are too protective of the states and the executive branch, or that structural disputes are better worked out politically rather than through the judiciary, enhancing congressional power in the area would be an advantage.

## 2. Efficacy and Implementation

Any ultimate assessment of the systemic consequences of supermajority voting requirements will depend on one's perspective on the role the Supreme Court and the federal judiciary ought to play within our system of government and on how well the democratic

lawmaking process and its various institutions currently operate. Evaluating these proposals will hinge in large part on one's view of the relative abilities of courts and legislatures to protect constitutional rights. Whatever one's perspective on this question, which we do not purport to answer, we think it useful to offer observations concerning the likely effects of a supermajority voting requirement for the Supreme Court.

We believe that supermajority voting requirements are likely to achieve at least some of the effects intended by proponents. Supermajority voting may shift authority over constitutional questions marginally away from the Supreme Court and toward other government actors by reducing the likelihood that the Court would find actions of the political branches unconstitutional. But supermajority requirements also would bring with them their own potential costs, and it is uncertain that greater "correctness" would result from supermajority voting in the absence of agreed-upon criteria for differentiating correct from incorrect decisions.<sup>102</sup> The extent of success would depend on how the supermajority voting requirements were imposed, and the general idea of supermajority voting gives rise to some specific implementation challenges, particularly given the wide range of cases that come before the Court in varied procedural posture. Below, we highlight a few of the many complications that might arise.

First, a supermajority requirement would complicate the Supreme Court's supervision of the courts of appeals. Though a full accounting of these technical issues would be too extensive to analyze in detail here, it is important to consider what the weight of a 5-4 decision of the Supreme Court would be in a world where a 6-3 decision is required to find a statute unconstitutional. Imagine that the Supreme Court votes 5-4 to affirm a lower court decision that invalidated a federal law on constitutional grounds. What happens to the constitutional challenge? The 5-4 vote falls short of the requisite supermajority needed to find unconstitutionality, so does the Court's decision amount to a decision to reverse the lower court judgment invalidating the statute? We would assume so, given that the principal motivation for the supermajority rule is greater judicial deference to the political branches. The alternative, in which the lower court decision is undisturbed, would not actually promote judicial deference; it would only shift power from the Supreme Court to the lower courts.

But this disjunction between the majority of judges who have heard a case and concluded that a law is unconstitutional and the legal outcome of the case dictated by the supermajority voting requirement could cause confusion for subsequent courts that must interpret the doctrinal meaning of those cases. Should courts follow the reasoning of the majority of Justices in the 5-4 case, or disregard the majority opinion and instead follow the reasoning of the four-

Justice minority that controls the outcome of the case under the supermajority requirement? The greater precedential weight given to the minority's opinion, the greater the level of deference produced by the new supermajority requirement. These issues are novel, as far as we can tell, for U.S. law. Past practice with supermajority voting at the state level is too sparse to establish a clear model for judicial decisionmaking. As noted, other countries with supermajority voting requirements for their highest court apply their rules without substantial difficulty, but these systems are often procedurally distinct from the U.S. system, particularly in terms of appellate structure.<sup>103</sup>

Second, Congress might consider extending a supermajority voting requirement to lower federal courts or state courts in addition to the Supreme Court. As noted, this extension would not change current practice for lower federal courts apart from en banc hearings. Most state supreme courts use majority voting, but their cases generally involve state law rather than federal law, so the effect (assuming it applied only to decisions under the U.S. Constitution) would not be wide-reaching.

A supermajority voting requirement applied only to the U.S. Supreme Court (or to all federal courts) might have the incidental effect of empowering state courts. Even if Congress extended a supermajority voting requirement to state supreme courts when they decide federal constitutional questions, state courts would still remain free to decide the constitutionality of state laws under their state constitutions, which often contain guarantees that parallel the federal Constitution.<sup>104</sup> These state-law guarantees would likely increase in importance if courts were constrained in their authority to decide under the federal Constitution (assuming the supermajority vote requirement applies only to federal constitutional questions). As discussed in connection with jurisdiction stripping, it is not necessarily preferable to have state courts substitute for federal courts in constitutional review of state lawmaking.

Third, in designing a supermajority voting rule, Congress also would need to consider to which laws or actions it would apply. Supermajority voting requirements could be imposed for review of (a) only federal legislation; (b) federal legislation and federal executive actions; or (c) all federal and state lawmaking. The reduction in judicial influence vis-à-vis the other branches of government would vary in step with the reach of the supermajority voting requirement. Simply put, the more actions to which the supermajority voting requirement applied, the greater the shift in influence to other institutions such as Congress, the Presidency, and state legislatures.

The proper specification of scope depends on the particular motivation for imposing a supermajority voting requirement. If the motivation is limited to addressing the courts' insufficient constitutional deference to Congress, then extension of the requirement to cases involving executive action or state laws seems unnecessary. However, if the motivation is a broader concern about judicial countermajoritarianism and insufficient judicial deference generally to the full political process, extension of the supermajority voting requirement to cases involving a wider spectrum of democratic actors makes more sense. Again, extension of the requirement beyond federal actors and federal law complicates the constitutional analysis, as we discuss in the next section.

Another important question of scope is whether the requirements would apply to all laws or just to those that Congress singled out on an issue-specific or even a law-specific basis. For example, instead of specifying a supermajority voting rule for all constitutional decisions of the Supreme Court, Congress might do so only for constitutional review of a wealth tax or only for constitutional review of abortion restrictions. As we discuss further in our constitutional analysis, whether a supermajority voting rule applies generally or on an issue-specific basis might influence its constitutionality as well.

No matter how the requirement is designed, a supermajority voting requirement is likely to affect only a limited number of cases as a practical matter. By its terms, the requirement would not affect cases where a majority of the Court votes to uphold the action in question. In addition, the requirement would not change the outcome where the Court finds a constitutional violation by a supermajority vote. Unlike other disempowering reforms such as jurisdiction stripping, a supermajority voting rule would leave the Court (and lower courts) with clear authority to invalidate laws for unconstitutionality. The supermajority requirement changes outcomes only where the Court would invalidate a law by a bare majority rather than a supermajority.<sup>105</sup>

Of course, the relatively few close cases where a supermajority voting requirement would affect the outcome may be quite important. *Shelby County v. Holder*, in which a 5-4 majority of the Supreme Court invalidated Section 4 of the Voting Rights Act, was such a case.<sup>106</sup> Similarly, *United States v. Windsor*, where a 5-4 Court majority declared unconstitutional part of the Defense of Marriage Act,<sup>107</sup> also would have been decided otherwise under a supermajority voting rule. Much of the support for disempowering reforms galvanizes around similarly controversial closely decided cases, in which the Court has divided narrowly along ideological or partisan lines. For those critical cases, supermajority voting requirements could marginally redistribute resolution of close constitutional calls to Congress, where these

advocates contend they belong.<sup>108</sup> In addition, even if a supermajority voting rule changes the outcomes of only a few Supreme Court cases, the jurisprudential consequences of these decisions may be far reaching, as they may set legal precedent for a large number of lower court cases as well. For instance, a decision in which only a bare majority, but not a supermajority, of Justices thought the application of a statute to a criminal defendant violated the defendant's constitutional rights would apply potentially to many other cases involving the same statute; similarly situated defendants thus might be precluded from raising the same constitutional claim against the federal criminal statute.

An additional challenge involving the application of supermajority voting rules is that court majorities may be able to achieve their preferred outcomes despite a supermajority requirement by narrowly interpreting laws rather than finding them unconstitutional. A supermajority voting requirement would apply only when courts find a constitutional violation but (we assume) not when a court simply reads a law to have a narrow application that stunts its impact. In those cases, a court would avoid the supermajority requirement by understanding it not to be triggered in the first place. One witness testified before us that courts in Japan and the United Kingdom are widely known for their judicial restraint regarding outright invalidation of legislation, but they nonetheless engage in “wide-ranging sub-constitutional review in the guise of statutory (re)interpretation” that effectively limits the purpose and reach of challenged laws.<sup>109</sup>

### C. Deferential Standards of Review

Another means of reducing the power of the judiciary by changing its decisionmaking practices would be for Congress to impose a deferential standard of review in constitutional cases. (We assume this reform would apply to the judiciary generally, as it appears to make little sense to impose deference only on the Supreme Court.) Like a supermajority voting requirement, this reform would have the purpose of reducing the courts' propensity to invalidate acts of Congress (or acts of the political branches and the states more generally, depending on how the standard is designed).<sup>110</sup> Congress could provide by statute that the federal courts shall not invalidate legislation (or other government action) unless the court concludes that it is clearly unconstitutional (or some similar standard). As mentioned earlier, James Bradley Thayer famously proposed a standard of clear unconstitutionality before courts should invalidate congressional statutes, though his proposal was principally directed to courts themselves rather than as a legislative reform.<sup>111</sup> Notably, the Court on its own initiative has adopted highly deferential standards of review in particular subject areas of constitutional

adjudication, such as review of ordinary economic regulation for consistency with the Due Process and Equal Protection Clauses.<sup>112</sup>

Though Congress has sometimes imposed deferential standards of review on the federal courts with respect to statutory and other sub-constitutional questions of law,<sup>113</sup> requiring a more deferential standard of review for constitutional questions has been quite uncommon. In AEDPA, Congress imposed a highly deferential standard of review on federal courts (in a different context) that might offer a potential example; the statute prohibited federal courts from granting federal habeas corpus relief to state criminal defendants unless the previous state court adjudication of the claim was an “unreasonable application of clearly established federal law” or based on an “unreasonable determination” of the facts.<sup>114</sup> Congress could consider imposing a similarly deferential standard on constitutional review of legislation.

A deferential standard of judicial review would be functionally similar to, but distinct from, a supermajority voting requirement. It would achieve greater deference than current practice by requiring greater subjective certainty as to a law’s unconstitutionality from each judge before voting to invalidate a law. But at the Supreme Court only a simple majority of Justices would need to vote in favor of unconstitutionality for a statute to be invalidated. By comparison, a supermajority voting requirement is what some scholars call a “hard solution.”<sup>115</sup> It would not require the Justices to adjust their subjective evaluations, but it would seek to protect the decisions of the elected branches by requiring a greater number of Justices to find unconstitutionality. A supermajority voting requirement would not directly impose the clear unconstitutionality standard advocated by Thayer, because it would not restrict judges to voting to invalidate statutes only in cases of clear error. For example, it is possible that a supermajority of Justices could agree that it was a close (not clear) question whether a statute was constitutional but decide that the statute was ultimately unconstitutional. In such a situation, a supermajority of Justices might still decide in favor of unconstitutionality and therefore satisfy the supermajority voting requirement, in spite of the fact that they also agree that the constitutional question is a close or debatable one. Supermajority voting requirements and heightened deference standards thus can produce different outcomes.

A required deferential standard of review seems easier to adopt than a supermajority voting requirement, avoiding some of the complexities mentioned above. It might be less effective in shifting power away from the courts, depending on the extent to which judges were willing to internalize an externally imposed deference standard. Like a supermajority voting requirement, it might lead courts to reach their preferred outcomes by sub-constitutional means, such as by interpreting statutes narrowly. Also like a supermajority voting requirement,



the principal objection would seem to be that it would lessen courts' ability to protect constitutional rights and structure from transgressions by Congress and the Executive.

## D. The Constitutional Permissibility of Supermajority Voting and Deference Rules

### 1. Supermajority Rules

Whether Congress could impose some form of supermajority voting requirement on the Supreme Court without a constitutional amendment is a difficult question.<sup>116</sup> As with jurisdiction-stripping legislation discussed earlier, a central issue would be the constitutional source of Congress's power. Again, like jurisdiction stripping, one possibility is the Exceptions and Regulations Clause of Article III, which grants the Supreme Court "appellate Jurisdiction, as to both Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."<sup>117</sup> Reliance on this provision would be subject to many of the difficulties discussed earlier with respect to jurisdiction stripping. Further, it is less clear that this clause allows Congress to regulate decisionmaking procedures of the Court, as opposed to matters affecting its jurisdiction—the term used in the text. However, one could argue that a supermajority voting rule is a "regulation" of the manner in which the Court exercises its appellate jurisdiction.<sup>118</sup>

To the extent the power to create supermajority voting rules is located in the Exceptions and Regulations Clause, that power would likely not extend to matters under the Court's original jurisdiction, which is described in a separate sentence of Article III and so appears not to be covered by the Exceptions and Regulations Clause.<sup>119</sup> That could create an odd situation: The majority required to overturn a statute on constitutional grounds would depend on the route the case took to reach the Court. Although the vast majority of cases currently reach the Court through its appellate jurisdiction, that might change if the supermajority rule applied to one type of jurisdiction but not the other.<sup>120</sup>

Another possible source of congressional authority to impose a supermajority voting rule might be the Necessary and Proper Clause of Article I, Section 8.<sup>121</sup> That clause grants Congress authority to "Make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." It is commonly understood that this clause is the source of Congress's power to legislate with respect to the structure and procedures of the Court. For example, Congress has by statute designated the size of the Court as nine Justices,<sup>122</sup> with a quorum of six required for issuing decisions,<sup>123</sup> and

set the start of the Court’s annual Term (the first Monday in October),<sup>124</sup> to be held at the “seat of government.”<sup>125</sup> These statutory provisions “carry[] into Execution” the judicial power vested in the Supreme Court by the Constitution.

However, one might conclude that Congress’s power to carry into execution the powers of the Supreme Court only empowers Congress to facilitate the operation of the Court. Legislation designed to limit the power of the Court (as a supermajority voting requirement might plausibly be described) would arguably not be enacted to carry into execution the Court’s power, but rather to frustrate (to some extent) the Court’s power. It thus might not be regarded as “necessary and proper” to a constitutionally permissible purpose.

Alternatively, one might locate Congress’s power to prescribe judicial supermajority voting rules in Congress’s power to make laws necessary and proper to carry into execution Congress’s own powers. For example, in legislating to regulate commerce among the states, Congress might think that limiting the Court’s review of such legislation is necessary and proper to giving that legislation full effect. But one might also conclude that Congress’s power to effectuate its own legislation does not extend to limiting the Court’s power of constitutional review (or, in textual terms, that limiting the Court’s review is not “necessary and proper” to Congress’s exercising its own power).

Regardless of the potential sources of congressional power, the Court might also take the position that judicial action by majority vote is implied by the grant of “the judicial Power” to the Court in Article III,<sup>126</sup> since action by majority is the usual and historical practice of multimember courts and was the presumed way that courts operated at the time of the Founding. At minimum, it might be thought that the power to determine voting rules lies with the courts through the Constitution’s vesting of the judicial power. On this view, Congress would not have power to interfere with a power constitutionally granted to another branch. However, judicial action by majority vote could also be viewed merely as a default rule that could be altered by Congress, assuming Congress had an applicable power granted to it by the Constitution.

There is little precedent or practice to inform any of these matters. Congress has rarely acted in ways that materially restrict the Court’s decisionmaking procedures. As discussed in Part I of this Chapter, scholars have debated how the Supreme Court’s decision in *United States v. Klein*<sup>127</sup> affects Congress’s powers to control the Court’s decisionmaking. *Klein*’s implications for Congress’s power to impose a supermajority voting rule on the Court are uncertain.<sup>128</sup> One reading of *Klein* is that Congress infringes the judicial power when it directs

courts to reach an unconstitutional result, which arguably would be the effect of a supermajority voting rule. Thus, the Court might conclude that *Klein* bars Congress from influencing judicial outcomes through devices such as a supermajority voting rule.

A supermajority voting requirement could be restricted by Congress to particular pieces of legislation, or alternately to a specified area of law, where congressional action arguably warrants greater judicial deference. For instance, Congress might understand the Fourteenth Amendment’s textual direction that “Congress shall have power to enforce, by appropriate legislation, the provisions of this article” as granting Congress broader prerogatives vis-à-vis the courts. The argument would be that a higher bar should apply before courts can invalidate legislation enacted under the specified congressional enforcement powers. To be sure, this position likely would not withstand review by the Supreme Court, absent a change in doctrine. In a different context, the Supreme Court, in *City of Boerne v. Flores*,<sup>129</sup> largely rejected the view that Congress possesses enhanced authority to interpret the Constitution when acting pursuant to its Fourteenth Amendment enforcement power. Still, four dissenting Justices and many scholars from across the political spectrum have argued that historical and textual considerations support broader congressional interpretative authority with respect to the Fourteenth Amendment than the Court majority recognized.<sup>130</sup>

Attempts by Congress to impose broad versions of the supermajority voting rule—for example, extending it to state courts or to judicial review of state legislation—seem even more likely to raise constitutional doubts as to the source of Congress’s power. Any claim of congressional power to regulate voting requirements in state courts would need to rely on its power under the Necessary and Proper Clause. To the extent that the Necessary and Proper Clause allows Congress to impose a supermajority rule on the Supreme Court’s review of federal legislation (an untested proposition), that power might also be thought to extend equally to state court review of federal legislation. Requiring state court supermajorities to invalidate federal legislation might similarly be necessary and proper to implementation of federal policies. Requiring state court supermajorities to invalidate state legislation on federal constitutional grounds seems less capable of justification under the Necessary and Proper Clause, as it would not involve the implementation of federal legislation.

In sum, while definite conclusions are elusive in this area and the analysis will vary depending on the particular contours of any proposed reform, it seems quite plausible that the Court would find a congressional attempt to impose a supermajority rule on the Court’s decisionmaking, or courts generally, to be beyond Congress’s power. It should be noted that Congress might be able to impose a version of a supermajority rule on the Court by prescribing

an even number of Justices. As discussed in Chapter 2, Congress has broad power to establish the number of Justices on the Court.<sup>131</sup> Even using a rule of majority vote, a six-Justice Court in effect requires a 2/3 supermajority vote (four of six) to act, while an eight-Justice Court in effect requires a 62.5% supermajority (five of eight).

## 2. Deferential Standards of Review

The related proposal discussed above—for Congress to limit the Court’s authority to situations of clear constitutional error (or a similar standard of review)—would raise generally parallel constitutional issues. There would first be the question of the constitutional source of Congress’s power. Congress might claim power from the Exceptions and Regulations Clause or from the Necessary and Proper Clause, each of which would be subject to the potential objections noted above in relation to supermajority voting proposals. There might also be the objection that establishing a standard of constitutional review for the Court, like establishing a voting procedure in constitutional cases, is committed to the Court, not Congress, by the vesting of “the judicial Power” in the courts in Article III, Section 1.

Congress commonly prescribes standards of review for courts in statutory and administrative matters, and this is generally not thought to raise constitutional problems. For example, the Administrative Procedure Act provides for judicial review of certain agency actions under an “arbitrary or capricious” standard, and some statutes wholly preclude judicial review of administrative or executive determinations. As described previously, in AEDPA Congress imposed a deferential standard of review on federal courts’ habeas corpus review of state criminal convictions, and the Supreme Court has routinely applied AEDPA without finding constitutional problems.<sup>132</sup> However, a congressionally prescribed standard of review for constitutional claims more generally is arguably distinguishable. AEDPA applies only to cases on collateral review after state court convictions have been upheld pursuant to nondeferential standards on direct review or otherwise have ripened into final judgments. The Court might well find a congressionally mandated standard of review in constitutional cases to be an infringement of the judicial power.

Of course, a supermajority voting rule or a deferential standard of review could be imposed by constitutional amendment, regardless of any limitations under the current Constitution. Several of the historical proposals for supermajority voting requirements took the form of constitutional amendments.<sup>133</sup> As discussed above, there would be substantial technical issues of implementation, particularly for supermajority rules, but these could conceivably be addressed by careful drafting.

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### III. Proposals to Enable Legislative Overrides of Supreme Court Decisions

Another way to reduce the Supreme Court’s power would be to allow Congress to override Court decisions that strike down federal or state legislation on constitutional grounds.<sup>134</sup> A constitutional amendment adopting a system of legislative overrides was urged in the Progressive Era and during the New Deal period. More recently, the idea of an override has been floated by advocates on both the right and left of the political spectrum as a way to minimize judicial supremacy—i.e., the system under which the Court is the final and authoritative arbiter of the constitutionality of statutes or executive action. Legislative overrides exist in several countries, including in Canada and Israel, and other countries reject judicial supremacy even without a formal system of legislative overrides.

Legislative override systems can take different forms. For example, section 33 of the Canadian Charter of Rights and Freedoms, known as the “notwithstanding clause,” allows both the federal Parliament and the provincial legislatures to “expressly declare” by a simple majority that a law “shall operate notwithstanding” a provision in the Charter, whether or not a court has already ruled the law unconstitutional. Only some Charter provisions may be overridden, and an override ceases to have effect five years after it comes into force, though it may be reenacted by the legislature upon its expiration.<sup>135</sup> Israel’s legislative override system is similar but allows an override only by the national parliament, applies only to the right to “freedom of occupation,” and has a four-year sunset provision.<sup>136</sup>

A constitutional amendment establishing a legislative override system would allow Congress and the President to override Supreme Court decisions that strike down legislation on constitutional grounds. The system could follow the ordinary legislative process of bicameralism and presentment; alternatively, an override could require a supermajority vote by both houses of Congress, as well as presidential signature. A system could allow override of any court decision striking down a statute on constitutional grounds, or it could be limited to decisions involving certain constitutional provisions. It could allow permanent override of decisions or it could specify that the override will sunset after a particular period of time, at which point the courts’ prior interpretation would prevail. In addition, the system could allow Congress to act prospectively in anticipation of a negative court decision or only after a court has struck down legislation.<sup>137</sup>

Supporters argue that legislative overrides would cabin excessive judicial power in favor of democratic decisionmaking, while also encouraging greater constitutional discourse and deliberation within the legislative and executive branches and among the public as part of the political process. They contend that the system can be designed in ways to minimize risk to individual rights, structural design, and the stability of law. Perhaps because an explicit override system would very likely require a constitutional amendment, the academic debate on legislative overrides is relatively limited. No recent commentator has offered a programmatic blueprint for overrides, though arguments have long existed to support the assertion of constitutional interpretive authority by Congress (and the Executive) in ways short of an override. In the analysis that follows, we briefly provide a historical background, an evaluation of various forms of legislative overrides, and a constitutional assessment.

### A. Constitutional and Historical Background

As discussed in the Introduction to this Chapter, it is widely believed that the Supreme Court has the last word when it comes to constitutional interpretation and that its decisions bind not only the parties in a particular case but also future action by the President, Congress, and the states. This approach to judicial review—known as “judicial supremacy”—has been embraced by the Supreme Court for many decades.<sup>138</sup> Yet the extent of the Court’s authority to serve as the final interpreter of the Constitution—or to foreclose contrary interpretation by other branches of government acting in their own spheres—has also long been contested.

In the early years of the Republic, many argued that each of the three branches of government was endowed with the power of constitutional interpretation. As long as legislative and executive branch actors obeyed specific Court orders in specific cases, they could act on a contrary interpretation of the Constitution.<sup>139</sup>

Those who embrace judicial supremacy often point to Chief Justice John Marshall’s famous pronouncement in *Marbury v. Madison* that “it is emphatically the province and duty of the judicial department to say what the law is.”<sup>140</sup> Indeed, that line has been cited by the Supreme Court in recent decades to support a strong approach to judicial supremacy. However, according to many scholars, Chief Justice Marshall was asserting only the authority of judicial review—i.e., the power of a court to refuse to give effect to an act or mandate of a coordinate branch of government—not the power of judicial supremacy. Moreover, over the course of the country’s history, numerous Presidents have claimed the right to engage in independent and co-equal constitutional interpretation. Although nearly all Presidents have conceded that they are bound by direct orders from the Supreme Court, they have also offered their own

constitutional interpretations through signing statements, litigation, and enforcement practices that have been in tension with, or even contrary to, Supreme Court precedent.<sup>141</sup> Likewise, Congress has sometimes resisted—or refused to acquiesce to—the Court’s constitutional interpretations, for example by attempting to overrule Court decisions through legislation, or by enacting statutes in considerable tension with prior Supreme Court decisions.<sup>142</sup>

On several occasions over the course of U.S. history, advocates have sought to amend the Constitution in order to grant Congress power to overrule the Supreme Court’s rulings striking down federal statutes through a formal system of legislative overrides. The Progressive Party, which ran a ticket with Senator Robert La Follette (Wisconsin) and Senator Burton Wheeler (Montana) in the 1924 presidential election, included a provision in its platform calling for “a constitutional amendment providing that Congress may by enacting a statute make it effective over a judicial veto.”<sup>143</sup> La Follette was a vocal advocate for the amendment, which would have allowed Congress to override the Supreme Court by repassing any legislation previously declared unconstitutional.<sup>144</sup>

In 1937, Senator Wheeler, who remained a Democratic Senator from Montana following his unsuccessful bid for the Vice Presidency, along with Senator Homer Bone, a Republican from Washington State, introduced a variation on the Progressive Era proposal. Their constitutional amendment would have allowed Congress, by a two-thirds vote of each Chamber, to overturn a Supreme Court decision holding an act unconstitutional—but not until after the election following the Supreme Court decision.<sup>145</sup> Notably, Senator Wheeler was a strong supporter of the New Deal but adamantly opposed President Franklin D. Roosevelt’s proposal to increase the size of the Supreme Court.<sup>146</sup> Reportedly, two of President Roosevelt’s closest advisors, Benjamin Cohen and Thomas Corcoran, also privately opposed the proposal for Court expansion in favor of a constitutional amendment similar to the one proposed by Senator Wheeler. Their version would have allowed Congress to overturn immediately a Supreme Court constitutional decision striking down a federal statute by a two-thirds vote from each chamber, or to overturn such a decision by a simple majority following the next election.<sup>147</sup>

More recently, proposals for overrides by Congress have appeared only in academic writing and public commentary. For example, in 1996, Robert H. Bork—who served as a judge on the D.C. Circuit and as Solicitor General of the United States—wrote an essay in which he argued that the “most important moral, political, and cultural decisions affecting our lives are steadily being removed from democratic control.” He suggested that the Constitution be amended to enable modification or reversal of Supreme Court decisions by a simple majority

vote of the Senate and House of Representatives.<sup>148</sup> A few scholars from the opposite side of the political spectrum from Bork have recently expressed support for legislative overrides, albeit without offering any detailed proposal.<sup>149</sup> Meanwhile, at the state level, numerous state legislators have introduced legislation to allow overrides of state court decisions, though none of these efforts has been successful.<sup>150</sup>

## B. Evaluation of Override Proposals

In this Section, we consider (a) the goals of a system of overrides and whether such goals are likely to be achieved by the reform; and (b) the overall consequences for the functioning of the constitutional system if overrides are successfully implemented. We also distinguish among different forms of override systems. For the purposes of this analysis, we assume that an override system would be adopted through constitutional amendment, though we discuss the arguments regarding how Congress might engage in independent constitutional interpretation or attempt to limit the reach of Supreme Court decisions in Part III.C.

As with the other reforms discussed in this Chapter, we note that a system of legislative overrides has no inherent or fixed partisan or ideological valence—an override system could be used to advance the goals of any legislative majority or supermajority. However, some commentators have argued that elite interests are more likely to find a favorable audience with the Supreme Court, and therefore to benefit from a system of judicial supremacy; on this account, shifting power away from the courts and toward the legislature would benefit non-elites.<sup>151</sup> Others, however, have argued that Congress is also more responsive to elites than it is to non-elites or the poor.<sup>152</sup>

### 1. Goals and Efficacy

Congress on occasion has enacted one-off efforts to override a Supreme Court decision. But its efforts, such as its attempt to override the Court's decision in *Miranda v. Arizona*<sup>153</sup> with the Omnibus Crime Bill of 1968, have tended to have subject-specific goals (to change a particular constitutional doctrine) and have generally been rebuffed by the Court.<sup>154</sup> The goals of a constitutional amendment enabling legislative overrides would be more fundamental. Their chief aim would be to allocate power away from the Supreme Court and toward the elected branches. Proponents of legislative overrides, as with other disempowerment reforms, worry that the Supreme Court exercises excessive power over the resolution of major social, political, and cultural decisions—decisions that would be better resolved through the democratic process. As we discuss in the Introduction to this Chapter, for these critics, the



Supreme Court’s fundamentally “countermajoritarian” character is in tension with the basic commitments of a democracy.

The concern about excessive Court power is not limited to one political camp. Conservatives objected to the Warren Court’s assertion of judicial supremacy in desegregation and criminal law cases,<sup>155</sup> as well as to more recent rulings striking down prohibitions on gay marriage and restrictions on abortion. On the left, concerns about judicial supremacy, dominant during the early twentieth century when the Court routinely struck down legislation protective of workers and consumers, have returned in recent years as the Court has exercised less deference to congressional judgments about the scope of the Reconstruction Amendments and civil rights (e.g., in voting rights cases such as *Shelby County v. Holder*),<sup>156</sup> and as it has used the First Amendment to invalidate campaign finance regulation and union security agreements.<sup>157</sup>

Proponents of legislative overrides also emphasize two other, related goals: Overrides would strengthen the system of checks and balances by allowing Congress the power to override the Court much like it can override presidential vetoes, and they would strengthen public deliberation and discourse on constitutional matters by empowering the people’s representatives to decide constitutional questions and thus returning such questions directly to the political process.<sup>158</sup>

As a theoretical matter, a system of legislative overrides should accomplish all three of the goals their proponents advance. By expressly allowing Congress to overrule the Court’s constitutional decisions, the power of Congress over fundamental social, political, and cultural decisions would be augmented, the power of the Court would be checked, and more actors would be engaged in constitutional interpretation.

In practice, however, the evidence from countries with both judicial review and legislative override systems—chiefly Canada and Israel—is mixed.<sup>159</sup> In both Canada and Israel, despite language in the constitutions enabling legislative overrides, the federal legislatures have used the power rarely.<sup>160</sup> One might predict a similar outcome in the United States, particularly if a legislative override system were to require a two-thirds or other supermajority vote by Congress. Scholars note, however, that even if the use of legislative overrides is infrequent, the mere possibility of legislative overrides may influence the Court, for example by making it more deferential to the elected branches.<sup>161</sup>

Another way in which legislative overrides might not achieve their goals is if they enable Congress to overrule constitutional decisions made only by the Supreme Court. This approach

would still leave extensive power in the lower federal courts and the state courts. Because the U.S. Supreme Court is under no obligation to grant certiorari after a lower court or state court rules a federal statute unconstitutional, a legislative override system that did not empower review of lower court decisions striking down federal statutes would leave such decisions more insulated from democratic review than similar decisions of the Supreme Court. This problem is soluble, however, by enabling overrides of lower court or state court decisions, as well as Supreme Court decisions, on federal constitutional grounds.

Finally, some observers question whether legislative overrides are the best way to achieve the ends that their proponents desire. A better approach, they argue, would be to change Article V of the Constitution, making the Constitution easier to amend. Changing the Constitution through amendment, these critics contend, produces more reasoned democratic deliberation; in contrast, overrides are too tied to particular controversies. The Commission notes that there may well be sound arguments for making the Constitution easier to amend. However, because such substantial reform to the Constitution is outside the scope of this Commission's mandate, we do not consider this proposal. In addition, it is worth noting that a system of legislative overrides might have advantages over making the entire Constitution significantly easier to amend. A legislative override process could enable Congress to advance its own constitutional vision, re-enacting statutes that the Court has struck down subject to a temporal sunset or to other limitations, without enabling too-frequent wholesale reforms to the structure of government or the text of the Constitution.

## 2. Consequences for the Political Process and Legal System

Given that legislative overrides would at least partially achieve the goal of reducing the Supreme Court's power vis-à-vis the democratic branches, one important concern is whether they might result in insufficient protection of individual rights and, in particular, minority rights. Another concern is that allowing actors other than the Court to determine the constitutionality of statutes might result in less settled law and less well-reasoned constitutional decisionmaking. In addition, some worry that allowing congressional overrides might have implications for federalism, with Congress potentially more likely to use legislative overrides to favor its own power over states' rights (though some might find that to be an advantage rather than a disadvantage).

Proponents of legislative overrides (and critics of judicial supremacy more generally) respond that, in practice, the Court has not consistently protected rights of underprivileged, politically powerless minorities who lack support from popular majorities; indeed, some argue it has rarely done so.<sup>162</sup> Notably, many scholars observe that parliamentary democracies

without American-style judicial supremacy—including Australia, New Zealand, and numerous European countries—are just as effective when it comes to protecting rights (although it is important to note that the comparative analysis is challenging, in part because those jurisdictions have very different structures of governments and broader commitments to universal social benefits).<sup>163</sup> Proponents of overrides would also argue that federalism concerns are overstated, given that the design of Congress already adequately represents the interests of states.

Meanwhile, concerns about minority rights, rule of law, and deliberation could potentially be addressed in the design of the system. The systemic consequences of congressional overrides would depend significantly on the details of the system adopted. The varying approaches have tradeoffs. For example, requiring a two-thirds majority of both houses of Congress to override the Court would reduce the risk of threat to minority rights and would require significant congressional deliberation about the underlying constitutional issue. But this approach would also make overrides much less likely to occur. Limiting overrides to cases that do not involve certain fundamental rights—as is done in Canada<sup>164</sup>—would limit the risk to those rights, but unless very clearly elaborated, would leave great discretion with the Supreme Court. Adopting a “sunset” element, where Congress’s override would last only for a certain number of years and then would need to be reenacted,<sup>165</sup> might also serve as a safeguard against long-term incursions on individual rights and would encourage continued constitutional debate but could introduce greater uncertainty and instability in the law. Finally, a system that only permitted a legislature to issue an override after the Court has rendered its constitutional judgment, rather than insulating its laws preemptively, could help raise the political costs of an override and prompt the legislature to directly engage the constitutional principles at stake.

### C. Constitutional Analysis

As noted in the preceding analysis, the most straightforward way to adopt a system of legislative overrides would be through constitutional amendment, as was urged during the Progressive and New Deal eras. Absent constitutional amendment, it is highly likely that the Supreme Court would strike down a statute (or congressional rule of procedure) setting forth a system for legislative overrides. The Court would likely conclude that it—not Congress—has ultimate authority under Article III to determine the constitutionality of federal statutes (as well as state statutes and executive action).<sup>166</sup> On this view, any effort at legislative override absent a constitutional amendment would constitute an impermissible end run around the amendment process established by Article V of the Constitution. Indeed, the Article V

amendment process has been used on numerous occasions to overrule Supreme Court opinions.<sup>167</sup>

Nonetheless, Congress may be able to assert greater authority to engage in independent constitutional interpretation or to limit the reach of judicial opinions, short of enacting a system of legislative overrides.<sup>168</sup> As previously noted, numerous scholars have long contended that Article III never expressly states that the Supreme Court is the final or sole arbiter of statutes' constitutionality.<sup>169</sup> Under this view, although specific Court orders must be obeyed, Congress and the President can continue to enforce the Constitution as they see fit, as long as they are not in defiance of a particular order. By way of example, Congress might make it a crime to burn the flag; the Court might hold that such a law is unconstitutional; Congress does nothing wrong by enacting the statute again and saying it does not agree with the Court's interpretation, particularly if it includes new legislative findings. But if someone is prosecuted under the new law, and the Court maintains the view that the law is unconstitutional and enjoins the prosecution, the Court's orders in that case must be followed.

According to this understanding of judicial review, Congress could enact a statute that affirms congressional authority to reenact a statute after a negative Court ruling; Congress could also establish procedures for such reenactment, consistent with bicameralism and presentment requirements. In addition, Congress could attempt to establish a general rule regarding what weight *stare decisis* ought to carry. The argument would be that determining the prospective precedential effect of opinions is within Congress's "necessary and proper" power to regulate the operations of the federal courts, similar to its power to provide rules of evidence and procedure.<sup>170</sup> Others, however, have argued that determining the significance of *stare decisis* in constitutional cases is an inherent aspect of the judicial power to interpret the Constitution.<sup>171</sup> In any case, there is widespread agreement that Congress could not prospectively or retroactively deny the reach of a court order to the parties in a particular case.<sup>172</sup>

Apart from possible constitutional difficulties, Congress's assertion of authority to limit the precedential effects of prior Court decisions might raise arbitrariness and unfairness concerns about giving the parties to a particular case the benefit (or burden) of a rule announced by the Court, while denying the same benefit (or burden) to others similarly situated.<sup>173</sup> In other words, the government would remain free to bring prosecutions against individuals who have violated a statute that the Court has declared unconstitutional in another case, leaving it to each individual defendant to raise the constitutional objection anew. Such concerns would be less pressing with a legislative override system achieved by constitutional

amendment; such a system would clearly enable Congress to declare that, for all parties, “notwithstanding” a court’s interpretation of particular constitutional provisions, a particular statute is permissible, for a defined period of time. However, as discussed above, the broader system may raise other concerns about protection of rights.

### D. Conclusion: Legislative Overrides

In short, a constitutional amendment adopting a system of legislative overrides would reduce the power of the Supreme Court over fundamental social questions and would increase the power of Congress. Design of the system might mitigate concerns about rule of law, constitutional structure, and minority rights. However, those design questions are difficult and would require further debate and elaboration, particularly because this reform has attracted less attention than some of the other reforms discussed in this Report. Short of constitutional amendment, some argue that Congress could still do more to resist judicial supremacy, though that, too, would likely face a critical audience from the current Supreme Court. Some proponents of reducing the power of the Court argue that the Court’s commitment to judicial supremacy should not be a concern and that statutory reform to facilitate Congress’s ability to assert its own constitutional authority would be worth trying.<sup>174</sup> Others disagree—not only because they question the legality of congressional non-acquiescence to the Court, but also because resistance to judicial supremacy would mark a substantial shift in contemporary practice, the legitimacy of which would be questionable without constitutional amendment.<sup>175</sup> In any event, further public debate could help flesh out the merits of the various approaches.

## Endnotes: Chapter 4

- <sup>1</sup> See, e.g., *Presidential Commission on the Supreme Court of the United States* 7 (June 30, 2021) (written testimony of Noah Feldman, Harvard Law School) [hereinafter Feldman Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf>; *Presidential Commission on the Supreme Court of the United States* 8, 12-13 (Oct. 2021) (written testimony of Philip Bobbitt, Columbia Law School) [hereinafter Bobbitt Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/10/Professor-Philip-Bobbitt.pdf>; Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Reexamining Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. (forthcoming) (manuscript at 28-39), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3869128](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3869128).
- <sup>2</sup> *Presidential Commission on the Supreme Court of the United States* 7 (June 30, 2021) (written testimony of Samuel Moyn, Yale Law School) [hereinafter Moyn Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf>; *Presidential Commission on the Supreme Court of the United States* 3-5 (June 30, 2021) (written testimony of Nikolas Bowie, Harvard Law School) [hereinafter Bowie Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf>; see also Ryan Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893); Robert H. Bork, *The End of Democracy? Our Judicial Oligarchy*, FIRST THINGS (Nov. 1996), <https://www.firstthings.com/article/1996/11/the-end-of-democracy-our-judicial-oligarchy>.
- <sup>3</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962) (introducing the term “the counter-majoritarian difficulty”). For academic critiques of judicial supremacy, see, for example, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 249-53 (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 177 (1999); and Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 789 (2002). For a defense, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997).
- <sup>4</sup> See Bowie Testimony, *supra* note 2, at 15-16, 19, 23 (describing how Justices share the same elite educational backgrounds).
- <sup>5</sup> *Presidential Commission on the Supreme Court of the United States* 2 (June 25, 2021) (written testimony of Rosalind Dixon, University of New South Wales) [hereinafter Dixon Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf>; see also MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 21 (2009).
- <sup>6</sup> See generally Jamal Greene, *Giving the Constitution to the Courts*, 117 YALE L.J. 886, 888 (2008) (reviewing KEITH WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2007)).
- <sup>7</sup> See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *United States v. Nixon*, 418 U.S. 683, 705 (1974); *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997); *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).
- <sup>8</sup> *Cooper*, 358 U.S. at 18.
- <sup>9</sup> See *infra* notes 139-141.
- <sup>10</sup> Dixon Testimony, *supra* note 5, at 7; *Presidential Commission on the Supreme Court of the United States* 3 (June 30, 2021) (written testimony of Kim Lane Scheppele, Princeton University) [hereinafter Scheppele Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Scheppele-Written-Testimony.pdf>.

- <sup>11</sup> See Bobbitt Testimony, *supra* note 1, at 6, 12; Feldman Testimony, *supra* note 1, at 8; Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 197 (1952); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1069 (2001); Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38, 39 (2006); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1805 (2007); NeJaime & Siegel, *supra* note 1, at 39-41.
- <sup>12</sup> We note that any future elaboration of these proposals would require addressing a number of technical concerns that we have chosen not to analyze here because of their specificity. These include how the proposals might be drafted to encompass cases brought as both facial and as-applied challenges and how to take into account the range of remedies available to courts. Relatedly, we note that most of the proposals discussed below do not address another suite of concerns critics raise: that courts sometimes exercise power to rewrite statutes or to arrogate power to themselves by giving statutes meaning, including through the practice of constitutional avoidance.
- <sup>13</sup> See, e.g., S. 158, 97th Cong. (1981); H.R. 867, 97th Cong. (1981); H.R. 900, 97th Cong. (1981).
- <sup>14</sup> See, e.g., S. 1742, 97th Cong. (1981); H.R. 4364, 109th Cong. (2005).
- <sup>15</sup> See, e.g., Patient Protection and Affordable Care Act § 3403(e)(5), 42 U.S.C. § 1395ww(r)(3).
- <sup>16</sup> See, e.g., S. 4058, 90th Cong. (1968).
- <sup>17</sup> See, e.g., H.R. 2389, 109th Cong. (2005).
- <sup>18</sup> See, e.g., H.R. 3313, 108th Cong. (2004); H.R. 4379, 109th Cong. (2005).
- <sup>19</sup> See Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1785 (2020).
- <sup>20</sup> See generally Doerfler & Moyn, *supra* note 2.
- <sup>21</sup> See, e.g., Dixon Testimony, *supra* note 5, at 8-9.
- <sup>22</sup> U.S. CONST. art. III, § 2, cl. 2 (emphasis added).
- <sup>23</sup> Forsyth v. United States, 50 U.S. (9 How.) 571, 572 (1850).
- <sup>24</sup> U.S. CONST. art. III, § 1, cl. 1.
- <sup>25</sup> An Act to Establish the Judicial Courts of the United States, ch. 20, § 11, 1 Stat. 73, 78 (1789) [hereinafter Judiciary Act of 1789].
- <sup>26</sup> Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 161, 163-64 (1913).
- <sup>27</sup> William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 238 (1973). During the Reconstruction Era, Congress enacted the Military Reconstruction Act of 1867 in part to enforce new federal protections for civil rights and civil liberties. The Act sought “to ‘regularize’ federal military jurisdiction in the South by dividing the region into districts subject to military command.” *Id.* at 236.
- <sup>28</sup> 74 U.S. (7 Wall.) 506 (1868).
- <sup>29</sup> 80 U.S. (13 Wall.) 128, 128 (1871).
- <sup>30</sup> *Id.* at 146.
- <sup>31</sup> 29 U.S.C. §§ 101-102.
- <sup>32</sup> 303 U.S. 323 (1938).
- <sup>33</sup> 28 U.S.C. § 1342.
- <sup>34</sup> *Id.* § 1341.
- <sup>35</sup> Such proposed legislation has frequently triggered debates about constitutional permissibility in both Congress and the executive branch. See Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 900-16, 920-27 (2011); Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 268-86 (2012).
- <sup>36</sup> See, e.g., S. 3930, 109th Cong. (2006).
- <sup>37</sup> See, e.g., H.R. 13915, 92d Cong. (1972).

<sup>38</sup> See *supra* notes 13-14 and accompanying text.

<sup>39</sup> The Defense of Marriage Act defined marriage as “only a legal union between one man and one woman as husband and wife” for federal purposes. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 2419 (1996), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013). For related jurisdiction-stripping proposals, see *supra* note 18 and accompanying text.

<sup>40</sup> See *supra* note 17 and accompanying text.

<sup>41</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 106(b), 110 Stat. 1214, 1220-21 (codified at 28 U.S.C. § 2244(b)(3)(E)).

<sup>42</sup> 518 U.S. 651 (1996).

<sup>43</sup> 553 U.S. 723 (2008).

<sup>44</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>45</sup> See, e.g., *Presidential Commission on the Supreme Court of the United States* 16 (July 20, 2021) (written testimony of Jamal Greene, Columbia Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Greene-Testimony.pdf> (stating that “Congress unquestionably has the constitutional power, via the Exceptions Clause, to require the Court to hear certain appellate cases and not to hear others”); *Presidential Commission on the Supreme Court of the United States* 12 (July 20, 2021) (written testimony of Stephen E. Sachs, Harvard Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Sachs-Testimony.pdf> (noting that Congress exercising its power under the Exceptions Clause to make “Exceptions” to the Supreme Court’s appellate jurisdiction is “wholly constitutional”). Even critics of proposals to limit the Court’s jurisdiction, on policy and constitutional grounds, could not conclude that such proposals are categorically or definitively unconstitutional. The most that they conclude is that such proposals would raise constitutional questions. See, e.g., *Presidential Commission on the Supreme Court of the United States* 57 (July 16, 2021) (written testimony of Kenneth Geller, Mayer Brown LLP, and Maureen Mahoney, Latham & Watkins, LLP), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Geller-Mahoney-Testimony.pdf> (expressing significant reservations on proposals to limit the Court’s jurisdiction and concluding that such proposals “would raise serious constitutional issues”).

<sup>46</sup> See, e.g., Feldman Testimony, *supra* note 1, at 2 (noting that Supreme Court reform proposals ought to be evaluated against (a) the function of the Court in the American constitutional context and (b) whether reform proposals would advance or impede that function).

<sup>47</sup> See, e.g., Moyn Testimony, *supra* note 2, at 3; Sprigman, *supra* note 19, at 1858-59.

<sup>48</sup> See generally Bowie Testimony, *supra* note 2, at 24, 25; Moyn Testimony, *supra* note 2, at 1.

<sup>49</sup> U.S. CONST. art. VI cl. 2.

<sup>50</sup> See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1384 (2006); see also Scheppele Testimony, *supra* note 10, at 6.

<sup>51</sup> However, the power remains a subject of debate. See, e.g., Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 81 (1975); Peter N. Salib & David K. Suska, *The Federal-State Standing Gap: How to Enforce Federal Law in Federal Court Without Article III Standing*, 26 WM. & MARY BILL RTS. J. 1155, 1190 (2018).

<sup>52</sup> Several of the experts who testified before the Commission counseled that any reforms of our current system should be developed and implemented in a manner that reduces partisan polarization and minimizes institutional instability. See, e.g., *Presidential Commission on the Supreme Court of the United States* 2 (July 16, 2021) (written testimony of Vicki C. Jackson, Harvard Law School) [hereinafter Jackson Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf>; *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Neil S. Siegel, Duke Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Siegel-Testimony.pdf>.

<sup>53</sup> See Feldman Testimony, *supra* note 1, at 9 (noting that jurisdiction stripping “could potentially devastate the Court’s ability to fulfill its functions”).



- <sup>54</sup> Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 897 n.9 (1984) (quoting Letter from William Van Alstyne to Gerald Gunther (Feb. 28, 1983)).
- <sup>55</sup> See U.S. CONST. art. I, § 8, cl. 18 (conferring congressional power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).
- <sup>56</sup> *Id.* art. III, § 1.
- <sup>57</sup> *Id.* art. I, § 8, cl. 18.
- <sup>58</sup> *Id.* art. III, § 2, cl. 2.
- <sup>59</sup> 383 U.S. 301 (1966).
- <sup>60</sup> See, e.g., *California v. Texas*, 141 S. Ct. 2104 (2021) (challenge to the Affordable Care Act); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (challenge to the Trump Administration’s travel ban); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (challenge to the Deferred Action for Childhood Arrivals and Deferred Action for Parents of Americans and Lawful Permanent Residents programs), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016); *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007) (challenge to the Environmental Protection Agency’s refusal to regulate greenhouse gas emissions from motor vehicles); see also *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (mem.) (rejecting Texas’s challenge, brought under the Court’s original jurisdiction, to other states’ election administration procedures).
- <sup>61</sup> See, e.g., *California v. Arizona*, 440 U.S. 59, 66 (1979) (noting it is “extremely doubtful” that Congress could exclude the Supreme Court’s original jurisdiction by granting exclusive jurisdiction to federal district courts over actions for which the United States has waived its sovereign immunity); *Kansas v. Colorado*, 556 U.S. 98, 109-10 (2009) (Roberts, C.J., concurring) (arguing that Congress cannot infringe on the Court’s authority over procedural matters related to its original jurisdiction).
- <sup>62</sup> Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).
- <sup>63</sup> See, e.g., Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1637 (1990).
- <sup>64</sup> See, e.g., Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1083 (2010); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What the Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 30 (2019); Laurence Henry Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 149-52 (1981).
- <sup>65</sup> 74 U.S. (7 Wall.) 506, 514 (1868).
- <sup>66</sup> 80 U.S. (13 Wall.) 128, 145-46 (1871).
- <sup>67</sup> See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 583 (1988); *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 759 (1961); Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 525-26 (2016); Laurence Henry Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 17-26.
- <sup>68</sup> 553 U.S. 723, 798 (2008).
- <sup>69</sup> Hart, *supra* note 62, at 1371.
- <sup>70</sup> *Id.* at 1369.
- <sup>71</sup> Support for this argument would come from James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1435 (2000).
- <sup>72</sup> *Id.* at 1441.
- <sup>73</sup> 74 U.S. (7 Wall.) 506, 514 (1868).
- <sup>74</sup> 518 U.S. 651, 658 (1996).
- <sup>75</sup> 14 U.S. (1 Wheat.) 304 (1816).

- <sup>76</sup> The relevant articles include Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 271-72 (1985); Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 487 (1989); Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651, 1673 (1990); and Akhil Reed Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 NW. U. L. REV. 442, 445 (1991).
- <sup>77</sup> See Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997); William A. Fletcher, Lecture, *Congressional Power over the Jurisdiction of Federal Courts: The Meaning of the Word “All” in Article III*, 59 DUKE L.J. 929 (2010).
- <sup>78</sup> See, e.g., Meltzer, *supra* note 77, at 1575.
- <sup>79</sup> Evan Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rules: Lessons from the Past*, 78 IND. L.J. 73, 88 (2003); *Id.* at 117 (appendix listing proposals).
- <sup>80</sup> H.R. 379, 40th Cong. (1868).
- <sup>81</sup> S. 4483, 67th Cong. (1923).
- <sup>82</sup> H.R. 11007, 90th Cong. (1967).
- <sup>83</sup> Caminker, *supra* note 79, at 83.
- <sup>84</sup> See Moyn Testimony, *supra* note 2, at 6 (discussing the post-Civil War era); Steven F. Lawson, *Progressives and the Supreme Court: A Case for Judicial Reform in the 1920s*, 42 HISTORIAN 419, 420 (1980) (discussing Senator Borah’s Court reform efforts).
- <sup>85</sup> N.D. CONST. art. VI, § 4; see Caminker, *supra* note 79, at 91 (noting that this supermajority voting rule was originally adopted in a 1919 amendment).
- <sup>86</sup> NEB. CONST. art. V, § 2; see Caminker, *supra* note 79, at 92-93 (noting that this supermajority voting rule was originally adopted in a 1920 amendment).
- <sup>87</sup> Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 955-56 (2003).
- <sup>88</sup> OHIO CONST. art. IV, § 2 (amended 1968); see Caminker, *supra* note 79, at 91-92 (discussing difficulties motivating the elimination of the requirement, including inconsistent caselaw between circuits and confusion surrounding the precedential status of certain decisions); Shugerman, *supra* note 87, at 956-62 (same).
- <sup>89</sup> *Presidential Commission on the Supreme Court of the United States 2* (Sept. 21, 2021) (written testimony of David Law, University of Virginia Law School) [hereinafter Law Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/09/Professor-David-Law.pdf> (citing Eric Yik Him Chan, *Judicial Review and Supermajority Voting Rules* (May 2019) (L.L.M. thesis, University of Hong Kong, Faculty of Law), <https://www.whitehouse.gov/wp-content/uploads/2021/09/Professor-David-Law-appendix.pdf>). The cited thesis lists eleven countries with supermajority voting requirements in their highest constitutional court as of 2019; this includes Taiwan, which has switched to majority voting effective in 2022. Chan, *supra*, at 13. In addition, a number of countries require an absolute majority of the entire court, as opposed to a majority or plurality of voting justices, and a few countries have supermajority requirements for decisions in particular subject matters. See Chan, *supra*, at 51-60; Law Testimony, *supra*, at 3.
- <sup>90</sup> Joon Seok Hong, *Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea*, 67 AM. J. COMP. L. 177, 194 (2019).
- <sup>91</sup> *Id.* However, many of these courts—including in South Korea—hear principally or exclusively constitutional claims and do not generally hear cases on appeal from lower courts. Therefore, it is not clear whether their experiences readily translate to the U.S. Supreme Court, which hears statutory as well as constitutional cases and typically reviews decisions of lower courts.
- <sup>92</sup> See, e.g., Anthony Harrup, *Mexico’s Top Court Sets Back President’s Plans for State Power Company*, WALL ST. J. (Feb. 3, 2021, 3:42 PM), <https://www.wsj.com/articles/top-mexico-court-rules-electricity-rules-favoring-state-utility-are-unconstitutional-11612381067>.
- <sup>93</sup> Shugerman, *supra* note 87, at 893-94.
- <sup>94</sup> *Id.* at 899-931; see *id.* at 906 (referring to an “explosion of five-to-four decisions invalidating acts of Congress”).

- <sup>95</sup> Thayer, *supra* note 2, at 144.
- <sup>96</sup> Shugerman, *supra* note 87, at 932; *see also* John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 437-38 (1999) (generally advocating for supermajority rules as a tool for achieving better results).
- <sup>97</sup> Shugerman, *supra* note 87, at 932-35.
- <sup>98</sup> *See generally* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 85 (1978) (“A judge who is insulated from the demands of the political majority whose interest the right would trump is, therefore, in a better position to evaluate the argument [about the right].”).
- <sup>99</sup> Doerfler & Moyn, *supra* note 2, at 1742.
- <sup>100</sup> *Shelby County v. Holder*, 570 U.S. 529 (2013); *see* Bowie Testimony, *supra* note 2, at 8-9.
- <sup>101</sup> Doerfler & Moyn, *supra* note 2.
- <sup>102</sup> *See* Guha Krishnamurthi, *For Judicial Majoritarianism*, 22 U. PA. J. CONST. L. 1201, 1240-43 (2020).
- <sup>103</sup> *See* Law Testimony, *supra* note 89.
- <sup>104</sup> *See* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).
- <sup>105</sup> *See* Caminker, *supra* note 79, at 73-75; Shugerman, *supra* note 87, at 1012-19 (listing Court decisions invalidating congressional acts and noting cases decided by a bare majority).
- <sup>106</sup> *See* 570 U.S. 529, 532 (2013) (noting 5-4 majority).
- <sup>107</sup> Defense of Marriage Act, 1 U.S.C. § 7, *invalidated by* *United States v. Windsor*, 570 U.S. 744 (2013).
- <sup>108</sup> *Cf. Presidential Commission on the Supreme Court of the United States* 1 (Aug. 2021) (written testimony of Center for American Progress), <https://www.whitehouse.gov/wp-content/uploads/2021/08/CAP-Testimony.pdf> (advocating supermajority voting requirements as a mechanism to steer the Court away from “blockbuster political issues”); Bowie Testimony, *supra* note 2, at 3-5 (arguing that rights are more reliably protected through Congress than through the Court).
- <sup>109</sup> Dixon Testimony, *supra* note 5, at 10.
- <sup>110</sup> *See* Caminker, *supra* note 79, at 88 (comparing deferential review with supermajority rules as ways of limiting the Court’s role in constitutional adjudication).
- <sup>111</sup> Thayer, *supra* note 2, at 144.
- <sup>112</sup> *See, e.g.,* *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955).
- <sup>113</sup> *See, e.g.,* Administrative Procedure Act (APA) § 10(e), 5 U.S.C. § 706(2)(A) (directing courts to “set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”); *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (describing the APA’s arbitrary or capricious standard as “deferential”).
- <sup>114</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2254(d)).
- <sup>115</sup> *See* Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 685-86 (2007) (arguing that a “hard solution” like a supermajority voting rule is more effective in producing deference than a soft solution like a more deferential standard; judges might not comply, consciously or not, with a statutorily imposed deferential standard and may instead fall back on a traditional, less deferential standard).
- <sup>116</sup> For an overview of scholarly views and responses, *see* Shugerman, *supra* note 87, at 971-88.
- <sup>117</sup> U.S. CONST. art. III, § 2, cl. 2.
- <sup>118</sup> Congress has a strong claim to broad power to regulate lower federal courts due to its plenary power to decide whether to establish such courts in the first place. *See* U.S. CONST. art. I, § 8, cl. 9. Thus, Congress’s powers to impose a supermajority rule on lower federal courts or to prescribe the effect on lower federal courts of the Supreme Court failing to reach the necessary supermajority seem to have fairly firm constitutional foundations.
- <sup>119</sup> U.S. CONST. art. III, § 2, cl. 2.
- <sup>120</sup> *See supra* text accompanying notes 58-61.

- <sup>121</sup> U.S. CONST. art. I, § 8, cl. 18.
- <sup>122</sup> Circuit Judges Act of 1869, § 1, 16. Stat. 44 (codified as amended at 28 U.S.C. § 1).
- <sup>123</sup> 28 U.S.C. § 1.
- <sup>124</sup> *Id.* § 2.
- <sup>125</sup> *Id.*
- <sup>126</sup> U.S. CONST. art. III, § 1.
- <sup>127</sup> 80 U.S. (13 Wall.) 128 (1871).
- <sup>128</sup> See Shugerman, *supra* note 87, at 972.
- <sup>129</sup> 521 U.S. 507 (1997).
- <sup>130</sup> See, e.g., Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV L. REV. 1 (2011); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997).
- <sup>131</sup> See Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73 (creating a Supreme Court composed of one Chief Justice and five Associate Justices).
- <sup>132</sup> It is important to note that not everyone has been convinced that AEDPA’s deferential review scheme is constitutional. See, e.g., James S. Liebman & William F. Ryan, “*Some Effectual Power*”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 703-04 (1998) (criticizing AEDPA’s review scheme as applied by the Fifth, Seventh, and Eleventh Circuits); *Williams v. Taylor*, 529 U.S. 362, 378-79 (2000) (Stevens, J., concurring) (“A construction of AEDPA that would require the federal courts to cede this authority [to say what the law is] to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution. If Congress had intended to require such an important change in the exercise of our jurisdiction, we believe it would have spoken with much greater clarity than is found in the text of AEDPA.”).
- <sup>132</sup> Caminker, *supra* note 79, at 117.
- <sup>133</sup> *Id.*
- <sup>134</sup> We focus on a system of legislative overrides that would allow Congress to overrule decisions by the Supreme Court or other courts striking down federal or state legislation. However, a broader approach would allow Congress to overrule any constitutional opinion that upholds or rejects claims of constitutional rights, whether or not a statute is involved. Congress would, for example, have power to override such decisions as the Court’s rejection of a Free Exercise claim in *Employment Division v. Smith*, 494 U.S. 872 (1990), or of a Takings claim in *Kelo v. City of New London*, 545 U.S. 469 (2005). Because past proposals have not urged such expansive reform, we do not discuss it in any depth, however many of the legal and policy arguments discussed in this Chapter would apply equally or in stronger version to the broader reform.
- <sup>135</sup> Constitution Act, 1982, § 33, *being* Schedule B to the Canada Act 1982, c 11 (U.K.); see Nicholas Stephanopoulos, *The Case for the Legislative Override*, 10 UCLA J. INT’L L. & FOREIGN AFF. 250, 255 (2005).
- <sup>136</sup> Stephanopoulos, *supra* note 135, at 260.
- <sup>137</sup> Theoretically, a legislative override system achieved through constitutional amendment could also empower state legislatures but this might raise serious federalism concerns given the overall structure of U.S. government. Because this idea has not been proposed, we do not consider it.
- <sup>138</sup> *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); see also *United States v. Nixon*, 418 U.S. 683, 704-05 (1974); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).
- <sup>139</sup> Kramer, *supra* note 3, at 105-10, 125, 135-36; see also Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*, at xi (2007) (discussing the theory of departmentalism); *Presidential Commission on the Supreme Court of the United States* 5-7 (June 30, 2021) (written testimony of Ilan Wurman, Arizona State University) [hereinafter Wurman Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Wurman-Testimony-Supreme-Court-Commission.pdf> (noting that the modern Supreme Court’s view of judicial supremacy departs from antebellum understandings of the three branches’ coextensive powers over constitutional interpretation). Notably, the

departmentalist view—that legislative and executive branch actors could act on their own interpretations of the Constitution in their respective spheres—seems to have been Hamilton’s view, in contrast to the views of the antifederalist writer Brutus, who suggested that the federal courts would have greater interpretative authority under the Constitution and opposed it on that ground. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217, 245-52 (1994); The Federalist No. 78 (Alexander Hamilton); *Essays of Brutus*, No. XI, reprinted in 2 Herbert J. Storing, *The Complete Anti-Federalist* § 2.9.138-139 (1st ed. 1981).

<sup>140</sup> 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>141</sup> See Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 503-05 (2018).

<sup>142</sup> See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 141-43 (2007) (discussing how, in enacting the Partial-Birth Abortion Ban Act of 2003, Congress “responded” to the Supreme Court’s decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), which invalidated a similar state law, and sought to tailor the federal law to avoid the errors the Court identified in the state analog); *Dickerson v. United States*, 530 U.S. 428, 431-38 (2000) (describing how Congress sought to override the Supreme Court’s decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), but holding Congress was powerless to do so because the Court’s decision in *Miranda* announced a constitutional rule that Congress could not legislatively override); *City of Boerne v. Flores*, 521 U.S. 507, 511-12, 515 (1997) (invalidating the Religious Freedom Restoration Act of 1993, which “Congress enacted . . . in direct response to the Court’s decision” in *Employment Division v. Smith*, 494 U.S. 872 (1990)); see also Barry Cushman, *NFIB v. Sebelius and the Transformation of the Taxing Power*, 89 NOTRE DAME L. REV. 133, 142-43 (2013) (recounting how in an effort to combat child labor Congress passed the Keating-Owen Act, which the Supreme Court ruled unconstitutional in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and that when Congress subsequently “responded” to that decision “by adding a provision to the Revenue Act of 1918” that taxed businesses employing children “in violation of any of the standards established by the Keating-Owen Act,” the Supreme Court in turn invalidated that tax in *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922)).

<sup>143</sup> *Progressive Party Platform of 1924*, AM. PRESIDENCY PROJECT (Nov. 4, 1924), <https://www.presidency.ucsb.edu/documents/progressive-party-platform-1924>.

<sup>144</sup> *Senate Progressives vs. the Federal Courts*, US SENATE: SENATE STORIES (May 3, 2021), <https://www.senate.gov/artandhistory/senate-stories/senate-progressives-vs-the-federal-courts.htm#6>.

<sup>145</sup> Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 476-77 n.87 (2001) (citing S.J. Res. 80, 75th Cong. (1937)). See generally 81 CONG. REC. 1273 (1937), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1937-pt2-v81/pdf/GPO-CRECB-1937-pt2-v81-3.pdf> (noting Senators Wheeler and Bone’s introduction of the proposed amendment).

<sup>146</sup> Marian C. McKenna, *Prelude to Tyranny: Wheeler, F.D.R., and the 1937 Court Fight*, 62 PAC. HIST. REV. 405, 405 (1993).

<sup>147</sup> See William Lasser, *Justice Roberts and the Constitutional Revolution of 1937—Was there a “Switch in Time”?*, 78 TEX. L. REV. 1347, 1372 (2000) (citing Memorandum from Benjamin V. Cohen & Thomas G. Corcoran on Constitutional Problems, Cohen Papers, Library of Congress, <https://www.loc.gov/item/mm83061590>) (reviewing BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998)).

<sup>148</sup> Robert H. Bork, *Our Judicial Oligarchy*, FIRST THINGS (Nov. 1996).

<sup>149</sup> E.g., Doerfler & Moyn, *supra* note 2; Stephanopoulos, *supra* note 135, at 264-69, 290-92.

<sup>150</sup> Alicia Bannon & Nathan Sobel, *Assaults on the Courts: A Legislative Round-Up*, BRENNAN CTR. (May 8, 2017), <https://www.brennancenter.org/our-work/research-reports/assaults-courts-legislative-round>.

<sup>151</sup> See Bowie Testimony, *supra* note 2, at 23; see also William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1129-30 (1989) (noting that courts played a proactive role in fashioning an economic system that was hostile to workers during the Gilded Age).

<sup>152</sup> LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (1st ed. 2008); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN*

AMERICA (2012); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 565 (2014).

- <sup>153</sup> 384 U.S. 436 (1966) (holding that the Fifth Amendment bars the prosecution from “us[ing] statements, whether exculpatory or inculpatory,” made by a person in police custody “unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination,” and that those safeguards require that “[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney”).
- <sup>154</sup> See *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (holding that Congress could not overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), by legislation, since “*Miranda* announced a constitutional rule”).
- <sup>155</sup> See, e.g., *Presidential Commission on the Supreme Court of the United States* 1-3 (Aug. 2021) (written testimony of William G. Ross, Samford University), <https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-William-G.-Ross.pdf>.
- <sup>156</sup> 570 U.S. 529 (2013).
- <sup>157</sup> See, e.g., Doerfler & Moyn, *supra* note 2, at 1713; *Presidential Commission on the Supreme Court of the United States* 10-11 (Aug. 17, 2021) (written testimony of Mark Tushnet, Harvard Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Mark-Tushnet.pdf>.
- <sup>158</sup> See Stephanopoulos, *supra* note 135, at 264-69, 290-92; Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 247, 265, 275 (1995).
- <sup>159</sup> See Tsvi Kahana, *Understanding the Notwithstanding Mechanism*, 52 U. TORONTO L.J. 221, 222 (2002); Peter H. Russell, *Standing up for Notwithstanding*, 29 ALTA. L. REV. 293, 297 (1991); Stephanopoulos, *supra* note 135, at 254-59; Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457, 457-59 (2012).
- <sup>160</sup> See Kahana, *supra* note 159, at 223 (Canada); Weill, *supra* note 159, at 461 (Israel). In Canada, the provincial legislatures, particularly Quebec, have been the primary proponents of legislative overrides, known as “notwithstanding clauses,” in legislation. Early on, the province of Quebec attempted to craft an omnibus notwithstanding clause to immunize its laws against all court attacks. This approach was invalidated by the Canadian Supreme Court but narrower approaches have had some limited success. See Stephanopoulos, *supra* note 135, at 255-56; see also Law Testimony, *supra* note 89, at 4-5 (discussing Canada’s experience and noting that “[a]t one extreme, the province of Quebec has overused the override power to the point of preemptively immunizing all laws against constitutional challenge, and dragging the override power itself into disrepute in the process,” while “[a]t the other extreme, the federal government has effectively abandoned the override power”).
- <sup>161</sup> Weill, *supra* note 159, at 461.
- <sup>162</sup> Bowie Testimony, *supra* note 2, at 4-5; Moyn Testimony, *supra* note 2, at 6.
- <sup>163</sup> For example, in Australia and New Zealand, judicial review is “constrained,” with courts exercising a “privileged, but not a supreme, role,” without any evidence of resulting harm to minority rights. Alon Harel & Adam Shinar, *Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review*, 10 INT’L J. CONST. L. 950, 951-52 (2012). Moreover, in most European countries, constitutional questions typically are reviewed by specialized courts and through referral by parliamentary or executive officials, rather than in individualized cases. In this model, the court serves as an aide to the legislature in determining the conformity of legislation to the constitution. Albert H. Y. Chen, *The Global Expansion of Constitutional Judicial Review: Some Historical and Comparative Perspectives* 3 (Univ. of H.K. Faculty of Law Research Paper No. 1, 2013). Such inquiries take place on a theoretical level and not in terms of a case or controversy involving the rights of an individual allegedly harmed by such a law. This approach, it has been argued, is equally if not more protective of rights than the U.S. model. See, e.g., VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE, at xiii-xvi (2009). Of course, it bears remembering that Europeans’ rights are also protected by the European Court of Human Rights and the European Court of Justice, among other institutions. See Waldron, *supra* note 50, at 1353 n.20.

- <sup>164</sup> Canadian Charter of Rights and Freedoms § 33, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 c. 11 (U.K.) (excluding from the “notwithstanding clause” democratic rights, mobility rights, language rights, and education rights); *see* Dixon Testimony, *supra* note 5, at 7.
- <sup>165</sup> *See* Canadian Charter of Rights and Freedoms § 33.
- <sup>166</sup> *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000); *Shelby County v. Holder*, 570 U.S. 529, 556 (2013) (citing *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)).
- <sup>167</sup> The Eleventh Amendment, immunizing states from certain lawsuits, overruled the Supreme Court’s ruling in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); the Thirteenth, Fourteenth, and Fifteenth Amendments—the Reconstruction Amendments—effectively overruled the Court’s decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); the Sixteenth Amendment gave Congress the authority to enact income taxes, overturning the Supreme Court’s ruling in *Pollack v. Farmers’ Loan and Trust Co.*, 157 U.S. 429 (1895); the Nineteenth Amendment enfranchised women, overruling *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875); the Twenty-Fourth Amendment abolished poll taxes, overruling the Supreme Court’s decisions in cases like *Breedlove v. Suttles*, 302 U.S. 277 (1937); and the Twenty-Sixth Amendment made clear that all U.S. citizens eighteen years of age and older have the right to vote in 1971, overruling *Oregon v. Mitchell*, 400 U.S. 112 (1970).
- <sup>168</sup> *See* Moyn Testimony, *supra* note 2, at 19; *see also* Presidential Commission on the Supreme Court of the United States 8-9 (Aug. 15, 2021) (written testimony of Christopher Jon Sprigman, New York University School of Law) [hereinafter Sprigman Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Christopher-Jon-Sprigman.pdf>.
- <sup>169</sup> *See* KRAMER, *supra* note 3, at 105-10, 125, 135-36; WHITTINGTON, *supra* note 139, at xi; Wurman Testimony, *supra* note 139, at 5-7.
- <sup>170</sup> *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1543 (2000). It is important to note, however, that such an argument likely would not extend to limiting the stare decisis of state court decisions.
- <sup>171</sup> *See* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001)
- <sup>172</sup> *See* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).
- <sup>173</sup> *See* *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (1991) (“[S]elective prospectivity . . . breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally.”). Some Justices have also expressed concern that applying decisions only to subsequent litigants violates the judicial power established by Article III. *See* *Am. Trucking Ass’n, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring); *James B. Beam Distilling Co.*, 501 U.S. at 549 (Scalia, J., concurring).
- <sup>174</sup> *See* Sprigman, *supra* note 19, at 9 (“There is nothing standing in the way of Congress asserting its power to override judicial decisions save the will to do so and the political judgment to do so successfully. As a matter of practical politics, Congress can draw the outlines of its own authority by using its Article III power effectively and in ways that voters approve.”).
- <sup>175</sup> *Cf.* Dixon Testimony, *supra* note 5, at 7-8 (emphasizing importance of formal amendment to change longstanding norms); Jackson Testimony, *supra* note 52, at 14 (suggesting, while evaluating term limit proposals, that constitutional amendment would be needed to “significant[ly]” depart from longstanding norms surrounding Justices’ tenure on the Court); *see also* Fallon, *supra* note 171, at 582 (arguing that “deeply entrenched practices” greatly inform the American constitutional order).

## Chapter 5: The Supreme Court's Procedures and Practices

In recent years, Supreme Court observers have engaged in vigorous debates about how the Court conducts its work and explains its decisions. The Commission recognizes that the discourse about reform, in addition to focusing on the structural proposals discussed in prior Chapters, has also addressed the Court's operations and its procedures for reviewing cases. As observers, including members of Congress, have emphasized, internal procedures and practices at the Court can have a significant external impact: They affect perceptions of the Court's impartiality, the credibility of its rulings, and the clarity of its guidance for lawyers and for other courts. And they have real consequences for the parties in each case, as well as for the many people and institutions affected by the federal laws or constitutional rights at issue.

The Commission received testimony on a broad range of the Court's internal procedures and practices. The testimony included criticisms and counterarguments, as well as proposals aimed at increasing transparency, improving procedure, and generating more visible adherence to standards of judicial ethics.<sup>1</sup> A number of Justices have also expressed their views on some of these issues in written opinions and public discussions. Although it is not the Commission's charge to present suggestions to the Court, we are tasked with examining prominent debates about the work of the Court; and this task entails addressing a range of proposals from witnesses and commentators, including policies the Court would be able to implement on its own.

This Chapter focuses on three sets of issues. While some of these issues have become more salient under the pressure of recent events, others have been the subject of longstanding public discussion, debate, and analysis. The first issue is the Court's use of emergency orders, issued without the usual rounds of briefing or oral argument and often without a written explanatory opinion. The second is judicial ethics. The third is public access to the Court's proceedings. In addition, Appendix D to this Report details analyses offered by witnesses before the Commission about the sources of advocacy and information provided to the Court.



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## I. Emergency Orders

Many people associate the work of the Supreme Court with its “merits cases.” These are cases in which the Court grants review and the parties then conduct established rounds of briefing and participate in oral argument. The Court may also receive briefs from interested non-parties called *amici curiae*. In these cases, the Court eventually issues a decision with a reasoned, written opinion and discloses the votes of all Justices. These robust procedures are intended to ensure that the Court’s decisions are well informed, fair to the parties, and attentive to implications for the broader legal system. The opinions in these merits cases generally carry the full weight of precedent and thus are written in a manner that not only binds lower courts but also aspires to guide them, all while limiting the likelihood that the Court will dramatically change its own positions in the near future.

Yet the Court’s business goes beyond its merits cases. As the Court explains on its website, the “vast majority of cases filed in the Supreme Court are disposed of summarily by unsigned orders.”<sup>2</sup> The most common orders—there are thousands of these each year—are those in which the Court declines to review cases by denying the parties’ petitions for certiorari.<sup>3</sup>

In another category of unsigned orders, the Court responds to parties’ emergency requests by issuing an injunction, vacating a lower court’s injunction, granting or lifting a stay of a lower court ruling, or denying such emergency relief. Because these emergency orders often concern legal challenges to governmental decisions and practices, they can have substantial effects on the rights and obligations of governments, private institutions, and broad segments of the American public.

In contrast to its merits cases, however, the Court issues emergency orders without the same regularized rounds of full briefing, amicus participation, and oral argument; without much time for deliberation; often without a written opinion speaking for the Court and explaining its reasoning; and often without disclosing how each of the Justices voted. Many of these orders respond to requests from parties in the early stages of litigation and thus are issued before the lower courts have completed their adjudication and appellate review of the case.

The Court’s use of various truncated procedures has at times attracted public scrutiny. Beginning in the 1950s, some commentators criticized its use of summary decisions on grounds of procedural inadequacy and lack of guidance for the lower courts.<sup>4</sup> Others argued

that these practices were useful for managing a large caseload and supervising the lower courts.<sup>5</sup> Subsequent scholarship has continued to address certain forms of summary or unsigned decisions,<sup>6</sup> and recently the phrase “shadow docket” has come into use as a catch-all term for the Court’s “orders and summary decisions that defy its normal procedural regularity.”<sup>7</sup>

In the past few years, many commentators have focused their attention on the Court’s increasing use of emergency orders,<sup>8</sup> especially in cases of public importance or controversy.<sup>9</sup> Several Justices have addressed the issue in recent statements, offering both critiques and defenses of this practice.<sup>10</sup> The Commission also received testimony and comments about the Court’s use of emergency orders. It should be emphasized that the concerns raised are not about the existence of emergency procedures—no one disputes that they are needed for true emergencies—but about specific aspects of their current use by the Court.

This section first examines three sets of concerns about emergency orders: limited process in high-impact cases; limited information about the Justices’ votes and the Court’s reasoning; and uncertain signals about a ruling’s precedential effect. This section then examines proposals from witnesses and commentators for changing current practices, including proposals addressed to concerns about emergency orders generally, as well as those specifically addressed to cases involving the death penalty.<sup>11</sup>

## A. Limited Procedure for Important Cases

The Court’s recent emergency orders have involved issues of national importance and public debate, including abortion,<sup>12</sup> immigration policy,<sup>13</sup> environmental regulations,<sup>14</sup> and evictions during a surge in COVID-19.<sup>15</sup> Yet the Court’s practice in issuing such orders has involved relatively limited briefing, no oral argument, no norm that the Court’s reasoning must be publicly explained in a written opinion, and no expectation that the Justices’ votes will be revealed. Thus, a prominent line of critique has focused on the dissonance between the significance of many of the Court’s orders and the limited procedures that apply to them. Commentators initially focused criticism on orders that granted emergency applications seeking results contrary to those reached by the lower courts. More recently, following the Court’s first ruling in *Whole Woman’s Health v. Jackson*, which denied an emergency application that would have prevented a Texas abortion law known as S.B. 8 from going into effect,<sup>16</sup> critical attention has also turned to orders that deny such relief.

Although emergency orders technically are temporary and used in service of further adjudication, they often have the practical effect of being the final word on the issue. Since

2016, for example, the Court has issued orders that have effectively determined the end of the period for responding to the 2020 Census;<sup>17</sup> limitations on absentee and curbside voting, including for voters with disabilities and other vulnerable populations, at the height of the pandemic;<sup>18</sup> the degree of exposure to COVID-19 infection for inmates in prisons and jails;<sup>19</sup> and the extent of the right to congregate for religious services during the pandemic.<sup>20</sup> Even where such orders eventually expire, moreover, and even where they directly involve only one person as a party, they can have profound implications for affected individuals and influence larger societal debates.<sup>21</sup>

As these examples suggest, the issues resolved through emergency rulings often are controversial as well as consequential. Emergency orders breaking down 6-3 or 5-4 along ideological lines have multiplied in recent years, indicating that the Court increasingly is deciding contested legal questions through cursory and relatively non-transparent emergency procedures.<sup>22</sup> During the 2017 Term, there were five orders from which at least three Justices publicly dissented; during the 2020 Term, there were 29 such orders.<sup>23</sup> This increase has occurred even while the merits docket has remained at historically low levels,<sup>24</sup> and during the 2019 Term there were nearly as many 5-4 decisions among emergency rulings as on the merits docket.<sup>25</sup>

Various explanations have been offered for the Court's increasing use of expedited procedures in important and controversial cases: the lower courts' issuance of so-called "nationwide" or "universal" injunctions that "control the behavior of the federal government toward everyone, not just the plaintiffs," and which often prompt the government to seek relief;<sup>26</sup> federal executions during the Trump Administration; emergency requests during the COVID-19 pandemic;<sup>27</sup> a growing divide between the views of the Supreme Court and the lower federal courts; and possible changes in how the Justices apply the traditional legal standard for emergency relief pending appeal.<sup>28</sup> Critics and defenders of the Court's practices draw competing conclusions from such explanations, some of which point to passing rather than persistent causes.

Those who defend the Court's recent use of emergency rulings argue that the problem—if there is one—is not of the Court's own making. As in the lower courts, emergency applications come to the Court from parties seeking urgent relief.<sup>29</sup> The consequential nature of the interests at stake is precisely why the Court must act quickly, lest significant rights be left unprotected or harm imposed on the parties and the public while the full judicial process unfolds.<sup>30</sup> Deciding important issues using a truncated process, on this view, is not illegitimate; it is the nature of emergency adjudication. And the de facto final resolution of important

matters through temporary relief is an unavoidable part of the tradeoff that can happen at any judicial level.

Indeed, virtually everyone agrees that nothing is inherently suspect about emergency orders. Every court must have procedures for accelerated determination of urgent matters, even at the expense of a more deliberative process or more fully reasoned decisions. Disagreement, then, tends to center not on the fact of emergency procedures, but on which matters warrant the Court's immediate intervention. Critics have argued that the Court is too often using relatively impoverished procedures and deliberation to intervene on important issues, including by overturning reasoned decisions of the lower courts.<sup>31</sup> Relatedly, some commentators contend that the Court too often acts to disrupt the appropriate "status quo" rather than to preserve it—in some cases, at least, without clear explanation of when or why intervention is warranted.<sup>32</sup>

In some respects, these debates may reflect disagreement about the underlying merits of the disputes or about how to weigh the threatened interests or risk of harm.<sup>33</sup> An additional source of disagreement is the question of how to characterize the baseline condition or "status quo" that emergency relief is meant to preserve and the "disruptive force" that is to be held at bay pending full judicial consideration.<sup>34</sup> Witnesses before the Commission differed on the proper conception of the status quo for purposes of evaluating the Court's emergency orders,<sup>35</sup> and as one witness acknowledged, the choice will often be contested and "normatively tinge[d]."<sup>36</sup> One possible understanding of the status quo is the state of affairs that exists based on the last ruling in the courts below.<sup>37</sup> That is the baseline some critics claim the Court too often disrupts, as it did in a number of pandemic-related voting, prison safety, and religious gathering cases, among others.<sup>38</sup> A different conception of the status quo is the state of affairs created by the law, policy, or practice being challenged.<sup>39</sup> A third understanding was captured by Chief Justice Roberts's dissent in *Whole Woman's Health*, in which he explained: "I would grant preliminary relief to preserve the status quo ante—*before* the law went into effect—so that the courts may consider whether a state can avoid responsibility for its laws in such a manner."<sup>40</sup> This question becomes more complicated still when policymakers are responding (or not) to a sudden change in the state of the world, such as during a pandemic.

## B. Transparency

The Court often issues emergency orders without accompanying explanation, or with very little of it. A standard defense of such a norm is that emergency decisionmaking may not allow time for a thorough expression of the Court's reasoning in every case, and that anything less

(such as a rote citation to a legal standard without elaboration on its application to a given case) would rarely provide much useful information.

Yet the question is not whether all emergency orders require detailed explanation; there has been no serious suggestion that routine denials of obviously unwarranted relief need to be accompanied by a written opinion.<sup>41</sup> Rather, the question is whether some emergency orders are important enough (as all merits cases are presumed to be) that the public—and the public record—should receive an express statement of the Court’s reasoning and of how the Justices voted.

Critics and defenders alike recognize that the Court sometimes does issue opinions explaining its emergency orders, and individual Justices even more frequently write opinions concurring in or dissenting from the Court’s orders. For critics of the Court’s orders practices, such opinions demonstrate that reasoned explanation is possible; the problem, in their view, is that it is not provided more regularly in cases of national importance.

Critics argue that the lack of a stated rationale on behalf of the Court—and the lack of full disclosure of the Justices’ votes on emergency orders—deprive the public of valuable information about how the Court and each of its members understands and applies the substantive legal principles at issue in important cases.<sup>42</sup> Similar arguments extend to the procedural rules that govern emergency orders: Critics contend that it is sometimes unclear whether or how the Court is applying the traditional multipart standard used to determine issuance of emergency relief.<sup>43</sup>

Another line of critique focuses on the disciplining function of reasoned opinions. For example, some critics argue that the Court has not followed a straight line on the question of when to grant emergency relief, and that it has been willing to break new legal ground in certain cases while disclaiming that power in others, without explaining the difference.<sup>44</sup> In the critics’ view, the lack of explanation enables such variation by removing the rigor and consistency that the writing of carefully reasoned opinions is said to impose on judicial decisions.

Critics more broadly charge that the issuance of high-profile orders without adequate explanation damages the perceived impartiality and legitimacy of those rulings, or even of the Court, in the public eye: When the Court does not routinely explain its reasoning in cases of great public concern, people may speculate that the Justices are making decisions based on politics.

Defenders of the Court’s rulings respond that detailed opinion writing is infeasible in many emergency settings.<sup>45</sup> On this view, the relative lack of explanation in emergency orders is simply part of the process of faster decisionmaking. Moreover, in certain cases, the chances of the Justices reaching rapid agreement on the outcome might be improved by dispensing with an expectation that a majority of Justices will agree on legal reasoning set out in an opinion speaking for the Court.<sup>46</sup>

Relatedly, it may be practically useful for the Justices to reveal less rather than more in their emergency orders, to avoid locking themselves into positions or reasoning that is based on limited process, reflection, and information.<sup>47</sup> A similar argument supports the view that Justices ought not be required to reveal their votes in emergency orders.

### C. Uncertain Precedential Effect

A third set of concerns centers on the uncertain precedential effect of the Court’s emergency rulings. Even to expert legal observers, including judges, it remains unclear which orders and related opinions operate as precedents binding on lower courts.<sup>48</sup> In the context of emergency orders, one might think that, at most, only opinions designated as “Opinions of the Court” should function as binding precedents; indeed, Justice Alito recently noted in a public address that a ruling on an emergency application is not a precedent with respect to the underlying issue in the case.<sup>49</sup> Yet at times the Court has appeared to expect its emergency orders to be treated as precedential, at least if statements of individual Justices or concurring opinions accompany the order, even though none of them is designated as the opinion of the Court.

An example from the Court’s pandemic cases about religious gatherings illustrates this issue.<sup>50</sup> In *Gateway City Church v. Newsom*, the Court ruled that the Ninth Circuit’s “failure to grant relief was erroneous,” and explained that “[t]his outcome is clearly dictated by this Court’s decision in *South Bay United Pentecostal Church v. Newsom*.”<sup>51</sup> But the *South Bay* case was an emergency ruling that presented no majority rationale. As one Commission witness noted, the Court seemed to require lower courts to discern binding legal principles from an order with a concurring opinion by Justice Barrett (joined by Justice Kavanaugh), a statement of Justice Gorsuch (joined by Justices Thomas and Alito), and a concurrence by Chief Justice Roberts.<sup>52</sup>

Critics as well as many defenders of the Court’s emergency orders appear to agree that orders like the one in *South Bay* should not carry precedential weight for lower courts. More broadly, even when emergency orders do include an opinion for “the Court,” the nature of

such orders and the quality of the processes that precede them generally counsel against giving dispositive weight to decisions reached on an emergency footing.<sup>53</sup> Without clarification, uncertainty about the precedential effect of emergency orders can breed confusion about the content of the law for the lower courts, for relevant parties, and for the public.

## D. General Proposals

Commentators have made various proposals aimed at addressing the concerns described above while acknowledging the reality that emergency orders are, and will remain, a necessary component of the Court's work.

### 1. Giving Reasons

Specific reforms proposed in response to concerns about inadequate transparency—and the accompanying risk of an appearance of inconsistency, arbitrariness, or bias—urge the Court to explain the majority's reasoning in emergency orders involving matters of great public debate. A different approach would place a premium on providing an explanation whenever the Court is undoing reasoned rulings in the lower courts.<sup>54</sup> Another proposal would urge the Justices to disclose their votes in emergency orders.<sup>55</sup>

The aim of such explanations and disclosures would be to provide guidance to parties, lawyers, and lower court judges; to allow the public to know the role of each Justice in granting or denying an emergency order; and to ensure that especially consequential decisions benefit from the rigor and discipline associated with reasoned opinions.<sup>56</sup> The explanations need not be lengthy, nor does anyone suggest that opinions need to be written in every case. Instead, the goal is to enable observers to understand the bases for the Court's most significant rulings—to follow the legal trail through each decision and from one decision to the next. Proponents of reform argue that, at a minimum, the Court should clearly articulate the test it is using to assess the application for emergency relief and indicate how (or whether) it applied each prong of the test.<sup>57</sup>

The category of “important” cases in which explanation may be most valuable is not self-defining; reasonable minds will differ about that threshold. Even short opinions take time to write, moreover, and the suggestion that the Court indicate how it applied each prong of a four-part test may be in tension with the suggestion that the writing need not be lengthy. Indeed, there may be an unavoidable tradeoff between the explanatory benefits of any given opinion and the costs of producing it—including not only the time and effort spent preparing the opinion, but also the possibility of committing the Justices to positions they have not yet

had time to consider fully. On the one hand, an opinion in which the Court merely articulates the relevant legal test and states its conclusions on the application of each prong may not pose undue risks of delay or lock-in. On the other hand, such an opinion—lacking the detailed explanation of the underlying reasoning typically found in merits opinions—may not provide much illumination.<sup>58</sup>

The Court has demonstrated, however, that it can issue informative opinions in an expedited way. In a high-profile case concerning the second federal eviction moratorium, the Court released an eight-page per curiam opinion providing a concise analysis of the majority’s view of the likelihood of success on the merits, weighing of the equities, and consideration of the public interest.<sup>59</sup> Given that public perceptions of the legitimacy of its rulings may be at stake, the Court may well benefit from continuing to adjust its explanatory practices in important cases, with an eye toward providing insight into the Court’s reasoning, reinforcing procedural consistency, and avoiding the possible appearance of arbitrariness or bias.

Relatedly, the Court might also avoid most of the procedural and transparency concerns about emergency rulings by more frequently exercising its discretion to transfer emergency applications to the merits docket on an expedited basis, as it recently did in the ongoing litigation concerning the Texas abortion law,<sup>60</sup> as well as in *Ramirez v. Collier*, a capital case.<sup>61</sup>

## 2. Clarity on Precedential Value

Many observers seem to agree that emergency orders should not, as a general matter, carry precedential weight. In some of its orders, the Court is careful to say that the grant or denial of emergency relief should not be construed as resolving the merits of the case. The opinions accompanying the first emergency order denying relief in *Whole Woman’s Health* present an illustration: The Court stated that “we stress that we do not purport to resolve definitively any jurisdictional or substantive claim in the applicants’ lawsuit.”<sup>62</sup> And, as the dissent by Chief Justice Roberts elaborates, “[a]lthough the Court denies the applicants’ request for emergency relief today, the Court’s order is emphatic in making clear that it cannot be understood as sustaining the constitutionality of the law at issue.”<sup>63</sup>

By contrast, when the Court earlier implied that lower courts are bound even by an emergency order issued with no opinion on behalf of the Court, in *Gateway City Church v. Newsom*, it risked confusing lower courts, relevant parties, and the public. Such an implied expectation would also be hard to square with a central justification for using truncated and relatively non-transparent procedures for emergency orders.<sup>64</sup> To the extent the Court has been taking steps since that case to clarify whether emergency rulings should have any precedential



effect on lower courts,<sup>65</sup> or to specify which aspects of individual rulings should or should not be construed as precedent, these are welcome developments.

### 3. Existing Norms of Deference

A committee of regular advocates before the Court, including several former Solicitors General and Deputy Solicitors General, provided testimony highlighting established principles that the Court has endorsed and yet may not be regularly applying.<sup>66</sup> These principles, if applied more consistently, might relieve pressure on the Court to intervene early in at least some lower court proceedings. For example, their testimony pointed to “the Supreme Court’s traditional ‘two-court rule,’” which places an especially heavy thumb on the scale against reversing findings of fact that have been made by the trial court and affirmed by a court of appeals.<sup>67</sup> Also, “when the Court of Appeals sets an expedited schedule to address an important constitutional issue, the interest in ordinary process weighs against Supreme Court intervention.”<sup>68</sup> One potential cost of more regular adherence to such principles might arise from privileging lower court rulings that turn out to be erroneous. An additional limitation is that these principles are relevant only to a subset of cases. The reach of both principles may be expanded, however, by the greater use of expedited scheduling in the federal appeals courts for cases likely qualifying as emergencies.<sup>69</sup>

### 4. Nationwide Injunctions

Another approach would aim to eliminate or reduce the number of “nationwide” or other defendant-oriented injunctions in the lower courts, some of which give rise to emergency applications to the Court.<sup>70</sup> Recommendations along these lines, including proposed legislation, have been primarily motivated not by concerns about the Court’s emergency orders but by considerations about the power of the lower courts; such proposals have inspired extensive debate among commentators and policymakers, which we do not rehearse or evaluate here.<sup>71</sup> A witness before the Commission proposed the alternative of legislation allowing the government to “transfer all civil suits seeking ‘nationwide’ injunctive relief to the D.C. district court—to avoid the concern of overlapping (or diverging) ‘nationwide’ injunctions.”<sup>72</sup> Funneling litigation involving the federal government into a single court, however, would only affect the subset of cases in which federal law or policy is at issue—and perhaps only the still-smaller subset in which there is a realistic risk of conflicting injunctions.

## E. Proposals for Capital Cases

The Supreme Court's emergency orders draw the most attention in high-profile cases where controversies directly impacting large numbers of people are at stake. Another component of the Court's emergency rulings, however, arises in the context of capital punishment, where the Court often has the final word on whether a state or federal execution will go forward. These cases come to the Court in an emergency posture as the date of execution approaches, when there are unresolved legal challenges to the execution pending in the lower courts.<sup>73</sup> If the lower courts do not stay the execution, the condemned person will ask the Court to do so. If the lower courts do halt the execution, the state will typically ask the Court to vacate that stay so the execution can proceed.<sup>74</sup> These decisions form a substantial and well-known component of the Court's emergency orders.<sup>75</sup>

In recent years, the Court's handling of emergency applications in capital cases has drawn criticism from commentators as well as from members of the Court itself. Several Commission witnesses presented arguments and proposals specific to the death penalty context, based on the premise that "death is different" because there is no opportunity to correct a legal error if an execution goes through, and because ending human life is a uniquely serious form of state action.<sup>76</sup> At the extreme, the risk of legal error may compound a risk of factual error, thus raising the worry that the state may kill an innocent person;<sup>77</sup> one Commission witness testified that to date "185 people have been exonerated after being wrongfully convicted of a capital offense and condemned to death."<sup>78</sup> In other cases, the concern is not that the state might execute someone who is innocent, but rather that it will violate constitutional or other legal rights and protections in the course of administering a death sentence.<sup>79</sup> These cases include challenges concerning the risk of severe and needless pain and suffering due to the method of execution,<sup>80</sup> the individual's competency to be executed,<sup>81</sup> or the presence of a religious advisor at the time of death.<sup>82</sup> Commentators have argued that the Court should err on the side of pausing an execution if such legal challenges remain unresolved.<sup>83</sup>

Yet there are those who argue, to quote Justice Thomas, that injustice can also come "in the form of justice delayed."<sup>84</sup> Executions typically are authorized pursuant to warrants that expire on a given date; if a judicial stay prevents the execution from going forward, the state often needs to obtain a fresh warrant, a process that can delay an execution by a month or more, while frustrating the state's interest in carrying out the sentence.<sup>85</sup> And a stay that remains in effect during the pendency of lower court or Supreme Court review can remain in place for considerably longer.<sup>86</sup>

Until very recently, such debates centered on death penalty cases in the states, with little attention paid to federal executions, for the simple reason that federal executions are far less common. Between 1963 and 2001, the federal government did not execute anyone, and it executed only three people between 2001 and 2019.<sup>87</sup> By contrast, the states have executed more than 1,500 people since 1973.<sup>88</sup> In the months before the Commission’s formation, however, a spike in federal executions gave rise to multiple emergency applications to the Court. Commission witnesses and commentators cited these rulings, in addition to state cases, as salient examples of problems with the Court’s handling of its emergency orders.<sup>89</sup>

The federal executions at issue occurred during the last six months of the Trump administration, when the Department of Justice sought the execution of thirteen individuals.<sup>90</sup> Legal challenges were filed in all thirteen cases, including claims that the Department’s proposed execution plan violated federal statutes and constituted cruel and unusual punishment under the Eighth Amendment.<sup>91</sup> In multiple instances, the lower federal courts noted that the challenges raised significant and complex issues, and in some cases they concluded that the challengers were likely enough to succeed on the merits to warrant a stay of execution to permit time for the courts to resolve the issues.<sup>92</sup> At the Supreme Court, one or more requests for emergency relief were filed in each case, sometimes from the government seeking to vacate a lower court stay and sometimes from the person seeking the stay. The combined effect of the Court’s orders in these cases was to permit all thirteen executions to go forward.<sup>93</sup> In most cases, it did so in brief orders that gave no rationale for its decision,<sup>94</sup> though multiple dissents were filed.<sup>95</sup> A Commission witness defended these rulings on the ground that the challengers did not convince the Court that they were likely to succeed on the underlying merits.<sup>96</sup> Other Commission witnesses criticized the Court’s handling of the cases.<sup>97</sup> So did Justices Breyer and Sotomayor.<sup>98</sup> In Justice Sotomayor’s view, the way the Court made these decisions, “with little opportunity for proper briefing and consideration, often in just a few short days or even hours,” and often without a public explanation of their rationale, “is not justice.”<sup>99</sup>

In their testimony before the Commission, several witnesses argued that because in capital cases the stakes of error are asymmetrical, the Court’s approach to stays of execution should be asymmetrical as well. “[T]here is no symmetry between an erroneous execution and an erroneous non-execution,” one witness reasoned. “If proper attention is given to irreparability [of harm] and the need to preserve the judiciary’s ability to decide a case, then the Justices should be much more willing to give shadow-docket orders that *delay* an execution than shadow-docket orders that *accelerate* an execution.”<sup>100</sup> Below, we address two sets of reforms proposed by witnesses taking this view of asymmetrical stakes.

## 1. Asymmetric or Automatic Stays of Execution

Several witnesses endorsed the view that the Court should apply an explicitly asymmetrical approach to staying executions,<sup>101</sup> for example, with a presumption in favor of staying an execution when there is genuine doubt as to its legality, or with a heightened standard of review for vacating stays when lower courts have issued them.<sup>102</sup> One witness testified that such an asymmetric approach could be imposed by congressional legislation, either in the form of a statute prescribing asymmetric standards of review or one removing the Court's jurisdiction to review stays of execution entered by lower courts.<sup>103</sup> We address jurisdiction stripping generally in Chapter 4 of this Report. But absent any action from Congress, the Court can alter its own threshold for staying an execution.

Commission witnesses also proposed variations of an automatic stay of execution during certain stages of litigation. Under one proposal, previously endorsed by Justice Stevens and by a commission led by Justice Powell, “the Supreme Court should be required to automatically grant a stay of execution to any defendant who has not yet completed a first federal habeas review.”<sup>104</sup> In another proposal, every person with a pending execution date would have at least one full opportunity to litigate any challenges to the state's proposed method or administration of execution.<sup>105</sup> Arguing against these proposals, a Commission witness contended that the availability of automatic stays might induce litigation based on weak claims; that the existing legal standard could account for the irreversibility of an execution; and that any additional delay could undermine the government's interests in cases where the legal challenge has little chance of success, even if lower court judges view the underlying question as unsettled or unresolved.<sup>106</sup>

## 2. Four Votes to Stay an Execution

Another approach would be for the Court itself to reduce the number of votes required to grant a stay of execution, from five votes to four—a reform embraced by a number of Commission witnesses,<sup>107</sup> as well as certain Justices in the past.<sup>108</sup> Such a reduction would address a related but distinct set of concerns called to the Commission's attention regarding what one commentator has termed “a lethal gap” in the Court's internal processes: “It takes four votes to put a case on the court's docket” via a writ of certiorari, “but it takes five to stop an execution.”<sup>109</sup> Thus, it is possible that the Court could grant a petition for certiorari and set a case for full briefing and argument to resolve a significant legal question, and yet also allow the petitioner to be put to death while the case is pending. Given this concern, some Justices have at times employed a practice known as the “courtesy fifth,” whereby a Justice who does not believe that either certiorari or a stay is warranted will nonetheless vote to issue a stay if

four other Justices have voted to grant certiorari, thus preserving the Court’s jurisdiction.<sup>110</sup> The contours and the continuing viability of this norm are unclear, however.<sup>111</sup>

In recent years, the Court has declined to halt executions when four Justices requested more time for consideration—before a vote on certiorari. In one instance, four Justices voted to call for the views of the Solicitor General, a step typically taken only in cases in which the Court is seriously considering granting certiorari. But as Justice Breyer noted in dissent: “[N]o Member of the majority . . . proved willing to provide a courtesy vote for a stay so that we can consider the Solicitor General’s view once received. As it is, the request will be mooted by petitioner’s execution.”<sup>112</sup> More recently, in *Dunn v. Price*,<sup>113</sup> after the state sought to vacate a lower court stay on the evening of the execution, four Justices requested that the application be held until the following morning when all the Justices could discuss the issue at their regularly scheduled conference; the Court refused and entered a brief order vacating the stay.<sup>114</sup>

In such situations, a case that four Justices are seriously considering placing on the merits docket for full consideration can be denied a path forward by a decision disposing of the case through an emergency order. The proposal of a rule that four votes are sufficient to grant a stay of execution would resolve this concern. So would an extension of the “courtesy fifth” norm to include circumstances in which four Justices need more time to determine whether to vote to grant certiorari, an approach taken by Chief Justice Roberts in a capital case several years ago.<sup>115</sup>

Arguing against such a proposal, a Commission witness urged that if the Court is to prevent the government from carrying out a death sentence as scheduled, it should only do so if a majority of the Justices endorse that action.<sup>116</sup> A related concern is the one raised by then-Justice Rehnquist, who argued to his colleagues that “four Justices out of a total number of nine could frustrate the effectuation of the will of the majority” by banding together to issue a stay “in every death penalty case.”<sup>117</sup> Other commentators are skeptical of this concern, however, asserting for instance that “there are many reasons—including collegiality, the likelihood of an adverse outcome on the merits, and the probability of negative public and congressional comment—why the minority would be unlikely to behave in this fashion.”<sup>118</sup> A Commission witness observed, moreover, that the Court for many years had four Justices who were generally sympathetic to legal issues raised by capital defendants, but who did not use “their existing authority to disrupt the operation of the court” by granting certiorari in every capital case and pressing for a courtesy fifth.<sup>119</sup>

## II. Judicial Ethics

The Justices of the U.S. Supreme Court are the only members of the federal judiciary who are not covered by a code of conduct. Since 1973, the United States Judicial Conference has composed and updated an advisory Code of Conduct directed to all other federal judges. That Code, by its own terms, is not addressed to the Justices.

In a 2011 year-end report, Chief Justice Roberts addressed concerns over the Justices' exclusion from the Code. He emphasized that "All Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations. In this way, the Code plays the same role for the Justices as it does for other federal judges since . . . the Code 'is designed to provide guidance to judges.'"<sup>120</sup> In 2019, during an appropriations hearing in Congress, Justice Kagan similarly stated that the Justices follow the Code to the very best of their ability.<sup>121</sup>

There is some debate over whether the Justices always follow the Code even if they do consult it.<sup>122</sup> The Commission has not undertaken a study of the Justices' adherence to the standards in the existing Code and makes no finding in this respect. Regardless of whether the Justices do consult and follow the existing Code, not having a formally adopted code might not be best practice for the Court. On this view, even if there were no apparent issue with ethical practices on the Court, the explicit adoption of a code could promote important institutional values. Most significant public and private entities have adopted codes of conduct for their organizations and employees.<sup>123</sup> It is not obvious why the Court is best served by an exemption from what so many consider best practice. To bring the Court into alignment with other courts and entities, some observers argue that the Supreme Court should adopt a code of conduct—either the existing Code applicable to other judges or its own version of a code—or that Congress should impose one.

The discussion of whether the Court should adopt a code of conduct has included a further discussion about whether the Justices should be subject to a disciplinary framework as well. The Justices are not subject to the complaint and discipline framework that applies to other federal judges. The Judicial Conduct and Disability Act of 1980 allows for any person to file a complaint against a federal judge alleging that the judge "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or "is unable to discharge all the duties of office by reason of mental or physical disability."<sup>124</sup> The Code of Conduct can be relevant to determining whether a judge has engaged in prejudicial conduct. However, the Judicial Conduct and Disability Act excludes the Justices from its reach.<sup>125</sup>

Relatedly, though the Justices are subject to statutory standards that require recusal in specified situations, unlike recusal decisions by lower court judges, the Justices' recusal decisions are not subject to further review.

This section discusses potential benefits and drawbacks of reforms that would impose a code of conduct, a disciplinary framework, or recusal review.

## A. Code of Conduct

A code of conduct for the Court would bring the Court into line with the lower federal courts and demonstrate its dedication to an ethical culture, beyond existing statements that the Justices voluntarily consult the Code. In other contexts, such a demonstration of commitment has affected conduct over time, in part by encouraging periodic training and other similar techniques that enhance attention to ethical concerns.<sup>126</sup>

There are two paths to a code of conduct for the Supreme Court: The Court could *internally* adopt a code, or Congress could *externally* impose a code upon the Court. In either case, the code could mirror the one that applies to other federal judges or could be specific to the Supreme Court.

### 1. Internal Adoption of a Code

The Court could formally adopt the Code of Conduct that already applies to other Article III federal judges. It has adopted similar non-binding regulations in the past: In 1991, the Court formally adopted ethical regulations enacted by the Judicial Conference under the Ethics Reform Act of 1989.<sup>127</sup> Those regulations now govern the Justices' ability to receive gifts, honoraria, and outside income, and they require the Justices to make periodic financial disclosures. Adopting the current Code could be done quickly. Furthermore, the Justices' ethical obligations would then parallel those of the rest of the federal judiciary. The Code comprises, for the most part, broadly stated aspirational principles. Were the current Code to apply to the Justices, it might not be necessary to amend the actual language of the Code,<sup>128</sup> although the opinion letters interpreting the Code in the context of particular situations involving lower court judges might not be directly applicable to the Justices.

As an alternative to adopting the current Code, the Court could create its own code. In a 2019 appropriations hearing, Justice Kagan stated that the Chief Justice was "studying" the question of whether to adopt a code applicable only to the Supreme Court.<sup>129</sup> In that same hearing, Justice Alito was asked why the current Code of Conduct does not apply to the

Supreme Court; among other things, he commented that the working life of the Court is a “little different” from that of the rest of the federal judiciary.<sup>130</sup>

An advantage of creating a new code drafted by the Justices is that the language of the code could be geared to the unique institutional setting of the Court. For example, the considerations involved in the recusal context might be different for the Justices, even though the statutory standards are the same as for other judges.<sup>131</sup> This is because a Justice, unlike a lower court judge, cannot simply be replaced by another judge. As another example, a new code for the Justices might also provide guidance on public and private appearances, as the considerations could be different for a Justice than for other judges who are not the object of so much public attention. The Justices themselves might be well positioned to consider the tensions and issues that can arise from their public and private activities, and to set standards for themselves. While the Justices’ participation in a broad range of educational and professional activities undoubtedly benefits the profession and the country, the Justices must be mindful of appearances if they choose to attend meetings of organizations that have a political or other valence that could cause the Justices’ attendance to become controversial or cast doubt on their neutrality.<sup>132</sup> A code drafted by the Justices, amplified over time through its application, might help the Justices navigate these waters.

In either case, the Supreme Court clearly has sufficient authority to adopt a code—doing so raises no constitutional problems. The Court has the power to affect its own internal governance, so long as it continues to meet its constitutional responsibilities.

## 2. External Imposition of a Code

In the absence of Court action, Congress could enact a code for the Supreme Court. Several bills have been proposed to this effect, although none has been enacted.<sup>133</sup> Typically, the proposed bills direct the Judicial Conference to craft a code for the Court (or simply make the existing Code applicable to the Justices). In his 2011 year-end report, Chief Justice Roberts pointed out that the Judicial Conference currently lacks the statutory authority to do so. The Chief Justice put it bluntly: “Because the Judicial Conference is an instrument for the management of the lower federal courts, its committees have no mandate to prescribe rules or standards for any other body.”<sup>134</sup> The proposed bills would address this precise issue of Judicial Conference authority.

Alternatively, Congress could write a code itself. One observer points out that Congress already imposes requirements on the Court that are analogous to a code of conduct.<sup>135</sup> For example, Congress requires that Justices take an oath of office, requiring them to swear to



“administer justice without respect to persons, and do equal right to the poor and to the rich . . . .”<sup>136</sup> The oath resembles provisions that might be included in a code of conduct.

External proposals would give Congress more control over the composition of a code of conduct. If Congress were to write a code, it would need to be careful to ensure that the code’s demands did not encroach on the Court’s constitutionally exclusive judicial decisionmaking function.<sup>137</sup> Further, Congress has largely delegated procedural matters to the courts.<sup>138</sup>

## B. Judicial Discipline

In addition to the adoption of a code, there is a similar question of whether the Court should adopt a complaint and discipline framework. Under the Judicial Conduct and Disability Act, other federal judges can be subject to sanctions for conduct that is prejudicial to the “effective and expeditious” business of the courts; the Code is highly relevant to an appraisal of judicial conduct under this misconduct formulation.

This section will discuss first the benefits and costs of applying the Judicial Conduct and Disability Act to the Justices. It will then discuss the benefits and consequences of an internal disciplinary framework.

### 1. Judicial Conduct and Disability Act

The Judicial Conduct and Disability Act is a framework for disciplining misconduct that does not rise to the level of impeachment. The Judicial Conference provides nationally uniform guidelines governing the substantive and procedural aspects of misconduct proceedings. The following is a simplified description of the procedures currently in place for the lower federal courts:

- (1) “Any person” may file a complaint alleging misconduct or disability.
- (2) The chief judge of the relevant circuit (or the most senior active circuit judge in the event that the chief judge is disqualified) reviews the complaint and decides whether to dismiss the complaint for lack of conformity with the statute or because voluntary corrective action has been taken.
- (3) If the complaint is not dismissed, a special committee appointed by and including the chief judge investigates the complaint and reports to the circuit judicial council.<sup>139</sup>
- (4) Upon receiving the special committee’s report, the judicial council may conduct additional investigation, dismiss the complaint, impose sanctions, or refer the complaint to the United States Judicial Conference.

- (5) If a complainant is dissatisfied with the disposition of the circuit council, the complainant may petition for review by the judicial conduct and disability committee of the Judicial Conference (review is discretionary).

Applying the Act to the Justices without modification would place inferior court judges in the position of evaluating members of a body that is hierarchically superior. This could possibly lead to undue deference. Applying the Act to the Court might be constitutionally infirm as well if the disciplinary process encroached on the judicial decisionmaking function of the Court.<sup>140</sup>

Additionally, the Act's lack of a standing or jurisdictional requirement for filing a complaint may be open to abuse. The Act allows "any person" to file a complaint against a federal judge. In 2013, chief circuit judges resolved 1,167 filed complaints, dismissing all but 20 as "merits-related, lacking sufficient evidence, frivolous, or otherwise improper."<sup>141</sup> These numbers would likely be even higher if the statute applied to the Supreme Court due to the visibility of the Court and the individual Justices.<sup>142</sup>

Furthermore, the stakes of the procedure would be much higher if applied to the Court. Sanctions under the Act "may include . . . ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint."<sup>143</sup> Although Justices do not have their own dockets, temporarily restricting a Justice from the work of the Court would be a highly consequential event that would deprive litigants and the American people of whatever number constitutes a full complement of Justices.<sup>144</sup> Unlike in the lower courts, there is currently no mechanism for replacing an absent Justice. The availability of such a sanction could cause groups to file more complaints in the hope of removing those Justices with whom they tend to disagree. Further, and more broadly, it is possible that interest groups seeking to mobilize support, raise money, and pursue their own agendas would see in this process an avenue for seeking their own ends to the detriment of the Court, individual Justices, and the public.

## 2. Internal Disciplinary Procedures

An internal disciplinary procedure for the Court would avoid the issue of having inferior court judges sit in judgment of the Justices or the more serious risks that could arise if the disciplinary process were run by persons outside the judiciary.<sup>145</sup> Some of the mechanisms of the Judicial Conduct and Disability Act, detailed above, could serve as a model for procedures tailored to the Justices. If these procedures called for internal enforcement, the Chief Justice (or next most senior Justice, in the event of conflict) could review complaints against

individual Justices. The complaint could be referred to the entire Court or a subset of Justices. How such a procedure might affect the overall role of the Chief Justice and the working relationships of the Justices is not clear, although the development of deep personal rifts seems at least possible as a result. And again, the sanction of removal from a case could have broad repercussions for the Court, litigants, and the public.

Some might conclude that the adoption of a code of conduct would not be beneficial without an additional mechanism for receiving and reviewing complaints. However, experience in other contexts suggests that the adoption of an advisory code would be a positive step on its own, even absent binding sanctions.<sup>146</sup>

### C. Recusal

All federal judges, including the Justices, are subject to statutory standards that require recusal in specified situations. The statute, 28 U.S.C. § 455, requires a judge or Justice to recuse “in any proceeding in which his impartiality might reasonably be questioned.”<sup>147</sup> The statute also requires recusal in more specific circumstances, such as when the judge has a financial interest in the proceedings or personal knowledge of disputed facts.<sup>148</sup> Recusal decisions by lower court judges are orders in a case and, like other rulings, are subject to review on appeal. By contrast, a recusal decision by a Justice is not subject to further review. Perhaps in part for this reason, the Justices rarely offer any explanation either for refusing to recuse or for recusing. Justices Rehnquist and Scalia famously wrote memoranda explaining their decisions not to recuse in two high-profile cases.<sup>149</sup> But those memoranda were quite unusual.

Moreover, when a lower court judge recuses, another judge is selected to hear the case. While it can be disruptive to a case when a judge recuses after participating in the proceedings for a substantial period of time, most recusals come at the first assignment of a case and do not affect the handling of the case. In contrast, when a Justice recuses there is no current possibility of adding another Justice. For this reason, the mere fact of the recusal may be case dispositive. The Justices may therefore be justified in being more hesitant than lower court judges to recuse, and correspondingly should be more careful to avoid circumstances that might trigger recusal.

The Justices’ recusal decisions are subject to significant public attention, and Justices are often criticized for failing to recuse.<sup>150</sup> Even so, the Justices recuse somewhat frequently, at least at the certiorari stage. There was an average of 193 recusals at the certiorari stage over the last six Terms, and an average of four recusals at the merits stage.<sup>151</sup>

U.S. Supreme Court Term	Recusals at the Certiorari Stage	Recusals at the Merits Stage
2020	247	1
2019	145	4
2018	198	3
2017	228	6
2016	206	4
2015	181	4

The Justices do not offer reasons for their recusals, but reasons sometimes can be inferred based on context. For example, a Justice’s financial disclosure forms may reveal whether a recusal was due to an interest such as owning shares of stock in a publicly traded company. Based on context, it appears that the most common reason for recusal in the past six Terms is that the Justice was involved with a case during previous employment as a circuit judge or as Solicitor General. Following that, recusals due to stock ownership were the next most common.

After stock ownership, there is a significant dip. A few recusals were likely because a Justice (or Justices) were named in the suit, or because of a family relationship (Justice Breyer, for example, will routinely recuse in cases that were handled by his brother, a U.S. district judge). A negligible number of recusals involve other reasons. In 2020, for example, Chief Justice Roberts recused from a case involving the Smithsonian Institute apparently because the Chief Justice serves as the chancellor of that institution.

Proposals for recusal reform largely focus on making the process more transparent and accountable. There are three common proposals for reform: (1) require the Justices to state their reasons for recusal or for refusing to recuse; (2) establish a formal procedure by which recusal decisions may be reviewed by another Justice or by the entire Court; and (3) reform recusal laws to make it easier for Justices to avoid financial conflicts.

### 1. Stating Reasons for Recusal

Statements from the Justices explaining their reasons for recusal could enhance the transparency of the recusal process and help build a “common law” of recusal on the Court.

Recusal decisions could serve as guidance to Justices and might also clarify whether the Justices use the same standards for recusal on recurring issues, particularly a Justice’s prior contact with a case when a circuit judge. While the Justices may provide such statements on their own, Congress or the Court itself might also require such statements from the Justices.<sup>152</sup> However, requiring full discussion on every decision to recuse could be time consuming and burdensome. A reasoning requirement could also force Justices in some situations to divulge private matters—for example the medical condition of a family member—and this could discourage recusal where otherwise appropriate. A recusal opinion might also have the appearance or effect of lobbying the other Justices.<sup>153</sup> One answer to these concerns might be to require only a short statement without specific details; for example, the Justice might state that the recusal is based on the Justice’s involvement with the case when a circuit judge and identify the nature of the involvement (e.g., served on the panel, reviewed a motion to hear the case en banc).

In tandem with requiring explanations for recusal, there may be benefits to requiring Justices to state reasons for *not* recusing when a motion for recusal has been filed. Requiring reasoned explanations could ensure that the Justices have thoroughly considered whether to recuse. And, like explanations for recusal, explanations for not recusing could help build a body of guidance to future Justices that is also accessible to the public. Even more so than with explanations for recusal, however, requiring explanations for not recusing could become burdensome and time-consuming if motions to recuse became more common and interested groups see such motions as an opportunity to harry or embarrass Justices with whom they disagree.

## 2. Establish a Review Procedure

A Justice’s decision whether to recuse is totally independent, and recusal decisions are not subject to any kind of review. The Justices may well consult with one another over difficult recusal decisions, but the decision is still that of the individual Justice and not subject to further review. This places the Justice in the position of being the final arbiter of a recusal motion that challenges the Justice’s own impartiality.<sup>154</sup>

Other individual decisions made by the Justices are subject to a form of review by another Justice or the full Court. Parties regularly make applications to individual Justices. These applications include, for example, requests for filing deadline extensions and requests for a temporary stay of an injunction. If a Justice denies one of these requests, Supreme Court Rule

22 provides that a party may renew its request to another Justice on the Court.<sup>155</sup> Sometimes Justices refer emergency motions to the entire court.

It is not clear how the Court's operations or relations among the Justices would be affected by an internal process for review of recusal decisions. There has been at least one occasion in the Court's history where disagreement over recusal has led to a significant feud.<sup>156</sup> Because recusal can be case dispositive, were the ultimate decision on recusal to rest with the entire Court, a decision by the Court to force a Justice to recuse may lead to accusations of improper purpose. These issues may not be insuperable; some state supreme courts have a referral process for recusal decisions and the process appears to work without undue friction or burden in that setting.<sup>157</sup> The practice of comparable high courts in other countries, such as those in Canada and the UK, also may be instructive. It appears that neither Canada nor the UK has a referral practice for recusal on its highest court and that high court justices decide recusal on their own without further review, as in the U.S. Supreme Court. The views of the Justices would be particularly helpful in any further analysis.

### 3. Reform Financial Recusal Laws

Context suggests that a significant number of Supreme Court recusals are due to a Justice's financial conflict. Indeed, a study of recusals at the certiorari stage in Terms 2003-2013 revealed that there was at least one recusal in 10% of certiorari petitions involving a Forbes 100 company.<sup>158</sup> What makes these numbers surprising is that the Justices (along with their spouses and dependent children) are legally enabled to divest themselves of any stock that is causing a conflict without incurring capital gains tax.<sup>159</sup> It may be that there is something about the wording or operation of the relevant statute, 26 U.S.C. § 1043, that limits its reach or effectiveness.<sup>160</sup> If so, the Court might speak to this issue so that the statute might be improved.

Given the significant number of financial recusals, some have suggested reforms that may reduce the number of recusals due to financial conflicts. For example, Congress could act to prohibit Justices, their spouses, and any dependent children from owning individual shares in publicly traded companies, or Congress could require divestment when a conflict arises.<sup>161</sup> Both reforms would reduce financial conflicts significantly (and eliminate conflicts arising from stock ownership).

The Commission notes a building consensus among observers that no Justices or their spouses and dependent children should own or continue to own individual publicly traded securities.<sup>162</sup>

### III. Courtroom Transparency

Due to the COVID-19 pandemic, the Supreme Court conducted oral arguments over teleconference beginning in the 2020 Term. For the first time, oral arguments were routinely livestreamed, so the public could listen in from anywhere an internet connection was available. The Court has decided to continue livestreaming oral arguments for the first few months of the current Term (through December 2021), although it has not yet announced whether this practice would continue beyond that period. The present experiment in simultaneous audio has added additional fuel to a longstanding debate over whether there ought to be cameras in the Supreme Court's courtroom, which is usually capable of seating only around 50 members of the general public at a time.

In many respects, the work of the Court has become more accessible over the past few decades. The Court's opinions are available online for anyone to read or download, as are its orders, including decisions on petitions for certiorari. Even before arguments were livestreamed, recordings could be accessed after the fact in most modern cases. Still, the Court has never made the leap to allowing video streaming or video recording of its proceedings.

Proponents of cameras in the courtroom emphasize the potential educational, historical, and civic benefits of being able to see the Justices at work. Congress has introduced bills calling for cameras. Numerous members of the media and interested members of the public also urge video coverage. Moreover, lower federal courts and state courts have experimented with cameras, and scholars and judges have documented the results of those experiments.<sup>163</sup>

However, several Justices have made clear that they disfavor video recording and streaming of the Court's proceedings.<sup>164</sup> They and other opponents of cameras raise concerns that being on camera may lead to grandstanding by attorneys or even by the Justices, that the nature of the discussion may become more scripted and less useful, and that video clips of the Court may be taken out of context and used to mislead the public.

As an alternative to cameras in the courtroom, the Court could continue its current practice of livestreaming audio of oral arguments. Prior to the pandemic, attendance at the courtroom was determined on a first-come, first-served basis, and important cases often attracted long lines and large crowds.<sup>165</sup> Critics have documented the unfortunate practice of paid line-standers, a problem the Court itself partially addressed in advance of one especially high-profile case.<sup>166</sup> Livestreamed audio is far more accessible; one does not need to be in Washington, D.C., to listen to arguments, and attendance is not limited by seats available.

Livestreamed audio also gives the American public real-time access to important events in the Supreme Court's courtroom. This may be practically important in those few cases where the oral argument itself may have significant immediate effects, for example on public markets. In addition to hearing arguments, it could also be meaningful for members of the public to hear opinion announcements from the Justices themselves in real time.

Although livestreaming of the arguments prevents the Court from fixing minor mistakes that may occur during oral argument, the past two Terms indicate that this problem is minor. Livestreamed audio has led to few, if any, hiccups; any such technical problems were related to the telephonic format of the arguments during the pandemic. There is also some concern that observers in the courtroom might attempt to use the fact of livestreaming to disrupt the proceedings. A short delay in transmission to allow livestreaming to be halted during any outburst could prevent any such disruption.

Given the Court's longstanding opposition to cameras, a continuation of near-simultaneous audio would be a step toward enabling the media and interested members of the bar and the public to better follow the work of the Court. Perhaps further experience with simultaneous audio will encourage the Court to try cameras as well.



## Endnotes: Chapter 5

<sup>1</sup> By transparency, we do not mean opening the Court’s internal deliberations to the public but rather increasing the consistency of reason-giving in important cases and easing public access to the Court’s already public activity.

<sup>2</sup> *Orders of the Court - Term Year 2020*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/orders/ordersofthecourt/20> (last accessed Sept. 18, 2021). The Court releases a list of orders each Monday that it sits and issues “miscellaneous” orders in individual cases “at any time.” *Id.* These orders are catalogued by date of issuance on the Court’s website and later consolidated into a set of Orders Lists published in the bound volumes of the *United States Reports*, in a section following the Opinions of the Court. The *United States Reports* are generally printed multiple years after a case is resolved. See Richard J. Lazarus, *The (Non)finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 543 (2014) (noting a five-year delay). In the interim, the Court’s orders and its opinions related to orders can be found in various places on the Court’s website, including: on a page entitled “Opinions Relating to Orders;” at the end of the regular or miscellaneous “Orders List” catalogued online; and in the preliminary (and eventually final) version of the *United States Reports*, digital images of which the Court makes available for free online. Finally, the Court’s orders (but not the opinions relating to those orders) are separately printed in the Journal of the Supreme Court, a bound volume printed at the conclusion of each Term that contains “the official minutes of the Court,” digital images of which are also made available online. *Journal*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/orders/journal.aspx> (last accessed Sept. 18, 2021).

<sup>3</sup> The Court also sometimes issues per curiam decisions finally resolving a given case. These per curiam opinions appear on the Court’s web page and in the *United States Reports* alongside other “Opinions of the Court” issued via the merits docket, even though they are often decided summarily without the robust procedures normally associated with merits cases. In addition, the Court sometimes resolves a pending case by granting a petition for certiorari, vacating the opinion below, and remanding for further proceedings (typically with brief instructions, such as to consider a recently issued opinion of the Court). These summary dispositions, known colloquially as “GVRs,” for grant, vacate, and remand, appear on the Orders List. Individual Justices also occasionally issue “in chambers” opinions in their capacities as Circuit Justice; these opinions are posted on the Court’s web page and eventually published in the *United States Reports*.

<sup>4</sup> See, e.g., Albert M. Sacks, *The Supreme Court, 1953 Term - Foreword*, 68 HARV. L. REV. 96, 103 (1954); Ernest J. Brown, *The Supreme Court, 1957 Term - Foreword: Process of Law*, 72 HARV. L. REV. 77 (1957); Henry M. Hart, Jr., *The Supreme Court, 1958 Term - Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 89 & n.13 (1959); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3-4 (1957). Many of these criticisms focused on summary dispositions occurring at a time when the Court’s docket was more crowded with mandatory appeals (which have largely been eliminated from its present, almost entirely discretionary merits docket). See, e.g., *Presidential Commission on the Supreme Court of the United States 20* (June 30, 2021) (written testimony of Judith Resnik, Yale Law School) [hereinafter Resnik Testimony] (noting that between 2018 and 2021, while certiorari was granted in 217 cases, only 4 cases arose from the Court’s mandatory appellate jurisdiction), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Resnik-PDF-Presidential-Commission.pdf>.

<sup>5</sup> See, e.g., William O. Douglas, *The Supreme Court and its Caseload*, 45 CORNELL L.Q. 40 (1960); Eugene Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742 (1964).

<sup>6</sup> See, e.g., Aaron-Andrew P. Bruhl, *The Supreme Court’s Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711 (2009); Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197 (2012).

<sup>7</sup> See William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015); see also *Presidential Commission on the Supreme Court of the United States* 1 n.1 (June 30, 2021) (written testimony of Samuel L. Bray, Notre Dame Law School) [hereinafter Bray Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bray-Statement-for-Presidential-Commission-on-the-Supreme-Court-2021.pdf> (defining the shadow docket as “the portion of the orders list that is substantive, not including the mere grant or denial of a petition for a writ of certiorari”).

<sup>8</sup> See *Presidential Commission on the Supreme Court of the United States* 4-5 (June 30, 2021) (testimony of Stephen I. Vladeck, University of Texas School of Law) [hereinafter Vladeck Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Vladeck-SCOTUS-Commission-Testimony-06-30-2021.pdf> (presenting evidence of an increase in emergency orders in important cases, while also acknowledging that “[t]here’s no perfect way to measure the rise of the shadow docket” and that “it’s hard to separate out the significant rulings (which are always a relatively small percentage of the total number of orders the Court hands down) from the insignificant ones”). Professor Vladeck documents a general upward trend, from 2005 through 2020, in the number of orders that either grant or vacate a stay or injunction—“orders that, through whatever mechanism, change the status quo” set by the lower courts. *Id.* Although this measure omits rulings in which the Court *denied* an application to grant or vacate a stay or injunction, such orders can also be of great consequence. Professor Vladeck also presents indicators of shifts in the qualitative importance of the Court’s emergency orders in recent years. *Id.* at 6-10.

<sup>9</sup> The leading critic on these issues is Professor Stephen Vladeck. See, e.g., *The Supreme Court’s Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 117th Cong. (2021) (statement of Stephen I. Vladeck, University of Texas School of Law), <https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-VladeckS-20210218-U1.pdf>; Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019) [hereinafter Vladeck, *The Solicitor General and the Shadow Docket*]; Vladeck Testimony, *supra* note 8. For other critics of the Court’s use of emergency rulings, see, for example, *The Supreme Court’s Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 117th Cong. (2021) (statement of Loren L. AliKhan, Solicitor General, District of Columbia) [hereinafter AliKhan House Testimony], <https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-AliKhanL-20210218-U1.pdf>; Mark Walsh, *The Supreme Court’s ‘Shadow Docket’ Is Drawing Increasing Scrutiny*, A.B.A. J. (Aug. 20, 2020, 9:20 AM), <https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny>. Although emergency orders—the focus of this section—have received the most attention in recent debates, commentators also continue to point to concerns about the Court’s use of summary reversals. See, e.g., *Presidential Commission on the Supreme Court of the United States* 11-12 (June 25, 2021) (testimony of Michael R. Dreeben, O’Melveny & Myers LLP), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Dreeben-Statement-for-the-Presidential-Commission-on-the-Supreme-Court-6.25.2021.pdf>; Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691 (2020); Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591 (2016); see also Barry Friedman & Maria Ponomarenko, *To Rein in Abuse by the Police, Lawmakers Must Do What the Supreme Court Will Not*, N.Y. TIMES (Oct. 27, 2021) (critiquing recent summary reversals and arguing that the decisions escaped media attention “because the court handled them on its shadow docket”).

<sup>10</sup> On September 30, 2021, Justice Alito gave a public address on “The Emergency Docket” at Notre Dame Law School in which he responded to many of the critiques of the Court’s recent orders. The address was livestreamed, but a recording is not publicly available. See <https://events.nd.edu/events/2021/09/30/justice-samuel-alito-the-emergency-docket/>. See also, e.g., *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) (contending that the ruling “illustrates just how far the Court’s ‘shadow docket’ decisions may depart from the usual principles of appellate process,” and “is emblematic of too much of this Court’s shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend”); Adam Liptak, *Justice Breyer on Retirement and the Role of Politics at the Supreme Court*, N.Y. TIMES (Aug. 27, 2021), <https://www.nytimes.com/2021/08/27/us/politics/justice-breyer-supreme-court-retirement.html> (quoting Justice Breyer in an interview: “I can’t say never decide a shadow-docket thing,” he said. “Not never. But be careful. And I’ve said that in print. I’ll probably say it more.”).

- <sup>11</sup> This section is not meant to exhaustively engage every criticism or defense advanced about the Court’s procedures in its issuance of emergency orders. We have focused on especially salient critiques—and responses to those critiques—that have been developed by scholars and practitioners, and more recently the Justices themselves, over the past few years.
- <sup>12</sup> *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494 (2021).
- <sup>13</sup> *E.g.*, *Biden v. Texas*, No. 21A21, slip op. at 1 (U.S. Aug. 24, 2021) (mem.); *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (mem.).
- <sup>14</sup> *E.g.*, *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.).
- <sup>15</sup> *Alabama Ass’n of Realtors v. Dep’t of Health & Human Servs.*, No. 21A23, slip op. at 1 (U.S. Aug. 26, 2021) (per curiam); *Alabama Ass’n of Realtors v. Dep’t of Health & Human Servs.*, No. 20A169, slip op. at 1 (U.S. June 29, 2021) (mem.); *Chrysfafis v. Marks*, No. 21A8, slip op. at 1 (U.S. Aug. 12, 2021) (mem.).
- <sup>16</sup> 141 S. Ct. 2494 (2021).
- <sup>17</sup> *See* *Ross v. Nat’l Urban League*, 141 S. Ct. 18 (2020) (mem.).
- <sup>18</sup> *See* *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (mem.); *Andino v. Middleton*, 141 S. Ct. 9 (2020) (mem.); *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205 (2020) (mem.).
- <sup>19</sup> *See* *Barnes v. Ahlman*, 140 S. Ct. 2620 (2020) (mem.).
- <sup>20</sup> *See, e.g.*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam).
- <sup>21</sup> *Presidential Commission on the Supreme Court of the United States* 13 (July 20, 2021) (written testimony of Sharon McGowan, Lambda Legal), <https://www.whitehouse.gov/wp-content/uploads/2021/07/McGowan-Testimony.pdf> (describing how although the Court later denied cert in a Virginia school board’s effort to reverse a lower court injunction allowing a transgender student to use the boys’ bathroom, the Supreme Court’s initial stay in the case, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (mem.), had the effect of barring Gavin Grimm from “using the boys’ restroom along with all the other boys throughout his last year of high school”).
- <sup>22</sup> Vladeck Testimony, *supra* note 8, at 7.
- <sup>23</sup> Steve Vladeck (@steve\_vladeck), TWITTER (Sept. 5, 2021 1:27 PM), [https://mobile.twitter.com/steve\\_vladeck/status/1434568812045742086](https://mobile.twitter.com/steve_vladeck/status/1434568812045742086).
- <sup>24</sup> In the 2020 Term, the Court decided fewer than 70 merits cases, below its average over the past 15 years. *See* Kalvis Golde, *In Barrett’s First Term, Conservative Majority Is Dominant but Divided*, SCOTUSBLOG (July 2, 2021, 6:37 PM), <https://www.scotusblog.com/2021/07/in-barretts-first-term-conservative-majority-is-dominant-but-divided>; SCOTUSBLOG, STAT PACK FOR THE SUPREME COURT’S 2020-21 TERM 18 (2021), <https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-07.02.2021.pdf>. The merits docket for the 2019 Term contained the lowest number of cases since the Civil War. 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>; *see* SCOTUSBLOG, FINAL STAT PACK FOR OCTOBER TERM 2019, at 1 (2020), <https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf>.
- <sup>25</sup> Vladeck Testimony, *supra* note 8, at 7-8.
- <sup>26</sup> Bray Testimony, *supra* note 7, at 5-7 (discussing such injunctions and their relationship to the shadow docket).
- <sup>27</sup> *See* Alito, “The Emergency Docket,” *supra* note 10.
- <sup>28</sup> As an example of the latter point, Professor Vladeck argues that a majority of the Justices believe that state and federal governments are irreparably harmed when their actions are enjoined by a lower court and suggests that this is a relatively new development. Vladeck Testimony, *supra* note 8, at 14.

- <sup>29</sup> In *Whole Woman’s Health*, for example, abortion providers and other groups challenging the Texas law applied to the Court for emergency relief after a federal appeals court issued an administrative stay halting proceedings in the district court. Challengers asked the Court to issue injunctive relief or, in the alternative, to lift the appellate court’s stay. Given that the law was set to go into effect the following day, the Court faced great pressure to act quickly—and its decision could hardly have failed to be important and controversial.
- <sup>30</sup> See Alito, “The Emergency Docket,” *supra* note 10. See also Mark Rienzi, *The Supreme Court’s “Shadow” Docket—A Response to Professor Vladeck*, NAT’L REV. (Mar. 16, 2021, 1:30 PM), <https://www.nationalreview.com/bench-memos/the-supreme-courts-shadow-docket-a-response-to-professor-vladeck>.
- <sup>31</sup> See, e.g., Vladeck Testimony, *supra* note 8, at 4-6 (focusing on evidence of an increase in “cases in which the Justices are using the shadow docket to change the status quo—where the Court’s summary action disrupts what was previously true under rulings by lower courts”); *Id.* at 14-15 (critiquing the Court’s apparent readiness to intervene on the ground that “when *any* government action is enjoined by a lower court, the government is irreparably harmed, and the equities weigh in favor of emergency relief *no matter* the consequences to those who might be injured by allowing the policy to remain in effect,” as well as the Court’s apparent willingness to grant emergency relief to protect “newly minted rights”).
- <sup>32</sup> *Id.* at 6 (describing the rise of “cases in which the Justices are using the shadow docket to change the status quo” and arguing that “part of the significance of the shadow docket of late has been in how often the Justices are using it to disrupt the state of affairs until a case reaches the Court on the merits (which, increasingly, may be never”).
- <sup>33</sup> See, e.g., Rienzi, *The Supreme Court’s “Shadow” Docket*, *supra* note 30. For a response, see *Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket*, Hearing Before the Senate Committee on the Judiciary 20-21 (Sept. 29, 2021) (written testimony of Stephen I. Vladeck, University of Texas School of Law), <https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf> [hereinafter Vladeck Senate Testimony]. See also Charlie Savage, *Texas Abortion Case Highlights Concern Over Supreme Court’s ‘Shadow Docket,’* N.Y. Times (Sept. 2, 2021) (“I think the real concern [of critics] is that the court has been reaching out aggressively in some of the immigration and Covid cases, and [in *Whole Woman’s Health*] it is not. . . . And why is it when it’s a Covid restriction in church service, the court rushes in, in the middle of the night, to stop the government, but when it’s an anti-abortion law, the court lets it go?” (quoting Professor Will Baude)).
- <sup>34</sup> Bray Testimony, *supra* note 7, at 9.
- <sup>35</sup> Compare Presidential Commission on the Supreme Court of the United States 5:19:47 (June 30, 2021) (oral testimony of Samuel L. Bray) [hereinafter Bray Oral Testimony], <https://www.whitehouse.gov/pccscotus/public-meetings/june-30-2021> (defining “status quo” as used in the testimony of Samuel L. Bray) with *Id.* at 50:20:12 (defining “status quo” as used in the testimony of Stephen I. Vladeck).
- <sup>36</sup> Bray Testimony, *supra* note 7, at 9 (“I recognize that these judgments inevitably have a normative tinge. I know that it is a choice to see the national injunction as the disruptive force, not the executive policy or rule that prompted the national injunction. I know it is a choice to see the state public health measures as the disruptive force, not the worship services that ran up against the public health measures.”).
- <sup>37</sup> See, e.g., Vladeck Testimony, *supra* note 8, at 4 (describing “orders that . . . change the status quo” as those that “stay[] a lower court decision and/or mandate pending appeal,” “vacat[e] a stay . . . imposed by a lower court,” “grant[] an emergency writ of injunction pending appeal,” or “vacat[e] a lower court’s grant of an emergency injunction”).
- <sup>38</sup> See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam) (issuing a writ of injunction against enforcement of California’s pandemic-based limits on in-home gatherings); *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (staying a lower court order lifting a ban on Alabama counties from offering curbside voting in light of the COVID-19 pandemic); *Barnes v. Ahlman*, 140 S. Ct. 2620 (2020) (mem.) (staying a lower court preliminary injunction requiring implementation of safety measures to protect inmates during the COVID-19 pandemic).
- <sup>39</sup> See, e.g., *Alabama Ass’n of Realtors v. Dep’t of Health & Human Servs.*, No. 21A23, slip op. at 8 (U.S. Aug. 26, 2021) (Breyer, J., dissenting) (“We should not set aside the CDC’s eviction moratorium in this summary

proceeding.”); Bray Oral Testimony, *supra* note 35 (defining status quo as “the last peaceable moment” that existed prior to a disruption, and explaining that in a case in which a lower court enters an injunction blocking a new executive policy, “the disruption is coming from the lower courts usually”).

- <sup>40</sup> *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2496 (Roberts, C.J., dissenting) (emphasis added).
- <sup>41</sup> For example, Justice Barrett recently denied a request for emergency relief concerning Indiana University’s vaccine requirement. The denial is noted on the Court’s docket without any accompanying explanation. *See* *Klaassen v. Trustees of Indiana University*, No. 21A15, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a15.html>; Amy Howe, *Barrett leaves Indiana University’s vaccine mandate in place*, SCOTUSblog (Aug. 12, 2021, 9:40 PM), <https://www.scotusblog.com/2021/08/barrett-leaves-indiana-universitys-vaccine-mandate-in-place/>.
- <sup>42</sup> As an example, commentators cite the Court’s decisions in a series of cases concerning the rights of people facing execution to have a religious advisor of their chosen spiritual denomination present in the execution chamber at the time of their death. *See* *Dunn v. Smith*, 141 S. Ct. 725 (2021) (mem.); *Gutierrez v. Saenz*, 141 S. Ct. 127 (2020) (mem.); *Murphy v. Collier*, 139 S. Ct. 1475 (2019) (mem.); *Dunn v. Ray*, 139 S. Ct. 661 (2019) (mem.). To some observers, the Court’s rulings suggest that some of the Justices’ understanding of the governing legal principles may have shifted across the four cases, but in the absence of majority opinions speaking for “the Court” and information about how each Justice voted in each case, the answer is not clear. *See* Vladeck Testimony, *supra* note 8, at 8-9 & 18 (discussing the lack of written explanation for the Court, as well as the lack of disclosure of certain Justices’ votes, in the emergency orders in the religious-adviser capital cases).
- <sup>43</sup> *See* Vladeck, *The Solicitor General and the Shadow Docket*, *supra* note 9, at 131; Vladeck Testimony, *supra* note 8, at 14 (citing the Court’s decision in *South Bay United Pentecostal Church v. Newsom (South Bay II)*, 141 S. Ct. 716 (2021) (mem), and emphasizing that none of the four separate opinions issued by Justices who supported the order “purported to apply the four-factor test the Court traditionally follows when considering whether to grant an injunction”). For some of the recent articulations of the standard, which may vary by context, including procedural posture, see, e.g., *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (“To prevail in an application for a stay or an injunction, an applicant must carry the burden of making a strong showing that it is likely to succeed on the merits, that it will be irreparably injured absent a stay, that the balance of equities favors it, and that a stay is consistent with the public interest.” (internal quotation marks omitted)); *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (“To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.”); *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citing the factors as “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies”). *Cf.* *John Does 1-3 v. Mills*, No. 21A90, slip op. at 1 (U.S. Oct. 29, 2021) (Barrett, J., concurring) (“When this Court is asked to grant extraordinary relief, it considers, among other things, whether the applicant is ‘likely to succeed on the merits’ . . . I understand this factor to encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case . . . Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without the benefit of full briefing and argument.”).
- <sup>44</sup> *See, e.g.,* Steve Vladeck, *The Supreme Court Doesn’t Just Abuse Its Shadow Docket. It Does So Inconsistently.*, WASH. POST (Sept. 3, 2021, 10:43 AM), available at <https://www.washingtonpost.com/outlook/2021/09/03/shadow-docket-elena-kagan-abortion/> (contrasting the Court’s refusal to issue relief in *Whole Woman’s Health*, the Texas abortion case, on grounds of legal uncertainty, with cases in which the Court “showed no compunction about [making new law] where alleged infringements on religion were at issue”); Lee Kovarsky, *Abortion, the Death Penalty, and the Shadow Docket*, SCOTUSBLOG (Sept. 6, 2021, 12:03 PM), <https://www.scotusblog.com/2021/09/abortion-the-death-penalty-and-the-shadow-docket/> (contrasting *Whole Woman’s Health* with cases involving federal executions); *see also* *Alabama Ass’n of Realtors v. Dep’t of Health & Human Servs.*, No. 21A23, slip op. at 1-2 (U.S. Aug. 26, 2021) (Breyer, J.,

dissenting) (criticizing the majority for vacating a stay entered by a lower court when the agency order was not “demonstrably wrong” (citation omitted)); *Wheaton College v. Burwell*, 573 U.S. 958, 965-68 (2014) (Sotomayor, J., dissenting) (objecting to the majority’s decision to issue an emergency injunction where the legal rights at issue were not “indisputably clear,” as required by precedent interpreting the All Writs Act, 28 U.S.C. § 1651 (citing *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1303 (1993))).

<sup>45</sup> As one Commission witness put it, “[i]t is common in our legal system for preliminary orders, rather than merits decisions, to have different norms of justification and attribution.” Bray Testimony, *supra* note 7, at 13. *See also* Alito, “The Emergency Docket,” *supra* note 10.

<sup>46</sup> As Professor Michael Morley argued in congressional testimony, “it may often be much easier for Justices to agree on an ultimate outcome than to craft an opinion with detailed reasoning . . . .” *The Supreme Court’s Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 117th Cong. 3 (2021) (statement of Michael T. Morley, Florida State University College of Law) [hereinafter Morley House Testimony], <https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-MorleyM-20210218-U1.pdf>.

<sup>47</sup> *See, e.g., Presidential Commission on the Supreme Court of the United States* 18 (July 16, 2021) (written testimony of Kenneth Geller, Mayer Brown LLP, & Maureen Mahoney, Latham & Watkins, LLP) [hereinafter Geller & Mahoney Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Geller-Mahoney-Testimony.pdf> (arguing that “requiring the Court to announce legal conclusions may appear to commit the Justices to particular views before merits briefing—which itself is a criticism of some emergency orders”); Bray Testimony, *supra* note 7, at 14 (discussing potential psychological precommitment effect).

<sup>48</sup> *See, e.g., Trevor N. McFadden & Vetan Kapoor, The Precedential Effects of the Supreme Court’s Emergency Stays*, 44 HARV. J.L. & PUB. POL’Y 827, 830 (2021); AliKhan House Testimony, *supra* note 9, at 12-13.

<sup>49</sup> *See* Alito, “The Emergency Docket,” *supra* note 10.

<sup>50</sup> There are other examples. One witness testified that the U.S. Court of Appeals for the Fourth Circuit grappled with the same problem in *CASA de Md., Inc. v. Trump*, 971 F.3d 220 (4th Cir. 2020). *See* Vladeck Testimony, *supra* note 8, at 10 n.30; *see also* Baude, *Foreword: The Supreme Court’s Shadow Docket*, *supra* note 7, at 13 (describing the Seventh Circuit’s effort in *Frank v. Walker*, 769 F.3d 494 (7th Cir. 2014), to discern the meaning of the Supreme Court’s stays in the earlier marriage equality cases). *Cf. Alabama Ass’n of Realtors v. Dep’t of Health & Human Servs.*, No. 21A23, slip op. at 4 (U.S. Aug. 26, 2021) (per curiam) (explaining, in the second of two eviction moratorium cases, that the district court concluded that “the Government was unlikely to succeed on the merits, given the four votes to vacate the stay in this Court and Justice Kavanaugh’s concurring opinion” in the first case); *Id.* at 5 (Breyer, J., dissenting) (“Certainly this Court did not resolve the question by denying applicants’ last emergency motion, whatever one Justice might have said in a concurrence.”).

<sup>51</sup> 141 S. Ct. 1460, 1460 (2021).

<sup>52</sup> Vladeck Testimony, *supra* note 8, at 14.

<sup>53</sup> *See, e.g.,* Bray Testimony, *supra* note 7, at 7-9, 18 (analogizing emergency rulings to preliminary injunctions and arguing that “[i]f the shadow docket works (and fails to work) in the same way as the preliminary injunction, then we want to tamp down the precedential effects, not ramp them up”).

<sup>54</sup> *See, e.g.,* Vladeck Testimony, *supra* note 8, at 22-26.

<sup>55</sup> *Id.*

<sup>56</sup> One defender of the Court’s use of emergency orders explained that “there does not appear to be a need for either vote tallies, or the identities of the Justices who voted to grant or deny a petition, to be withheld from the public.” Morley House Testimony, *supra* note 46, at 3.

<sup>57</sup> *See* Vladeck Senate Testimony, *supra* note 33, at 27 (critiquing the Court’s order in *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494 (2021), which articulated the standard four-part test for relief and concluded that the applicants failed to “me[e]t their burden,” but did not explain how the Court weighed the four factors (or whether it deemed some factors irrelevant in the absence of a sufficient showing on the merits)). For a response, *see*

*Jurisdiction and the Supreme Court's Orders Docket*, U.S. Senate Committee on the Judiciary (Sept. 29, 2021) (written testimony of Jennifer L. Mascott).

- <sup>58</sup> See *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) (faulting the majority for “barely bother[ing] to explain its conclusion—that a challenge to an obviously unconstitutional abortion regulation backed by a wholly unprecedented enforcement scheme is unlikely to prevail”).
- <sup>59</sup> *Alabama Ass’n of Realtors v. Dep’t of Health & Human Servs.*, No. 21A23, slip op. (U.S. Aug. 26, 2021) (per curiam).
- <sup>60</sup> *United States v. Texas*, No. 21A85, slip op. (U.S. Oct. 22, 2021), [https://www.supremecourt.gov/opinions/21pdf/21a85\\_5h25.pdf](https://www.supremecourt.gov/opinions/21pdf/21a85_5h25.pdf) (treating application for emergency relief as a petition for a writ of certiorari before judgment and granting the petition with an expedited schedule for briefing and oral argument); *Whole Woman's Health v. Jackson*, No. 21-463, 2021 U.S. LEXIS 5326 (Oct. 22, 2021), [https://www.supremecourt.gov/orders/courtorders/102221zr\\_986b.pdf](https://www.supremecourt.gov/orders/courtorders/102221zr_986b.pdf) (granting petition for certiorari before judgment with an expedited schedule for briefing and oral argument).
- <sup>61</sup> *Ramirez v. Collier*, No. 21-5592 (21A33), 2021 U.S. LEXIS 3681 (Sept. 8, 2021), [https://www.supremecourt.gov/orders/courtorders/090821zr\\_n7ip.pdf](https://www.supremecourt.gov/orders/courtorders/090821zr_n7ip.pdf).
- <sup>62</sup> *Whole Woman's Health*, 141 S. Ct., at 2495. Disavowing a decision on the merits, while potentially deflecting mistaken treatment of an emergency ruling as precedent, might not dull its practical effects. See *United States v. Texas*, slip op. at 2 (Sotomayor, J., concurring in part and dissenting in part) (“The promise of future adjudication offers cold comfort, however, for Texas women seeking abortion care, who are entitled to relief now. These women will suffer personal harm from delaying their medical care, and as their pregnancies progress, they may even be unable to obtain abortion care altogether.”).
- <sup>63</sup> *Whole Woman's Health*, 141 S. Ct., at 2496 (Roberts, C.J., dissenting).
- <sup>64</sup> *Bray Testimony*, *supra* note 7, at 18.
- <sup>65</sup> The Commission has focused primarily on the issue of emergency orders as “vertical precedents” that are binding on lower courts. Significant complications are raised by the questions of whether, when, and how emergency orders should operate as “horizontal precedents” that bind the Court itself in later cases. The Court might, for example, treat its statements about the standards for review in emergency rulings as carrying some precedential weight in later cases even if it does not treat the more substantive elements of its emergency rulings, such as predictions about likelihood of success on the merits, as precedential. One’s views on these matters might inform the questions of whether and on what issues the Court should be “consistent” across the run of its emergency rulings, and vice versa.
- <sup>66</sup> *Geller & Mahoney Testimony*, *supra* note 47, at 18-19 (detailing such existing principles but noting that “the Court may not always garner universal acclaim—even among the Justices themselves—for its adherence to these settled standards”).
- <sup>67</sup> *Id.* at 19 (citing *Glossip v. Gross*, 576 U.S. 863, 882 (2015) as stating that Supreme Court does not review “concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error”).
- <sup>68</sup> *Id.* at 19. The testimony points to *Doe v. Gonzales*, 546 U.S. 1301, 1303 (2005) (Ginsburg, J., in chambers), as an endorsement of the expedited-schedule norm. *Id.*
- <sup>69</sup> Professor Vladeck, for example, has proposed that “[i]n any cases in which any (state or federal) government action is enjoined by a lower federal court, speed up the appellate timelines so that appeals of lower court rulings receive plenary appellate review much faster — by shortening the time for filing an appeal; by mandating aggressive briefing schedules; and by strongly encouraging courts to give such cases all due priority.” Vladeck Testimony, *supra* note 8, at 24. Although Professor Vladeck is suggesting this as a reform for Congress to enact, similar acceleration may be accomplished to some degree by the courts themselves.
- <sup>70</sup> *Bray Testimony*, *supra* note 7, at 18 (endorsing the Injunctive Authority Clarification Act of 2021, H.R. 43, 117th Cong. (2021)); see also *Morley House Testimony*, *supra* note 46, at 7 (arguing that if nationwide injunctions were

“curtailed—whether through a clear Supreme Court precedent directly on point, a federal statute, or an amendment to the Federal Rules of Civil Procedure—at least one of the contributing factors to the recent growth of the shadow docket w[ould] be removed”).

<sup>71</sup> In the specific context of “nationwide” injunctions, as relevant to emergency orders, one limitation is that such restrictions would address only a subset of the orders that have been of concern. *See* Vladeck Testimony, *supra* note 8, at 11-12 (reporting that cases involving the federal government—and, thus, the potential for a nationwide injunction—account for “only one modest slice of the shadow docket,” and that “even within the DOJ slice, less than half of the Trump administration’s applications for emergency relief involved nationwide injunctions” (emphasis omitted)).

<sup>72</sup> *Id.* at 24.

<sup>73</sup> There is a debate over the extent to which litigation commenced as execution dates approach is an example of strategic gamesmanship, versus a more benign outgrowth of the nature of death penalty law and litigation itself. Several Justices clearly view it as the former. *See, e.g.,* *Murphy v. Collier*, 139 S. Ct. 1475, 1482 (2019) (mem.) (Alito, J., dissenting) (“This Court receives an application to stay virtually every execution; these applications are almost all filed on or shortly before the scheduled execution date; and in the great majority of cases, no good reason for the late filing is apparent.”); *Price v. Dunn*, 139 S. Ct. 1533, 1538 (2019) (mem.) (Thomas, J., concurring) (“A stay [when] the petitioner inexcusably filed additional evidence hours before his scheduled execution after delaying bringing his challenge in the first place — only encourages the proliferation of dilatory litigation strategies that we have recently and repeatedly sought to discourage.”). On the other hand, Professor Lee Kovarsky observes that litigation in the lead up to an execution is a natural consequence of two other factors. First, the Court’s own doctrine creates a set of “intrinsically delayed claims,” such as challenges to a person’s competency to be executed or to the method of execution, for which “the nature of the constitutional challenge itself thwarts early-phase litigation” because the claims are unripe for adjudication until an execution date is imminent. Lee Kovarsky, *Delay in the Shadow of Death*, 95 N.Y.U. L. REV. 1319, 1322-23 (2020) (citing, *inter alia*, *Panetti v. Quarterman*, 551 U.S. 930, 946 (2007)); *cf. Glossip v. Gross*, 576 U.S. 863, 923-24 (2015) (Breyer, J., dissenting) (“[D]elay is in part a problem that the Constitution’s own demands create.”). Second, Kovarsky observes that a lack of resources available to capital defendants forces a small number of lawyers to triage their representation, such that litigation is often “undertaken after the state sets an execution date—because that is the first time that many capital prisoners have the legal representation necessary to enforce certain rights.” Kovarsky, *supra*, at 1321. *See generally Id.* at 1356-85.

<sup>74</sup> *See* Adam Liptak, *To Beat the Execution Clock, the Justices Prepare Early*, N.Y. TIMES, Sept. 4, 2012, at A19.

<sup>75</sup> The clerk who handles all emergency applications at the Court is sometimes referred to as the “death clerk” due to the salience of this category of cases. *Id.* This category is also procedurally distinctive in that many cases involve habeas corpus, “a thorny and evolving area of the law governed by intricate rules, multi-faceted statutes, and a complex (and still developing) jurisprudence.” *Presidential Commission on the Supreme Court of the United States* (July 26, 2021) (written testimony of Federal Capital Habeas Project) [hereinafter Federal Capital Habeas Project Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/08/Federal-Capital-Habeas-Project.pdf>.

<sup>76</sup> *See, e.g.,* Geller & Mahoney testimony, *supra* note 47, at 28 (“On balance, based on the Supreme Court’s recognition that capital cases are different and on the potential beneficial effects of a heightened standard of review on the process for consideration of applications to vacate a stay of execution, a majority of the Committee [of experienced Supreme Court practitioners] believes that proposals for heightened standards of review for such applications warrant serious consideration.”); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice”); *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (on rehearing) (Frankfurter, J., concurring) (“The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights.”).

<sup>77</sup> *Cf. Glossip*, 576 U.S. at 937 (Breyer, J., dissenting) (“[R]eview by courts at every level helps to ensure reliability; if this Court had not ordered that Anthony Ray Hinton receive further hearings in state court he may well have been executed rather than exonerated.” (citing *Hinton v. Alabama*, 571 U.S. 263 (2014))).



- <sup>78</sup> See *Presidential Commission on the Supreme Court of the United States 2* (June 25, 2021) (written testimony of Christina Swarns, Innocence Project) [hereinafter Swarns Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Swarns-Presidential-Commission-on-SCOTUS-Testimony.pdf>. Given these statistics, “the risk of convicting and executing an innocent person is real and,” the witness argued, “constitutionally unacceptable.” *Id.* See also *Glossip v. Gross*, 567 U.S. 863, 927 (2015) (Breyer, J., dissenting) (“Several inmates have come within hours or days of execution before later being exonerated.”) (citing multiple examples); Dahlia Lithwick, *Cruel but not Unusual*, SLATE (Apr. 1, 2011, 7:43 PM), <https://slate.com/news-and-politics/2011/04/connick-v-thompson-clarence-thomas-writes-one-of-the-cruellest-supreme-court-decisions-ever.html> (noting that John Thompson had seven death warrants signed, each setting an imminent date for his execution, before he was exonerated).
- <sup>79</sup> One Commission witness drew a sharp distinction between challenges to a condemned person’s conviction and arguments that the execution itself would violate the condemned person’s constitutional or statutory rights. *Presidential Commission on the Supreme Court of the United States 2* (Sept. 15, 2021) (written testimony of Hashim M. Mooppan) [hereinafter Mooppan Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/09/Hashim-Mooppan.pdf>.
- <sup>80</sup> See, e.g., *Glossip*, 576 U.S. at 876-77 (2015) (describing the standard for an Eighth Amendment method-of-execution claim).
- <sup>81</sup> See *Ford v. Wainwright*, 477 U.S. 399 (1986).
- <sup>82</sup> See *supra* note 42 (discussing religious advisor cases).
- <sup>83</sup> See, e.g., Swarns Testimony, *supra* note 78, at 1 (arguing that there “is no area of the law in which reliability, accuracy, and fairness are more critical than capital punishment”).
- <sup>84</sup> *Price v. Dunn*, 139 S. Ct. 1533, 1540 (2019) (mem.) (Thomas, J., concurring in denial of certiorari) (quoting Ivana Hrynkiw, *Execution Called Off for Christopher Price; SCOTUS Decision Allowing It Came Too Late*, ALABAMA.COM (Apr. 12, 2019, 7:03 AM), <https://www.al.com/news/birmingham/2019/04/christopher-price-set-to-be-executed-thursday-evening-for-1991-slaying-of-minister.html>). Most death sentences are never carried out. See *Glossip*, 576 U.S. at 931 (Breyer, J., dissenting) (“Of the 8,466 inmates under a death sentence at some point between 1973 and 2013, 16% were executed, 42% had their convictions or sentences overturned or commuted, and 6% died by other causes; the remainder (35%) are still on death row.”). Those that are take a very long time: for those put to death in 2014, an average of 18 years had elapsed between the imposition and the execution of sentence. See *id.* at 924-25. Most of that delay is attributable to the ordinary course of judicial review (as opposed to emergency stay applications) or to factors independent of the judicial process. See, e.g., *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1055-60 (C.D. Cal. 2014) (concluding after reviewing multiple reports on death penalty delay in California “that delay is evident at each stage of the post-conviction review process, including from the time the death sentence is issued”).
- <sup>85</sup> Mooppan Testimony, *supra* note 79, at 3 (“Especially given the lengthy delay before an execution is scheduled at all, further delaying an execution even for a limited time in these circumstances essentially undermines for that period the judgment of Congress, the Executive Branch, and the sentencing judge and jury that continued imprisonment is inadequate and only death is sufficient punishment for the most heinous of murders.”).
- <sup>86</sup> A further consequence, also noted by Justice Thomas, is that surviving relatives of the victims sometimes travel to witness the execution and may be “forced to leave without closure” after years of waiting if the execution is postponed at the last minute. *Dunn v. Price*, 139 S. Ct. 1533, 1540 (2019) (mem.).
- <sup>87</sup> See Federal Bureau of Prisons, *Historical Information: Capital Punishment*, at [https://www.bop.gov/about/history/federal\\_executions.jsp](https://www.bop.gov/about/history/federal_executions.jsp) (last accessed Oct. 3, 2021); see also Lee Kovarsky, *The Trump Executions* 10 (July 27, 2021) (U. Tex. L. Sch., Pub. L. Res. Paper), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3891784](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3891784).
- <sup>88</sup> See Death Penalty Information Center, *Execution Database*, <https://deathpenaltyinfo.org/executions/execution-database> (last accessed Oct. 3, 2021). Against this backdrop, several witnesses who shared assessments and recommendations with the Commission regarding the Court’s emergency capital orders grounded their analyses at least in part on cases from the states, including a series of recent cases from Alabama and Texas about the

presence of a religious adviser at the execution. *See* Swarns Testimony, *supra* note 78; Bray Testimony, *supra* note 7; *cf.* Mooppan Testimony, *supra* note 79, at 22 n.10.

- <sup>89</sup> Federal Capital Habeas Project Testimony, *supra* note 75; Vladeck Testimony, *supra* note 8; *see also* Kovarsky, *The Trump Executions*, *supra* note 87. The Commission also solicited and received testimony from one witness who defended the Court’s approach to the federal execution cases. *See* Mooppan Testimony, *supra* note 79.
- <sup>90</sup> For detailed (and divergent) accounts of the cases and litigation described in this section, see Kovarsky, *The Trump Executions*, *supra* note 87; Federal Capital Habeas Project Testimony, *supra* note 75; Mooppan Testimony, *supra* note 79.
- <sup>91</sup> Federal Capital Habeas Project Testimony, *supra* note 75, at 5-6 (listing legal challenges raised by federal prisoners that were unanswered by the Supreme Court); Kovarsky, *The Trump Executions*, *supra* note 87, at 27-28 (noting Eighth Amendment claims). Notably, these executions were conducted pursuant to a recently adopted execution protocol that was being implemented for the first time in the midst of a pandemic, and they implicated a set of statutes that had not previously been examined closely by the courts.
- <sup>92</sup> Federal Capital Habeas Project Testimony, *supra* note 75, at 3 & n.14.
- <sup>93</sup> Professor Kovarsky summarized these requests as follows: the Court “entertained some twenty-four requests for emergency relief, touching on all of the executions”; and while it “granted no emergency relief to prisoners,” it issued “shadow-docket orders granting emergency relief to the U.S. Solicitor General” multiple times. Kovarsky, *The Trump Executions*, *supra* note 87, at 43 & n.322 (citing *United States v. Higgs*, 141 S. Ct. 645 (2021); *Rosen v. Montgomery*, 141 S. Ct. 1232 (2021); *United States v. Montgomery*, 141 S. Ct. 1233 (2021); *Barr v. Hall*, 141 S. Ct. 869 (2020); *Barr v. Purkey*, 141 S. Ct. 196 (2020); *Barr v. Lee*, 140 S. Ct. 2590 (2020)). *See also* Federal Capital Habeas Project Testimony, *supra* note 75, n.14 (“In eight of these cases, the government filed emergency applications to vacate the stays, which the Court uniformly granted—and in seven of those eight, the Court provided no explanation at all for its orders.”).
- <sup>94</sup> *See, e.g.*, *United States v. Higgs*, 141 S. Ct. 645 (2021) (granting certiorari before judgment and vacating two lower court decisions preventing execution); *Barr v. Purkey*, 141 S. Ct. 196 (2020) (vacating the lower court’s preliminary injunction without reasoning). As one commentator observes, in the rare instance where the Court did issue a brief per curiam opinion, it appeared to change the underlying Eighth Amendment doctrine. Prior precedent issued in 2019 (via the merits docket) had held that a person challenging a method of execution under the Eighth Amendment must demonstrate that the challenged method would “superadd” pain above and beyond a “feasible and readily implemented alternative method of execution.” *Buckley v. Precythe*, 139 S. Ct. 1112, 1125 (2019). In contrast to that comparative analysis, the Court’s per curiam opinion in the federal execution case of *Barr v. Lee*, 140 S. Ct. 2590 (2020), “appeared to ground its vacatur [of the lower court’s stay] in the idea that pentobarbital-only executions [a]re *unconditionally* consistent with the Eighth Amendment,” even when compared to a proposed less painful alternative that had not previously been analyzed by the Court. Kovarsky, *The Trump Executions*, *supra* note 87, at 24 (emphasis added).
- <sup>95</sup> Ten of the orders, out of 25, were issued over dissents. Mooppan Testimony, *supra* note 79, at 11. Also, in several cases, the Court vacated lower court stays even though the courts of appeals had set expedited briefing schedules to resolve the cases promptly. *See, e.g.*, *Rosen v. Montgomery*, 141 S. Ct. 1232 (2021) (mem.) (vacating D.C. Circuit’s stay of execution pending highly expedited en banc consideration of FDPA statutory question); *Barr v. Lee*, 140 S. Ct. 2590 (2020) (per curiam) (vacating similarly expedited D.C. Circuit consideration of Eighth Amendment challenge to federal execution protocol).
- <sup>96</sup> *See generally* Mooppan Testimony, *supra* note 79, at 1-16; *see also Id.* at 12 (defending “the orders where the criticism of the Court would seem to be most relevant, because a divided Court used emergency rulings to” summarily vacate lower court stays, on the ground that “the dissenting Justices did not assert that the inmate’s claim was likely to succeed”).
- <sup>97</sup> *See* Vladeck Testimony, *supra* note 8; Federal Capital Habeas Project Testimony, *supra* note 75; *Presidential Commission on the Supreme Court of the United States* 16 (Sept. 1, 2021) (written testimony of Janai S. Nelson, NAACP Legal Defense Fund), <https://www.whitehouse.gov/wp-content/uploads/2021/09/NAACP-LDF.pdf> (“In

eight orders supported by little to no reasoning, the Court lifted lower court stays of federal executions, denying the inmates a fair opportunity to present evidence for their claims.”).

<sup>98</sup> In *United States v. Higgs*, the final case to reach the Court during the Trump administration, Justice Sotomayor argued in dissent that:

This unprecedented rush of federal executions has predictably given rise to many difficult legal disputes. . . . Throughout this expedited spree of executions, this Court has consistently rejected inmates’ credible claims for relief. The Court has even intervened to lift stays of execution that lower courts put in place, thereby ensuring those prisoners’ challenges would never receive a meaningful airing. The Court made these weighty decisions in response to emergency applications, with little opportunity for proper briefing and consideration, often in just a few short days or even hours. Very few of these decisions offered any public explanation for their rationale. This is not justice.

*Higgs*, 141 S. Ct. at 647 (Sotomayor, J., dissenting). Justice Breyer was similarly critical: “None of these legal questions is frivolous. What are courts to do when faced with legal questions of this kind? Are they simply to ignore them? Or are they, as in this case, to ‘hurry up, hurry up’? That is no solution.” *Id.* at 646 (Breyer, J., dissenting).

<sup>99</sup> *Id.* at 647 (Sotomayor, J., dissenting).

<sup>100</sup> See, e.g., Bray Testimony, *supra* note 7, at 16. Professor Bray’s point echoed others, most notably Mr. Amir Ali, who told Congress earlier this year that “When it comes to ending someone’s life, there is no do-over. And when the matter before the Court is one of life or death, the public’s interest in transparency and the need to ensure public confidence in our legal system are at their apex.” *The Supreme Court’s Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 117th Cong. 1 (2021) (statement of Amir H. Ali, Roderick & Solange MacArthur Justice Center) [hereinafter Ali House Testimony], <https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-AliA-20210218-U2.pdf>; see also Swarns Testimony, *supra* note 78; cf. Eric M. Freedman, *No Execution If Four Justices Object*, 43 HOFSTRA L. REV. 639, 652-54 (2015) (arguing that executions should be stayed whenever necessary to afford the Justices “time to think” about whether to grant certiorari in a case).

<sup>101</sup> See Bray Testimony, *supra* note 7, at 16-17; Swarns Testimony, *supra* note 78, at 5-6; see also Ali House Testimony, *supra* note 100, at 5-6.

<sup>102</sup> See Swarns Testimony, *supra* note 78, at 5-6. See also Geller & Mahoney testimony, *supra* note 47, at 28 (noting that among a committee of experienced Supreme Court practitioners, “a majority of the Committee believes that proposals for heightened standards of review for such applications warrant serious consideration,” although a “significant number of members of the Committee oppose the proposal”).

<sup>103</sup> See *Presidential Commission on the Supreme Court of the United States* 5:42:00 (June 30, 2021) (oral testimony of Stephen Vladeck, University of Texas Law School) [hereinafter Vladeck Oral Testimony], <https://www.whitehouse.gov/prescotus/public-meetings/june-30-2021> (describing an asymmetrical, statutorily imposed standard of review as “clearly constitutional”); see also Ali House Testimony, *supra* note 100, at 5-6 (proposing a statutory approach).

<sup>104</sup> Swarns Testimony *supra* note 78, at 6. See also *Id.* at 7 (“While it may be unlikely for an execution to proceed while a first-time habeas petition pends, the assurance of an automatic stay is nevertheless called for given the gravity of what is at stake.”). Ms. Swarns agreed with Justice Stevens that “granting an automatic stay of execution pending the completion of a full round of federal habeas review is consistent with the goals of the Antiterrorism and Effective Death Penalty Act and would improve the balance between finality and justice in the Court’s review of capital cases.” *Id.* See also AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, *Report on Habeas Corpus in Capital Cases*, reprinted in 45 CRIM. L. REP. 3239 (1989); *Emmett v. Kelly*, 552 U.S. 942, 943 (2007) (statement of Stevens, J., joined by Ginsburg J. respecting denial of certiorari).

<sup>105</sup> See Vladeck Oral Testimony, *supra* note 103, at 5:44:22 (proposing a statutory bar on carrying out an execution during the course of such a legal challenge to the method of execution, as well as arguing for mandatory review at the Supreme Court of such a challenge). *But see* Mooppan Testimony, *supra* note 79, at 23 (noting practical

problems with automatically allowing a full round of litigation on administration-of-execution challenges, including potential incentives for capital inmates to raise weak claims).

- <sup>106</sup> See, e.g., Mooppan Testimony, *supra* note 79, at 3 (“[W]hen a claim is not likely to succeed—especially when it does not even challenge the lawfulness of the sentence or the risk of material harm in how the sentence will be carried out—the execution should not be postponed until the claim is finally rejected due merely to the existence of doubts and questions held by some judges. Postponement for that reason alone would fail to give sufficient weight to the compelling interest of the government and the public in timely executions.”).
- <sup>107</sup> See *Presidential Commission on the Supreme Court of the United States* 5:46:40 (June 30, 2021) (oral testimony of Michael Dreeben, O’Melveny & Myers LLP), <https://www.whitehouse.gov/pscotus/public-meetings/june-30-2021> (“I think a much better approach would be that if four Justices vote to hear a case, that there either be a courtesy fifth or just a policy that four in that instance trumps five and that the Court hear the case on the merits. I think that would be more consistent with the traditional rule of four and the underlying purposes that it serves.”).
- <sup>108</sup> See Freedman, *supra* note 100, at 650 n.45 (describing proposals separately advanced over the years, most explicitly by Justices Brennan and Marshall).
- <sup>109</sup> Adam Liptak, *A Fitful Commitment to Halting Executions*, N.Y. TIMES, Dec. 13, 2016, at A13.
- <sup>110</sup> See, e.g., *Darden v. Wainwright*, 473 U.S. 928, 928–29 (1985) (mem.) (Powell, J., concurring in the granting of the application for a stay) (“I find no merit whatever in any of the claims advanced in the petition for certiorari . . . . But in view of the unusual situation in which four Justices have voted to grant certiorari . . . and in view of the fact that this is a capital case with petitioner’s life at stake . . . I feel obligated to join in granting the application for a stay.”). In practice, however, this norm has been difficult to discern and has not always been applied consistently. See Freedman, *supra* note 100; Liptak, *supra* note 109 (describing the courtesy-fifth practice as operating “in fits and starts” and as being “inconsistent”). The Court also often denies stays of execution or vacates lower court stays over four dissents. See, e.g., *Dunn v. Ray*, 139 S. Ct. 661 (2019) (mem.) (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., dissenting); see also Freedman, *supra* note 100, at 651 n.50 (recounting “dozens of cases . . . denying stays over four dissents”). Some observers contend that these votes might be consistent with the courtesy-fifth norm if the norm requires the four dissenting Justices to actually vote to grant certiorari, and not merely to vote for a stay to permit more time to consider granting certiorari. See Tom Goldstein, *Death Penalty Stays*, SCOTUSBLOG (Oct. 13, 2007, 12:06 PM), <http://www.scotusblog.com/wp/2007/10/death-penalty-stays>.
- <sup>111</sup> As one commentator notes, “the Court has chosen to reveal neither whether it is governed by a rule nor what the contents of that rule might be,” while any potential pattern one might attempt to glean from the Court’s public actions are consistent with “ad hoc negotiations by the Justices on a case-by-case basis.” Freedman, *supra* note 100, at 651.
- <sup>112</sup> *Medellin v. Texas*, 554 U.S. 759, 765-66 (2008) (Breyer, J., dissenting).
- <sup>113</sup> 139 S. Ct. 1312 (2019) (mem.). In *Dunn*, Justice Breyer’s request to consider the state’s application the following morning would have carried the execution past its warrant date. As it turns out, the Court’s majority did not vacate the lower court’s stay until after the warrant expired, which resulted in the execution being postponed. See Adam Liptak, *Dissent As Court Splits Over Execution*, N.Y. TIMES, Apr. 13, 2019, at A1.
- <sup>114</sup> *Id.* at 1313-14 (Breyer, J., dissenting). *But cf.* *Price v. Dunn*, 139 S. Ct. 1533, 1539 (2019) (mem.) (Thomas, J., concurring in denial of certiorari) (“Insofar as Justice Breyer was serious in suggesting that the Court simply ‘take no action’ on the State’s emergency motion to vacate until the following day, it should be obvious that *emergency* applications ordinarily cannot be scheduled for discussion at weekly (or sometimes more infrequent) Conferences.”).
- <sup>115</sup> As Chief Justice Roberts noted in voting for a stay as a “courtesy” when four other Justices had voted for a stay (before deciding on certiorari): “I do not believe that this application meets our ordinary criteria for a stay. This case does not merit the Court’s review: the claims set out in the application are purely fact-specific, dependent on contested interpretations of state law, insulated from our review by alternative holdings below, or some combination of the three. Four Justices have, however, voted to grant a stay. To afford them the opportunity to

more fully consider the suitability of this case for review, including these circumstances, I vote to grant the stay as a courtesy.” *Arthur v. Dunn*, 137 S. Ct. 14 (2016) (mem.) (statement of Roberts, C.J., respecting the grant of the application for stay).

<sup>116</sup> Mooppan Testimony, *supra* note 79, at 5 (“If the Supreme Court is to take such consequential action, it should be done only if a majority of the Justices vested with the judicial power of the Court actually agrees with that action.”).

<sup>117</sup> Freedman, *supra* note 100, at 652 n.55 (quoting Memorandum from Justice William H. Rehnquist, Supreme Court of the U.S., on *Darden v. Wainwright* to the Conference 2 (Sept. 9, 1985)). At various points over the past few decades, more than four Justices (albeit not all serving at the same time) have expressed their opposition to the death penalty. Some but not all made a regular practice of voting in favor of every capital defendant seeking relief at the Court. *See, e.g.*, *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari); *see also* *Green v. Zant*, 469 U.S. 1143, 1143 (1985) (mem.) (Brennan, J., joined by Marshall, J., dissenting) (“Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, I would grant the application for a stay of execution.”) (citation omitted); *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) (“[T]he imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.”) (quotation omitted); *Glossip v. Gross*, 576 U.S. 863, 909 (2015) (Breyer, J., joined by Ginsburg, J., dissenting) (“[M]y own 20 years of experience on this Court, that lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited cruel and unusual punishment.”); *see generally* CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* ch. 2 (2016).

<sup>118</sup> Freedman, *supra* note 100, at 652 n.55.

<sup>119</sup> Swarns Testimony, *supra* note 78, at 5.

<sup>120</sup> 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2011) [hereinafter 2011 YEAR-END REPORT], <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

<sup>121</sup> *Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 116th Cong. (2019) (statements of Hons. Samuel Alito & Elena Kagan, Associate Justices, U.S. Supreme Court), <https://www.govinfo.gov/content/pkg/CHRG-116hhrg38124/html/CHRG-116hhrg38124.htm>.

<sup>122</sup> In the past decade, observers have argued that Justices transgressed provisions of the Code by participating in fundraising dinners for outside organizations or by overtly criticizing political candidates, to take two prominent examples. *See e.g.*, Andrew Rosenthal, *Step Right Up. Buy Dinner with a Justice*, N.Y. TIMES (Nov. 10, 2011, 4:30 PM), <https://takingnote.blogs.nytimes.com/2011/11/10/step-right-up-buy-dinner-with-a-justice>; Editorial Board, *Justice Ginsburg’s Inappropriate Comments on Donald Trump*, WASH. POST (July 12, 2016), [https://www.washingtonpost.com/opinions/justice-ginsburgs-inappropriate-comments-on-donald-trump/2016/07/12/981df404-4862-11e6-bdb9-701687974517\\_story.html](https://www.washingtonpost.com/opinions/justice-ginsburgs-inappropriate-comments-on-donald-trump/2016/07/12/981df404-4862-11e6-bdb9-701687974517_story.html). Justice Ginsburg later apologized for her comments and acknowledged that “[j]udges should avoid commenting on a candidate for public office.” Meg Anderson, *LISTEN: Justice Ginsburg Expands on Decision to Apologize for Trump Remarks*, NPR (July 14, 2016), <https://www.npr.org/2016/07/14/486080234/listen-justice-ginsburg-expands-on-decision-to-apologize-for-trump-remarks>.

<sup>123</sup> *See, e.g.*, *Ethics Handbook for On and Off-Duty Conduct*, DEP’T OF JUSTICE (Jan. 2017), <https://www.justice.gov/jmd/ethics-handbook>; *Code of Business Conduct and Ethics*, AMAZON, <https://ir.aboutamazon.com/corporate-governance/documents-and-charters/code-of-business-conduct-and-ethics/default.aspx> (last accessed Oct. 25, 2021); *Code of Ethics*, EXXONMOBIL, <https://corporate.exxonmobil.com/About-us/Who-we-are/Corporate-governance/Code-of-ethics#Overview> (last accessed Oct. 25, 2021).

<sup>124</sup> 28 U.S.C. § 351(a).

<sup>125</sup> *Id.* § 351(d).

<sup>126</sup> *See, e.g.*, Patrick M. Erwin, *Corporate Codes of Conduct: The Effects of Code Content and Quality on Ethical Performance*, 99 J. BUS. ETHICS 535 (2011) (finding that quality codes of conduct can positively affect culture in

the corporate context); Alan Doig & John Wilson, *The Effectiveness Of Codes Of Conduct*, 7 BUS. ETHICS, ENV'T & RESPONSIBILITY 140 (1998) (finding that codes of conduct can positively affect ethical practices when paired with practices that inculcate and reinforce values).

<sup>127</sup> 1991 SUPREME COURT INTERNAL ETHICS RESOLUTION 1 (1991),

<https://www.documentcloud.org/documents/296686-1991-supreme-court-internal-ethics-resolution.html>.

<sup>128</sup> Although, as noted below, there might be reason to be cautious when considering the current Code's provisions on recusal because recused Justices cannot be replaced. Although the current statutory standards of recusal apply equally to the Justices. 28 U.S.C. §455(a).

<sup>129</sup> Alito & Kagan House Testimony, *supra* note 121.

<sup>130</sup> *Id.*

<sup>131</sup> Although the statutory standards for recusal are fixed, courts have developed doctrines that assist in their application. For example, many circuits require timely filing of recusal motions so that waste of judicial resources may be avoided. *See, e.g.*, *Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991) ("We require recusal motions to be lodged in a timely fashion because the absence of such a requirement would result in increased instances of wasted judicial time and resources."); *Travelers Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994) ("[I]t is well-settled that—for obvious reasons—one seeking disqualification must do so at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification."). The Supreme Court might similarly tailor the application of the statute to fit its institutional concerns.

<sup>132</sup> There has been an internal debate in the federal judiciary over to what extent judges should be limited in their attendance at events and memberships in organizations. In 2020, the Code of Conduct Committee of the Judicial Conference released a draft opinion concluding that the Code prohibits membership in the Federalist Society and American Constitution Society. COMM. ON CODES OF CONDUCT, ADVISORY OPINION NO. 117 (EXPOSURE DRAFT): JUDGES' INVOLVEMENT WITH THE AMERICAN CONSTITUTION SOCIETY, THE FEDERALIST SOCIETY, AND THE AMERICAN BAR ASSOCIATION (2020). But the opinion was rescinded after widespread opposition from many members of the judiciary.

<sup>133</sup> *See, e.g.*, Supreme Court Ethics Act of 2015, S. 1072, 114th Cong. (2015); Supreme Court Ethics Act, H.R. 1057, 116th Cong. (2019). As noted above, Congress has enacted such legislation with respect to other federal courts. *See* Resnik Testimony, *supra* note 4, at 13 ("During the twentieth century, Congress built on constitutional and common law understandings of judicial impartiality and due process to articulate norms for most of the federal judiciary. . . . Congress elaborated methods for rulemaking, imposed standards for recusal, mandated term limits on individuals serving as the chief judge of a district and or a circuit court, and instituted a process for complaints to be filed against judges.").

<sup>134</sup> 2011 YEAR-END REPORT, *supra* note 120, at 4.

<sup>135</sup> Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 460-61 (2013).

<sup>136</sup> 28 U.S.C. § 453.

<sup>137</sup> Several observers have argued that Congress is limited in its capacity to regulate the ethical practices of the Supreme Court when such regulation might intrude on the Court's inherent constitutional powers. *See* Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1562-75 (2012); Suzanne Levy, *Your Honor, Please Explain: Why Congress Can, and Should, Require Justices to Publish Reasons for Their Recusal Decisions*, 16 U. PA. J. CONST. L. 1161, 1181-84 (2014); *but see* Frost, *supra* note 135, at 463-75 (arguing against various constitutional objections to proposed ethics legislation governing the Supreme Court, in part because ethics legislation might encroach on the Court's decisionmaking function).

<sup>138</sup> *See* 28 U.S.C. § 2072 (Rules Enabling Act).

<sup>139</sup> Circuit judicial councils are composed of a circuit's chief judge sitting as chair and an equal number of other circuit and district court judges. Circuit judicial councils perform various administrative roles within their

circuits. *See Governance & the Judicial Conference*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference> (last accessed Sept. 18, 2021).

- <sup>140</sup> The constitutionality of the Judicial Conduct and Disability Act has been challenged at least once in the past, in a case brought by a United States District Judge; there, the Act’s constitutionality was upheld. *See McBryde v. Comm. to Rev. Cir. Council Conduct and Disability Orders of Jud. Conf. of U.S.*, 264 F.3d 52, 64–70 (D.C. Cir. 2001) (upholding the constitutionality of the Judicial Conduct and Disability Act against arguments based on Article III and the impeachment clause).
- <sup>141</sup> Anthony J. Scirica, Senior Circuit Judge, U.S. Court of Appeals for the Third Circuit, *Judicial Governance and Judicial Independence*, Madison Lecture, in 90 N.Y.U. L. REV. 779, 788 (2015).
- <sup>142</sup> *Presidential Commission on the Supreme Court of the United States* 8 (June 30, 2021) (written testimony of Russell Wheeler), [https://www.whitehouse.gov/wp-content/uploads/2021/07/R.-Wheeler-statement-6.30-rev.7.12-on-SCOTUS\\_.pdf](https://www.whitehouse.gov/wp-content/uploads/2021/07/R.-Wheeler-statement-6.30-rev.7.12-on-SCOTUS_.pdf) (noting that a “small bureaucracy” would be required to sift through the high number of potential complaints against Supreme Court justices).
- <sup>143</sup> *See* 28 U.S.C. § 354(a)(2).
- <sup>144</sup> Such a sanction might also be unconstitutional as a de facto impeachment or impairment of the Court’s ability to discharge its constitutionally mandated duties. *See* Lynn A. Baker, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117, 1133 (1985) (“By authorizing the judicial councils and the Judicial Conference to order that no new cases be assigned [to] a judge, the Act contravenes th[e] explicit decision of the Framers not to permit so much as the temporary removal of an official, even if already impeached, until convicted by the Senate.”); *but see* McBryde v. Comm. to Rev. Cir. Council Conduct and Disability Orders of Jud. Conf. of U.S., 264 F.3d 52, 64–70 (D.C. Cir. 2001) (upholding the facial constitutionality of the Judicial Conduct and Disability Act on the theory that principles of judicial independence established by the Constitution were designed to protect judges from interference by the *other branches*, and not to prevent intrabranch organization and discipline).
- <sup>145</sup> A conduct oversight option frequently proposed by some members of Congress is the creation of an Inspector General for the Federal Courts. Some variations of the proposal give the Inspector General the power to investigate misconduct on the Supreme Court. This proposal has been around for decades and has been heavily discussed. *See, e.g.*, Diane M. Hartmus, *Inspection and Oversight in the Federal Courts: Creating an Office of Inspector General*, 35 CAL. W. L. REV. 243 (1999); Ronald D. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts*, 41 LOY. U. CHI. L.J. 301 (2010). Members of the federal judiciary have criticized the proposal and noted the dangers such an office could pose to judicial independence. *See* Scirica, *supra* note 141, at 789-97 (2015). Since 2018, the Judicial Conference has provided for a “Judicial Integrity Officer” who oversees workplace conduct in the federal judiciary. The responsibilities of the Judicial Integrity Office include “answering individuals’ questions, providing guidance on conflict resolution, mediation, and formal complaint options.” *Judicial Integrity Officer Named for Federal Judiciary*, U.S. COURTS (Dec. 3, 2018), <https://www.uscourts.gov/news/2018/12/03/judicial-integrity-officer-named-federal-judiciary>.
- <sup>146</sup> *Cf.* W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955 (2001) (arguing that where lawyers are given clear rules to follow, informal social pressures from other members of the profession can serve the role of formal sanctions).
- <sup>147</sup> 28 U.S.C. § 455(a).
- <sup>148</sup> *Id.* § 455(1)-(4).
- <sup>149</sup> *See* Tuan Samahon, *Rehnquist’s Recusals*, 10 GREEN BAG 2D 205, 207 (2007); Memorandum of Justice Scalia, *Cheney v. U.S. Dist. Court for D.C.*, 541 U.S. 913 (2004), available at <https://www.supremecourt.gov/opinions/03pdf/03-475scalia.pdf>.
- <sup>150</sup> *See Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests*, FIX THE COURT (June 13, 2021), <https://fixthecourt.com/2021/06/recent-times-justice-failed-recuse-despite-clear-conflict-interest>.

- <sup>151</sup> This data was compiled with the help of Fix the Court’s regular reports on Supreme Court recusal. *See, e.g., The Supreme Court’s Unexplained OT17 Cert.-Stage Recusals Explained*, FIX THE COURT, <https://fixthecourt.com/wp-content/uploads/2018/05/OT17-cert.-stage-recusals-chart.pdf> (last accessed Sept. 18, 2021).
- <sup>152</sup> Even some who are skeptical of congressional regulation of the Court’s recusal practices have argued that requiring statements explaining recusal decisions would be a permissible procedural reform. *See Virelli, supra* note 137, at 1591-92.
- <sup>153</sup> In a 2015 appropriations hearing, Justice Kennedy voiced a concern that presenting reasons for recusal might resemble lobbying. Justice Kennedy said: “In the rare cases when I recuse, I never tell my colleagues, oh, I’m recusing because my son works for this company and it’s a very important case for my son. Why should I say that? That’s almost like lobbying. So, in my view, the reason for recusal should never be discussed.” Rich Gardella, *Why Don’t Supreme Court Justices Have an Ethics Code*, NBC NEWS (Apr. 11, 2017, 2:26 PM) (quoting Justice Kennedy), <https://www.nbcnews.com/news/us-news/why-don-t-supreme-court-justices-have-ethics-code-n745236>.
- <sup>154</sup> Under 28 U.S.C. § 455, all federal judges decide certain recusal motions in the first instance. However, for lower court judges, the decision not to recuse may be appealed. Under 28 U.S.C. § 144, an affidavit alleging personal bias or prejudice by a United States District Judge must be heard by another judge if the affidavit is timely and sufficient.
- <sup>155</sup> SUP. CT. R. 22(4).
- <sup>156</sup> Justice Black and Justice Jackson feuded over Black’s refusal to recuse himself in a case where the plaintiff’s counsel was Black’s former law partner and personal lawyer. Jackson wrote a concurrence to an order denying rehearing of the case that has been interpreted as critical of Black. *See Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 897 (1945) (Jackson, J., concurring); *see also* Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203 (covering the Black-Jackson feud in detail).
- <sup>157</sup> *See* RUSSELL WHEELER & MALIA REDDICK, JUDICIAL RECUSAL PROCEDURES: A REPORT ON THE IAALS CONVENING 19-21 (2017) (listing state statutes and codes that allow or require a judge’s recusal decision to be referred to another judge or the entire court, including some statutes and codes that create such a referral process for the state’s highest court).
- <sup>158</sup> James M. Anderson, Eric Helland & Merritt McAlister, *Measuring How Stock Ownership Affects Which Judges and Justices Hear Cases*, 103 GEO. L.J. 1163, 1178 (2015).
- <sup>159</sup> *See* 26 U.S.C. § 1043.
- <sup>160</sup> For example, the divestment statute only allows for divestiture when doing so is “reasonably necessary” to avoid a conflict. 26 U.S.C. § 1043(b)(2). Perhaps the Justices interpret this language as not permitting preemptive divestments to avoid conflicts.
- <sup>161</sup> *See* Anderson, Helland & McAlister, *supra* note 158, at 1207-08 (proposing divestment requirements for judges or Justices).
- <sup>162</sup> *See, e.g.,* Anderson, Helland & McAlister, *supra* note 158 at 1207-08 (suggesting that Congress should require divestment of stock ownership as a condition for confirmation, or require divestment when conflicts arise); Adam Liptak, *The Hazards Justices Face by Owning Individual Stocks*, N.Y. TIMES (Jan. 9, 2017), <https://www.nytimes.com/2017/01/09/us/politics/the-hazards-justices-face-by-owning-individual-stocks.html>; Richard W. Painter, *Stocks owned by Supreme Court justices tilt the scales of justice*, MSNBC (Oct. 6, 2021, 1:39 PM), <https://www.msnbc.com/opinion/stocks-owned-supreme-court-justices-tilt-scales-justice-n1280712>.
- <sup>163</sup> From our review, the Second, Third, Seventh, and Ninth Circuits have all allowed video recording of at least some oral arguments in the past few years. The Ninth Circuit has been especially prolific in this regard; it posts video recordings of most, if not all, of its oral arguments. *See Audio and Video*, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, <https://www.ca9.uscourts.gov/media/> (last accessed Oct. 31, 2021). According to a 2019 report by the Congressional Research Service, all 50 state supreme courts allow video recording of proceedings “under certain conditions.” CONGRESSIONAL RESEARCH SERVICE, VIDEO BROADCASTING FROM THE FEDERAL



COURTS: ISSUES FOR CONGRESS (2019). Judges on lower federal courts and state courts have written articles reflecting on the positive and negative effects of cameras in their courtrooms. See Diarmuid F. O’Scannlain, *Some Reflections on Cameras in the Appellate Courtroom*, 9 J. APP. PRAC. & PROCESS 323 (2007); Robert L. Brown, *Just a Matter of Time? Video Cameras at the United States Supreme Court and the State Supreme Courts*, 9 J. APP. PRAC. & PROCESS 1 (2007). See also Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489 (2012) (collecting many of the competing arguments for and against cameras).

<sup>164</sup> See, e.g., Alito & Kagan House Testimony, *supra* note 121 (Justice Alito observing that “I recognize that most people think that our arguments should be televised. Most of the members of my family think that arguments should be televised. I used to think they should be televised. . . . But I came to see and I do believe that allowing the arguments to be televised would undermine their value to us as a step in the decisionmaking process. I think that lawyers would find it irresistible to try to put in a little sound bite in the hope of being that evening on CNN or FOX or MSNBC or one of the broadcast networks, and that would detract from the value of the arguments in the decisionmaking process”); *Id.* (Justice Kagan observing that “it is a principle of physics, I think, . . . [that] when the observer comes in, the observed thing changes. And you commented on Congress, and if you all were given truth serum, I think some of you might agree that hearings change when cameras are there”); Sonia Sotomayor, “*Just Ask*” & *Life as a Supreme Court Justice – Extended Interview*, THE DAILY SHOW WITH TREVOR NOAH (Sept. 16, 2019) (Justice Sotomayor arguing that “if our arguments were televised, it might change the dynamic,” for instance, “you would have more studied questions rather than those questions which are less studied and more inquisitive” and “the draw to play to TV affects every human being,” with the overall result that “I think you would change our institution so dramatically that it would be for its worse, not for the country’s better”), <https://www.cc.com/video/hdash0/the-daily-show-with-trevor-noah-sonia-sotomayor-just-ask-life-as-a-supreme-court-justice-extended-interview>.

<sup>165</sup> *Visitor’s Guide to Oral Argument*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx> (last accessed Sept. 18, 2021).

<sup>166</sup> At the start of the 2015 Term, the Court announced: “Only Bar members who actually intend to attend argument will be allowed in the line for the bar section; ‘line standers’ will not be permitted.” Robert Barnes, *Supreme Court Tells Lawyers: Stand in Line Yourself. You Can’t Pay Others to Hold a Spot*, WASH. POST (Oct. 6, 2015), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-bar-bans-line-standing-for-hearings/2015/10/06/a309e0e6-6c15-11e5-aa5b-f78a98956699\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-bar-bans-line-standing-for-hearings/2015/10/06/a309e0e6-6c15-11e5-aa5b-f78a98956699_story.html); see *Presidential Commission on the Supreme Court of the United States* 3 (June 30, 2021) (testimony of Amy Howe), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Testimony-of-Amy-Howe.pdf>; Katie Bart, *Courtroom Access: Line-Standing Businesses Save Spots in the Public Line*, SCOTUSBLOG (Apr. 15, 2020, 4:48 PM), <https://www.scotusblog.com/2020/04/courtroom-access-line-standing-businesses-save-spots-in-the-public-line>. For data on the number of people waiting in the public line for seats at each argument session during the 2019 Term (until the courtroom closed due to the pandemic), the share of people in line who were eventually seated, and when one would have needed to arrive in order to secure a seat, see Amy Howe, *Courtroom Access: Let’s Talk Data—The Public Line*, SCOTUSBLOG (May 4, 2020, 6:47 PM), <https://www.scotusblog.com/category/special-features/courtroom-access-2020/>.

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# Appendices

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# Appendix A: Executive Order 14023

## Executive Order on the Establishment of the Presidential Commission on the Supreme Court of the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

### Section 1. Establishment.

There is established the Presidential Commission on the Supreme Court of the United States (Commission).

### Sec. 2. Membership.

- (a) The Commission shall be composed of not more than 36 members appointed by the President.
- (b) Members of the Commission shall be distinguished constitutional scholars, retired members of the Federal judiciary, or other individuals having experience with and knowledge of the Federal judiciary and the Supreme Court of the United States (Supreme Court).
- (c) The President shall designate two members of the Commission to serve as Co-Chairs.

### Sec. 3. Functions.

- (a) The Commission shall produce a report for the President that includes the following:
  - (i) An account of the contemporary commentary and debate about the role and operation of the Supreme Court in our constitutional system and about the functioning of the constitutional process by which the President nominates and, by and with the advice and consent of the Senate, appoints Justices to the Supreme Court;
  - (ii) The historical background of other periods in the Nation's history when the Supreme Court's role and the nominations and advice-and-consent process were subject to critical assessment and prompted proposals for reform; and
  - (iii) An analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals.
- (b) The Commission shall solicit public comment, including other expert views, to ensure that its work is informed by a broad spectrum of ideas.
- (c) The Commission shall submit its report to the President within 180 days of the date of the Commission's first public meeting.

Sec. 4. Administration.

(a) The Office of Administration within the Executive Office of the President shall provide funding and administrative support for the Commission to the extent permitted by law and within existing appropriations. To the extent permitted by law, including the Economy Act (31 U.S.C. 1535), and subject to the availability of appropriations, the General Services Administration shall provide administrative services, including facilities, staff, equipment, and other support services as may be necessary to carry out the objectives of the Commission.

(b) Members of the Commission shall serve without compensation for their work on the Commission, but shall be allowed travel expenses, including per diem in lieu of subsistence, to the extent permitted by law for persons serving intermittently in the Government service (5 U.S.C. 5701-5707).

(c) Insofar as the Federal Advisory Committee Act, as amended (5 U.S.C. App.) (Act), may apply to the Commission, any functions of the President under the Act, except for those in section 6 of the Act, shall be performed by the Administrator of General Services.

Sec. 5. Termination.

The Commission shall terminate 30 days after it submits its report to the President.

Sec. 6. General Provisions.

(a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department or agency, or the head thereof; or
- (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

JOSEPH R. BIDEN JR.

THE WHITE HOUSE,

April 9, 2021

## Appendix B: Commission Meetings, Expert Testimony, and Public Comment

President Biden established this Commission on April 9, 2021, by Executive Order 14023. Consistent with the Federal Advisory Committee Act of 1972, Public Law 92-463, 5 U.S.C. App., the Commission held public meetings on May 19, June 30, July 20, October 15, November 19, and December 7, 2021. Recordings and transcripts of those meetings, which include deliberations and statements by Commissioners, are available here (<https://www.whitehouse.gov/pscotus/public-meetings/>).

Following its introductory meeting on May 19, the Commission scheduled public hearings on June 30, 2021, and July 20, 2021. Over the course of these two days, the Commission heard oral testimony from 44 experts. The materials circulated for each meeting, the recordings and transcripts of the hearings, and witnesses' written statements are available for review at [www.whitehouse.gov/pscotus/public-meetings/](http://www.whitehouse.gov/pscotus/public-meetings/). The Commission also solicited and received additional written testimony from numerous academic experts and advocacy organizations, available at [www.whitehouse.gov/pscotus/public-comments/](http://www.whitehouse.gov/pscotus/public-comments/).

In addition, the Commission received submissions from several members of Congress, current and retired federal and state judges, and members of state government.

Fifteen days prior to each public meeting, the Commission called for public comments through notices released in the Federal Register. The Commission also established a portal through which members of the general public were able to provide commentary, at [regulations.gov](http://regulations.gov), and maintained an email inbox for public commentary.

As discussed at the first public meeting, the Commission divided itself into subcommittees, denominated as “Working Groups,” to consider testimony and comments from outside experts, organizations, and the public, and to further research and analyze the following topics:

- The Genesis of the Reform Debate; the Commission’s Mission; and the History of Reforms
- Membership and Size of the Court
- Length of Service and Turnover of Justices on the Court
- The Court’s Role in the Constitutional System
- The Supreme Court’s Procedures and Practices

## The following individuals or organizations provided oral or written submissions to the Commission:

### Witnesses of June 30, 2021

Nikolas Bowie, Harvard Law School  
Samuel Bray, Notre Dame Law School  
Rosalind Dixon, University of New South Wales, Sydney  
Michael Dreeben, O’Melveny and Myers, LLP  
Noah Feldman, Harvard Law School  
Charles Fried, Harvard Law School  
Deepak Gupta, Gupta Wessler  
Amy Howe, SCOTUSblog  
Laura Kalman, University of California - Santa Barbara  
Allison Orr Larsen, William & Mary Law School  
Michael McConnell, Stanford Law School  
Samuel Moyn, Yale Law School  
Judith Resnik, Yale Law School  
Kim Scheppele, Princeton University  
Maya Sen, Harvard University  
Christina Swarns, Innocence Project  
Stephen Vladeck, University of Texas Austin School of Law  
Russell Wheeler, Brookings Institution  
Ilan Wurman, Arizona State University

### Witnesses of July 20, 2021

Justice Rosalie Abella, Supreme Court of Canada  
Akhil Amar, Yale Law School  
Nan Aron, Alliance for Justice  
Randy Barnett, Georgetown University Law Center  
Craig Becker, AFL-CIO  
Daniel Epps, Washington University in St. Louis  
Kenneth Geller, Mayer Brown, LLP

Tom Ginsburg, University of Chicago  
Jamal Greene, Columbia Law School  
Wade Henderson, The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund  
Vicki Jackson, Harvard Law School  
Christopher Kang, Demand Justice  
Michael Klarman, Harvard Law School  
Larry Kramer, Harvard Law School  
Curt Levey, Committee for Justice  
Marin Levy, Duke University School of Law  
Maureen Mahoney, Latham & Watkins  
John Malcolm, Heritage Foundation  
Justice Margaret Marshall, Choate, Hall & Stewart  
Sharon McGowan, Lambda Legal  
Dennis Parker, National Center for Law and Economic Justice  
Jeff Peck, Tiber Creek Group  
Gabe Roth, Fix the Court  
Stephen Sachs, Harvard Law School  
Ilya Shapiro, Cato Institute  
Neil Siegel, Duke Law School  
Benjamin Wittes, The Brookings Institution

## Public Officials<sup>1</sup>

Senator Richard Blumenthal  
Senator Ted Cruz  
Senator Mazie Hirono  
Representative Henry C. “Hank” Johnson, Jr.  
Senator Charles Schumer  
Senator Sheldon Whitehouse  
Jim Jones, former Attorney General and state Supreme Court Justice of Idaho  
Champ Lyons, Supreme Court of Alabama  
Ashley Moody, Attorney General of Florida  
Paul Summers, Attorney General (retired), Tennessee  
Samuel Thumma, Court of Appeals of Arizona  
Galen Vaa, 7th Judicial District, Minnesota

## Academic and Legal Experts

Aaron Belkin, Take Back the Court  
Philip Bobbitt, Columbia Law School  
Barry Cushman, Notre Dame Law School  
Erin Delaney, Northwestern Pritzker School of Law  
Michael J. Gerhardt, University of North Carolina School of Law  
Edward A. Hartnett, Seton Hall Law School  
Amanda Hollis-Brusky, Pomona College  
David Law, University of Virginia School of Law  
Richard Lazarus, Professor, Harvard Law School  
Hashim M. Mooppan, Jones Day (formerly U.S. Department of Justice)  
Michael Stokes Paulsen, University of St. Thomas School of Law  
William G. Ross, Samford University  
Jeff Shesol, Author  
Christopher Jon Sprigman, New York University School of Law  
Julie Suk, Fordham University School of Law  
Mark Tushnet, Harvard Law School  
G. Edward White, University of Virginia School of Law

## Advocacy and Professional Organizations<sup>2</sup>

American Academy of Arts & Sciences  
American Bar Association  
American Civil Liberties Union (ACLU)  
American Constitution Society  
Appellate Courts Working Group  
Brazil Comparative Law Institute  
Business Roundtable  
Center for American Progress  
Chamber of Commerce of the United States of America  
Coalition Against Judicial Fraud  
Constitutional Accountability Center  
Demos



Federal Bar Association  
Federal Capital Habeas Project  
First Liberty Institute  
FreedomWorks Foundation  
Independent Women's Forum  
Judicial Discipline Reform  
Keep Nine Coalition  
Lawyers' Committee for Civil Rights Under Law  
Madison Coalition  
National Asian Pacific American Women's Forum  
National Association for the Advancement of Colored People (NAACP) Legal Defense Fund  
National Center for Law and Economic Justice  
National Council of Jewish Women  
National Federation of Independent Business (NFIB)  
New York County Lawyers Association  
Our Children's Trust  
People For the American Way  
Project on Government Oversight  
Public Citizen Inc. and Public Citizen Foundation  
Service Employees International Union (SEIU)  
Stand Up America  
Take Back the Court  
The Constitution Project at POGO (Project on Government Oversight)  
The Innocence Project  
Unrig the Courts Coalition

## Public Comments Received by the Commission

The Commission established a public comment policy that set parameters for the publication of comments received on regulations.gov. Public comments that met this policy were published on regulations.gov (Docket: PCSCOTUS) and can be reviewed there. The published comments expressed a broad array of opinions on the Commission’s work, its draft discussion materials, reform proposals in the public debate, and other related topics.

Comments received by the Commission that did not meet the posted public comment policy were not published. The bulk of unpublished comments fell into two categories: duplicate submissions included in several mass mailing campaigns targeted at the Commission and submissions on topics not within the Commission charge/not relevant.

The table below provides an overview of the public comments received in association with a given public meeting. Deadlines were set out in each public meeting notice as a cut-off for comments prior to each public meeting. The table below is complete up to and including comments received for the 12/7 public meeting (cut-off 12/3). Comments received after this date could not be included in the report due to printing timelines.

Number of comments received by status of publication and public meeting date:<sup>3</sup>

COMMISSION PUBLIC MEETING DATE <sup>4</sup>							
	5/19/21	6/30/21	7/20/21	10/15/21	11/19/21	12/7/21	Total
Comments published on Regulations.gov	46	221	163	3,556	186	1,118	5,290
Comments not published due to violations of policy	58	2,054	429	367	502	50	3,460
<b>Total comments received</b>	<b>104</b>	<b>2,275</b>	<b>592</b>	<b>3,923</b>	<b>688</b>	<b>1,168</b>	<b>8,750</b>

## Endnotes: Appendix B

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<sup>1</sup> Individuals listed provided their title in their public comment or signed, with their name and title, a submission filed by another individual. Additional comments from current or retired government officials may have been received but are not listed here if submissions did not specify their title or office.

<sup>2</sup> Published comments from these organizations can be found on <https://www.regulations.gov/document/PCSCOTUS-2021-0001-0003/comment>

<sup>3</sup> All published comments received by the Commission can be found on <https://www.regulations.gov/document/PCSCOTUS-2021-0001-0003/comment>

<sup>4</sup> Source: PCSCOTUS public comment tracker. This tracker contains a record of all received comments through both Regulations.gov and the Commission's general email inbox.

## Appendix C: The Confirmation Process

Executive Order 14023 directed the Commission on the Supreme Court of the United States to produce a report that includes an “account of the contemporary commentary and debate about . . . the functioning of the constitutional process by which the President nominates and, by and with the advice and consent of the Senate, appoints Justices to the Supreme Court.” Several witnesses who testified before the Commission noted that recent debates over Supreme Court reform have taken place amidst controversies surrounding the processes by which Justices are nominated and confirmed. The evaluation of proposals for Court reform may thus require both attention to existing problems with the confirmation process and consideration of how a proposal, if implemented, might affect that process.

One witness, Jeffrey J. Peck, who previously served as General Counsel and the Majority Staff Director of the Senate Judiciary Committee, proposed changes to Senate rules and norms designed to improve the confirmation process. These proposals grew out of his examination of the history of the Senate’s treatment of Supreme Court nominees over the last several decades and numerous interviews he conducted with former Senators and senior staff—thirteen Democrats and twelve Republicans. That group included individuals who had been involved in seventeen Supreme Court nominations, from 1981 to the present.

In the Introduction to this Report, we have provided a brief account of contemporary debates surrounding the confirmation process, consistent with our charge. But consideration of proposed reforms to the confirmation process are beyond that charge, and we accordingly do not analyze or endorse any of the recommendations offered to us. Nonetheless, we do wish to highlight some of the analysis and recommendations in the Peck testimony.

In this Appendix, we have included excerpts from Mr. Peck’s testimony. The full testimony is available at the Commission website at <https://www.whitehouse.gov/wp-content/uploads/2021/07/Peck-Testimony.pdf>

**Excerpts of Testimony of Jeffrey J. Peck**  
**The Presidential Commission on the Supreme Court of the United States**  
**July 20, 2021**

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In calendar years, it was not too long ago – 1994, in fact – when Stephen Breyer was confirmed, 87-9. When Ruth Bader Ginsburg was confirmed, 96-3, in 1993. When David Souter was confirmed, 90-9, in 1990. When Anthony Kennedy was confirmed, 97-0, in 1988. When Antonin Scalia was confirmed, 98-0, in 1986. And when Sandra Day O’Connor was confirmed, 99-0, in 1981. Strong bipartisan majorities often prevailed.

In political years, these consensus confirmations reflect a bygone era akin to the locomotive, the Model T and wired telephones. Will any nominee to the highest court in the land ever get 90 votes again? Doubtful, since at present there are likely to be at least 25 negative votes before hearings begin, regardless of which party controls the White House and the Senate; indeed, there may be that many automatic negative votes before a nomination is even announced!

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During the past few months, I conducted 25 interviews<sup>1</sup> -- 13 Republicans and 12 Democrats, thereby ensuring that both sides of the political spectrum were fairly represented.<sup>2</sup> All respondents served in the Senate as Senators or senior staff, typically as committee chief counsels, staff directors, senior nomination counsels or senior leadership staff. Time constraints and respondent availability limited the overall number...My objective was to speak with individuals spanning as broad a range of nominations as possible to secure bipartisan perspectives from multiple political eras. Accordingly, the responses discussed herein cover 17 nominations between Sandra Day O’Connor (1981) and Amy Coney Barrett (2020)...

As detailed therein, I covered eight areas with all interviewees.

1. Biographical Information
2. General Observations
3. The Senate’s Advice Function
4. Role of the Senate Judiciary Committee
5. Scope of Questioning

6. The FBI Report
7. Third Party Witnesses
8. The Senate's Consent Function: Filibuster, Margins and Presidential Election Year Nominations

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Most interviewees believe that the value of SCOTUS nomination hearings has increasingly diminished over time. Common descriptions included “kabuki theater,” “farce,” “charade,” “circus,” “a model of escape and evasion” and “insufferable.” Anyone who has watched recent hearings would be hard pressed to disagree. Given the extreme reluctance of nominees, questioning by Senators has become tedious and uninformative. One interviewee noted that Senate questioning has become “air cover for some to justify a negative vote they have already decided to make.”

There was consensus among all interviewees that it is not feasible to develop hard-and-fast formal rules regarding the questioning of SCOTUS nominees. Among other problems, such rules would turn the Judiciary Committee chair into a faux judge obligated to decide on the relevance, materiality and scope of his or her colleagues’ questions – inevitably a “lose-lose” proposition for the Chair, as one interviewee put it. It would also, as another interviewee noted, invade the “holy province of senatorial desire” to ask any questions he or she wants to pose.

A small number of Democrat interviewees and one Republican interviewee supported the view that nominees should answer questions about how they would have ruled in specific past Supreme Court decisions. These interviewees dismissed the notion that outside groups would use these answers to politicize the process even further, noting that the groups already assume that nominees embrace particular views and act on those assumptions accordingly. The Republican interviewee in this group supported this level of specificity based on his view that future cases involved different facts and thereby do not compromise a nominee’s judicial independence. Moreover, this interviewee believes that the public is entitled to know a nominee’s views and that Senators, with such information, can then vote based on the totality of the nominee’s record.

Two Democrat interviewees and one Republican interviewee support specific questioning but stop short of asking about how a nominee would have voted in past cases. The Republican interviewee noted the appropriateness of asking a nominee, “Had you been on the Court in

1973 and had the Roe factual record before you, how would you have approached the case,” distinguishing that question from a precise question about how the nominee would have voted.

Approximately 15 interviewees – both Democrats and Republicans – support questions about the “general philosophy of judging.” They believe it is appropriate to ask questions about what nominees have written but oppose questions regarding how nominees would have ruled in specific past cases decided by the Court. For nominees who are or have previously been judges, these interviewees also support asking them about their reasoning in cases they have decided.

Several Republican interviewees referred approvingly to the so-called “Ginsburg Rule,” noting that should be the model for all future nominees.

One issue that arose during my research was whether to allow each Member of the Judiciary Committee to submit a defined number of written questions to the nominee before the hearings commence, with answers due before the nominee appears in person. The argument in favor of such an approach is that the nominee’s testimony would then follow an enhanced record. The problem with such an approach is that if history is any guide, the answers are likely to be written by White House Counsel lawyers, Department of Justice lawyers, outside lawyers (such as former law clerks) supporting the nominee or some combination thereof. While rules could require the nominee to attest to the accuracy of the answers and the fact that they reflect the nominee’s actual views, it would be difficult, if not impossible, to police their actual preparation.

One GOP interviewee proposed limiting the questioning of nominees in open session to one round, no longer than 30 minutes, with the remainder of the questioning occurred in closed session to “produce less grandstanding.”

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I offer the following recommendations to the Commission.<sup>3</sup>

**I. Time Frames:** By Standing Rule of the Senate or Rule of Procedure of the Senate Judiciary Committee, the following time frames and procedures should be adopted and implemented:

- a) Hearings shall commence no sooner than 30 days and no later than 50 days after the Senate receives the nomination. If the nomination is made during a Senate recess that

- is longer than three days, the minimum and maximum periods shall be extended by the length of the recess.
- b) The nominee’s complete written record shall be delivered to the Committee no later than 10 days before hearings begin. Delays in the production of materials shall extend the minimum and maximum periods by the length of the delay, thereby penalizing the nominating Administration for dragging its feet. The White House Counsel shall certify when production of materials has been completed.
  - c) The Committee shall vote on the nomination no sooner than 10 days and no later than 21 days after hearings conclude. The “official” conclusion of the hearings shall be determined by the Chair and Ranking Member; any “gaming” of the hearings for the sole purpose of extending the time frames should be avoided. The current ability of one Senator to “hold over” a nomination shall be eliminated.
  - d) The Committee shall be required to report the nomination to the floor in all circumstances – even with a negative recommendation or without recommendation. The Constitution places the advice and consent obligation on the Senate, not a committee of the Senate. The Judiciary Committee processes the nomination by holding hearings, preparing a report and reporting the nomination to the Senate. It should not determine the fate of the nominee.
  - e) The full Senate shall begin consideration of the nomination no sooner than 10 days and no later than 21 days after the Committee formally files its report on the nomination. The Senate can delay consideration only by unanimous consent.
  - f) The time frames in this new Rule could be shortened or lengthened “for cause” by joint agreement of the Judiciary Committee’s Chair and Ranking Member. “Cause” includes, but is not limited to, a voluminous record of the nominee due to extensive writings, speeches or opinions, the need for investigation of new matters and/or if additional relevant materials are uncovered.
  - g) These timeframes shall apply under all circumstances, including nominations in a presidential election year up to August 1 of that year, as explained below.
  - h) These new Rules could be altered only by unanimous consent of the Senate in order to eliminate the ability of the majority party to jettison the new policies for political expediency by simple majority vote.
  - i) These new Rules are needed now and, ideally, should be adopted and implemented immediately. Unfortunately, there is little or no chance of that occurring. Accordingly, the new Rules proposed here shall not take effect until after the next presidential election and not until the swearing in of the new Congress in January 2025. Postponing the effective date of new rules should reduce the partisanship over their deliberation and increase the likelihood of adoption because neither party would know who the rules theoretically help, and who they theoretically hurt, by the time they go into effect.



- II. Scope of Questioning:** While it is not feasible to establish a Senate or Committee Rule defining the allowable scope of questioning, the appropriate norm for questioning SCOTUS nominees – a “standard of responsiveness” – should be “philosophical particularity,” as opposed to “pinpoint specificity seeking pledges or commitments” or the “extreme reluctance” taken by more recent nominees. Procedurally, no Member of the Committee, including the Chair or Ranking Member, should be allowed to instruct a nominee not to answer a question. A Member or Members may dislike the questions posed by a colleague, but it is up to the nominee to decide whether to answer.
- a) To make an informed decision and fulfill their constitutional obligation and duty to exercise “advice and consent” on judicial nominations, Senators must understand the nominee’s judicial philosophy and views on core constitutional principles.
  - b) The so-called “Ginsburg Rule” cited by recent nominees is neither a rule nor an appropriate tactic to utilize to deflect substantively appropriate questions. Indeed, then Judge Ginsburg did not always follow it during her hearings.
  - c) When presidents campaign on promises regarding the justices they will appoint to the Supreme Court, criticizing past rulings and individual Justices – as they increasingly do – the Senate can hardly sit idly by during the hearings and not probe the judicial philosophy of nominees selected to fulfill those promises and answer those critiques. Indeed, the imperative to question nominees on judicial philosophy is even greater under such circumstances.
- III. The Role of the FBI:** Processes pertaining to the FBI’s investigation of SCOTUS nominees should be further clarified and memorialized in a Memorandum of Understanding that updates and replaces the 2009 MOU executed by President Obama’s White House Counsel and the then Senate Judiciary Committee Chair and Ranking Member. This MOU should be adopted at the beginning of a new Congress so that it is done outside the context of any particular nomination, and should:
- a) Underscore and memorialize the independence of the FBI, stating specifically that the FBI’s client is the American people. It is important to make clear, formally, that when the FBI conducts its investigations neither the White House Counsel nor the Senate Judiciary Committee majority or minority are the clients.
  - b) Create communication protocols governing the FBI’s dialogue with the White House and the Chair/Ranking Member of the Judiciary Committee so that each of those three parties receives information simultaneously when the FBI has determined that a matter warrants investigation. It is necessary to take steps ensuring neither receives preferential treatment over the other.
  - c) Spell out the parameters of the FBI’s role in conducting the background investigation before the hearings begin and any subsequent investigations that arise once the hearings have started. Specifically, and working with FBI leadership, the MOU should require

a more fulsome investigative process at the outset so matters that have historically come to light later in the process are more likely to be uncovered on the front end.

- d) Set an expected time frame for the delivery of the FBI report for the original investigation and any subsequent investigations, with room for potential adjustments depending on the precise nature of allegations that arise.

**IV. Third Party Witnesses:** Qualitative or quantitative limits on the live testimony of third-party witnesses should not be established by rule.

- a) The Supreme Court plays a vital role in our nation and third-party witnesses should have the opportunity not only to submit written statements for the record but also testify in person.
- b) A norm should be established whereby the majority of outside witnesses should provide well-informed assessments of the record of the nominee.
- c) The Chair and Ranking Member should utilize their joint discretion, as they do in all hearings, to manage the number of witnesses.
- d) The American Bar Association should no longer play the dominant role it has in reviewing nominees. The Committee should place equal weight on multiple bar associations without affording a lead role to any single one.

**V. Senate Consideration and Vote on Confirmation:** If we had the good fortune to write on a blank slate, Senate Rules should require 60 votes to confirm a Supreme Court Justice in order to force, at least in most circumstances, a bipartisan consensus not only on the back end, for the final vote, but also on the front end, by necessitating more consultation by the president with the minority party leadership in the Senate. But the slate is not blank; far from it. It is inconceivable that Democrats will restore a 60-vote margin for SCOTUS nominees after a Republican president and Republican Senate confirmed one-third of the Justices sitting today by majority vote. Bipartisan consensus on this issue is simply not attainable. Accordingly, I recommend:

- a) The Senate should retain the current simple majority requirement for confirming Supreme Court nominees.
- b) The Senate should add a new Rule explicitly requiring that all nominees receive a Senate Judiciary Committee hearing, a Committee vote and an up-or-down vote on the merits in the Senate. No nominee should be refused consideration unless the nomination has been withdrawn.
- c) The Senate should consider all nominations in a presidential election year except for those made after August 1. Nominations before August 1 are likely to be completed prior to Election Day in a balanced and orderly manner. Given the time frames proposed for new Rules guiding the Judiciary Committee's consideration, nominations after August 1 are not likely to be considered thoroughly and fairly before the American people select the next president. Key steps by the Administration and the Senate – including document production, requests for more investigative work by the FBI,

- number of third-party witnesses and the like – are more likely to be colored by politics and game-playing when taking place within 90 days of a presidential election. Fairness and responsible decision-making will ensue when presidential politics is not the main driver.
- d) Using August 1 as a cut-off date in a presidential election year also takes into account the early voting – either by mail or in-person – that many states now allow. There are few more consequential decisions made in in our nation than placing one of nine Justices with life tenure on the Supreme Court. Doing so while tens of millions of Americans are voicing their preference about the next president is anti-democratic.
  - e) Despite the August 1 cut-off date, any Senator who believes nominations made before that date in a presidential election year are still too close to Election Day can vote against the nomination solely for that reason.
  - f) While not likely feasible to implement by Senate rule, the two parties should share an understanding that nominations made by a lame duck president after his or her defeat on Election Day will not be considered.

## Endnotes: Appendix C

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- <sup>1</sup> I am not presenting my findings as empirical research or necessarily consistent with scientifically accepted statistical methodology. The goal was to solicit opinions through a standardized set of questions, with answers informed by personal experience, which, in all cases, was extensive.
- <sup>2</sup> Since my views as a Democrat are also included in this report, the total number of interviewees was, in effect, equally split.
- <sup>3</sup> Each potential reform area is discussed later in detail, and organized and presented in three sections: Relevant Historical Background and Context; Results of Research; and Policy Recommendations. The relevant historical background sections are not intended to be exhaustive.

## Appendix D: Advocacy Before the Court

The Commission received testimony from several witnesses about the sources of advocacy and information provided to the Supreme Court as it selects and decides cases. Their testimony addressed patterns in advocacy before the Court, including the fact that a small group of specialized lawyers appears in a large proportion of cases. It also addressed the role of interested non-parties, called amici curiae, in providing information to the Court beyond the parties' briefs and the record in a given case. These analyses focused on the conduct and characteristics of advocates and amici rather than of the Court itself. We do not endorse this testimony or the proposals contained within it. But we believe it would be informative for the public discourse for this Report to highlight portions of the testimony.

The witnesses whose statements are excerpted here are Deepak Gupta; the Supreme Court Practitioners' Committee, chaired by Kenneth Geller and Maureen Mahoney; Richard Lazarus; and Allison Orr Larsen. Their full testimony, respectively, is available on the Commission website at the links noted below.<sup>1</sup>

### **Excerpts from Testimony of Deepak Gupta, Gupta Wessler PLLC**

<https://www.whitehouse.gov/wp-content/uploads/2021/06/Gupta-SCOTUS-Commission-Testimony-Final.pdf>

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#### *The Diversity of the Supreme Court Bar*

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Today, roughly 70 lawyers are considered part of the elite Supreme Court bar, filing less than 1% of the petitions for certiorari before the Court but participating in nearly half the cases the Court selects.

The demographics of these elite few are telling. From 2012 to 2018, women appearing before the Court constituted only 12 to 21% of advocates. In the 2019 term, 155 oral argument appearances were made before the Court, only twenty of which were made by women and only twenty-seven of which were made by advocates of color. In the entire 2019 term, only one woman of color appeared before the Court.

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In other words, the entire ecosystem surrounding the Court looks a lot less like the American public than we might hope. For the development of the law, this limited diversity can make the Court “woefully inattentive to its impact on underrepresented groups.” And on the most basic level, as this small and elite institution makes laws for a large and diverse country, many Americans do not see people like them regularly participate in the process.

### *Docket Capture*

Homogeneity among Supreme Court advocates is by no means limited to race and gender. The small handful of elite appellate lawyers who argue most cases before the Supreme Court are not only overwhelmingly white and male—they also tend to represent the largest corporations in the world. Attorneys at corporate-defense firms are often conflicted out of representing plaintiffs, even if they would be inclined to do so otherwise.

This imbalance in the small group of advocates who have the ear of the Court has serious consequences for the Court’s agenda and the public’s perception that the Court gives each party before it an equal hearing. In turn, the stakes for the country are high: not just the rights of workers, consumers, and other plaintiffs, but also the credibility and legitimacy of the Court in the eyes of a public that already believes their government is overly aligned with the interests of large corporations.

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. . . The influence of corporate America in the Supreme Court is borne out by the dominance of specialized “repeat players.” As Professor Richard Lazarus has written, the 1980 term saw 5.8% of cases argued by attorneys who have presented at least five cases before the Supreme Court, or who were affiliated with law firms whose members had argued at least ten. By 2007, the percentage of Supreme Court cases argued by such “expert advocates” had passed 50%. For the past several years, it has hovered around 70%. Hiring one of these advocates is especially useful at the cert stage, and, since the 1980’s, the success of cert petitions filed by specialized private appellate practices has skyrocketed. In 1980, 5% of successful petitions (excluding the Solicitor General’s) were filed by repeat player advocates. By 2007, that rate had increased to more than 50%. Unsurprisingly, these advocates’ corporate clients benefit from their success. The past few decades are replete with examples of the Court granting

review to corporate-friendly petitions that it would have likely passed over if not for an expert advocate's name on the industry-side brief.

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These elite lawyers' "capture" of the Supreme Court docket, as Professor Lazarus has put it, has real consequences for workers, consumers, and other plaintiffs who have been hurt by corporations, as well as for criminal defendants. For one, judges and attorneys widely agree that hiring specialized appellate counsel—especially one particularly familiar with the Court—matters for a favorable outcome. In a 2004 survey of former Supreme Court clerks, 88% said they "len[t] additional consideration" to amicus briefs signed by an eminent repeat player. Empirical studies have linked attorney experience with case outcomes as well. A study by Professor Jeffrey Fisher, for example, found that a party represented in the Supreme Court is almost 20% more likely to win on the merits than one represented by a nonspecialist—and that the advantage at the certiorari stage is likely even larger. A 2014 investigation found that over a decade, just 66 of the 17,000 attorneys who filed petitions at the Supreme Court accounted for 43% of the cases the Court took up, and 51 of those lawyers represented corporate interests. An increase in cert petitions, combined with a shrinking merits docket, has made the involvement of repeat players in petitioning the Court especially valuable. . .

The access that plaintiffs, criminal defendants, and other public-interest clients have to this specialized group of repeat players is severely limited. For one, corporate-defense firms routinely charge more than \$1,000 per hour for their services, and a single cert petition can cost a client hundreds of thousands of dollars. Even if attorneys at high-powered appellate practices have some inclination to take on plaintiff-side work, they often will not due to the fact that their firms represent the corporations, or at least the antiplaintiff positions, on the other side of the case. The Chamber of Commerce and other influential industry groups—not to mention many of the largest corporations in the country themselves—have hired most of the firms with elite appellate practices, making it difficult or impossible for attorneys at those firms to represent contrary interests and positions. Some might reasonably suggest that the rise of excellent law school supreme court clinics mitigates this problem, but, unfortunately, that is not the case. Virtually all of those clinics are affiliated with the very same corporate-defense law firms that employ the expert Supreme Court advocates, making it difficult for the clinics to take a position against, for example, a major bank in a case concerning financial services regulation.

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### *Mitigating Corporate Skew in the Supreme Court Bar*

Given this landscape, the government, starting with this Commission and this White House, can and should encourage the development of specialized public-interest and plaintiffs' lawyers—first and foremost by advocating for increased funding to organizations that do this appellate work. To start, Legal Aid organizations around the country provide invaluable services to low-income people in the areas of housing, employment, immigration, criminal justice, public benefits, and more. A few Legal Aid offices—but only a few—have developed small appellate practices. Similarly, some public defender offices have small appellate divisions. More funding for these offices would strengthen the legal representation of low-income and other marginalized people in general—a worthy goal in its own right—but it could also facilitate the development of a larger, more experienced public-interest appellate bar. Just as corporate law firms and the Solicitor General's office do for most prominent appellate lawyers now, better-funded Legal Aid and Public Defender offices could create the kinds of opportunities for training, specialization, and, eventually, repeat advocacy for career public-interest lawyers.

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### **Excerpts from Testimony of Supreme Court Practitioners' Committee (Co-Chairs Kenneth Geller, Mayer Brown LLP; Maureen Mahoney, Latham & Watkins LLP)**

<https://www.whitehouse.gov/wp-content/uploads/2021/07/Geller-Mahoney-Testimony.pdf>

### *Diversifying the Group of Appointed Amicus Counsel*

Since 1926, the Supreme Court has appointed counsel as amicus curiae approximately 70 times, with an average of one or two per year. Unlike traditional amici, appointed amici are instructed by the Court to take a particular position and to present oral argument. Of the approximately 70 amicus counsel appointments to date, it appears that only seven advocates have been women and only four have been people of color. Appointments have been heavily skewed toward former law clerks.

Commentators have suggested various means of broadening the group of attorneys considered for appointment by creating an application process, promulgating qualification



criteria, or issuing general invitations for amicus briefing on issues and selecting one responding amicus to argue.

The Committee does not endorse prescribing a public standard for appointments, but we support continued expansion of the group to which the Court looks for appointments. In particular, greater diversity likely would result if consideration were given to more attorneys who are not former law clerks, especially advocates in the specialized appellate bars of state courts and other federal courts and law professors.

### *Criminal Defense Cases*

Some of the best advocates before the Supreme Court are criminal defense attorneys, especially in the specialized capital defense bar. But the attorneys in the criminal defense bar generally have fewer resources to support specialized Supreme Court litigation than do their prosecutor counterparts. Government prosecutors also have more strategic flexibility about which issues to litigate in a case, whereas criminal defense attorneys have an ethical duty to zealously represent the interests of their individual client whose personal liberty is at stake. And prosecutors collaborate extensively with each other through organizations like the National Association of Attorneys General, and often support each other as amicus curiae, but such resources are much more limited on the criminal defense side.

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The imbalance would be better addressed through federal and state legislative appropriation of increased resources to develop more Supreme Court specialization within the criminal defense bar in state and federal public defender offices and through greater collaboration with Supreme Court specialists in clinics and pro bono partnerships.

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## **Excerpts from Written Statement of Richard Lazarus, Harvard Law School**

<https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Richard-Lazarus.pdf>

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### *The Distinct Importance of the Court's Jurisdictional Determination*

. . . The Court's decision at the jurisdictional stage that a particular case warrants plenary review is . . . one of the most consequential rulings that the Court makes. Yet, as the number of petitions has significantly increased over time, the Court's resources to identify which cases warrant full briefing and argument have necessarily been stretched increasingly thin and, as a result, increasingly susceptible to be unduly influenced by expert members of the Supreme Court Bar.

I have no comparable concern relating to the Court's decision-making process for those cases granted plenary review. Especially now that the Court decides only sixty to eighty cases a year, the Justices and their chambers have ample time to immerse themselves fully into those cases and potentially make up for any possible deficits in the advocacy in any specific case. Advocacy deficits are also effectively addressed in most cases that the Court has decided to review with full briefing and oral argument by the sheer number of amicus briefs filed these days in those merits cases, many of which are crafted by outstanding lawyers on all sides of a case. My concern is instead limited to the jurisdictional stage, where mismatches in the advocacy skills of the competing parties favoring and opposing review are likely to be present and the Court lacks the time and resources to make up for the difference. It is at the jurisdictional stage, not the merits stage, that the Court is most vulnerable.

### *The Deficiencies in the Court's Current Internal Processes at the Jurisdictional Stage*

The Court currently considers between five and six thousand petitions each year and, as described above, grants review in about sixty to eighty cases. Although the Justices themselves plainly commit significant time to deciding—based on full briefing and the merits, oral argument, and circulation of draft opinions—those cases in which review is granted, it is an open secret that the individual Justices spend relatively little time reviewing individual petitions at the jurisdictional stage. To be sure, the Justices are the ones who formally vote on the question whether review is warranted but given the thousands of petitions to be considered and all of their other responsibilities, especially deciding the cases granted review, the Justices themselves spend no time at all on the vast majority of cert petitions and only minutes even

on those relatively few petitions in which review is seriously considered. The Justices instead must, as they do, depend heavily on their law clerks to identify which cases warrant the Court's attention.

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As a result, the law clerks and, accordingly, the Justices, are highly dependent at the jurisdictional stage on the quality of the advocacy reflected in the petition for a writ of certiorari seeking review, amicus briefs filed in support of the petition, and those in any briefs opposed to review. And, most simply put, as good as those law clerks are, they are no match at the jurisdictional stage when time is so limited for the nation's most skilled Supreme Court advocates. The latter, many of whom were once themselves Supreme Court law clerks but are now seasoned Supreme Court lawyers with years and decades of experience, know precisely how to pitch cases both to persuade a law clerk that a case is worthy of the Court's review when it is not, and to persuade the clerks that a case is not worthy of review, when it is.

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Were the assistance of the most skilled Supreme Court advocates equally available to all persons, especially our society's most vulnerable, their potential for outsized influence would neither be realized nor a problem. The Justices and their chambers would always have the advantage of exceedingly able lawyers on all sides of a case. In many cases, with the modern rise of the expert Supreme Court Bar during the past four decades, that is now true for the cases the Court decides after full briefing and oral argument. That development is very much a good thing. But it is not true at the jurisdictional stage which is both why the Court remains particularly vulnerable to undue influence by certain advocates and reform of the Court's procedures is warranted.

Until relatively recently, the problem of skewed advocacy expertise was less concerning because so few attorneys possessed it outside of the Office of the Solicitor General of the U.S. Department of Justice. . .

Until the late 1980s, the Office of the Solicitor General enjoyed the equivalent of a monopoly on such expertise, but the emergence of a modern Supreme Court Bar has since dramatically changed that dynamic, and a handful of national law firms now fairly boast of highly skilled and successful Supreme Court practices frequently staffed by veterans of the

Solicitor General's Office and former Supreme Court law clerks. They match, and sometimes even best the Solicitor General's Office in the depth and breadth of their advocacy expertise. Year after year, they now dominate the cases the Court decides to hear at the jurisdictional stage and disproportionately employ the attorneys who file the briefs and present oral argument on the merits.

Nor does the significant pro bono work many of those same law firms commendably engage in effectively close the advocacy gap. Such work is necessarily both secondary to their need to earn profits and limited by the professional requirement that they avoid any formal conflicts of interests with their paying clients as well as by the practical need to avoid taking on pro bono causes that might upset their business clients that pay full freight for legal representation. Consequently, it is the business interests that can afford to pay their high billable rates that have greatest access to their expertise.

To be sure, a few public interest organizations, such as the NAACP Legal Defense Fund, Public Citizen, and the American Civil Liberties Union, can fairly boast of impressive Supreme Court expertise. Their representation, however, is as a practical matter still very limited in its reach at the Court's jurisdictional stage and many parties, such as non-white-collar defendants in federal and state criminal defendants, lack the distinct advantage of their assistance. As a result, potentially successful cert petitions representing those parties are either not filed at all or, if filed, poorly executed. And petitions filed by government prosecutors drafted by expert Supreme Court counsel in the U.S. Solicitor General's Office, or their counterparts in many States, are granted, even though an effective opposition to the petition might well have resulted in a denial of review instead.

#### *The Proposed Addition of a Career Staff Attorney Office at the Court*

My reform proposal for the Commission's consideration is a modest one that does not purport to address the more serious and pervasive underlying problem of the profound lack of effective legal representation of the nation's most vulnerable populations. Consistent with the Commission's charge, my proposal is instead narrowly aimed at improving the internal decisionmaking process that the Supreme Court uses to identify the cases it determines warrant its plenary review. Although a significant problem, it is also one that I believe can be effectively addressed in a relatively simple way and at relatively little cost.

The Court should hire a staff of career attorneys whose exclusive responsibility would be to provide the Court with assistance in deciding which cases warrant the Court's review. The

office would be staffed by seasoned, highly accomplished attorneys with significant experience in appellate and Supreme Court advocacy. Following general guidance provided by the Justices, these staff attorneys would review the petitions in the first instance, identify those petitions warranting closer attention by the Justices and their law clerks, and write up memoranda for their consideration in deciding whether review should be granted. The staff attorneys would possess both the time and the years of professional experience that the law clerks currently lack in evaluating the cert petitions. That would include, when needed, reading closely the briefs, the cited authorities, the lower court opinions, identifying how expert counsel may be overreaching in their framing of the case, and otherwise making up for gaps in advocacy. But also important, the staff attorneys would, as now, leave the final decisions to the Justices, assisted by their clerks as each Justice sees fit.

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### **Testimony of Allison Orr Larsen, William & Mary Law School**

<https://www.whitehouse.gov/wp-content/uploads/2021/06/Larsen-Testimony-Presidential-Commission-on-the-Supreme-Court.pdf>.

#### *An Amicus Boom*

Amicus briefs are on the rise. Ninety-eight percent of Supreme Court cases now have amicus filings; over 800 briefs are filed each term and the marquee cases attract briefs in the triple digits. This is an 800% increase from the 1950s and a 95% increase from 1995. To put things in perspective historically, amici averaged roughly one brief per case in the 1950s and about five briefs per case in the 1990s. By contrast, in the 2015 *Obergefell* case the number of amicus briefs reached 147 (a record-breaker) and the health care case two years earlier (*NFIB v. Sebelius*) had 136 amicus briefs on the docket. For the sake of comparison, consider that *Roe v. Wade* had twenty-three amicus briefs. In *Brown v. Board of Education*, there were only six. In *Lochner v. New York* that number was zero.

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Perhaps it is not surprising, therefore, that the Justices cite these briefs to support their factual claims . . . increasingly regularly. In my 2014 study on the subject I found that one in every five citations to amicus briefs by the Justices were used to support a factual assertion. The Justices seem to have only picked up the pace since then. A 2020 study of amicus citations found citations to amici in 65 percent of the Court’s cases (a record), and “most of all” the

justices relied on briefs that “provided real world information.” Of the citations I studied, several surprising patterns emerge. Less than a third of the factual claims presented by amici and credited by the Court were contested by the party briefs. And more than two-thirds of the time, the Justice citing the amicus brief for a fact cites only the amicus brief as authority—not any accompanying study or journal citation from within the brief. The implication from this omission is telling: the Justices are using these briefs as more than a research tool. The briefs themselves are the factual authorities, and the amici are the experts.

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### *The Trouble with Amicus Facts*

Nowhere outside the Supreme Court do we see this widespread eleventh-hour supplementation of the factual record from sources that are not subject to cross-examination or other checks on reliability. The fact that the U.S. Supreme Court is unique in educating itself about the world in this way should give us significant pause. Unlike other legal decision makers (i.e., administrative agencies and trial courts), the U.S. Supreme Court is not set up to sort through what is now a sea of factual claims coming from a variety of actors who all claim to be experts. Mistakes are almost inevitable.

The studies, statistics, and articles marshaled by these groups to support factual assertions are selected by those with a “dog in the fight.” The factual sources are chosen by amici, in other words, for reasons other than that they are the industry standard, the most peer-reviewed, or the most accurate state of our knowledge today. Rather they are chosen as part of a coordinated plan to win the day. And with the vast amount of information and studies available online now, it is not hard to assemble evidence – whether of dubious or strong reliability – to support a pre-existing point of view. Because the secret is out that the Justices value briefs that supplement their technical knowledge, many amicus briefs stretch to make factual claims – even if it is beyond their institutional capacity to do so.

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To date, the standard response to questions about “junk science” ending up in Supreme Court opinions is to resort to the adversary process. While that may have been enough in a pre-Internet universe, it is insufficient today. My research shows that the check from the adversary system at the Court is very feeble to the point of being almost non-existent. In both my 2014 published study and my 2018 update I went through each of the factual claims

supported by an amicus and cross-referenced the party briefs to see if they were contested by the parties. Such a check existed in less than a third of the citations for the 2014 study and less than 10% of the citations for the more modern time period. The number of amicus briefs filed and the amount of seemingly legitimate information available to present makes it very unlikely that a litigant can adequately respond to amici-presented factual claims.

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One possible reform involves increased disclosure rules on amici so that the Justices are fully aware of the source of the information they are digesting. . . If the Justices are blind to the actual funders of the amici then they have no way to evaluate critically the factual submissions coming from them. Current Supreme Court rules on amicus briefs require a statement of interest of the amicus and disclosure only as to whether the party contributed financially or otherwise to the brief. The rules do not bar anonymously-funded amicus briefs and they do little to shed light on briefs filed by neutral-sounding organizations that are in reality funded by those with an interest in the case (even if not the party).

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Disclosure rules on amicus briefs can take many forms and still be effective. One possibility (borrowed from Daubert and the rules of evidence) is for the Court to require any amicus brief filed with factual claims to include an explanation of the methods used to discover them. . . The Court could easily impose even minor variations of this reform. It could, for example, require that any statement of fact in an amicus brief be supported by data that is publicly available (not “on file with” the author). Or, the Court could require disclosure when an amicus (or a related group) funds or authors a study purporting to establish a factual claim. . . Alternatively, the Supreme Court Rules could create a limited way for the parties to respond to unreliability in factual claims. The Court could permit a limited letter at the end of the amicus submissions in which the parties can respond—not to legal arguments—but only to instances where they think the amicus has relied on a shaky authority for a claim of fact.

## Endnotes: Appendix D

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<sup>1</sup> All citations are omitted from the excerpts but are included in the full testimony available on the website.



## Appendix E: Commission Members

### Michelle Adams

Michelle Adams is a Professor of Law at Benjamin N. Cardozo School of Law, where she teaches Constitutional Law, Federal Courts, and Federal Civil Rights. At Cardozo, she is a Director of the Floersheimer Center for Constitutional Democracy and was a Board Member of the Innocence Project. Adams has published in the *Yale Law Journal*, the *California Law Review*, and the *Texas Law Review*. She recently appeared in “Amend: The Fight for America,” a 2021 Netflix documentary about the 14th Amendment. She is the author of *The Containment: Detroit, The Supreme Court, and the Battle for Racial Justice in the North*, forthcoming from Farrar, Straus and Giroux. Previously, she was a Law Professor at Seton Hall Law School, practiced law at the Legal Aid Society, and served as a Law Clerk for Magistrate Judge James C. Francis IV in the Southern District of New York. Adams holds a B.A. from Brown University, a J.D. from City University of New York Law School, and an LL.M. from Harvard Law School, where she was the first Charles Hamilton Houston Scholar. She is a two-time recipient of Cardozo’s Faculty Inspire Award.

### Kate Andrias (Rapporteur)

Kate Andrias is a Professor of Law at Columbia Law School. She teaches and writes about constitutional law, labor and employment law, and administrative law, with a focus on problems of economic and political inequality. Her work has been published in numerous books and journals, including the *Harvard Law Review*, the *NYU Law Review*, the *Supreme Court Review*, and the *Yale Law Journal*. In 2016, Andrias was the recipient of Michigan Law School’s L. Hart Wright Award for Excellence in Teaching. Andrias previously served as special assistant and associate counsel to President Obama, and as chief of staff of the White House Counsel’s Office. A graduate of Yale Law School, she clerked for Justice Ruth Bader Ginsburg of the U.S. Supreme Court and the Hon. Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit.

### Jack M. Balkin

Jack M. Balkin is Knight Professor of Constitutional Law and the First Amendment at Yale Law School. He is the founder and director of Yale’s Information Society Project, an interdisciplinary center that studies law and new information technologies. He also directs the Abrams Institute for Freedom of Expression, and the Knight Law and Media Program at Yale. Balkin is a member of the American Law Institute and the American Academy of Arts and Sciences, and founded and edits the group blog Balkinization. His most recent books include

The Cycles of Constitutional Time, Democracy and Dysfunction (with Sanford Levinson), Processes of Constitutional Decisionmaking (7th ed. with Brest, Levinson, Amar, and Siegel), Living Originalism, and Constitutional Redemption: Political Faith in an Unjust World.

## Bob Bauer (Co-Chair)

Bob Bauer is Professor of Practice and Distinguished Scholar in Residence at the New York University School of Law and Co-Director of NYU Law’s Legislative and Regulatory Process Clinic. Bauer served as White House Counsel to President Obama from 2009 to 2011. In 2013, the President named him to be Co-Chair of the Presidential Commission on Election Administration. He is co-author with Jack Goldsmith of *After Trump: Reconstructing the Presidency* (2020), books on federal campaign finance and numerous articles on law and politics for legal periodicals. He has co-authored numerous bipartisan reports on policy and legal reform, including “The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration” (Presidential Commission on Election Administration, 2014); “The State of Campaign Finance in the United States” (Bipartisan Policy Center, 2018); and “Democratizing the Debates” (Annenberg Working Group on Presidential Campaign Debate Reform, 2015); ; He is a Contributing Editor of *Lawfare* and has published opinion pieces on constitutional and political law issues in *The New York Times*, *The Washington Post*, and *The Atlantic*, among other publications.

## William Baude

William Baude is a Professor of Law and Faculty Director of the Constitutional Law Institute at the University of Chicago Law School, where he teaches federal courts, constitutional law, conflicts of law, and elements of the law. His most recent articles include *Adjudication Outside Article III*, and *Is Quasi-Judicial Immunity Qualified Immunity?* He is also the co-editor of the textbook, *The Constitution of the United States*, and an Affiliated Scholar at the Center for the Study of Constitutional Originalism. He is a graduate of the University of Chicago and the Yale Law School, and a former clerk for then-Judge Michael McConnell and Chief Justice John Roberts.

## Elise Boddie

Elise Boddie is a Professor of Law, Henry Rutgers Professor, and Judge Robert L. Carter Scholar at Rutgers University. An award-winning scholar, Boddie teaches and writes about constitutional law and civil rights and has published in leading law reviews. Her commentary has appeared multiple times in *The New York Times*, as well as in *The Washington Post*, among other national news outlets. Boddie has served on the national board of the American Constitution Society and the board of the New Jersey Institute for Social Justice and is the

founder and director of The Inclusion Project at Rutgers. Before joining the Rutgers faculty, Boddie was Director of Litigation for the NAACP Legal Defense & Educational Fund, Inc. and supervised its nationwide litigation program, including its advocacy in several major U.S. Supreme Court cases. An honors graduate of Harvard Law School and Yale, she also holds a master's degree in public policy from the Harvard Kennedy School of Government. Boddie clerked for Judge Robert L. Carter in the Southern District of New York. She is a member of the American Law Institute and an American Bar Foundation Fellow. In 2016, Rutgers University President Barchi appointed Boddie a Henry Rutgers Professor in recognition of her scholarship, teaching, and service. In 2021, Boddie was named the founding Newark Director of Rutgers University's Institute for the Study of Global Racial Justice.

## Guy-Uriel E. Charles

Guy-Uriel E. Charles is the inaugural Charles J. Ogletree Jr. Professor of Law at Harvard Law School. He writes about the relationship between law and political power and law's role in addressing racial subordination. He teaches courses on civil procedure; election law; constitutional law; race and law; legislation and statutory interpretation; law, economics, and politics; and law, identity, and politics. He is currently working on a book, with Luis Fuentes-Rohwer, on the past and future of voting rights, under contract with Cambridge University Press. He is also co-editing, with Aziza Ahmed, a handbook entitled *Race, Racism, and the Law*, under contract with Edward Elgar Publishing. This book will survey the current state of research on race and the law in the United States and aims to influence the intellectual agenda of the field. He clerked on the Sixth Circuit for the late Judge Damon J. Keith. He has published numerous articles in top law journals. He is the co-author of two leading casebooks and two edited volumes. He is also a member of the American Law Institute.

## Andrew Manuel Crespo

Andrew Manuel Crespo is the Morris Wasserstein Public Interest Professor of Law at Harvard University where he directs the Institute to End Mass Incarceration. Professor Crespo's scholarship has been published in multiple leading academic journals including the Harvard Law Review, the Yale Law Journal, and the Columbia Law Review. Prior to beginning his academic career, Professor Crespo served as a Staff Attorney with the Public Defender Service for the District of Columbia, where he represented over one hundred people accused of crimes who could not afford a lawyer. Professor Crespo graduated magna cum laude from Harvard Law School, where he served as president of the Harvard Law Review and was the first Latino to hold that position. Following law school, he served as a law clerk to Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit before going on to serve for two years as a law clerk at the United States Supreme Court, first to Associate Justice Stephen Breyer and then to Associate Justice Elena Kagan during her inaugural term on the Court.

## Walter Dellinger

Walter Dellinger is the Douglas Maggs Emeritus Professor of Law at Duke University and a Partner in the firm of O'Melveny & Myers. He was named one of the 100 Most Influential Lawyers in America by the National Law Journal and is the recipient of Lifetime Achievement Awards from the American Lawyer, the American Constitution Society and the Mississippi Center for Justice. Dellinger served in the White House and as Assistant Attorney General and head of the Office of Legal Counsel (OLC) from 1993 to 1996. He was acting Solicitor General for the 1996-97 Term of the US Supreme Court, He has argued 25 cases before the United States Supreme Court and has testified more than 30 times before committees of Congress. He has published in academic journals including the Harvard Law Review, the Yale Law Journal and the Duke Law Journal, and has written extensively for the Washington Post, The New York Times, the Wall Street Journal, Slate, and other publications. In 1987-88 he was a scholar at the National Humanities Center and has lectured at universities throughout the United States and other countries including China, Belgium, Netherlands, Germany, Mexico, Italy, Brazil, and Denmark. He graduated from University of North Carolina and Yale Law School and served as law clerk to Supreme Court Justice Hugo Black.

## Justin Driver

Justin Driver is the Robert R. Slaughter Professor of Law at Yale Law School. He teaches and writes in the areas of constitutional law, education law, and prison law. His prize-winning book, *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind*, was selected as a Washington Post Notable Book of the Year, an Editors' Choice of the New York Times Book Review, and received several other accolades. A recipient of the American Society for Legal History's William Nelson Cromwell Article Prize, he has published widely in the nation's leading law reviews and has also written extensively for general audiences. He is an editor of the *Supreme Court Review* and an elected member of the American Law Institute. He holds degrees from Brown, Oxford (where he was a Marshall Scholar), Duke (where he received certification to teach public school), and Harvard Law School (where he was an editor of the *Harvard Law Review*). After graduating from Harvard, he clerked for Judge Merrick Garland, Justice Sandra Day O'Connor (Ret.), and Justice Stephen Breyer.

## Richard H. Fallon, Jr.

Richard H. Fallon, Jr., joined the Harvard Law School faculty as an assistant professor in 1982 and is currently Story Professor of Law. He is also an Affiliate Professor in the Harvard University Government Department. Fallon is a graduate of Yale University and Yale Law School. He also earned a B.A. degree in Philosophy, Politics, and Economics from Oxford University, which he attended as a Rhodes Scholar. Before entering teaching, Fallon served as

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## Caroline Fredrickson

Caroline Fredrickson is a Distinguished Visiting Professor from Practice at Georgetown Law and a Senior Fellow at the Brennan Center for Justice. Caroline Fredrickson served as the President of the American Constitution Society from 2009-2019. Fredrickson has published works on many legal and constitutional issues and is a frequent guest on television and radio, including serving as a regular on-air commentator on impeachment. Before joining ACS, Fredrickson served as the Director of the ACLU's Washington Legislative Office and as General Counsel and Legal Director of NARAL Pro-Choice America. In addition, she served as the Chief of Staff to Senator Maria Cantwell, of Washington, and Deputy Chief of Staff to then-Senate Democratic Leader Tom Daschle, of South Dakota. During the Clinton Administration, she served as Special Assistant to the President for Legislative Affairs. Fredrickson is currently an elected member of the American Law Institute, co-chair of the National Constitution Center's Coalition of Freedom Advisory Board, a member of If/When/How's Advisory Board, and on the boards of American Oversight and the National Institute of Money and Politics. In 2015 Fredrickson was appointed a member of the Yale Les Aspin Fellowship Committee. Fredrickson received her J.D. from Columbia Law School with honors and her B.A. from Yale University in Russian and East European Studies summa cum laude, phi beta kappa. She clerked for the Hon. James L. Oakes of the United States Court of Appeals for the Second Circuit.

## Heather Gerken

Heather Gerken is the Dean and Sol & Lillian Goldman Professor of Law at Yale Law School and one of the country's leading experts on constitutional law and election law. A founder of the "nationalist school" of federalism, her work focuses on federalism, diversity, and dissent. Gerken's work has been featured in the *Harvard Law Review*, the *Yale Law Journal*, and the

Stanford Law Review as well as *The Atlantic*, *The Boston Globe*, NPR, and *The New York Times*. In 2017, *Politico Magazine* named Gerken one of *The Politico 50*, a list of idea makers in American politics. At Yale, she founded and runs the country's most innovative clinic in local government law, the San Francisco Affirmative Litigation Project (SFALP). Gerken is also a renowned teacher who has won awards at both Yale and Harvard. She was named one of the nation's "twenty-six best law teachers" in a book published by the Harvard University Press. She became dean of Yale Law School on July 1, 2017.

## Nancy Gertner

Nancy Gertner was United States District Court Judge (D. Mass.) from 1994-2011. She retired to join the faculty at Harvard Law School and has been a Visiting Lecturer at Yale Law School. Prior to 1994, Gertner was a civil rights and criminal defense lawyer. Named one of "The Most Influential Lawyers of the Past 25 Years" by *Massachusetts Lawyers Weekly*, she has published widely on sentencing, discrimination, forensic evidence, women's rights, and the jury system. Her autobiography, "In Defense of Women: Memoirs of an Unrepentant Advocate," (Beacon Press) was published in 2011. She is coauthor of "The Law of Juries" (Thomson Reuters, 2021). She is the author of an edited volume of the dissenting and majority opinions of Justice Ruth Bader Ginsburg (Talbot, forthcoming). She is writing a memoir, "Incomplete Sentences" (Beacon, forthcoming) about the men she has sentenced. A graduate of Barnard College, with a M.A in Political Science and J.D. from Yale, she clerked for Justice Luther Swygert, Chief Judge, 7th Circuit. She has received numerous awards, including the ABA's Margaret Brent Award, the National Association of Women Lawyers' Arabella Babb Mansfield Award, and the Thurgood Marshall Award from the American Bar Association. In October 2014, she was a resident scholar at the Rockefeller Foundation in Bellagio, Italy.

## Thomas B. Griffith

Thomas B. Griffith served on the U. S. Court of Appeals for the D. C. Circuit from 2005 – 2020. He is now Special Counsel at Hunton Andrews Kurth, a Senior Advisor to the National Institute for Civil Discourse, and a Lecturer on Law at Harvard Law School. During his tenure on the D.C. Circuit, Judge Griffith served on the Judicial Conference's Committee on the Judicial Branch, which is concerned with the federal judiciary's relationship to the Executive Branch and Congress, and the Code of Conduct Committee, which sets the ethical standards that govern the federal judiciary. Prior to his appointment to the D.C. Circuit, Judge Griffith was the General Counsel of Brigham Young University. Previously he served as Senate Legal Counsel, the nonpartisan chief legal officer of the U.S. Senate, and before that was a partner at Wiley, Rein & Fielding. Judge Griffith has long been active in the American Bar Association's rule of law projects in Eastern Europe and Eurasia and is currently a member of the International

Advisory Board of the CEELI Institute in Prague. He is a graduate of Brigham Young University and the University of Virginia School of Law.

## Tara Leigh Grove

Tara Leigh Grove is the Charles E. Tweedy, Jr., Endowed Chairholder of Law and Director of the Program in Constitutional Studies at the University of Alabama School of Law. After graduating summa cum laude from Duke University and magna cum laude from Harvard Law School, Grove clerked for Judge Emilio Garza of the U.S. Court of Appeals for the Fifth Circuit. She then spent four years as an appellate attorney for the U.S. Department of Justice, arguing fifteen cases in the courts of appeals. Grove has written extensively about the federal judiciary, exploring issues related to judicial legitimacy and judicial independence. Grove's work has been published in prestigious law journals, such as the Harvard Law Review, the Columbia Law Review, the University of Pennsylvania Law Review, the New York University Law Review, the Cornell Law Review, and the Vanderbilt Law Review. Grove has served as a visiting professor at Harvard Law School and Northwestern Pritzker School of Law.

## Bert I. Huang

Bert I. Huang is the Michael I. Sovern Professor of Law at Columbia University, where he received the Reese Prize for Excellence in Teaching from the law school's graduating class. The university has also recognized him with its Presidential Award for Outstanding Teaching. At Columbia, he created the Courts & Legal Process colloquium to bring judges, students, and faculty together to discuss new academic research about the judiciary; and he previously served as a vice dean. He has also taught at Harvard. He served as the president of the Harvard Law Review and as a law clerk for Justice David H. Souter of the U.S. Supreme Court. He also clerked for Judge Michael Boudin of the U.S. Court of Appeals for the First Circuit. He completed his J.D. and Ph.D. at Harvard University, where he was a Paul & Daisy Soros Fellow. After receiving his A.B. from Harvard, he was a Marshall Scholar at the University of Oxford and worked for the White House Council of Economic Advisers.

## Sherrilyn Ifill

Sherrilyn Ifill is the President & Director-Counsel of the NAACP Legal Defense & Educational Fund, Inc. (LDF), the nation's oldest and premier civil rights law organization fighting for racial justice and equality. Ifill began her career as a Fellow at the American Civil Liberties Union, and then as an Assistant Counsel at LDF where she litigated voting rights cases in the South. In 1993 Ifill joined the faculty at University of Maryland School of Law, where she taught civil procedure, constitutional law, and a broad range of civil rights and clinical offerings. Her scholarship focused on the critical importance of a racially diverse judiciary to the integrity of

judicial decision-making. Ifill also studies and writes about racial violence. Her critically acclaimed book, *On The Courthouse Lawn: Confronting The Legacy Of Lynching In The 21st Century*, is credited with inspiring contemporary conversations about lynching and reconciliation. Since returning to LDF as its 7th President & Director-Counsel in 2013, Ifill has led the organization's bold advocacy in the federal courts, including the U.S. Supreme Court, on behalf of clients fighting voter suppression, racial discrimination in the criminal justice system, and a broad array of other urgent civil rights issues. Ifill is a member of the American Law Institute and the American Academy of Arts & Sciences. She holds an undergraduate degree from Vassar College, a J.D. from New York University School of Law, and numerous honorary doctorates.

## Olatunde Johnson

Olatunde Johnson is the Jerome B. Sherman Professor of Law at Columbia Law School where she teaches and writes about legislation, administrative law, antidiscrimination law, litigation, and inequality in the United States. In February 2020, she was appointed by the United States Department of Justice to the Resolutions Committee honoring Justice John Paul Stevens. In 2016, she was awarded Columbia University's Presidential Award for Outstanding Teaching, and Columbia Law School's Willis L.M. Reese Prize for Excellence in Teaching. Previously, Professor Johnson served as constitutional and civil rights counsel to Senator Edward M. Kennedy on the Senate Judiciary Committee and as an attorney at the NAACP Legal Defense Fund. Professor Johnson graduated from Yale University and from Stanford Law School. After law school, she clerked for Judge David Tatel on the U.S. Court of Appeals for the D.C. Circuit and for Justice John Paul Stevens on the United States Supreme Court.

## Michael S. Kang

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## Alison L. LaCroix

Alison L. LaCroix is the Robert Newton Reid Professor of Law at the University of Chicago Law School. She is also an Associate Member of the University of Chicago Department of History. Professor LaCroix is the author of *The Ideological Origins of American Federalism* (Harvard University Press, 2010), and in 2018 she was awarded a National Endowment for the Humanities Fellowship for her current book project, titled *The Interbellum Constitution: Union, Commerce, and Slavery From the Long Founding Moment to the Civil War* (Yale University Press, forthcoming). Before joining the University of Chicago faculty in 2006, she practiced in the litigation department at Debevoise & Plimpton in New York. Professor LaCroix received her B.A. and J.D. from Yale University, and her A.M. and Ph.D. from Harvard University.

## Margaret H. Lemos

Maggie Lemos is the Robert G. Seaks LL.B. '34 Professor of Law, Senior Associate Dean for Faculty and Research, and faculty co-advisor for the Bolch Judicial Institute at Duke Law School. She is a scholar of constitutional law, legal institutions, and procedure. Her current research focuses on the institutions of law interpretation and enforcement, including both public and private lawyers, and their effects on substantive rights. Lemos is also a co-author of a new multidisciplinary coursebook on judicial decision making. She teaches courses on civil procedure, legislation, and judicial process, and was awarded Duke's Distinguished Teaching Award in 2013. Prior to joining the Duke Law faculty, Lemos was an associate professor at the Benjamin N. Cardozo School of Law; a Bristow Fellow at the Office of the Solicitor General; and a law clerk for Judge Kermit V. Lipez of the U.S. Court of Appeals for the First Circuit, and for U.S. Supreme Court Justice John Paul Stevens. She received her J.D. from New York University School of Law and her B.A. from Brown University.

## David F. Levi

David F. Levi is the Levi Family Professor of Law and Judicial Studies and Director of the Bolch Judicial Institute at Duke Law School. Levi was previously the James B. Duke and Benjamin N. Duke Dean of the Duke Law School. He served as dean for 11 years from 2007-2018. Prior to his appointment at Duke, Levi was the Chief United States District Judge for the Eastern District of California with chambers in Sacramento. He was appointed to the district court in 1990. From 1986-1990 he was the United States Attorney for the Eastern District of California. Following graduation from Stanford Law School in 1980, Levi served as a law clerk to Judge Ben C. Duniway of the U.S. Court of Appeals for the Ninth Circuit, and then to Justice Lewis F. Powell, Jr., of the U.S. Supreme Court. Levi has served as member and chair of two U.S. Judicial Conference committees — the Advisory Committee on the Civil Rules and the Standing Committee on the Rules of Practice and Procedure. He was chair of the American Bar

Association's Standing Committee on the American Judicial System (2014-2016). He is an elected fellow of the American Academy of Arts and Sciences. He is the author or co-author of several books, articles, and published speeches mostly on the judiciary, judicial independence, and judicial decision-making. He is President of the American Law Institute.

## Trevor W. Morrison

Trevor Morrison serves as Dean of New York University School of Law, where he is also the Eric M. & Laurie B. Roth Professor of Law. He previously held faculty appointments at Cornell Law School and Columbia Law School. Morrison's research and teaching interests are in constitutional law (especially separation of powers), federal courts, and the law of the executive branch. After graduating from Columbia Law School, he served as a law clerk to Judge Betty Fletcher of the U.S. Court of Appeals for the Ninth Circuit and to Justice Ruth Bader Ginsburg of the U.S. Supreme Court. Between those clerkships, he was a Bristow Fellow in the U.S. Justice Department's Office of the Solicitor General, an attorney-adviser in the Justice Department's Office of Legal Counsel, and an associate at Wilmer, Cutler & Pickering (now WilmerHale). Morrison also served as associate counsel to President Barack Obama. He is a fellow of the American Academy of Arts & Sciences and a member of the American Law Institute and the Council on Foreign Relations.

## Richard H. Pildes

Professor Richard H. Pildes is Sudler Family Professor of Constitutional Law at New York University School of Law and one of the country's leading experts on the legal aspects of American democracy and government. His academic work focuses on all aspects of the political process, as well as legal issues concerning the structure of American government, including the powers of the President, Congress, and the Supreme Court. His two casebooks, *The Law of Democracy* and *When Elections Go Bad*, created the law of democracy as a field of study in the law schools. In addition to editing the book, *The Future of the Voting Rights Act*, he has published more than seventy academic articles. Pildes has represented numerous clients before the Supreme Court. He served as a law clerk at the Court to Justice Thurgood Marshall and to Judge Abner J. Mikva of the United States Court of Appeals for the D.C. Circuit. He has testified several times before the United States Senate and House of Representatives. Born in Chicago, he began his teaching career at the University of Michigan Law School, before moving to NYU. He is an elected member of the American Academy of Arts and Sciences and the American Law Institute, as well as a Guggenheim Fellow.

## Michael D. Ramsey

Michael D. Ramsey is Hugh and Hazel Darling Foundation Professor of Law at the University of San Diego School of Law, where he teaches and writes in the areas of constitutional law, foreign relations law, and international law. He is the author of *The Constitution's Text in Foreign Affairs* (Harvard University Press 2007), co-editor of *International Law in the U.S. Supreme Court: Continuity and Change* (Cambridge University Press 2011), and co-author of two casebooks, *Transnational Law and Practice* (Aspen 2015) and *International Business Transactions: A Problem-Oriented Coursebook* (12th ed., West 2015). His scholarly articles have appeared in publications such as the *Yale Law Journal*, the *University of Chicago Law Review*, the *Georgetown Law Journal* and the *American Journal of International Law*. He received his B.A. magna cum laude from Dartmouth College and his J.D. summa cum laude from Stanford Law School. Prior to teaching, he served as a judicial clerk for Judge J. Clifford Wallace of the United States Court of Appeals for the Ninth Circuit and Justice Antonin Scalia of the United States Supreme Court, and practiced law with the law firm of Latham & Watkins. He has taught as a visiting professor at the University of California, San Diego, in the Department of Political Science and at the University of Paris – Sorbonne, in the Department of Comparative Law.

## Cristina M. Rodríguez (Co-Chair)

Cristina M. Rodríguez is the Leighton Homer Surbeck Professor of Law at Yale Law School. Her fields of research and teaching include constitutional law and theory, immigration law and policy, and administrative law and process. Her new book, *The President and Immigration Law* (with Adam B. Cox) was published by Oxford University Press in September 2020, and explores the long history of presidential control over immigration policy and its implications for the future of immigration law and the presidency itself. Rodríguez joined Yale Law School in 2013 after serving for two years as Deputy Assistant Attorney General in the Office of Legal Counsel at the U.S. Department of Justice. She was on the faculty at the New York University School of Law from 2004–2012 and has been Visiting Professor of Law at Stanford, Harvard, and Columbia Law Schools. She is a member of the American Academy of Arts and Sciences and the American Law Institute, a non-resident fellow at the Migration Policy Institute in Washington, D.C., and a past member of the Council on Foreign Relations. She is also a past recipient of the Yale Law Women Award for Excellence in Teaching. She earned her B.A. and J.D. degrees from Yale and attended Oxford University as a Rhodes Scholar, where she received a Master of Letters in Modern History. Following law school, Rodríguez clerked for Judge David S. Tatel of the U.S. Court of Appeals for the D.C. Circuit and Justice Sandra Day O'Connor of the U.S. Supreme Court.

## Kermit Roosevelt

Kermit Roosevelt is a professor of law at the University of Pennsylvania Carey Law School, where he teaches constitutional law and conflict of laws. He is a graduate of Harvard College and Yale Law School. Before joining the Penn faculty, he practiced appellate litigation with Mayer Brown in Chicago and clerked for D.C. Circuit Judge Stephen F. Williams and Supreme Court Justice David H. Souter. He is the Reporter for the American Law Institute's Third Restatement of Conflict of Laws. His most recent book, *The Nation that Never Was: Reconstructing America's Story* (University of Chicago Press, 2022), explores the source of American values of liberty and equality.

## Bertrall Ross

Bertrall Ross is the Justice Thurgood Marshall Distinguished Professor of Law at the University of Virginia, School of Law. He teaches and writes in the areas of constitutional law, election law, administrative law, and statutory interpretation. Ross's research is driven by a concern about democratic responsiveness and accountability, as well as the inclusion of marginalized communities in administrative and political processes. His past scholarship has been published in several books and journals, including the *Columbia Law Review*, the *NYU Law Review*, and the *University of Chicago Law Review*. Ross is currently working on book projects related to separation of powers, gerrymandering, and voter data as a tool for disfranchisement. Ross has been the recipient of the Berkeley Law Rutter Award for Teaching Distinction, the Berlin Prize from the American Academy in Berlin, the Princeton University Law and Public Affairs Fellowship, the Columbia Law School Kellis Parker Academic Fellowship, and the Marshall Scholarship. He is currently a public member of the Administrative Conference of the United States. Ross earned his law degree from Yale Law School and Masters degrees from the London School of Economics and Princeton University's School of Public and International Affairs. Prior to joining Berkeley Law, he clerked for Judge Dorothy Nelson of the U.S. Court of Appeals for the Ninth Circuit and Judge Myron Thompson of the U.S. District Court for the Middle District of Alabama.

## David A. Strauss

David Strauss is the Gerald Ratner Distinguished Service Professor of Law and the Faculty Director of the Supreme Court and Appellate Clinic at the University of Chicago. He is the author of *The Living Constitution* (Oxford University Press, 2010) and the co-author of *Democracy and Equality: The Enduring Constitutional Vision of the Warren Court* (Oxford University Press, 2019), and he has written many academic and popular articles on constitutional law and related subjects. He is a Fellow of the American Academy of Arts and Sciences and a co-editor of the *Supreme Court Review*. He has been a visiting professor at

Harvard and Georgetown. He has served as an Assistant to the Solicitor General of the United States, in the Office of Legal Counsel of the U.S. Department of Justice, and as Special Counsel to the Senate Judiciary Committee. He has argued nineteen cases before the U.S. Supreme Court.

## Laurence H. Tribe

Laurence Tribe is the Carl M. Loeb University Professor and Professor of Constitutional Law Emeritus at Harvard University. Tribe has taught at Harvard since 1968 and was voted the best professor by the class of 2000. The title “University Professor” is Harvard’s highest academic honor, awarded to a handful of professors at any given time and to fewer than 75 professors in Harvard University’s history. Tribe clerked for the California and U.S. Supreme Courts; was elected to the American Academy of Arts and Sciences in 1980 and the American Philosophical Society in 2010; helped write the constitutions of South Africa, the Czech Republic, and the Marshall Islands; and has received eleven honorary degrees, most recently a degree honoris causa from the Government of Mexico in March 2011 (never before awarded to an American) and an LL.D from Columbia University. Tribe has argued 35 cases in the U.S. Supreme Court. He was appointed in 2010 by President Obama and Attorney General Holder to serve as the first Senior Counselor for Access to Justice. He has written 115 books and articles, most recently, “To End A Presidency: The Power of Impeachment.” His treatise, “American Constitutional Law,” has been cited more than any other legal text since 1950.

## Michael Waldman

Michael Waldman is the president of the Brennan Center for Justice at NYU School of Law. The Brennan Center is a nonpartisan law and policy institute that works to strengthen the systems of democracy and justice so they work for all Americans. The Center is a leading national voice on voting rights, money in politics, criminal justice reform, and constitutional law. Waldman has led the Center since 2005. He is the author of *The Fight to Vote* (2016), a history of the struggle to win voting rights for all citizens, *The Second Amendment: A Biography* (2014), and five other books. Waldman served as director of speechwriting for President Bill Clinton from 1995-1999, and special assistant to the president for policy coordination from 1993-1995. He was responsible for writing or editing nearly two thousand speeches, including four State of the Union and two inaugural addresses. He is a graduate of NYU School of Law and Columbia College.

## Adam White

Adam White is a senior fellow at the American Enterprise Institute and co-director of George Mason University's C. Boyden Gray Center for the Study of the Administrative State. He writes

on the courts, the Constitution, administrative law, and regulatory policy. He is a public member of the Administrative Conference of the United States. Previously he practiced constitutional and administrative law in Washington, D.C., and he clerked for the U.S. Court of Appeals for the D.C. Circuit, after graduating from the Harvard Law School and the University of Iowa. In 2005, the *Harvard Journal of Law & Public Policy* published his study of the Senate's constitutional power to grant or withhold its "advice and consent" for judicial nominations.

## Keith E. Whittington

Keith E. Whittington is the William Nelson Cromwell Professor of Politics at Princeton University and is currently the chair of Academic Freedom Alliance. He works on American constitutional history, politics and law, and on American political thought. He is the author of *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* and *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*, among other works. He has been a visiting professor at Harvard Law School, Georgetown University Law Center, and the University of Texas School of Law, and he is a member of the American Academy of Arts and Sciences. He did his undergraduate work at the University of Texas at Austin and completed his Ph.D. in political science at Yale University.