Presidential Commission on the Supreme Court of the United States

Hearing on "The Court's Role in Our Constitutional System"

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Commissioners:

Thank you for inviting these remarks on (1) the United States Supreme Court's role in the resolution of major social and political issues, and on (2) proposals for reform that would affect judicial review of legislative enactments.

First, I will provide some background on these two topics that you have singled out for my commentary in the session. Second, I will contend that reform of the Supreme Court must not emphasize the maintenance or restoration of institutional legitimacy as its main rationale, but instead adopt the goal of enhancing democratic authority over law. Third, I will support reforms that seek to curtail and manage the institution's power, compared to those that affect its composition or personnel.

Throughout, my suggestion is that a democratizing reform of the Supreme Court's place in our constitutional system will be an indispensable part of any democratization of the American polity in the future.[1]

Introduction

Political control of judiciaries is essential to all regimes — and, far from being illiberal or undemocratic, is especially precious in liberal democracies.[2] This political control is meaningfully exercised, not merely by appointment of judges, but also by jurisdictional channeling and definition, which has to be open to ongoing adjustment in light of experience, and to institutional experiments when the opportunities outweigh the risks. The best hope for and model of Supreme Court reform lies in the fine-tuning of jurisdiction, to limit the policymaking power it currently enjoys.

Albeit in different cases, judges themselves concur that the prior regime of judicial self-restraint except in the case of "clear error" or serious violation has broken down, and perhaps it was inevitable that this occur. For this reason, the fine-tuning of Supreme Court power has to come from without. And while this strategy is justifiable on its own, it is

[1] This testimony reprises the analysis of ends and means in Supreme Court reform in Ryan D. Doerfler and Samuel Moyn, "Democratizing the Supreme Court," *California Law Review* (forthcoming 2021), posted since July 2020 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665032, and where much fuller substantiation for all claims is offered. See also my "Stop Worrying About Kavanaugh, Liberals," *Washington Post*, August 8, 2018; "Resisting the Juristocracy," *Boston Review*, October 6, 2018; "The Court Is Not Your Friend," *Dissent*, Winter 2020; (with Doerfler) "Reform the Court, But Don't Pack It," *The Atlantic*, August 8, 2020; (with Doerfler) "Making the Supreme Court Safe for Democracy," *The New Republic*, November 2020; and "Change the Court for Good," *New York Daily News*, January 30, 2021.

[2] Thomas Hobbes warned that "by the craft of an Interpreter, the Law may be made to beare a sense, contrary to that of the Sovereign; by which means the Interpreter becomes the Legislator." Thomas Hobbes, *Leviathan*, ed. Richard Tuck (1996), 190. Democracy makes the concern greater rather than less.

fortunate that the United States Constitution gives Congress extraordinary and uncontroversial flexibility, not merely in the design of the federal judiciary, but also in the allocation (and therefore channeling, or even deprivation) of its jurisdiction.

The problem to solve is not that the Supreme Court has lost legitimacy, understood as the current trust of enough observers, but that it thwarts the democratic authority that alone justifies our political arrangements. It is one thing to insulate and protect interpreters of our Constitution and laws from certain kinds of short-term democratic control. It is quite another to cede the last word over large parts of our national political conversation — not to mention the power to edit and throw out major laws — to less accountable powers and, to add insult to injury, to pretend that doing so is either mandated by our Constitution or essential to democracy.

The American higher judiciary has too much authority, allocated and arrogated, and this fact has been grievous for our national political experience. Not least, in recent decades, it has diverted collective political choices on a range of important issues, as well as the most momentous national elections, into a distorted and unhelpful contest about *who will serve* on judiciaries mistakenly empowered to face our dilemmas. In the most visible cases, the choices in these dilemmas are almost never constitutionally or legally compelled, which the close disagreement of our justices themselves already proves. Rather than continuing a regime of politics by means of the higher judiciary, Americans deserve a more democratic politics for themselves.

Nor are the costs of "juristocracy" merely in the excess power given to or taken by unelected judges. As our greatest constitutional theorist, Professor James Bradley Thayer,

originally argued at the end of the nineteenth century, empowerment and self-empowerment of the judiciary stunts our common democratic life, and recent political experience confirms he was correct.[3] Disempowering our constitutional judiciary for the long term is the opportunity that reformers should seize, rather than locking in short-term partisan gain on the bench on one side or the other, or pursuing forms of balance of power or false neutrality there.

It is not obvious that legal elites — especially those who have been onetime clerks to Supreme Court justices and made their names and spent their careers as commentators on the institution's doctrinal output — are best situated to appreciate this development, let alone to embrace alternatives.[4] The reform debate does not concern the Supreme Court's doctrinal output (on which legal experts claim some preeminence), but its decisionmaking power and its design parameters. And formally, the initiation of any Supreme reform lies with Congress, whether to propose amendments or to pass statutes, not within the executive branch, or with the president personally. Even informed by this commission's findings, the president's own view about next steps is not of exclusive, or even primary, importance. Instead, Supreme Court reform will depend on a political coalition in Congress in the first instance.[5]

More broadly, my comments presuppose that the most burning questions about Supreme Court reform are neither intellectual or legal. They are political — including which

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[3] James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7, no. 3 (1893): 129-56.

[4] "These jurists stand in the imaginative position of judges, or whisper, figuratively or literally, into their ears." Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (1996), 111.

[5] See Ryan D. Doerfler, "Why Progressives Should Ignore Biden's Supreme Court Commission," *Washington Post*, May 20, 2021.

reforms can garner the likeliest coalition for restoring democratic authority, an agenda that has appealed across the partisan spectrum at different times in our history. The determination of the "merits" of any of the currently debated reforms singly or together is a political one — anything but a neutral-technical matter. In most instances, the same turns out to be true of the "legality" of the reforms.

It is also worth observing at the start that no one knows precisely how any particular structural intervention would play out, since various proposals can come in different forms, and each would inaugurate an experiment with not fully predictable outcomes. But many of the reforms are likely superior enough to current arrangements to be worth a try if and when they enjoy political support. Indeed, as I indicate, the fine-tuning of jurisdiction that I advocate can come in alternative and concurrent versions, and the effect of each is to some extent speculative — but this cannot mean that the devil we know is preferable. Nor is there ever going to a perfect and riskless solution that is consensual in advance, especially on the fine-tuning model, which is always a matter of more or less, not all or nothing. More generally, we can think of court reform the way we should about constitutional self-government as such: as a project of opportunities to contemplate and risks to manage.[6]

With these points in mind, I will give reasons for preferring reforms that curtail the Supreme Court's power through various mechanisms. I do not personally advocate any specific disempowering reform, since each has virtues and vices and, indeed, can be institutionalized in combination with other reforms. If pushed, I would advocate that Congress try them all, singly or together, in an experimental mode.

[6] Adrian Vermeule, *The Constitution of Risk* (2014).

2. Historical Background

From the earliest days of the republic, Americans have debated the forms and scope of judicial power. After *Marbury* v. *Madison*, contention often concerned whether the United States Supreme Court properly enjoyed the power of judicial review. With time, the institution accreted the distinctive powers of judicial finality and supremacy.[7] (Judicial review refers to the power to examine the constitutionality of legislation before applying it in court, while judicial finality and supremacy refer to the powers to have the last or only word on constitutionality for all actors, respectively.)

Judicial power was not only central to the maintenance of chattel slavery. After the Civil War, it was profoundly implicated in the abandonment of Reconstruction policies, and helped to institutionalize African-American subordination in new guise.[8] Just as notoriously, the Supreme Court became a bastion from which business elites in America's first Gilded Age put up dramatic resistance against progressive reform. It was in the course of the debates that ensued that essentially all of the Supreme Court reforms now being surveyed by this commission were first proposed. Nor should this commission neglect comparative global experience, not least since for most of modern history the American judicial power

[7] 5 U.S. (1 Cranch) 137 (1803). For the best bibliography I have seen illustrating this persistence, see Alan F. Westin, "An Historical Bibliography on the Supreme Court's Authority to Pass on the Constitutionality of Congressional Acts," in Charles A. Beard, *The Supreme Court and the Constitution* (1962). See also Keith Whittington, *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (2019).

[8] It was, indeed, the Supreme Court's troubling decision in the Civil Rights Cases (1883), invalidating the Civil Rights Act of 1875 and leaving the heavy legacy of the state action doctrine, that first motivated Thayer to seek to curb judicial power. See Thayer, "Constitutionality of Legislation: The Precise Question for a Court," *The Nation*, April 10, 1884.

was not the norm but the outlier in constitution-making, attractive to some for its potential to thwart democratic self-rule but generally rejected around the world for the same reason.[9]

The assertion of judicial supremacy, and the invalidation of Congressional acts that goes with it, presents the enormous challenge of controlling essentially limitless authority, so that it does not become a political tool that factions seek — especially when they cannot win electorally. As Thomas Jefferson observed, to the extent judiciaries are empowered to make political choices for the people under the cover of constitutional interpretation, it will incentivize political actors to "retreat[] into the judiciary as into a stronghold," including by making it a bastion of minority rule against majority power to make laws.[10]

Along with judicial review, this tradition, too, continues today. In our time, this power has deprived Americans of gun regulation, health care, religious freedom, and voting rights.[11] It has also transformed or "weaponized" many precious rights, as during the earlier gilded age, from shields for the vulnerable and weak into swords for the powerful and wealthy.

Of course, judicial review itself will probably remain academically controversial given its uses not simply for good but also for ill. But accepting judicial review, it is the fine-tuning of jurisdiction through structural reform that can limit the harm. "Jefferson's opposition to

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[9] Attention to comparative experience, the recent part of which illustrates the greater Americanization of constitutional arrangements around the world than earlier, should not scant global thinking before the rise of "juristocracy." See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004). At the same time, comparative study shows that too little judicial power can indeed be problematic, which hardly means too much is not. Finally, there are many untried experiments that comparison with historical and current situations cannot help illuminate, but that are nonetheless worth considering.

[10] Thomas Jefferson to Joel Barlow, 1801, in Jefferson, *Writings*, 20 vols. (1903-7), 10: 223.

[11] *United States* v. *Lopez*, 514 U.S. 549 (1995) (invalidating the Gun Free School Zones Act); *NFIB* v. *Sebelius*, 567 U.S. 519 (2012) (partially invalidating the Affordable Care Act, depriving millions of poor Americans of the Medicaid expansion Congress authorized); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act); *Shelby County* v. *Holder*, 570 U.S. 529 (2013) (partially invalidating the Voting Rights Act of 1965).

judicial review has not been accepted by history," as Justice Felix Frankfurter once rightly noted, "but it still serves as an admonition against confusion between judicial and political functions."[12] This admonition is the one on which Supreme Court reform must center, which practically requires the reduction of the institution's power.

Franklin Roosevelt's choice of personnel expansion from the menu of reform options in the crisis of the New Deal does not mean it ever outranked other approaches in plausibility and preeminence, except in the and through the controversy of 1937 that Roosevelt instigated, and in memory since. And it is proper that this commission is surveying different options beyond personnel expansion, for — as I shall argue later — it is doubtful that that reform addresses the main quandary. More important for background purposes, the failure of "court packing" (as its enemies called Roosevelt's plan) should not obscure the breakdown in our times of the alternative regime of judicial self-restraint that the era produced.

Proposed by Thayer decades before as an intrajudicial check on the institution's power, a self-restraint regime for limiting Supreme Court power was embraced by the justices in the 1930s, at least rhetorically. Even so-called "bifurcated" review, which arose in stages after, was supposed to privilege deference as a default. A commitment to such intrajudicial restraint differs from some form of extrajudicial intervention, however, because it leaves whether to exercise conclusive and unaccountable power ultimately up to the justices themselves and no one else.

[12] *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), at 667 (dissenting).

And unsurprisingly, self-control did not last. Indeed, if this commission can take advantage of any intellectual learning since earlier debates around Supreme Court reform, it is the lesson that intrajudicial checks do not guarantee limits for long. Self-imposed rules are bracketed sooner or later, out of the best intentions, or because power corrupts. Indeed, the erosion of deference since the 1930s is the main novelty to consider since the last major Supreme Court reform debate in the country, before the experiment with a deference regime to curb the institution's power occurred.

And the old regime has broken down. For both sides of America's partisan spectrum, "decades of attempts to restrain th[e] Court's abuse of its authority have failed."[13] It is not merely that the most familiar way of talking about how to keep the Supreme Court to a defensible role in our democratic polity, "[p]reaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility," cannot "compete with the temptation to achieve what is viewed as a noble end by any practicable means" — though that is true.[14] It is also that constitutional law is, now, more openly politics by other means than some once believed or hoped. It is for the same reasons that extrajudicial constraints, including structural reforms that fine-tune jurisdiction, are more credible now than ever.

3. The Democratic Criterion for Reform

[13] *Obergefell* v. *Hodges*, 576 U.S. 644 (2015), at 742. (Justice Samuel Alito dissenting).

[14] Ibid.

To contemplate reform, or deny the need for it, presupposes a criterion by which to justify the Supreme Court's existence and assess its performance. There are many possible criteria, and no reason to judge the institution according to one alone. But, in my remarks, I will cast doubt on "institutional legitimacy" as the prime criterion, one that purports to identify a crucial value that is either threatened enough to justify restorative efforts today or secure enough (for example, because the Supreme Court is comparatively less unpopular than political branches) to obviate them. In spite of the elite currency of the framework of "institutional legitimacy," as much among those for as against reform, democratic authority is the criterion to place at the top of the list of political goals that Supreme Court reform should pursue.

Most who have taken positions about reform assign great importance to the criterion of institutional legitimacy. On this scheme, even if the judiciary is deeply entangled in policymaking, it is most critical that it *seem* to be not doing politics. For those who think recent events have endangered appearances, it is imperative to restore them somehow. The goal is "to save the Supreme Court" — to save it, that is, from the appearance of a political role.[15] Among reformers, this perspective takes the Supreme Court's accreted powers as a given, arbitrarily restricting the consideration of institutional options to ones that would render those powers more acceptable through bringing about a more balanced or centrist or neutral-seeming court.

[15] See Daniel Epps and Ganesh Sitaraman, "How to Save the Supreme Court," *Yale Law Journal* 129, no. 1 (October 2019): 148-206. But compare, by the same authors, "Supreme Court Reform and American Democracy," *Yale Law Journal Forum* 130 (2021): 821-51.

The most important reason not to seek to buttress or restore Supreme Court's legitimacy — or to oppose any reform because it might do more to erode remaining legitimacy — is simple. It is an impossible mission to seek to depoliticize a political court, difficult in the extreme to distract from the fact that it is one, and normatively wrong to do so. The fact that the institution's powers are not in bounds, especially with its uncontrollable prerogative to censor or invalidate laws under the authority of the Constitution, means that its descent into policy is no one justice's or side's fault. Rather, it is a structural liability, which justices currently manage more or less well — including, when it becomes increasingly obvious that the Supreme Court is making large choices about the American future, by exploiting optional deference or playing coalition politics with one another.

In a recent Harvard Law School lecture warning the public against Supreme Court reform (or his own colleagues against inciting that reform), Justice Stephen Breyer has called for managing appearances in the name of institutional legitimacy. And it is useful to dwell on his argument to show why privileging that criterion understates the difficulty of depoliticizing a political court — and overstates the necessity of doing so, given the possibility he omits of fine-tuning jurisdiction.

Justice Breyer contends that it is "the public's acceptance" of the Supreme Court in its current role and with its existing powers that matters most. And that public acceptance depends, in turn, on the belief that the institution is apolitical. Acknowledging or contending that it is not, in order to motivate reform, would threaten a precious resource of legitimacy that is not easy to restore. "Discussion of institutional change," the justice explained, "should include discussion of certain background matters, such as the trust the court has

gradually built, the long period of time needed to build that trust, the importance of that trust in a nation that values, indeed depends upon, a rule of law."[16]

Justice Breyer's discussion of legitimacy resonates with what is easily the most prominent appeal to the importance of the Supreme Court's legitimacy, which dates from three decades before. "[T]he Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation," the plurality on the Supreme Court itself remarked in *Planned Parenthood* v. *Casey*. The concern about legitimacy, put a different way, is maintaining *the popular belief* that the Supreme Court acts lawfully rather than "politically." It has to be credible to enough observers that it does so.[17]

Justice Breyer is right, of course, that enough institutional legitimacy is required for all otherwise justifiable institutions to function and survive. But such legitimacy is never *itself* the justification of an institution. In a democracy, the value by which to judge institutions (to safeguard if they serve it and reform them if not) is whether they advance or incarnate collective self-rule. Justice Breyer sidestepped this criterion entirely, as if the whole problem were saving the appearance that the Supreme Court is apolitical, managing a situation where his institution has accreted too much power to be regarded, in many instances, as following legal rules rather than making political choices.

Fortunately, it is hardly clear that the American people actually do accept the desirability — especially when alternatives are left out of account — for a constitutional

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[16] The Honorable Stephen Breyer, "The Authority of the Court and the Peril of Politics," Harvard Law School, April 6, 2021, posted at https://www.youtube.com/watch?v=bHxTQxDVTdU.

[17] *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), at 866.

authority that confers immense political choice on unelected officials. As an empirical matter, it may or may not be the case that the Supreme Court enjoys the powers it does because "Americans want their Constitution to have the authority of law, and they understand law to be distinct from politics."[18] But one thing is for sure: whether Americans ever believed otherwise, the extraordinary political mobilization and organization to achieve partisan control over the Supreme Court in our lifetimes — especially when it comes to appointments to our apex court — prove that Americans know the institution is political. Indeed, hostage to arrangements that constrain them to conduct their national life via choosing justices rather than justice, Americans may well want a less distorted politics that only Supreme Court reform emphasizing their own self-rule can provide.

More important, whatever the evidence shows, public acceptance of current arrangements as legitimate is no defense of them when they conflict with our deepest political ideals, in our case democratic ones. No more than acceptance of subordination is an argument in favor of things like patriarchy or slavery that clash with our most important ideals can shunting political choice away from openly political fora comport with our ideal of collective self-government (let alone be required by it).

Conceding in much of his lecture how politically fraught the Supreme Court's role has often been, however, Breyer implied that the sole alternative to shoring up institutional legitimacy is mere despotism, exemplified by "other countries." "Turn on the television," he counseled.[19] If judicial power just as it exists now is abandoned, tyranny results. And as in

[18] Robert Post and Reva Siegel, "Democratic Constitutionalism," in Jack Balkin and Reva Siegel, eds., *The Constitution in 2020* (2009), 27.

[19] Breyer, "The Authority of the Court."

Justice Breyer's discussion, in *Casey* the alternative to a policymaking court popularly believed to be doing legal interpretation is said to be grave in the extreme. Somewhat melodramatically, the plurality in *Casey* contended that, absent this continuing belief among the people, the court would not merely lose its "authority to decide their constitutional cases," since it would stand revealed as a bevy of politicians without mandates to rule. Also threatened would be the Supreme Court's own power "to speak before all others for their constitutional ideals" so that, in turn, the people can "see itself through its constitutional ideals."[20] Where for Justice Breyer, lawlessness and tyranny loom if the Supreme Court's institutional legitimacy is not made the most pivotal concern, in the *Casey* opinion it is our self-understanding through our constitutional ideals that depends on it.

Both contentions ignore the possibility and reality of fine-tuning jurisdiction, which make Supreme Court reform quite safe, rather than either an affront to constitutionalism as such or a step down the road to serfdom. Indeed, through existing statutes starting with the First Judiciary Act and through an accretion of judge-made doctrines that have a similar functional purpose, jurisdiction already sets up a continuum, and therefore is always a matter of more or less. The primary question therefore ought to be how much power the Supreme Court should enjoy under our democratic constitution, not the second-order one — once the first and far more important one is resolved — of how it can exercise that power acceptably and effectively. But the predominant focus of the justification of current

[20] *Casey,* at 868. Interestingly, the evidence suggests that the concept of legitimacy as a criterion for arrangements, especially Supreme Court power, is no more than a few decades old. To avoid confusion, I have referred to democratic authority rather than describing it as a form of "normative legitimacy," to provide a clearer contrast between the democratic rationale for all of our political arrangements and the concern for descriptive or sociological legitimacy that prevails in current debate.

arrangements on whether the public accepts them and their output (including in instances that the public is unhappy with that output in specific cases) invariably leads to ignoring the primary concern to substitute a far less important one. Of course, it is natural for justices themselves to prefer this substitution. But Supreme Court reform should begin by forbidding it.

There need be no commitment to the extreme view that legal interpretation, as such, is politics by other means to observe that constitutional invalidation of federal legislation almost always is, especially in dramatic episodes when political actors outside the Supreme Court have in effect transferred their disputes about policymaking to it. The only answer is to transfer it back. A political court, unless its jurisdiction is managed, cannot "transcend" politics. The division of the Supreme Court itself is good enough evidence, in such cases, that there is no good cause for allowing a bare majority of justices to decide our fate, compared to majority of citizens.

In sum, the obsession with legitimacy dallies with the impossible task of depoliticizing a political court. It leads to the adoption of goals such as making Supreme Court output more centrist than extremist or, worse, demanding better promotion of the illusion that the higher judiciary is apolitical, even when it is patently not (including when it achieves compromise or moderate positions). What matters, in a democracy, is whether it is appropriate for a judiciary to make policy, not whether it is accepted in exercising policy authority, or successful in denying that it is doing so.

4. Disempowering Means of Reform

Supreme Court reform should therefore prioritize *disempowering* reforms that intervene structurally to limit jurisdiction (defined broadly).[21] The specific reforms you have asked for my consideration in this session — jurisdiction stripping, supermajority rules, and legislative overrides — are all disempowering reforms. All, furthermore, can be presented as examples of jurisdictional fine-tuning. Article III contains few limits on such fine-tuning, according plenary authority over inferior courts and explicit authority under the Exceptions Clause to curtail Supreme Court appellate jurisdiction.

Not all available reforms under current discussion among experts and before the public disempower as clearly and directly — and sometimes do not so at all. Just as it has mistakenly privileged institutional legitimacy as the criterion that matters, so recent expert and public debate has prioritized personnel reforms that propose to alter Supreme Court composition, for example through increase of the number of justices or limitation of their terms of office. Across the board, such personnel reforms are likely to operate (at best) only indirectly and weakly to disempower the Supreme Court, while sometimes incurring other risks.

Even before the current era of Supreme Court reform politics, term limitation has long been the most popular possible move, in spite of its apparently clear prohibition by the constitutional text, with continuation in office conditional only on good behavior. One goal

[21] Epps and Sitaraman, in their "Supreme Court Reform and American Democracy," propose a dichotomy between "external" and "structural" reforms. But all reforms on the table are external: all originate in Congress as amendments or statutes. And all are structural, unless their actual point is merely to be credible threats to motivate the adoption of non-structural constraints by justices through formal deference doctrines or through informal moderation of decisions. The key question, therefore, is whether reforms disempower or not, hence my stress on that classificatory standard for evaluating reforms.

of term limitation is to regularize appointments and distribute them more fairly across time, and therefore across the presidents that choose and Senates that approve justices. Another goal is to save American democracy from its erratic paroxysms based on the accident of the passing of justices or of their unilateral choice to relinquish their seats. Limiting the damage of both kinds of fortuity is a worthy goal. But neither is oriented to disempowering the Supreme Court, and thus to restoring democratic authority in the first instance to elected representatives to devise our collective future. The effect of term limitation, if successfully squared with the Constitution's guarantee of life tenure (one of the few specific constraints in Article III on legislative shaping of the judiciary), is likely to be modest, especially if it works prospectively.

Thanks to Roosevelt's memory, and the liberal perception that Republicans have recently engaged in "constructive packing" of the Supreme Court, it is no wonder that Supreme Court reform discussions have emphasized court expansion in the last few years. Indeed, such expansion has dominated proposals among supporters (and opponents) of reform and in the public domain almost to the exclusion of other approaches. At the opposite pole from term limitation, personnel expansion is the least constitutionally troublesome reform currently being mooted, as it has happened before, and it is doubtful that any long-standing constitutional "norm" prohibits it. Personnel expansion may be plausibly justified, and it is certainly a more ambitious intervention than term limitation. But, likewise, adding justices is merely an ad hoc remedy to short-term flouting of appointment norms to correct perceived imbalance or unfairness — even if just the arbitrariness of when justices die or retire. Expansion does nothing to diminish the power of the institution: the

individual and collective power justices hold no matter who they are. On the contrary, expansion identifies the Supreme Court even more openly as the highest prize of partisan contest, and of maneuvering to dominate through appointment. And it does so in a divided country in which the prospect of a spiral of new episodes of packing is hardly unimaginable. For all the short-term ascendancy it might provide, expansion hardly seems like the best response to current ills.

Compared to such personnel reforms, the disempowering reforms on which you have invited my comment hold much more promise. They de-dramatize not merely the appointments process, but also the Supreme Court as a whole, albeit through different mechanisms. Singly or together, all three work to restore the institution to a sensible position in our constitutional order (and, insofar as it matters, a position more compatible with founding intentions). They demote the Supreme Court's staff from fame or "notoriety" to the anonymity a democratic citizenry rightly expects of judges. Moreover, disempowering works a durable fix with less prospect of spiraling out of control. And, in theory, it can appeal across the partisan spectrum, since its function is essentially to transfer authority to Congress, compatibly with that body's constitutional role, while leaving important judicial functions intact. As a result, it would immediately favor no side in present controversies, putting the onus on each to win elections for the exercise of power, and making long-term control a matter of building effective coalitions that last rather than stocking the bench with friendly jurists instead. Lastly, a fine-tuning approach leaves residual jurisdiction for the vast majority of current cases and controversies for which there are good political reasons to erect judiciaries to decide cases and interpret laws.

Jurisdiction channeling and stripping are only the most obvious reforms that fine-tune court power by preempting or reassigning certain kinds of cases or protecting and shielding certain laws from Article III courts.[22] A supermajority rule for Supreme Court decision, requiring a 7-2 or other high threshold for constitutional invalidation, can be institutionalized by statute under Congress's substantial powers under Article III to structure the judiciary and provide it jurisdiction. The same is even true of the legislative override option. Just as Congress possesses the power to use its own statutory authority to channel and limit jurisdiction or impose decision rules, it could also reassign finality of decision to itself through a jurisdictional statute that makes Supreme Court invalidations of federal law provisional unless and until Congress passes on the result (or fails to exercise its option to do so in some time frame). In this sense, all three reforms can be conceived as jurisdictional fine-tuning by statute, with legislative override functionally transforming Supreme Court jurisdiction in cases of constitutional invalidation of federal law in an advisory direction. Of course, amendments can do the same work as these statutes.

Among scholars, there is, of course, the minority view that the Constitution limits jurisdictional fine-tuning very strictly. And in that writing, distinguished by its hypothetical and speculative character in the absence of either judicial precedent or public debate, there is broader support for limits when constitutional claims are stripped formally or functionally. But there is equal or greater authority — starting, unlike for judicial review, in the constitutional text itself — for the presumption that Congress has wide latitude to shape

[22] I refer to jurisdictional "channeling," not merely stripping, because, in such cases as *Crowell* v. *Benson*, 285 U.S. 22 (1932) and *Yakus* v. *United States*, 321 U.S. 414 (1944), the Supreme Court impliedly or openly approved wide latitude for transferring jurisdiction to alternative Article III and non-Article III venues.

jurisdiction. And as a political matter, Supreme Court reform can and should proceed to experiment, consistently with the Constitution's general framework for experimentation in self-government, so long as it faces no clear prohibitions to doing so.

For example, the dominant and "traditional" view empowers Congress, with only some arguable limits, to eliminate jurisdiction under Article III, and that is good enough — as a political matter — for Americans and their politicians to debate whether to do so today.[23] The very fact that "legal expertise" has not reached consensus on limits to jurisdiction stripping suggests that it is a matter of political choice whether to fine-tune in this way. The view that stripping constitutional assault against particular federal laws or in some kinds of cases is itself a constitutional question to be determined by the Supreme Court begs the very question at issue. And it makes the Supreme Court judge in its own cause, which may be as offensive to our ideals of the rule of law as prohibiting Congress from experimenting with jurisdiction is to our ideals of democratic self-rule.

Similarly, adjusting the decision rule to require a supermajority for Supreme Court invalidation of federal statute can be said to run afoul of the prohibition on Congress, in *United States* v. *Klein* (1872), against dictating the results of judicial decisions.[24] But, as Professor Jed Shugerman has explained, there are easily enough considerations to classify a supermajority rule as a legal exercise of Congress's power to fine-tune jurisdiction, rather

[23] Richard H. Fallon, Jr., "Jurisdiction-Stripping Reconsidered," *Virginia Law Review* 96, no. 5 (2010): 1065. I do not refer, obviously, to the original jurisdiction of the Supreme Court, which Article III specifies. See also Christopher Jon Sprigman, "Congress's Article III Power and the Process of Constitutional Change," *New York University Law Review* 95, no. 6 (December 2020): 1778-1859.

[24] 80 U.S. (13 Wall) 128 (1872).

than dictate results, as to make it a political matter whether to try it out.[25] And once again, in a debate that concerns precisely whether Congress should make policy for the country without censorship or interference from less accountable officials, it is hard not to conclude that it should simply attempt its chosen remedy.

Legal challenges are, of course, to be expected no matter which Supreme Court reform is selected, and this includes the fine-tuning approaches. As I have noted, it is ironic that the most consensual (because modest) such reform, term limitation, is the one that, on its face, is most constitutionally dubious. But such challenges would put the institution itself in the position of either allowing democratic experimentation, or — in a naked attempt to claw back its own powers — transgressing the line between politics and law it purports to honor and police.

These same considerations suggest that selection *among* disempowering reforms, as for reforms in general, is an essentially political matter, notwithstanding this commission's charge to assess the "merits and legality" of options. Disappointing as it may be to legal experts, which reform or reforms to try turns out not to be a legal question, but a political one requiring accountability, prudence, and risk tolerance. Even the considerable legal qualifications of some commentators or commissioners provide no apparent basis for ranking (let alone ruling out) any of the disempowering reforms. As noted above for Supreme Court reform as a whole, the comparison of reform options to one another also implicates what electoral and partisan coalition may back one rather than another, which is

[25] Jed Handelsman Shugerman, "A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court," *Georgia Law Review* 37, no. 3 (Spring 2003): 893-1020.

essentially a political matter. Even so, it is worth observing that, along with term limitation, disempowering reforms are self-evidently much more coalitionally plausible in the near term or even beyond than reforms that only advance the interest of one party.

And there are some obvious differences among the disempowering reforms worth flagging. Where jurisdiction channeling or stripping would likeliest work area by area or statute by statute, protecting especially important matters of Congressional policy from censorship or invalidation, a supermajority decision rule could cut across the entire body of federal law, raising the number of justices required for a final decision. One of its appeals, in fact, is that (in alternative imaginable versions) it could be deployed to protect past as well as future legislation, or even precedents of the Supreme Court that have interpreted constitutional provisions that bear on the validity of federal legislation. A legislative override amendment or statute is formally even bolder, depriving the Supreme Court of the finality its decisions have regularly been assumed to possess (though the text of the Constitution by no means confers it). What may seem bold in theory, however, could turn out to be small-bore in fact. Transnational experience, from Canada and Israel for example, suggests that legislatures almost always take the advice of judiciaries even when they can formally ignore it, so even this most aggressive fine-tuning reform involves little risk of abuse, let alone lawlessness and tyranny. Thus, while all of the disempowering strategies reassign power to some extent back to the Congress, they do so in different ways.

5. Anticipating Objections

a. *But disempowering the Supreme Court would threaten basic rights and other precious constitutional values.*

There are many available responses to this objection. The most basic is the reminder that all reforms incur greater or lesser risks, much like doing nothing. As noted, politics is not about eliminating risks, but assessing them and, counteracting them when possible, deciding politically which to court, in the spirit of ongoing democratic experimentalism. And there is no defensible conception of rights or other non-democratic values that erects them into an eternal prohibition against altering the terms of our self-rule, certainly including jurisdictional fine-tuning.

Moreover, there are excellent reasons to think that such steps would improve rights protection, rather than undermine it. The very impetus for Supreme Court reform — for many of its supporters — is that legislatures are the main source of rights in recorded history. From the initiation of the Bill of Rights and later amendments to the more regular examples of statutory rights enactment in the domains of civil, disabilities, voting, and other rights, and including the prohibition of discrimination in various spheres like employment and housing, Congress has been the essential source of rights protection in our history. (Comparative global history tends to show that rights depend on legislatures not merely for existence but also for durability, entrenchment, and — where necessary — funding.)

Meanwhile, higher judiciaries have too often functioned to deprive citizens of their constitutional or statutory rights. Or, such judiciaries have perverted natural or constitutional rights into protections of losers in democratic politics who have no credible entitlement to

such safeguards in the democratic process and, indeed, turn to judiciaries to exert political authority by means of fictitious rights claims. The era of *Lochner* v. *New York* provides the best-known of many historical examples — but there is a set of contemporary ones that grows daily.[26]

None of this is to deny the contributions of the Supreme Court in rights protection. But it calls for genuine scrutiny, rather than complacent mythology, to determine the precise circumstances in which the institution's current powers help rather than harm, and in which the Supreme Court is essential rather than redundant to the strengthening of rights. The entire point of jurisdictional fine-tuning is to isolate the contributions that judicial empowerment — including for the sake of rights — can make, in order to render the Supreme Court not merely safe for democracy but also more supportive of the rights essential to it than the institution has been.

Jurisprudentially, finally, a democratic citizenry should want legislatures to play a much larger role in *defining* its rights, after so frequently giving them in the first place in American history. For some years, especially in this country, rights have generally been conceived as trumps against majorities, "principle" to block the aggregative tasks and interest-orientation that purportedly characterize the legislative process. But given how few rights are absolute, determining their scope, and making a choice when they conflict with one another or with compelling social interests, is a form of policymaking in which judges

[26] 198 U.S. 45 (1905); consider, e.g., *Citizens United* v. *Federal Election Commission*, 558 U.S. 310 (2010) or *Cedar Point Nursery* v. *Hassid*, 594 U.S. ___ (2021).

have much less proper a role, and legislators much more of one, than many have realized.[27] For that reason, fine-tuning jurisdiction, far from necessarily threatening non-democratic values, transfers definitional authority over rights back to the right place.

b. *But fine-tuning constitutional review would leave unaddressed statutory interpretation, in which excessive judicial power is even more prevalently exercised, and might become more so with the reduction of constitutional power to censor laws. Indeed, even controls on statutory interpretation could never prevent judicial abuse of any remaining power to achieve the same results as before — or worse. The game of Supreme Court reform is not worth the candle.*

This commission is, in its title and most of its tasking, concerned with Supreme Court reform. This does not mean that there are not other problems to solve. As noted at the start, political control of judiciaries, for all their uses, is an endemic problem in all regimes that have them, quite apart from how to manage their empowerment to pass on the constitutional validity of federal legislation in particular in our system. This most certainly includes statutory interpretation — with the great difference that constitutional invalidation means that Congress cannot simply make its intentions clear in later rounds of legislation.

But there is no reason to believe that, in an almost hydraulic fashion, the alteration of one kind of Supreme Court authority would lead to its exercise by other means, through the exaggeration of remaining powers. It is a risk, of course, calling for the prudent design of the

[27] Grégoire Webber, et al., *Legislated Rights: Securing Human Rights through Legislation* (2018); see also my "On Human Rights and Majority Politics," *Vanderbilt Journal of Transnational Law* 52, no. 5 (November 2019): 1135-65 and "Why Do Americans Have So Few Rights?," *The New Republic*, April 2021.

structural intervention — and, potentially, the fine-tuning of judicial power over the statutory order.[28] But the defeatist proposition that fine-tuning of institutional power is not worth attempting because it can have no effect is clearly wrong. (For example, consider the uses and very real consequences, for good or ill, of Congress's legislation stripping jurisdiction in the immigration context in the last few decades.)

Finally, far from being ineffective and therefore undesirable, the fine-tuning of jurisdiction merely continues a process already long underway. Jurisdiction is already on a continuum that reflects doctrinal, prudential, statutory, and other limitations on judicial power. The only real question concerns getting the balance right through the politics of institutional design.

c. *But would not disempowering the Supreme Court empower lower courts, or risk diffusion and uncertainty in federal law?*

Once again, this commission is charged with assessing the merits of Supreme Court reform, which by no means implies that lower court reform is dispensable or unimportant. Fortunately, there is even more of a tradition in American history for expansion of the lower courts than of the number of Supreme Court justices, and plenary authority under Article III to do so — not to mention greater prospect of bipartisan expansion of the lower courts than

[28] For one of many imaginable proposals in this regard, see Jacob E. Gersen and Adrian Vermeule, "*Chevron* as a Voting Rule," *Yale Law Journal* 116, no. 4 (January 2007): 676-731.

of the Supreme Court itself. But disempowering Supreme Court reforms may raise unique questions of institutionalization in our tiered system of courts.

The effect on the courts as a whole of disempowering the Supreme Court would depend on the institutional specifics of the intervention. Some such reforms, like jurisdiction stripping, can be applied to the judiciary all the way down. The same is true of the supermajority rule in cases that the constitutionality of federal legislation is in question, but there may be no need to do so as long as the Supreme Court's ultimate determination alone requires the higher threshold. Similarly, a legislative override would displace the finality of decision in such cases to Congress, functioning merely to make a different body "infallible, because final" than before, with no effect on the operation of the lower courts.[29]

A supermajority threshold may raise the distinctive problem of what happens (in cases of circuit splits for example) when the Supreme Court cannot reach the higher threshold for affirming the unconstitutionality of federal law and is so fractured to reach any other outcome. Of course, in cases of an equally divided Supreme Court, circuit splits sometimes remain. More to the point, it is easy to imagine a jurisdictional statute that makes any lower court injunctions against enforcement of federal law expire unless the Supreme Court ratifies invalidation.

d. *But what about constitutional review of state legislation?*

[29] The allusion is to *Brown* v. *Allen*, 344 U.S. 443 (1953), at 540 (Justice Robert Jackson concurring).

I was asked for remarks on the Supreme Court's power to invalidate "legislative enactments," without offering any restriction (which I have presupposed so far) to federal law.[30] And there is no doubt that, as much as the Supreme Court's censorship of state law has been of great value, it has likewise been troubling at various points in our history. This is especially true for those who attempt to justify our federal system on the grounds that states are precisely intended to be fora for democratic experimentalism.

The record of federal judicial invalidation of state experimentation is not without its blemishes, whether in clamping down on attempts to emancipate African Americans, or in the Lochner era, on attempts to provide workers' rights through state legislation.[31] Furthermore, all the arguments that call for democratizing control of arrangements through federal legislative empowerment can be deployed in favor of fine-tuning to produce greater state control.

Of course, unlike in the case of federal legislation, for which the text of Article III gives so expansive a set of authorities to configure the judiciary, the Supremacy Clause of the U.S. Constitution effectively subordinates states to federal determinations at least to some considerable extent. Furthermore, while fine-tuning the Supreme Court's jurisdiction over federal law is eminently imaginable, there may be something unthinkable about new limits over the constitutional supervision of state law. As Justice Oliver Wendell Holmes memorably remarked, "I do not think the United States would come to an end if we lost our

[30] For the same reason, I have omitted judicial controls over executives (federal and state) acting *ultra vires* — except to note in passing here that there is nothing entailed in the fine-tuning recommendations with respect to federal legislation that would or should affect such controls.

[31] See, e.g., *Prigg* v. *Pennsylvania*, 41 U.S. 539 (1842) and *Lochner*, cited above.

power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as the laws of the several States."[32]

The truth is that jurisdictional fine-tuning to curtail the Supreme Court's authority over state law, too, is a possibility that democratic experimentation should leave open. Just as we can imagine American futures of increased federal control, so we can imagine futures of less. In a divided country more and more characterized by geographic sorting, we should not want the Supreme Court to function as a kind of substitute for a failure of citizens to agree nationally on basic values, using constitutional fiat to compensate for the negligence of the harder work of democratic conviction not merely at the national level, but between it and state fora.

But while these considerations are worth noting, the disempowering reforms are easily restricted to invalidation of federal law, and I support that restriction.

[32] Oliver Wendell Holmes, Jr., *Collected Legal Papers* (1921), 295–296.