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Testimony before the Presidential Commission on the Supreme Court of the United States

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I have been asked to testify about “the Court’s role in our constitutional system,” in particular its role in resolving “major social and political issues” and proposals for reforms affecting judicial review of legislative enactments such as jurisdiction stripping, supermajority voting requirements, or congressional overrides. Recognizing that this Commission already comprises leading experts on these subjects, I will limit my comments to three discrete points that the Commission might find useful in its deliberations. I will discuss (1) the importance of different methods of constitutional interpretation to the Court’s role in our society, (2) the concept of “departmentalism,” which already exists, or can exist, within our present constitutional system, and by which the importance of the Supreme Court might be diminished, and (3) a proposal for eighteen-year, staggered term limits for Justices.

The upshot of my remarks is that the current Supreme Court, if it were to follow a genuinely “originalist” approach to constitutional interpretation, is not in need of reform because on many controversial social and political questions the Constitution leaves the answers to the democratic process, and on other questions an originalist approach does not reliably lead to results that only one political party favors. Recognizing, however, that originalism might nevertheless be controversial, I suggest reinvigorating the concept of departmentalism in our political and constitutional culture. Departmentalism recognizes that the Supreme Court has the final say on interpretations of law in cases and controversies that come before it, and that its judgments in such cases are binding on the parties. The political branches need not follow the Supreme Court’s reasoning as a political rule, however, at least not until good faith requires accepting that a constitutional question has been fully settled. (And a single Supreme Court opinion does not, or ought not, settle all such questions.) Neither the argument on originalism nor departmentalism requires any affirmative action on the part of this Commission.

To the extent these proposals are not satisfying, however, I also explore the possibility of imposing eighteen-year, staggered term limits on Supreme Court Justices. The National Constitution Center recently commissioned three teams—progressive, libertarian, and conservative—to draft new Constitutions for the United States. Team conservative, which I led, proposed eighteen-year, staggered term limits, as did the progressive team. Libertarian scholars have also endorsed this idea. In other words, eighteen-year, staggered term limits are a potential reform that persons of all backgrounds and political persuasions might support. The proposal would likely require a constitutional amendment, and it is hardly a perfect solution; indeed, in my view it is an unnecessary one. But it is probably the most plausible and politically achievable reform.

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## **1. The Importance of Different Methods of Constitutional Interpretation**

### **1.1: The Constitution as a public instruction.**

It will come as no surprise to members of this Commission that President Trump appointed at least two, and probably three, self-avowed “originalists” to the Supreme Court, and it is now likely that originalists constitute a majority of the Court. As I explain in my book *A Debt against the Living: An Introduction to Originalism* (Cambridge 2017), originalism today stands for the proposition that we should interpret the Constitution with its original meaning, with the meaning the words would have had to the Framers who wrote it and the public that ratified it. Context, structure, the specific intent of individual Framers or ratifiers, and historical and legal background are all useful in ascertaining original meaning, but only the meaning itself is what governs. Importantly, although originalism will often lead to determinate answers, in many cases it will lead to a range of plausible answers.

The argument for originalism, in a nutshell, is that the Constitution is a certain kind of document: it is a set of public instructions, largely to our elected officials. As such, it is interpreted the way one would ordinarily interpret a public instruction. That is, it should be interpreted with a public meaning, and not a secret or esoteric or poetic meaning. After all, the Constitution is not a secret code, nor a Socratic dialogue, nor a poem or novel.

The Constitution, as a public instruction, should also be interpreted with its *original* meaning—the meaning its authors intended to convey at the time it was written. It is possible for contemporary meaning to diverge from original meaning, but this could only transpire in one of two ways. The first is linguistic drift. Perhaps “domestic violence” meant something different to the Framers (insurrection) than it means to modern ears (spousal abuse). But surely we would not interpret the Constitution consistently with the contemporary, drifted meaning. No theory of political philosophy of which I am aware would justify allowing accidental shifts in language to determine the content of law.

The second reason why contemporary meaning might diverge from original meaning is because some intervening occurrence has altered modern perceptions of meaning. Thus today “the accused shall enjoy the right . . . to have the assistance of counsel for his defence” sounds like it could plausibly require the government to pay for a defendant’s lawyer. But that’s only because the Supreme Court has so said several decades ago. That view is illogical as a matter of original meaning because the *New York Times* does not have a right to a government-funded printing press, and private citizens do not have the right to taxpayer-subsidized firearms purchases. A “right” within the meaning of the Constitution is an entitlement to act free of interference if one has the ability, wherewithal, and desire to so act. The contemporary meaning of the Sixth Amendment’s right to counsel deviates from the original meaning only because an institution supposed to be controlled by the Constitution deviated from that original meaning at some point in time.<sup>2</sup>

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<sup>2</sup> Perhaps the modern doctrine sounds plausible to modern ears because the discourse surrounding “rights” has changed in the modern era, and modern speakers often think of entitlements as rights. But that would be another example of linguistic drift.

## 1.2: The normative grounds for originalism and nonoriginalism.

To be sure, maybe we *should* deviate from the original meaning of the Constitution, but that is a separate question. It is plausible to say that the original Constitution, even as it has been corrected by the Reconstruction and other amendments, is too old and outdated and, moreover, hard to amend, to work today. If these premises are correct, then nonoriginalism, or living constitutionalism, is a plausible second-best method of constitutional change. Importantly, that does not, in my view, make nonoriginalism a method of *interpretation*. Even in the nonoriginalist constitutional system something will still be interpreted with its original public meaning: namely, the judicial opinions published by the Justices of the Supreme Court. That is the only way public and private actors will know what the Court requires of them. The debate between originalism and nonoriginalism, in other words, is a debate over which sources legitimately supply the content of our constitutional law: the parchment under the glass at the National Archives, or the modern judicial opinions, even the ones that deviate from that parchment's text. (Judicial opinions are still important in an originalist system, particularly to resolve textual indeterminacy or under-determinacy, and to resolve lower-order disputes over how to apply otherwise relatively determinate text. The question here is rather which source of law governs when a judicial opinion goes beyond the range of plausible original meanings.)

For the originalist, what makes the Constitution legitimate and binding, worthy of our adhering to it today? There are many possible answers to this question, but allow me to put forward one view. We know *something* must make a constitution binding. No political society could be possible if it were otherwise. But we also know that it cannot be the case that a constitution is only binding if every individual in the polity personally agrees with it in all its particulars. Three-hundred million Americans can have a different view of that matter. Something must make a constitution legitimate and therefore binding even in the face of disagreement.

In a free, liberal society like ours, what makes the Constitution an improvement of the kind that forms a debt against the living generation—to borrow from James Madison's response to Thomas Jefferson's famous dead-hand-of-the-past letter—is successfully balancing self-government and liberty. A free constitution for a society like ours must on the one hand enable self-government: it must allow us in some circumstances, through democratic deliberation, to authorize the use of coercive power to shape what kind of society we wish to have politically, economically, culturally, socially, and morally. On the other hand, that exact same constitution must also preserve a large measure of natural liberty; otherwise, there would have been no point in getting out of the state of nature, a state of perfect liberty and equality, if we were made worse off by doing so. These two objectives are in tension, which is why any constitution for a society like ours will require a balancing act.

In my view, which I advance in my book, the Constitution as it has been corrected by the Reconstruction Amendments and subsequent changes sufficiently balances these two competing objectives, even if it does so imperfectly and reasonable people disagree over the particulars. Therefore so long as we the people *today*—not as a matter of blind veneration to the past, but as a matter of present-day social facts—continue to view the Constitution as successfully balancing these objectives, then in my view that is sufficient to make the Constitution legitimate and binding. And, if it is legitimate and binding, we follow it—including by treating it as we would treat any other binding public instruction or public legal instrument, viz. with its original public meaning.

### 1.3: Originalism and political conservatism.

If originalism always led to politically conservative results, then one should view it with skepticism, just as one should view skeptically any theory of living constitutionalism, or moral theory of constitutional interpretation, that always leads to a particular writer's political preferences. And although originalism may sometimes be misused, or done incorrectly, on the whole it does not lead to any particular political results. Here I wish to make three points: (1) the correct originalist answer to some constitutional questions is in fact the preferred progressive result; (2) in many cases, the correct originalist answer has no political valence, or originalists disagree among themselves as to the right answer; and (3) in many controversial cases, the Constitution leaves the answer to the democratic process, where the libertarian, progressives, or conservatives might win the day.

First, originalism sometimes requires progressive results. To take two obvious examples, conservatives and libertarians are bound to the Sixteenth and Seventeenth Amendments, even though they were enacted as part of a progressive agenda. Perhaps less obviously, the conservative majority in *Shelby County v. Holder*, 570 U.S. 529 (2013), was wrong to invalidate the formula for the Voting Rights Act. There is no equal sovereignty principle in the Reconstruction Amendments. Congress could, if it wanted, enact the Mississippi Enforcement Act, leaving the problems of Georgia, or California, for another day. Conservatives may not like that result, but nothing in the Constitution prevents Congress from enforcing the Reconstruction Amendments selectively. In the criminal law context, Justice Scalia famously led his liberal and other colleagues in articulating an originalist, pro-defendant reading of the Confrontation Clause. And I, for one, have made the case in my new book *The Second Founding: An Introduction to the Fourteenth Amendment* (Cambridge 2020) that same-sex marriage is plausible under the original meaning of the privileges or immunities clause, although the argument is by no means foolproof. I have also argued that "the executive power" vested in the President by Article II is only a grant of law-execution power, and not a residual grant of royal prerogative powers.<sup>3</sup>

Second, in many instances an originalist outcome will have no political valence, or originalists will disagree among themselves as to the correct answer. For example, many originalists take a states-rights view and argue there should be no dormant commerce clause doctrine. In my view, there is ample originalist support for a dormant commerce clause doctrine that prohibits states from interfering with interstate commerce. In contrast, most originalist scholars today take an anti-states-rights view when it comes to incorporation of the Bill of Rights against the states; almost all originalists today argue incorporation was correct under the original meaning of the privileges or immunities clause. I have argued in my recent book, however, that incorporation was likely not correct as an originalist matter. In both sets of doctrine, the political valence is not obvious, and originalists disagree among themselves as to the best answer in any event.

Third, on many controversial issues the Constitution is simply silent, leaving such matters to the democratic process. The Constitution does not enact a libertarian paradise, nor does it compel a progressive polity with wealth and income redistribution, and neither does it compel conservative views on family, marriage, or religion in the public square. Properly understood, our Constitution seems to *permit* all, or at least most, of these options, leaving the ultimate decision of the kind of regime and polity we will have to democratic deliberation. Perhaps the right to government-funded

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<sup>3</sup> Ilan Wurman, *In Search of Prerogative*, 70 Duke L.J. 93 (2020).

lawyers is not constitutionally required, but it is a darn good idea and nothing prevents states and the federal government from legislating it. And even if the predominant view among originalists with respect to same-sex marriage were to prevail, all that would mean is that the question would be left to the democratic process in the several states.

All of that is to say, there is no obvious political valence to originalism. If originalism is “conservative” because it leaves many questions to the political process—say on criminal procedure, or abortion, or same-sex marriage, or flag burning—where political progressives, libertarians, and conservatives have to battle it out, then that’s a conservatism that should be embraced. A truly originalist Supreme Court, in short, is not a court that should be feared. It is not a court in need of reform.

## **2. Departmentalism**

### **2.1: The Court’s conception of itself is at odds with antebellum views.**

Even an originalist Court may nevertheless have an outsized role in American politics. Today it is widely assumed that the Court is the final arbiter of the Constitution’s meaning and is supreme above the other branches in the task of constitutional interpretation. In *Cooper v. Aaron*, the Supreme Court wrote that *Marbury v. Madison* “declared the basic principle that the federal judiciary is *supreme* in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.” 358 U.S. 1 (1958) (emphasis added). In *City of Boerne v. Flores*, Justice Kennedy similarly wrote for the Court, “When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.” 521 U.S. 507 (1997). And in *United States v. Windsor*, Justice Kennedy more recently held for the Court that “if the Executive’s agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court’s *primary* role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only *secondary* to the President’s.” 570 U.S. 744 (2013) (emphases added).

In these cases, the Supreme Court articulated a vision of “judicial supremacy,” that is, a vision in which the Supreme Court has a higher responsibility to interpret the Constitution than coordinate branches of government, and in which a single decision of the Court settles a question for all time (at least, until the Supreme Court itself chooses to reconsider its precedents). This description of the judicial role is a far cry from Chief Justice John Marshall’s actual holding in *Marbury v. Madison*. Here is Marshall’s famous paragraph, in full: “It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each.”

In this paragraph, Marshall makes two points. First—and this has come to be known as judicial review—Marshall explained that when more than one law applies to a given case, the judges must decide the operation of each. This requires interpreting those laws. And, when those laws conflict, the judge must decide which law controls, as when a statute enacted later in time conflicts with a statute enacted earlier in time. In the event of a conflict between a congressional enactment

and a constitutional provision, the latter prevails because the Constitution is paramount law, antecedent and superior to ordinary law. The power of judges to review the constitutionality of legislative enactments follows from basic conflict-of-laws principle and the nature of a higher-law constitution.

Second, Marshall says that in discharging this duty, judges do so *in particular cases*. In those cases, judges refuse to give effect to the law that they hold to be invalid or inoperable. That law, however, remains on the books; the law is not repealed until Congress chooses to repeal it. Government officials can, in fact, continue to enforce the statute. To be sure, in subsequent cases, judges are likely to follow the Supreme Court's prior holding as precedent. But they may not always do so, and they may supply reasons for the Supreme Court to reconsider its prior position. Perhaps the best observer of the operation of judicial power in the early United States was Tocqueville, who wrote in *Democracy in America*:

Whenever a law which the judge holds to be unconstitutional is argued in a tribunal of the United States he may refuse to admit it as a rule . . . . [F]rom the time that a judge has refused to apply any given law in a case, that law loses a portion of its moral cogency. The persons to whose interests it is prejudicial learn that means exist of evading its authority, and similar suits are multiplied, until it becomes powerless. One of two alternatives must then be resorted to: the people must alter the constitution, or the legislature must repeal the law. The political power which the Americans have intrusted to their courts of justice is therefore immense, but the evils of this power are considerably diminished by the obligation which has been imposed of attacking the laws through the courts of justice alone. . . .

[W]hen a judge contests a law applied to some particular case in an obscure proceeding, the importance of his attack is concealed from the public gaze, his decision bears upon the interest of an individual, and if the law is slighted it is only collaterally. Moreover, although it is censured, it is not abolished; its moral force may be diminished, but its cogency is by no means suspended, and its final destruction can only be accomplished by the reiterated attacks of judicial functionaries.<sup>4</sup>

Here, in a nutshell, is a description of “departmentalism,” as opposed to what we might term “judicial supremacy.” Under Tocqueville—and Marshall’s—conception of the judicial role, judges interpret the laws and the Constitution as part of the judicial power (or duty) to decide judicial cases. Every time a judge refuses to give effect to an unconstitutional law, that law loses its “moral cogency.” But future litigants cannot rely on that case alone; they must bring their own suits in their own cases if they desire a similar result. Over time, perhaps many judges, over a sustained period of time, would refuse to give effect to the law, rendering it effectively a dead letter. Or perhaps Congress will repeal the statute. But a single pronouncement by a federal judge—or by a 5-4 decision of the Supreme Court—is insufficient to wipe out a law from our statute books. The legislative and executive departments have their own responsibilities to enforce and interpret the Constitution and can continue to act inconsistently with the pronouncements of judges (although they must abide by

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<sup>4</sup> Vol. 1, Part 1, Chapter 6.

the *judgments* as applied to the parties to a decided case), at least until good faith suggests that a question has been fully settled.

## 2.2: Applying departmentalism in concrete cases.

The implications of this view cannot be overstated. Departmentalism is what allows Congress or the President to disagree with contrary judicial opinions. It allowed Thomas Jefferson to pardon offenders under the Sedition Act even though that law had been upheld by the lower courts that considered it. It allowed Andrew Jackson to veto the renewal of the Second Bank of the United States because he disagreed with the constitutional approval of the Supreme Court. Departmentalism allows Congress or the Executive to act consistently with their own views of the Constitution when engaged in their own functions.

But departmentalism goes even further than merely allowing Congress or the Executive to be additional constitutional gatekeepers. It also allows them to act where the Supreme Court has held that it would be unconstitutional to act. Departmentalism is what allowed Abraham Lincoln to argue that Congress and the President should not follow the decision of *Dred Scott v. Sandford* as a “political rule.”<sup>5</sup> As Lincoln argued, “judicial decisions have two uses—first, to absolutely determine the case decided, and secondly, to indicate to the public how other similar cases will be decided when they arise.” But “its decisions on Constitutional questions . . . should control, not only the particular cases decided, but the general policy of the country,” only where the questions are “fully settled.” Thus, had the questions involved in *Dred Scott* “been affirmed and re-affirmed through a course of years,” and had been answered consistently “with the steady practice of the departments throughout our history,” only then would it be revolutionary not to “acquiesce” in the decision as precedent.<sup>6</sup> Over time, by refusing to follow that rule, and convincing the people that a different rule should be followed, new officials will be elected and new judges will eventually be appointed, or current judges will perhaps reconsider the strength of prior decisions.

A more contemporary illustration is provided by *City of Boerne v. Flores*. In *Employment Division v. Smith*, 494 U.S. 872 (1990), in what was effectively a 5-4 decision, the Supreme Court held that generally applicable and neutral laws were constitutional even if they burdened religious exercise. That means, for example, that a general prohibition on alcohol, with no exception for communion, would be constitutional, even though it would appear to “prohibit the free exercise” of the Catholic religion. Religious exemptions from such generally applicable laws, however, go back to our Founding, both legislatively and judicially, and *Smith* contradicted this important constitutional tradition.<sup>7</sup>

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<sup>5</sup> Abraham Lincoln, Speech at the Sixth Lincoln-Douglas Debate, Oct. 13, 1858.

<sup>6</sup> Abraham Lincoln, Speech at Springfield, Illinois, June 26, 1857.

<sup>7</sup> There has been some debate recently over just how much precedent *Smith* overturned. Although the judicial test requiring religious accommodations unless there was a compelling state interest was articulated in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court arguably adhered to a version of strict scrutiny for religious exercise cases starting in the 1940s, as soon as the First Amendment was incorporated against the states. *See, e.g.*, *Murdock v. Pennsylvania*, 319 U.S. 105, 117 (1943) (granting religious exemption for Jehovah’s Witnesses to prohibition on door-to-door solicitation). In the antebellum period, state courts appear to have required religious exemptions under their state constitutions. *See generally* Stephanie Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 Notre Dame L. Rev. 55, 63-66 (2020). And state legislatures routinely gave such exemptions, as when they exempted scientific and religious uses from alcohol prohibitions.

Following *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA), which would have restored the law pre-*Smith* and required states (and the national government) to provide accommodations from generally applicable and neutral laws for religious exercise unless there was a compelling state interest. This law was enacted *unanimously* by the House of Representatives, 97-3 in the Senate, and signed by President Clinton. However, to apply this requirement to the states, Congress would have to rely on its Fourteenth Amendment enforcement power. But RFRA did not “enforce” anything if states were already complying with the Free Exercise Clause without providing accommodations from generally applicable and neutral laws.

When the Supreme Court reviewed the constitutionality of RFRA in *City of Boerne v. Flores*, it was thus confronted with the question whether *Smith* was rightly decided. Against five Justices now stood the disagreement of four Justices, a unanimous House, a nearly unanimous Senate, a President of the United States, and arguably over a century of contrary judicial and legislative practice. Yet the Supreme Court refused even to consider the possibility that it had erred: “When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed.” Reasonable people must wonder: shouldn’t the Supreme Court at least have reconsidered its position?

### **2.3: The connection of departmentalism to constitutional “liquidation.”**

Once again, this view of judicial supremacy is at odds with the views of Marshall, Tocqueville, and Lincoln. It is also at odds with James Madison’s views. Madison argued in *Federalist No. 37* that constitutional ambiguities would be resolved, and the meaning of constitutional provisions “liquidated and ascertained,” by “a series of particular discussions and adjudications.” Thus Madison, although he objected to the Bank of the United States on constitutional grounds in 1791, waived the constitutional argument over two decades later when he was President. In his veto message of January 30, 1815, Madison waived “the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation.”

The question of the Bank’s constitutionality, in other words, was settled by repeated deliberations in the executive and legislative branches—and at least four years before the Supreme Court ever addressed the question in *McCulloch v. Maryland* (1819). And when it did confront the question, the Supreme Court decided the case for itself, but it gave great weight to the judgments of the coordinate departments. “The principle now contested,” Marshall wrote, “was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the Judicial Department, in cases of peculiar delicacy, as a law of undoubted obligation.” To be sure, Marshall added, “It will not be denied that a bold and daring usurpation might be resisted after an acquiescence still longer and more complete than this.” But where the Constitution involves a “doubtful question, one on which human reason may pause and the human judgment be suspended,” and where the question does not involve “the great principles of liberty” but rather “the respective powers” of the political branches, then such a question, “if not put at rest by the practice of the Government, ought to receive a considerable impression from that practice.”



This view of “liquidation,” which requires a *series* of discussions and adjudications, is inconsistent with judicial supremacy, by which a single judgment of a one-Justice majority purports to settle a constitutional question. To be sure, eventually good faith will require an acknowledgment that a constitutional question has been “settled,” or “liquidated,” just as Lincoln suggested. But a single judgment of a single Court is not what settled such questions historically. The Supreme Court’s judgment was merely one input in a greater constitutional conversation.

In summary, an originalist Supreme Court will become more limited in political and cultural power if our constitutional culture adopted a more departmentalist approach to constitutional adjudication. Under such an approach, the Supreme Court may very well have stayed out of the *Windsor* case and may stay out of future cases where the President agrees with a lower-court judgment. The Supreme Court would have at least reconsidered its prior holding in *Smith*. And where the Supreme Court grievously errs—as it did in *Dred Scott*—the political branches will have some means to combat it. With departmentalism in view, perhaps Congress would have been motivated to reenact the Voting Rights Act in 2013 (with the same coverage formula that was struck down) to force the Supreme Court to reconsider its views. In fact, Congress would not have had to reenact the Voting Rights Act because, technically speaking, that law is still on the books.

### **3. Staggered Term Limits**

I wish to conclude my testimony with brief remarks on what I view to be the most plausible reform of the Supreme Court. The National Constitution Center recently commissioned three teams—libertarian, progressive, and conservative—to draft new Constitutions for the United States. Both the conservative and progressive teams proposed eighteen-year, staggered term limits for Supreme Court Justices (and fixing the Court at nine Justices), such that each President will get two appointees per term.

The [progressive draft](#) provided: “The Judges, both of the supreme and inferior Courts, shall hold their Offices for terms of eighteen years and during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office. Judges of the Supreme Court shall serve for terms that begin in the first and third years of the presidential term. Should a judge of the Supreme Court or any inferior court fail to serve a full eighteen-year term, the president shall, with the advice and consent of the Senate, appoint a replacement to serve for the remainder of the term.”

The [conservative draft](#) provided, “There shall be nine judges of the supreme court, who shall hold their offices for staggered terms of eighteen years, such that every two years there shall be a vacancy. In the event of a vacancy resulting from death, resignation, impeachment, or other inability to perform the duties of the office, a new judge shall be appointed for the duration of the term only. After a term of office has expired, the judge whose term has expired may elect to sit on an inferior court during good behavior, which court is to be determined by the Chief Justice or as Congress shall direct.”

And, although the libertarian draft did not advance a similar proposal, libertarian scholars such as Steven G. Calabresi [have argued](#) for such term limits in the past. Calabresi and James Lindgren argue that eighteen-year, staggered term limits “would reduce the stakes of the nomination process and eliminate the uncertainty that now exists regarding when vacancies will occur.” In my view, Calabresi and Lindgren are correct that eighteen-year, staggered term limits have the potential

to reduce the temperature of modern judicial confirmation battles. Additionally, such limits could lead to nominations of more seasoned and older individuals, instead of those who are likely to serve on the bench for many decades.

These proposals do not solve all questions or problems (let alone provide for transition rules). For example, Ilya Shapiro [argues](#) that the Senate might block confirmation, leading to multiple vacancies to be filled at one time by a subsequent President. In the conservatives' proposed constitution mentioned above, the draft solved this problem by revamping the appointment process altogether, allowing presidential nominees to be confirmed by default unless specifically voted down by the Senate. The draft provided at the end of what is now the Appointments Clause, "Nominations shall be deemed to have received the advice and consent of the Senate unless disapproved by majority vote within three months of the nomination; but any Senator shall have the right to bring any nomination to the floor for debate and vote prior to that time. Any nomination made within the last three months of the President's term shall lapse at the end of the President's term, unless sooner approved by the Senate." Although this proposal strikes me as a good idea for all judicial and executive nominations, it could be limited to Supreme Court nominations. Such a clause would make it highly unlikely that a President will be unable to make the appointment, while still reserving an important senatorial check. Under this proposal, Merrick Garland would at least have gotten a vote.

There is also, lastly, a potential problem with Justices being influenced by the desire to enter lucrative private practices after their service. There is no foolproof solution for this problem, but the conservatives' draft constitution also provided that the Justices could sit on a circuit court of their choosing after their Supreme Court tenure. And to the extent a Justice chooses to retire altogether, Congress could presumably provide that a former Justice cannot appear on behalf of a private party in any federal court for a specified number of years after the Justice's service has completed.

Adding to the difficulties of this proposal, the confirmation piece of it would require a constitutional amendment, and the term limit component would also most likely require an amendment. That is because when a Justice is appointed, his or her "office" is that of a judge of the Supreme Court, not of an inferior court. Providing by law that Justices must transition to a circuit court after eighteen years of service would violate the Constitution because the Justice must be allowed to serve during good behavior in his or her *current* office—that is, the office of a judge of the Supreme Court.<sup>8</sup>

In my view, and in conclusion, the proposal for eighteen-year, staggered term limits is unnecessary. As noted, I believe an originalist Supreme Court is not one that needs to be feared or reformed, particularly if we reinvigorate departmentalism in our constitutional culture. But the proposal for eighteen-year, staggered term limits, fixing the Court at nine Justices, strikes me as the most plausible of all available reforms. It would require a constitutional amendment, but such an amendment is likely to have at least some support across all major political parties.

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<sup>8</sup> Perhaps Congress could legislatively define the office to which these judges are appointed, but it is unclear that that would be constitutional. The appointments clause specifically references "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." This seems to suggest that the office of judge of the Supreme Court is specifically provided for in the Constitution; it is not subject to legislative modification.