

Presidential Commission on the Supreme Court of the United States

Panel 5: “Composition of the Supreme Court”

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I thank the Commission for this opportunity to offer my thoughts on the topic of the “Composition of the Supreme Court”—in particular my thoughts on proposals to expand the number of justices of the Supreme Court. In these remarks, I wish to save time by expressing my agreement with important parts of the previous testimony of Professors Noah Feldman and Michael McConnell. In particular, I agree with Professor Feldman that:

Under almost all ordinary circumstances, court-packing would seriously undermine the legitimacy of the Supreme Court. The reason is that adding new justices for the purpose of changing the direction of constitutional jurisprudence would indicate to the public that Congress and the president seek to control the meaning of the Constitution. To be sure, that control would be exercised through new justices who themselves would be part of the nominally independent judiciary. Yet because those justices would be appointed to positions created specifically in order to change the direction of constitutional jurisprudence, it would be clear that they were not being appointed to be independent, but rather to effectuate a particular jurisprudential view.

And I agree with Professor McConnell that: “To be blunt: the ‘contemporary debate’ is not over Supreme Court reform in the abstract, but over the proper political response to the transitory consequence of the alignment of political majorities at the unpredictable moments of Supreme Court vacancies.” Further, “the ‘contemporary debate over the Supreme Court’ presents no special circumstances that warrant extraordinary response.”

Any such proposal would end the independence of the Supreme Court (and through it the lower courts as well); and would destroy the Supreme Court as a protector of our rights and liberties from majoritarian infringement.¹ Nor would it end the current partisan polarization; instead, it would greatly heighten it. As Professor Feldman testified:

The likely consequences of this process would be for the Supreme Court to come to be—and to be seen—as a kind of legislature in itself, albeit one whose members were selected by the political branches rather than elected. Although individual justices might continue to rely on their own independent judgment, the court would often not be in a position to function as a check on the legislative or executive

¹I explain the vital role of the judiciary in performing this “undemocratic” function in RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016).

branches except where at least one house of Congress was controlled by the party different from the that of the president. When the president and majority in both houses of Congress came from the same party, any check by the Court would be met with more court-packing.

To my mind, Professors Feldman and McConnell’s testimony provides good and sufficient—indeed mainstream— prudential reasons to reject this proposal on policy grounds. I urge the commission to take their conclusions to heart and to adopt their reasoning when reporting to the President. To their arguments, I will add one more: partisan court packing is also unconstitutional because it violates both the letter and spirit of the Constitution. By “the letter” I mean the text of the Constitution properly interpreted. By “the spirit” I mean the functions the text was originally adopted to perform.²

The Unconstitutionality of Partisan Court Expansion

To appreciate the constitutional problem, we first need to locate the power that Congress is exercising when it organizes the courts and sets the number of Supreme Court justices. This is found in the Necessary and Proper Clause, which gives Congress the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof.” (Emphasis added.)

Under the Necessary and Proper Clause, Congress has the power to make a law to carry into execution the judicial *power* that is vested by Article III in the judicial *department* (as the different branches of government were called³):

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

While Article III does not specify the size of the Court, it does specify there is to be “one supreme Court.” Congress has the discretion to establish *inferior* courts; they do not have the discretion to establish a Supreme Court. The Supreme Court is established by the Constitution itself and Congress has a duty to provide its personnel. Therefore, while Congress has the power

²See Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018).

³ See, e.g., THE FEDERALIST, No. 81 (Hamilton) (describing “the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department.”); *Id* (referring to “observations hitherto made on the authority of the judicial department”). See also Gary Lawson, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 TEX. L. REV. 1373, 1386 (2005) (“The term ‘departments’ refers either to the three great departments of the national government—the legislative, executive, and judicial departments—or to units of the executive department, such as the Treasury Department.”).

to set the number of Supreme Court “judges,” there are limits on the number Congress can choose. We can all agree that it cannot be zero. And it must be more than just the Chief Justice.

The first judiciary act set the number at six, though President Washington had a hard time finding six qualified persons who were willing to serve on this new court. During the first eighty years of the nation (1789-1869), the number of justices set by Congress has varied from five on the low side to ten on the high side. For the past one hundred and fifty two years (1869-2021) it has been set at nine. A nine-member Supreme Court has become an entrenched constitutional norm. To change the Norm of Nine, Congress needs to pass a new law. Under the letter of the Constitution’s text, any such law must be both “necessary” and “proper.”

This is not the venue to present all the evidence of the original meaning of the Necessary and Proper Clause.⁴ The founder with the most capacious reading of this Clause was Alexander Hamilton. In his opinion as Treasury Secretary to President Washington on the constitutionality of a national bank, Hamilton insisted that “[t]he degree in which a measure is necessary, can never be a test of the legal right to adopt it; that must be a matter of opinion, and can only be a test of expediency.”⁵ He then offered the following test: “The *relation* between the measure and the end; between the nature of *the mean* employed toward the execution of a power, and *the object* of that power must be the criterion of constitutionality, not the more or less of necessity or utility.”⁶ (Emphases added.) Today, we would call this the requirement of means-end fit. An appropriate “end” or “object”—we would say “objective” or “purpose”—must be identified and the measure being adopted as “the means” must be closely enough related to that end.

Hamilton’s test was not the only test proposed after the Constitution was adopted. In a speech to the House, Representative James Madison offered his: “Whatever meaning this clause may have, none can be admitted that would give an unlimited discretion to Congress. Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end and *incident to the nature of the specified powers.*”⁷ Madison contended that “[t]he essential characteristic of the government, as composed of limited and enumerated powers, would be destroyed: If instead of direct and incidental means, *any* means could be used.”⁸ (Emphases added.)

Despite the fact they sharply disagreed on the constitutionality of a national bank, I do not think there is much daylight between Hamilton and Madison’s tests of whether a law is “necessary” and therefore within the power of Congress to enact. Their dispute largely turned on a factual disagreement about whether the bank was or was not closely enough *related* to (Hamilton) or *incident* to (Madison) an enumerated power. Both Hamilton, explicitly, and Madison, implicitly, rejected Secretary of State Thomas Jefferson’s more stringent view that “the Constitution restrained [Congress] to the *necessary* means, that is to say, to those means without which the grant of power would be nugatory.”⁹ Hamilton’s lengthy response to this test in his bank opinion

⁴See, e.g., Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183-221 (2003).

⁵Opinion of Alexander Hamilton, on the Constitutionality of a National Bank (Feb. 23, 1794), reprinted in *History of the Bank of the United States* at 98 (M. St. Clair Clarke & D.A. Halls eds., Augustus M. Kelley 1967) (1832).

⁶*Id.*

⁷1 ANNALS OF CONG. 1947-48 (Joseph Gales ed., 1791).

⁸*Id.*

⁹Opinion of Thomas Jefferson, Secretary of State, on the Same Subject (Feb. 15, 1791), reprinted in

was telling.

It took some thirty years for the issue of the constitutionality of a national bank to reach the Supreme Court. In *McCulloch v. Maryland*,¹⁰ Hamilton's acolyte, Chief Justice John Marshall adopted the following rule: "Let *the end be legitimate*, let it be within the scope of the Constitution, and all *means which are appropriate*, which are *plainly adapted* to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional."¹¹ This formulation has become canonical; it is the test with which all Supreme Court analyses of the Necessary and Proper Clause begin. Marshall's rule is not the original meaning of the Necessary and Proper Clause; it is what modern originalists call a "constitutional construction" by which that meaning is put into effect.¹²

Of utmost importance for our purposes is the how this rule of construction starts: "Let the end be legitimate...." This is the first step of any analysis of the scope of Congressional power: is Congress seeking a legitimate end—an end that is "within the scope of the Constitution"? One immediately sees the fundamental constitution problem with partisan court expansion. The end of seeking a partisan advantage on the Supreme Court is not a legitimate end. Having set the number of justices as is its prerogative, Congress may not then enact a law to change that number for the illegitimate end of affecting how the Court rules.

In a recent and detailed study, Professor Joshua Braver has examined the rationales for previous adjustments to the size of the Court.¹³ He shows that changes made in 1807 (from six to seven circuits and Supreme Court seats), in 1837 (from seven to nine circuits and Supreme Court seats), and 1863 (from nine to ten circuits and Supreme Court seats) were each done to reflect the need for intermediate appellate review in new states. This need was then met by the Supreme Court justices riding circuit. While Braver allows that political motives may have existed with each change to the number of justices, these motives were suppressed and there was a demonstrable justification for altering the number of judges as the number of states expanded. Because others have interpreted these episodes as precedents that justify partisan court expansion, I urge the commission to consult Professor Braver's nuanced analysis before accepting such a characterization.

Professor Braver concludes that four other "changes to the Court's size were part of attempts to pack the Court."¹⁴ On these occasions, "[c]oncerns about efficiency and good administration, so prominent in the changes related to circuit-riding, were largely irrelevant. What was at stake was the ideological composition of the Court."¹⁵ These four changes came "in pairs, one in the early 1800s and the other during Reconstruction. Both pairs began with an attempt to prevent a President from filling a vacant seat by abolishing it and in so doing reducing the court's size."¹⁶

LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANKING HISTORY OF THE BANK (M. St. Clair Clarke & D.A. Hall eds., Augustus M. Kelley 1967), at 93.

¹⁰ 17 U.S. 316 (1819).

¹¹ *Id.* at 421.

¹² See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

¹³ See Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747 (2020).
<https://lawdigitalcommons.bc.edu/bclr/vol61/iss8/2>

¹⁴ *Id.* at 2773.

¹⁵ *Id.*

¹⁶ *Id.*

The 1801 law enacted by a lame duck Federalist Congress reducing the number of Supreme Court seats from six to five should be seen as a *failed* attempt by the Federalists to alter the balance on the Court; the Republicans were able to restore the original number the very next year allowing President Jefferson the chance to appoint an additional justice.

[T]he 1802 restoration signals the failure of the previous year's court-packing attempt. The 1802 restoration essentially reversed and repealed the previous administration's attempt to deny the incoming President a chance to fill the next vacant seat on the Supreme Court. This defeat is no more a precedent in favor of court-packing than is Roosevelt's infamous failure in 1937.¹⁷

Further, "rather than either destroy or pack the Supreme Court, both live options, Jefferson and his lieutenants in Congress chose to restore the Court to its previous size." While "restoring the Court's size was uncontroversial, both parties condemned packing because it more gravely threatened the independence of the Supreme Court."¹⁸ Indeed, in criticizing the Federalist partisan increase in the number of lower court judges, Republican Congressmen David Stone warned that if this form of court expansion was justified, then

[c]an anything be more easy than for the Legislature . . . in order to free themselves from the opposition of the present Supreme Court, to declare, that court shall hereafter be held by thirteen judges[?] An understanding between the President and the Senate would make it practicable to fill the new offices with men of different views and opinions from those now in office. And what, in either case, would become of this boasted protection of the people against themselves?¹⁹

Increasing the number of justices to thirteen would have given Republican President Jefferson enough appointments to flip the Court to a majority of Republican-appointed justices. So too would House Democrats' current proposal to increase the Court to thirteen be just enough to change the composition of the court from majority Republican-appointed to majority Democrat-appointed. This choice of numbers is a partisan "tell." In contrast, Republicans in Congress merely restored the number of justices to six, giving the president of their party a single new appointment and saddling his administration with a Supreme Court dominated by Federalist-appointed justices.

This court-packing failure reinforced, rather than undermined, the norm against partisan court composition changes. This norm then held until 1866, when the Republicans reduced the number of justices to seven to prevent President Andrew Johnson from making appointments that would thwart their Reconstruction agenda. In 1869, they returned the Court to nine after Johnson left office, which allowed Republican President Ulysses Grant to fill the vacancies.

Braver considers the 1866 and 1869 changes to have been partisan court packing because they were unsupported by some other legitimate end. Instead, "it irreversibly manipulated the Court's size in order to alter its ideological composition."²⁰ But he then notes that it was aimed at

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.* at 2778.

²⁰*Id.* at 2785.

President Andrew Johnson in particular, rather than at the opposing party, and it did not give rise to Democratic retaliation when Democrats gained control of the presidency and of Congress. Why not? Braver speculates that “a likely possibility is that Democrats did not consider it a stolen seat because it never belonged to their party in the first place. The anti-packing norm was irrelevant because Johnson was a president without a party.”²¹ Therefore, “[g]iven that both political parties had deserted President Johnson, the stolen seat was unlikely to lead to a cycle of the tit-for-tat retaliation that would probably result today.”²²

Be this as it may, we have then a single example of successful political court expansion as “precedent” for doing so today. Just as one swallow does not make a spring, one deviation from a constitutional norm does not destroy that norm. Whether that deviation destroyed the norm against court packing depends on what happened *next*. For 150 years, from 1869 until today, both the Norm of Nine and the norm against partisan court expansion has held regardless of which party controlled the presidency and Congress.

It was not until some sixty years later that this norm was again famously put to the test with FDR’s court packing scheme. The history of this incident has been usefully described to the Commission by Professor Laura Kalman. Contrary to some other scholars, Professor Kalman defends the conventional wisdom that the threat of Roosevelt’s proposal was effective in getting the Supreme Court to change its rulings. Still, her testimony confirms that FDR did not claim that partisan court expansion was constitutional. Instead, he claimed that the number of justices should be expanded as a means to the politically neutral end of handling the increase in litigation created by his proposed expansion of the lower courts, along with the increased agedness of the justices.

Yet, it was obvious then, and remains so today, that these purported rationales were pretextual. If partisan court expansion was a constitutional norm in 1937, why not assert it openly and candidly? The answer is that it was not then a norm and, because it was not, FDR’s plan was rejected by prominent members of his own party. The 1937 report of the then-Democratic-controlled Senate Judiciary Committee was scathing:

The committee recommends that the measure be rejected for the following primary reasons:

I. The bill does not accomplish any one of the objectives for which it was originally offered.

II. It applies force to the judiciary and in its initial and ultimate effect would undermine the independence of the courts.

III. It violates all precedents in the history of our Government and would in itself be a dangerous precedent for the future.

IV. The theory of the bill is in direct violation of the spirit of the American Constitution and its employment would permit alteration of the Constitution without the people’s consent or approval; it undermines the protection our constitutional system gives to minorities and is subversive of the rights of individuals.

V. It tends to centralize the Federal district judiciary by the power of assigning judges from one district to another at will.

²¹*Id.* at 2786.

²²*Id.* at 2773.

VI. It tends to expand political control over the judicial department by adding to the powers of the legislative and executive departments respecting the judiciary.²³

The Committee concluded that the proposal was “without precedent and without justification. It would subjugate the courts to the will of Congress and the President and thereby destroy the independence of the judiciary, the only certain shield of individual rights.”²⁴

Nor has partisan court-expansion become a norm since 1937. For this reason, House Democrats have posited ostensibly nonpartisan objects or ends for expanding the Court to thirteen. As Professor McConnell relates, House members have stated that the number thirteen is the appropriate number because that is now the number of circuits, which was indeed the grounds on which the number of justices were set until 1866.

But circuit riding was effectively ended by Congress in 1891 with the Everts Act and formally abolished in 1911 in favor of exclusive reliance on Circuit Courts of Appeals staffed by inferior circuit court judges. As McConnell observes, “[t]oday, the duties of a Circuit Justice are largely ceremonial. Nine Justices easily meet the needs of the thirteen circuits. In my years on the bench, I never heard a judge or justice suggest that there was any need for the numbers of justices and circuits to coincide.” The suggestion that the United States Court of Appeals for the Federal Circuit needs a justice all its own is, frankly, ludicrous.

The rationales for court expansion offered by FDR in the 1930s and House Democrats today are mere pretexts for proposals whose patently obvious objective is the constitutionally illegitimate end of changing how the Court rules in particular cases to outcomes favored by these Democrats. But offering pretextual reasons is the homage that constitutional vice pays to constitutional virtue. Such pretexts would be unnecessary if partisan court expansion was a permissible and recognized constitutional norm.

This is why it is so important that FDR did not justify his court packing scheme on the basis that he wished to change the direction of the Supreme Court. Instead, he justified his scheme on the agedness of the justices and the increased workload upon them from the proposed expansion of the lower courts. This is why House Democrats suggested that the number of justices should reflect the number of circuits (along with alleging that Senate Republicans had illegitimately exercised their advice and consent power in rejecting President Obama’s nomination of Merrick Garland and approving the appointment of Amy Coney Barrett). These reasons are offered not to justify partisan court expansion, but to conceal it. However morally righteous it may seem to those who disagree with the decisions of the Supreme Court in 1937 or today, FDR knew then, and House Democrats know now, that their real reason for court expansion is constitutionally illegitimate. So they provided others.

Does reliance on pretextual reasons undermine the constitutionality of a law? Here again is John Marshall in *McCulloch*:

Should Congress . . . under *the pretext* of executing its powers, pass laws for the accomplishment of *objects not intrusted* to the Government, it would become the

²³ Senate Committee on the Judiciary, Reorganization of the Federal Judiciary, S. Rep. No. 711, 75th Congress, 1st Session, 1 (1937), at p. 3. [hereafter Senate Report of 1937]

²⁴ *Id.* at 23.

painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.²⁵

Marshall is speaking here of ends or “objects not intrusted to the [federal] Government,” but the same principle holds true *inter alia* to ends or objects not entrusted to the Congress.

Congress has the constitutional duty to staff the Supreme Court with multiple justices. It does not have the right to alter the outcomes of the Court by resetting the number of justices. Nor does it have the right—and here I part company with Professor Feldman—to influence how the Court exercises the judicial power by *threatening* to reset their number. Even now, because of campaign talk, the House bill, and the formation of this Commission, speculation has arisen that the Court’s decisions this past term were influenced by the desire to fend off court-packing; that the Court reached overly narrow holdings and refused to consider certain cases due to this threat.

If true, that is not a legitimate basis for its judicial decision and the parties in any case that was decided on that basis did not get the hearing before an independent tribunal that the Constitution provides. This is especially true of any party whose petition for certiorari was denied because the justices wanted to avoid a controversial ruling that would induce court packing. Indeed, the *effect* of partisan court expansion on the independence of the Supreme Court is so deleterious as to be unconstitutional without needing to consider the congressional intent behind such a measure.

The Supreme Court Clause reads: “The judicial Power of the United States, shall be vested in one *supreme* Court, and in such *inferior* Courts as the Congress may from time to time ordain and establish.” (Emphases added.) This clause does not merely provide the Court’s name. It specifies its function as being “supreme” as opposed to “inferior.” Whatever may be the intent of Congress, partisan court packing has the effect of rendering the Supreme Court inferior to Congress thus violating both the letter and spirit of this clause.

There is a proper political means to affect or change how the justices exercise their power, on which I will elaborate later in my testimony: an elected president may nominate judges based on their judicial philosophy and an elected Senate may confirm or reject nominees on that same basis. But, once selected, these justices are supposed to be independent of the political actors who selected and confirmed them. This is why Article III stipulates that they “shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” Partisan court packing is the illegitimate effort to interfere with this independence.

If you are still resisting the conclusion that threatening court expansion to influence the content of Supreme Court rulings is an unconstitutional exercise of Congress’s power to set the size of the Court, consider the following the hypothetical: Suppose Congress passes a law in August 2021 stating that, if the Supreme Court overturns *Roe v. Wade* (or cuts back on the right to abortion) in *Dobbs v. Jackson Women’s Health Organization*—which is now pending before it—then there shall be created three new Supreme Court justice positions which can be filled immediately.²⁶ Any theory of Congress’s power to set the number of justices that fails to recognize the constitutional difficulty of such a hypothetical law is highly problematic.

But wait, there’s more.

²⁵ 17 U. S., at 423 (emphases added).

²⁶ I thank Professor Michael Rappaport for this hypothetical.

In addition to limiting Congress to making laws that are “necessary” to achieve a legitimate end, the Necessary and Proper Clause requires that such laws also be “proper.” The Supreme Court has rightly distinguished between these two criteria. In *Printz v. United States*,²⁷ the Court held it to be “improper” under the Clause to “commandeer” or compel state executive branch officials to perform criminal background checks on gun purchasers, even if such a measure was necessary to the operation of the Brady Act. Then, in *NFIB v. Sebelius*,²⁸ a majority of the Court held that it was “improper” under the Clause to commandeer or compel individual citizens to engage in commerce, even if such a mandate was necessary to the operation of the Affordable Care Act.

In *NFIB*, Chief Justice Roberts wrote:

As our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential to Congress’s determination that a regulation is “necessary.” We have thus upheld laws that are “‘convenient, or useful’ or ‘conducive’ to the authority’s ‘beneficial exercise.’” But we have also carried out our responsibility to declare unconstitutional those laws that *undermine the structure of government* established by the Constitution. Such laws, which are not “consist[ent] with the letter and spirit of the constitution,” *McCulloch*, are not “proper [means] for carrying into Execution” Congress’s enumerated powers. Rather, they are, “in the words of The Federalist, ‘merely acts of usurpation’ which ‘deserve to be treated as such.’” *Printz v. United States* (1997) (quoting The Federalist No. 33, at 204 (A. Hamilton)).²⁹

It is obvious why undercutting the independence of the judiciary—as Professor Feldman explained in his testimony— “undermine[s] the structure of government established by the Constitution.” For this reason, a law expanding the number of justices to influence how the Court rules is not “consist[ent] with the letter and spirit if the constitution.” Indeed, when one looks past the pretexts, undermining the independence of the judiciary is the whole object of this proposal.

Professor Michael Rappaport has described the relevance of the requirement that a law be “proper” to the constitutionality of partisan court packing in terms of the “spirit” of the text:

An important understanding of proper is that it requires that the law Congress is passing not violate the spirit of the Constitution. The idea here is that the “necessary” means-end power can be extremely broad, which would allow the Congress to undermine important constitutional principles, such as federalism and separation of powers. Therefore, the word “proper” was added to require that this “necessary” authority not violate the spirit of the Constitution. In that way, Congress could not use its necessary authority to undermine the Constitution.³⁰

Partisan court expansion does just this.

²⁷ 521 US 898 (1997).

²⁸ 567 U.S. 519 (2012).

²⁹ *Id.* (emphasis added).

³⁰Michael B. Rappaport, *Is Court Packing Constitutional?*, LAW & LIBERTY, November 6, 2020. <https://lawliberty.org/is-court-packing-constitutional/>

For these reasons, partisan court expansion is neither necessary to the accomplishment of a legitimate legislative end nor proper insofar as it undermines our system of separation of powers and the independence of the judiciary. Partisan court expansion is, therefore, unconstitutional. In the words of the Democrat-controlled Senate Judiciary Committee: “Under the form of the Constitution it seeks to do that which is unconstitutional.”³¹

Is Partisan Court Expansion Constitutional Because the Supreme Court Will Uphold It?

Let me now turn to the most obvious objection to this conclusion: if enacted, the Supreme Court will uphold partisan court packing. As I have explained elsewhere, there are three ways to analyze whether a law is constitutional or not. “Does it conflict with what the Constitution says? Does it conflict with what the Supreme Court has said? Are there five votes for a particular result? Unless we are clear about which sense of ‘unconstitutional’ we are using, we are likely to talk past each other.”³² To this point, I have been considering the first of these three conceptions of constitutionality: partisan court expansion conflicts with what the Constitution says in the Necessary and Proper Clause and in Article III and is, for this reason, unconstitutional. Does partisan court expansion conflict with what the Supreme Court has said?

As Professor Braver has shown, there have been three examples of attempts to change the number of justices to affect the way the Court rules: in 1801, 1866 and 1937. Two of these attempts failed in Congress. The third was never contested in the courts. So the Supreme Court has never passed upon the constitutionality of partisan court expansion. The Court has never said whether partisan court expansion is constitutional or unconstitutional. Because of this, there are no Supreme Court “precedents” that stand in the way of the justices following what the Constitution says. In the absence of their own precedents, that’s typically what the justices try to do: follow what the Constitution says.

Even if the justices accept the reasoning I offered above, this does not guarantee they will hold a partisan court expansion law to be unconstitutional and void. They might, instead, decline to reach the issue. Recall the John Marshall’s injunction I quoted above:

Should Congress . . . under *the pretext* of executing its powers, pass laws for the accomplishment of *objects not intrusted* to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

Despite this language by a much-revered justice in so canonical an opinion, in the 1942 case of *Darby v. United States*,³³ the Court said that:

The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction, and over which the courts are given no control.... Whatever their motive

³¹ Senate Report of 1937, at p. 23.

³²Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 583 (2010).

³³ 312 US 100 (1941).

and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.³⁴

In making this claim, the Court in *Darby* failed to mention the quoted language from *McCulloch*.

Of course, *Darby* concerned the scope of Congress's power to regulate commerce among the several states, not its power to set the number Supreme Court justices. The "legislative judgment" to which the Court was deferring was whether laws regulating local activity are necessary to effectuate Congress's power to regulate interstate commerce. This is akin to the judgment Congress legitimately exercised when it expanded the number of circuits to meet the exigencies created by the addition of new states, and then expanded the number of Supreme Court justices to ride circuit to hear cases in these states.

Since *Darby* was decided, the courts have often considered whether the object or ends of legislatures are legitimate. They do not do so by inquiring into the "motives" or purposes of individual legislators, however. Instead, they employ "tiers of scrutiny" to assess, in Hamilton's words, "[t]he relation between the measure and the end; between the nature of the mean employed toward the execution of a power, and the object of that power...." Illegitimate ends are exactly what the Court's various tiers of scrutiny are designed to detect.

Partisan court packing would fail even the most forgiving tier of scrutiny: rational basis review. Such review requires that a particular law be "rationally related" to "a legitimate state end." The Court finds that a law fails rational basis scrutiny where the lack of a means-ends-fit suggests it was likely motivated by an illegitimate end or by animus.³⁵ The end of partisan court packing is to change the way the Court rules. That end is illegitimate according to the entrenched norm I discussed above.

Because the end of affecting the decisions of the Supreme Court is not a legitimate government interest, the proposal would have to rise or fall on its relationship to, for example, whether the number of justices corresponds to the number of circuits. But we have already seen why, since circuit-riding ended, this is no longer a valid justification for setting the number of justices. That would leave the court with the inescapable conclusion—supported by knowledge of the political origins of this proposal—that the actual end being sought was illegitimate.

There is one notable way for Congress to demonstrate that the purpose of its court expansion was not partisan advantage: if the law receives bipartisan support. Were such an expansion supported by both Democrats and Republicans, courts would be very unlikely to find its objective was partisan advantage. Conversely, the very fact that court expansion is clearly a partisan initiative provides powerful evidence that it is illegitimate and unconstitutional.

Another doctrine that could lead the Court to uphold a court-packing law is the Political

³⁴ *Id.* at 115.

³⁵ See, e.g., *City of Cleburne, Texas v. Cleburne Living Center, Inc.* 473 US 432, 448, 450 (1985) ("in our view, the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests." Therefore "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded"); *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) ("Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."). While, both of these cases are Equal Protection Clause cases, the point is that, *Darby* notwithstanding, the courts have held that improper motive is not a "legitimate state interest" as part of its rational basis analysis.

Question Doctrine. In *Rucho v. Common Cause*,³⁶ the Court declined to consider the constitutionality of partisan gerrymandering—“the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.”³⁷ Altering the shape of legislative districts to gain partisan advantage was a normal, well known, and widely accepted—if often condemned—constitutional practice. Everyone knew it was being done and why it was being done. No pretexts were necessary.

The Supreme Court declined to consider a constitutional challenge to that norm. A majority found this question to be a nonjusticiable “political question.”

We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. “[J]udicial action must be governed by standard, by rule,” and must be “principled, rational, and based upon reasoned distinctions” found in the Constitution or laws.... Judicial review of partisan gerrymandering does not meet those basic requirements.³⁸

But in *Rucho*, four justices would have reached the merits and ruled that partisan gerrymandering of congressional districts was unconstitutional. Indeed, until Justice Kennedy left the Court, the door was left open to such challenges by a majority of the justices.

The example of partisan gerrymandering is instructive in several ways. Like “court packing,” the label “gerrymandering” is a pejorative term. But unlike partisan court packing, partisan gerrymandering has a very long history in the United States. Indeed, the term was coined in 1812 to criticize the legislative districts drawn by the Massachusetts legislature and signed by its governor Elbridge Gerry—a prominent founder. The shape of the contested district was said to resemble that of a salamander. Yet, partisan gerrymandering has always been accepted as constitutional. In contrast, while the number of justices waxed and waned during the first eighty years of the United States, partisan court expansion has *never* been accepted as a constitutional norm.

Further, the majority asserted that a judicial effort to police legislative redistricting would lack any objective standard of fairness. The Court also feared judicial involvement “would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives.”³⁹ None of these fears apply to judicially invalidating a partisan scheme to expand the Supreme Court. Once held to be unconstitutional, the Court’s number would remain as it has been for 150 years.

However odious some find it to be, the Court could not see how the norm of partisan gerrymandering could be both allowed and then limited in a fair and neutral way. But because partisan court expansion is illegitimate, it can be invalidated altogether. And it is easy to detect:

³⁶588 US __ (2019).

³⁷Congressional Research Service, *Partisan Gerrymandering Claims Not Subject to Federal Court Review: Considerations Going Forward*, July 5, 2019.

³⁸ 588, US, at ____.

³⁹ *Id.*

were the number of justices increased by members of one party and uniformly opposed by members of the other party? If so, such expansion is presumably “partisan” and illegitimate. If not, such expansion is presumably legitimate and constitutional.

Moreover, unlike both partisan gerrymandering and regulations of commerce, partisan court expansion involves grave separation of powers issues. The Court has been far more willing to police the boundaries of the branches to protect each from the other than it has been to police the boundaries of federal power to protect the policy-making powers of states. This would seem even more likely when the independence of the Court itself is at stake, as Professor Feldman’s testimony shows it would be. Given the constitutional objection I have described above, I believe a majority of the Court would reach the merits on whether the institution of the Court can be constitutionally subject to this kind of partisan interference.

In the end, each in its own way, both the majority’s and dissenters’ approaches to partisan gerrymandering in *Rucho* support the conclusion that partisan court expansion is reviewable. The majority refused to disturb the perennial constitutional norm that partisan that gerrymandering was constitutional. The constitutional norm against court packing is just as longstanding and is far more normatively appealing. For their part, the dissenters contended that “gerrymandering” for partisan advantage was unconstitutional. So too is expanding the size of the court for partisan advantage.

Let me now offer a caution to the talented and distinguished constitutional law professors and lawyers among you. Just because you can think of objections to this claim that partisan court expansion is unconstitutional, does not mean it is wrong. As anyone who watches the courts can aver, there are always two sides to every constitutional argument. That means there are *always* objections to be made against *any* constitutional claim. The question for this commission is not whether you all agree that the argument I have just sketched is ultimately correct. Reasonable people will surely disagree about that. The question is how plausible this argument will seem to those who may disagree with you. Is it truly “off the wall”?

While I may not have said enough to convince you that this constitutional argument is correct, I hope provided reason to believe that the argument is plausible enough to be “on the wall”—or at least it could move onto the wall in the future. If so, you should include this potential constitutional difficulty in your report to the President and do so respectfully rather than derisively. As a group, constitutional law professors are often too quick to deride arguments which they find unpersuasive (but others do not). As a group, they’ve been wrong before.⁴⁰

To repeat, I do not base my claim that partisan court packing is unconstitutional on any prediction that it will be invalidated by a majority of the Court. There are myriad obstacles to such an outcome. Moreover, this would be putting the cart before the horse. Given the absence of any judicial precedent approving of such a measure, I base this claim on the letter and spirit of the Constitution’s text.

The Problem of Double Deference

I now wish to stress that whether partisan court expansion is constitutional or unconstitutional is not a question that is confined to the courts. For example, United States Senators

⁴⁰See, e.g., Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331 (2013).

are empowered to raise a constitutional point of order to any legislation, and Senate rules require a debate and vote on that point of order. On December 23, 2009, such a point of order was raised, debated, and voted upon the day before the Affordable Care Act was approved by the Senate.⁴¹ If a court packing bill passes the House, I can all but guarantee that a constitutional point of order will be raised in the Senate. Therefore, a Senate debate on the constitutionality of such a bill is virtually inevitable. When that debate is held, each Senator has a duty to make his or her own assessment of whether the bill is constitutional— independent of how a future court may rule.

Further, when this Commission was first convened, I watched each of you take an oath to uphold the Constitution without any mental reservation. No matter what the Court might ultimately hold, if you conclude that partisan gerrymandering is unconstitutional, your own oaths morally require you to say so—to the end that the President you are advising, and other constitutional actors, might remain faithful to their oaths as well.

The doctrines I have discussed as potential reasons why the Court might uphold a partisan court-expansion bill all rest on some notion of judicial deference to the judgment of Congress or state legislatures. But deference to what judgment exactly? In *Darby*, the New Deal Court deferred to the judgment of Congress that, to effectively exercise its enumerated power over interstate commerce, it needed to reach some local activity that substantially affected that commerce. Likewise, in *McCulloch v. Maryland*, the Court deferred to Congress’s judgment that a national bank was needed to effectively facilitate the exercise of Congress’s enumerated powers.

But this judicial deference to Congress assumes that Congress is assessing the genuine necessity of these measures in good faith. Measures are only constitutional if Congress finds them to be truly necessary. After *McCulloch* was decided, President Andrew Jackson vetoed a bill renewing the second National Bank. In his veto message he said that if the Court was going to defer to the judgment of Congress (and the president with his legislative veto power), then if he, as president, concluded that the bank was unnecessary, that made it unconstitutional as well.

Jackson read the holding of *McCulloch* as affirming the principle “that the ‘degree of its necessity,’ involving all the details of a banking institution, is a question exclusively for legislative consideration.”⁴² That it is “the province of the Legislature to determine whether this or that particular power, privilege, or exemption is ‘necessary and proper’ to enable the bank to discharge its duties to the Government, and from their decision there is no appeal to the courts of justice.”⁴³ Fine. Then,

[u]nder the decision of the Supreme Court, therefore, it is the exclusive province of Congress and the President to decide whether the particular features of this act are *necessary* and *proper* in order to in order to enable the bank to perform conveniently and efficiently the public duties assigned to it as a fiscal agent, and therefore constitutional, or *unnecessary* and *improper*, and therefore unconstitutional.⁴⁴

⁴¹ Josh Blackman, *Unprecedented: The Constitutional Challenge to Obamacare* 55-58 (2013) (discussing constitutional point of order).

⁴² Andrew Jackson, *Veto Message Regarding the Bank of the United States* (July 10, 1832).

⁴³ *Id.*

⁴⁴ *Id.*

In the end, “[e]ach public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.”⁴⁵

Congress cannot therefore say partisan court expansion is constitutional simply “because the Court will uphold it.” In effect, the Court would be deferring to Congress’s assessment of its necessity and propriety; and members of Congress would in turn be deferring to their prediction of the Court’s assessment of its constitutionality. Such “double-deference” would result in *no one* assessing the constitutionality of such a law. Even if you think the Court should be highly deferential to Congress, unless Congress independently assesses the necessity and propriety of partisan court expansion, there is nothing to which the Supreme Court can defer. And it is your responsibility to independently advise the President of the serious constitutional infirmities of this proposal—even if, in the end, you doubt that the Supreme Court will hold such a law to be unconstitutional.

The Legitimate Way to Change the Direction of the Supreme Court

In their testimony, Professor Feldman and McConnell offer their assessments of why the Supreme Court nominations process has become so acrimonious and polarized. I wish to add another cause, which points the way to how the direction of the Supreme Court is properly changed by political activists and actors.

I submit that the judicial selection and confirmation process has been polarized along political lines because, among other issues, the political coalitions that comprise our two major parties have become divided on the proper approach to interpreting and enforcing the Constitution. The Democratic Party coalition has largely adopted “living constitutionalism.” The Republican Party coalition has now largely adopted what is known as “originalism” or “textualism.” There are, of course, competing varieties of both living constitutionalism and originalism; this is not the place to examine them. Nor are the political coalitions that make up our two major parties particularly fine-grained in the views they now hold.

These caveats notwithstanding, we can generalize the view of living constitutionalism held by the Democratic Party coalition as follows: Judges have the power and duty to “interpret” the Constitution in such a way that aligns it with contemporary values even if this means deviating from the meaning the relevant text of the Constitution had at the time it was enacted in 1789, 1791, or 1868. In short, it is within the proper scope of the judicial power to “update” the Constitution, which should be viewed as a living, breathing, evolving document that should be read to respond to the changing needs of society.

The view of originalism held by the Republican Party coalition can be summarized as follows: The meaning of the written Constitution should remain the same until it is properly changed by amendment. With rare exception, the Constitution is not the law that governs We the People; the Constitution is the law that We the People made to govern those who govern them. Those persons who take an express oath to be governed by “this Constitution”—and who receive power in return for that oath—can no more revise or update its meaning without going through the

⁴⁵ *Id.*

amendment process than We the People can revise or update the meaning of statutes imposed on us without going through the legislative process.

During the Warren and Burger Courts, living constitutionalism came to hold sway on the Supreme Court. Indeed, this view came largely to hold sway in both political parties. So long as that consensus about how to approach constitutional interpretation existed, Supreme Court nominations focused on such “qualifications” as character, intelligence, experience, learning, temperament, etc. Perhaps the only issue that divided the parties with respect to the proper role of judges was the degree to which judges should be “activist” or “restrained”—a split that developed during the 1940s in the New Deal Court among the justices appointed by FDR.⁴⁶ Even on this issue, however, the political parties did not cleanly divide.

It was not until the election of Ronald Reagan in 1980—and especially the appointment of Edward Meese as his Attorney General during Reagan’s second term—that the Republican Party coalition began to adopt a distinctly different “judicial philosophy” and sought to select Supreme Court justices on the basis of that philosophy. In addition to a continued commitment to “judicial restraint,” there was added a commitment to originalism. Over time, the latter commitment would grow in its relative importance, reaching its current apogee with the Trump administration.

In response to this shift in the Republican Party coalition during President Reagan’s second term, as chair of the Senate Judiciary Committee (which was controlled by the Democrats), then-Senator Joseph Biden made consideration of a nominee’s “judicial philosophy” an explicit part of the nomination process. In 1987, he declared: “The Senate has an undisputed right to consider judicial philosophy.”⁴⁷ The Bork confirmation hearings featured extensive discussion of judicial philosophy, especially in questioning by Chairman Biden.⁴⁸

In my view, this stance was altogether legitimate. How one approaches the interpretation of the Constitution is indeed a “qualification” for holding the office of justice of the Supreme Court or that of an inferior court judge. If the president can select nominees on this basis, so too can the Senate withhold its consent from those whose judicial philosophy it finds objectionable. As a result of this focus, in 1987, Judge Robert Bork—an advocate of “judicial restraint” and a self-described “originalist”—was rejected by the Senate generally along party lines.

After this rejection, even Supreme Court nominees of the Republican Party avoided calling themselves “originalists”—though Justices Scalia (whose nomination preceded Bork’s) and Thomas (whose nomination followed it) prominently adopted that label after they were on the Court, as eventually did Justice Alito. It was not until the nomination of Justice Neil Gorsuch that a Republican nominee identified as an “originalist” before confirmation. In this identification, he was followed by Justices Kavanaugh and Barrett.

This shift of identification was made possible by developments within the Republican Party coalition together with that party eventually gaining control of both the Presidency and the Senate. This development was abetted by the public defense of originalism offered by Justices Thomas and especially by Justice Scalia. As important, it was also made possible by a marked change in the judicial philosophy of “originalism” since the 1980s.

⁴⁶See Arthur M Schlesinger, Jr., *The Supreme Court: 1947*, *Fortune*, v. 35, no. 1, January 1947, p. 73.

⁴⁷James H. Rubin, *Burger Backs Bork; Biden Disagrees with AM-ABA-Resolution*, Associated Press, August 11, 1987.

⁴⁸ See Randy E. Barnett & Josh Blackman, *Restoring the Lost Confirmation*, National Affairs (Fall 2016), <https://www.nationalaffairs.com/publications/detail/restoring-the-lost-confirmation>.

The originalism of Justices Gorsuch, Kavanaugh, and Barrett is not the same as the originalism of Judge Bork. While Bork was committed to what is called the “original intentions” of the Framers, today’s originalist justices and judges are committed to what is known as the “original meaning” of the text. In addition, at least since the Supreme Court’s decision in *NFIB v. Sebelius* in 2012, a commitment to originalism has become a higher priority within the Republican coalition than a commitment to judicial restraint—though the latter still survives and surfaces in important ways.⁴⁹

To sum up, Democrats opposed the nomination of Robert Bork on the basis of his judicial philosophy. Unlike others, I hesitate to label this as “ideological,” except perhaps to the extent that the judicial philosophy of “living constitutionalism” is thought to serve the political ideology of the Democratic Party coalition. After all, there are prominent conservatives and libertarians who are living constitutionalists. For their part, Republicans eventually coalesced around the platform of appointing self-identified originalist judges. Once again, this should not be called “ideological,” except insofar as adhering to the original meaning of the text serves the political agenda of the Republican Party coalition. There are prominent progressives who are originalists.

The lesson here is if people are unhappy with the judicial philosophy of the Supreme Court, our system requires that they organize in one of our two major political parties to affect this selection process. This is what happened in the Republican Party. Members of that party’s coalition organized to change the direction of the Court by making judicial philosophy a plank of that party’s platform. This is how such change was accomplished by political progressives in the 1930s and into the 1940s. Supreme Court justices nominated by Republican Hebert Hoover—a political progressive—and Democrat FDR began to change the Court’s approach to the Constitution even before the court-packing scheme of 1937.⁵⁰

This is how change is supposed to be done under our Constitution. A politically-elected President nominates justices to be confirmed by a politically-elected Senate. But when the parties become polarized on the issue of judicial philosophy, so too will be the political process that the Constitution designates for selecting judges.

True, as Professor McConnell testified, “[h]ad the Senate been under the control of the Democratic Party in 2016, and had Justice Ginsburg lived a few more months, into the Biden Administration, the partisan results would be exactly the opposite. Progressives would enjoy a 6-3 majority, and there would be no talk of Supreme Court ‘reform.’” As Professor Feldman observed

under existing conditions, presidents must wait for the happenstance of the judicial vacancy opening before they can appoint a Supreme Court justice. Those opportunities are distributed roughly randomly across time. They are therefore in an important way accidents. That accidental feature preserves the independence of the judiciary even in the face of the reality of the political appointment process. Who controls the court, jurisprudentially speaking, is at least to some degree the result of chance.

⁴⁹For an extended discussion of the history of “judicial restraint” and its adoption by the Republican party see, BARNETT, *OUR REPUBLICAN CONSTITUTION*.

⁵⁰See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998).

But Congress may consider another path: a constitutional amendment to make these selections less random by limiting the terms of Supreme Court justices.

Term Limits for Justices

The unconstitutionality of Congressionally-imposed term limits seems more obvious than that of court packing. In sharp contrast with its long-recognized power to set the number of judges, Congress has no express power to impose term limits on justices. Professor Ryan W. Scott and Judge David R. Stras have contended that attempting to accomplish this by statute would violate both the constitutional requirement of good behavior and the fact that the Constitution specifies three distinct judicial offices: the office of chief justice, the office of supreme court judge, and the office of inferior court judge. The original meaning of “good behavior” was a life estate, they maintain—though in the case of an Article III judge, this life estate is defeasible by bad behavior. Once appointed to one of these offices, the good behavior requirement kicks in and that judge can neither be removed nor moved to another office without a new Senate confirmation.⁵¹

Of course, if term limits are enacted by constitutional amendment—as Professor McConnell proposes—there is no question about their constitutionality. Their wisdom, however, is another matter. I have serious concerns about the independence of the Supreme Court if its members all know there is a light at the end of the tunnel in which they may seek remunerative employment in the private sector or in academia. Proposals such as Professor McConnell’s allow them to remain on the bench for life, but I doubt very many will choose to do so. The promise of a payday upon completion of service runs the clear and present danger of influencing their rulings on the Court as well affecting as their treatment of the Supreme Court bar that appears before them. In sum, the prospect of future emoluments is likely to be a corrupting influence during their limited tenure. Beware of unintended consequences associated with “reform.”

But there is one thing to be said on behalf of this type of proposal that cannot be said for partisan court expansion: A constitutional amendment limiting the terms of justices would necessarily be bipartisan, commanding a very broad consensus from a variety of persons and interests. It would also allow states to have as say—either via state legislatures or conventions held in each state. Therefore, unlike a bill for partisan court expansion, such a constitutional amendment would be an entirely *legitimate* change to our constitutional order—however wrong-headed and ill-advised it may be.

Conclusion

In conclusion, I cannot improve upon the final words of the Democratic-controlled Senate Judiciary Committee’s 1937 report on FDR’s court packing scheme:

It points the way to the evasion of the Constitution and establishes the method whereby the people may be deprived of their right to pass upon all amendments of the fundamental law.

⁵¹ See Ryan W. Scott & David R. Stras, *Retaining Life Tenure: The Case for a Golden Parachute*, 83 WASH. U. L. QUARTERLY 1397 (2006) (proposing that older judges be incentivized to retire by generous pension benefits).

It stands now before the country, acknowledged by its proponents as a plan to force judicial interpretations of the Constitution, a proposal that violates every sacred tradition of American democracy.

Under the form of the Constitution it seeks to do that which is unconstitutional.

Its ultimate operation would be to make this Government one of men rather than one of law, and its practical operation would be to make the Constitution what the executive or legislative branches of the Government choose to say it is—an interpretation to be changed with each change of administration.

It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America.⁵²

⁵² Senate Report of 1937, at p. 23.