

The Presidential Commission on the Supreme Court of the United States

“Court Expansion and Other Changes to the Court’s Composition”

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I. INTRODUCTION

I am grateful for the opportunity to address the Commission on the topic of Supreme Court expansion and other possible changes to the composition of the Court. In my remarks, I will focus on three points. First, I will address what I see as a set of pressing problems with the current system governing the composition of the Supreme Court. Second, I will discuss in general terms the various kinds of reforms that might address those problems, and some of the tradeoffs that they involve. Third, I’ll briefly discuss why I hope the Commission will not attempt to foreclose future reform efforts by declaring any particular proposal constitutionally out of bounds.

At the outset, a brief word about why I’ve chosen to address the particular set of problems I’m focusing on here. My remarks will revolve around what I see as a structural defect with “the functioning of the constitutional process by which the President nominates and, by and with the advice and consent of the Senate, appoints Justices to the Supreme Court.”¹ A combination of factors means that individual appointments to the Supreme Court are highly consequential, yet the way in which opportunities to appoint justices are distributed bears an imperfect and unpredictable relationship to the results of democratic elections.

This problem is distinct from several other democratic problems posed by the Supreme Court that are not my testimony’s primary object of concern. One is the classic countermajoritarian difficulty—the fact that unelected, life-tenured justices have the power to strike down legislation enacted by democratically elected officials.² Another is the fact that the political system which shapes the selection of justices permits minoritarian rule due to the structure of the Electoral College and the Senate.³ And finally, there is the argument that the current Court itself presents a challenge to American democracy through its substantive decisions.⁴

I share concerns about those other problems. The democracy deficit I note exacerbates these problems, in my view. But, importantly, one need not agree with all or any of the other democracy-based critiques of the Court to agree with the critique I will develop here—or to agree that some solution to this problem is necessary. Given this Commission’s bipartisan nature, I will emphasize

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1. Executive Order 14023, Executive Order on the Establishment of the Presidential Commission on the Supreme Court of the United States (Apr. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/09/executive-order-on-the-establishment-of-the-presidential-commission-on-the-supreme-court-of-the-united-states/>.
 2. See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).
 3. See, e.g., Michael Tomasky, Opinion, *The Supreme Court’s Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html>.
 4. See Michael J. Klarman, *Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1 (2020).

why the particular problem I highlight should be of concern to all who care about the rule of law irrespective of whether they approve or disapprove of the current composition of the Court that status quo arrangements have created.

II. WHAT'S WRONG WITH THE CURRENT SYSTEM

Why is there sudden interest in changing the composition of the Supreme Court? Many will see this as all driven by politics: Democrats don't like the current Republican-appointed majority, and are upset about the circumstances under which those appointments were made. As my friend and fellow witness Professor Stephen Sachs puts it, "[i]t is hard to escape the conclusion that the sense of crisis depends on whose ox is gored."⁵ And, of course, that's right: it's hard to imagine that, had things gone differently in 2016, and were the Court now composed of a 6-3 Democratic-appointed majority, the current debate about Court reform would be happening in the same way. (Of course, in that alternate universe, there's reason to suspect that the shoe would be on the other foot and Republicans and their allies would be leading a campaign of obstruction and delegitimization, leading to a crisis of a different sort.⁶).

At the same time, that way of seeing things misses a deeper truth. There still can be a problem with the Supreme Court's selection process, even if at any given moment in time people on only one side of the aisle have the incentives to seek to change that process. Every status quo produces winners and losers; the fact that only the losers are motivated to complain does not mean that their complaints are ill-founded.

I'll try to explain those problems as simply and briefly as I can. And, as this is a bipartisan commission, I'll do my best to argue why these problems are ones that should trouble both those whom the status quo presently benefits and those whom it presently burdens. The problems I see have, in my view, deepened as a result of a number of different changes to the Supreme Court and to American society and legal culture. And they seem unlikely to disappear on their own.

Consider the following facts about the current Supreme Court selection process.

- First, justices have life tenure. That means they serve until death or voluntary retirement. This means that vacancies on the Court arise from a combination of strategic retirements and unpredictable deaths (or unpredictable health-related retirements).⁷
- Second, justices tend to serve for lengthy periods, and their typical length of service crept up significantly in the latter part of the Twentieth Century, with average tenures starting to

5. Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J. F. 93, 103 (2019).

6. See, e.g., Ilya Shapiro, *The Senate Should Refuse to Confirm All of Hillary Clinton's Judicial Nominees*, CATO INSTITUTE (Oct. 26, 2016), <https://www.cato.org/commentary/senate-should-refuse-confirm-all-hillary-clintons-judicial-nominees#>.

7. One problem life tenure creates is that some justices stay on the Court into old age and beyond the point when they can still serve effectively. See generally, e.g., David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000). That particular problem, while important and worth addressing, is not my focus here.

approach three decades on the bench.⁸

- Third, the Court is relatively small, with only nine justices. Though this number is not specified in the Constitution, it has been fixed by statute at this number for more than 150 years. A smaller Court means fewer vacancies, and means that each vacancy is more important in shaping the overall composition of the Court.
- Fourth, the Court is powerful. The Court is quite regularly asked to, and quite regularly does, declare federal statutes unconstitutional. And it does so today much more frequently than it did during its early years.⁹ Constitutional challenges to federal statutes that the Court has confronted in recent years involve such controversial matters as voting rights,¹⁰ healthcare reform,¹¹ campaign-finance regulation,¹² gay marriage,¹³ and abortion.¹⁴ The Court also regularly declares state and local laws and practices unconstitutional, and does so in areas of intense controversy, such as abortion,¹⁵ gay marriage,¹⁶ firearms regulation,¹⁷ and affirmative action.¹⁸
- Fifth, our political and legal cultures are both increasingly polarized. On the political side, there is evidence that American voters and the officials they elect have both become more polarized in their views.¹⁹ And there is reason to believe judicial ideology on the Supreme

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8. See Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. (forthcoming 2021) (manuscript at 14 fig. 2), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788497; Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 777–79 (2006).
 9. For a comprehensive analysis of Supreme Court cases involving constitutional challenges to federal statutes, see Keith E. Whittington, THE JUDICIAL REVIEW OF CONGRESS DATABASE (May 2019), <https://scholar.princeton.edu/kewhitt/judicial-review-congress-database>.
 10. See, e.g., *Shelby County v. Holder*, 570 U.S. 529 (2013).
 11. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).
 12. See, e.g., *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
 13. See *United States v. Windsor*, 570 U.S. 744 (2013).
 14. See *Gonzales v. Carhart*, 550 U.S. 124 (2007).
 15. See, e.g., *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).
 16. See *Obergefell v. Hodges*, 576 U.S. 644 (2015).
 17. See *McDonald v. Chicago*, 561 U.S. 742 (2010).
 18. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).
 19. See, e.g., MARC J. HETHERINGTON & THOMAS J. RANDOLPH, *WHY WASHINGTON WON'T WORK* 15–21 (2015); LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* 3–4 (2018); NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 12–13 (2d ed. 2016); Shanto Iyengar & Masha Krupenkin, *The Strengthening of Partisan Affect*, 39 ADVANCES POL. PSYCHOL. 201 (2018);

Court is increasingly tracking partisan affiliation,²⁰ perhaps due to the increasing tendency among justices to inhabit different cultural and professional worlds and to speak to different audiences.²¹

Now let us combine these facts. Life tenure, the Court's small size, and the tendency of justices to remain on the Court longer means vacancies are relatively rare. They're also unpredictable because some justices choose to retire strategically and others choose to remain on the Court until death. But those unpredictable events are extremely consequential because that the Court is powerful and because our polarized political and legal cultures produce justices who decide cases quite differently depending on the political party of the president who appointed them.

Recognizing this last point isn't the same thing as asserting that the justices decide cases in an entirely political or partisan fashion. As the members of this Commission surely know, many of the Court's cases are unanimous, and many of the non-unanimous cases do not neatly break down on party lines. Nonetheless, I think few if any people familiar with the Court's work would deny that the party of the appointing president matters for judicial ideology; nor would they deny that ideology matters a great deal in many of the cases with the highest stakes.

So individual appointments to the Court are immensely consequential. And though there is some unpredictability to when vacancies arise, strategic retirement and Senate obstructionism can mean that filling any given vacancy could leave that seat in one party's hands for more than a generation. This means that in our system the composition of the Court bears only an imperfect relationship to the results of democratic elections. Accordingly, some presidents have much more influence on the Court's membership than others. Donald Trump was able to appoint three justices to the Court in his one term as President, whereas Barack Obama appointed only two justices in two terms as president and Jimmy Carter appointed none in his single term. Even though Democrats controlled the White House for 20 of the 52 years between 1968 and 2020, happenstance and other factors meant that Democrats appointed only four justices during that time while Republicans appointed 15 (in addition to elevating William Rehnquist from Associate Justice to Chief Justice).

There is nothing inherently objectionable with the idea that Trump's victory over Hillary Clinton in the 2016 presidential election should matter for the Court's membership. As they say, elections have consequences. But having been elected, *how much* influence President Trump was able to have on the Court should not turn on the fact that Justice Ruth Bader Ginsburg chose to serve on the Court until her death at age 87 rather than retiring in 2013 under President Obama when she was 79.

There is no sensible reason for the composition of the Supreme Court to turn on essentially

Shanto Iyenger *et al.*, *The Origins and Consequences of Affective Polarization in the United States*, 22 ANNUAL REV. POL. SCI. 129 (2018).

20. See, e.g., Lee Epstein & Eric Posner, *Opinion, If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html>.

21. See NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* (2019).

random, unpredictable events. Whether various rights are recognized, whether Congress has the power to enact major statutory reforms, and so on all should not turn on when justices die or retire. Matters of great national consequence should not turn on the health and retirement decisions of individual octogenarians. This system is hard to justify.

Of course, many of our constitutional arrangements are imperfect or unfair in some way. We have lived with this system of Supreme Court justice selection for more than two centuries; couldn't we continue living with it for many years to come? But something seems to have changed recently. Indeed, the very existence of this Commission is evidence of that: structural changes to the Supreme Court are now on the table when they had been off the wall for many decades. What is it that has changed? As I acknowledged above, part of the story (of course) is one side's unhappiness with the current composition of the Court.

Yet that can't be the whole story. What's changed, I think, is that some of the various factors I noted have intensified over time. The Court is powerful and plays an important role in a range of highly controversial policy disputes; politics and law are increasingly polarized; justices are serving for longer tenures. All this, in turn, is placing additional stress on existing flaws in our current rules and institutional arrangements.

And this is dangerous. A reason that we have courts is to resolve conflicts in a way that is final, at least to some degree. But any such resolution will inevitably lead to an outcome that makes at least one side to the dispute unhappy. But a court's role is to produce an outcome that even the losing parties will abide by. In order to produce this result, though, there must be some basic degree of respect for the decisionmaker. Indeed, this is, I think, why our system cares about eliminating not just actual bias among judges, but also the mere *appearance* of bias.²²

Many courts' primary role is to resolve relatively small disputes between individuals. But the Supreme Court, for better or for worse, has been given (or taken on) the responsibility to resolve much bigger disputes—many of the disputes that divide our polity most deeply. Yet to have any chance of success in resolving those disputes, there needs to be some shared willingness to agree—at least to believe—that the system that produced that resolution is fair. At the very least, there needs to be some willingness of the losing side to believe that adhering to the existing rules for resolving disputes will ultimately be more advantageous than refusing to honor those rules. For social peace, we need people to believe that it is better to continue living under existing arrangements, however imperfect, rather than trying to burn them down. True, there may be some disputes over which our society is too divided for a court to have a chance of producing any final resolution.²³ But there are surely many questions over which some kind of resolution, even if uneasy, is possible and desirable.

This is a necessary prerequisite for a successful constitutional court. This is part of what it means to

22. See, e.g., CODE OF CONDUCT FOR UNITED STATES JUDGES canon 2.

23. The Court certainly failed to produce any satisfactory resolution in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). To take a more recent example, the Court's attempt in *Planned Parenthood of Southeastern Pennsylvania v. Casey* to "call[] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," 505 U.S. 833, 867 (1992), has seemingly produced no lasting peace on the question of abortion rights.

have a “rule of law.” And more generally, it is what a *constitution* is supposed to do. As Professor Daryl Levinson puts it, “the success of constitutional law, in both its constitutive and constraining roles, depends on the willingness and ability of powerful social and political actors to make sustainable commitments to abide by and uphold constitutional rules and institutions.”²⁴

At this moment in history, however, there appears to be decreasing willingness among those on the losing side of the disputes that the Supreme Court is called upon to resolve to simply accept results with which they disagree. This, I think, is why we are suddenly seeing increased willingness to consider court expansion and other structural reforms recently seen as unthinkable. And, I submit, that is at least in part a product of the various factors I’ve identified. We have a system that distributes control over a powerful institution in a way that is extremely hard to justify in terms of fairness, or even using the argument that the system’s benefits and burdens are likely to be roughly evenly distributed over time.

Why is this so bad? Shouldn’t the response be to simply tell the losers to get over it? The Court has faced similar legitimacy crises in the past, perhaps most recently in the Southern backlash to *Brown v. Board of Education*.²⁵ The short answer, though, is that there is no guarantee that the losers today will get over it. More fundamentally, it is not obvious why they *should*. Why should Democrats live with decisions produced by a Supreme Court majority they see as adherent to a partisan ideology, who sit on the Court because of a selection process Democrats see as arbitrary and unfair, and which Democrats fear may be permanently entrenched in light of the prospect of strategic retirement and Republican obstruction in the Senate if vacancies do arise? Given this state of affairs, it is becoming increasingly less obvious to one side of our divided country why sticking with the system we have is better than trying to tear down the system and replacing it with something else.

III. DIFFERENT WAYS TO FIX THE PROBLEM

I’ve explained a set of problems with our current system for determining the Court’s composition. If I’m right about the problem, what should be done? As I see it, there are a number of possibilities.

The first, and perhaps most likely, path is to do nothing. Structural change is always difficult; inertia is a powerful force. Yet for the reasons I’ve already explained, I don’t see the underlying problem—the unwillingness of the losing side to “take a loss and move on”²⁶—as likely to evaporate, in light of the causes that I’ve identified.

If so, the likelihood of what we might call partisan court-packing—the expansion of the Supreme Court solely to change its partisan, ideological composition—becomes more likely. That reform is generally seen as the easiest to accomplish and the least subject to constitutional objections. Nor is it obviously the wrong approach for Democrats to take. If one believes that Senate Republicans’ handling of the Supreme Court vacancies in 2016 and 2020 was deeply unprincipled and contrary to settled norms, it’s hard to explain why a retaliatory escalation should be off the table. At the

24. Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 662 (2011).

25. 347 U.S. 483 (1954).

26. Sachs, *supra* note 5, at 104.

same time, though, partisan court-packing is a change that many fear will be most destructive to the rule of law. Many fear that it will generate a cycle of retaliatory reprisals, leading to a Supreme Court with many justices but little legitimacy.²⁷

I'm not certain whether that prediction is correct.²⁸ But if the Commission is worried about it, it would be wise to explore alternatives. There are ways that we could seek to reform our system that would address the underlying causes of our current predicament. I will outline what I see as the different ways that might happen.

1. One strategy is to *regularize appointments* in some way. That is, we could change the system so that vacancies are more predictable and thus more directly connected to the results of elections. Such reforms would be particularly attractive to those who think that the Court's membership should have a close relationship to the outcomes of presidential elections over time.

There are different ways to accomplish this goal. Staggered term limits, about which the Commission has already heard testimony, is one option. Under the most common version of that reform, terms would last 18 years and each president would have two—and exactly two—vacancies to fill in each presidential term in office. This reform would have other benefits, such as preventing justices from remaining on the Court into old age and thus possible senescence.

Another intriguing possibility is Professor Daniel Hemel's suggestion "to retain life tenure but decouple appointment opportunities from vacancies."²⁹ Under his proposal, "[e]ach president would have the opportunity to appoint two justices at the beginning of each term, regardless of how many vacancies have occurred or will occur."³⁰

But other reforms could accomplish the same goal of more evenly distributing appointments across presidential terms, albeit more indirectly. Expanding the size of the Court by a significant degree would also tend to regularize appointments in practice even without changing our current approach to judicial tenure and appointments. The law of large numbers suggests that, as the Court's size increases, randomness in deaths and retirements would tend to even out, resulting in roughly similar numbers of appointments per presidential term. One proposal that may achieve this result is my and Ganesh Sitaraman's "Lottery Court" system, in which the Court would be expanded to include all judges on the federal courts of appeals, with the Court sitting in panels.³¹

2. Another strategy is some kind of *power-sharing* arrangement. Rather than making the Court's

27. See, e.g., Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2750 (2020). For an empirical exploration of the possible long-term effects of a cycle of retaliatory partisan court-packing, see Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *The Endgame of Court-Packing* (working paper), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835502.

28. For brief discussion of arguments in both directions, see Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 177 (2019).

29. Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. ECON. PERSPECTIVES 119, 121 (2021).

30. *Id.* at 136.

31. See Epps & Sitaraman, *supra* note 28, at 182–84.

membership more closely tied to the results of elections, a power-sharing arrangement would go in the other direction and make the Court's composition more stable and evenly divided in terms of party of appointment—without regard to the results of presidential elections. Underlying this kind of solution would be the view that warring political factions should come to a truce in the battle to capture the Court, and that this goal is more important than ensuring that there was a tight fit between election results and the composition of the Court.

Along these lines is Eric Segall's proposal for an eight-member Supreme Court evenly divided along partisan lines.³² My and Ganesh Sitaraman's "Balanced Bench" proposal,³³ in which the Court would have five seats reserved for Democratic appointees and five for Republican appointees (as well as five more justices chosen by the other 10 justices collectively) also reflects a power-sharing strategy.

3. A third strategy is *disempowering the Court* in some way. Rather than changing the composition of the Court, reformers could make the Court less powerful. The way that the Court's membership is selected would still suffer from the deficiencies I've discussed above. But that would be less of a problem, because the stakes would be reduced.

There are various options here. Professors Samuel Moyn and Ryan Doerfler have ably catalogued a number of them.³⁴ Stripping the Court of jurisdiction over particular classes of cases is one possibility.³⁵ I'm skeptical of this strategy as a long-term fix. Selectively removing certain areas of law from Supreme Court review will inevitably have partisan valence, as the possibility of Supreme Court review tends to have directionally predictable effects, and thus seems unlikely to serve as a stable solution.

Another option is to require supermajority votes for the Court to declare federal statutes unconstitutional.³⁶ This would presumably make decisions striking down federal statutes rarer, and thus could turn down the temperature of the nomination process to some degree. But again, this isn't an obviously complete solution. Rather than directly addressing the incentives for partisan politicians to seek to capture the Court, it merely moves the goalposts.

Finally, there is the prospect of a rule permitting a legislative or popular override of constitutional decisions by the Supreme Court.³⁷ This reform, too, would make the composition of the Supreme

32. Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547 (2018).

33. See Epps & Sitaraman, *supra* note 28, at 193–200.

34. See Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, CALIF. L. REV. (forthcoming 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665032.

35. See, e.g., Christopher Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778 (2020).

36. See Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73 (2003); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (2003).

37. See, e.g., Barry Friedman, *Things Forgotten in the Debate over Judicial Independence*, 14 GA. ST. U. L.

Court somewhat less important, if its decisions were not the last word on constitutional questions. But here again the solution seems incomplete. It addresses the problem of an out-of-control Court that is too eager to strike down laws. It does not satisfy those who see the problem as a Court that is too unwilling to *recognize* constitutional rights.

The value of these disempowering strategies as compared to power-sharing and appointments-regularization turns on what one sees as the proper role of the Supreme Court in relation to democratic governance. Power-sharing is perhaps the least democratic solution, as it distributes power over the Court without regard to which party has recently prevailed at the ballot box. Appointments-regularization is more democratic, in that it makes the Court's membership more dependent on election results. And disempowering reforms are most democratic, in that they envision giving more power over important decisions to democratically accountable institutions.

4. A final strategy is to try to *rebuild consensus* in our legal culture about what exactly Supreme Court justices should be doing and what exactly counts as a right answer to a disputed legal question. This is the solution offered by Professor Sachs, who argues that we should build consensus around “[l]imited government, federalism, originalism, and so on.”³⁸

I'm skeptical of the specifics of that solution, given that it looks like unilateral disarmament by one side, making it appear extremely unlikely to come to pass.³⁹ Nonetheless, I share the hope that it is possible to work toward greater shared consensus in our legal culture, even if that seems increasingly impossible in the political arena. And, for that reason, I see efforts to build bridges, to try to find the lost middle ground—a goal that partly motivates the formation of this bipartisan Commission, I think—as worth pursuing, even if I am skeptical of whether they can solve the problem.

5. One last possibility is that the Court itself will, through its decisions, *self-moderate* and thus reduce the temperature and the eagerness for reform. Perhaps one reason why the crisis I see didn't materialize decades earlier is that the Court has given both sides of our divided country decisions they are happy about, particular in some culture-wars disputes. This is not to say the Court has done so intentionally, or that the justices will take that path intentionally in the years to come—though some certainly speculate that calls for court-packing could push some of the justices to moderate their views. Even if that isn't true, it is possible that the justices' ideological and methodological differences will produce enough unpredictable results over time to defuse a currently ticking time bomb.

I think there's some reason to be skeptical, given what seems to be a significant and growing link between partisan affiliation and judicial ideology. Moreover, the fact that the Court is increasingly the site of battles over the “rules of the game”—the distribution of power over politics itself—may

REV. 737 (1998) (discussing earlier proposals to permit overrides of Supreme Court decisions); Mark Tushnet, *Dialogic Judicial Review*, 61 ARK. L. REV. 205 (2009) (discussing “notwithstanding” clause in the Canadian Charter of Rights, which permits legislative override of constitutional decisions).

38. Sachs, *supra* note 5, at 107.

39. See Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J. F. 821, 834 (2021).

make it unlikely that the tension will dissipate. In any event, this possibility is not one over which potential reformers have any control, and thus it is not a strategy that this Commission can recommend or explore.

IV. A WORD OF CAUTION

I hope that the Commission will consider the problems I've noted and the solutions I discussed. One thing I hope that the Commission, won't do, however, is try to take any of the solutions I've discussed *off* the table. This Commission was charged with providing "an appraisal of the merits and legality of particular reform proposals."⁴⁰ Though I'm sure the Commissioners will feel obliged to take that charge seriously, I would urge them to proceed cautiously in assessing the constitutionality of the various reform proposals discussed above as well as others it will consider. Here is why.

First, the constitutional issues raised by these various proposals are novel and (to my eyes) not easily resolved. Consider the prominent proposal for term limits for Supreme Court justices. Some think such a reform can only be accomplished by constitutional amendment.⁴¹ But others have argued that such a reform could be effectively achieved via statutory means, so long as the justices would not be deprived of their titles and salaries and still were permitted to serve in certain types of cases.⁴² The Constitution does not specify exactly what good-behavior tenure means.⁴³ And a well-crafted statutory term-limits proposal would arguably still respect the underlying concerns that appear to have motivated the inclusion of good-behavior protections in the Constitution. Given those facts, it strikes me that as far from obvious that such a statutory reform should be off the table.

True, such a reform has never been attempted. But the mere fact that a particular reform is novel is not necessarily a reason to conclude that such a reform is unconstitutional.⁴⁴ Moreover, the resolution of constitutional questions posed by statutory term-limits proposals and other reforms may depend at least in part on a choice between different methods brought to bear on constitutional interpretation—and that conflict over interpretive method is one dilemma that has generated our present predicament.

Second, the area of Supreme Court reform is one in which elected officials and the public may play

40. Executive Order 14032, *supra* note 1.

41. *See, e.g.*, Calabresi & Lindgren, *supra* note 8, at 859–68.

42. *See* Roger C. Cramton, *Constitutionality of Reforming the Supreme Court by Statute*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 345 (Roger C. Cramton & Paul D. Carington eds., 2006); Jack Balkin, *Don't Pack the Court. Regularize Appointments.*, BALKINIZATION (Oct. 5, 2020, <https://balkin.blogspot.com/2020/10/dont-pack-court-regularize-appointments.html>).

43. For a fascinating exchange on the meaning of "good behaviour," compare Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006) with Martin H. Redish, *Response: Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139 (2006).

44. *See generally* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1406 (2017).

a greater role in fleshing out constitutional meaning than many other questions of constitutional law. While today we assume most constitutional questions will be settled by the Supreme Court, through briefing, oral argument, and so on, it is less clear whether that is how disputes over the constitutionality of Supreme Court reform will, or should, be decided. The sitting justices are not obviously the right decisionmakers to resolve questions of their own power. Moreover, elected officials are in the process of thinking through proposals to reform the Court via statute—most notably, statutory term-limits proposals⁴⁵—which necessarily involves their own consideration of constitutional questions. This Commission should avoid doing anything that risks short-circuiting that healthy debate.

Third, the conditions which have led to the present circumstances suggest it is quite unlikely that any solution that requires a constitutional amendment can be successfully enacted. Our country's deep polarization makes it difficult to imagine court-reform measures clearing the supermajority hurdles required for constitutional amendment. Making matters worse, the statutory reform that many see as most easily defended on constitutional grounds is the one that many find most troubling: partisan court-packing. Any efforts to build consensus against the constitutionality of other reforms may make that path more likely.

Fourth and finally, the Commission should recognize that what it produces may be more likely to take reforms off the table than to spur reform along. As noted previously, inertia is powerful. And a conclusion by a bipartisan commission that any particular reform is not viable may be more persuasive in future debates than any recommendation in favor of any particular proposal.

It is certainly my hope that the Commission's work will help cure the sickness plaguing our current system for Supreme Court appointments. If nothing else, though, I hope the Commission will heed the admonition to "first, do no harm."

45. See Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Cong. § 8(b) (2020).