

**Statement of**  
**Jamal Greene, Dwight Professor of Law, Columbia Law School**  
**to the**  
**Presidential Commission on the Supreme Court of the United States**  
**Closing Reflections on the Supreme Court and Constitutional Governance**  
**July 20, 2021**

**Introduction**

I am the Dwight Professor of Law at Columbia Law School. My scholarship has focused on U.S. and comparative constitutional rights adjudication, theories of constitutional interpretation, and the structure and rhetoric of constitutional argumentation. I have been asked to offer concluding remarks that address the overall mandate of the Presidential Commission on the Supreme Court of the United States, including the factors that have driven and shaped the debate over Supreme Court reform, how to identify criteria to evaluate reform arguments that find support across the political spectrum, and specific proposals that may—or may not—satisfy these criteria.

I will cut to the chase. Among the many potential drivers of the need for reform of the modern Supreme Court, one stands out as nonpartisan, undeniable, and incompatible with constitutional democracy: the disproportionate amount of power each individual justice wields. The justices of the U.S. Supreme Court are too few, they hold office for too long, they are too easy to seat, and they exercise too much discretion over the cases they hear and the political identity of their replacements. “This, in America, is a charge that matters,”<sup>1</sup> or at least it should.

Thus, while the most recent push for Supreme Court reform has its genesis in the perception of a growing political imbalance on the Court,<sup>2</sup> this statement does not focus directly on responses to that imbalance. While a belief, if widely held, that the Court is

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<sup>1</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* 5 (1980).

<sup>2</sup> Fifteen of the last 19 Supreme Court appointees were nominated by Republican presidents even though Democrats have held the presidency for 16 of the last 28 years and have received more votes in six of the last seven presidential elections. The last Chief Justice appointed by a Democratic President, Fred Vinson, died in 1953.

captured by a single political party can affect its legitimacy,<sup>3</sup> the appropriate remedy for that perceived capture is a topic better addressed by political strategists than legal scholars. Democrats and Republicans, progressives and conservatives can and do disagree about the degree to which the ideological makeup of the Court constitutes a genuine social problem. But the amount of power individual justices wield over American life should concern policymakers, lawyers, and citizens of all political and ideological perspectives.

That said, the discussion that follows does speak indirectly to certain concerns over the Court's ideological balance. The main reason the judicial nomination process has become so overtly politicized, so vulnerable to political gamesmanship, is because the stakes of individual appointments to the Court have become so enormously high. Unless and until those stakes are reduced, political parties will be tempted to scorch the Earth to staff the Court with co-partisans. Reform proposals that seek to depoliticize the nomination process cannot be successful without simultaneously disempowering the people being nominated, and thereby reducing the political benefit associated with their success or failure.

Part I describes the problem of too much power in greater detail. Importantly, the concern I identify is not with the power of the Court as a whole. Although reducing the Court's jurisdictional, substantive, or remedial power would also reduce the power of individual justices (and may have other benefits),<sup>4</sup> there are a wide range of reasonable views about how much involvement the Court as an institution should have in our political life, and what the character of that involvement should be. By contrast, the case for reducing the proportionate power of the Court's individual members is consistent with support for either a minimalist or an activist conception of the Court's role.

Likewise, my concern over the power of individual justices should not be mistaken for a critique of how that power has been exercised. While I have views about individual decisions and doctrinal trends, and you do too, the problem I identify persists whether or not the justices are performing their duties competently, in good faith, or in a way congenial to a particular view of the law.

Part II discusses some nonpartisan legal and policy options in four areas that could mitigate the problem of too much power: increasing the size the Court (in nonpartisan

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<sup>3</sup> See James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New Style" Judicial Campaigns*, 102 AM. POL. SCI. REV. 59 (2008).

<sup>4</sup> See Statement of Nikolas Bowie to Presidential Commission on the Supreme Court of the United States, *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives*, June 30, 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf>.

ways), imposing prospective tenure limits on the Court's members, raising hurdles to confirmation to the Court, and reducing the Court's control over its docket.

Part III elaborates a specific proposal to dilute the power of individual justices that joins some of the policy options described in Part II. Specifically, the proposal would increase the size of the Supreme Court to 16 justices, drawn exclusively from the pool of Article III appellate judges, sitting in panels, serving 16-year terms, and relinquishing or diminishing control over the certiorari process. The particular details of the proposal are less important than its structure, which means to model creative thinking around the problem of individual judicial power in ways that (1) may conceivably be achieved by federal statute, and (2) are motivated by no particular ideology, save that of constitutional democracy.

### **I. The Power of Individual Justices**

The Supreme Court is one of the most powerful institutions in American public life. In just the last 11 years, the Court has (among many other important decisions) significantly weakened the Voting Rights Act (VRA),<sup>5</sup> has preserved the individual mandate under the Affordable Care Act (ACA),<sup>6</sup> has required states to make marriage available to same-sex couples,<sup>7</sup> has preserved the viability of race-based affirmative action plans,<sup>8</sup> and has prevented both Congress and state and local governments from regulating corporate electioneering.<sup>9</sup>

In each of these instances, the shift of a single vote would have led to a radically different, enormously consequential outcome: the preservation of section 5 of the VRA, the end of the ACA individual mandate, state prohibitions on same-sex marriage, the effective end of race-based affirmative action, and bans on corporate electioneering expenditures.

In brief, a starkly different political and legal landscape in a nation of 330 million has the potential to turn on the views of a single person. That single person is unelected, is one of only nine, can be confirmed by a bare and strictly partisan majority of the U.S. Senate, plays a major role in deciding what cases they hear, can potentially remain in office for 40 or 50 years, and can, in effect, choose the ideology of their replacement, who may in turn hold office for another 40 or 50 years under like conditions. In constitutional cases, the decisions the Court reaches are effectively unreviewable except by the Court

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<sup>5</sup> *Shelby County v. Holder*, 570 U.S. 529 (2013).

<sup>6</sup> *NFIB v. Sebelius*, 567 U.S. 519 (2012).

<sup>7</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>8</sup> *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016).

<sup>9</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010); *Am. Tradition P'ship v. Bullock*, 576 U.S. 516 (2012).

itself, amendment of the federal Constitution having become effectively defunct. No democracy of any character should tolerate a single person exercising this degree of power, discretion, longevity, and complete lack of accountability, and no other democracy does. A judiciary empowered to enforce the guarantees of the Constitution has been and remains a vital ingredient of American democracy. But it does not serve that democracy for its Supreme Court to be structured as a monarchy.

The Founders did not gift us this constellation of features. It is for good reason that Alexander Hamilton in *Federalist 78* called the judiciary “the least dangerous branch.”<sup>10</sup> The early Supreme Court was nothing like what it has since become. In the 1790s, the Court’s docket was largely limited to admiralty cases and picayune commercial disputes, and even then, the caseload was small.<sup>11</sup> The Court issued fewer than 70 opinions in its first 10 years, with most of the Nation’s important legal business occurring in the far more prestigious state courts.<sup>12</sup> Circuit-riding duties in the horse-and-buggy age were onerous, even hazardous, leading John Rutledge to quit without ever hearing a Supreme Court case.<sup>13</sup>

Of the six original Supreme Court justices, all but one—William Cushing—served less than a decade. John Jay, the Court’s first Chief Justice, stepped down in 1795 to become governor of New York and refused to return to the post in 1800 despite John Adams’s entreaties. “I left the bench,” Jay wrote, “perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess.”<sup>14</sup> True to Jay’s observation, when the federal government moved to Washington in 1800, no provision was even made for a space to house the Court: the Justices sat in makeshift chambers fashioned out of a small committee room on the first floor of the Capitol.<sup>15</sup>

The Supreme Court was not heavily immersed in national political life until deep into the nineteenth century. Congress first granted the Court general federal question

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<sup>10</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>11</sup> COMMISSION ON THE BICENTENNIAL OF THE U.S. CONSTITUTION, THE SUPREME COURT OF THE UNITED STATES: ITS BEGINNINGS AND ITS JUSTICES 1790–1991, at 12 (1992) [hereinafter BICENTENNIAL COMM’N].

<sup>12</sup> *Id.*

<sup>13</sup> James F. Flanagan, *Five Justices and Why They Left the Court for “Better” Positions*, 41 J. SUP. CT. HIST. 72, 74 (2016). In separate incidents, Justice Iredell was robbed and was injured in a horse accident while riding circuit. BICENTENNIAL COMM’N, *supra* note 11, at 14.

<sup>14</sup> Flanagan, *supra* note 13, at 77.

<sup>15</sup> BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 37 (1993).

jurisdiction in 1875,<sup>16</sup> and the Court's now familiar preoccupation with questions of constitutional rights is largely a twentieth-century novelty. Passage of the 1925 Judiciary Act gave the Supreme Court significant discretion to choose the cases its members wish to hear. That discretion brought with it a power to act as a proactive rather than largely reactive participant in the political culture. Much of what Americans today associate with the Court's docket—cases about free speech, and abortion rights, and gun rights, and criminal justice—did not take their modern form until the 1960s and 1970s, if not later.

The Court's structure has not kept pace with its astronomical growth in power. It has the same number of members it had in 1869, before federal courts had general federal question jurisdiction, before the Bill of Rights had ever been applied to state governments, before the Fourteenth Amendment had even been interpreted, and when the country's population was smaller than that of its largest state today. Justices live and serve for far longer than they once did.<sup>17</sup> Nomination battles have become intensely partisan notwithstanding the mandate that judges exercise independence of political parties. Courts rely on interested parties and Internet searches to identify decisive social facts in consequential cases.<sup>18</sup> The power and prestige of individual justices has tended to personalize the law, which for decades at a time can track the (sometimes idiosyncratic) views of a small number of swing justices. These features of the Supreme Court are so reliable that they have come to feel immutable. They are not.

## II. Four Areas for Reform

Four aspects of the Court's design in particular combine to personalize the Court's power in the way described: life tenure, a small absolute number of justices, a partisan confirmation process, and a discretionary docket. I discuss each in turn below.

### A. Life Tenure

Life tenure for federal judges is a global anomaly. Indeed, I am presently aware of only two nations on Earth that do not restrict the tenure of the judges of their apex courts, whether through terms of office, age limits, or both: the United States and Iceland, a country whose population is roughly the size of Bakersfield, California.<sup>19</sup> With the

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<sup>16</sup> See Act of Mar. 3, 1875, ch. 137, § I, 18 Stat 470.

<sup>17</sup> See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L. & PUB. POL'Y 769, 770–71 (2006).

<sup>18</sup> See Statement of Allison Orr Larsen to Presidential Commission on the Supreme Court of the United States, *Access to Justice and Transparency in the Operation of the Supreme Court*, June 30, 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/06/Larsen-Testimony-Presidential-Commission-on-the-Supreme-Court.pdf>.

<sup>19</sup> See Appendix for a selection of tenure limits in constitutional democracies.

exception of Rhode Island, every U.S. state does the same for the judges of its high court. There is no evidence that restrictions on the service time of judges confers a crisis of judicial independence or legitimacy. Much of the scholarly debate around tenure limits for Supreme Court justices accordingly focuses on the form such limits should take and the constitutional status of various proposals, not on whether some kind of limit is a good idea or not. The consensus around the wisdom of limited terms for Supreme Court justices is not unquestioned but it is broad and cross-ideological.

The most common term-limit proposal, for 18-year terms that expire every two years at fixed intervals, is well-known to the Commission.<sup>20</sup> I will not linger on its details. Suffice to say that its benefits are many. Justices serve for longer periods and to riper ages than they have historically. This means both that their undemocratic character is enhanced and that there is a higher probability that the high court will be staffed with people who are in intellectual decline. Regularizing the nomination and confirmation process, in combination with reducing the time justices stay in office, seems likely to lower the stakes of the process and thereby reduce the political incentive to engage in “hardball” tactics around judicial selection. A fixed term can also be structured in a way that prevents a justice from having any role in choosing the ideology of their replacement, a deeply undemocratic practice that Americans have come to see as unremarkable.

The biggest drawback to many term-limit proposals is that limiting the tenure of Supreme Court justices appears to conflict with the requirement under Article III that the judges of the Supreme Court “hold their offices during good behaviour.” This phrase, *quam diu se bene gesserint* in Latin, is borrowed from the Act of Settlement 1701, which granted life tenure to English judges rather than have them serve at the pleasure of the king. There is little discussion of this language in relevant founding-era documents. It appears that the Constitution’s framers by and large expected the language to provide for life tenure absent impeachment or a similar process through which the reason for removal is tested before an adjudicatory body.<sup>21</sup>

That said, there is some reason to question whether a preset and nonrenewable term of office that is otherwise subject to good behavior and compensation protections should be read to violate the language of Article III.<sup>22</sup> At the time of the Founding, *quam diu se bene gesserint* was understood as standing in contrast with *durante bene placito* (at

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<sup>20</sup> See Calabresi & Lindgren, *supra* note 17; Roger C. Cramton & Paul D. Carrington, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467 (Roger C. Cramton & Paul D. Carrington eds., 2006).

<sup>21</sup> See Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006).

<sup>22</sup> The analysis below would be similar for a statutory mandatory retirement age, which is common around the world.

the pleasure of the authorities).<sup>23</sup> Thus, the Declaration of Independence complained that the King “ha[d] made Judges dependent on his Will alone for the Tenure of their Offices.”<sup>24</sup> In Federalist 78, Hamilton described the good behavior standard as “an excellent barrier to the despotism of the prince” in a monarchy and “no less excellent a barrier to the encroachments and oppressions of the representative body” in a republic.<sup>25</sup> The concern was less that judges enjoy longevity for its own sake than that longevity was an instrumental barrier to political interference. And so, when Hamilton wrote in Federalist 78 that “inflexible and uniform adherence to the rights of the Constitution” cannot be expected of “judges who hold their offices by a temporary commission,” his concern with such commissions was that they could be revoked by the president or by Congress.<sup>26</sup> This concern is easily addressed. A fixed and nonrenewable term of years falsifies the dichotomy between life tenure and service at the pleasure of the executive or the legislature. The values of impartiality thought to be served by life tenure provisions are substantially satisfied by a sufficiently long and nonrenewable term that may be truncated only via impeachment, voluntary retirement, or death.

It is undisputed, moreover, that life tenure is not strictly required for a judge to exercise all the powers of Article III and indeed to sit on the Supreme Court. Hundreds of federal judges, including 15 Supreme Court justices, have received recess appointments to the bench.<sup>27</sup> Five of those justices were recess appointed in the Court’s first 33 years of existence.<sup>28</sup> These judges have consistently sat on cases, have been paid, have been subsequently confirmed without dissent, and have been adjudged valid Article III judges.<sup>29</sup> Recess appointments of federal judges constitutes a far greater threat to judicial independence than any term limit proposal,<sup>30</sup> and yet the constitutionality of that particular judicial term limit is well-settled. Of course, recess appointments are specifically contemplated in the Constitution (though not for judges as such), but the fact

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<sup>23</sup> Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1104 (1976).

<sup>24</sup> THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

<sup>25</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>26</sup> *See id.* (“If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.”).

<sup>27</sup> *United States v. Woodley*, 751 F.2d 1008, 1011 (9th Cir. 1985) (en banc).

<sup>28</sup> *Id.*

<sup>29</sup> *See id.*; *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962).

<sup>30</sup> *See* Henry Hart, *Prof. Hart’s Letter*, HARV. L. SCH. REC., Oct. 8, 1953, at 2 (arguing that a judge “cannot possibly have [the requisite] independence if his every vote, indeed his every question from the bench, is subject to the possibility of inquiry in later committee hearings and floor debates to determine his fitness to continue in judicial office”).

that they are permitted tends to suggest that a term of office can coexist with good behavior protection.

Even if Article III is understood as preventing direct imposition of term limits, there are statutory alternatives that plausibly meet constitutional standards. The most promising statutory route would take advantage of the fact that Congress has long been understood to have the power to alter the Supreme Court's duties and jurisdiction,<sup>31</sup> including by requiring justices to ride circuit, defining its term, and adjusting its docket and case selection methods. This being so, Congress would likely increase its flexibility to impose term limits (and other reforms) on the Supreme Court if it were to designate a much larger number of judges as constituting "the Supreme Court." Doing so would enable Congress to define a procedure for assigning the Court's docket to a subset of the larger Court. I discuss this proposal at greater length in Part III.

Constitutional amendment is widely believed to be politically impossible. It is not obvious that this would be the case for a hypothetical term limit amendment.<sup>32</sup> As noted, among well-informed scholars and lawyers who have given the issue serious thought, there is broad agreement across the ideological spectrum that term limits are a desirable reform. Still, given the proximity of the Court's composition to questions of great political interest, any term limit amendment would likely face an uphill climb.

If we believe judicial term limits are or would be adjudged unconstitutional, and that imposing such limits via constitutional amendment is not feasible, there may be ways of incentivizing justices to serve shorter terms.<sup>33</sup> In years past, Congress has sought to address concerns about the declining mental condition of life-tenured judges by creating a generous pension scheme, in 1869, and later introducing "senior" status, in 1919.<sup>34</sup> Offering additional pay incentives or other benefits to induce judges to retire can serve as a "carrot," though it is unclear whether it could work for Supreme Court justices in light of their power and prestige. Incentives need not always be positive, of course. It may be possible for Congress to deprive justices of law clerks or other staff after a fixed period of time, to be restored on retirement. This kind of "stick" approach might conflict with the constitutional prohibition on "diminish[ing]" the "compensation" of federal judges, though this is not obvious.

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<sup>31</sup> See *Booth v. United States*, 291 U.S. 339, 351 (1934) ("Congress may lighten judicial duties . . .").

<sup>32</sup> See Statement of Michael W. McConnell to Presidential Commission on the Supreme Court of the United States, *The Contemporary Debate Over Supreme Court Reform: Origins and Perspectives*, June 30, 2021, <https://www.whitehouse.gov/pscotus/public-meetings/june-30-2021/>.

<sup>33</sup> See David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a Golden Parachute*, 83 WASH. U. L.Q. 1397 (2005).

<sup>34</sup> See David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 473 (2007).

As with any reform that affects the Court's composition, any term limit proposal would ideally be structured so as to be insulated from current political arrangements. This means that its political viability may depend upon its taking effect only, for example, with the next (or a subsequent) presidential administration rather than the current one.

### *B. Size of the Court*

There is little question that increasing the size of the Supreme Court is statutorily available, having occurred six times in the past, but it has a bad rap. The fact that President Franklin Delano Roosevelt's 1937 proposal to "pack" the Court failed at the height of his power, when his party held 334 seats in the House of Representatives and 76 seats in the Senate, is sometimes said to have established a convention that the Court's size should remain at nine. To the extent this is so, it is unfortunate. There are good reasons to resist the partisan Court-packing President Roosevelt was (winkingly) proposing. But a bipartisan effort to assess the Court's needs and ideal structure, up to and including its size, should be encouraged.

A glance around the world reveals the size of the Supreme Court to be a serious anomaly. Of the 30 most populous countries in the world, the United States is the only one whose highest court hears both ordinary and constitutional cases and has fewer than 11 judges.<sup>35</sup> Even among the many courts around the world that hear solely constitutional cases, most have more than nine members. Germany's Constitutional Court has 16 judges, Italy's 15, the South African Constitutional Court 11. And as noted, the high court and constitutional court judges of nearly every other country in the world, large and small, are term- or age-limited.

Workload alone provides good and sufficient reason for the U.S. Supreme Court to have more than nine members (as discussed below), but the best justification relates to power. The Court's membership has become personalized in ways that should feel disquieting.<sup>36</sup> We have become accustomed to the views of a small handful of people—and often just one—visiting enormous consequences upon tens of millions of people across wide-ranging areas of constitutional and federal law over the course of many decades. Increasing the Court's size could significantly reduce the influence of particular justices, thereby lowering the stakes that attach to their appointment and increasing the Court's diversity along multiple dimensions. The Court could sit in randomized panels of varying sizes depending on the stakes of a particular controversy,<sup>37</sup> with en banc or

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<sup>35</sup> See Appendix for a selection of sizes of highest courts in constitutional democracies.

<sup>36</sup> See Jonathan Turley, *Unpacking the Court*, 33 PERSPECTIVES ON POLITICAL SCIENCE 155, 158 (2004).

<sup>37</sup> As occurs in Canada, Australia, and India, among a great many other jurisdictions.

otherwise large benches reserved for potential overrulings or cases of truly national importance.

A larger size could also affect the pace and quality of the Court's work. Multiple panels of the Court could operate simultaneously, each one devoting more time and care to the cases they hear. As others have emphasized, the Court's approach to ascertaining crucial factual information is wanting.<sup>38</sup> A larger overall bench could give Court panels time to hear about and test legislative facts in hearings that run much longer than one hour.<sup>39</sup> The Court could revitalize its already authorized power to answer certified federal questions from courts of appeal.<sup>40</sup> Rotating panels could be used for certiorari or for last-minute stays (for example, in capital cases) in ways that do not detract from the Court's other business. Larger panels, or even an outright majority of the full Court, could be required for extraordinary relief in cases decided without full briefing or argument, which could alleviate concerns over lawmaking via what has been called the "shadow docket."<sup>41</sup>

There are arguments against increasing the size of the Court that are important to address. First, to the degree the argument focuses on the Court's caseload, the well-known diminution in the size of the Court's docket may suggest that reform is unnecessary. I do not find this argument persuasive. As noted, the best case for increasing the Court's size relates to the undiluted power of its members, not the size of its docket. In addition, as noted above, there remain ways in which role differentiation could improve the quality of the Court's performance. At a minimum, any argument for increasing the number of cases the Court hears should not be constrained by the capacity of its nine members to dispose of the docket in timely fashion. Finally, there is good reason to think the decline in the Court's caseload is not for want of interesting work but

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<sup>38</sup> Statement of Allison Orr Larsen, *supra* note 18; see also Jamal Greene, *A Private Law Court in a Public Law System*, 12 L. & ETHICS HUM. RTS. 37, 58–65 (2018).

<sup>39</sup> As once was common. See Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1439–40 (2006).

<sup>40</sup> Circuit Court of Appeals Act, Ch. 517, § 6, 26 Stat. 826 (1891); See Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1450–51 (2009); Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 GEO. WASH. U. L. REV. 1310 (2010).

<sup>41</sup> See Statement of Stephen I. Vladeck, Case Selection and Review at the Supreme Court, Presidential Commission on the Supreme Court of the United States, June 30, 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/06/Vladeck-SCOTUS-Commission-Testimony-06-30-2021.pdf>.

rather emerges from other considerations such as strategic cert denials, risk aversion on the part of law clerks, and perceived resource constraints.<sup>42</sup>

A second argument against increasing the size of the Court is fear that doing so could lead to inconsistency in federal law. Different panels of the Court could attempt to pull the law in competing directions, undermining the Court’s harmonization function. This concern is genuine but overstated. We tolerate considerable inconsistency in federal law in virtue of the small docket of the Court as it exists today; the shrinking Supreme Court docket has been accompanied by a dramatic increase in the workload of the lower federal courts.<sup>43</sup> Increasing the Court’s size would therefore likely result in greater rather than less consistency in federal law. Moreover, the Court’s current norms around departing from settled law are likely affected by the Court’s structure—it engages in doctrinal innovation because it is both expected and empowered to do so. The individual judges of an enlarged Court would not have sustained control over the direction of the law—this is a feature of the reform, not a bug. There is good reason to think that such a structure would support an equilibrium of incremental development of legal doctrine, especially if the Court were to be staffed by judges who begin and end their judicial careers on lower federal courts (as discussed below). Rules for hearing cases en banc or empaneling larger benches could also be structured to mitigate concerns over inconsistency between panels.

A final argument against increasing the size of the Supreme Court is that requiring the Court to sit in panels may conflict with Article III, which vests “[t]he judicial power of the United States” in “one supreme Court.” Might it be argued that a Court sitting in panels qualifies as multiple Supreme Courts? I don’t think so. The Supreme Court has long been authorized to conduct some business without the involvement of its full membership. I do not perceive a constitutional distinction between hiving off subsets of

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<sup>42</sup> See Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV 1219 (2012).

<sup>43</sup> See Statement of Judith Resnik, Equity, Access to Justice, and Transparency in the Operation of the Supreme Court, Presidential Commission on the Supreme Court of the United States, June 30, 2021, at 6–8, <https://www.whitehouse.gov/wp-content/uploads/2021/06/Resnik-PDF-Presidential-Commission.pdf>. The problem Professor Resnik identifies is of long standing. See Paul Bator, *What’s Wrong With the Supreme Court?*, 50 U. PITT. L. REV. 673, 678 (1990) (“[A]t the court of appeals level, the appellate system is malfunctioning. The opportunity for error, injustice, contradiction, uncertainty, and disuniformity proliferates as we have more law, more cases, more judges and more judicial adjuncts.”); see also *id.* at 679 (“No effective system exists to harmonize and stabilize this enormous body of cases except recourse to the discretionary jurisdiction of one Supreme Court of nine judges sitting always en banc. . . . Without knowing anything more, it can be said with confidence that this is an absolutely crazy way to run the federal lawmaking enterprise and to try to attend to its clarification, stabilization, and improvement.”). Professor Bator was writing at a time when the Court routinely heard more than twice as many cases as it does today.

the Court to conduct such business and doing so for merits cases, especially if an en banc procedure is in place.

### *C. Selection Process*

The degree of attention and political controversy that regularly surrounds the selection of U.S. Supreme Court justices is unparalleled around the world. The nomination process dominates the news cycle, interest groups assume a wartime posture, wealthy partisans run costly advertisements, hearings are aired live on multiple major cable networks, and politicians use their votes and public statements to mobilize significant fundraising efforts.

At least two interrelated reasons for this state of affairs are apparent. First, the process through which Supreme Court justices are selected is overtly political and has become strictly partisan. The most recently confirmed justice, Amy Coney Barrett, was the first nominee to be confirmed with votes from only one party. The previous nominee, Brett Kavanaugh, received only one vote from a Democratic senator; Neil Gorsuch received three. In the nature of partisanship, each side accuses the other of being at fault for this acrimony.

Many other constitutional democracies choose high court justices with significant input from less partisan actors. Use of a judicial selection committee to create the short list or to choose the judges outright has become a common device, used, for example, to select members of the UK Supreme Court, the Supreme Court of Canada, the South African Constitutional Court, and the Israeli Supreme Court.<sup>44</sup> Typically, committee members include current or retired judges, distinguished members of the bar, lay citizens, and public officials such as the minister of justice.

Other innovations also reduce the possibility of purely partisan selection. For example, Indian Supreme Court justices are selected by the “collegium,” which comprises the Chief Justice and five other senior judges.<sup>45</sup> Members of Germany’s Federal

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<sup>44</sup> See The Supreme Court (of the United Kingdom), Supreme Court Selection Process, <https://www.supremecourt.uk/news/supreme-court-selection-process-for-president-and-justices-2019.html>; Office of the Commissioner for Federal Judicial Affairs Canada, The Independent Advisor Board for Supreme Court of Canada Judicial Appointments, <https://www.fja.gc.ca/scc-csc/2021/establishment-creation-eng.html>; Office of the Chief Justice, Republic of South Africa, About the JSC, <https://www.judiciary.org.za/index.php/judicial-service-commission/about-the-jsc>; Basic Law—The Judiciary, [http://www.mfa.gov.il/MFA/MFAArchive/1980\\_1989/Basic%20Law-%20The%20Judiciary](http://www.mfa.gov.il/MFA/MFAArchive/1980_1989/Basic%20Law-%20The%20Judiciary).

<sup>45</sup> See Memorandum Showing the Procedure for Appointment of the Chief Justice of India and Judges of the Supreme Court of India, <https://doj.gov.in/sites/default/files/memosc.pdf>.

Constitutional Court are selected by the two houses of parliament, the Bundestag and the Bundesrat, but a two-thirds supermajority is required for a judge to be seated. In the Bundestag, a multipartisan electoral committee chooses the candidate to be voted upon. The committee's proceedings are confidential and the eventual Bundestag vote is by secret ballot and without debate, reducing the chance that confirmation votes prompt political reprisals against individual MPs. By convention, the supermajority requirement has led the dominant political parties, the Christian Democrats and the Social Democrats, to a relatively stable equilibrium in which they divide the seats among themselves, allocating a minority of their "slots" to minor parties.<sup>46</sup>

Even apart from the formally partisan nature of U.S. judicial selection, the partisanship evident in U.S. Supreme Court confirmation fights simply follows from the high stakes of confirmation. When each justice is one of only nine and holds a lifetime appointment, the political cost-benefit analysis leans in favor of obstructing the other party's choice of justice whenever possible. Norms that prevented this obstruction from happening at late as 1988, when Justice Kennedy was confirmed 97-0 by a Democratic-controlled Senate in the last year of President Reagan's term, appear to have eroded entirely, along with a general increase in party discipline and solidarity.<sup>47</sup> There is no reason to believe these norms will return unless the stakes of a judicial appointment are reduced significantly.

Direct, mandatory changes to the process of Supreme Court appointment would require a constitutional amendment. Certain indirect processes may be possible through statute, internal Senate rules, or changes in convention. As with term limit proposals, a formally larger Supreme Court could potentially enable some flexibility in allocating case work among justices designated through bespoke appointments processes. It is also conceivable that some of the judges who hear Supreme Court cases could sit by designation from lower federal courts, whether selected by the justices themselves or chosen through other processes.<sup>48</sup> But the easiest way to increase the degrees of freedom available in altering the process through which justices are chosen would be to alter the stakes of appointment by changing the tenure and/or the numerosity of the Court's members.

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<sup>46</sup> See Uwe Kischel, *Party, Pope, and Politics? The Election of German Constitutional Court Justices in Comparative Perspective*, 11 INT'L J. CONS. L. 962 (2013).

<sup>47</sup> See Chelsea Cox, *McConnell: GOP-Controlled Senate Would Block a Supreme Court Nominee Before 2024 Election*, USA TODAY, June 14, 2021; see NOLAN MCCARTY, *POLARIZATION: WHAT EVERYONE NEEDS TO KNOW* 22-49 (2019).

<sup>48</sup> See Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 201-02 (2019).

Reasonable minds can differ as to the best mode of selection for Supreme Court justices, but at least three principles of a well-functioning appointment process should be relatively uncontroversial. First, political actors should play some role in determining who sits on the Supreme Court. This principle might seem subversive at first blush. It is important, of course, for the Court to be insulated from partisan politics. The perception of subversiveness dissipates on reflection. It is for good reason that the Founders created a process of judicial selection that involves some influence by elected officials, and that every U.S. state and most foreign countries do the same. Linking political decisionmaking to the will of the governed is how democratic (or, if you prefer, republican) polities arrange their affairs. The question is not whether there should be political input into judicial selection but rather how much, and through what levers. In a nation whose Supreme Court exercises an especially strong form of judicial review under a Constitution that is rarely amended, it is appropriate that (at least) long-term political trends have some bearing upon the Court's membership.

A second nonpartisan principle is that the Senate should not decline to consider a president's nominees to the Supreme Court, effectively altering the size of the Court unilaterally. The Senate has the power to control its own agenda, but in a well-functioning system we should expect the Senate generally to vote on nominees the president has put forward. This principle runs in both directions: the Senate should vote on duly submitted nominees, and the president should nominate candidates for the Court under circumstances that lend themselves to engaging the Senate on the politics of judicial appointments. Regularizing the appointments process would make it more likely that this principle is honored.

A third nonpartisan principle is that Supreme Court justices should enjoy the support of a bipartisan majority of Senators. Given the amount of power Supreme Court justices hold, it should be difficult for someone to become one. The occupants of these seats should enjoy broad respect, from across the political spectrum, for their wisdom, judgment, and experience. A selection process in which a lawyer or judge can become a Supreme Court justice solely with the support of senators from one political party is a broken one. While controversy surrounding the Senate's refusal to consider Merrick Garland's 2016 Supreme Court nomination may raise concerns that political recalcitrance can leave seats on the Court unfilled, we should perhaps be more concerned that justices are too easy to confirm than too hard.

Even as these principles should not be controversial, the political benefit to having one's preferred justice in place is high enough to overwhelm the second two principles. It is difficult to imagine, for example, the Senate agreeing to confirm only nominees

prescreened by a bipartisan commission—a common, relatively unobjectionable procedure—unless the power of a Supreme Court justice were to be substantially reduced. Other interesting reform options such as secret ballots or supermajority requirements are nonstarters in light of current power dynamics around Court appointments.

#### *D. Docket Control*

With limited exceptions, no one outside the Supreme Court itself has the power either to require the Court to decide a case or to prevent it from doing so. Control over the process through which cases reach the Court enables the justices to decrease and tailor their workload, which was the original motivation behind the momentous changes made to the case selection process in 1925, at the Court's behest.<sup>49</sup> It is not unusual globally for a high court to have substantial control over its docket. But in combination with other features of the U.S. Supreme Court—life tenure, its small size, and its partisan selection process—the fact that the Court all but entirely controls its agenda becomes more concerning.

It has been said that the Court's primarily reactive nature serves as a justification for its power. The romantic vision of a Supreme Court that simply determines the law to be applied to cases that organically come before it is necessary to sustain the fiction of a Court that applies the law rather than making it.<sup>50</sup> When the court has the power not to hear a case, it undermines the rationale Chief Justice Marshall relied on in *Marbury v. Madison* and *Cohens v. Virginia* to affirm the power of judicial review:

The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.<sup>51</sup>

As Herbert Wechsler wrote in 1965, "Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to

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<sup>49</sup> Judiciary Act of 1925, ch. 229, 43 Stat. 936; see Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000).

<sup>50</sup> See *id.* at 1717 ("A court that can simply refuse to hear a case can no longer credibly say that it had to decide it.").

<sup>51</sup> *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land.”<sup>52</sup> There is almost no litigated issue, though, that the Court *must* decide, and with 8,000 or more certiorari petitions filed annually (more than twice as many as when Wechsler was writing),<sup>53</sup> an incalculable number of issues that the Court *may* decide, if four of its members so choose. There is no longer any serious question that the Supreme Court performs the roving policing and supervisory function Wechsler wanted it not to; the Court is and understands itself to be a “law declaration” and not just a “dispute resolution” body.<sup>54</sup>

A number of reforms have been proposed to resolve the amount of discretion the Court holds over the cases it hears. In 1972, Paul Freund headed a study group that proposed the creation, by statute, of a National Court of Appeals that would be empowered, among other things, to screen cert petitions before they reach the Supreme Court.<sup>55</sup> Somewhat similarly, Paul Carrington and Robert Cramton have suggested that a group of court of appeals judges certify mandatory cases to be decided by the Court.<sup>56</sup> I see no constitutional objection to such proposals, nor indeed with power over case selection to be lodged in some other institution, whether comprising Article III judges or not.

It has been argued that a proposal of this sort contravenes Article III by vesting a portion of the Supreme Court’s appellate jurisdiction in other bodies.<sup>57</sup> But Congress unquestionably has the constitutional power, via the Exceptions Clause, to require the Court to hear certain appellate cases and not to hear others. This power suggests that control over case selection is not an indivisible element of the judicial power that must rest with the “one” Supreme Court.<sup>58</sup> As Freund has noted, if final authority over the

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<sup>52</sup> Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1065–66 (1965).

<sup>53</sup> See Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1059 (1977).

<sup>54</sup> See Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665 (2012).

<sup>55</sup> See FEDERAL JUDICIAL STUDY GROUP, REPORT ON THE CASE LOAD OF THE SUPREME COURT (1972).

<sup>56</sup> Paul D. Carrington & Robert C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009).

<sup>57</sup> See Charles L. Black, Jr., *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883, 885–87 (1974); Eugene Gressman, *The Constitution v. The Freund Report*, 41 GEO. WASH. L. REV. 951, 960–62 (1973).

<sup>58</sup> See Alexander M. Bickel, *The Overworked Court*, NEW REPUBLIC, Feb. 17, 1973, at 17, 18 (“[Q]uite plainly the provision for one, final, ultimate Supreme Court cannot be read to mean that all cases must be decided in it on appeal, or the institution would have burst a long time ago. Nor is there anything in the Constitution to suggest that the Supreme Court has to have the power to decide for itself what it shall decide out of an unlimited mass of possible cases.”).

decision of a lower court constitutionally may rest only with the “one” Supreme Court, then “all of the Judiciary Acts from the beginning to the present have been unconstitutional.”<sup>59</sup>

None of the above is to dispute that there is a benefit in granting the Court some substantial power to determine which cases it hears. The Court ideally should spend its time on the cases that most call for its intervention and not merely all those it has the power to decide, and I do not suggest that the justices are not capable arbiters of what the former category comprises. As noted, though, docket control would be less worrisome if the substantive power of individual justices were reduced. Moreover, if not every justice had a say on every petition (as in Canada, for example, which uses a rotating three-judge panel), the ability of individual members of the Court to control the law’s direction would be reduced.

### III. A Proposal

The institutional features discussed above—life tenure, a small number of justices, partisan selection, and full agenda control—are all individually concerning. In combination, they are unheard of outside the United States, and for good reason. I conclude with a proposal that would address all these concerning features at once and that may be achievable without the need for a constitutional amendment. In brief, the suggestion is for a 16-member Court whose members serve 16-year terms and are drawn from what are now designated as the courts of appeals.<sup>60</sup>

For ease of exposition, I refer below to the existing courts of appeals as the institution that would become the “formal” Supreme Court. I refer to the judges who would exercise many of the powers the Supreme Court exercises today as the “functional” Supreme Court. Thus, the first step in the proposal would be to expand the formal size of the Supreme Court to equal the size of the Article III appellate bench—currently 179 authorized positions—and to appoint all current court of appeals judges as formal Supreme Court justices. The second step would be to enact, via statute, an appointment procedure that would designate which judges of the formally expanded Supreme Court exercise the powers of the functional Supreme Court. The remaining judges of the formal Supreme Court would exercise roughly the same powers, including appeals of right from federal district courts, that the courts of appeals enjoy today.

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<sup>59</sup> Paul A. Freund, *A National Court of Appeals*, 25 HASTINGS L.J. 1301, 1310 (1974) (referring to limits on appeals to the Supreme Court in certain cases in which the requisite jurisdictional amount was not met or in criminal cases in which there was no certificate of division in the lower court).

<sup>60</sup> For a variation on this suggestion, see Epps & Sitaraman, *supra* note 48, at 181.

Because all court of appeals judges would formally become life-tenured Supreme Court justices, Congress would have significant flexibility in constructing a functional Supreme Court without being constrained by tenure or Appointments Clause restrictions. Congress could vest in the president the power to appoint, with the advice and consent of the Senate, 16 of the formal Supreme Court judges to limited 16-year terms as judges who hear cases that are of particular importance or are required to resolve conflicts in federal law. These 16 judges would constitute the functional Supreme Court.

As formal Supreme Court justices, these judges would have life tenure, but they would only serve as the functional Supreme Court for 16 years; thereafter, they would continue to hear the other business currently assigned to the courts of appeal. The functional Supreme Court would therefore have a structure not so unlike, for example, the current Foreign Intelligence Surveillance Court, which comprises Article III judges who serve a specific statutorily defined function pursuant to statutory terms of office but retain their status as life-tenured judges. The president could make two functional Supreme Court appointments at a time, to begin (for example) on July 1 of the first and the third years of a presidential term, permitting every president to appoint no more and no less than one quarter of the functional Supreme Court's members every four years.

The flexibility afforded by designating all federal appellate judges as Supreme Court justices would enable additional flexibility in structuring the selection process for the functional Court. Congress could, for example, require supermajority support of 55 or 60 or 67 Senators to ensure that each justice has bipartisan support. To prevent partisan blockages of seats, Congress could prescribe that a nominee who fails to receive a vote within a specified period is deemed confirmed,<sup>61</sup> and/or that until a nominee is confirmed, open seats are filled by the senior active court of appeals (i.e., formal Supreme Court) judge nominated by a president of the current president's party. A 16-member court could sit in panels of 5, or 7, or 9, or larger depending on the importance of the case, with an en banc (or otherwise large bench) procedure for cases of special significance or to reconsider prior precedent.<sup>62</sup> Emergency applications and cert petitions could be resolved by rotating panels of court members. The cert process could alternatively be

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<sup>61</sup> See Statement of Michael W. McConnell, *supra* note 32, at 6.

<sup>62</sup> I do not think it essential that the Court have an odd number of justices. En banc sittings on a 16-member Court would presumably be rare, and in any event an even number of justices would mean that the Court could not act as a plenary body without a majority of two. This kind of rule has some benefits. See Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547 (2018). Notably, the Supreme Court has had an even number of Justices on a number of occasions, including for its first 17 years of existence.

lodged in a panel of court of appeals judges who sit on the formal but not the functional Supreme Court, thereby disaggregating case selection from the case decision function.<sup>63</sup>

I have indicated that a proposal of this sort could be achieved by statute. Though the argument is not without difficulties, I am not currently persuaded that a proposal structured in this way would require a constitutional amendment. That tentative conclusion draws on the fact that significant changes in the internal structure of the federal courts, including having judges sit by designation on other courts, has long been assumed to be within the power of Congress to prescribe.<sup>64</sup>

I see two substantial objections. First, and most significantly, the proposal contemplates individuals being nominated to the Supreme Court (that is, the formal Supreme Court) but being disempowered to exercise the Court's power on terms equal to that of other justices (that is, the functional Supreme Court). This allocation of duties might be read as multiplying the number of "Supreme Courts" in contravention of the text of Article III. This is a plausible constitutional objection.

In responding to the objection, it might be fruitful first to consider the *constitutional* status of retired Supreme Court justices. David Souter, for example, has retired from the Supreme Court but remains an Article III judge who has regularly sat by designation on the U.S. Court of Appeals for the First Circuit. A hypothetical court of appeals panel staffed entirely by retired justices would not, I think, be regarded as a second "Supreme Court," but it is unclear how that would differ in Article III terms from the present proposal. Justice Souter's retirement is a creature of statute—his constitutional status has not changed since his time as an active justice—and yet no one doubts that, owing to statute, he no longer may choose to hear Supreme Court cases.<sup>65</sup>

Interestingly, the original circuit courts established under the Judiciary Act of 1789 were not staffed by designated "court of appeals" judges but rather by one district judge and two Supreme Court justices for each of the three circuits.<sup>66</sup> The idea that judges must receive distinct commissions that prevent them from serving in multiple roles within the

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<sup>63</sup> Enlarging the courts of appeal to encompass SCOTUS could rather seamlessly enable some version of Paul Carrington and Roger Cramton's proposal for a "Certiorari Division" of the Supreme Court. See Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 632 (2009).

<sup>64</sup> See Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1640–42 (2006).

<sup>65</sup> It is true, of course, that a retired Supreme Court justice will have chosen this arrangement, but to say that the protections of Article III may be waived is not only atextual but would pose a threat to the judicial independence Article III is meant to promote. See Stras & Scott, *supra* note 34, at 492–94.

<sup>66</sup> See BICENTENNIAL COMM'N, *supra* note 11, at 10.

federal judiciary was rejected in *Stuart v. Laird*, when Justice William Paterson noted for the Court that “practice and acquiescence under [the circuit-riding system] for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer and have indeed fixed the construction.”<sup>67</sup>

To the degree the status-inequality of different “Supreme Court” judges remains a concern, it is potentially surmountable by adding the notional possibility of the functional Supreme Court being overruled by the full body of formal Supreme Court justices, such as under a demanding “extraordinary circumstances” standard. This expedient would render the business of the functional Supreme Court an internal division of labor—as when individual justices are empowered to make decisions on stay applications, extensions of time, and petitions for rehearing<sup>68</sup>—rather than a hierarchy among justices. The “division of labor” theory might be reinforced if, for example, the formal Supreme Court handled cert petitions, stay applications, ethics complaints, or other elements of the Court’s business.

A challenge to a proposal of this sort grounded in the division of labor would have still less force under the suggestion by Dan Epps and Ganesh Sitaraman that Supreme Court justices sit in panels chosen by a lottery of court of appeals judges. The downside of the Epps and Sitaraman proposal is that there would be no way, under their system, to assign judges considered the wisest or most able to specially decide those cases calling for the most wisdom and ability. Relatedly, political control over the Court’s membership would be highly diffuse. This is a feature rather than a bug of the proposal, of course, but its costs in decisional quality might be high.

The second substantial objection I see to a proposal structured as I have described is precisely that it would enable political actors to select the functional Court. If the conceit is that the difference between the formal and the functional Court is a matter of internal Court organization, there might be a general separation of powers objection to political control over that organization insofar as it implicates the Court’s substantive decisions.<sup>69</sup> I am not convinced. Note that the office of Chief Justice is subject to political control. The Constitution does not specify how the Chief Justice is to be selected (or tenure-limited, as in the lower federal courts) and yet, by unbroken tradition, this task has fallen to the president, with the advice and consent of the Senate, even for justices

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<sup>67</sup> *Stuart v. Laird*, 5 U.S. 299, 309 (1803).

<sup>68</sup> See Sup. Ct. R. 23(1), 32(3).

<sup>69</sup> As with the first objection, this one is mitigated—indeed eliminated—under the Epps and Sitaraman variation or under variations that assign selection of the functional court to the judges themselves.

who are already associates.<sup>70</sup> I assume that what the president and Congress may do by convention—choose the Court’s constitutionally recognized leadership, assign that leader a wide array of administrative duties, and indeed permit that leader to perform additional duties on behalf of the “courts of law”<sup>71</sup>—Congress may also do by statute. More generally, it has long been assumed that Congress may add or remove seats on the Court, abolish the Court’s term,<sup>72</sup> repurpose its building, eliminate its staff, or deprive it of all or much of its constitutional jurisdiction.<sup>73</sup> The proposal outlined above would threaten the Court’s independence far less than any of these actions.

That said, a constitutional amendment might well be preferable to a statute. An amendment would insulate the proposal from litigation risk and would ensure broad public buy-in for a significant change in constitutional governance. In addition, opening the door to significant Court reform through ordinary statute increases the likelihood of *partisan* political manipulation of the Court’s structure and jurisdiction, threatening the Court’s independence. Still, this objection has its limits, as it is ultimately an argument for a permanent status quo.

## Conclusion

A remarkable range of concerns raised in testimony before this Commission could be alleviated or outright eliminated by a bigger, tenure-limited Court such as those used in every other large country in the world. Concerns about a broken judicial appointments process, a politically polarized bench, pathologies relating to certiorari and agenda-setting, the emergence of a robust shadow docket, the challenges of information gathering, the puzzle of how to handle ethics and recusal issues for the highest court, and worries that the nine justices cannot properly supervise an ever-sprawling body of federal law all could be mitigated if the Court’s structure looked more like that of the high courts of the world’s other democracies. Most importantly, such a Court would help to diffuse the judicial power, resting less control over the course of U.S. law in the hands of a tiny number of unaccountable and life-tenured individuals.

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<sup>70</sup> See Todd E. Pettys, *Choosing a Chief Justice: Presidential Prerogative or a Job for the Court*, 22 J.L. & POL. 231 (2006); Resnik & Dilg, *supra* note 64, at 1622 (describing the Chief Justice’s tasks of “ceremonial head, diplomat, manager, speaker, planner, career-enhancer, policymaker, adjudicator, intellectual leader, CEO, trustee, rulemaker, museum trustee”).

<sup>71</sup> See James E. Pfander, *The Chief Justice, The Appointment of Inferior Officers, and the “Court of Law” Requirement*, 107 NW. U. L. REV. 1125 (2015).

<sup>72</sup> As Congress did to the Court’s 1802 Term. See Sanford Levinson & Jack M. Balkin, *What Are the Facts of Marbury v. Madison?*, 20 CONST. COMM. 255, 259 (2003).

<sup>73</sup> See generally Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

This is not an exceptionalism that America, of all places, should celebrate. For the United States is not just the world's oldest democracy but is among its largest and its most pluralistic. Our diversity is a source of pride, yes, but it is also a source of *wisdom*, as no community, and certainly no individual, has all the answers a complex society demands. As Madison wrote of a republican form of government, "It is ESSENTIAL to such a government that it be derived from the great body of society, not from an inconsiderable proportion, or a favored class of it."<sup>74</sup> If the point seems obvious, that's all the more reason our legal institutions should be structured to reflect it.

The proposal outlined above will no doubt strike some readers as academic, even exotic, but the conversation it means to promote is an urgent one. If proposals of the sort offered here seem radical, it is because the institution they seek to reform is itself radical, departing starkly from the many sober-minded judicial arrangements that have postdated it. The question this Commission should seek to answer is what the Supreme Court of the United States needs in order to do its job well, being careful, as Felix Frankfurter warned, to avoid "canonizing the familiar into the eternal."<sup>75</sup> Recognition by this Commission, across ideological lines, of the problems this statement identifies and the practical availability of an answer would go some way toward normalizing the kinds of reform our democracy vitally needs.

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<sup>74</sup> THE FEDERALIST NO. 39 (James Madison).

<sup>75</sup> *The Same Mr. Taft*, NEW REPUBLIC, Jan. 18, 1922, reprinted in FELIX FRANKFURTER, LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913–1938, at 47 (Archibald MacLeish & E.F. Prichard, Jr., eds., 1939).

## Appendix

<b>Size and Tenure Limits for Highest Court: Selected Countries</b>			
<b>Country</b>	<b>Population (in thousands)*</b>	<b>Number of Judges</b>	<b>Tenure Limit</b>
India	1,380,004	34	65 years old
United States	329,484	9	Life
Brazil	212,559	11	75 years old
Nigeria	206,140	18	70 years old
Mexico	128,933	11	15 years
Japan	125,836	15	70 years old
Turkey	84,339	17 (CC) <sup>†</sup>	12 years
Germany	83,241	16 (CC)	12 years
France	67,392	9 (CC)	9 years
United Kingdom	67,215	12	75 years old
Italy	59,554	15 (CC)	9 years
South Africa	59,309	11 (CC)	12-15 yrs   70-75 y/o
South Korea	51,781	9 (CC)	70 years old
Colombia	50,883	9 (CC)	8 years
Spain	47,352	12 (CC)	9 years
Argentina	45,377	5	75 years old <sup>‡</sup>
Canada	38,005	9	75 years old
Malaysia	32,366	15	66.5 years old
Australia	25,687	7	70 years old
Taiwan	23,817	15 (CC)	8 years
Chile	19,116	10 (CC)	9 years
Israel	9,217	15	70 years old
Denmark	5,831	18	70 years old
New Zealand	5,084	6	70 years old
Ireland	4,995	10	70 years old

\* The World Bank, <https://data.worldbank.org/indicator/SP.POP.TOTL> (last accessed July 15, 2021).

<sup>†</sup> "CC" denotes that the court is strictly a constitutional court rather than a court of broader jurisdiction.

<sup>‡</sup> After a Supreme Court justice turns 75, they may serve a renewable five-year term.