

Statement of
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Good afternoon, Chairpersons Bauer and Rodriguez and members of the Presidential Commission on the Supreme Court of the United States. I am grateful for the opportunity to testify at today’s hearing on the Supreme Court and Constitutional Governance.

The session is appropriately named, inasmuch as the debate about whether and how to restructure the Supreme Court is driven by, and connected to, a set of interrelated questions about the role of the Court, the appropriate scope of its power, the meaning of judicial independence, and the relationship between the Court and the political branches. These questions can only be understood through the prism of our nation’s history and practice, beginning with some of the theoretical quandaries that shaped the framing of the Constitution and, as a result, the history that has brought us to the present moment.

I. Independence and Accountability.

To Americans of the founding generation, the most important and profound achievement of their Revolution was the establishment of a legitimately popular government. The United States became the only country in the world with such a government, which the political science of the era insisted was infeasible. Pride in this fact—together with awareness of the fragility and importance of their venture in popular government—was, in historian Gordon Wood’s words, “the deeply felt meaning of the [American] Revolution.”¹

Popular government did not mean direct rule by citizens. As James Madison pointed out in *Federalist 10*, two thousand years of history taught that direct democracies “have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.”² Instead, the new United States would be a republic, meaning “a government in which the scheme of representation takes place.”³ The task of governing would be carried out by agents of the people, chosen (directly or indirectly) by the people, and subject (directly or indirectly) to their supervision and final say.

¹ Gordon S. Wood, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 47 (1969).

² *THE FEDERALIST* NO. 10, at 61 (Jacob E. Cooke ed. 1961).

³ *Id.* at 62.

The founders of our republic had good reasons for deeming representation indispensable to make popular government practicable. While still beholden to the ultimate and actual sovereign—“the People themselves”—representatives are better positioned to learn and gather information about appropriate governance, to argue and deliberate among plausible alternatives, and to achieve the necessary compromises and accommodations that are unavoidable in a large complex society. Under a system of representation, Madison continued, “the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.”⁴

Yet representatives cannot play this role if they are mere cyphers, reproducing an already existing, fixed popular will. They need to exercise judgment and help shape popular will in accordance with justice and good policy. Republican government thus depends on striking an appropriate balance between representatives’ *independence*—creating space for the people’s agents to make and act on hard decisions—and *accountability*—holding these agents answerable for their decisions to the people, who as sovereign are the true and only principals. It is in the space between these commitments that democratic politics occurs. Here is where the people’s agents are called upon not just to make hard decisions, but also to lead by persuading their principals that these are the right decisions; and if they cannot, the same principals must be able to hold them to account and reverse their judgments.

Finding the right balance between independence and accountability—between the power to act and the need to persuade—is a tricky business: too much independence and the system ceases to be republican; too much accountability and it risks the fate of earlier, failed republics. The framers of our Constitution solved the problem by creating a complex system with multiple, interdependent branches—all responsible to the same “people,” but structured in different ways, with different mixtures of independence and accountability. They did this by varying the size of the electorate that chose particular representatives, whether these representatives were chosen directly or indirectly, and how much time passes between their elections. The House of Representatives was made the most accountable and least independent of the branches by having its members elected directly, in relatively small districts, every two years. The Senate was made more independent by having its members elected indirectly through state legislatures, on a statewide basis, every six years. The Executive fell in the middle, being elected indirectly through the Electoral College, on a nationwide basis, but every four years. This compound blend of independence and accountability, in a system in which each branch could check and balance the others, was designed to produce a net balance of independence and accountability that was both workable and appropriate—enabling government to make hard decisions and act and lead, while still being ultimately responsive and responsible to popular will.

II. Independent Judges, Dependent Judiciary.

And what about courts? There doesn’t seem to be much mixing or balancing in Article III. On the contrary, when it comes to the judiciary, the Constitution’s emphasis is almost entirely on independence, achieved by providing judges with life tenure and salary protection.

⁴ Id.

That's because, when the Constitution was written, the idea of courts playing a significant role in constitutional politics and governance would have seemed ridiculous and farfetched. Courts had played no such role in English or colonial history, including the political and constitutional disputes that underlay the American Revolution and led to the Declaration of Independence. Nor had they been a notable force in states during the Confederation period. Nor were they assigned a meaningful part in any of the political and theoretical writings that informed Americans of the period. All this being so, it's not surprising to find courts entirely absent from Madison's *Federalist 51*, the ur-text for understanding separation of powers, and scarcely mentioned at all during the year-long Ratification debates.⁵

A judiciary was necessary of course, and judicial independence was deemed essential to its operation—but in connection with the courts' ordinary law function of deciding individual cases fairly. Americans had learned the hard way under colonial rule that justice in regular litigation required insulating judges from overt political pressure. The possibility of courts as important players in shaping politics and governance was something as yet dimly imagined by only a handful of individuals, whose views on the subject turned out to be prescient but at the time were treated as peripheral and largely ignored.⁶

Note, this is not because there was still no concept of judicial review. The practice emerged in the early 1780s, and, while not widespread or widely known, it was familiar to members of the political elite, including participants at the Constitutional Convention. But judicial review had also been flimsy and ineffectual, and even in its weak early form was still mostly condemned and rejected. Which is why even proponents thought little of it and put little faith in it—leaving it out of the Constitution except as it might come up incidentally in the course of deciding ordinary cases.⁷

⁵ Larry D. Kramer, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 73-92 (2004).

⁶ *Id.* at 78-81. The only meaningful exchange about the role of the judiciary is the one between Brutus and Publius in New York. The Anti-Federalist Brutus wrote three essays arguing that federal courts would be too powerful, to which Publius replied in Alexander Hamilton's famous *Federalist 78*. But almost no one saw either of their arguments. Brutus was not widely circulated or read—two of his three essays were reprinted nowhere, while the third was reprinted only twice. *Federalist 78*, meanwhile, was not even part of the original newspaper series and saw the light of day only in May 1788—too late to influence any ratifying convention except (possibly) New York, where the question of judicial review never came up. No one else discussed the nature, importance, or role of the judiciary in anywhere near the same depth. Only a handful of other Federalists even mentioned judicial review, mostly in passages too fleeting or obscure to attract attention.

⁷ *Id.* at 65-72:

“Obsessive attention to the minutiae of judicial review in the early 1780s can easily mislead. An argument to assign courts a role in enforcing the constitution may have been in the air, but it was hardly one that had achieved widespread notice or approbation so far as the general public was concerned or that could be called established. Our intensive focus on the question is an artifact of what judicial review subsequently became and of our natural curiosity, as a result, to understand its origins. In trying to get a sense of the historical context, however, it is important not to exaggerate the significance of what was, in fact, insignificant to the vast majority of Americans. For most, including most politicians and public leaders, the focus remained on traditional popular means of enforcing the constitution, the major change being a new emphasis on elections. Judicial review was either something they had never heard of or thought about, or, at most, a barely audible note in the background that had not, as yet, attracted their attention in a serious way.”

This shouldn't be surprising. The men who wrote and ratified our Constitution were smart but hardly omniscient. Much that they thought they understood in the 1780s turned out to be wrong once they tried putting the new system into operation. Federalism didn't operate as expected, and neither did separation of powers. The presidency proved much stronger than anyone anticipated, while states proved weaker. Political parties didn't just emerge, they turned out to be essential to make the system function. Countless questions surfaced that had not been anticipated. And on and on.

Fortunately, the founders of our Constitution were not themselves originalists. If they had been, the new Republic likely would not have survived its first decade; indeed, it almost didn't.⁸ But they adapted and adjusted and innovated as needed to make the new government work.

The growing role of the judiciary was just one more unplanned development. During the 1790s, the weak notion of judicial review that had developed in the 1780s solidified and achieved widespread acceptance, while a new, more controversial doctrine appeared—the idea of judicial *supremacy*, of the courts as final arbiter of constitutional meaning. The doctrine failed to achieve widespread acceptance, but its emergence was part of an ambitious bid to augment and enlarge judicial power. And as the Judiciary's potential political importance became clear, so too did awareness that independence may have been overweighted in Article III's structure.

An unlooked-for dilemma suddenly came into focus: how to balance the necessary independence of an unexpectedly powerful Judiciary with an appropriate degree of accountability? Because if courts were to play this larger role in constitutional governance, it was imperative that they, too, be somehow accountable to the people. Americans had not fought and died to establish a republic only to turn final say over the meaning of their most fundamental law—their Constitution—to, in Thomas Jefferson's words, “the despotism of an oligarchy,”⁹ especially one whose members were appointed for life.

Before turning to how Americans have answered this question over time, I want to digress briefly and talk about more recent constitutional developments in post-WWII Western Europe, post-Soviet Eastern Europe, and the post-colonial Global South. New constitutions adopted over the past seventy-five years in many of these countries created strong courts with explicit powers of constitutional review. In doing so, however, they could draw upon both our experience and the experience of other nations that have attempted forms of constitutional government. How, then, have these nations addressed the problem of balancing independence and accountability when it comes to their courts?

The structure favored in most constitutions adopted since the mid-20th century can be summarized as “independent judges in a dependent judiciary.” That is, they strongly secure the

⁸ We tend to forget how close the new Republic came to collapsing in its early years. See James Rogers Sharp, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* (1993); Stanley Elkins and Eric McKittrick, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800* (1993).

⁹ Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in *10 THE WRITINGS OF THOMAS JEFFERSON* 160 (Paul Leicester Ford, ed. 1899).

power of judges to make independent decisions, while utilizing structural and procedural devices to ensure that the judicial branch cannot veer too far from the larger political community. This is accomplished through a bundle of interrelated provisions:¹⁰

- First, recognizing that constitutional enforcement is not and cannot be treated like ordinary legal interpretation, most of the new constitutions establish special courts, not part of the ordinary legal system, whose sole function is to review constitutional questions.
- Second, given the high political station these courts occupy, the constitutions add additional safeguards to ensure an appropriate level of institutional accountability without compromising judicial independence in deciding cases:
 - Appointment to the bench typically requires a supermajority in one or both houses of the legislature, making it difficult to appoint judges with fringe or extreme ideologies.
 - The judges then serve terms that are limited and staggered to ensure a regular turnover.
- Finally, the constitutions themselves are made more easily amendable than ours.¹¹

The combined effect of these innovations is to preserve judicial independence in decision making, while reducing the likelihood of serious breaches between the constitutional court and the directly accountable political branches and making course corrections easier to implement if breaches occur.

No similar devices are found in the U.S. Constitution because, as noted above, when our founders wrote, no one had yet imagined anything remotely like the modern judiciary. So as judicial power expanded, and its potential and political importance came into clearer view, America's political leaders improvised a jury-rigged system using the tools available to them to create a similar kind of control and accountability.

I won't discuss these tools in detail. They have been the subject of much public debate, as well, I am sure, of testimony you have already heard. They include the Executive's power to refuse to enforce judicial mandates—not in the particular case but as general guidance, as with

¹⁰ See the country-by-country surveys in Vicki C. Jackson and Mark Tushnet, *COMPARATIVE CONSTITUTIONAL LAW* 538-40 (3rd ed. 2014).

¹¹ It is worth noting that, in our Constitution's original design, amendment was not meant to be especially difficult—more demanding than ordinary legislation, but not much. Recall that the Constitution made amendment *easier* than it had been under the Articles of Confederation, which required unanimity. Indeed, under the rule adopted in Article V, every proposed amendment that had failed during the Confederation period would have passed. And it worked as planned at first: the Constitution was amended 12 times in the first 15 years. This changed partly because the number of states grew more than anyone in 1788 had imagined, but more because the effort to tamp down ferocious controversies in the first half century after Ratification—especially over slavery—led to a political culture that treats the text as close to holy writ. See Michael Vorenberg, *FINAL FREEDOM* (2004).

Andrew Jackson's 1832 bank veto, and Abraham Lincoln's issuing passports to free Blacks despite *Dred Scot's* holding that Blacks could not be citizens. They include Congress's power to change the jurisdiction of the court, as the Republican Congress did in repealing the Judiciary Act of 1801, and the Reconstruction Congress did after the Civil War. Other forms of control include modifying judicial procedures, something else pushed by Jefferson in requiring the Justices to return to riding circuit; and controlling the Court's budget and resources, a power frequently exercised (though sometimes in the form of a carrot, as when Congress agreed to reduce the Supreme Court's appellate jurisdiction and fund a new building only in exchange for a promise to grant any writ of certiorari supported by four Justices).

Recent debates have focused mainly on Congress's power to change the Court's size and composition, historically the most frequently used device for managing the Judiciary. The Federalist Congress reduced the Supreme Court from six to five in 1801 to force Jefferson to wait for two retirements before he could make an appointment, a decision the new Republican Congress promptly reversed. Concerned about a pro-slavery Supreme Court majority, Congress gave Abraham Lincoln an appointment in 1863 by increasing the size of the Court from nine to ten, only to shrink the Court to seven in 1866 to ensure that Andrew Johnson could not make appointments, and then increase it back to nine in 1869 when Ulysses Grant became President.

The most well-known effort to recast the Court by changing its size was FDR's "Court packing" plan in 1937. I'll say a bit more about this one only to correct the erroneous conventional wisdom that Roosevelt's plan failed—an understanding that has been relied on to support the idea that his effort was somehow also illegitimate. In fact, exactly the opposite is true.

As we have seen, Roosevelt's overture was solidly grounded in well-settled practice—a practice that was needed, he argued, to ensure that "[w]henver legalistic interpretation . . . clashe[s] with contemporary sense on great questions of broad national policy, ultimately the people and the Congress have . . . their way."¹² Roosevelt's Court-packing plan was controversial, to be sure, but no more so than earlier such efforts—though Roosevelt did not help himself by offering a patently disingenuous age-based justification.

Be that as it may, Roosevelt's effort was also *entirely* successful in getting him exactly what he sought: the Court reversed course and upheld the second New Deal, followed a few weeks later by Justice Van Devanter's retirement and the appointment of Hugo Black. No longer needing additional Justices, Roosevelt let the plan drop. But can anyone seriously doubt how popular it would have become—overnight—had the Court stuck to its position and held the Administration's very popular efforts to address the Depression unconstitutional yet again?

Understanding how FDR's battle with the Court actually played out calls attention to an important property of these checking devices—namely, that making them available does not produce more or constant conflict, but rather *reduces* it. As with any tool of deterrence, making

¹² Franklin D. Roosevelt, Address on Constitution Day, Washington, D.C., Sept. 17, 1937, in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 365 (Samuel I. Rosenman, ed. 1941).

clear that the other branches can and will push back against an overreaching Court makes it less necessary to do so. Rather than conflict, we get a different equilibrium and a better balance of power, as the Court adjusts its behavior to greater sensitivity in the other branches. Hence, conflict and controversy over the Supreme Court has been exponentially more frequent and intense in the last half century, as the legitimacy of these checking devices has been called into question.

III. The Rise of the Untouchable Court.

Yet called into question they have been. Somehow, the idea that these balancing tactics are illegitimate has become conventional wisdom, accepted across the political spectrum. To think otherwise, we are told—to countenance any kind of institutional pushback to the Court—nullifies the principle of judicial independence and threatens the Judiciary’s ability to protect our Constitution and our rights. To sustain this supposedly weakest branch, in other words, we must make it the strongest one: able to order the other branches, the states, and the American people about without interference or institutional pushback. The only options available to restrain the Supreme Court, no matter what it does, are to amend the Constitution or wait for some of the Justices to die or retire in the hopes of appointing someone more desirable.

Before turning to how this conventional wisdom developed—and why it is wrong—I want to repeat, for emphasis, that the Constitution *indisputably* and *explicitly* confers powers on the other branches that can be used to balance the Court’s independence. Congress has near plenary authority over the Court’s budget, size, composition, and procedures, while the Executive has independent discretion over enforcement. The Court’s budget can be cut, the President can ignore its mandates, Congress can reduce or adjust its jurisdiction, or revise its procedures, or change its size and composition. Not only are these powers undeniably given, they have in fact been used, and to good effect, throughout U.S. history. Used, we should note, not by disreputable or failed leaders, but by some of the most admired Presidents and Congresses in American history: Thomas Jefferson, Andrew Jackson, Abraham Lincoln, the Reconstruction Congress, Teddy Roosevelt, and Franklin Roosevelt. Hardly a rogues’ gallery.

Bear in mind that battles over the scope of judicial authority, while more than sporadic or incidental, have not been a constant in American history. Precisely because these tools were available, most of the time the Court has played its role in our constitutional system in a manner that avoided major controversy, exercising judicial review but in ways acceptable to the broad American polity. Periodically, however, the Court has injected itself more assertively into politics, triggering a blowup by seeking to upset or stymie major political decisions. In response, Presidents and Congresses exercised their constitutional prerogatives to rein in the Court. And in each instance, their power to do so was unequivocally reaffirmed.

So what changed to create the idea, so widespread today, that exercising these time-honored powers is somehow improper? In a word (or three): the Warren Court. Prior to its advent, battles over judicial authority invariably lined up along predictable political lines, with “conservatives” (however defined by the politics of the moment) supporting muscular claims of

judicial authority, while “progressives” (however understood at the time) rebuffed them.¹³ But the Warren Court was something new in American history: an activist Court that was also politically liberal. The left soon flipped, eagerly embracing the opportunities judicial intervention suddenly afforded to advance their agenda. Conservatives, for their part, continued to support judicial authority—objecting to what they saw as the Warren Court’s footloose method of interpreting the Constitution, but without denying that the Court cannot be gainsaid. The debate shifted from whether the Court should have the last word on constitutional meaning—yes, everyone now agreed—to how that word should be determined. Conservatives adopted a theory of interpretation based on “originalism,” while liberals stuck with a more open-ended, forensic approach that is sometimes called “living constitutionalism.”

In practical terms, this agreement about the scope of judicial authority was made operational by delegitimizing the devices historically used by the political branches to push back (changing the Court’s composition, shifting its jurisdiction, and the like). Of course, given life tenure, limiting the available checks to the appointments process shifted the equilibrium among the branches decisively in favor of judicial authority. Unsurprisingly, the role of the judiciary grew exponentially—an expansion that has continued uninterrupted whether the Court has been liberal (like the Warren Court), moderate (like the Burger Court), or conservative (like the Rehnquist and Roberts Courts).

It’s important to understand that this was not something that happened in a moment or was embraced by everyone all at once. Liberal reactions to the Warren Court were quite divided at first. The older generation—the folks who had fought to undo *Lochner*—liked the result in *Brown v. Board of Education* but were profoundly uncomfortable with the Court’s assertion of supremacy in *Cooper v. Aaron*, while their younger counterparts were quick to embrace *Cooper*’s practical implications for the things they cared about. Over time, however, the idea of judicial supremacy became the norm—gradually spreading beyond the academy and profession to the political classes and from there to the general public. History was rewritten to conform to the new mythology,¹⁴ and by the 1980s acceptance of judicial finality came to seem obvious and natural. Witness the conniptions evoked in 1986 when former Attorney General Edwin Meese dared to suggest that Supreme Court decisions might be binding only on the parties to a case.¹⁵

¹³ For instance, many today would consider Jacksonian Democrats “conservative” and their Whig opponents “liberal,” but at the time the Democratic commitment to popular rule against Whig support for elite institutions like the Bank of the United States gave them the opposite flavor. Thirty years later, the Republican commitment to free labor as against Democratic support for slavery made the former progressive and the latter conservative. One sees this pattern repeat in all the major controversies over the Supreme Court prior to the Warren Court.

¹⁴ See Kramer, *supra* note 4, at 208:

“[W]hile an argument for judicial supremacy had emerged by the end of the 1790s, it was decisively repudiated both then and later. The idea did not disappear: there were always those who favored giving courts final say over the Constitution ‘this side of an amendment.’ But they were a minority. Not surprisingly, this minority included prominent judges and members of the legal profession—men like Marshall, Webster, and Story—and we have tended (understandably perhaps, but without any real basis) to treat their views as authoritative, as reflecting an established practice and position. Yet the reality is that we have been privileging the views of men who suffered overwhelming political defeats each time they tried to establish their position. It was the views of Jefferson, Jackson, and Van Buren that carried the day and that reflected how most Americans apparently understood their Constitution.”

¹⁵ Meese’s speech is reprinted as *The Law of the Constitution*, 61 *Tulane L. Rev.* 979, 983 (1987).

For making the exact same argument as Abraham Lincoln, Meese was accused of inviting anarchy and “making a calculated assault on the idea of law in this country: on the role of judges as the balance wheel in the American system.”¹⁶ He quickly backed down, softening his criticism to concede that judicial decisions “are the law of the land” and “do indeed have general applicability.”¹⁷

Widespread acceptance of judicial authority had another, unintended—or, rather, unanticipated—consequence, as political actors grasped the practical implications of combining life tenure with judicial finality for using courts to advance a political agenda. Conservatives spotted this first, and the Reagan Administration moved aggressively to centralize the process for choosing nominees. It began vetting potential candidates for ideological conformity and nominating judges who would further its political agenda. Suddenly, the potential consequences attached to every appointment became huge.

The heightened stakes surrounding judicial nominations exploded publicly in the rancorous Robert Bork hearings in 1987. Republicans lost that battle, but they won the war. Today, no one bats an eye at the idea that judges are selected for their political allegiance and judicial ideology.

Republicans have been far more energetic in these efforts than Democrats, who employ a similar playbook but have never been as attentive to the third branch. This has meant not just looking for judges who can be depended on to advance an agenda, but looking for *young* judges, who will be there for decades, grafting their views onto the Constitution for as many years as medical advances will permit. Who needs elections when you can pack the bench with ideologues to perpetuate your world view long after you’ve left office? No wonder Donald Trump and Mitch McConnell put remaking the federal bench, and especially the Supreme Court, at the top of their agenda and consider it to have been their preeminent achievement.

It is difficult to overstate how much these changes have disfigured the process of judicial appointments. Indeed, “disfigured” may be too genteel: warped, perverted, corrupted all seem equally apt. The result is the most politicized judiciary in the developed world, and a continued war of tactics that reached a new low with McConnell’s and Trump’s recent shenanigans. Yes, Republicans had the legal power to refuse a hearing to Judge Merrick Garland even though he was nominated nearly eight months before the 2016 election, just as they had the legal power to ram Amy Coney Barrett’s nomination through the Senate Judiciary Committee two weeks before the Nov. 3 election. And yes, they had the legal power to do so even while offering disgracefully hypocritical justifications: denying Judge Garland a hearing because, they said, legitimacy required waiting for an election that was close in time, while rushing through a last-minute appointment for Judge Barrett lest they lose an election that was much, much closer. But both acts upended long-established norms based on flimsy, transparently cynical justifications,

¹⁶ Anthony Lewis, *Law or Power?*, N.Y. Times, Oct. 27, 1986, at A23; see also Ronald J. Ostrow, *Meese’s View that Court Doesn’t Make Laws Scored*, L.A. Times, Oct. 24, 1986, at I13 (quoting Ira Glasser describing Meese’s speech as an “invitation to lawlessness”).

¹⁷ Edwin Meese III, *The Tulane Speech: What I Meant*, Wash. Post, Nov. 13, 1986, at A21.

betraying a ruthless, win-at-all-costs willingness to politicize judicial selection in extreme ways. Let's just call it what it is: ideological Court packing.

IV. Restoring the Balance.

Which brings us to the present crossroad and the question whether something can and should be done to rectify what has become, by almost any measure, a deplorable state of affairs. With respect to “can,” the answer most certainly is yes. As I have argued above, echoing others from whom you have heard, there is no question that Congress *can* employ a whole range of constitutional tools to address dysfunction in the Judiciary, including political dysfunction. Indeed, Congress has a *duty* to do so when circumstances so demand—such is its constitutional responsibility in our system of checks and balances, which to work properly must comprise all three branches of government.

Whether today's circumstances do “so demand”—whether, that is, a dramatic response is called for—is a trickier question. Unlike more modern constitutions, the tools our charter provides to balance the judiciary are rather blunt, with political consequences that are harder to predict. They must, for this reason, be deployed with care, lest Congress do more harm than good.

A. Using a Sledgehammer.

Many progressives nevertheless are urging President Biden and the Democrats to answer the Republicans' ideological Court packing with some Court packing of their own—enlarging the Court with as many as four new positions. Conservatives are opposed, of course, but so are many liberals and Democrats, who worry that it will politicize the judiciary. Yet it seems a little late for that worry. Republicans have already politicized the judiciary by brazenly and unapologetically discarding longstanding cooperative rules to make their appointments happen. So if politicization is the concern, the germane question would seem to be whether only one side is going to play that game.

Still, we ought have a better reason than “turnabout is fair play” for deploying the political sledgehammer of changing the Court's composition. And there is a more prudent reason than revenge to consider this action. Paradoxical as it sounds, enlarging the Court now might actually offer a way back to a less politicized process. This is a lesson we learned decades ago from psychologists and game theorists: if cooperation breaks down, the best way to restore it is tit-for-tat.¹⁸ Played with conviction, it's the most effective way for both sides to learn that neither wins over time unless they cooperate. Ironically, then, tit-for-tat, hard ball for hard ball, could actually set the stage for an improved selection process and a fairer, more balanced judiciary.

¹⁸ See Robert Axelrod and W.D. Hamilton, *The Evolution of Cooperation*, 211 *Science* 1390 (1981); Robert Axelrod, *THE EVOLUTION OF COOPERATION* (1984). The origin of this idea came from psychologist Anatol Rapaport's successful deployment of the tit-for-tat strategy in two “Prisoner's Dilemma” tournaments Axelrod ran in 1980.

But if the Democrats do this now, won't Republicans just follow suit the next time they have control—setting off a cycle of retaliation that makes the present situation even worse? Certainly that's possible, though the game theory described above hypothesizes the contrary: faced with a credible threat that “tit” really will be matched by “tat,” opposing parties learn to cooperate. That conjecture is borne out, moreover, by actual experience. Because we have seen this drama before. Similar clashes have occurred from time to time in U.S. history, and they have never set off wars of retaliation. Lesson learned, the Court and political branches quickly settled back into a more normal equilibrium. It has been when the passage of time led one or both parties to forget why they need to cooperate, like now, that trouble has emerged.

This same history refutes the other common objection to taking action, *viz*, that changing the Supreme Court this way will sap its effectiveness. For experience also shows the Court to be anything but fragile. As a historical matter, the Supreme Court has been able to get away with a great deal before provoking an outcry. It has also been capable of withstanding enormous pressure once its actions finally did so, and it has recovered quickly in the rare instances in which political firepower was finally brought to bear against it. Not that one cannot conjure up a scenario in which the political branches inflicted serious damage on the judiciary. But if history is any guide, this risk of wounding the Court is far smaller than the alternative danger—which is that excessive concern for injuring our supposedly fragile Court become an excuse for doing nothing.¹⁹

B. Using a Scalpel.

¹⁹ It's easy to explain the source of the Court's strength and durability. As social scientists have long understood, a reasonably prudent Court can establish and sustain a high degree of authority. See James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of High National Courts*, 92 Am. Pol. Sci. Rev. 343, 356 (1998). The reasons were identified by Madison back in 1834:

[T]he Judicial department most familiarizes itself to the public attention as the expositor, by the *order* of its functions in relation to the other departments; and attracts most of the public confidence by the composition of the tribunal. . . . [T]he public deference to and confidence in the judgment of the body are peculiarly inspired by the qualities implied in its members; by the gravity and deliberation of their proceedings; and by the advantage their plurality gives them over the unity of the Executive department, and their fewness over the multitudinous composition of the Legislative department.

Letter from James Madison to Mr. _____ (1834), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 349, 349-50 (1865). What Madison does not say, but what is implicit in his argument, is that these sorts of factors carry weight because of certain expectations the public holds in respect to the Court and its role. The importance of the Judiciary in a separation-of-powers scheme is widely understood and shared, and politicians and ordinary citizens alike can and do appreciate that there are advantages in giving the Court leeway to act as a check on politics. This includes understanding that many benefits of judicial involvement are long term and systemic and so may require accepting individual decisions with which one disagrees. It takes a lot to persuade a majority in this country that particular rulings are wrong enough to overcome this presumption—shown, for example, by the ambivalent initial reaction noted above to FDR's Court-packing plan. See Greg Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 Am. Pol. Sci. Rev. 1139 (1987); Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 Buffalo L. Rev. 7 (2002). To this, moreover, we must add the assorted obstacles our political system puts in the way of anyone seeking to change law (through bicameralism, the congressional committee system, filibusters, presidential vetoes, and the like), and the disproportionate power these obstacles give political minorities in blocking new measures.

All of which is only to say that Congress can, legally and legitimately, add seats to the Supreme Court to counter the appointment process's corruption and continuing deterioration. There are, however, other ways to address the problem that could be both less disruptive and more effective. Rather than a heavy-handed fix that might influence both sides to behave better—but only might, and only for a time—Congress could just create a fairer process that regularizes Supreme Court appointments in a way that removes the incentives to play these games in the first place.

The best and most well-known proposal along these lines was developed by law professors Roger Cramton and Paul Carrington back in 2005.²⁰ Their “Supreme Court Renewal Act” would add a new justice each Congress, with the nine most recent appointees deciding the merits cases on the Court’s regular docket. The other Justices would remain on the bench, with their full salaries and tenure, and perform all the other duties of Article III judges: filling in when one of the nine is recused or unavailable, deciding cases in the district or circuit courts, helping administer the judicial branch, and possibly participating in the process of selecting merits cases for the Supreme Court to decide. Last September, Representatives Ro Khanna, Don Beyer, and Joe Kennedy III introduced a version of this proposal into Congress as HR 8424, the “Supreme Court Term Limits and Regular Appointments Act.”²¹

It’s an easy fix—brilliant, really, in its simplicity—that creates de facto term limits without running afoul of the Constitution. Congress has plenary authority to “ordain and establish” the federal courts as it deems best, so long as there is a Supreme Court with original jurisdiction over the cases specified in Article III and the salaries and tenure of federal judges are protected. There’s no question that Congress could have originally structured the Supreme Court in the form contemplated by Cramton’s and Carrington’s proposal, and it has been clear since at least 1803, when the Court upheld the repeal of the Judiciary Act of 1801 in *Stuart v. Laird*,²² that Congress can alter or redefine the roles of sitting federal judges—including Supreme Court Justices.

The Cramton-Carrington proposal directly addresses the problems that have plagued judicial appointments in recent decades. By requiring regular appointments on a frequent basis, it reduces the stakes of any single appointment and ensures both parties regular opportunities to nominate. By having merits cases decided by the nine most recent appointees, it assures that cases are not being decided by Justices appointed decades earlier when the issues facing the nation were very different, and it eliminates the incentive to make age (that is, relative youth) a

²⁰ Roger C. Cramton and Paul D. Carrington, eds., *REFORMING THE SUPREME COURT* (2006). Cramton’s and Carrington’s original proposal is in an appendix at pp. 467-71; the volume consists of essays by other constitutional scholars addressing various aspects and proposing alternatives.

²¹ H.R. 8424, Supreme Court Term Limits and Regular Appointments Act of 2020 (116th Congress Sept. 29, 2020).

²² 5 U.S. 299 (1803). Congress has on several other occasions abolished or redefined the jurisdiction of federal courts in ways that left sitting Article III judges with their tenure and salaries but no cases to decide. See Roger C. Cramton, *Reforming the Supreme Court*, 95 Cal. L. Rev. 1313, 1329-31 (2007). The Cramton-Carrington proposal is less drastic inasmuch as Supreme Court Justices who remain on the bench after 18 years may still hear lower court cases as well as Supreme Court cases where a Justice is recused or a temporary vacancy has been created by death or early retirement.

critical factor in appointments. It fully protects judicial independence, while reducing the likelihood of a court that is ideologically extreme or out of sync with the rest of society.

Worried that the current Justices might find unconstitutional a law that changes their job responsibilities, Cramton and Carrington suggested postponing implementation until after all Justices sitting at the time of enactment have left the Court, a provision also found in HR 8424. That's likely to be a very long postponement: Brett Kavanaugh is 56, Neil Gorsuch is 53, and Amy Coney Barrett is only 49. Waiting for them to leave could mean that the new system would not even begin to be put into effect for three or four decades, during which time things might get a whole lot worse.

But the underlying constitutional concern is unwarranted. Nothing in the text or original understanding of Article III limits Congress's power to reassign judicial duties, so long as tenure and salary are protected, and, as noted above, Congress has done so on several occasions in the past. Apart from their pay and right to remain a federal judge, particular individuals appointed to our courts have no constitutional right to hear any particular cases or preside over any particular jurisdiction. A judicial appointment is not a property right. It's a job, assigned by law and subject to being changed by law, except as otherwise specified in Article III.

There is, however, a political concern that merits attention. Opponents of altering the present Supreme Court will argue—indeed, already have argued—that talk about a dysfunctional appointments process is, like FDR's argument for younger Justices, a pretext to mask the Democrats' "real" motive, which is to make the Supreme Court more liberal. Given the context and timing of the proposal, the argument is likely to ring true to many people, and not just Republicans or conservatives.

If the charge rings true, that's because it is to some extent accurate—just as it is, to the same extent, inevitable and unavoidable. Political advocates and elected officials are *always* motivated, at least partly, by politics, concern for reelection, and how best to advance their substantive agendas. That's why Republican opposition to fixing the Court, which obviously is no less self-interested, is likewise not illegitimate. If partisans cannot support (or oppose) reforms because doing so is in their political interest, we might as well write off the possibility of reform altogether. Political interests are part of the motivation for every reform that ever has been, or ever will be, undertaken in a democracy.

So let's put aside spurious arguments about motivation and focus on the important question: whether, such motives notwithstanding, reform is a good idea. And given the circus the present system of judicial appointments has become, the answer to that question seems obvious.

It still matters what the reform looks like. The pretext charge has force as applied to the proposal to add new Justices while leaving the appointments process otherwise untouched because that solution resets the Court's ideological balance without getting to the root of the problem. The same thing cannot be said for the Cramton-Carrington proposal or HR 8424, however, which directly address the defects in the appointments process in a way that favors

neither party and will apply fairly and neutrally to both going forward. The only partisan advantage to the Democrats is that, if enacted now, President Biden would get the first two appointments before the next presidential election puts the power up for grabs again.

Of course, someone must have the first bite at any new apple. And if this presents an obstacle to passage, Congress could simply delay implementation until after the 2024 presidential election. A short postponement of that length would not create significant difficulties, and inasmuch as we cannot know who the next president will be, it puts both sides behind a veil of ignorance as to who gets the first move.

Which is a small price to pay for the opportunity to fix a dreadfully broken process.