

Presidential Commission on the Supreme Court of the United States

“Closing Reflections on the Supreme Court
and Constitutional Governance”

Stephen E. Sachs
Antonin Scalia Professor of Law, Harvard Law School

July 20, 2021

I am honored to testify before the Commission and to offer reflections on the Supreme Court and constitutional governance. In considering potential reforms, the Commission should take care to do the following:

- *Preserve judicial independence.* The courts’ job is to apply the law to cases before them. We rely on courts, not only to reach individual judgments of guilt or civil liability, but to enforce the limited powers of different governments and different branches. Correcting for judges’ errors, even serious ones, by shifting these powers to another department would not make that enforcement more reliable. But it would harm the courts’ ability to act as neutral tribunals in particular cases—a crucial element of the rule of law, and for that reason a frequent target of autocracies the world over. America has a nearly unbroken tradition of judicial independence, and we should not break it today.
- *Put politics in its place.* If you want a less political judiciary, you need a more political amendment process. You need to move political fights out of judicial conference rooms and into the statehouses and the halls of Congress. A “court reform” that ignores Article V is reform only in name—because a Court that practices constitutional amendment on the cheap, evading the Constitution in the guise of interpreting it, will forever be a target for partisan capture.
- *Beware unforeseen consequences.* It is much harder to build than to destroy. Traditions of judicial independence built up over time can be

demolished rather quickly, and many proposed reforms would have consequences far beyond what we expect. These might include:

- measures that are likely unconstitutional absent amendment, such as supermajority requirements or 18-year terms;
- measures that would be constitutional but dangerous and irresponsible, such as court-packing or jurisdiction-stripping;
- measures that would be lawful but unwise, such as cameras in the Court.

The Commission's greatest contribution might be to raise the profile of smaller-bore reforms, whose consequences can be better assessed (and, if necessary, more easily reversed).

There is much that could be improved about the Supreme Court. Over the last century, the Justices have too often mistaken their own rulings for the law they are charged to enforce. But these problems are not yet matters of universal agreement, and they can only be solved by the slow work of persuading others. There are no drastic policy changes that would avoid the need for this work, and there is no sudden crisis that calls out for major reform. Rather, the Commission's first rule should be to do no harm.

1 PRESERVE JUDICIAL INDEPENDENCE

1.1 What independence is for

The fundamental job of our courts is to apply the law to the facts in the cases before them. To borrow a point from David Zaring, when Americans have an ordinary contract dispute, they don't first ask whether the other party is a Democrat or a Republican, or whether the judge will be too: they sit down and read the contract. This is a remarkable achievement. It was not the case at many times and in many places, and we should be grateful every day that we are lucky enough to have it.

In the federal courts, where power is most concentrated, we keep judges impartial by keeping them independent. We staff courts with people who care relatively less about normal things like taxes and health care and relatively more about unusual things like *Chevron* deference and standards of review. We then insulate those judges from the political branches, letting

them “hold their Offices during good Behaviour.” Having laid down some legal rules, we create institutions aimed at applying those rules as they already stand, without fear or favor, to whatever facts might arise. That lets us rely on the rules, whether as lawyers or as ordinary citizens; it makes ours a government of laws and not of men.

Judges are human beings, which means their independence can be abused. Well-intentioned judges still face questions of moral and political judgment: whether a defendant took due care, or whether a criminal sentence was sufficient but not greater than necessary. Even so, at the federal level, we entrust those decisions to unelected judges rather than to elected legislators, and we ban *ex post facto* laws or bills of attainder rather than encouraging them. The rule of law may help keep a democratic system democratic, but it is not the same as the rule of public opinion.

1.2 Judicial independence and judicial review

The same principles of judicial independence protect the exercise of judicial review. The Constitution is part of the law—the “supreme Law of the Land,” to be applied as law by “the Judges in every State.” This is Hamilton’s explanation of judicial review in *The Federalist*, and Chief Justice Marshall’s similar explanation in *Marbury*. When powers are limited, because a constitution restricts what each part of the government may do, applying the law as it stands will sometimes mean saying “no” to elected officials. Just as a court might face two conflicting statutes, with no possibility of giving full effect to both, it might face a statute and a contrary constitutional provision, to which the statute must give way. Judicial review was no novelty to the Founders, and no judicial power grab; it was the ordinary result of a constitution that limits the powers of each department of government and that acts as ordinary law to be applied in ordinary cases.

Americans today often disagree about how to apply the Constitution. As our normal way of settling things is through majority vote, it may seem sensible to get the unelected judges out of the way. And some constitutional decisions—such as whether a criminal fine is “excessive” under the Eighth Amendment—may seem to call for democratic decisionmaking rather than the intuition of elite lawyers.

But the Court's unfortunate history of under- or over-reading the Constitution is not a full argument for putting another branch in charge instead. Unelected judges decide which fines are "excessive" only because other people, who *were* elected, chose to make it that way. If the members of Congress and state legislators who wrote that standard into the Eighth Amendment gave unelected judges too much power, we could write a different amendment instead. But in the meantime, there is no way to reduce the influence of judges, as if in a vacuum, and to leave everything else the same. Weakening one branch of government usually means empowering another branch; typically, reducing the power of courts by increasing that of Congress. Yet that treats Congress, to borrow a comparison from Justice Scalia, as the jackal stealing the lion's kill—expropriating some of the power that the Court has already wrested away from the amendment process.

1.3 Congress and the courts

Elevating one branch over another could have serious consequences for our constitutional structure. Our system keeps a divided people together by dividing its own powers. We have a compound republic, a democracy made up of little democracies, each of which can sometimes go its own way—and to which Americans dissatisfied at home can always go instead, in migrations great and small. For that reason, neither the House and Senate, nor Congress and the President together, truly speak with the People's voice. The question is not whether majorities should control, but *which* majorities should control *where*. Some legal questions are decided in statehouses in Columbus or Sacramento; some are decided in the halls of Congress in Washington, D.C.; and some are decided in the U.N. headquarters on the East River in New York. The only way to settle whose decision legally takes precedence is to look to what has already been agreed on, and to the limits that define the institutions to which the people have sent representatives.

Even with all the courts' errors, there are good reasons to doubt whether Congress would do as well at protecting individual rights, so often inconvenient to party platforms—much less at enforcing the constitutional structures that pit some officials against others, in the hopes of protecting the people at large. Because Congress's other powers are greater, its errors are

correspondingly larger: consider the example of the National Industrial Recovery Act, which nearly cartelized the entire American economy before being turned back by the Court. Justice Holmes famously doubted that the Union would collapse if Congress were always to get its way; but *of course* a central government would not fall simply because its central legislature were given control. What is less clear is whether that centralized government would continue to afford Americans the same protections we enjoy today. Our history of judicial review is mostly a history of limits on the states; many famous Bill of Rights cases, for example, actually relied on the Fourteenth Amendment. But because these were Bill of Rights cases too, it was understood that Congress would be bound by the restrictions before the courts. What Congress would have done if its hands were truly untied is something else entirely.

A Congress inclined to pack the Court to get its way would effectively act as a sovereign legislature. There are countries, such as the United Kingdom or New Zealand, that seem to do reasonably well with a powerful Parliament. But in our system, and with our history, Congress has gotten accustomed to making its own decisions, and not to applying faithfully the decisions of others. A Congress newly empowered to bring the courts to heel would not necessarily shy away from subjecting each new decision to political review. There is no guarantee that elected Senators or Representatives, who run for office as Democrats or Republicans, would be any better at evenhandedly enforcing our existing rules; the judges, at least, are trained and expected to act in ways not defined by the politicians who appointed them. (If law professors were required to wear blue or red hats to signal their party affiliation, would you expect them to be more or less evenhanded in the classroom?)

The more divided society becomes, the more its members need to be able to trust the rules as they already stand. There is a reason why would-be autocrats, in many different countries, try to dismantle their independent judiciaries. Enforcing past rules tends to slow things down, and that makes it harder for any one person or faction to consolidate control. But if the political branches in the United States get accustomed to cowering the courts, there is no reason to expect them to limit their involvement to occasional corrections of the judiciary's worst mistakes. And there is every reason to

expect authoritarians in other countries, countries that might look to the United States as a model, to defend their own restrictions on judicial independence by pointing to what the American Congress had already done. The damage to judicial independence and impartiality would not be finished in a day, but we would still have good reason not to start.

2 PUT POLITICS IN ITS PLACE

Politics belongs in the process of legal decisionmaking—but at the stage of writing the laws, and usually not in applying them. In fact, we have a political process for settling constitutional questions: it involves two-thirds of each House and three-fourths of the states. We should use it more often.

Today American courts are regularly criticized as “political.” Many of these criticisms miss the mark. A judiciary can never be apolitical, in the sense of making decisions free of controversy, unless it cares more about avoiding controversy than about following the law. And that law might afford judges no way around the exercise of moral or political judgment. But it hardly follows that law is in any real sense *nothing but* politics, or that independent courts should be replaced with more explicitly political mechanisms. (Whether I own the Brooklyn Bridge is not a matter for political dispute, unless we empty out the usual concept of “political dispute.”)

The reason why judicial politics is so hotly contested is that American judges disagree, increasingly along party lines, about the content of constitutional law. There are three ways to fix this division. One is to appoint only judges from the same school of thought. The problem with this approach is that the other party can try it too, and each party is in charge roughly half the time. A second way to fix this division is the slow work of changing hearts and minds, persuading fellow citizens that one understanding of present law is more correct than another. This approach has real effects—the inventiveness of a Justice Douglas is no longer acceptable among judges, regardless of party—though it only works over many decades. But a third way to solve disagreement over the law is just to write a new law, and to use the political process to come to a political settlement. That calls for more constitutional amendments.

The great advantage of constitutional amendments is that they reward, rather than discourage, straightforward application of the law. Rather than search for judges willing to demand the direct election of Senators, constitutional text notwithstanding, Americans adopted the Seventeenth Amendment—which no Justice, of whatever political stripe, can reasonably avoid applying. Rather than lower the voting age to 18 by stretching constitutional language beyond the breaking point, as Congress once tried to do, Americans adopted the Twenty-Sixth Amendment, with new language that requires no stretching at all.

Despite frequent protestations to the contrary, our Constitution is not “effectively unamendable.” At the start of the last century, we amended our Constitution eleven times in six decades. What constrains new amendments is not the dead hand of the past, but our complex federal structure, and our present disagreement over which changes should be made. Article V requires support that is broad, but not necessarily deep: 51 percent of voters, spread evenly across congressional districts and statehouses across the land, are more than enough to get anything you want done.

More importantly, if the argument for political control of the courts is that the Constitution is too hard to amend, we could make it easier to amend. Congress could propose, and the states could ratify, an amendment reducing the threshold for proposals to, say, four-sevenths of each House instead of two-thirds, or dropping the ratification requirement to two-thirds of the states from three-fourths. Or Congress could adopt, by statute, pre-set procedures to guide and encourage a convention that might be requested by state legislatures under Article V. Or Congress could, by amendment, create a “rolling convention”—allowing a given number of state legislatures, representing a given proportion of the country, to propose or ratify amendments by adopting identical resolutions over time.

This Commission’s remit is broad enough to consider the amendment process: it could report that various proposed reforms would be unnecessary if certain constitutional amendments were adopted instead. And any of these proposed changes to Article V would be highly effective at subjecting judicial decisions to democratic politics, without the danger of increasing political influence over individual cases or Justices. Indeed, if an easier path to Article V amendment seems too frightening to recommend, then

the Commission should hardly recommend other measures subjecting the Court to greater political control.

3 BEWARE UNFORESEEN CONSEQUENCES

By comparison to new amendments, it is much harder to predict the political and legal consequences of many of the reforms discussed thus far—some of which are likely unconstitutional, some of which are constitutional but irresponsible, and some of which are merely unwise.

3.1 Unconstitutional measures

3.1.1 Supermajority rules

Congress lacks power to require a supermajority vote for decisions invalidating federal statutes. Its power to specify voting rules in the Supreme Court derives only from its power to make laws “necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” For example, one appropriate means of carrying the judicial power into execution might be to specify the number of Justices who must exercise it. So, while ordinarily a majority is a quorum, Congress specified in 28 U.S.C. § 1 that six Justices must be present for the Court to act. Congress could likewise provide that five Justices, or six, or all nine, must be present for the Court to exercise its judicial power in other ways—say, to agree to hear a case, or to disturb a judgment on appeal. Such rules might be quite unwise, but they do not exceed congressional power.

By contrast, holding a federal statute contrary to the Constitution is not a distinct exercise of judicial power. That judicial power is the power to issue judgments in particular cases. These judgments, if within the court’s jurisdiction, bind the parties and determine the matters between them; they likewise bind the executive, to the extent that it has a constitutional duty to “take Care that the Laws be faithfully executed,” as well as a statutory duty to “execute all lawful writs, process, and orders issued under the authority of the United States.” That is why, if an appellate court is equally divided,

no order can be made; without the exercise of judicial power, any judgment under review remains unaltered. By contrast, a conclusion that a federal statute contradicts a constitutional provision is not itself a judgment, but a *reason to enter* a judgment for one party or another—indeed, perhaps a reason to leave the lower court’s judgment undisturbed.

For Congress to require more votes for particular kinds of *reasons*, rather than for the issuance of particular kinds of *orders*, is not to carry the judicial power into execution, but to instruct the courts in its exercise. Congress cannot rewrite the Constitution or tell judges what the Constitution means. It also cannot require a court that votes for an order saying one thing to enter the same kind of order but to say something else.

Even if such measures could be adopted (say, by constitutional amendment), their consequences for the legal system would be hard to constrain. A Congress that is used to requiring six or seven votes for invalidation might well, once crossed, insist on nine instead. A Court majority forbidden to recognize a statute’s incompatibility with the Constitution might just construe the statute until it is unrecognizable. And a President, state governor, or other official enjoying the support of a majority of Justices and a sizable portion of the public might well choose to disregard a judgment enjoying only minority support. If the courts have their influence only because they are trusted to say what the law is, we cannot expect obedience to judicial decisions that say what Congress told them to.

3.1.2 Limited terms

The “judges of the Supreme Court” hold distinct offices from those of the “inferior Courts,” and both kinds of judges “hold their Offices during good Behaviour.” As Hamilton observed in *The Federalist*, this means that judges, “if they behave properly, will be secured in their places for life.” The Founders knew the difference between good-behavior tenure and tenure for a term of years; restricting a currently serving Justice to a term of 18 years would be inconsistent with this constitutional protection. And just as it would be unlawful to separate the person from the office, the same would be true of separating the office from the person—statutorily assigning to more senior Justices different and more limited duties, such that they no

longer take full part as members of “one Supreme Court.” If Congress can do so after 18 years, it can do so after six months, and the independence of the currently serving Justices would be deeply compromised.

Even for newly appointed Justices, a newly created office with two tiers of judicial power, before and after the 18-year mark, is hardly free of constitutional doubt. Could Congress provide for six-month terms for the Justices, giving them other Article III duties thereafter, but with the hopes of regular reappointment (if they stay on the President’s good side) to a different first-tier seat on the Court? There is no barrier to a judge or Justice holding multiple appointments; Chief Justice Marshall was for a short time also the Secretary of State. If Congress could do that, it could convert what the Constitution describes as good-behavior tenure into a renewable term, depriving judges of the independence that Article III’s tenure protections confer. That is a good reason to conclude that Article III’s creation of “one supreme Court,” whose judges “hold their Offices during good Behaviour,” is incompatible with a multi-tiered Court, whose Justices move down the tiers as they go.

Alternatively, an 18-year term could be imposed by constitutional amendment. Many nations have experience with high-ranking judges serving for a term of years. A constitutional amendment would also require widespread support, reducing any impression of a partisan takeover. Even better, an amendment might be written to delay its effect for several years, and to have no application to any judge or Justice serving upon its adoption.

But an 18-year term remains an odd solution to the most pressing problem with the nomination process, namely that the President and Senate are frequently at loggerheads over constitutional interpretation and the qualities of a good Justice. If every two years reliably brings a new appointment, it is hard to say whether the Senate will be less or more likely to delay its consent until a friendly Administration takes office. And precisely because of our current polarization, which an 18-year term is designed to address, many of the new questions raised by a limited term—renewability, eligibility for other offices, the calendar of appointments, procedures for unexpected vacancies—might have to be hard-coded into the Constitution, or else might afford plentiful opportunities for mischief to a future Congress.

Unless the Commission has clear answers to these questions, it should not recommend an amendment limiting the Justices to a term of years.

(Some downsides of the current system, particularly the unseemly attention to the Justices' health, could be addressed by floating the size of the Court. As Daniel Hemel and others have proposed, Congress might provide for the creation of two seats every four years—just as in many 18-year term proposals—but with each seat disappearing upon becoming vacant. In other words, every Administration would have the same number of nominees, but the death or resignation of a Justice would trigger no furious confirmation battle. These proposals carry their own complexities, especially as to handling equally divided courts or to placing upper or lower bounds on the Court's size. While they are worth the Commission's consideration, their long-term consequences are harder to predict.)

3.2 Irresponsible measures

Neither packing the Court nor restricting its appellate jurisdiction is subject to similar constitutional objections. But each change would also be far more damaging to the legal system, and each would be deeply irresponsible for Congress to entertain.

3.2.1 Court-packing

To the extent that Congress may select the number of Justices, it may increase that number consistently with the Constitution. But techniques like court-packing undermine constitutional government in a different way. Through them, Congress and the President together may do literally anything in violation of the Constitution and still have it accepted by the courts, so long as they also find enough appointees to give it a pass. Today the federal government cannot take away someone's life, liberty, or property unless the legislature authorizes the deprivation, the executive undertakes it, and the judiciary upholds it—each branch agreeing that the deprivation is constitutional. Court-packing would effectively reduce the branches of government from three to two.

An expressed willingness to pack the courts has consequences of its own. These measures have, and are intended to have, an *in terrorem* effect even before they are used. They force judges to make decisions with half an eye, or more than half an eye, to the political response and not to what the Constitution requires. Telling federal judges that their decisions must not upset the political branches, on pain of their being outvoted by new Justices, means that there is one fewer branch in the way of any person or faction who would consolidate power.

Court-packing is occasionally seen at the state level, to relatively little consequence. That does not make it safe to use at the apex of national power—where questions of national security may be at stake, and from which there may be little escape when individual rights are denied. So long as Americans can still move from state to state, fifty Huey Longs as governors would be less dangerous than a single Huey Long as president. Likewise, it would be better to see court-packing in all fifty state supreme courts than to see the same thing happen at the federal level.

If Americans generally agreed that the current Justices were out of line (and in the same direction), then adding a new crop of more faithful Justices might seem a reasonable response. But as things stand, court-packing will be perceived, correctly, as a transparent political power grab. It will be understood, not as an attempt to enforce the Constitution, but to find new judges to enforce something else. Under such circumstances, disobedience to court decisions might well become routine. I can think of nothing more likely to destroy trust in the courts than to make them mere extensions of the political branches.

3.2.2 Jurisdiction-stripping

Congress also has power to make “Exceptions” to the Supreme Court’s appellate jurisdiction. Yet its use of that power, though wholly constitutional, could likewise undermine our constitutional system. Removing the Court’s ability to police errors at the appellate level would encourage, not fidelity to the law, but experimentation by appellate judges, whose decisions would no longer be subject to review. Enough damage has been done by appellate

judges under the motto “They can’t reverse everything”; providing by statute that “They can’t reverse *anything*” would be worse.

Watching the courts reach wildly different decisions, each depending on the plaintiff’s skill in shopping for the right forum, Americans would see even less reason to respect any of these decisions. It is not clear that traditional doctrines of *stare decisis*, defined by the structure of appellate jurisdiction, would require circuit courts to adhere to Supreme Court precedent absent the possibility of Supreme Court review. And the mere threat of jurisdiction-stripping, like that of court-packing, would only encourage the Justices to let political considerations outweigh the law.

Some jurisdiction-stripping efforts might also go beyond what the Constitution permits. Congress could not, by phrasing a statute in jurisdictional terms, deprive a court of the ability to consider a federal statute unconstitutional. As in the case of supermajority rules, this would target a court’s reasons rather than its orders; but jurisdiction is the power to enter a binding order, not the power to think about what kinds of orders the laws require. (Any old professor can think about the law; only a court with jurisdiction can issue orders with legal force.) Under the Fifth Amendment, many deprivations of life, liberty, or property may only be done pursuant to a judicial judgment: Congress cannot confer jurisdiction on a district court to enter a judgment of conviction but deprive it of jurisdiction to inquire whether the defendant’s conduct was criminal. Likewise, it cannot give the Supreme Court the appellate jurisdiction to reverse a lower court’s judgment but deny it jurisdiction to consider whether the lower court was correct. Judges told to “close their eyes on the constitution, and see only the law,” as Marshall put it in *Marbury*, have no option but to refuse, or else refuse to enter any order at all.

3.2.3 Unwise measures

Other measures proposed before this Commission are perfectly lawful and well-intentioned, but unwise. The best-known of these proposals is to require cameras in the Court. This kind of change might seem harmless: who could be against public access or transparency? But this reform might be more dangerous precisely because it sounds inoffensive.

Congress can surely provide for televising arguments, and as a consumer of television, I would love to watch them. But as a scholar and citizen, I can hardly hope for cameras to do to the Court what C-SPAN has done to Congress. Reviewing transcripts of old congressional hearings, I have been struck by how useful and productive the discussions sometimes were—discussions which would never occur on a stage, where each witness or member of Congress would be expected to represent their “side.” Without cameras present, the point of many hearings is to talk to the people who are there. By contrast, the congressional hearings I have witnessed have been largely stage-managed affairs, designed to reach people who are *not* there—events free of any real spontaneity, doubt, or persuasion, at least while the cameras were turned on.

This would be a disaster for the Court. If the only goal is to public understanding of the Court and its functioning, it would be even better to place cameras in the Conference Room, in the Justices’ chambers, and at the clerks’ desks. But it is not hard to see why such cameras would be terribly damaging. The Justices need a space to try out ideas and see how they work, before the Court’s judgments are released to the public. They should be assessed on the substance and merits of their opinions, which might become apparent only years or decades afterwards, and not on courtroom dramas suitable for daily viewing.

Likewise, the lawyers at oral argument need the chance to wrestle with arguments and their implications in ways that are generally not apparent to the viewing public. They need to be able to make concessions—say, that the statute in *Citizens United v. FEC* might support banning pamphlets, or that the government’s position in *United States v. Jones* would allow GPS devices on the Justices’ cars—that a worse advocate, or an advocate more worried about a clip circulating on the Internet, might try to resist. There are already incentives for lawyers to play to the public; there will be even more incentives to play to the camera. These incentives would not take root during a single experiment or an unusual pandemic year; but they would likely follow from decades’ worth of new expectations about how public the oral arguments would be.

More generally, we should not be confident that public attention to the Court is always a good thing. Sometimes a responsible judge must rule in

an unpopular way. Many people, even many lawyers, are quick to assume that if you think the death penalty is constitutional, it must be because you support it as a matter of policy; that if you wonder whether *Reynolds v. Sims* misread the Fourteenth Amendment, it must be because you want unequal representation; and so on. The Justices' fundamental job is to adhere to the law, which responds to public opinion only indirectly, through the political process. The more public opinion is brought to bear on advocates and Justices, or the more celebrity that advocates and Justices enjoy, the less force we can expect for fidelity to the law.

3.3 Smaller-bore changes

Any major changes the Commission recommends might well be blocked in Congress. But minor improvements that the Commission identifies could have a good chance of passage. The Commission's prominence and expertise give it an unusually strong ability to highlight small legislative changes that would make the judicial system better.

For example, there might be useful reforms to the "shadow docket" of stay applications and emergency rulings, which might help the Court decide issues more fully and at appropriate times. The growth since the Obama Administration of nonparty injunctions (also known as "nationwide" or "universal" injunctions), whereby plaintiffs seek classwide relief without certification under Rule 23, has put enormous pressure on the Court for immediate action; these could be usefully cut back. And to the extent that the Court's shrinking docket is a problem, Congress could conceivably empower any three Justices to grant a writ of certiorari, increasing the number of cases the Court hears without having to define new categories of mandatory jurisdiction.

Each of these reforms would come with its own potentially unpredictable consequences. But because of their smaller scale, they would be easier for Congress to reverse if they proved unwise. In any case, as attractive as it may be to think big, the Commission could do a great deal of good by thinking small.

CONCLUSION

In considering potential reforms, the members of the Commission must be honest with each other and with the public. Euphemism is not your friend. The public will see through efforts to recast court-packing as “court expansion,” jurisdiction-stripping as “jurisdiction channeling,” and so on. It will see through efforts to pursue short-term partisan payback under the guise of long-term reform. And because legitimacy is a two-way street, reforms that are not perceived by both sides as enhancing the courts’ legitimacy will never succeed in doing so.

Whatever else may be wrong with today’s Court—and there is much to say on that score—it has not shown itself overly resistant to public opinion. The Court is not getting in Congress’s way; the main barrier to major legislation, whether on voting rights or climate or health care or anything else, is cobbling together 50 votes in the Senate, not five votes on the Supreme Court. The most controversial topic that might arise in the next Term is whether to revisit *Roe v. Wade*; whatever one’s views, doing so would *allow* democratic majorities to make their own decisions, not prevent them. And the public’s approval of the Supreme Court, at least as of last year’s Gallup poll, was higher than it has been for most of the last decade.

If there were a single policy that could improve the Court’s fidelity to law, I would happily recommend it. But many of the reforms proposed thus far would subject the Court to political pressure instead. Under these circumstances, the best the Commission can do is to avoid making things worse.