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Co-Chair Bauer, Co-Chair Rodriguez, and distinguished members of the Commission:

Thank you for the invitation to provide this written testimony. I have been a close student of the Supreme Court for decades, reaching back to my days as a research assistant to John Sexton when I visited the Court to pick up boxes of certiorari petitions and helped analyze them as part of a project responding to proposals for a National Court of Appeals.[1] Since then, I have written about the history of Supreme Court jurisdiction, including the birth of certiorari in 1891, its expansion to state court judgments in 1914, and its major expansion in 1925.[2] Beginning with its ninth edition (published in 2007), I have been a co-author of Stern & Gressman, the leading treatise on Supreme Court practice.[3] I am also the Reporter for the Advisory Committee on the Federal Rules of Appellate Procedure, a paid position to which I was appointed by Chief Justice John Roberts. I hasten to add that I speak only for myself, not for Seton Hall University, not for my co-authors, and certainly not for any part of the rules committee process or anyone involved in the rule making process.

Because I am submitting this testimony after the Commission has already heard from witnesses over two days of hearings, I will try not to repeat what others have said. Instead, I offer reflections informed by both my own study and the testimony already provided. I hope that the Commission will find these reflections useful in its deliberations and analysis.

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[1] *See* Samuel Estreicher and John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681 (1984).

[2] *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill,* 100 Colum. L. Rev. 1643 (2000); *Why is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 Tex. L. Rev. 907 (1997).

[3] The latest edition is Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett & Dan Himmelfarb, Supreme Court Practice (11th ed. 2019). Other editions were published in 2013 (10th) and 2007 (9th). I also contributed one chapter to the eighth edition in 2002.

I hope to add two major points to the discussion. First, I urge the Commission to avoid (or at least be very careful when using) certain phrases that are common in discussions surrounding the Supreme Court. I do so, not out of a desire for punctiliousness in language, but because these common shorthand phrases can mislead and obscure hidden assumptions. Second, to the extent the Commission views some measures to be appropriate only in an emergency, "break glass" situation, I urge the Commission to distinguish carefully between different reasons why one might think we are in such a situation today. That's because different diagnoses call for different prescriptions.

I

I will discuss four common but troublesome phrases: "jurisdiction stripping," "strike down," "nationwide (or universal) injunctions," and "shadow docket."

"Jurisdiction stripping." The phrase "jurisdiction stripping" is commonly used in discussions of Supreme Court reform. It is even used in the questions posed by the Commission itself. But the term obscures more than it enlightens.

Most notably, the phrase takes the current jurisdictional scheme as the baseline, suggesting that departures from that baseline would remove something essential to the dignity of the one being "stripped" and glossing over that the current jurisdictional scheme is the product of Congressional legislation. In particular, it takes as its baseline that the Supreme Court has almost complete control to pick and choose what cases to decide. The Court had no power at all to choose what cases to decide for its first century and only has such a power today because Congress bestowed that power and later expanded it.[4] While a large literature has sprouted attempting to find limits to Congressional power to limit the Supreme Court's appellate jurisdiction, it hardly seems coincidental that the literature emerged only after the Court's broad power to select cases became the norm.

What, then, is the proper baseline? Under Article III of the Constitution, here is the constitutional baseline of the Supreme Court's appellate jurisdiction—that is, the cases that the Supreme Court would be obliged to decide on appeal if Congress did not limit its appellate jurisdiction:

> all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;
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> all cases affecting ambassadors, other public ministers and consuls;

[4] *See Questioning Certiorari*, 100 Colum. L. Rev. at 1649.

> all cases of admiralty and maritime jurisdiction;
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> controversies to which the United States shall be a party;
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> controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.[5]

And under Article III, that appellate jurisdiction extends to "both . . . law and fact."[6]

As Chief Justice John Marshall put it, if Congress did not limit the Supreme Court's Article III appellate jurisdiction, "a full and complete appellate jurisdiction would have vested in it, which *must* have been exercised in *all cases whatever*."[7] He explained:

> Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court as ordained by the constitution; and, in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left

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[5] *Marbury* indicated that cases allocated by Article III to the Supreme Court's original jurisdiction were outside its appellate jurisdiction. 5 U.S. at 175 ("When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original.") But the Court retreated from that position. *Cohens v. Virginia*, 19 U.S. 264, 400 (1821) (noting that in *Marbury*'s reasoning "some expressions are used which go far beyond" the question presented and holding that "the appellate jurisdiction of this Court, in all cases arising under the constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party").

[6] The right to a jury puts some limits on the Court's appellate jurisdiction regarding facts. *See* U.S. Const., art. III and Fifth Amendment (criminal); Seventh Amendment (civil).

[7] *Durousseau v. United States*, 10 U.S. 307, 313 (1810) (emphasis added).

> those powers undiminished. The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial and by such other acts as have been passed on the subject.
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> When the first legislature of the union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.[8]

Wisely, Congress has never permitted the Court to exercise the full breadth of its appellate jurisdiction. In other words, Congress has always used its power to make exceptions to and regulations of the Court's appellate jurisdiction. For example, the "judicial act" referred to by Marshall (better known today as the Judiciary Act of 1789) implemented appellate jurisdiction using writs of error, thereby preventing the Supreme Court from redetermining facts—even before the adoption of the Seventh Amendment.[9]

Some exceptions seem so obvious that we forget it could be otherwise. The Judiciary Act of 1789 limited the Court's review of state court judgments to final judgments rendered by the highest state court in which judgment could be had, thereby limiting the ability of the Supreme Court to review interlocutory decisions and decisions by lower state courts.[10] And it limited the Court's review of state court judgments to those arising under federal law, thereby preventing the Court from hearing appeals in diversity cases decided in state court[11]—a major limitation in the days before *Erie* when a significant component of the Supreme Court's work involved diversity cases from the federal circuit courts (which were primarily trial courts) involving questions of general law.[12]

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[8] *Id.* at 313–14.

[9] Judiciary Act of 1789, §§ 22 & 25.

[10] Judiciary Act of 1789, § 25.

[11] *Id.*

[12] *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Other exceptions are so unfamiliar that they may seem unthinkable to many today. For example, appellate jurisdiction over federal circuit courts had an amount in controversy requirement in civil cases, separate from the amount in controversy requirement in the circuit courts themselves.[13] And there was no Supreme Court appellate jurisdiction at all over criminal cases tried in the federal circuit courts (which tried the more serious federal crimes).[14] As a result, trial court decisions were frequently final. With regard to state court judgments, if the state court rejected the federal claim or defense, the loser had a right to Supreme Court review. But if the state court upheld the federal claim or defense, Supreme Court review was unavailable.[15]

The Supreme Court needs Congress to limit its appellate jurisdiction, as the Court itself has realized when, most notably in 1891 and 1925, it came to Congress seeking relief.[16] Without such limits, the Supreme Court would be completely overwhelmed. Imagine mandatory appellate jurisdiction in every diversity case, whether from a state court or a lower federal court, bearing in mind that minimal

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[13] Judiciary Act of 1789, § 22. *Gordon v. Ogden*, 28 U.S. 33, 34 (1830) ("This court has jurisdiction over final judgments and decrees of the circuit court, where the matter in dispute exceeds the sum or value of two thousand dollars. The jurisdiction of the court has been supposed to depend on the sum or value of the matter in dispute in this court, not on that which was in dispute in the circuit court.").

[14] Judiciary Act of 1789, § 9 (providing for district court jurisdiction over criminal prosecutions "where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted"); § 11 (providing that circuit courts "shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein"). Nor was habeas available after conviction in a circuit court. *Ex parte Watkins*, 28 U.S. 193 (1830). In 1889, Congress gave the Supreme Court jurisdiction to review judgments in capital cases, Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656, and the Evarts Act broadened that to cases of "infamous crimes." Circuit Court of Appeals Act of 1891, ch. 517, § 5, 26 Stat. 826, 82. *See Questioning Certiorari*, 100 Colum. L. Rev. at 1657 n.56.

[15] For an account of how this statutory change came about in 1914, *see Why is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 Tex. L. Rev. 907 (1997).

[16] The Court's role in the 1891 Act was behind the scenes; its role in the 1925 Act was sufficiently public that it is known as the Judges' Bill. *See Questioning Certiorari*, 100 Colum. L. Rev. at 1650-52, 1660-1704.

diversity (with no amount in controversy requirement) is enough for Article III.[17] Even if we ignore diversity cases and focus on federal question cases, while not all of the millions of cases filed each year in state and federal courts involve a federal question, many of them do. Consider civil cases that involve an issue of personal jurisdiction, procedural due process, or preemption. Consider criminal cases that involve an issue of the legality of a search or seizure, the admissibility of a confession, or the right to counsel. In 2020, the number of bankruptcy filings fell dramatically, but there were still over 500,000. Every one of them is a federal question case within the Supreme Court's Article III appellate jurisdiction.

Of course, a primary way in which the Court has avoided an overwhelming flood of cases is that Congress has given the Court discretion to decide which cases to hear. But that's the point: *Congress* has provided this discretion—effectively delegating its exceptions power to the Court. It didn't have to. Indeed, as I read the history, when Congress first granted the Court this discretion, it was largely an afterthought. Certiorari was at best parallel to, if not secondary to, the power of courts of appeal to certify questions to the Supreme Court.[18] Over time, certiorari has grown, and the Court has taken the initiative to largely kill off certification, a process that was not designed to give the Supreme Court discretion.[19]

The Court's ability to choose its cases has been a significant source of its power, enabling it to exercise the will to move the law in its preferred direction at its preferred pace, without having to bear the costs of hearing the resulting cases or even

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[17] *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967).

[18] *Questioning Certiorari*, 100 Colum. L. Rev. at 1652-56.

[19] *Id*. at 1710-12. Wright and Miller use the term "disembowel." 17 Fed. Prac. & Proc. Juris. § 4038 (3d ed.) (referring to the Court's "apparent desire to disembowel the certification jurisdiction"). More than a decade ago, Justices Stevens and Scalia lamented:

> The certification process has all but disappeared in recent decades. The Court has accepted only a handful of certified cases since the 1940s and none since 1981; it is a newsworthy event these days when a lower court even tries for certification. Section 1254(2) and this Court's Rule 19 remain part of our law because the certification process serves a valuable, if limited, function. We ought to avail ourselves of it in an appropriate case. In my judgment, this case should be briefed and set for argument.

United States v. Seale, 558 U.S. 985 (2009).

face the logical implications of its decisions until it thinks the time is right.[20] For precisely these reasons, some cheer this discretion unchecked by law.[21] But it was not inevitable, is by no means constitutionally required, and what Congress has delegated, Congress can reclaim.

To provide just two examples, either as a replacement for certiorari or in addition to it: Congress could create a revised version of certification and provide for an appeal as of right from any court of appeals decision where the court of appeals certifies that its decision conflicts with the decision of another court of appeals.[22] Or Congress could provide for an appeal as of right from any en banc court of appeals decision where more than one-third of the participating judges dissent.

The phrase "jurisdiction stripping," in addition to obscuring the implicit assumption that Supreme Court discretion to choose its own cases is the appropriate baseline, also obscures important questions about what remedies are constitutionally required. Although some like to point to dictum in *Marbury* and claim that every right requires a remedy,[23] the holding of *Marbury* is precisely to the contrary; Marbury received no remedy for his withheld commission. *Marbury* itself refutes the contention that the writ of mandamus is constitutionally required. The long history of equitable discretion—and that Congress could have chosen not to create inferior federal courts with jurisdiction over suits in equity—makes it difficult to claim that

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[20] *Questioning Certiorari*, 100 Colum. L. Rev. at 1730-38.

[21] *See, e.g.*, Statement of Michael R. Dreeben at 23 (June 25, 2021) ("The certiorari standards that the Court actually applies are sufficiently broad and flexible that it is difficult to say that there is law to apply.") (cleaned up).

[22] In 1890, the Justices wrote a letter to the Senate Judiciary Committee approving of a proposal that would have required certification by a court of appeals of any question "upon which there has been a different decision in another circuit." *Questioning Certiorari*, 100 Colum. L. Rev. at 1651–52. Certification by the court of appeals after it rendered a decision would obviate one of the objections to the current certification statute. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties. It is also the task of a Court of Appeals to decide all properly presented cases coming before it, except in the rare instances, as for example the pendency of another case before this Court raising the same issue, when certification may be advisable in the proper administration and expedition of judicial business.").

[23] "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

injunctions are constitutionally required.[24] Various immunity doctrines, coupled with reluctance to infer private rights of action, make it nearly impossible to claim that damages are constitutionally required.[25] Constitutional entitlement to a declaratory judgment is a nonstarter: They are expressly discretionary, were not available in federal court at all until 1934, and the serious question was whether they were constitutionally permissible, with an affirmative answer depending on a declaratory judgment either providing a preclusive defense to a subsequent coercive action or providing a basis, if needed, for a subsequent injunction.[26]

Nevertheless at least one remedy is constitutionally required: nullity. That is, a judge cannot enforce an unconstitutional law. So while Congress can preclude federal courts from issuing writs of mandamus to federal officials compelling them to act, can preclude federal courts from issuing injunctions against federal officials blocking their enforcement of federal law, can preclude federal courts from awarding damages against federal officials, and can preclude federal courts from issuing declaratory judgments against federal officials, it cannot require a federal court to enforce an unconstitutional law. For example, Congress could have sought to protect the Affordable Care Act by barring federal courts from issuing an injunction (or a declaratory judgment) against federal officials forbidding its implementation and from awarding damages against federal officials who implemented it.[27] But if the

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[24] *See Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) (upholding limitation on labor injunctions); *Atlantic Coast Line R.R. v. Locomotive Engineers*, 398 U.S. 281 (1970) (rejecting argument that the Anti-Injunction Act "only establishes a principle of comity, not a binding rule on the power of the federal courts") (cleaned up); *Younger v. Harris*, 401 U.S. 37, 54 (1971) (holding that "the possible unconstitutionality of a statute on its face does not in itself justify an injunction against good-faith attempts to enforce it," and noting "our holding rests on the absence of the factors necessary under equitable principles") (cleaned up). *Cf. Truax v. Corrigan*, 257 U.S. 312 (1921) (finding state statute limiting labor injunctions unconstitutional).

[25] *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Imbler v. Pachtman*, 42 U.S. 409 (1976).

[26] 28 U.S.C. § 2201 ("may declare the rights"); *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227 (1937); 28 U.S.C. § 2202 ("Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.").

[27] Indeed, there was a serious argument that a pre-existing statute limiting injunctions against the collection of taxes barred the claim. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 543-46 (2012) (rejecting the argument).

United States sued a person for failure to pay the required tax penalty, the court could not enter a judgment requiring payment if it concluded that the tax penalty was unconstitutional. That's what it means for the constitution to be "a rule for the government of courts, as well as of the Legislature,"[28] and that "courts, as well as other departments, are bound by that instrument."[29]

"Strike down." The phrase "strike down" is frequently used to describe a judicial decision holding a statute unconstitutional. But it is misleading. Of course, a judicial decision does not remove a law from the Statutes at Large. Courts decide particular cases between particular parties by issuing judgments in those cases. The law of vertical precedent means that lower courts must honor the decisions of their reviewing courts, but only the parties to a case are bound by the judgment.[30]

A number of witnesses have urged the Commission to explicitly reject judicial supremacy and embrace departmentalism. I will not repeat those arguments here, other than to note that it should be easy to recognize Abraham Lincoln as a better guide to the meaning of our Constitution than Stephen Douglas. The Lincoln Memorial is the closest thing there is to a high temple of the American civil religion; the Tomb of Stephen Douglas in Chicago, to put it mildly, is not. (And statues of Roger Taney have been taken down in Maryland.) Lincoln was right: judicial decisions do not unilaterally "settle" the meaning of the Constitution. Realistically, the meaning of the Constitution is truly settled only when—and only to the extent that—people stop fighting about it.[31]

At least if they obey judgments in particular cases, there is nothing unconstitutional about Congress and the President acting on a different view of the Constitution than the one adopted by the Supreme Court. My favorite example is child labor: If Congress and the President had simply accepted the Court's view about federal power to restrict child labor, then (short of a constitutional amendment),

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[28] *Marbury*, 5 U.S. at 180.

[29] *Id*. And if the executive simply locked someone up without bothering to go to court, habeas would be available. U.S. Const. art. I, § 9.

[30] *See A Matter of Judgment, Not A Matter of Opinion*, 74 N.Y.U. L. Rev. 123, 126 (1999).

[31] "Settlements take place, not when official law is pronounced, but when persons opposed to that constitutional status quo abandon efforts to secure revision." Mark A. Graber*, Settling the West: The Annexation of Texas, The Louisiana Purchase, and* Bush v. Gore, in The Louisiana Purchase and American Expansion, 1803-1898, at 83, 84-85 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005).

federal law would still allow child labor.[32] Even the Court itself has recognized that sometimes it needs Congress to help extricate it from error.[33]

There is an odd disconnect in some proposals for reform: On the one hand, in diagnosing the problem, judicial supremacy seems to be assumed, but on the other hand, the suggested reforms work only if someone (Congress, President, private litigants) takes action inconsistent with Supreme Court opinions.

The phrase "strike down" also is consonant with trendy ideas that the Supreme Court should be more like modern "constitutional courts" in other nations—perhaps to the point of deciding only constitutional cases. The American theory of judicial review is that the constitution is law, and therefore conflicts between statutes and constitution must be resolved by courts if and when necessary to decide the case between the parties—in principle no different from other choice of law questions (such as between state and federal law, statutes and regulations, later statutes and earlier statutes.) Separating questions of constitutional law from other questions of law undermines this theory. Turning the Supreme Court into a modern "constitutional court" also seems unworkable in the American scheme for a variety of reasons, including the sheer number of cases that present constitutional questions, the practice of constitutional avoidance, and the preference for as-applied rather than facial adjudication of constitutional questions. Even classification is problematic. Does a contention that the executive lacks power to act because a statute confers no

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[32] *A Matter of Judgment, Not A Matter of Opinion*, 74 N.Y.U. L. Rev. at 151–52 (tracing the story of the battle between the judiciary and Congress over child labor from 1916 to 1941).

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> There is ample ground to know that the prospect of conflict in opinion with this Court on constitutional questions was not sufficient so to mute the 74th and 75th Congresses. This was as it should be. There is no reason to doubt that this Court may fall into error as may other branches of the Government. Nothing in the history or attitude of this Court should give rise to legislative embarrassment if in the performance of its duty a legislative body feels impelled to enact laws which may require the Court to re-examine its previous judgments or doctrine. The Court differs, however, from other branches of the Government in its ability to extricate itself from error. It can reconsider a matter only when it is again properly brought before it in a case or controversy; and if the case requires a statutory basis for a case, the new case must have sufficient statutory support.

Helvering v. Griffiths, 318 U.S. 371, 400–01 (1943) (cleaned up).

such power present merely a statutory question or also a constitutional question? Does preemption present a constitutional question, or only a question of statutory interpretation?

If "strike down" is misleading with regard to Supreme Court decisions, it is even more so with regard to lower court decisions, whose decisions have less (or no) binding precedential effect. But the rhetoric of "striking down" may well contribute to lower courts issuing injunctions that reach beyond the parties to the case: If a district court views itself as "striking down" a law, why should relief be limited to the parties to the case?

"Nationwide (or universal) injunctions." This phrase comes up less in discussions of Supreme Court reform, but it does at times, particularly in connection with stay applications. The phrase suggests that the problem is with the geographic scope of some injunctions.

But that's not the problem. Consider a straightforward injunction in private litigation that bars a defendant from selling a product that infringes the plaintiff's copyright. The defendant cannot avoid the injunction simply by selling the product in a different federal district, a different state, or different federal circuit. The injunction controls the action of the defendant toward the plaintiff wherever the defendant acts (at least in the United States).[34]

The problem is that some injunctions reach beyond the parties to the case and are therefore better described as "non-party injunctions."[35] They evade both the ordinary limits of precedent and the carefully created limits on class actions designed in part to protect other members of the class who might have divergent or conflicting

[34] 17 U.S.C. § 502 ("Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person."). *See, e.g.*, *Liberty Toy Co. v. Fred Silber Co.*, 149 F.3d 1183 (6th Cir. 1998) (discussing geographic applicability of copyright law). Of course, some injunctions should be limited in geographic scope, such as injunctions enforcing covenants not to compete.

[35] *See* Associate Attorney General Brand Delivers Remarks to the Washington, D.C. Lawyers Chapter of the Federalist Society (February 15, 2018) ("There are real questions about whether nationwide injunctions are consistent with Article III of the Constitution, since they grant relief to parties not before the court. In fact, rather than calling them nationwide injunctions, the term 'non-party injunctions' might be more apt.").

interests.[36] Although such problematic non-party injunctions are sometimes issued against private actors, not just public officials, the evasion of the limits on nonmutual issue preclusion is particularly acute in cases against public officials.[37]

"Shadow docket." I raise this one reluctantly. Commissioner William Baude has been remarkably successful in having a term he coined just a few years ago enter widespread use.[38] Perhaps I have an idiosyncratic aversion to the phrase—which to my ear connotes something nefarious, or at least sleazy—because I have been writing about emergency applications for stays and injunctions for nearly twenty years, beginning with the eighth edition of Stern & Gressman in 2002, and have long emphasized to my Federal Courts students the importance of the stay issued by Justice Douglas in *DeFunis*.[39] (Were it not for this stay, *DeFunis* might be the famous affirmative action case rather than *Bakke*.[40])

But treating emergency applications and summary reversals together can obscure crucial differences, most significantly that an emergency application can be decided by an individual circuit justice while a summary reversal certainly cannot.[41] My sense is that the trend toward referring applications to the full Court was driven

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[36] *See* Fed R. Civ. P. 23; *Hansberry v. Lee*, 311 U.S. 32 (1940).

[37] *See United States v. Mendoza*, 464 U.S. 154 (1984).

[38] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1 (2015).

[39] *DeFunis v. Odegaard*, 416 U.S. 312, 315 (1974) (noting that Circuit Justice Douglas had stayed the judgment of the Washington Supreme Court and that "by virtue of this stay, DeFunis has remained in law school"). By the time the Supreme Court decided the case, DeFunis had registered for his last quarter in law school, and the Court found the case moot.

[40] *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

[41] *See Kimble v. Swackhamer*, 439 U.S. 1385 (1978) (Rehnquist, J., in chambers) ("It scarcely requires reference to authority to conclude that a single Circuit Justice has no authority to 'summarily reverse' a judgment of the highest court of a State; a single Justice has authority only to grant interim relief in order to preserve the jurisdiction of the full Court to consider an applicant's claim on the merits."); *Locks v. Commanding Gen., Sixth Army*, 89 S. Ct. 31, 32 (1968) (Douglas, J., in chambers) ("As Circuit Justice I have no authority to revise, modify, or reverse the order of the Court of Appeals on the merits of this controversy. Apart from granting stays, arranging bail, and providing for other ancillary relief, an individual Justice of this Court has no power to dispose of cases on the merits." (cleaned up).

not just by technology (allowing for immediate distribution of written submissions pretty much anywhere) but also by experience in capital cases where the party who lost before the circuit justice was very likely to seek relief from the rest of the Court, and the other justices (who were deeply divided regarding capital punishment) were unlikely to defer to the circuit justice. Perhaps it is too late to return to the practice of a circuit justice trying to predict the views of the rest of the justices when it has become so easy to put the question to them directly. Nevertheless, to the extent it is possible, there may be some value in reducing the frequency of referrals and increasing the deference to the circuit justice. And there is certainly some value in not requiring that all votes on an emergency application be revealed: Suppose by the time a justice is available to review the application that has been referred to the full Court there are already five votes for a stay. Or suppose a justice finds an application to present a close call and before deciding how to vote learns that there are already five votes for a stay. What's wrong with the justice simply acquiescing in the stay? (A similar point has been made about certiorari votes. If there are already four votes to grant before a justice's turn to vote, what's wrong with simply acquiescing?[42])

As for summary reversals, there are values served by summary reversals that plenary consideration cannot serve, which helps explain why the Court persists in the practice despite decades of criticism.[43]

II

There has been discussion whether some measures might be appropriate only if the nation finds itself in an emergency "break glass" situation and whether we are currently in such a situation. If the Commission takes up this issue, I urge it to distinguish between different kinds of "break glass" situations because different reforms might be appropriate for each. Naturally, some might think that we already face more than one of these emergencies, in which case it might be even more important to draw these distinctions to help identify tensions between possible reforms.

Too much power. If one thinks that the problem is that the Supreme Court has too much power, and that by exercising so much power it has sapped the democratic power of Congress, Congress might want to reassert its own power to make exceptions to and regulations of the Court's appellate jurisdiction. In particular, because one major source of the Court's power is its ability to choose its own cases, Congress might want to remove some or all of that discretion.

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[42] Statement of Michael R. Dreeben at 25 (June 25, 2021).

[43] *Summary Reversals in the Roberts Court*, 38 Cardozo L. Rev. 591 (2016) (classifying summary reversals and discussing the administrative functions they serve).

But before taking such a step, one should worry about what body, if any, would step into the resulting vacuum. To the extent members of Congress have preferred to (explicitly or implicitly) delegate decisions to others and then criticize the decisions made rather than make the decisions themselves, reducing the power of the Supreme Court might instead further empower the executive and perhaps the lower courts. It seems unlikely that reducing the power of the Supreme Court will, by itself, bring back the days when Congressional debates were meaningful discussions of both policy and constitutional permissibility.

Wrong decisions. If one thinks that the problem is that the Supreme Court has made wrong decisions and is poised to make more, and one looks with horror at a world (for example) where the issue of abortion will be left to the states, where voting procedures used in the 1970s will be found acceptable, and where religious liberty will be strongly protected, then increasing the number of justices might look attractive.[44] And the greater one's fears (voting procedures of the 1950s found acceptable?), the more attractive this might be.

As many have noted, this is a path that could lead to an endless spiral of retaliation. Others claim, pointing to game theory, that tit-for-tat retaliation can induce cooperative behavior. I certainly do not claim expertise in game theory, but I suggest that before endorsing such an optimistic conclusion it would be important to be sure of the payoff matrix facing Senators and Representatives, bearing in mind that the payoffs for them—viewed as a greater chance of surviving a partisan primary and retaining office—may be quite different than the payoff matrix viewed from the perspective of their constituents or the country as a whole.

Extreme partisanship. If one thinks that the problem is that our culture and politics in general, and the judicial appointment process in particular, are too riven with partisan division, eighteen-year terms for Supreme Court Justices may be appealing. At least if coupled with some mechanism to assure that seats are filled on

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[44] *See Dobbs v. Jackson Women's Health*, No. 19-1392 (May 17, 2021) (granting certiorari limited to the question whether all pre-viability prohibitions on elective abortions are unconstitutional); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338 (2021) ("The degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982 is a relevant consideration. Because every voting rule imposes a burden of some sort, it is useful to have benchmarks with which the burdens imposed by a challenged rule can be compared.") (cleaned up); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1924 (2021) (Alito, J., joined by Thomas & Gorsuch) (concurring in the judgment)) (calling for the overruling of *Employment Division v. Smith*, 494 U.S. 872 (1990); *id.* at 1882 (Barrett, J., joined by Kavanaugh) (concurring) (noting that the arguments against *Smith* are more compelling, but not deciding whether *Smith* should be overruled).

a timely basis, this reform does have the potential to reduce the stakes of each appointment.

However, even if one of the various statutory mechanisms to effectively achieve eighteen-year terms (including by changing the duties of the office after eighteen years of service[45]) is constitutional, a statutory mechanism may not solve the problem. That's because if an eighteen-year term can effectively be achieved by statute, then so can shorter terms, and partisans may enact such statutes. A constitutional amendment, on the other hand, would require broad support for adoption and be far more entrenched.

Democratic failure and authoritarianism. Finally, if one thinks that the "break the glass" situation facing the nation is the risk of democratic failure and the rise of authoritarianism, then it would be important to assess which institutions are best suited to resisting authoritarianism. Under recent stress, Congress bent, but didn't break. The executive branch held, but only by relying on law to resist the President's entreaties. The judiciary, including the Supreme Court, did well.[46] I think it is difficult to resist the conclusion that the judiciary has been the best functioning branch of our national government.

From this perspective, whatever other problems one might see with the Supreme Court, it would be wise to think long and hard, and then think hard again, before picking up any tool today that a would-be authoritarian could too easily use tomorrow.[47]

It is important not to equate the rule of law with rule by judges. In the end, no court can save us from ourselves.[48] But I am reminded of Justice Jackson's hope, a hope that may be well placed:

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[45] Statement of Akhil Reed Amar (July 20, 2021).

[46] As did state executives. One can only wonder what would have happened if the presidential election were administered on the national level, rather than state by state: Would a national Secretary of Elections have withstood the pressure as well? *See The Pathological Perspective and Presidential Election*, 73 SMU L. Rev. 445, 482 (2020) (published prior to the November election).

[47] The phrase "think hard, and then think hard again," comes from Justice Kagan's opinion for the Court in *Camreta v. Greene*, 563 U.S. 692, 707 (2011).

[48] "The only absolute safeguards of a constitutional system lie in the character, the independence, the resolution, the right purpose of the men who vote and who choose the public servants of whom the government is to consist." Woodrow Wilson, Constitutional Government in the United States 166-67 (1908) (cleaned up). "If the

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.
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> Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.[49]

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Thank you again for the invitation to provide this written testimony. As I noted at the outset, I hope that the Commission will find these reflections useful in its deliberations and analysis.

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majority of the American people were in fact tyrannous over the minority, no written words which our forefathers put into the Constitution could stay that tyranny." Theodore Roosevelt, The Rights of the People to Rule, in 17 The Works of Theodore Roosevelt 152 (Hermann Hagedorn, ed. 1926) (cleaned up). Learned Hand, The Spirit of Liberty 190 (3d ed. 1974) ("Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.").

[49] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).