

PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES

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Thank you for your invitation to submit written testimony for the Commission's consideration. Yours is a challenging task with many competing (and possibly contradictory) concerns, and I am grateful for your efforts and service. In the short statement that follows, I elaborate upon a theme I believe deserves further attention in light of the preceding testimony before the Commission: the construction and maintenance of judicial power in the United States.

Drawing from my published and forthcoming work on the relationship between federalism and judicial power, my comments first address the Supreme Court of the United States and then provide a comparative federal perspective. I conclude by briefly addressing various options for reform set forth in the list of questions before the Commission.

The Supreme Court as Constitutional Fulcrum

It is perhaps a commonplace at this point in American political life to say that the Supreme Court is too powerful. The Court's countermajoritarian nature, ably described by many who have submitted commentary to this Commission, and its ability to decide rights issues core to personal self-determination present obvious challenges to democracy. But I wish to explore the nature of this power in a bit more depth, in order to assist the Commission in thinking through whether and how the Court should be reformed or its authority curtailed.

The political foundations of judicial review have been expertly elucidated, including by members of this Commission. But constructing authority is only the first step; how does that power accrue and how is it maintained over time? Since Thomas Jefferson's anxiety about the creation of the Supreme Court, we have recognized the specter of the judge "throw[ing] an anchor ahead, [to] grapple further hold for future advances of power."¹ And in cases like *City of Boerne v. Flores*, we have seen the Supreme Court, in furtherance of its claim to judicial supremacy, undermine coordinate branches and the constitutional powers delegated to them. But given the Court has "neither force nor will," any success in judges' aggrandizing attempts rests in the willingness of the political branches of the federal government—and maybe that of individual States, or even the public—to accede. In this telling, judicial power is ultimately a matter of political permission.

If this assumption is true, Congressional efforts to rein in the Court—particularly substantive mechanisms of limitation (jurisdiction-stripping, Congressional overrides, etc.)—should be effective. The coordinate branches are finally paying attention to the judges: Permission granted can be revoked. If, however, the Court's power is a function of judicial action *and* outside systemic pressures, then there might be reason to despair of the stability of those court-curbing mechanisms. If power accrues

¹ Thomas Jefferson, *The Autobiography of Thomas Jefferson*, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* (Adrienne Koch & William Peden, eds., 1944), 83; see also *id.* ("[It is] the *esprit de corps* of their particular maxim and creed that 'it is the office of a good Judge to enlarge his jurisdiction'").

not by permission, but as an inescapable function of our current political system, then such changes are likely to be undone as soon as politics shift, and may even have unintended consequences for the political coalition implementing them.

Indeed, the centrality of the Supreme Court to our politics and the concomitant maintenance of judicial power have key structural supports. Our two-party system is one. Mark Graber has argued that in a regime of political party competition, the presence of cross-cutting political issues can accelerate delegation to the judiciary.² If political dynamics ensure that neither political party will benefit from raising or championing a particular cause, it is to both parties' benefit to avoid the topic and defer to other actors in the constitutional scheme. (In an electoral system based on multi-party proportional representation, such "third rail" political topics are rarer.) The result is not an example of permission (or what Barry Friedman and I have called the "usurpation-and-acquiescence" thesis³), but a grant of power borne from an outright preference for judicial determination.

Our federal structure also works to empower the Court.⁴ In federations of divided governmental power, two key aspects help to cement and maintain a court's centrality: the prevalence of boundary disputes and pressures for uniformity.⁵

- *Boundary Disputes*: Divided power often becomes an exercise in line-drawing: the principle of distributed powers requires determining when bounded limits are breached. These "federalism" cases are at the core of the central court's remit, usually as a condition of the initial federal compact.⁶ As Friedman and I have shown, federalism not only presented a steady stream of business for the Supreme Court but also created pressures for national politicians to support the Court's authority to rein in the states. In the words of Justice Holmes, the "Union would be imperiled" if the Court were unable to declare state laws void,⁷ and various presidents have understood that threat. And keeping law siloed to its vertical (court-to-state) component is difficult. Doctrinal analysis destined for state action necessarily ensnares the federal government; law (and the legal method) has bite.⁸
- *Uniformity*: Federalism permits and safeguards variation; multi-level governance systems are thought to maximize individuals' preferences, as people can relocate to the state that best reflects their desired bundle of goods and services. In addition, permitting decisions to be taken as close as possible to the affected population can allow for better matching between preferences and results and thereby fosters democracy. But of course, to ensure the federation doesn't come apart, some things must be uniform across the federal units—perhaps to support

² Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35 (1993).

³ Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 *COLUM. L. REV.* 1137 (2011).

⁴ *Id.*

⁵ Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 *NW. U. L. REV.* 543 (2015).

⁶ See Erin F. Delaney, *The Federal Case for Judicial Review*, *OXFORD J. LEGAL STUD.* (forthcoming).

⁷ Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 *HARV. L. REV.* 683, 688 (1916). Indeed, Holmes may have been right that the Court was the only option. In Canada, the British North America Act provided for the "dominion disallowance" of provincial statutes; in other words, the federal parliament could overturn a provincial statute. The British North America Act, 1867, 30–31 *Vict.*, c. 3, ss 56 & 90. The power ultimately fell into desuetude and governments found ways to refer these "political 'hot potatoes' to the Supreme Court." Gerald Rubin, *The Nature, Use, and Effect of Reference Cases in Canadian Constitutional Law*, 6 *MCGILL L. J.* 168, 172 (1960).

⁸ See Delaney, *Judiciary Rising*, *supra* note 5; Friedman & Delaney, *supra* note 3.

a national economy; perhaps to ensure a minimum level of rights protection. In the evolution of judicial power in the United States, the Supreme Court gained power during times when it was the only institution capable of imposing uniform rules.⁹ Some of those times—such as its decision in *Brown v. Board of Education*—were due to institutional dysfunction within Congress. But at least some aspects of that institutional dysfunction also stemmed from the ways in which our federal system—and internal national political party structures—worked to shelter the actions of individual states from Congressional review.¹⁰

As we have seen in the recent embrace of federalism by left-leaning politicians, twenty-first century federalism in the United States has no inbuilt political valence. It can be used by all sides to promote competing interests. And the Court's appropriate role cannot be evaluated in a vacuum; Congress has its own set of much needed reforms. It is therefore unlikely that demands for boundary drawing and nationalized rules will abate. And long-standing interpretations of the Constitution give the Court a prominent role in both contexts.

The most successful long-term approach for changing the Court's role in the resolution of major social and political issues is through constitutional amendment. It would require retooling our federalism along many lines: clarifying the role of Congress, for example, by rearticulating its authority within Section 5 of the Fourteenth Amendment; tiering constitutional rights, an approach that could function to identify uniform national rights and those that could be allowed to vary across jurisdictions; restructuring the Senate and reevaluating the role of Electoral College; and rearticulating the division of powers. In the absence of this type of dramatic intervention and intentional scaling back of the federal structure, our federalism will force the continued centrality of the Supreme Court to our politics.

A Comparative Example: Canada

This role of “federal apex court” as constitutional fulcrum is not unique to the United States. Canada provides a useful comparative example, as a federation that shares our commitment to rights and democracy.

In submissions to this Commission, much of the comparative focus on Canada has been on the mechanisms in that system that work to curtail the Supreme Court of Canada's (SCC) authority or provide opportunities for political engagement or dialogue. For example, the “notwithstanding clause” permits governmental noncompliance with certain rights-based decisions of the SCC.¹¹ (It is notable that the federal government has yet to use the provision.) And the SCC's use of delayed remedies allows for political input into rectifying constitutional violations.¹² These mechanisms may

⁹ See Friedman & Delaney, *supra* note 3.

¹⁰ Subnational authoritarianism can occur when political parties are themselves federated—and thus structured in such a way so as to allow subnational leaders important roles in national governing coalitions while insulating them from national attention at home. See Edward L. Gibson, *Boundary Control: Subnational Authoritarianism in Democratic Countries*, 58 *WORLD POLITICS* 101, 107–08 (2005). See generally ROBERT MICKEY, *PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA'S DEEP SOUTH, 1944-1972* (2015).

¹¹ Canadian Charter of Rights and Freedoms, s 33, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

¹² Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 *DUKE L. J.* 1 (2016).

help temper the politicization of the SCC around divisive political issues; but *the centrality* of the SCC to Canadian politics remains.

The centrality is the result of many of the same structural pressures found in the United States, but it is effectuated through the reference mechanism, which allows parties to “refer” issues generalized or abstracted away from their particularized facts to the SCC for commentary.¹³ Used both by provinces and by the federal government, references are “highly contested disputes [and] inescapably political.”¹⁴ In her work exploring how provincial actors have used the mechanism, Kate Puddister found that “the majority of interview participants explicitly stated that the decision to use the reference power by their government was either a political consideration or a means to deal with a political controversy.”¹⁵ Inputs for the federal government’s decision to refer include timing, party politics, and “diffusion of political responsibility” to avoid a political controversy or to make a “proactive strike.”¹⁶ And even though they have only advisory authority, reference determinations are generally treated as binding.¹⁷

The Canadian example demonstrates that it is possible to have a federal apex court that is central to the resolution of major social and political issues and yet is not overly politicized. But there is no easy template that can be exported to the United States. This state of affairs could be due to the appointments process; the existence of a more widely agreed-upon approach to constitutional interpretation (largely a “living tree” approach); the availability of the notwithstanding clause; the SCC’s own efforts to engage the political branches through delayed remedies; the nature of the Canadian people and Canadian politics; or any number of historical or cultural differences. Or it may be that despite these differences, the SCC is itself on a trajectory of politicization, and in a few years, judicial politics to our north will look more familiar.

Implications for Reform

The Supreme Court plays a central role in the resolution of major social and political issues, and it does so for reasons that are inherent in our constitutional federation and the broader political system we have constructed over the past 230 years. The forgoing commentary sheds light on the range of reforms on which the Commission has asked for comment. To summarize the implications of the theory and history above:

- Only fulsome constitutional revision would restructure our federal system in a way that could permanently decrease the centrality of the Supreme Court.
- Whatever their merit, substantive or procedural court-curbing mechanisms are likely to be short-term, unstable solutions, as political coalitions shift and boundary-drawing and

¹³ See Erin F. Delaney, *Reimagining Judicial Federalism*, in *REWRITING THE CANADIAN CONSTITUTION* (Richard Albert, Kate Glover, Michael Pal & Wade Wright, eds.) (forthcoming).

¹⁴ CARISSIMA MATHEN, *COURTS WITHOUT CASES: THE LAW AND POLITICS OF ADVISORY OPINIONS* 158 (2019).

¹⁵ KATE PUDDISTER, *SEEKING THE COURT’S ADVICE: THE POLITICS OF THE CANADIAN REFERENCE POWER* 145 (2019).

¹⁶ Adam Dodek, *The Politics of the Senate Reform Reference: Fidelity, Frustration, and Federal Unilateralism*, 60 *MCGILL L.J.* 623, 651 (2015).

¹⁷ See generally MATHEN, *supra* note 14.

uniformity pressures push new cases to the Court (or as the Court becomes a more attractive outlet than Congress to those seeking resolution of those issues).

- Legislative review/override or delay/dialogic mechanisms such as those found in Canada, while attractive,¹⁸ may not ensure the Court will be sidelined from politics. The Canadian example is too complex for simple transplantation. In Canada, provincial and federal politicians have found another manner of engaging the SCC through the reference mechanism. Water will find a way: The Court is an institution that will be used in politics. It may be that the best chance of avoiding its further politicization is to accept that fact, and to structure term limits to better reflect the politics of our time. Term limits or mandatory retirement would be in keeping with the practice in the rest of the world and have obvious benefits, as noted by many others.¹⁹
- Finally, the Commission has asked about court expansion. Court expansion is far more likely to begin a tit-for-tat game of Supreme Court manipulation than it is to decentralize the Court. Expansion may be necessary, as Noah Feldman suggested in his testimony, if we arrive at a “break glass” moment for our democracy. If quantifying the extent and the magnitude of any democratic decline is before the Commission, I would urge you to invite a different and wider set of scholars and individuals to testify: more political scientists and sociologists, those in media studies and psychology, those studying redistricting and voter turnout, and those who evaluate the impact of lies and the denial of truth on the social fabric of a political system.

¹⁸ See the submission to this Commission by Rosalind Dixon.

¹⁹ See the submissions to this Commission by Tom Ginsburg and Vicki Jackson.