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My name is Michael Stokes Paulsen. I am honored to have been invited to provide this written testimony to the Presidential Commission on the Supreme Court of the United States. I have been a law professor for thirty years, first at the University of Minnesota Law School (1991-2007) and now at the University of St. Thomas (2007-2021). I have held endowed chairs at both law schools. I have taught as a visiting professor at Princeton University, Pepperdine University, Uppsala University, and Georgetown University, among other institutions. For the academic year 2021-2022 I am a visiting fellow at the Hoover Institution at Stanford University.

My primary area of academic legal scholarship is Constitutional Law. I am the author of nearly one hundred academic articles in this area, including articles in the Harvard Law Review, Yale Law Journal, Stanford Law Review, University of Chicago Law Review, Georgetown Law Journal, Northwestern University Law Review, Texas Law Review, Michigan Law Review, and many other law journals. I am co-author (with professors Steven Calabresi, Michael McConnell, Samuel Bray, and Will Baude) of the law school casebook *The Constitution of the United States*, now in its fourth edition. I am co-author (with Luke Paulsen) of the book *The Constitution: An Introduction.* My academic c.v. is attached.

Of particular relevance to the topics being considered by this committee are several of my academic articles, noted below.[1] Of special interest is the article *Checking the Court*, 10 N.Y.U. J of Law & Liberty 18 (2016), which addresses many of the issues being considered by this Commission.

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The broad topic framed by this Commission is proposals to reform the Supreme Court. The twin themes of my testimony are as follows: First, the most important way to "reform" the Supreme Court is *not* to weaken the Court as an institution but instead to reassert, restore, and reinvigorate the roles of competing centers of constitutional interpretive power – that is, to return

[1] Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J. Law & Liberty 18 (2016) (hereinafter "*Checking the Court*"); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 Mich. L. Rev. 2706 (2003) (hereinafter "*Irrepressible Myth*"); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey?, 109 Yale L.J. 1535 (2000) (hereinafter "*Abrogating*"); Michael Stokes Paulsen, *Straightening Out The Confirmation Mess*, 105 Yale L.J. 549 (1995) (book review) (hereinafter "*Confirmation Mess*"); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L.J. 217 (1994) (hereinafter "*Most Dangerous Branch*").

to the intentions of the framing generation with respect to separation of powers and the resulting coequal interpretive authority of independent branches of government. The best way to "reform" the judiciary is thus for other branches and interpreters to reject the premise of judicial *supremacy* in constitutional interpretation and thereby to reduce the undue prominence attached to the Supreme Court's decisions – to lower the "stakes," as it were, of the Court's exercise of judicial power, by strengthening and reasserting the intended constitutional role of other interpreters and institutions.

Second, with respect to measures these other interpreters constitutionally can take to "check" the Supreme Court, my corollary theme is that not everything that is constitutionally permissible is constitutionally desirable. The object of any proposed reform of the Supreme Court should be to facilitate effective checks on the inappropriate exercise of judicial power *without improperly weakening the Court itself as an independent constitutional interpreter*. The Court's strength – its only legitimate strength – stems solely from its constitutional power of independent judgment. That power must be preserved, even as other branches reassert their independent powers and duty of faithful constitutional interpretation. Accordingly, I urge this Commission to support no "reform" that, even if constitutionally permissible, would weaken the judicial power of independent judgment or weaken the judiciary (and specifically the Supreme Court) as an institution, on an ongoing basis. (As set forth below, such inappropriate measures include proposals to "pack" the Supreme Court by increasing its membership and thereby dilute the votes of its members.) On the contrary, proposed reforms in my view should take the shape of steps to *fortify* the judicial power of faithful independent constitutional judgment by removing impediments to its rightful exercise, including (somewhat ironically) certain judicially created non-constitutional doctrines that purport to limit the exercise by courts of their constitutional power and duty of independent judgment. These include certain doctrines of "prudential standing" and "abstention," some aspects of the so-called "political question" doctrine, and versions of the judicial doctrine of stare decisis that would require (or permit) courts to render decisions contrary to their best judgment as to the correct understanding of the Constitution or other controlling federal law.

I.

The power of constitutional interpretation is not properly understood as an exclusive or supreme power of the federal judiciary. Rather, the power of constitutional interpretation is divided and shared by all three branches of the national government as an incident of the exercise by each branch of its specific enumerated powers. The Constitution does not designate a supreme constitutional interpreter. Each branch has the power and duty of faithful constitutional interpretation; none is the superior of the others in this regard. Their interpretive authority is co-equal and co-ordinate, as is their overall status in the constitutional scheme. As James Madison expressed the point in *The Federalist No. 49*: "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."

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Much of the impetus for "reform" of the Supreme Court appears premised on a misunderstanding about the extent of the judiciary's authority: the mistaken assumption that the Court is the sole or supreme constitutional interpreter, and that the judiciary's decisions themselves constitute the supreme law of the land. To be sure, such a (self-interested) claim has periodically been made by the judiciary. But the judicial assertion of judicial supremacy in constitutional interpretation is not warranted by constitutional text, structure, logic, or historical evidence of original understanding.[2]

With all due respect, many of the calls for ostensible reform of the Supreme Court are premised on a misunderstanding of the Court's role and the scope of its true authority. They are thus based on an improper, or badly exaggerated, estimation of the *stakes* involved in such reform proposals. To illustrate and explain: If one believes that the Supreme Court is the single, all-powerful constitutional interpreter, vested with ultimate and unquestionable authority over constitutional interpretation – that whatever the Court says, goes, no matter what – then one naturally will attach extraordinary importance to such considerations as the size, membership, composition, and jurisdiction of the Court. If the Supreme Court is the end-all-be-all of constitutional interpretation, appointments to the Court, and these other characteristics of the Court's composition, take on extreme, undue importance. They become (as we have observed) the source of almost apocalyptic political contention. Indeed, if one is a judicial supremacist, this makes a certain amount of sense. For, on this view, *everything* depends on the Court. Proposals for reform of the judiciary become simultaneously both more critically vital – because the Court is everything – and, ironically, given the premise of judicial supremacy, also seem constitutionally improper: the Court, being everything, should on this view also be untouchable.

To be sure, even on a correct understanding of the power of the federal judiciary as one solely of (non-exclusive, non-supreme-over-all-others) independent judgment, courts exercise important governmental power. Consequently, it *is* an important matter how, when, and by whom that power is exercised. This has practical consequences in terms of the proper understanding and exercise of the checks that the political branches possess on the judiciary. But the stakes need to be assessed correctly – lowered – so that reform proposals can be calibrated appropriately.

In my opinion, the single most important step this Commission can take –one that would be complete in itself, effective without further executive or legislative action – would be to embrace, affirm, and vigorously champion, as a matter of bedrock constitutional principle, the *independence, co-ordinacy, and co-equality* of the three branches of the national government in the task of faithful constitutional interpretation. The Commission should embrace Madison's principle that none of the branches is the superior of the others in constitutional interpretation, that none is supreme over the others, that each has a role in faithful constitutional interpretation,

[2] For detailed treatments, see Paulsen, *Irrepressible Myth*, 101 Mich. L. Rev. 2706; Paulsen, *Most Dangerous Branch*, 83 Georgetown L.J. 217. See also Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 Notre Dame L. Rev. 1227 (2008) (describing President Abraham Lincoln's consistent and rigorous embrace of the anti-judicial-supremacist position); Michael Stokes Paulsen, Nixon *Now: The Courts and the Presidency After Twenty-Five Years*, 83 Minn. L. Rev. 1337 (1999) (discussing historical evidence that judicial supremacy is not consistent with the original understanding of the Constitution).

and that each legitimately can use the constitutional powers at its disposal to "check" and "balance" the interpretations and actions of the others.

That principle is the necessary foundation for any and all possible specific proposals for reforming the courts in general or the Supreme Court in particular. This Commission should thus, as its first and foremost action, embrace in principle the legitimacy and propriety of the other branches exercising their granted constitutional powers so as to check, and sometimes restrain or counter, the exercise of the judicial power. No court, not even the Supreme Court, is immune to the operation of constitutional checks legitimately possessed by the other branches of government.

This involves affirming that the other branches of government are, in principle, not bound in the exercise of their independent constitutional powers by the positions taken by the judiciary. Concretely, this means that it is *legitimate in principle* for presidents, when considering judicial appointments, and the Senate, in considering whether or not to consent to the president's nominations, to take into account a potential appointee's judicial philosophy or ideology – or lack of one, or unwillingness to articulate one – and to decline to support a candidate whose views the president or Senate considers constitutionally unsound and inappropriate, whether or not those views comport with existing judicial interpretations of the Constitution.[3]

It means that it is *legitimate in principle* for Congress to make constitutionally allowable alterations in the courts' assigned jurisdiction and the number of judges constituting such courts (including the Supreme Court), as long as such changes are consistent with Article III of the Constitution, even if such measures are motivated by disagreement with past or expected exercise of the judicial power by the courts.

It means that it is *legitimate in principle* for Congress to adopt measures constitutionally within its power to pass laws "necessary and proper" for carrying into exercise the judicial power, superseding where appropriate judge-made doctrines that are not themselves required by Article III or other provisions of the Constitution.

It means that it is *legitimate in principle* for Congress to enact measures that conflict with judicial decisions and precedents, based on Congress's conflicting good faith understanding of the Constitution. It means that it is likewise legitimate in principle for the executive branch to decline to follow, as binding precedent governing its own actions, judicial decisions that conflict with the executive's good faith understanding of the Constitution. And it means that it is

[3] As I have explained in academic writing, it is entirely constitutionally appropriate for the political branches involved in the judicial appointment process to take into consideration, and inquire into, the substantive constitutional views of prospective appointees. The notion of "judicial independence," once a judge is appointed, cannot rightly be leveraged backward in time to foreclose an inquiry by the political process into considerations relevant to exercise of the constitutional power to make, or consent to, such an appointment. However, it is *not* appropriate for political actors to leverage the constitutional powers attending appointment and confirmation *forward*, to exact promises or pledges as to how a prospective judge will decide certain cases once on the bench. Such an exaction, or the making of such commitments, impairs the judicial independence of the judge once in office. See Paulsen, *Checking the Court*, 10 N.Y.U. J. Law & Liberty 30-48; Paulsen, *Confirmation Mess*, 105 Yale L.J. 549.

legitimate in principle for the executive branch not to execute a judicial judgment it concludes in good faith is seriously contrary to the Constitution.[4]

This would be a bold and meaningful stance for the Commission to take. In some respects, it might be politically controversial. But I believe it is vitally important for the Commission, as part of its work, to affirm the principles of the independence and co-equality of other institutions in the enterprise of constitutional interpretation and the consequent legitimacy and propriety, in principle, of proposals to alter the Court's membership, composition, and jurisdiction, as part of the Constitution's system of separation of powers and checks and balances.

II.

The above principle needs to be balanced with another: Not every "reform" measure with respect to the judiciary that is constitutionally *permissible* is constitutionally *desirable*. While it is legitimate in principle for the other branches of government to exercise their constitutionally granted powers to check, cabin, or constrain the exercise of judicial power, I believe that those powers are responsibly exercised only when they do not weaken the judiciary's sole true power – independent constitutional legal judgment – by measures that threaten permanently to diminish the Supreme Court's institutional power or capacity to exercise such independent judgment. In what follows, I consider a variety of common proposals in terms of this criterion.

a. Term Limits and Mandatory Retirement Proposals. Certain proposals – such as establishing term limits, regular fixed, staggered terms for Supreme Court justices, or mandatory retirement ages – would require amending the Constitution. Article III specifies that federal judges possess life tenure (they hold office "during good Behaviour," in Article III's language) and that their salaries cannot be reduced. The framers of the Constitution embraced these features of the federal judiciary as the only arrangement consonant with giving the judiciary the necessary independence and fortitude to render independent legal judgment. See generally *The Federalist No. 78* (Alexander Hamilton).[5]

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[4] For further development of these principles, see sources cited in footnote 1.

[5] I am aware that some have suggested that term limits for Supreme Court justices could be accomplished, in practical effect, by a *statute* that preserved an individual justice's salary after the end of a defined term of years (say, eighteen years) but redefined the *duties, responsibilities* and *judicial role* of the justice's "office" after that term of years had expired. With respect, such proposals, clever though they might be, strike me as constitutionally unsound. To be sure, Congress has substantial power to prescribe judicial duties and assignments, even of Supreme Court justices. But to *condition* the powers and duties of a federal judge or justice on a prescribed length of term of service – to make length of service the trigger of reduced duties – in my opinion attaches a term limit to the judge's service in office that departs from the Constitution's prescribed tenure "during good Behaviour."

Let me suggest an analogy: Law school deans typically have substantial control over a faculty member's teaching loads and assignments. But were a dean or university to prescribe that, *upon reaching age 65*, faculty members would become "emeritus professors" and retain their salaries as a pension but could no longer teach courses or vote in faculty meetings, such action likely would constitute illegal age discrimination under state or federal law. Similarly, to curtail duties of judicial office based on a judge's age or length of service probably violates the "good Behaviour" tenure standard of Article III of the Constitution.

Putting to one side the almost insuperable difficulty of amending the Constitution in this respect – and the enormous practical difficulty of settling upon any particular changed arrangement – my point here is more fundamental: The framers were right. The independence of the judiciary requires that, once appointed, the judges possess as great a degree of institutional independence as possible. Term limits, staggered rotation of judges, or mandatory retirement ages would impair the structural independence of the federal judiciary. The framers of the Constitution thought so and I believe they were right. Term limits and other such devices sap the strength of the judiciary as an institution. The only proper limitation on federal judges' tenure of office, the framers believed, is the vital constitutional check of impeachment, including impeachment for serious abuse or misuse of the judicial power. See *The Federalist Nos. 79* and *81* (Alexander Hamilton).

Proposals for term limits and/or staggered terms for Supreme Court justices are sometimes proposed in the name of reducing or removing – or at least regularizing and distributing roughly more "equally" over time and across presidential administrations – the impact of the political process for making such judicial appointments. There is good reason to be skeptical about whether such proposals would actually achieve that purpose, however. For most such proposed arrangements, politics would remain at some level. Strategically timed retirements (before a staggered term is completed) or unexpected deaths would not infrequently afford the same situation of "unscheduled" turnover, re-creating the opportunity for additional appointments in a single presidential term – or else requiring more complicated arrangements. Politics is not removed by such proposals, even assuming that such a goal is desirable in the first place.

For what it is worth, I am not as concerned by the effects of "politics" in Supreme Court appointments, or by the occasional randomness with which vacancies sometimes arise, or by the possibility of strategically time retirements, as some others might be. This is for several reasons.

First, *the framers devised and specifically contemplated a political appointment process*. That judicial appointments could be expected to depend to some extent on the vagaries of timing and of the political process seems to have been part of the original design or at least the expected consequence of that design.

Second, and relatedly, politics *should* affect judicial nominations. If judicial philosophy or ideology is a relevant consideration in making judicial appointments – and I believe it must and should be – such views of course sometimes might be correlated with specific political alignments (as they generally are today, for example). When the presidency and Senate are held by persons (or parties) of like-minded views on constitutional issues or constitutional interpretive method, judicial appointments will tend to be more ideological and sharply defined, reflecting that political consensus. When the presidency and the Senate are controlled by different parties, possessing different views, appointments will tend to be less ideological and the viewpoints of appointees less crisply defined. This strikes me as roughly how it should be. Over time, these factors will tend to even out. In themselves, they have no particular ideological valence.

As for retirement, the whole idea of life tenure – and the independence it produces – is that no one but the individual judge or justice determines the timing of his or her own retirement.

This again strikes me as being pretty much as it should be, and in accord with the framers' sense of what is necessary for judicial independence. Overall, then, the Constitution's present arrangement seems to me to be quite appropriate in balancing the inevitable role of politics in judicial appointments with the need for judicial independence once an individual is appointed.[6]

b. "Court-packing" Proposals. Other proposals for reforming the Court are plainly within the constitutional powers of Congress to enact without a constitutional amendment. But some of these would not operate to "check" or counteract *specific believed abuses* of judicial power – such as do the checks of declining to enforce or follow as precedent a judicial decision egregiously departing from the Constitution. Rather, they would operate to seriously, and perhaps irremediably, *weaken the judiciary as an independent institution capable of rendering independent constitutional judgment.* In my view, the Commission should not embrace such ideas.

Prominent in this category are proposals to "pack" the Court by increasing its membership and thereby diluting – or swamping – the votes of sitting justices, often in an effort to reverse or overrule specific decisions. The term "Court-packing" derives from President Franklin D. Roosevelt's famous (or infamous, depending on one's point of view) proposal to enlarge the size of the Supreme Court to as many as fifteen justices, a proposal obviously motivated at the time by the dsire to change the outcomes of the Court's decisions invalidating parts of FDR's New Deal program enacted by Congress.

There is nothing literally *unconstitutional* about such a proposal. The Constitution does not prescribe a set size for the Supreme Court. Historically, the Court's membership has bounced around "from six to seven to nine to ten, back down to seven, and back up to nine again, for reasons of practicality, convenience, and politics."[7] It is therefore, in my view, appropriate for this Commission to acknowledge, in principle, the constitutional propriety of this blunt, crude power with which Congress can "check" the Supreme Court.[8]

But such an acknowledgement should be accompanied by a strong caution. Despite the constitutionality of "Court-packing," such a so-called reform is deeply problematic from an institutional perspective. Simply put, it "threatens systematically to weaken the Court as an institution, and thus *its* check on other branches."[9] As my co-author, Luke Paulsen, and I have written of the Roosevelt Court-packing plan, and its condemnation by critics at the time:

> The criticism was probably deserved: had FDR succeeded, it would have established the precedent that whenever the President and Congress become

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[6] As noted above (see footnote 3), this is the appropriate line: The Constitution contemplates a political process governing the decision to appoint federal judges. This makes it proper for political actors to take into account (and thus to inquire into) judicial ideology, because such ideology is relevant to how the prospective judge would exercise important government power. "Judicial independence" refers to the ability of a judge, *once appointed*, to exercise the judicial power free of political branches' control. Consequently, political actors can properly inquire into prospective judges' substantive views but may not exact pledges or promises that would bind or constrain prospective judges' future exercise of judicial power.

[7] Paulsen, *Checking the Court*, 10 N.Y.U. J. of Law & Liberty at 64.

[8] Id. at 64-65.

[9] Id. at 65 (emphasis in original).

> annoyed with decisions of the Court, they could simply dilute the votes of the justices by adding justices more to their liking. This would not only reverse the earlier decisions, but also reduce the Court's power by enlarging its membership. Unlike other checks on the Court and its decisions – presidential pardons and vetoes of bills on constitutional grounds that the Court has rejected, or even non-execution of judicial decrees in extraordinary circumstances – Court-packing could have permanently diminished the Court's ability to check *the other* branches, an act that would have had major consequences for the Constitution's separation-of-powers balance.[10]

To be sure, the exercise by the political branches of other checks on the judiciary risks systematically diminishing the potency of the judiciary and its ability to check the other branches, too. But there is something different about Court-packing that makes it especially troubling. The vote-dilution it accomplishes is not easily undone, given life tenure. Once having increased the size of the Court, if Congress changes its mind it cannot restore the status quo ante immediately by statute. An increased membership does not automatically "un-pack" itself with a reduction in the statutory size of the Supreme Court. (This contrasts with such actions as altering the courts' jurisdiction, in constitutionally allowable ways, by statute. Statutes limiting jurisdiction can simply be repealed by a subsequent Congress if it wishes to restore jurisdiction previously removed.) To put it colloquially, Court-packing is the "gift that keeps on giving."

Moreover, Court-packing invites an "arms race" of progressive escalation with changes in political alignments of the other branches. A Court of nine justices becomes a Court of eleven, thirteen, or fifteen. Once such a step is taken it becomes a precedent for future action enlarging the Court when political alignments or interests change once again. To dilute the decisions of the new larger membership, the Court then needs to be packed *more*. Fifteen becomes twenty-one becomes thirty-seven becomes fifty-three and we're off to the races. Clearly, under such conditions, the Court is crippled as an institution capable of rendering meaningful independent judgment and effectively checking the other branches with the moral and persuasive force of principled interpretations of the law. The best way to prevent such an arms race is not to start one.

c. Altering the Court's Jurisdiction. Aside from the Supreme Court's constitutionally-prescribed minimum original jurisdiction, set forth in the Original Jurisdiction Clause of Article III,[11] Congress possesses broad – nearly plenary – constitutional power to prescribe, limit, or make exceptions to the jurisdiction of the federal courts, including the Supreme Court.[12] This power includes the power colloquially known as "jurisdiction stripping" – the power of Congress, stated in the Exceptions Clause of Article III, Section 2, to make exceptions to and regulations concerning the Supreme Court's appellate jurisdiction over cases within Article III's specified categories coming from lower federal and state courts.

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[10] Michael Stokes Paulsen & Luke Paulsen, ***The Constitution: An Introduction*** (2015) at 223.

[11] U.S. Const. art. III, §2. In *Marbury v. Madison*, 5 U.S. 137 (1803), the Court construed Article III's minimum of Supreme Court original jurisdiction as also establishing a constitutional maximum.

[12] For a full explanation of this proposition, see Paulsen, *Checking the Court*, 10 N.Y.U. J. Law & Liberty at 48-64.

This is the source of Congress's power to enact nearly every statute currently on the books that concerns the Supreme Court's appellate jurisdiction. As I have bluntly described Congress's constitutional authority over the jurisdiction of federal courts: "Congress can do pretty much whatever it wants."[13] It is appropriate for this Commission to embrace the entire constitutional propriety of Congress's exercise of this sweeping power to prescribe, alter, and amend the jurisdiction of federal courts, including the Supreme Court's appellate jurisdiction, for whatever policy reasons Congress judges to be appropriate.

The power over jurisdiction is indeed sweeping. Consequently, it has potentially dramatic implications and applications. For example, Congress could remove entire categories of cases – such as cases challenging abortion regulations or gun regulations on constitutional grounds – from the appellate jurisdiction of the Supreme Court, vesting final jurisdiction of such cases in lower courts or even creating a new, specialized federal court to address and finally decide such issues. Such an arrangement of course would not "lock in" existing Supreme Court precedent as binding such lower courts or new federal courts. The practical force of precedent within the judicial hierarchy of courts is a function of the chain of appeal, which is itself subject to Congress's control.) Rather, such an arrangement would operate to check the Court in the entirely straightforward way of removing such cases from the Court's authority. The court or courts possessing final jurisdiction would possess the last judicial word on such questions and exercise such interpretive power independently, without the constraint of potential appeal of their decisions to the Supreme Court.[14]

This is a potentially valuable and a potentially dangerous power, depending on the manner of its exercise. But the principle underlying this power is an important one to acknowledge – and that I believe this Commission should embrace in concept: *The Supreme Court constitutionally does not need to possess, and never has possessed, jurisdiction over everything. Not all questions of constitutional law need constitutionally to fall within the Supreme Court's jurisdiction to decide.*

While I support the constitutional power of Congress, in principle, to engage in "jurisdiction stripping," I have mixed feelings about the desirability and effectiveness of exercising it as a way to appropriately check or reform judicial power. First, removing cases from judicial jurisdiction does not counteract specific abuses or misuses of judicial power the way that other exercises by the political branches of their independent constitutional interpretive power seek to do. Instead, removing jurisdiction seeks to prevent the Court from doing *future* believed harm, which is an uncertain predictive matter. Second, jurisdiction-stripping possesses some of the same problems as does Court-packing, though not to the same degree: it tends to weaken the Court as an institution (albeit in a constitutionally allowable and legislatively reversible way); and it has the practical and symbolic defect of being seen, often rightly, as a device to reverse specific decisions of the Court. Again, this is a constitutionally allowable motive and result. But it might sometimes not be a laudable one. On balance, then, I would urge the Commission to embrace the constitutional propriety, in point of principle, of (most) jurisdiction-removing measures while cautioning against the desirability of their exercise in

[13] Id. at 49.

[14] See id. at 59-60, n.55 (refuting any suggestion that removing jurisdiction over a category of cases from the Supreme Court would "freeze" in place, permanently, its prior precedents in such matters).

many instances and warning that the over-use of such a checking power could seriously weaken the Supreme Court as an institution and be seen as political manipulation of the judiciary.[15]

There are, however, many measures that Congress *could* enact with respect to the Court's jurisdiction – and regulating its exercise – that would not in my view present any such concerns. For example, Congress could *enlarge* the Court's appellate jurisdiction in any way compatible with Article III's scope, including assigning previously unfamiliar categories of cases to the Court's jurisdiction (like appellate diversity jurisdiction). There might be certain benefits to assigning the Supreme Court more cases to decide – and more "routine" or "ordinary" cases – rather than fewer. It might better comport with, and reinforce, the idea that the Court is a *case-deciding* body, not a *law-shaping* body. In addition, Congress might make the exercise of appellate jurisdiction *mandatory* rather than discretionary in certain cases or categories of cases. If a concern is that the Supreme Court, through the exercise of certiorari jurisdiction, exercises too great a control over the cases and issues before it – that it sets its agenda for itself – Congress could prescribe that some appellate jurisdiction be mandatory or alter the boundaries and procedures concerning certiorari jurisdiction. Further, as noted in the next section, Congress has power to prescribe standards of review of decisions made by lower courts. Finally, Congress could, consistently with Article III and pursuant to its Necessary and Proper Clause power with respect to carrying into proper execution the powers of the federal courts, remove or displace judicially crafted doctrines of self-limitation that are not required by the Constitution. That is, Congress could free the path to – and thereby fortify – the faithful exercise of the judicial power of principled independent legal judgment by removing barriers to its exercise. (I turn to some examples of this in the next section.)

Each of these types of measures arguably is a more valuable proposal for reform of the judiciary than is jurisdiction-stripping, which simply relocates the exercise of judicial power to different courts. Nonetheless, I believe it is valuable and important for this Commission to embrace the constitutional propriety in principle of Congress's control over federal court jurisdiction.

d. Regulation of Judicial Procedure, Practice, Policy, Standards of Review, "Choice-of-Law" Principles, and the Scope and Prospective Force of Judicial Decisions.

There are a great many actions that Congress constitutionally may take with respect to regulation of matters of judicial procedure, practice, and policy; with respect to specification of standards of review for appeals of lower court decisions (or determinations of administrative agencies); with respect to designation of the controlling substantive law governing certain categories of cases; with respect to the prospective binding force of some or all judicial judgments, upon other courts and parties, in future litigation; with respect to the law of remedies; with respect to the abrogation or modification of non-constitutional, judicially-developed

[15] Congress has no legitimate constitutional power to control, reverse, or revise the substantive outcomes of actual cases decided by the federal judiciary, as decisions of the judicial branch, in cases within the federal courts' jurisdiction. Thus, while Congress has substantial power over jurisdiction, it may not condition a court's jurisdiction on a court reaching (or not reaching) certain results or make courts' jurisdiction contingent on Congress's approval of its exercise in specific cases or classes of cases.

doctrines of supposed discretionary, "prudential," judicial "restraint" or "abstention" from decision; and, in certain respects, with respect to prospective abrogation of precedent and rejection of some judicial formulations of the doctrine of *stare decisis.*

I have set forth the principles that govern in this area, the explanation of the source and scope of congressional power supporting those principles, and the well-accepted practice under the Constitution supporting this understanding, in a detailed law review article published in *The Yale Law Journal* twenty years ago, in 2000. I will not repeat those arguments here but simply refer members of the Commission to that prior work.[16]

Congress's power over such matters of judicial procedure and practice, in myriad forms, has been well recognized since the earliest days of the republic.[17] It is appropriate, therefore, and desirable, for this Commission to *embrace the constitutionality and propriety, in principle, of such exercises of congressional statutory power with respect to the judiciary*. This is true whether or not the Commission embraces any specific instance or illustration of such power. Again, such action by the Commission would be complete in itself – an important statement of principle.

With respect to specifics: In my view, the most positive and promising proposals for reform of the Supreme Court in this category are those that promote or enhance the Court's ability to render *faithful, independent judicial judgment in accordance with governing law.* While there are doubtless many measures falling within this category that might be taken to limit the effective power of the judiciary to render independent judgment – just as "jurisdiction stripping" reduces the available quantum of matters in which the judicial power can be exercised – the power to enact or alter rules of judicial procedure, practice, and policy is also available *to promote and enhance* the exercise of autonomous judicial judgment in matters before the national courts.

As I have said, the judicial power of independent, good-faith autonomous legal judgment is the one true power that the judiciary possesses. To be clear, however: the judicial power of "independent judgment" does not mean that the federal courts, including the Supreme Court, rightly may decide cases *any way they want*, or in accordance with *whatever criteria they choose to devise* (including arbitrary or lawless criteria or none at all). The courts are governed by law – the Constitution and other federal law, faithfully applied under correct criteria. The judicial power is not a power of arbitrary decision – of freedom to exercise raw power. Rather, promoting and furthering the judicial power of "independent judgment" means the enactment of measures designed to free the judiciary from false restraints or limiting doctrines – including ones devised by the courts themselves – in order to promote faithful decision in accordance with

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[16] Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey? 109 Yale L.J. 1535 (2000) (cited in footnote 1 and identified hereinafter as "*Abrogating*"). For a detailed discussion of Congress's constitutional power in these areas, see specifically pages 1567-1599 of that article. For a defense of Congress's power to prescribe certain interpretive rules of decision governing the federal judiciary, see Paulsen, *Checking the Court*, 10 N.Y.U. J. Law & Liberty at 90-100.

[17] For early congressional practice dating from the eighteenth century, see examples cited in Paulsen, *Abrogating*, 109 Yale L.J. at 1584-1585 (noting the Rules of Decision Act (1789), the Full Faith and Credit Act (1790), and the Anti-Injunction Act (1793)). For early judicial endorsement of broad congressional power in this area, see, e.g., *Wayman v. Southard*, 23 U.S. 1 (1825).

the Constitution and other federal law, unimpaired by limiting doctrines not required by the Constitution (and which may in fact sometimes be in conflict with it).

This is an important avenue for potential reform of the practices and procedures of the judiciary. And it is an avenue of true *reform – not interference* with core judicial power or weakening of the judiciary as an institution. Such measures would promote the proper exercise of judicial power in accordance with governing law. And they would facilitate the exercise of the core judicial power of independent judgment, by freeing from artificial constraint the exercise of independent judicial decision-making power. In sharp contrast with proposed measures that would limit the exercise of judicial power or that would alter judicial institutions themselves, removing doctrinal constraints on objective legal decision-making is not an interference with the judicial power. Quite the reverse. Such measures would enable and empower – liberate from unnecessary and unjustified limitation – the proper exercise of the judicial power of independent legal judgment.

1. For example, Congress possesses power to abrogate doctrines of judicial non-decision, such as non-constitutional "prudential" standing rules limiting who can maintain certain types of lawsuits, including bringing constitutional claims, in federal court.[18] Similarly, Congress can override or disapprove of the Court's various non-constitutional "abstention" doctrines – doctrines of decision-avoidance not required by the Constitution but crafted as a matter of judicial policy and practice. The Court itself has itself partially retreated from such doctrines, in several recent notable cases.[19] But the point is larger: To the extent such doctrines are not in fact required by the Constitution, but are instead creatures of judicial "policy" or purported "judicial restraint" only, they are subject to congressional control and displacement.

2. The same principle applies to the so-called "political question" doctrine. Sometimes, the Court purports to abjure decision on the merits of a constitutional question before it on the basis of this doctrine. A notable recent example of such a (purported) non-decision decision is *Rucho v. Common Cause*, where the Court employed the political question doctrine to deny claims for relief predicated on the assertion that "political gerrymandering" of election districts violates the Constitution.[20]

In my view, some decisions of the Court – perhaps many – nominally based on the political question doctrine are in fact more straightforwardly understood as decisions on the actual constitutional merits of the constitutional claim asserted. Where, for example, the Court concludes that an issue has been textually committed by the Constitution to a final determination or judgment of another branch of government, that judicial conclusion is more properly understood as an adjudication of the merits of the constitutional claim – an adjudication rejecting the claim for judicial relief that would invalidate the action of the political department(s) involved. Similarly, where the Court concludes that the Constitution supplies no judicially

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[18] Paulsen, *Abrogating*, 109 Yale L.J. at 1585-1586.

[19] *Lexmark Int'l, Inc. v. Static Control Components*, 572 U.S. 118 (2014) (indicating that "prudential" standing conflicts with constitutional obligation of courts to decide cases within their assigned jurisdiction); *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013) (limiting certain "abstention" doctrines); cf. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) (criticizing notions of "prudential ripeness").

[20] *Rucho v. Common Cause*, ___ U.S. ___, Slip op. No. 18-422 (June 27, 2019).

discoverable, manageable standards for resolving a constitutional claim, that judicial conclusion is also better understood as an adjudication of the merits – one rejecting the contention that the Constitution supplies a rule of law that would invalidate the action of the political actor(s) involved. (*Rucho* may well be a case of this description.) In part, therefore, the "political question" doctrine might simply be attaching a misleading label to what is in fact a substantive constitutional determination.

Other aspects of the "political question" doctrine appear to contemplate *judicial discretion to decide not to decide a case within its jurisdiction* for pure judicial-policy reasons of decision-avoidance. These include the supposed difficulty, embarrassment, political sensitivity, or practical consequences of a straightforward decision on the merits. In my view, these aspects of the political question doctrine clearly ought to be disapproved. Dismissal of a case on these grounds is simply decision contrary to law. These aspects of the political question doctrine assume the Constitution supplies a substantive rule, that that rule is fairly discernible by the judiciary, and that the Constitution's substantive rule is *not* that a particular political branch has discretion and final judgment as to the matter. Refusal to decide a case on the merits under such circumstances, simply for policy reasons, is improper. Congress has the power to disapprove such action and direct that the Court, where possessing and exercising jurisdiction to render independent judicial judgment in a case before it, must decide the case on its constitutional merits.

The exercise of statutorily granted *jurisdictional discretion* – for example, as with certiorari jurisdiction – is different: where Congress explicitly grants discretion as to jurisdiction, exercise of judicial power validly may be declined on that ground. But that does not in any way imply a general judicial power simply to refuse to decide cases within courts' assigned jurisdiction, where jurisdiction is mandated by statute (which, as noted above, is within the power of Congress to decide) or where a writ certiorari has been granted and is not dismissed in the exercise of statutory jurisdictional discretion. (A decision whether or not to exercise certiorari jurisdiction differs legally and often in result from a decision on "political question" grounds.)

I believe Congress may disapprove of all aspects of the political question doctrine and direct that cases within a federal court's assigned jurisdiction be decided straightforwardly on their merits. The federal judicial power does not entail a power to refuse to decide cases on policy grounds. This is most obviously true where Congress specifically directs the contrary. The Commission should embrace that principle and support proposals that would, as it were, "free up" the exercise of judicial power of independent judgment to decide cases, in accordance with governing law, by abolishing or significantly curtailing judicially invented doctrines of supposed judicial "restraint."[21]

[21] The Commission also should give serious consideration to endorsing measures that would free independent judicial judgment from the constraints of judicially devised rules of supposed interpretive "deference." Where such rules would lead the courts to decide cases in a manner *other than in accordance with their best understanding of the merits of the substantive legal question presented*, such rules, practically by definition, impair the faithful exercise of judicial power.

3. It is widely recognized that Congress has broad power to prescribe, subject to constitutional requirements of Due Process, the "law of judgments": that is, the preclusive res judicata (claim preclusion) or collateral estoppel (issue preclusion) effect that a final, valid adjudication in a former case will have in a subsequent case, against a party who lost a claim or issue in the earlier proceeding after having had a full and fair opportunity to litigate that claim or issue. Congress's power over the law of judgments includes as well matters of the scope to which a judgment, involving particular parties, properly extends. Some aspects of the law of judgments indeed involve constitutional requirements: A final judicial judgment, to be a final judgment, must have some minimum preclusive effect as against repeat litigation by a party in the initial proceeding. Likewise, due process forbids a judgment in one case from precluding re-litigation of issues of fact or law by persons who were not parties to the initial proceeding. Many other aspects of the law of judgments, however, are matters that Congress has authority to regulate by statute, as necessary and proper for carrying into execution the judicial power.

Congress has power to provide that a judicial judgment involving particular parties does not have general, prospective effect as to *everybody*, including non-parties. This is an important constitutional limitation on the judicial power and Congress rightly has power, under the Necessary and Proper Clause, to make such limitation explicit. (For constitutional reasons of the limitation of judgments, Congress cannot prescribe the reverse: it cannot specify that a judicial decision have general prospective effect as to non-parties.)

In practical terms, the power of Congress with respect to the law of judgments and remedies means that Congress may by statute prohibit so-called "nationwide injunctions" by federal courts, involving parties not before them.[22] Relatedly, and somewhat more technically, it means that Congress may by statute provide, much as the Supreme Court itself has said, that "nonmutual issue preclusion" does not apply to bar re-litigation of issues or facts by the national government in cases involving different parties.[23]

It also means that Congress may abrogate the non-constitutional judicial policy of stare decisis, to the extent that that judicial doctrine is thought to require or suggest that a judicial decision in one case has some or complete *binding* force, as opposed to persuasive force only, in a different case. The power of Congress to abrogate judicial doctrines of stare decisis is almost precisely analogous to the power of Congress to abrogate judicial doctrines of prudential standing and the political question doctrine. It is further supported by Congress's power over the law of judgments. Congress may enact such an abrogation either as a general proposition or specifically for a category or categories of cases and decisions.

For example, if the Commission (or Congress) is concerned in particular about the consequences of the so-called "shadow docket" of Supreme Court – decisions in cases or involving injunctions pending appeal, or granting or reversing temporary injunctions or stays in lower courts, or decisions rendered summarily, or without opinion, for example – it could specify that such decisions should possess no stare decisis effect with respect to subsequent cases, either of the Court itself, or of the lower courts (in the same or different matters), or both. The powers

[22] See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417 (2017).
[23] See *United States v. Mendoza*, 464 U.S. 154 (1984).

of Congress with respect to both the law of remedies and the law of judgments supports the constitutionality and propriety of such proposals.[24]

What unites all of these proposals is the unquestioned authority of Congress under the Necessary and Proper Clause to enact constitutionally appropriate laws for carrying into execution the judicial power to render independent judgment in accordance with governing law. All of the proposals I have mentioned in this last category involve freeing the exercise of autonomous judicial judgment from artificial and in some cases legally improper constraints. They are reforms that would not *impair* the exercise of judicial power by weakening the Supreme Court as an institution but *repair* doctrines and practices that inhibit and distort the judicial power to render independent judgment according to law.

* * *

I close this testimony with a brief recapitulation of my two major themes. First, the most important way to reform current judicial practice is *not* to weaken the Supreme Court as an institution but to reassert in principle the rightful roles of the other branches of the national government as fully co-ordinate and co-equal constitutional interpreters. The political branches are equal in authority and dignity to the Supreme Court on matters of constitutional interpretation, possess independent responsibility to the Constitution, and are legitimately empowered to "check" and "balance" the Court by exercising the constitutional powers at their disposal for doing so. Acknowledging this fundamental principle appropriately lowers the stakes attached to the Court's decisions and, by extension, to its membership and composition. It both makes reform proposals proper in concept and lessens the stakes involved in any particular proposal. It is appropriate and important, I believe, for the Commission to embrace this position, irrespective of any particular proposal for reform.

Second, and relatedly, the objective of proposed reforms should be to support, not impair, the proper exercise of judicial power by the Supreme Court as an institution and by the federal judiciary in general. This Commission should, in my view, embrace no proposed "reform" – even if constitutionally allowable – that would threaten permanently to weaken the Court as itself an independent constitutional interpreter capable of checking the other branches of government (and the states) through its exercise of the core judicial power of principled, faithful independent legal judgment.

In my opinion, this means abjuring proposals for term limits, staggered terms, or mandatory retirement ages, each of which would necessitate an inadvisable constitutional amendment. In my opinion, this means abjuring various "Court-packing" proposals for diluting the Court's strength by enlarging its membership, a step that once taken is not easily reversed and that would provoke an "arms race" of future Court-packing, further weakening the Court as an institution. While constitutionally permissible, such a step would be systemically regrettable. This principle also counsels caution in the exercise of Congress's undoubted, and broad, constitutional powers with respect to assigning and altering federal courts' jurisdiction. And

[24] See generally Paulsen, *Abrogating*, 109 Yale L. J. 1535 (developing this argument specifically with reference to the power of Congress to abrogate judge-made rules of stare decisis in some or in all cases).

finally, this principle suggests that the better proposals for reform are ones that enhance the legitimate autonomy of judicial decision by the federal courts and remove improper doctrinal barriers to its faithful exercise.