PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES

TESTIMONY OF WILLIAM G. ROSS

Introduction

My name is William G. Ross. I am the Albert P. Brewer Professor of Law and Ethics at the Cumberland School of Law of Samford University in Birmingham, Alabama, where I have taught since 1988. My courses include Constitutional Law and American Constitutional History.

I offer this testimony for two purposes. First, I will provide historical perspectives about various movements during the past two centuries to curtail the institutional powers of the United States Supreme Court and will explain why such movements have failed. Second, I will offer historical perspectives about pending legislation to increase the number of Supreme Court Justices and explain why I oppose such legislation.

I base my testimony upon my studies of organized efforts to change the political direction of the federal courts by curtailing or altering their institutional powers or enlarging the size of the Supreme Court. I have published several books and articles that address this subject, including *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (Princeton University Press, 1994). That book includes a chapter about President Franklin D. Roosevelt's ill-fated effort in 1937 to "pack" the Court by adding six Justices, an episode that I also analyzed in a chapter of another of my books, *The Chief Justiceship of Charles Evans Hughes, 1930-1941* (University of South Carolina Press, 2007). My other relevant publications include "The Resilience of *Marbury v. Madison: Why Judicial Review Has Survived by Many Attacks*, 38 *Wake Forest Law Review* 733-92 (2003) and "Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail," 50 *Buffalo Law Review* 483-612 (2002).

Court-curbing movements in American history and why they have failed

Judicial review has been a source of perennial controversy ever since *Marbury* v. *Madison*, the celebrated 1803 decision in which the U.S. Supreme Court established the principle that the Court could review the constitutionality of federal legislation, a doctrine that the Court later extended to state legislation and the decisions of state courts. Throughout the past two centuries, various persons and political movements have proposed a multitude of measures to curtail judicial review. These include bills to permit Congress to re-enact legislation that the Court has nullified; limit judicial review to decisions that have the support of a super-majority of Justices (ranging in various proposals from six to a unanimous nine); recall judicial decisions by popular vote (advocated mostly by former President Theodore Roosevelt in 1912); and create a "Court of the Union" consisting of all fifty state chief justices that could overturn the Supreme Court's decisions (a measure that generated much support among political conservatives during

the early 1960s). The most frequently and seriously considered proposal has been to deny the Court the power to adjudicate certain classes of cases pursuant to the Exceptions Clause of Article I, section 2, clause 1 of the Constitution, which allows Congress to make exceptions to federal jurisdiction. The Court acquiesced to a very narrow curtailment of its jurisdiction in *Ex parte McCardle* (1869), but the full limits of congressional power to abrogate or curtail the jurisdiction of the federal courts never have been tested.

In addition to attempting to curtail the Court's institutional powers, critics of judicial review also have proposed constitutional amendments to overturn various judicial decisions. Since the constitutional amendment process is so arduous, only a very few amendments have overturned specific decisions of the Court. Some critics of judicial review also have advocated constitutional amendments to limit the tenure of federal judges, to provide for election of federal judges, or to permit the recall of federal judges by popular vote. Although judges in most states are elected for limited terms and some states permit recall of judges, efforts to limit judicial power in these ways have foundered on respect for tradition, concerns about impairing judicial independence, and the practical difficulties of the constitutional amendment process. Impeachment of federal judges would be another method of discouraging judicial review, but the principle that judges may not be impeached for political reasons was established in 1805, when the Senate acquitted Justice Samuel Chase after the House had impeached him because of his intense Federalist partisanship. Another means of influencing judicial behavior is manipulating judicial compensation. Although Article I of the Constitution prohibits Congress from retaliating against federal judges by reducing their compensation while they are in office, Congress may freeze judicial salaries.

Opposition to judicial review has arisen on various points along the political spectrum. Opposition to judicial review first arose during the early 19th century among Jeffersonians, who objected to decisions aggrandizing the Court's power in relation to Congress and the President and its decisions increasing the power of the federal government in relation to the states. In 1857, after the Court in *Dred Scott* held that Congress could not prohibit slavery in the territories, many members of the newly formed Republican party questioned the scope of judicial review. From the late nineteenth century until 1937, proponents of economic regulatory legislation objected to the Court's occasional nullification of statutes that were intended to ameliorate problems caused by the nation's rapid industrialization. During this same period, labor unions opposed judicial decisions that interfered with the efforts of unions to engage in various activities that promoted the interests of organized labor. Frustrated by these decisions, progressives and labor unions proposed various measures to curtail judicial review, particularly legislation to permit Congress to overturn judicial decisions, and legislation to require super-majorities of Justices to invalidate federal and state legislation. During the 1950s and 1960s, criticism of judicial review erupted on the right side of the political spectrum in response to the Warren Court's decisions protecting the rights of African Americans, criminal defendants, and political radicals, as well as its rulings regarding prayer and Bible reading in the public schools and its reapportionment decisions, which required equal population in voting districts ("one person, one vote").

Since the Court during the past half century has not, at least until very recently, been dominated by either political conservatives or liberals, criticism of the Court since 1970 has become more diffuse, and there has been a diminution of efforts to curtail judicial review. Critics of specific decisions or series of decisions have increasingly tended to believe that judicial review has become such an integral part of the American political and constitutional system that its curtailment is impracticable. Since opposition to judicial review has always tended to be more instrumental than principled, the critics of the Court's exercises of judicial review have increasingly recognized that judicial review could favor their political causes if the Court were dominated by Justices who shared their own political views. Rather than trying to curtail judicial review, political activists across the political spectrum since the 1970s have tried to influence the federal judicial selection process. The confirmation process for federal judges, particularly Supreme Court justices, has consequently become increasingly contentious. The vetting of candidates by the President has become more careful, the hearings on nominees have become increasingly protracted and tumultuous, and a growing number of senators have voted against the nominees of the opposing political party.

There are many reasons why Court-curbing movements have failed. Here is a list of the major reasons:

1. *Institutional obstacles*: The arduousness of the constitutional amendment process, which requires concurrence of two-thirds of both houses of Congress and three-quarters of state legislatures, explains why so few judicial decisions have been overturned by constitutional amendment. It likewise explains why proposals for election of federal judges and limitation of the length of their tenure never have made serious headway. The lack of need for a constitutional amendment to strip federal courts of jurisdiction pursuant to the Exceptions Clause helps to explain why bills are introduced in virtually every session of Congress to curtail federal jurisdiction over certain classes of controversial issues. It also helps to explain why Court-packing proposals presently are in vogue since changing the size of the Court does not require a constitutional amendment.

2. *Divisions among critics of judicial review regarding remedies*: Critics of the ways in which the Supreme Court has exercised judicial review often have failed to unite in support of a single remedy, particularly because such critics often disagree about whether to curb the Court's institutional powers or merely to try to place different kinds of Justices on the Court. This fissure was one of the major reasons for the failure of Roosevelt's Court-packing plan in 1937, which did not satisfy many longtime critics of judicial review because it did not curtail the Court's institutional powers. Although there is less criticism of judicial review itself today than there was in 1937, some critics of a "conservative" Court may prefer more fundamental and less overtly political alternatives, such as limitations on tenure or constitutional amendments to embody various progressive reforms.

3. *Reluctance of the Court's critics to transfer power to Congress, the President, or the states*: Throughout the past two centuries, even many of the Court's harshest critics have expressed reluctance to curb the Court's powers in ways that would increase the powers of the other two branches of the federal government or the states. Despite the Court's many unpopular decisions, there has been widespread agreement that the Court is more protective of fundamental rights and the interests of racial, ethnic, and religious minorities than are the President, Congress, or state governments.

4. *Broad harmony between the Court's decisions and public opinion*: Despite its many controversial decisions, the Court generally has not strayed far from the general political consensus on major issues. This is hardly surprising since Justices are nominated by presidents and confirmed by senators who are broadly representative of public opinion, or they could not have won election. Justices themselves, moreover, are citizens who are influenced by changing social, political, and economic attitudes and therefore are likely to modify their views in accordance with broad currents of change in society. Furthermore, the Justices are keenly aware that any sustained and significant departure from broad political consensus could provoke serious and perhaps successful efforts to curb the Court's institutional powers, which Justices, especially Chief Justices, have jealously and carefully guarded. Perennial proposals for curbing the Court's powers or altering its composition therefore may serve a useful purpose by reminding the Justices that their powers could be curtailed or diluted if they depart too far from prevailing public opinion.

5. *The Court's flexibility in transforming or adapting its decisions to conform to public opinion*: Closely related to the Court's broad harmony with public opinion is its deliberate flexibility in transforming or adapting its decisions to conform to broad public consensus on major issues. At times when criticism of the Court has been particularly harsh, the Court often has ameliorated hostility by rendering decisions that have placated public opinion. This occurred during the 1920s, when the Court handed down significant civil liberties decisions that muted criticism of its decisions striking down economic regulatory legislation, and it happened again in 1937, when the Court sustained the constitutionality of major New Deal legislation in the wake of Roosevelt's Court-packing plan.

6. *Absence of principled opposition to judicial review*: Most Court-curbing movements have suffered from the widespread and usually accurate public perception that they are motivated by short-term political goals rather than by objective and principled opposition to the power of an unelected federal judiciary. This perception has been validated by the many times in which harsh critics of judicial review have turned into proponents of a strong judiciary once the federal courts have altered their ideological or political direction. One of the major reasons for the failure of Roosevelt's Court-packing plan was the general perception that Roosevelt's motives were entirely instrumental and provided no principled basis for curtailing possible abuses of judicial power.

7. *Organized defenses of judicial review by political and economic elites*: Elite lawyers, prestigious bar associations, judges, journalists, and academicians have helped to frustrate past efforts to curtail judicial power. The recent criticisms of Court-packing by the late Justice Ruth Bader Ginsburg and Justice Stephen J. Breyer are examples of the kind of opposition that Court-packing legislation is likely to encounter even among progressives such as Ginsburg and Breyer.

8. *Recognition by the Court's critics that the Court can be an ally*: Efforts to curtail judicial review also have failed because critics of the Court have perceived that a powerful judiciary can help to serve their own ends. This is one of the reasons why critics of the Court's decisions during the past half century have directed their energies toward influencing the judicial selection process and perhaps is one of the reasons why Court-packing rather than Court-curbing has emerged as the favored expedient among present-day progressives who fear a Court that increasingly is dominated by conservatives.

9. *Absence of monolithic opposition to judicial decisions*: Relatively few critics of the Court even during the most intense periods of Court-curbing proposals have opposed all or even most of its decisions. Despite the apparent growth of political polarization during recent years, the Court has handed down both "liberal" and "conservative" decisions and often displayed as high level of consensus, as it did in many ways during its most recent term. Americans who agree with at least some of the Court's decisions are unlikely to favor efforts to curtail judicial power or to manipulate the Court's size for political reasons.

10. *The widespread, profound, and enduring public respect for the federal courts, particularly the Supreme Court*: Perhaps the major reason for the resilience of judicial review is that federal courts enjoy a deep reservoir of respect among a broad base of the American people. The federal courts are widely perceived as the most reliable bastions for protecting civil liberties and they are regarded as a balance wheel for providing the ultimate mediation of conflicting social, economic, and political viewpoints in a highly pluralistic society.

Proposals to increase the number of U. S. Supreme Court Justices

As is explained in the previous section, the recent proposals for increasing the number of Justices are consistent with the tendency of the Court's critics during the past fifty years to influence the Court's decisions without curtailing its institutional powers.

This expedient does not require a constitutional amendment since the Constitution allows Congress to establish the number of Justices. The Court's size has ranged from five to ten, and has been set at nine Justice since 1837, except for the period from 1863 to 1869, when there were ten. The most serious effort to "pack" the Court occurred in 1937, when President Franklin D. Roosevelt proposed adding six Justices to the Court. Since the Court had recently invalidated several of his "New Deal" measures extending the scope of economic regulatory legislation, Roosevelt believed that the addition of these Justices was necessary to ensure the Court's approval of Social Security Act, including both its old age pension and unemployment

compensation provisions, and the National Labor Relations Act, which was designed to help resolve to labor-management disputes during a time of widespread strikes and other industrial turmoil. Roosevelt's proposal ignited a firestorm of controversy and was widely regarded as an assault on judicial impendence and was opposed even by many of Roosevelt's most ardent supporters. Court packing did not emerge again as a subject of public discussion until some Democrats began to advocate it during the 2020 political campaign.

Since the possibility of increasing the number of Justices has become a subject of significant public discussion during the past year and is embodied in legislation pending in the House and Senate to add four Justices to the Court, I believe that President Biden is wise to have formed this Commission to study this issue. Consideration of these proposals by a nonpartisan commission is a temperate alternative to initiating discussion in the hurly burly of congressional hearings. Even if President Biden ultimately favors at least some form of Court packing, his appointment of a commission may spare him from the harsh criticism Roosevelt received for unleashing his Court packing plan as a thunderbolt of a surprise, without having consulted anyone other than his closest advisors and without having given any hint of what he was planning. If Biden does not support proposals to increase the number of Justices, as he would need to do if Court packing legislation were to have any chance of success, he could rightly claim that he had given the idea fair consideration through his appointment of this Commission.

Increasing the Court's size for political reasons would undermine judicial independence and interfere with separation of powers since it would allow the President and Congress to manipulate the outcome of judicial decisions by appointing additional Justices who would be expected to conform to the political predilections of the President and his or her party. Moreover, the prospect of legislation to permit the appointment of even more Justices if the Court's decisions did not placate the President and his supporters might intimidate the Court so much that it might influence its decisions.

The Court's independence from political pressure and intimidation has helped to ensure its ability to protect the civil liberties of Americans in countless cases involving racial, religious, political, and ethnic minorities whose rights were ignored or impugned by Congress, the President, and state governments. Similarly, the Court, on the whole and with some important exceptions, has protected liberty of speech, press, religion, and assembly more faithfully than have the President, Congress, or the three branches of state governments.

A politically motivated increase in the number of Justices also could erode public respect for the Court since it would exacerbate the growing tendency of Americans to believe that the Court's decisions are guided by political prejudices rather than constitutional principles. As members of this Commission presumably know, Justice Ruth Bader Ginsburg expressed this fear only a few weeks before her death last year, as did Justice Stephen J. Breyer during a speech at Harvard Law School earlier this year.

Advocates of increasing the Court's size claim that appointment of more Justices by a Democratic president would restore balance to a Court that so-called "conservatives" have hijacked and that the need for Court packing is particularly compelling if Democrats succeed in enacting even part of their raft of controversial legislation, most of which presumably would be challenged on constitutional grounds. Indeed, various advocates of increasing the Court's size insist that additional Justices would "unpack" a Court that presently is "packed" with right-leaning Justices. Since none of the six "conservative" Justices are particularly old by Supreme Court standards, with the partial exception of 73-year old Clarence Thomas, Biden is not likely to have an opportunity to replace any of these Justices during his term.

I fear whether and how Court packing would end once it began. If, for example, Democrats were able to obtain a "liberal" majority on the Court by appointing four more Justices as a result of increasing the Court's size and Republicans won control of the presidency and the Senate in 2024, would the next President appoint another four Justices to restore a "conservative" majority? Such on-going Court packing therefore could hoist Court packing advocates on their own petard, for future "conservative" Presidents could pack the Court with Justices whose ideologies could be anathema to the Democrats who are presently advocating Court packing.

Tampering with the size of the Court also is ill-advised since a nine-member Court is deeply rooted in tradition. The long tradition of nine Justices is based upon important practical considerations. Justices and legal scholars have tended to agree that nine is the ideal size for the Court since it is large enough to distribute the Court's heavy workload and provide a range of viewpoints, while small enough to promote collegiality and close deliberation. Increasing the Court's size could impair the Court's ability to function effectively. In particular, the addition of Justices would provide individual Justices with less time and opportunity to ask questions during oral arguments and to participate in the Court's post-argument conferences to discuss cases. Although the length of arguments and conferences could be extended, dragging them out in this manner could dilute the quality of analysis. When Roosevelt disingenuously attempted to disguise the political nature of his proposal to add six additional Justices in 1937 by claiming that the six Justices who were older than seventy were overworked and could use additional assistance, Chief Justice Charles Evans Hughes publicly torpedoed Roosevelt's claim. In a letter to Senator Burton K. Wheeler of Montana, Hughes declared that more Justices would impair the Court's efficiency. "There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide. The present number of justices is…large enough so far as the prompt, adequate, and efficient conduct of the work is concerned," Hughes wrote. Nine Justices today presumably may work more even effectively without additional help than they could have in 1937 since Justices now have many more resources at their disposal, including four law clerks rather than one and an array of modern technologies.

Although advocates of Court packing contend that the Court's new "conservative" majority should not frustrate the programs of the other two branches of government, it is the very role of the Court to filter political agendas through a constitutional lens. If the Court naturally

worked in tandem with the President, the Congress, and state governments, there would be little need for the Court. In a speech a month after he announced his Court packing plan, Roosevelt offended many Americans by comparing the three branches of government to three plough horses, explaining that the government cannot function effectively if all three branches do not work in unison, just as three horses cannot plough a field if one horse does not cooperate with the other two. Roosevelt's critics pointed out that this represented a fundamental misunderstanding of the Court's role. Advocates of today's Court packing proposal similarly need to appreciate that tethering the Court to the President and Congress contravenes fundamental concepts of separation of powers.

Efforts to increase the number of Justices at the present time are particularly brazen in their partisanship insofar as the Court is not monolithically "conservative" even though Ginsburg's replacement with Amy Coney Barrett presumably shifted the Court to the right, and at least to some extent disrupts the four-to-four-to-one balance that had prevailed on the Court for more than four decades. Indeed, there has been no significant liberal/conservative dichotomy in many of the Court's most recent decisions. During its most recent term, for example, the Court sustained the constitutionality of the Affordable Care Act for the third time, albeit on narrow grounds, by a vote of seven to two. The Court was unanimous in its recent decision protecting constitutional rights of high school students to engage in off-campus speech. And Chief Justice Roberts and Neil Gorsuch joined the Court's decision last year to interpret the Civil Rights Act of 1964 in a way that extends its protections to gays.

From a partisan standpoint, Roosevelt arguably had more compelling reasons for wanting to pack the Court in 1937 than do today's advocates of Court packing. When Roosevelt announced his plan on February 5, 1937, the Court was on the verge of deciding cases involving the constitutionality of both the old age and unemployment compensation provisions of the Social Security Act of 1935 and the National Labor Relations Act. Decisions of the Court in analogous cases striking down economic regulatory legislation during the past two years provided strong indications that the Court would strike down these statutes by at least a five-to-four vote. The Social Security Act was a more monumental statute than any legislation that is likely to come before the Court during the Biden Administration, and the National Labor Relations Act was at least as important as any statute that Congress is likely to enact during the next few years. During the past eighty years, the old age pension provisions of the Social Security Act have spared tens of millions of elderly Americans from destitution, while the unemployment compensation features of the legislation have rescued tens of millions of workers and their families from impoverishment during periods of unemployment. The National Labor Relations Act has gone far toward ameliorating the industrial turmoil that roiled the United States throughout the Great Depression and threatened the nation with economic and political chaos.

Faced with a high probability of the nullification of these cornerstones of his New Deal, it is not surprising that Roosevelt would have resorted to a radical expedient to rescue this legislation. Roosevelt also reasonably feared that the Court would stymie additional measures he

intended to propose, including those included in what became the Fair Labor Standards Act of 1938, which established minimum wages and prohibited the most egregious forms of child labor. Although Roosevelt considered seeking a constitutional amendment to expand the power of Congress to enact economic regulatory legislation, he regarded the prospects of such an amendment as too hazardous since it would have necessitated a constitutional amendment, requiring two-thirds approval by both houses of Congress and the assent of three-quarters of the state legislatures.

The Supreme Court itself helped to defeat Roosevelt's Court packing plan by sustaining important regulatory measures, including both the old age and unemployment compensation provisions of the Social Security Act and the National Labor Relations Act, while the Senate Judiciary Committee was deliberating on the plan. Most of these decisions were five-to-four, with Justice Owen Roberts tipping the Court's balance, just as he had cast deciding votes in opposition to similar statutes during the previous two years. Historians continue to disagree about the extent to which the Court packing plan influenced Roberts and Chief Justice Hughes, who like Roberts seemed to become markedly more receptive to the constitutionality of regulatory legislation after Roosevelt announced his plan. Even if no Justices were specifically intimidated by the Court packing plan, it is not surprising that a majority of the Justices eventually tilted in favor of sustaining New Deal legislation, for Justices are more sensitive to public opinion than they usually care to admit. Keenly aware that the Court has, as Alexander Hamilton pointed out, "no influence over either the sword or the purse," Justices recognize that their power ultimately depends upon the support of the President, Congress, state governments, and the American people. Even if today's Court seems to tilt toward the right, the Court ultimately is unlikely to stray very far for very long outside of the political mainstream. It never has.

It is a fallacy to suppose that the Democratic victories in the 2020 election provide any mandate for a "liberal" Court insofar Democratic voters do not necessarily have views that align with one bloc or the other on the Court. Although seven or eight members of the Court during most times for the past several decades have mirrored the positions of the Republican or Democratic parties to a degree that is astonishing, the political views of most Americans presumably are more eclectic. Most persons I know agree sometimes with the liberal Justices and sometimes with the conservatives, regardless of their general political inclinations or partisan preferences. This makes sense since the bundle of positions espoused by both parties have little internal logic and are largely dictated by the interest groups that support those parties.

One way to reform the Court without packing it or altering its institutional powers would be to enact a constitutional amendment limiting the terms of Justices and/or providing a mandatory retirement age. Although these measures arguably could interfere with judicial independence, they are less likely than Court packing to damage the Court's integrity. These perennial proposals for limitations on tenure have received somewhat more attention than usual during the past few years, but Court packing seems more appealing to critics of the Court because it is a quick political fix.

Today's Court packing proposals jeopardize the Court's integrity and independence no less than did Roosevelt's plan in 1937. As in 1937, Americans today of all political persuasions should oppose such political interference with the Court.