

IMPORTANT NOTE ON THESE DISCUSSION MATERIALS

The following are discussion materials on MEMBERSHIP AND SIZE OF THE COURT assembled solely for deliberation by the President's Commission on the Supreme Court of the United States. Each set of discussion materials was prepared by a working group for the Commission's use in studying and deliberating on the issues identified in Executive Order 14023.

These materials attempt to set forth the broad range of arguments that have been made in the course of the public debate over reform of the Supreme Court. They were designed to be inclusive in their discussion of these arguments to assist the Commission in robust, wide-ranging deliberations.

The inclusion of particular arguments in these draft materials does not constitute a Commission endorsement or rejection of any of them, and specific points of analysis or particular perspectives appearing in the drafts should not be understood to reflect the Commission's views or those of any particular Commissioner. Consistent with Executive Order 14023, the Commission includes members with diverse perspectives on these issues. Commissioners therefore can be expected to hold various and even strongly opposing views, which will be the subject of deliberation at the public meeting scheduled for October 15.

The Commission will post a draft Report for deliberation, in advance of its next public meeting.

MEMBERSHIP AND SIZE OF THE COURT

Introduction

The Nation has recently witnessed sustained, widespread, and vehement calls for structural reform of the Supreme Court, as well as counter arguments to “keep nine.”¹ The calls for Court expansion stem most immediately from the Senate’s refusal to act on President Obama’s nomination of Judge Garland to the Supreme Court and from its confirmation of President Trump’s three Supreme Court nominees. Many Democrats deeply contested—for varied reasons—the legitimacy of each of these three successive nominations to the Supreme Court. Some also increasingly question the legitimacy of the Court itself and what they regard as the anti-democratic, anti-egalitarian tilt of its doctrines. The assorted controversies, both procedural and substantive, that have surrounded the Court and its composition in recent years have led to calls from significant segments of the Democratic Party for reform of the Court. These arguments for structural reform, and particularly for Court expansion—a notion that not-so-long ago was absent from debates about the Supreme Court—have now become commonplace. Yet defenders of the current Court and its composition hold very different views of the recent confirmations, the evolution of the Court’s jurisprudence, and the propriety and necessity of structural reform. In their view, the recent nominations appropriately reflect the result of electoral successes, and the changing doctrine represents a principled approach to constitutional interpretation. Meanwhile, even some Democratic critics of the Court oppose expansion, warning that any attempt to expand the Court or otherwise alter its structure would threaten the independence of the Court and its role in the constitutional system.

In this Chapter, we focus first on the calls for Court expansion. In Part I, we provide a detailed account of the recent events that have spurred calls for Court expansion and delineate some of the principal arguments made in favor of and against expansion. In Part II, we examine past efforts to expand or contract the size of the Court, which occurred throughout the nineteenth century and perhaps most famously during the New Deal era. Part III builds on this historical analysis to evaluate current proposals to expand the Supreme Court, with an emphasis on whether such a reform would protect the Court’s legitimacy or advance democratic values. We also offer a comparative lens, examining how states and foreign countries opt to structure their courts of last resort, and how expansion of the U.S. Supreme Court might influence or be interpreted in struggles elsewhere in the world. Finally, in Part IV, we consider other proposals to restructure the Supreme Court.

I. The Calls for Court Expansion

In recent times, arguments to expand the Supreme Court have been relatively rare, but not nonexistent.² In 2017, an academic's call for congressional Republicans to expand the lower federal courts spurred an historian of President Roosevelt's court-packing plan to worry that President Trump would adopt such a proposal.³ But events surrounding the last three nominations to the Supreme Court have precipitated major controversy and sparked much more widespread calls for expansion of the Court, this time largely from some Democrats.

A. *Timeline of Recent Events*

1. *2016-2017: The Scalia Vacancy*

Justice Scalia died unexpectedly on February 13, 2016, 269 days—more than 38 weeks—before the 2016 presidential election. President Obama nominated Judge Garland to succeed Justice Scalia in March 2016. Judge Garland's distinguished judicial career garnered praise from Democrats and Republicans alike.⁴ Nevertheless, the Senate held neither a hearing nor a vote on his nomination. The Senate's fifty-one Republican Senators had decided not to proceed on a nomination, before Judge Garland was named, in order to allow the seat to remain vacant until after the next presidential election.⁵

Senate Majority Leader Mitch McConnell was the first to call upon the Senate not to act on the vacancy during the election year, invoking arguments about the need for the electorate to be heard. On the evening of Justice Scalia's death, he issued a press release stating that the "American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President."⁶ On that same day, Senator Chuck Grassley, chairman of the Senate Judiciary Committee, remarked that "it's been standard practice over the last 80 years to not confirm Supreme Court nominees during a presidential election year. . . . [I]t only makes sense that we defer to the American people who will elect a new president to select the next Supreme Court Justice."⁷

Days later, Senators McConnell and Grassley published an op-ed reiterating this call for election-year inaction: "Given that we are in the midst of the presidential election process," they wrote, "we believe that the American people should seize the opportunity to weigh in on whom they trust to nominate the next person for a lifetime appointment to the Supreme Court."⁸ On February 23, the Senate Judiciary Committee's Republican members issued a public letter declaring that the Committee would not act on a nomination for the vacant seat, because "the American people are presented with an exceedingly rare opportunity to decide, in a very real and concrete way, the direction the Court will take over the next generation. We believe The People should have this opportunity."⁹ This became the unanimous position of the Senate Republican majority.¹⁰

The McConnell-Grassley op-ed and the Republican Senators' February 23 letter also noted that the White House and the Senate were controlled by different political parties. The February 23 letter, for example, observed that "[n]ot since 1932 has the Senate confirmed in a presidential election year a Supreme Court nominee to a vacancy arising in that year," before further noting that "it is necessary to go back even further—to 1888—in order to find an election-year nominee who was nominated and confirmed under divided government, as we have now." Republicans also repeatedly invoked then-Vice President Biden's own remarks, as a Senator in 1992, that the Senate has a tradition of withholding action on any nominations for Court vacancies during presidential election years.¹¹ The Republicans branded this "the Biden Rule," though Biden himself labeled this claim a distortion of his actual views.¹²

While the Senate Republicans announced their position in broad terms—that "our decision is based on constitutional principle"¹³—the identification or statement of the principle varied. Republican Senators' statements in 2016 sometimes invoked the fact of divided government,¹⁴ and sometimes cast their inaction in terms of a categorical rule against proceeding on Supreme Court nominations for vacancies that occur during an election year per se.¹⁵ At least one GOP Senator expressly rejected the notion that party alignment of the Senate and the White House mattered for election year vacancies at the Supreme Court.¹⁶ The precise terms of the Republican Senators' argument for delay—the extent and limit of the principle they were asserting—would be contested four years later, as we explain below.

These debates unfolded against the backdrop of broader arguments about whether the Senate is obligated to act on Supreme Court nominations, either as a matter of constitutional text or as a matter of institutional norms. They also unfolded as Donald Trump, then a presidential candidate, publicly announced a series of lists of prospective Supreme Court nominees that had been produced with help from members of the Federalist Society and the Heritage Foundation.¹⁷ The Supreme Court became one of the foremost issues of the 2016 presidential campaign, and the seat remained vacant until after the election.

In early 2017, President Trump successfully appointed Justice Gorsuch, with the Senate's advice and consent. Many Democrats viewed Justice Gorsuch's seat as having been "stolen"¹⁸ from Judge Garland and therefore deemed Justice Gorsuch's appointment "illegitimate."¹⁹ Prominent critics decried the Senate Republicans' thwarting of the Garland nomination as "outrageous,"²⁰ "unconscionable,"²¹ "disgraceful,"²² and "shameful."²³ Congressional Republicans just as vehemently dismissed these critiques.²⁴

2. 2018: The Kennedy Vacancy

On June 27, 2018, Justice Kennedy announced that he would retire from active service on the Court. On July 9, President Trump announced the nomination of Judge Kavanaugh to succeed him. These events and Justice Kavanaugh's eventual confirmation became an extraordinarily controversial moment in the history of the Supreme Court—one that, for many, deepened what they believed was a legitimacy crisis already brewing from the confirmation battles of the previous two years.²⁵

Justice Kennedy long had been seen as the median Justice on a closely divided Court. So as a matter of substantive constitutional law, Justice Kavanaugh's appointment was received by proponents and critics alike as a moment of significant jurisprudential shift for the Court. But his critics also eventually leveled a variety of criticisms of the confirmation process itself, arguing that then-Judge Kavanaugh's responses to Democratic Senators' questions about sexual-assault allegations by Dr. Christine Blasey Ford displayed overt partisanship and an unbecoming judicial temperament;²⁶ that the FBI failed to investigate adequately those allegations;²⁷ and that Justice Kavanaugh had committed perjury in answering questions under oath during the course of the committee hearings.²⁸ His supporters, meanwhile, criticized the allegations against him as lacking evidentiary support, and they also sharply criticized Senate Democrats for their handling of the Blasey Ford allegations specifically and the committee proceedings more generally.²⁹ Ultimately, the full Senate voted in favor of his nomination on October 6 by a narrow margin of 50-48, one of the closest confirmations in American history.³⁰

3. 2020: *The Ginsburg Vacancy*

Justice Ginsburg died after a sustained struggle with cancer on September 18, 2020, 46 days before the upcoming presidential election. In response, Democrats invoked Senator McConnell's concerns from 2016 about the dangers and impropriety of filling a Supreme Court seat during an election year; they emphasized that Justice Ginsburg's death created a Court vacancy significantly closer to the upcoming presidential election than occurred upon Justice Scalia's death; and they questioned the wisdom of any such rush to judgment. However, Senator McConnell greeted the news of Justice Ginsburg's death by announcing immediately that "President Trump's nominee will receive a vote on the floor of the United States Senate."³¹ In his press release, Senator McConnell distinguished the 2020 vacancy from the 2016 vacancy by emphasizing that this time, unlike last time, the Senate and the White House were controlled by the same political party.

President Trump nominated Judge Barrett, on September 26, to succeed Justice Ginsburg. She received a Senate Judiciary Committee hearing just two and a half weeks later. Much attention was focused on the difference between the two jurists' respective approaches to constitutional interpretation and what the difference might portend for significant Supreme Court doctrines and the human consequences of those doctrines. But substantial debate also surrounded Senate Republicans' efforts to distinguish their arguments for inaction in 2016 from their arguments for action in 2020.

Republican Senators and their proponents highlighted statements from 2016 in which they had observed that the Senate and White House were controlled by different parties. Their critics, in turn, highlighted statements from 2016 in which the Republicans had argued against Senate action on election-year vacancies per se, especially Republican references to the 1992 “Biden Rule.”³² On September 19, the Senate Judiciary Committee’s Democratic members issued a letter urging Senator Lindsey Graham to commit publicly that he would not consider a nominee to fill Justice Ginsburg’s seat until after the election.³³ They quoted Senator Graham’s statement in 2016, in which he encouraged political opponents to “use [his] words against [him]” and said: “If there’s a Republican president in 2016 and a vacancy occurs in the last year of the first term, you can say Lindsey Graham said let’s let the next president, whoever it might be, make that nomination.”³⁴ The Senate Democrats declared, “There cannot be one set of rules for a Republican President and one set for a Democratic President.”³⁵ The Democrats’ argument seemed to focus not only on hypocrisy—changed positions are typical in politics—but also on the extraordinary importance of the issue in both 2016 and 2020: a vacant seat on a narrowly divided Supreme Court.³⁶ In response to the charges of hypocrisy, Republicans contended that their 2016 and 2020 positions could be reconciled because their 2016 inaction was justified by divided government, while their 2020 action was justified by the lack of divided government.³⁷

By the time the full Senate voted to give its advice and consent to Justice Barrett’s appointment, on October 26, the debates surrounding the Senate’s handling of her nomination and Judge Garland’s nomination had given rise to a broader debate about whether the Court should be reformed or expanded in response.

B. Growing Calls for Structural Reform

Even after Republican Senators refused to act on the Garland nomination and eventually confirmed Justice Gorsuch instead, Democratic critics who accused Republicans of “stealing” a Supreme Court seat largely refrained from calling for Democrats to retaliate with a Court expansion plan. Indeed, references to “Court packing” consisted primarily of arguments that Republicans themselves had in fact “packed the courts” by refusing to act on the Garland nomination and by moving swiftly to confirm President Trump’s nominations to the lower federal courts.³⁸ That said, prominent figures in the Democratic Party did argue as early as 2019 that the Republican Senators’ decision not to act on the Garland nomination might justify Court expansion at the first opportunity.³⁹

Calls for Democrats to expand the size of the Court first appeared in substantial numbers upon Justice Kennedy's announcement of his retirement in the summer of 2018, and they increased in late 2020 when Senate Republicans confirmed Justice Barrett to fill the vacancy that arose less than two months before a presidential election.⁴⁰ Indeed, even before the Senate acted on Justice Barrett's nomination, the *New York Times* reported that "the idea of expanding the Supreme Court" had "caught fire among some Democrats" upon news of Justice Ginsburg's death.⁴¹ Public discussion of Court expansion surged noticeably between 2019 and 2020. In 2020, more than 400 articles appeared in the *New York Times*, *Wall Street Journal*, *Washington Post*, and *USA Today* invoking the term "Court packing" in the context of the Supreme Court, in contrast to approximately 100 articles in 2019. In addition to greater media coverage, the topic of Court reform also captured the public's attention during that period. Google Trends, which captures patterns in Google search queries, recorded dramatic spikes in searches for "Court packing" and related terms between Justice Ginsburg's death and Justice Barrett's confirmation.⁴²

Supreme Court reform also became a pivotal topic in the 2020 Democratic primary, as several Democratic candidates endorsed significant reforms.⁴³ The Democratic Party Platform ultimately called for "structural court reforms to increase transparency and accountability,"⁴⁴ and then-candidates Trump and Biden debated the merits of Court expansion.⁴⁵

We evaluate the increasingly emphatic calls for Court expansion, as well as the resistance to it, in detail in Part III of this Chapter. Some proponents of Court expansion have argued that the addition of new seats to the Supreme Court, at the next opportunity, by a Democratic President and Congress, is necessary to restore the Supreme Court's legitimacy. Some proponents regard it as necessary to safeguard the Constitution. Expansion would be justified, in part, in light of Senate Republicans' handling of the election-year nominations of Judge Garland and Justice Barrett. But calls for Court expansion have not only been products of the contentious appointment process; they have also been fueled by Democrats' concerns that an increasingly conservative Court presents a threat to the progressive conception of the Constitution across a range of issues, including firearms,⁴⁶ reproductive rights,⁴⁷ LGBTQ rights,⁴⁸ voting rights,⁴⁹ health care, climate change, and affirmative action.⁵⁰ This movement in the Court's jurisprudence, some critics contend, is out of step with the views of the American public. Other critics regard these developments as threats to the health and viability of American democracy, contending that judicial doctrines related to voting rights and other matters central to the democratic process threaten to give outsized power over the future of the presidency and therefore the Court to one political party.⁵¹ However, opponents of Court expansion reject each of these arguments. In their view, the composition of the Court properly reflects electoral success under the republican system of government established by the Constitution and to suggest otherwise flouts that system and undermines the legitimacy of a critical institution within it.

II. History: Size of the Supreme Court

Although debates about Court expansion and restructuring have become increasingly salient in recent years, there is a long history of similar disputes earlier in U.S. history. Congress has repeatedly contracted or expanded the size of the Supreme Court. This section details that history. And as we explain further in Section III.A of this Chapter, this history powerfully suggests that altering the size of the Court long has been understood to be within Congress's power, though it also underscores the political and practical problems with proposals to expand the Court.

A. Nineteenth-Century Changes to the Court's Size

Article III provides that the “judicial Power of the United States, shall be vested in one supreme Court.”⁵² But the constitutional text does not specify how many judges should be on that Court. Congress on several occasions in the country's first century altered the size of the Court. In 1789, Congress fixed the size of the Court at six members.⁵³ But a decade later, Congress began to make changes. After Thomas Jefferson defeated John Adams for the presidency in 1800, but before the newly-elected President Jefferson took office, the outgoing Federalist Congress in 1801 reduced the Court's future size to five members.⁵⁴ (The Federalists did not terminate the position of any existing Justice; the law provided that, whenever the next Justice left the Court, the vacancy would not be filled.) In 1802, the new Democratic Republican Congress then repealed that 1801 law and restored the Court to six members.⁵⁵ In 1807, Congress added one Justice to increase the size to seven members,⁵⁶ and in 1837, Congress expanded the size to nine members.⁵⁷

Each reform seems to have been motivated by a mix of institutional and political concerns. During the early years of the Court, each Justice had two duties: both to sit on the Supreme Court and to serve as a judge on a lower federal court (a practice known as “circuit riding”).⁵⁸ In 1789, Congress created a six-member Supreme Court so that each Justice could serve on one of the six federal circuits. But over the next several decades, as the country grew in size, it became clear that more judges were needed, particularly in newly admitted states such as Kentucky, Tennessee, and Ohio, and (later) Louisiana, Illinois, Alabama, and Missouri.⁵⁹ So in 1807, Congress added a seventh circuit, and in 1837, an eighth and a ninth circuit. Each time, Congress expanded the size of the Supreme Court accordingly.⁶⁰ These expansions served an institutional purpose: providing sufficient judicial machinery for a growing nation. But each expansion also served the interests of a political party. In 1807, the Democratic Republicans controlled Congress and trusted their party leader—President Jefferson—to appoint the seventh Justice. In 1837, the Democrats who controlled Congress had similar confidence in their party leader President Andrew Jackson.⁶¹

The reforms in 1801 and 1802 can also be explained by a mix of institutional and political concerns (although, here, partisan motives seemed to have predominated). In 1801, the Federalist Congress temporarily ended circuit riding,⁶² and so its reduction of the Court to five Justices could have been justified by the fact that the Court could now function effectively with only five members. But the reduction in size was also likely attributable to the Federalists' desire to prevent their incoming political rival—President-elect Jefferson—from filling a Supreme Court vacancy.⁶³ When the Democratic Republicans repealed the 1801 law and returned the Court to six Justices, they also re-established circuit riding and thus the link between the number of Justices and the number of circuits.⁶⁴ But their re-expansion of the Court also coincided with their political interest in giving President Jefferson an opportunity to shape the future of the Court.

In the 1860s, Congress made several changes to the size of the Supreme Court in fairly short order. These changes were not tied as closely to the number of lower circuit courts and seem to have had a primarily political motivation.⁶⁵ Many lawmakers were deeply skeptical of the Court after its 1857 decision in *Dred Scott v. Sandford*, which held that African Americans were not “citizens,” and that Congress could not prohibit slavery in the territories.⁶⁶ Accordingly, there was a strong sense that the Court was in need of reform. During the Civil War, the Republican Congress in 1863 increased the Court’s size from nine to ten members, so that President Lincoln could appoint Justices who would support the Republicans’ anti-slavery agenda.⁶⁷

But soon thereafter, Congress again modified the Supreme Court’s size. In 1866, after the assassination of Lincoln led to the presidency of Democrat Andrew Johnson, Congress reduced the Court’s future membership to seven.⁶⁸ The Republicans who controlled Congress in the post-Civil War era—and whose primary goal was to reconstruct the South—did not trust Johnson to nominate Justices sympathetic to those reconstruction efforts.⁶⁹ By contrast, in 1869, the Republican Congress was willing to return the Supreme Court to nine members, after fellow Republican (and former Union army general) President Grant was in charge.⁷⁰

B. The Court-Packing Plan of 1937

The size of the Supreme Court has remained at nine members since 1869. But there was a prominent attempt to remake the Court in 1937: President Franklin Roosevelt’s so-called “Court-packing plan.”⁷¹ The proposal was a response to Supreme Court decisions invalidating Roosevelt’s progressive New Deal programs.⁷² Under the plan, the President could appoint one additional Justice to the Supreme Court for each Justice over seventy years of age (who did not retire within six months)—for a possible total of fifteen members.⁷³

Roosevelt’s Court-packing plan grew out of a nearly two-year study in the Department of Justice as to the proper means of reforming the Supreme Court. Justice Department officials considered a variety of proposals, including constitutional amendments, measures to restrict federal jurisdiction, and proposals to expand the Supreme Court.⁷⁴ Ultimately, officials advised that “the proposal to enlarge the Supreme Court, while not without flaw, was ‘the only one which is certainly constitutional and . . . may be done quickly and with a fair assurance of success.’ . . . [I]t was the ‘only undoubtedly constitutional method by which to obtain a more sympathetic majority of the Court.’”⁷⁵

In public, President Roosevelt initially asserted that the Court reform was designed to promote judicial efficiency. The Supreme Court, he argued, needed additional and younger personnel to handle its growing caseload.⁷⁶ But Roosevelt soon acknowledged that the real purpose was to alter the future course of the Court’s decisions.⁷⁷ In his Fireside Chat on March 9, 1937, the President urged that “new blood” was needed, because the Supreme Court was “acting not as a judicial body, but as a policy-making body” in invalidating New Deal programs.⁷⁸ “[W]e must take action to save the Constitution from the Court and the Court from itself.”⁷⁹

In congressional testimony, executive officials defended the plan as a constitutional and desirable method of Court reform. Then-Assistant Attorney General (and later Supreme Court Justice) Robert Jackson argued that “[o]ur forebears” placed certain mechanisms in the Constitution to “enable Congress to check judicial abuses and usurpations.”⁸⁰ One of those checks was the power of Congress to alter the size of the Supreme Court. Jackson insisted that Congress had throughout the nineteenth century changed the Court’s size “to keep the divergence between the Court and the elective branches from becoming so wide as to threaten the stability of the Government.”⁸¹ Jackson declared: “When immediate and effective action has been necessary” to prevent the judiciary from “impos[ing] . . . its unsympathetic predilections on the country,” “the method which the President now proposes has been used throughout our constitutional history.”⁸²

Some modern observers assume that Roosevelt’s proposal was quickly rejected by Congress and the country.⁸³ But that appears not to have been the case. To be sure, the plan faced considerable opposition, including from Roosevelt’s fellow Democrats.⁸⁴ Some opponents saw the plan as an effort to consolidate presidential control over the judiciary and “compar[ed] Roosevelt to Stuart tyrants and European dictators.”⁸⁵ Members of the Supreme Court also expressed practical concerns about the proposal. Chief Justice Hughes sent a letter to Senator Burton Wheeler, which sought to refute President Roosevelt’s initial claim that his Court-packing plan would improve judicial efficiency. The Chief Justice argued that “[a]n increase in the number of Justices . . . would impair that efficiency so long as the Court acts as a unit. 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 thought to be large enough so far as the prompt, adequate, and efficient conduct of the work of the Court is concerned.”⁸⁶

But there was also considerable support in Congress for Roosevelt’s plan. Democratic Senate Majority Leader Joe Robinson pushed hard for Court expansion, with the enthusiastic support of many other Democrats, including then-Senator (and later Supreme Court Justice) Hugo Black.⁸⁷ Initially, the measure seemed likely to get through the Senate, and many participants assumed that it would pass the House of Representatives by a wide margin.⁸⁸

The political debate was then significantly affected by the Supreme Court itself. Soon after the plan was announced, the Supreme Court issued a series of decisions upholding state and federal regulation of the economy.⁸⁹ Although scholars disagree as to why the Supreme Court changed its approach,⁹⁰ there is no question that this apparent “switch in time” dampened the congressional support for the Court-packing plan. The Court’s decisions signaled that it might be more receptive to New Deal programs, even absent a change in membership.⁹¹

Then in June 1937, the Senate Judiciary Committee, voting 10 to 8, issued a strongly worded report recommending against the plan.⁹² The majority of the Committee denounced Roosevelt’s plan as “a needless, futile, and utterly dangerous abandonment of constitutional principle.”⁹³ The bill was “an attempt to impose upon the courts . . . a line of decision” and thus “would undermine the independence of the courts.”⁹⁴ “Under the form of the Constitution, [the plan] seeks to do that which is unconstitutional.”⁹⁵ The report declared:

Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power or factional passion, approves any measure we may enact.⁹⁶

One might assume that these events signaled the demise of the Court-packing plan in Congress. And yet, considerable support in Congress for some type of Court expansion remained. It appeared for a time that Congress in fact would authorize the President to appoint four additional Justices (one for every member over age seventy-five).⁹⁷ It was not until after additional debates—and the sudden death of the bill’s staunch proponent Senate Majority Leader Robinson—that political support for the measure finally ran out.⁹⁸

C. A Failed Constitutional Amendment to Fix the Court at Nine

In the ensuing decades, lawmakers did not propose a change in the size of the Supreme Court. A strong norm against any measure that might be deemed “Court packing” seemed to develop.⁹⁹ Instead, members of Congress sought in the 1950s to amend the Constitution to fix the size of the Supreme Court at nine members.¹⁰⁰ (The proposed amendment would also have prevented Congress from restricting the Supreme Court’s appellate jurisdiction over constitutional claims.)¹⁰¹ Senator John Butler led the charge, declaring that the goal of the amendment was to “forestall future attempts to undermine the integrity and independence of the Supreme Court.”¹⁰²

Supporters argued that the amendment would close “loopholes” in the constitutional structure.¹⁰³ Senator Butler emphasized that Roosevelt was not the first to propose a change in the Supreme Court’s size in order to influence the future course of its decisions: “The Congress . . . in 1866, was guilty of the same wrong . . . except that in 1866, the attempt was successful” at “prevent[ing] President Johnson from having an opportunity to fill the vacancies with persons who were friendly to his policies.”¹⁰⁴ Butler asserted: “We cannot know, with these historical illustrations fresh in our minds from what quarter and at what time the next attempt to influence the judgment of the Supreme Court may come.”¹⁰⁵

Senator Butler’s amendment easily mustered the two-thirds supermajority needed to make it through the Senate.¹⁰⁶ But the measure failed in the House of Representatives. Some lawmakers worried that freezing the Supreme Court’s size would be unwise.¹⁰⁷ Congress might, the legislators argued, need to modify the Court’s size for institutional reasons, such as to enable it to tackle a larger workload. Representative Emmanuel Celler stated that, although he had protested “President Roosevelt’s proposal to pack the Supreme Court . . . with such vehemence that Roosevelt never forgave me for it,” Congress should not “force upon ourselves a rigidity which can in the future make much mischief. . . . In the event there is another such move to increase the members of the Court, the then Congress, in the final analysis, can approve or reject, as is deemed best in the national interest.”¹⁰⁸

Significantly, both supporters and opponents of this proposed constitutional amendment shared one assumption: Congress has broad formal power to expand or contract the Supreme Court, such that the only way to freeze the size of the Court in place is through a constitutional amendment. But significant disagreement arose over whether fixing the size of the Court at nine members would be wise.

III. Analysis of Proposals for Court Expansion

Having now demonstrated that the size of the Supreme Court has varied over time, in this Part we analyze whether it would be legally possible or otherwise advisable to make such changes to the current Court. As a legal matter, we conclude that Congress has broad power to structure the Supreme Court by expanding (or contracting) the number of Justices. The prudential question is more difficult, and Commissioners are divided on whether Court expansion would be wise. We describe the arguments that critics of the current Court offer in favor of Court expansion—arguments with which some Commissioners agree (at least in part). We also explain the counter-arguments: that Court expansion, at least absent other reforms to our system of government, presents considerable drawbacks. As other Commissioners conclude—including Commissioners who are critics of many of the Court’s recent decisions and support other reforms—Court expansion is likely to undermine, rather than enhance, the Supreme Court’s legitimacy and its role in the constitutional system, and there are significant reasons to be skeptical that expansion would serve democratic values. We also raise some tentative concerns about how expansion of the Supreme Court might be received in the broader domestic and international community.

A. The Legality of Court Expansion

As noted above, Article III of the Constitution, which establishes the judiciary, requires that there be “one supreme Court” but does not specify the number of Justices that shall serve on that Court.¹⁰⁹ Article I authorizes Congress to make all laws that are “necessary and proper” to carry out the powers conferred on various institutions of government, which includes the Supreme Court.¹¹⁰ Determining the size of the Court that might be “necessary and proper” to its functioning seems well within Congress’s formal discretion.¹¹¹

Historical practice also supports the conclusion that Congress has authority to establish and change the Court's size: Congress exercised that power on numerous occasions in the nation's first century (1789, 1801, 1802, 1807, 1837, 1863, 1866, and 1869), expanding or contracting the Supreme Court's size for both institutional and political reasons. On several occasions, Congress adjusted the Court's size to influence the future course of its decisions: That was what the Federalists in 1801, the Democratic Republicans in 1802, the Republicans in the 1860s, and the Roosevelt administration in 1937 sought to do. Indeed, Roosevelt himself explained a few years after the failure of his 1937 plan that he chose Court expansion in part because of its "undoubted constitutionality."¹¹² Two decades later, in the early 1950s, members of Congress continued to assume that the only way to fix the size of the Supreme Court at nine members was through a constitutional amendment. Accordingly, the weight of the evidence points to a broad congressional power over the Supreme Court's size. Most scholars who have considered the issue have arrived at the same conclusion.¹¹³

To be sure, since around the mid-twentieth century, there has been a norm against increasing the number of Justices.¹¹⁴ "Court packing" has been a "political epithet" in our constitutional culture for much of our recent history.¹¹⁵ Some lawmakers and other segments of the public today may be reluctant to depart from this norm; such reluctance stems, in part, from their commitment to preserving the constitutional principle of judicial independence. But we do not believe there is a formal legal obstacle to expansion of the Supreme Court.

B. Assessing the Merits of Court Expansion

Whether expansion of the Supreme Court ought to be pursued as a prudential matter presents a more difficult question. We focus our consideration on the most common proposal made today: the immediate expansion of the Court by two or more members. Some lawmakers recently have proposed increasing the Court's size from nine to thirteen members, for example.¹¹⁶ But we note as well that the (temporary) expansion of the Court might also be necessary to effectuate other reforms, such as the implementation of term limits for the Justices. We discuss this basis for expansion in Chapter 3 and focus in this Chapter on Court expansion without any accompanying reforms.

1. Expansion and the Court's Legitimacy

As we noted in Section I.B, some proponents of Court expansion justify the reform as a response to what they perceive to be a crisis of legitimacy—a concept whose dimensions we delineate in Chapter 1 of this Report. In the wake of bitter judicial confirmation battles, critics charge that Republican lawmakers since 2016 have used underhanded measures to secure a conservative supermajority on the Supreme Court.¹¹⁷ Critics further worry that this new supermajority threatens to take the law, and particularly federal constitutional law, in a still more radical direction than where it was already moving—perhaps by reversing or continuing to revise longstanding precedents in the areas of reproductive rights, affirmative action, gun rights, religion, administrative law, voting rights, and campaign finance law.¹¹⁸ But for the improper confirmation tactics of Republican lawmakers, the argument goes, the Court's doctrinal trajectory might have been considerably different. The confirmation process, in this view, has cast a shadow on the legitimacy of the Supreme Court and its jurisprudence. The loss in legitimacy could, over time, affect the willingness of the public—and especially those who disagree with the trend of Supreme Court decisions—to treat the Court's rulings as authoritative.¹¹⁹

Proponents of Court expansion argue that by adding two or more seats to the Supreme Court, Democratic lawmakers could help restore balance to—and, thus, the legitimacy of—the Court.¹²⁰ Those who take this perspective also emphasize that a failure to respond to the hardball tactics since 2016 might encourage future aggressive measures in the Senate confirmation process, such as a refusal to hold hearings on any judicial nominee.¹²¹ The judicial selection process has already become, in the view of many, a partisan spectacle.¹²² Further escalation of the battles surrounding the Supreme Court could put additional pressure on the long-term legitimacy of the institution. On this account, a significant reform such as Court expansion may be needed to calm the controversy surrounding the Court.¹²³

Court expansion might also benefit the Supreme Court's public reputation in other ways. A president could select individuals who reflect the rich diversity of the nation, that is, the wide range of characteristics and backgrounds that can enrich discussion and decisionmaking—gender, race, ethnicity, religion, sexual orientation, gender identity, educational and professional background, and geographic origin. Decisions by a more diverse judiciary might be more informed; for example, the Court's deliberations in criminal cases could be enhanced by the perspective of a Justice with a background in criminal defense. More generally, a Court that was drawn from a broader cross-section of society might be viewed as more acceptable to the public.¹²⁴

A larger Supreme Court might also be able to decide more cases and to spend more time on emergency petitions (a subject discussed in Chapter 5 of this Report). The Supreme Court's rulings in merits cases have decreased considerably in recent decades. In the 1980s, the Court decided around 150 cases per year.¹²⁵ In recent years, that number has fallen to seventy or eighty cases.¹²⁶ To the extent the public or lawmakers would like the Court to resolve more cases, and a larger Court would have a greater capacity to do so, Court expansion could bolster the institution's legitimacy and effectiveness.

But the risks of Court expansion are considerable, including that it could undermine the very goal of some of its proponents of restoring the Court’s legitimacy.¹²⁷ Recent polls suggest that a majority of the public does not support Court expansion.¹²⁸ And as even some supporters of Court expansion acknowledged during the Commission’s public hearings, the reform—at least if it were done in the near term and all at once—would be perceived by many as a partisan maneuver.¹²⁹

To understand why, we need to appreciate that members of society view the events surrounding the Supreme Court since 2016, as well as substantive developments in the Court’s jurisprudence, in distinct ways. Although many Democrats today believe that Republican lawmakers engaged in improper tactics to secure a conservative supermajority on the Supreme Court, many Republicans have a very different perspective: The Senate has the power to decline to hold hearings on any Supreme Court nominee, and the actions of Republican lawmakers were justified (or, at least, defensible), given the ways in which Democrats blocked some nominees of prior Republican presidents.¹³⁰ Under this view, there was no wrongdoing that must be corrected by Supreme Court reform today; relatedly, there is no genuine legitimacy crisis. In addition, this view holds that the conservative turn in the Court’s jurisprudence is not an affront to democratic principles, as it has resulted from the prescribed operation of our constitutional system and reflects views about the meaning of the Constitution and the law held by commentators, officials, and segments of the public. On this account, Court expansion would be a dangerous power grab by one political party—one that would render the decisions of the resulting (larger) Supreme Court of questionable legitimacy to at least some members of the public.¹³¹

We have not sought to determine whether any particular perspective on the confirmation process or on the Court’s composition today is “correct.” But the more important point is that different segments of the public and the legal and academic communities understand the determinants and likely consequences of the Court’s current composition differently, and any lawmaker contemplating Supreme Court reform should be aware that the pursuit of immediate Court expansion would involve taking a position in a partisan contest in which opinion is deeply divided.

There are other reasons to believe expansion efforts might have negative effects on the Supreme Court’s long-term legitimacy or otherwise undermine its role in our legal system. Court expansion today could lead to a continuous cycle of future expansions.¹³² To be sure, any Supreme Court reform would likely require unified government (a President and Congress controlled by the same political party). Given the recent history of divided government at the federal level, it is unclear how often reform would be possible.¹³³ Nevertheless, we believe it is important to recognize the risk. According to one (purportedly modest) estimate of the consequences of expansions as parties gain Senate majorities and add Justices, the Supreme Court could expand to twenty-three or twenty-nine Justices in the next fifty years, and thirty-nine or possibly sixty-three Justices over the next century.¹³⁴ But just as important as the raw numbers, if the country and the political system were to be embroiled in repeated fights over Court expansion, that alone could harm the Supreme Court’s public reputation. The public might come to see the Court as a “political football”—a pawn in a continuing partisan game.¹³⁵

Relatedly, rather than calm the controversy surrounding the Supreme Court, expansion could further degrade the confirmation process. There could be significant battles over any Justice added by a Court expansion measure. Indeed, a future Senate could respond to expansion by refusing to confirm any nominee.

There are also reasons to doubt that Court expansion necessarily would produce benefits in terms of diversity or efficiency. There is no guarantee that a larger Court would be drawn from a more diverse group of individuals. And a larger Court might be *less* efficient than the current complement of Justices.¹³⁶ Chief Justice Hughes raised this concern in response to President Roosevelt's 1937 plan, which could have increased the size of the Court to fifteen members: "There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide."¹³⁷ To address that issue, the Court could potentially hear some cases in panels. But a panel system is of at least debatable constitutionality and utility (and we elaborate on these issues in Part IV of this Chapter.)

2. *Expansion and Democracy*

Another important consideration in evaluating potential reforms to the Court is whether Court expansion would serve democratic values.¹³⁸ At the outset, we wish to clarify two points. As we noted in Chapter 1 of this Report, it may seem odd to some readers who regard the Court as a crucial check on the political process to consider the "democratizing" force of Supreme Court reform. But the judiciary must also be checked, and the system of government as a whole must serve the interests of the people. Without taking a position on the underlying questions of democratic theory, we evaluate below the extent to which Court expansion would serve the range of democracy-based goals articulated in Chapter 1 of this Report.

First, to the extent that one goal of Supreme Court reform is to enhance the power of democratic bodies, expansion may not be the most fruitful path to that end (and we appraise other reforms that have this particular goal in mind in Chapter 4). Expansion would leave the Supreme Court's existing jurisdiction in place, as well as its existing approach to judicial review. As we discuss in Chapter 4, under this existing system, the Court provides the definitive word on the constitutionality of federal statutes, sometimes with little deference to Congress's considered constitutional views. An expanded Court could just as easily hold unconstitutional federal and state legislation as the current Court.

As some of the testimony before the Commission suggested, an *attempted* expansion could lead the Supreme Court to be more deferential to the political branches, at least in the short term.¹³⁹ Soon after President Roosevelt unveiled his Court-reform plan in 1937, the Supreme Court began to uphold New Deal programs. Although scholars continue to debate the reason for this "switch," a few years after the failure of his plan, Roosevelt described it as "among the most important domestic achievements of [his] first two terms in office," because it led to changes in the Supreme Court's jurisprudence.¹⁴⁰ Some observers suggest that an effort by lawmakers today to expand the Supreme Court could likewise prompt a more deferential approach.¹⁴¹ But it is also quite possible that any such change would be temporary, because Court expansion on its own would not formally reduce the Court's power vis-à-vis the political branches.

A second democracy-based argument made by proponents of Court expansion is that it would help to “cure” the imbalance between the ideology of the Court and the political leanings of the majority of Americans as reflected in the election results of the last several decades, a contention which is detailed in Chapter 1 of this Report. To the extent such an imbalance exists today, Court expansion may be a mechanism to correct it. Yet any contention that Court expansion would create a representative Court reliably into the future rests on debatable assumptions. As discussed, Court expansion could lead to a cycle of similar efforts by opposing parties. It is not apparent that such ongoing efforts would “balance” the Court to align it with popular opinion, rather than “swing” the Court toward the preferences of the particular political party with the power to enact expansion legislation. Supreme Court Justices are selected by the President, with the advice and consent of the Senate, and the constitutional methods of selecting the President and the Senate do not guarantee that those bodies will reflect the popular will. The President is selected through the Electoral College, and on five occasions, a President has been elected without winning the popular vote.¹⁴² And the Senate is designed to provide equal representation to the states, not to reflect a broad national mandate.¹⁴³

Third, some proponents of Court expansion defend it as a means of stopping the current Court’s whittling away of the Voting Rights Act and other cornerstones of democracy.¹⁴⁴ It is certainly possible that, were the Supreme Court expanded today, the newly constituted Court would be more receptive to an expansive view of voting rights and other democracy-reinforcing claims and would be more likely to uphold any new laws enacted to protect voting rights and the political process. For many on the Commission, such legislation and decisions would be welcome. But it is not clear that these substantive views justify Court expansion. Indeed, in the view of some Commissioners, unless Congress acts to restore or reform the provisions of the Voting Rights Act that the Court has either invalidated or limited in scope, or to enact new voting protections, the extent to which differently constituted courts would be able to achieve those same objectives would be limited. Moreover, expansion as a response to the Supreme Court’s decisions on democracy could have the unintended consequence of affecting the Supreme Court’s jurisprudence in a variety of areas. Lawmakers might consider those broader implications of Court expansion, too, particularly if it seems likely to them that Court expansion today would ignite a wave of future similar efforts by either party. There is no guarantee that future expansions would lead to a Supreme Court committed to protecting the values that advocates of expansion today believe are under threat.

3. Expansion as a Response to Perceived Threats to the Constitutional Order

Even some forceful critics of Court expansion would not rule the possibility out entirely or for all time. Witnesses before the Commission emphasized that sufficiently dire circumstances could justify adding Justices to the Court to prevent threats to the Constitution or the survival of American democracy.¹⁴⁵ Some Commissioners believe that the nation has reached (or is on the verge of) just such a point of crisis, thus justifying serious consideration of either immediate or perhaps gradual expansion. This conclusion is premised on two sets of developments. First, as discussed immediately above, some critics maintain that the Supreme Court has been complicit in or even responsible for what has been termed the “degradation of American democracy.”¹⁴⁶ Second, Court expansion may be a means of addressing the sharply conservative turn in the Court’s jurisprudence more generally, which some critics contend cannot be dismissed as simply the product of election outcomes and the ordinary vagaries of the nomination and confirmation process. On this view, certain aspects of the current Court’s reinterpretation of doctrines and structures that protect basic values, such as human dignity and equal respect for all persons, represent threats to the survival of our constitutional order.

Other members of the Commission—including some who are deeply critical of much of the Supreme Court’s recent jurisprudence—strongly disagree with this rationale as a justification for Court expansion. First, many Commissioners reject the claim that the nation has reached a point of crisis that would justify Court expansion; the recent trajectory of the Court’s decisions does not, on this view, threaten the constitutional order. Second, even if there were a constitutional crisis of the Court’s making, Court expansion would be a misdirected response, given that it would leave the Court’s jurisdiction and power in place (and the newly constituted Court or a future Court could still adhere to the precedents that launched the alleged crisis). Third, Commissioners who are skeptical that the Court’s jurisprudence is at or near a point of crisis view this argument as based primarily on a substantive disagreement with the current trend of Supreme Court decisionmaking and doubt that expansion can ever be justified on this basis. As one witness stated during the Commission’s public hearings, “[a] strong norm has developed that the political branches do not threaten or change the Court’s membership because of unhappiness with its decisions.”¹⁴⁷ Lawmakers, these Commissioners emphasize, should be cautious about any reform that seems aimed at the substance of Court decisions or grounded in interpretations of the Constitution over which there is great disagreement in our political life.

4. Expansion in Comparative Perspective

We also situate the prospect of expanding the size of the U.S. Supreme Court in a broader context. A look to other jurisdictions highlights that no single approach to high-court size exists. The tradition in the American states has been close to that of the U.S. Supreme Court, though not identical. As in the federal government, in most states a single supreme court of general jurisdiction sits atop the judicial hierarchy. The states also all have courts with an odd number of seats. However, most states have traditionally favored a smaller bench than the U.S. Supreme Court:

5 judges	16 states
7 judges	27 states
9 judges	7 states

Proposals for court expansion also have arisen in the American states. Kentucky went to the greatest extremes in the early nineteenth century. Unhappy with the state supreme court's ruling on debtor relief laws, populist forces swept into power in the statehouse in 1824 and passed a statute dissolving the existing court and creating a new one more to their liking. Supporters of the "old court" soon enjoyed their own electoral sweep. Within two years of its creation, the "new court" was itself dissolved and the old court restored.¹⁴⁸

In recent years, proposals to alter the size of state supreme courts have been introduced in several legislatures, and those attempts have often been repeated in session after session. Though none would go so far as to dissolve the old court as Kentucky once did, some would eliminate seats from the existing courts in ways calculated to affect their partisan or ideological compositions. Others would take the more traditional path of adding seats. Although many of these bills have not progressed very far in the legislatures, some have met with greater success. In 2016, a Republican-controlled legislature added two seats to the Arizona state supreme court. In the same year, a Republican-controlled legislature in Georgia adopted a broad judicial reform that included the addition of two new seats to the state supreme court. We are currently in a period of heightened interest in altering the composition of the state courts.¹⁴⁹

In the international context, we see that the U.S. Supreme Court at nine members is small by global standards. Countries outside the United States have tended to settle on more than nine seats and have not necessarily maintained an odd number of seats on their high bench. A common feature of national judicial systems across the globe is to separate ordinary judicial functions from the interpretation of the constitution. Specialized constitutional courts are distinct from the ordinary judiciary and are often organized differently. Constitutional tribunals tend to be smaller, while supreme courts that resolve a wide array of legal issues are often significantly larger than the U.S. Supreme Court. The highest courts within the French, Italian, and German ordinary judicial systems have dozens of members,¹⁵⁰ but their constitutional courts are much smaller (although all larger than the United States) with eleven, fifteen, and sixteen members respectively.¹⁵¹

The table below puts the U.S. Supreme Court in context with other constitutional courts.

7 judges	Australia
9 judges	Canada, United States
10 judges	Chile
11 judges	France, South Africa
12 judges	Belgium, Ireland, Spain, United Kingdom
14 judges	Austria, South Korea
15 judges	Italy, Japan
16 judges	Germany, Sweden
18 judges	Denmark

Other countries have found ways to make a larger court workable and to reduce the potential problems of a cumbersome, inefficient, or uncollegial court. The range of design choices highlights the fact that it is possible for a high court to be productive and functional with significantly more than nine members. We should be cautious, however, about assuming that the U.S. Supreme Court could easily follow the lead of its international analogues.

First, the size of a court should be considered alongside a larger set of institutional features, and adjusting the size of a court is likely to put pressure on other parts of the judicial system. Most courts of larger size than the U.S. Supreme Court work in a panel system in which all of the court's judges never or rarely sit together. A larger sized court is also often accompanied by other measures to ensure regular rotation of the court's members and diversity of perspectives on the bench. (We explore in Part IV of this Chapter whether reforms such as rotation or panel systems would be feasible in the United States)

Second, a comparative perspective underscores that, depending on the timing and the rationale, the political reorganization of courts may be in tension with principles of judicial independence. Courts cannot serve as effective checks on government officials if their personnel can be altered by those same government officials. Courts across the globe—and in the United States—have seen their independence compromised in the wake of politically undesirable decisions. Authoritarian political leaders of various stripes have frequently consolidated their own power and weakened the effective constitutional checks on their power by expanding the size of the judiciary so as to add their friends and allies to it.

In some countries, alteration of the size of a country's high court has been a worrying sign of democratic backsliding.¹⁵² After his election in 1989, Argentinian president Carlos Menem worked to draw greater power into the executive branch, and in 1990 he successfully added four new members to a five-member supreme court.¹⁵³ In 2004, Hugo Chavez in Venezuela reined in judicial independence by expanding the size of the constitutional court from twenty to thirty-two.¹⁵⁴ In 2010, Turkish leader Recep Erdogan's populist party consolidated control over the Turkish constitutional court by expanding its membership from ten to seventeen and altering the process by which judges were selected.¹⁵⁵ In 2010, the populist Fidesz Party won a narrow majority in the Hungarian Parliament and quickly went about consolidating power, including through the addition of several new seats to the constitutional court.¹⁵⁶ In 2018, a package of judicial reforms in Poland forced sitting judges off the bench and dramatically expanded the size of the supreme court.¹⁵⁷ Stable democracies since the mid-twentieth century, however, have not tended to make such moves.

Third, the American example in the world matters. There are important differences between the situation in the United States and the situation in various nations experiencing democratic backsliding. Nonetheless, some Commissioners believe that there is a real risk that the willingness of Congress to expand the size of the U.S. Supreme Court could further weaken national and international norms against tampering with independent judiciaries. Politicians at home and abroad who might wish to control their nation's courts might find themselves emboldened to take such actions if the United States engages in Court expansion, regardless of the reasons for the U.S. expansion.¹⁵⁸ Today's proposals to expand the size of the U.S. Supreme Court arrive at a time in which such proposals have become increasingly common in legislatures across the country and the world. To the extent that the United States wishes to discourage such measures in Turkey, Poland, and Hungary, or even in the American states, it risks undermining its ability to effectively do so if it makes an exception for itself.¹⁵⁹ Other Commissioners believe that these potential risks do not justify the rejection of expansion proposals in the United States, not least because developments in other parts of the world are unlikely to be deterred by the U.S. example.

C. An Alternative: Court Expansion Over Time

Most proponents of Court expansion have focused on the possibility of an immediate increase in the number of Justices sitting on the Supreme Court. But Congress need not expand the Court all at once—a prospect that came up during the public testimony before the Commission. Congress could enact a law providing for the expansion of the Supreme Court over time.¹⁶⁰ For example, the Court could be increased by one Justice during each four-year presidential term until the Court reached some maximum size (say, thirteen members). Or the Court could be expanded by two Justices immediately, followed by two more Justices after an intervening presidential election.

Such reform might not invite the same charges of partisanship as immediate expansion. Expansion over time would also make it easier for the Court as an institution to adjust to the addition of new members. Moreover, a long-term expansion could produce diversity and efficiency benefits (although it would remain uncertain whether a larger Court would in fact be more diverse or efficient). Such a reform could also reduce the temperature of judicial confirmation battles. If the Supreme Court had more personnel—and those personnel were distributed more evenly across presidential administrations—both presidents and senators might be less invested in the fight over a particular nominee. Indeed, as we discuss in detail in Chapter 3, this objective also animates proposals for limiting the terms of Supreme Court Justices.

Such a long-term expansion would not, however, address as directly the legitimacy or democracy crises that drive most proponents of Court expansion today. The problem for the current Court, the argument goes, is not its size per se, but that its makeup has been improperly skewed by one political party and that its current composition is reinforcing dangerous doctrinal trends. Court expansion over time, especially if structured to give both political parties an equal opportunity to fill new vacancies, would not necessarily ameliorate that concern (and might exacerbate the perceived issue). In addition, the benefits of Court expansion spread out over time are uncertain. Giving the President in each of the next four terms the opportunity to appoint at least one Justice could help reduce the political importance of confirmations in the near term, but because thirteen is a relatively small number, presidents and senators are likely to see the stakes of appointing one of thirteen Justices as just as high as appointing one of nine. The proposals for term limits that we explore in Chapter 3 more clearly address this concern because they would regularize the timing of Supreme Court vacancies and appointments.

IV. Other Structural Reforms

At points in history, and in today's debate over Supreme Court reform, lawmakers and commentators have proposed different schemes for altering the composition of the Court beyond its basic expansion. Though their details vary, these reforms can be grouped into three categories: reforms that would structure the Supreme Court as a shifting or rotating set of nine (or more) Justices from among a larger set of Article III judges; reforms that would institute a system whereby a Court larger than nine would sit in panels; and reforms that would distribute partisan or ideological influence over the Court's composition. We find that these reforms present more serious constitutional questions than basic Court expansion and that they also offer uncertain practical benefits.

A. Legality

1. Rotation and Panel Systems and the Requirement of “one supreme Court”

The first two reforms—rotation and panel systems—raise similar legal questions. Under a rotation scheme, judges would rotate between service on the Supreme Court and the lower federal courts; some subset of these judges would constitute “the Supreme Court” in a given case or controversy.¹⁶¹ A panel system could take a variety of forms: For instance, one subset of Justices might be entrusted to decide questions falling within the Court’s “original Jurisdiction” and another subset of Justices might be empowered to hear appeals (that is, cases reviewing decisions of the lower courts).¹⁶² Or, one subset of Justices might be entrusted to resolve statutory questions and another subset could be entrusted to decide constitutional issues.¹⁶³

Both rotation and panel proposals face a potential constitutional obstacle in the Constitution’s command in Article III, Section 1, that “[t]he judicial Power of the United States, shall be vested in *one supreme Court*, and in such inferior Courts as the Congress may from time to time ordain and establish.”¹⁶⁴ As a textual and structural matter, that provision suggests, although it does not logically demand, a unitary apex court sitting together in every case the Court takes up on the merits rather than a Court consisting of a shifting or floating voting membership. We examine here the implications of the “one supreme Court” requirement. The rotation proposals, because they would alter the duties currently performed by the Justices of the Supreme Court, also could give rise to distinct constitutional concerns, both under the “good Behaviour” Clause of Article III, Section 1 and the Appointments Clause of Article II, Section 2.¹⁶⁵ Because some of the proposals for term limits raise similar concerns, and we therefore address these particular constitutional issues in Chapter 3, we focus here on the meaning of “one supreme Court.”

a. Text and Early History. During the Constitutional Convention of 1787, James Madison initially proposed “that a National Judiciary be established to consist of *one or more supreme tribunals*, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services. . . .”¹⁶⁶ But a few days later, the Convention opted for a “national judiciary . . . to consist of *One supreme tribunal*, and of one or more inferior tribunals.”¹⁶⁷ Subsequent versions of the constitutional text then consistently referred to “*one supreme Court*.”¹⁶⁸ This textual change—from “one or more supreme tribunals” to “one supreme Court”—may indicate that the Supreme Court was to function as a single unit.¹⁶⁹

There is evidence that at least some Framers anticipated that the Supreme Court would hear cases as a single unit. Later in the Convention, when the participants debated how Congress could address workload concerns in the judiciary, Madison argued that Congress could simply add more judges.¹⁷⁰ Gouverneur Morris responded that such an approach might work for the inferior federal courts but not for the Supreme Court, because “[a]ll the business of a certain description whether more or less must be done in that single tribunal.”¹⁷¹

b. Subsequent Debates. The early historical evidence is sparse. Accordingly, we turn to the way in which the “one supreme Court” language has been understood over time. In the nineteenth century, Congress on a few occasions considered a rotation or a panel system for the Supreme Court and, each time, some lawmakers questioned the constitutionality of such a scheme.

i. A Rotation System. In 1869 (as discussed in Section II.A), Congress increased the size of the Supreme Court from seven to nine members. During the debates over that reform, Congress also considered expanding the size of the lower federal judiciary.¹⁷² But one lawmaker suggested an alternative: Congress could add sufficient personnel to the federal judiciary by greatly expanding the Supreme Court (whose members were still expected to serve in part as lower circuit court judges). Under the proposed system, the Court would consist of eighteen members; nine members would serve on the Supreme Court at any given time, while the other nine would serve as circuit court judges (“riding circuit”).¹⁷³ That is, the judges would rotate between the Supreme Court and the circuit courts.

Several lawmakers objected that this system would be inconsistent with the constitutional requirement for “one supreme Court.”¹⁷⁴ “The Constitution establishes the Supreme Court. . . . [Y]ou have no right to say that half of those judges shall take no part in the adjudications of that court.”¹⁷⁵ Opponents also worried that a panel system might lead to instability in the law: “[A] court that was varying every year could never have stable decisions upon which the people of the country could rely[.] . . .”¹⁷⁶

Supporters of the measure countered that Congress had the power to say how many Justices could speak for the Court as a whole; after all, Congress had long established a quorum for the Supreme Court.¹⁷⁷ Moreover, supporters argued, past precedents had not proven unstable simply because they were decided by less than the full Court (but still a quorum).¹⁷⁸ Yet opponents insisted that establishing a quorum—*permitting* fewer than the full number to issue a decision—was very different from *prohibiting* some number of Justices from serving on the Supreme Court, if they so chose.¹⁷⁹ Ultimately, the proposal for an eighteen-member Court died in Congress.¹⁸⁰

ii. A Panel System. In the 1890s, Congress considered a proposal for a panel system. The issue arose as lawmakers sought to address a caseload crisis at the Supreme Court. The Court’s appellate jurisdiction was still largely defined by the Judiciary Act of 1789, which required it to review every case properly before it on appeal.¹⁸¹ By 1890, the Court’s mandatory appellate docket had swelled to over 1,800 cases, only four or five hundred of which it could dispose of in a given year.¹⁸²

To address this caseload crisis, Congress considered a number of options. Senator William Evarts proposed a plan to create a scheme of federal appellate courts and to give the Supreme Court the discretion to review certain classes of cases via writs of certiorari. A version of this proposal was ultimately enacted as the Judiciary Act of 1891.¹⁸³

During the debates over this 1891 measure, some lawmakers proposed an alternative reform to help the Court dispose of its appellate docket: The Court could hear cases in panels. Under the proposal advanced by several members of the Senate Judiciary Committee, the Court would hear most appeals in three-Justice panels, but the full Court would resolve federal constitutional questions and (at its discretion) other cases of “unusual difficulty or importance.”¹⁸⁴ Observing that such panel systems existed in some states and other countries, the Senators asserted that the Supreme Court could likewise “dispose speedily of all causes that may be upon its calendar . . . by acting in separate divisions of three or more [J]ustices,” all hearing cases “at the same time.”¹⁸⁵

The Senators argued that Congress could enact the proposal as part of its power to make exceptions and regulations to the Supreme Court’s appellate jurisdiction.¹⁸⁶ Much like their predecessors in 1869, they pointed out that Congress had long exercised the power to declare how many Justices constituted a quorum—and, thus, how many Justices were required to speak for the Court as a whole. Congress could, by extension, direct the Court to decide cases in panels.¹⁸⁷ Nor, according to the proponents, was such an arrangement at odds with the constitutional requirement for “one supreme Court.” The Justices would “proceed at the same time to hear arguments and pronounce decisions, not as three separate Supreme Courts, but as one Supreme Court, exercising its appellate jurisdiction in a twofold or threefold manner at the same time.”¹⁸⁸ The Senators added that, if a panel was presented with “a question of extraordinary difficulty or high consideration, . . . provision should be, and can be, made for the matter being heard before all.”¹⁸⁹

Other lawmakers were skeptical of the reform. Some insisted that a panel system would violate the constitutional requirement for “one supreme Court.”¹⁹⁰ “The power of Congress [to regulate the Court’s appellate jurisdiction] can not be held to extend to legislation which would break up the Supreme Court into fragments and substitute several courts with power to hear and finally determine causes for the one Supreme Court provided by the Constitution.”¹⁹¹ Some lawmakers also worried that a decision rendered by less than the full Court would lack legitimacy with the public.¹⁹² Ultimately, the proposal was rejected by the Senate.¹⁹³

iii. Views of Justices. Although there does not appear to have been another sustained debate in Congress about the validity of a rotation or a panel system, on several occasions, when Congress has considered reforms to deal with the Supreme Court’s capacity constraints, individual Justices have noted—and expressed concerns about—the possibility of splitting the Court into subsets. For example, in the 1920s, Chief Justice Taft insisted that Congress “could not adopt” the panel approach that existed in some states, “because our Constitution provides that there shall be one Supreme Court, and it is doubtful whether you could constitutionally divide the court into two parts.”¹⁹⁴

In responding to President Roosevelt's 1937 Court-packing plan, Chief Justice Hughes also doubted the wisdom or the constitutionality of a panel system. As noted, the Chief Justice's letter addressed Roosevelt's initial claim that the plan would promote judicial efficiency by enabling the Court to resolve more cases. Chief Justice Hughes argued that the proposed expansion would "impair [the Court's] efficiency so long as the Court acts as a unit."¹⁹⁵ He went on to consider the possibility of a panel scheme. Much like some lawmakers in 1891, Chief Justice Hughes worried that a decision by less than the full Court would be seen as less legitimate: "A large proportion of the cases we hear are important and a decision by a part of the Court would be unsatisfactory."¹⁹⁶ The Chief Justice also "call[ed] attention to the provisions of [A]rticle III, section 1, of the Constitution that the judicial power of the United States shall be vested in 'one Supreme Court.'" . . . The Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a supreme court functioning in effect as separate courts."¹⁹⁷

In the 1970s and 1980s, Congress once again considered reforms to help the Supreme Court deal with its caseload. These discussions eventually led to the Judiciary Act of 1988, which granted the Supreme Court the discretion to decide whether to review virtually every appeal.¹⁹⁸ During the debates leading up to this reform, Chief Justice Burger, much like his predecessors, asserted that a panel system was not a viable alternative: "Such a change would appear to alter the basic concept of 'one supreme Court' under Article III."¹⁹⁹

c. Analysis: Legality of Rotation and Panel Systems. Nothing in the history the Commission has reviewed surrounding the drafting or adoption of this "one supreme Court" provision, dating to the 1787 Constitution and unchanged since, supplements the lessons of text and structure by revealing the thinking that underlay the creation of one Supreme Court. The Constitution clearly reflects the desire to have an apex judicial body operating in some meaningful sense as a single "court" and not merely as a scattering of individual jurists, in order to resolve in a nationally uniform way issues about the meaning of national law. The Constitution as written, for example, clearly would not permit treating all Article III judges sitting at any given time as "the" Supreme Court of the United States and either polling that entire mass or randomly sampling individual judges' votes in order to emerge with a single result, by some algorithm but without mutual consultation or collaboration (and, presumably, no opinion of the "Court") in each case.

Setting aside examples that extreme, “one supreme Court” could be deemed a single court, even if it heard some cases in smaller subsets—as long as the full Court, sitting as a whole, were able to review decisions of the panels.²⁰⁰ In other words, it would be possible to speak of one Supreme Court in reference to a large apex body that is nonetheless fragmented into panels in the first instance, as long as a mechanism exists for ultimately emerging with a single, authoritative answer to whatever questions of fact or law the “judges of the Supreme Court” are charged with resolving. The Commission is not prepared to conclude that the Constitution, properly understood, necessarily rules out these rotation and panel systems simply on the ground that each would entail having less than the full set of sitting Justices making initial decisions for the Court as a whole. The thirteen United States Courts of Appeals, for instance, are understood to constitute thirteen unitary courts even though each of them typically sits in panels of three, reserving en banc sittings for special occasions and treating each panel’s decision as binding on all future panels of the same circuit unless and until reversed by that circuit sitting en banc. That practice obviously carries different implications for the circuits with fewer judges than for those that are more numerous: the number currently ranges from six on the First Circuit to twenty-nine on the Ninth. A similar construct would be linguistically possible for the U.S. Supreme Court, and a creditable argument could be made that the availability of a much larger pool from which individual panels of nine or perhaps a smaller number could sit in most cases, setting aside practical problems, would reconcile the scheme with Article III’s specification of “one supreme Court.”

It is notable, however, that both lawmakers and Supreme Court Justices have over the years questioned the constitutionality of a rotation or a panel system. In the nineteenth century, some lawmakers doubted that Congress could prevent an individual who was appointed to the Supreme Court from serving on that Court, if the Justice so chose: “The Constitution establishes the Supreme Court. . . . [Y]ou have no right to say that half of those judges shall take no part in the adjudications of that court.”²⁰¹ More generally, lawmakers questioned Congress’s power to “break up the Supreme Court into fragments and substitute several courts with power to hear and finally determine causes for the one Supreme Court provided by the Constitution.”²⁰²

Members of the Supreme Court have expressed similar concerns. In 1937, Chief Justice Hughes declared that “[t]he Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a supreme court functioning in effect as separate courts.”²⁰³ To be sure, statements of the Justices may not be the most reliable evidence of the meaning of Article III; the Justices may have an incentive to preserve the Court’s existing institutional authority. But it is nevertheless significant that, while Justices have *not* in the past questioned Congress’s power to modify the size of the Supreme Court, they have openly questioned the legality of these other structural reforms. Accordingly, rotation and panel systems are more vulnerable to a constitutional challenge than simple Court expansion.

2. *Proposals to Distribute Partisan or Ideological Influence*

Other proposals focus on ensuring ideological balance on the Supreme Court. One version of this idea would expand the Court to fifteen seats, with a significant change in how the Justices would be appointed. To start, five Justices “would be affiliated with the Democratic Party” and “five with the Republican Party.”²⁰⁴ These initial ten justices “would then select five additional Justices chosen from current circuit (or possibly district) court judges” to serve for a short-term period.²⁰⁵

Any reform of this character seems to be on a collision course with the Constitution’s clear specification in Article II, Section 2, of how “Judges of the supreme Court” are to be selected—namely, by presidential nomination and Senate confirmation.²⁰⁶ Article II does not permit “Judges of the supreme Court” to be selected by other members of that Court. This reform also may be seen to be in some tension with core First Amendment freedoms of political speech, association, and thought, as it may be seen as locking the major parties as they exist today into control over Court appointments.

B. The Value of Rotation, Panel, and Balance Systems

The rotation and panel proposals might enhance the Court’s operations by injecting vitality and diversity of various kinds into the Court or better enabling the Court to hear greater numbers of cases. These reforms also would reduce the power of any single individual on the Court, though by themselves they would not meaningfully reduce the power of the Court as a whole within the U.S. system of constitutional government. The proposals aimed more directly at distributing the partisan or ideological affiliations and identities of the Justices could help reduce the stakes of the nomination and confirmation processes and in turn make the Court less of a source of political acrimony, particularly proposals that would give each President a specific number of appointments each term. These types of reforms also squarely acknowledge the political implications of the Court’s decisionmaking, but they do not directly address the scope of the Court’s power. Ultimately, however, we conclude that although these proposals may have real benefits, those benefits are speculative and the pursuit of such reforms may not be worth the dramatic reconceptualization of the Article III judiciary they would require.

1. Policy Analysis of Rotation and Panel Proposals

a. Rotation Proposals. Proposals that would call for the rotation of Justices on and off the Supreme Court involve changing the membership of the Court on some sort of semi-regular basis; judges would alternate between actively hearing the cases of the Supreme Court and serving on the courts of appeals. Justices would be drawn according to a sorting process from a considerably larger collection of Article III judges—a set that could include all Article III judges or a prescribed subset of those judges. That larger set of Justices would be formally designated Supreme Court Justices serving during good behavior from the time of their appointment as Supreme Court Justices, but only a smaller subset of these judges would function as the Supreme Court of the United States in any given “case” or “controversy.”²⁰⁷

By expanding the number of Justices who would sit on the Court, rotation proposals reduce the power of any single individual over the outcomes of the Court's cases. Rotation would thus address the need for litigants to gear their strategies toward the predilections of a single Justice perceived as the swing vote and would reduce the power of a single swing voter on the Court (though not necessarily a moderate swing "bloc") from shaping the trajectory of the Court's doctrine.²⁰⁸ In addition, by incorporating a greater number of judges, these proposals could help regularly rejuvenate the Court by consistently introducing greater diversity of perspective, interpretive approach, and professional and geographic background, among other things, into its decisionmaking. Taken together, these features of rotation systems might enhance the Court's legitimacy in the eyes of the public by extending decisionmaking power over matters of great consequence beyond the same nine individuals, though the Court would still be composed of Article III judges with life tenure. And rotation might lower the stakes of any single confirmation and thus help to ameliorate the partisan warfare that characterizes the nomination and appointment process.²⁰⁹

Each of these potential benefits, however, may well be offset by significant costs. A rotation system could introduce inefficiencies into the Court's work, for example, or otherwise undermine the supervisory and unifying functions it performs within the U.S. legal system.²¹⁰ The utility of these proposals would depend in part on the size of the pool from which the Justices would be drawn; a pool that is too small or chosen by partisan actors would produce little advantage over the status quo. But the larger that pool, the more unwieldy and unstable the Supreme Court's decisionmaking processes would become. A regularly fluctuating Court might also undermine the collegiality and familiarity that enables the Justices to manage contentious cases, including through the resolution of hard cases through compromise. A lack of consistency in the Court's personnel could compromise its ability to provide guidance to lower courts and state courts as the result of more rapid doctrinal change on the Court. Most importantly, a rotation system that does not otherwise address the power of the Court could well heighten the stakes of confirmation processes for appellate judges.

Proponents of rotation contend, however, that Justices under this model would prioritize restraint and narrow decisionmaking for fear that a subsequent collection of Justices might overrule extreme or outlying precedent,²¹¹ which in turn would lower the stakes of Supreme Court judgments and therefore judicial confirmations. But it is not clear that having a larger Court whose personnel churns will lead the Court to accept fewer cases of great import or otherwise exercise the power of judicial review more modestly.

b. Panel Proposals. The need for the Justices to sit on panels could well arise as a consequence of other reform proposals that would lead to significant expansion of the Court's numbers. If an initial attempt at Court expansion were to prompt future expansions as the result of partisan competition in the political branches, or if the transition to a system of term limits were to temporarily expand the size of the Court, there could be too many Justices to efficiently hear cases in all instances. Size would thus necessitate panels, with a potential en banc procedure for resolving significant disputes or conflicts between panels in order to provide adequate guidance to the lower courts, as discussed in Chapter 3 of this Report. This model could introduce some inefficiencies into the Court's decisionmaking, but given that the courts of appeals and constitutional and high courts in other jurisdictions function effectively on this model, these inefficiencies would seem to be manageable if they were necessary consequences of larger, otherwise justified reforms.²¹²

The question then becomes whether there would be virtues in the first instance in establishing a panel system. Other constitutional courts, as well as state high courts, structure their decisionmaking in this way, whether by assigning particular types of cases to different panels or courts (constitutional vs. statutory cases, or criminal vs. civil cases, for example).²¹³ The Commission heard persuasive testimony suggesting that some apex courts in other nations manage to function with panels or layers, suggesting that complaints about the inherent infeasibility or inoperability of such systems are overdrawn.

A Court structured in this way would have to be sensitive to the need for the clear development of doctrine to provide adequate supervision of the lower courts, though the often fractured decisionmaking of the U.S. Supreme Court underscores that even the current composition can produce inefficiencies; such challenges might simply be an unavoidable aspect of deciding complex and novel cases by a set of individuals who hold different theories of interpretation and of the Constitution's meaning. A panel system would certainly expand perspectives and representation on the Court, though the extent of these benefits would be limited by the need to keep the overall size of the Court reasonable and manageable. Structuring panels along substantive lines might also produce specialization benefits, which might be especially useful when the Court deals with technical matters whose resolution would benefit from particularized expertise. And yet, the current Court's non-specialized character is itself a virtue; at least in theory, it facilitates fresh and open judgment about cases. More important, substantive areas of the law intersect and are deeply interrelated; it would be difficult, for example, to bifurcate constitutional and statutory analysis, since constitutional presumptions frequently inform how courts and others evaluate statutes.

2. *Proposals to Distribute Partisan or Ideological Influence*

As the Commission heard from numerous witnesses, and as has been established throughout this Report, calls for reform have been motivated in significant part by the perceived mismatch between the ideological composition of the Court and the views of the public as reflected in election outcomes at particular points in time.²¹⁴ The fact that the Court's membership is often determined by the contingencies of the Justices' retirement or death exacerbates this concern and raises the stakes of the nomination and confirmation processes. It is not surprising, then, that some reform proposals would attempt to ameliorate this problem by distributing appointments more predictably and by trying to ensure rough alignment between the Court and electoral majorities.

One such proposal, closely related to the term limits proposal and discussed in Chapter 3 of this Report, would give each President two nominations per term.²¹⁵ This proposal could go a long way toward reducing the partisan rancor of the confirmation process and lowering the stakes of appointments by ensuring that a party controlling the White House need not wait for happenstance to be able to influence the Court. This proposal also would address the anomaly of some presidents appointing as many as three Justices in one term and others having no opportunities to influence the Court in the same amount of time. As noted in Chapter 3, these benefits would depend on a functional confirmation process to ensure that each President could in fact make two nominations. And ultimately this sort of proposal is most productively considered alongside term limits; unlike a system of term limits, which could eventually stabilize at a particular number of Justices, this proposal could lead to an always expanding and contracting Court.

The other type of proposal that would introduce partisan or ideological balance onto the Court as a matter of design would require an even or roughly even number of Justices with affiliations from the two major political parties, on the model of independent commissions, with five additional judges to be chosen from the circuit or district courts by the party-affiliated Justices.²¹⁶ This approach—sometimes called the balanced bench—might ensure some form of ideological even-handedness, and therefore moderation, which could help to keep the outcomes of Court decisions in line with public opinion. This form of balance could help induce compromise among the Justices, especially under those proposals that would set the size of the Court at an even number.²¹⁷ These virtues would in turn temper the confirmation wars by ensuring that both parties have roughly equal influence over the Court.

But it is far from clear that ideological balance is in and of itself a desirable goal. If there is no such balance in the political branches, requiring such balance on the Court could make it insufficiently responsive to electoral outcomes. In other words, if the goal were to ensure that the Court roughly reflects the public will and exhibits a degree of responsiveness to the political composition of the people at a given time, artificial balance between the two political parties would not achieve that objective. A balanced bench could be preferable to the status quo for those observers of the Court who perceive a significant mismatch between its composition today and the body politics.²¹⁸ But institutionalizing such a requirement could block or would not be preferable to farther reaching change.

What is more, an explicit requirement that Justices be affiliated with particular parties would constrain the pool of potential nominees and reinforce the notion that Justices are partisan actors. Even if we accept the fact that the Justices' judgments have political implications and ideological motivations, this close identification of Justices with political party could undermine the perception of judicial independence, which is important to the acceptance of and compliance with the Court's decisions. It also seems likely that a "balanced bench" would continue to produce a significant number of divided results in contested cases, even on an evenly divided Court, keeping the Court at the center of charged political debates, for better or worse. Unless the types of cases the Court hears were to change markedly, its decisions would continue to have major political significance, and even more moderated outcomes that may result from these balancing proposals could still keep the Court central to political life.

¹ See S.J. Res. 9, 117th Cong. (2021) (proposing an amendment to the Constitution that would read, "[t]he Supreme Court of the United States shall be composed of nine justices"); H.J. Res. 11, 117th Cong. (2021) (proposing the same); Letter from Ted Cruz, U.S. Sen., and Dusty Johnson, U.S. Rep., to Bob Bauer & Cristina Rodriguez, Co-Chairs, Presidential Comm'n on Sup. Ct. of the U.S. (May 24, 2021), https://www.cruz.senate.gov/?p=press_release&id=5841 (seeking to "remind [the Commission's co-chairs] of the growing congressional momentum currently backing" these resolutions).

² See, e.g., Jean Edward Smith, *Stacking the Court*, N.Y. TIMES (July 26, 2007), <https://www.nytimes.com/2007/07/26/opinion/26smith.html> ("If the current five-man majority persists in thumbing its nose at popular values, the election of a Democratic president and Congress could provide a corrective."); Jonathan Turley, *A Bigger, Better Supreme Court: The Case for Reform*, GUARDIAN (June 27, 2012), <https://www.theguardian.com/commentisfree/2012/jun/27/bigger-better-supreme-court-reform>; Mark Tushnet, "For a Generation"?, BALKINIZATION (July 5, 2017), <https://balkin.blogspot.com/2017/07/for-generation.html> ("Suppose Democrats regain control of the Presidency and Congress after the 2020 elections. . . . One item on their legislative agenda might be expanding the Supreme Court to eleven (or more).").

³ Jeff Shesol, *Would Trump Consider a Court-Packing Scheme?*, NEW YORKER (Dec. 5, 2017), <https://www.newyorker.com/news/news-desk/would-trump-consider-a-court-packing-scheme>; see also Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), <https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal>.

⁴ See, e.g., *D.C. Circuit Judge Brett Kavanaugh: Garland 'Supremely Qualified' for Supreme Court*, LAW.COM (Mar. 31, 2016), <https://www.law.com/almID/1202753808423>; Thomas Ferraro, *Republican Would Back Garland for Supreme Court*, REUTERS (May 6, 2010), <https://www.reuters.com/article/us-usa-court-hatch/republican-would-back-garland-for-supreme-court-idUSTRE6456QY20100506> (noting that Senator Orrin Hatch, Republican from Utah, called Judge Garland "a consensus nominee" to replace Justice Stevens, who at that time had announced he planned to retire and who was ultimately replaced by Justice Kagan).

⁵ Adam Liptak & Sheryl Gay Stolberg, *Shadow of Merrick Garland Hangs Over the Next Supreme Court Fight*, N.Y. TIMES (June 11, 2021), <https://www.nytimes.com/2020/09/19/us/ginsburg-vacancy-garland.html>.

⁶ Press Release, Sen. Mitch McConnell, Justice Antonin Scalia, (Feb. 13, 2016), <https://www.republicanleader.senate.gov/newsroom/press-releases/justice-antonin-scalia>.

⁷ Lydia Wheeler, *Judiciary Chair: 'Standard Practice' to Not Confirm SCOTUS Nominee in Election Year*, HILL (Feb. 13, 2016, 7:39 PM EST), <https://thehill.com/regulation/court-battles/269398-senate-judiciary-chair-wait-until-election-is-over-to-fill-scalias>.

⁸ Mitch McConnell & Chuck Grassley, *Democrats Shouldn't Rob Voters of Chance to Replace Scalia*, WASH. POST, (Feb. 18, 2016), https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b_story.html.

⁹ Letter from Charles E. Grassley, Chairman, Sen. Judiciary Comm., et al., to Mitch McConnell, U.S. Sen. (Feb. 23, 2016) [hereinafter Letter from Charles E. Grassley], <https://www.scotusblog.com/wp-content/uploads/2016/02/SJC-GOP-letter-on-SCT-2-23-15.pdf>.

¹⁰ Lisa Desjardins, *What Every Republican Senator Has Said About Filling a Supreme Court Vacancy in an Election Year*, PBS NEWS (Sept. 22, 2020), <https://www.pbs.org/newshour/politics/what-every-republican-senator-has-said-about-filling-a-supreme-court-vacancy-in-an-election-year>.

¹¹ See Senate Republican Conference, *The Biden Standard*, LEADER BD. (Feb. 22, 2016), <https://web.archive.org/web/20160225183020/https://www.republican.senate.gov/public/index.cfm/blog?ID=7E53BFEC-32B0-4B55-A753-3860F588D30A> (compiling then-Senator Biden's statements from the Congressional Record in 1992); Press Release, Sen. Mitch McConnell, McConnell on Supreme Court Nomination (Mar. 16, 2016), <https://www.republicanleader.senate.gov/newsroom/remarks/mcconnell-on-supreme-court-nomination> (citing some of then-Senator Biden's statements).

¹² Corky Siemaszko, *Vice President Biden Rips Supposed 'Biden Rule,'* NBC NEWS (Mar. 24, 2016), <https://www.nbcnews.com/news/us-news/vice-president-biden-rips-supposed-biden-rule-n544786>.

¹³ Letter from Charles E. Grassley, *supra* note 9.

¹⁴ See, e.g., Press Release, Sen. John Thune, Thune Statement on Obama Nominee to Supreme Court (Mar. 16, 2016), <https://www.thune.senate.gov/public/index.cfm/press-releases?ID=35C7CFB1-AFF8-4411-98C0-2F982D0A7A5D> (“The Senate Republican majority was elected to be a check and balance to President Obama. The American people deserve to have their voices heard on the nomination of the next Supreme Court justice, who could fundamentally alter the direction of the Supreme Court for a generation.”); Sen. Mike Lee, *“This Isn’t About the Person, It Is About the Principle,”* YOUTUBE (Mar. 16, 2016), <https://www.youtube.com/watch?v=ZYJz10bKfNw> (“It has entirely to do with the fact that we’re in a presidential election year. And it’s been since 1888 that a Senate controlled by a party different than the party occupying the White House has confirmed a vacancy to the Supreme Court that arose during a presidential election year.”) (excerpt from interview on Fox News Channel).

¹⁵ See, e.g., Press Release, Sen. John Cornyn, Cornyn Statement on Nomination of Judge Merrick Garland to the Supreme Court (Mar. 16, 2016), <https://www.cornyn.senate.gov/content/cornyn-statement-nomination-judge-merrick-garland-supreme-court> (“At this critical juncture in our nation’s history, Texans and the American people deserve to have a say in the selection of the next lifetime appointment to the Supreme Court. The only way to empower the American people and ensure they have a voice is for the next President to make the nomination to fill this vacancy.”); Press Release, Sen. Mike Lee, Lee Reaffirms Commitment to Let People Pick Next Court Nominee (Mar. 16, 2016), <https://www.lee.senate.gov/2016/3/lee-reaffirms-commitment-to-let-people-pick-next-court-nominee> (“In light of the contentious presidential election already well underway, my colleagues and I on the Judiciary Committee have already given our advice and consent on this issue: we will not have any hearings or votes on President Obama’s pick.”).

¹⁶ Seung Min Kim & Burgess Everett, *More Republicans Agree to Meet with Garland*, POLITICO (Mar. 31, 2016, 4:56 PM EDT) (quoting a spokesman of Senator Marco Rubio as stating: “Senator Rubio will not be meeting with Judge Garland. He doesn’t believe the Senate should move on this nomination in the president’s final year . . .”).

¹⁷ See, e.g., Press Release, Donald J. Trump, Donald J. Trump Releases List of Potential United States Supreme Court Justices (May 18, 2016), <https://web.archive.org/web/20160519080254/https://www.donaldjtrump.com/press-releases/donald-j.-trump-releases-list-of-names-of-potential-united-states-supreme-c> (first list of nominees released by then-candidate Trump); Laurence Baum & Neal Devins, *Federalist Court*, SLATE (Jan. 31, 2017, 10:12 AM) (noting that as a presidential candidate Trump “promised that . . . his judicial nominees would ‘all [be] picked by the Federalist Society,’” and that he relied upon “the ‘Federalist people’ and the Heritage Foundation to assemble a list of 21 potential Supreme Court nominees”).

¹⁸ See, e.g., Editorial, *The Stolen Supreme Court Seat*, N.Y. TIMES (Dec. 24, 2016), [hereinafter Editorial, *The Stolen Supreme Court Seat*] <https://www.nytimes.com/2016/12/24/opinion/sunday/the-stolen-supreme-court-seat.html>; Dahlia Lithwick, *Republicans Stole the Supreme Court*, SLATE (Nov. 14, 2016, 4:59 PM), <https://slate.com/news-and-politics/2016/11/what-democrats-should-do-about-the-supreme-court.html>; Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE (Oct. 15, 2018), <https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court>; David S. Cohen, *Grand Theft Judiciary: How Republicans Stole the Supreme Court*, ROLLING STONE (Nov. 14, 2016, 6:35 PM ET), <https://www.rollingstone.com/politics/politics-features/grand-theft-judiciary-how-republicans-stole-the-supreme-court-128410>. The Republican-controlled Senate also exercised the so-called “nuclear option” to end the filibuster for nominees to all executive branch posts and the federal courts, including the Supreme Court. See Ed O’Keefe & Sean Sullivan, *Senate Republicans Go ‘Nuclear,’ Pave the Way for Gorsuch Confirmation to Supreme Court*, WASH. POST (Apr. 6, 2017), <https://www.washingtonpost.com/powerpost/senate->

poised-for-historic-clash-over-supreme-court-nominee-neil-gorsuch/2017/04/06/40295376-1aba-11e7-855e-4824bbb5d748_story.html?utm_term=.7b2a9084ee46.

¹⁹ See, e.g., Lawrence Weschler, *How the US Supreme Court Lost Its Legitimacy*, NATION (Sept. 17, 2018), <https://www.thenation.com/article/how-the-us-supreme-court-lost-its-legitimacy>; David Faris, *How Democrats Can Make Republicans Pay for Justice Gorsuch*, WEEK (Mar. 20, 2017), <https://theweek.com/articles/681352/how-democrats-make-republicans-pay-justice-gorsuch>.

²⁰ See, e.g., Editorial, *When the GOP Stole Merrick Garland's Supreme Court Seat, They Set the Stage for a Miserable Battle*, L.A. TIMES (Jan. 31, 2017, 5:00 AM PT), <https://www.latimes.com/opinion/editorials/la-ed-supreme-court-nomination-20170131-story.html>.

²¹ See, e.g., Geoffrey R. Stone, Opinion, *The Republican Assault on the Integrity of the Supreme Court*, HUFFPOST (Nov. 28, 2016), https://www.huffpost.com/entry/the-republican-assault-on-the-integrity-of-the-supreme_b_583bb36ce4b0a79f7433b82e.

²² See, e.g., Dahlia Lithwick, Opinion, *Supreme Court Nihilism*, SLATE (Mar. 17, 2016, 11:08 AM), <https://slate.com/news-and-politics/2016/03/the-gops-treatment-of-merrick-garland-is-disgraceful.html>.

²³ See, e.g., Editorial, *The Stolen Supreme Court Seat*, *supra* note Error! Bookmark not defined..

²⁴ See, e.g., Amita Kelly, *McConnell: Blocking Supreme Court Nomination 'About a Principle Not a Person'*, NAT'L PUB. RADIO (Mar. 16, 2016), <https://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person> (“It seems clear President Obama made this nomination not, not with the intent of seeing the nominee confirmed, but in order to politicize it for purposes of the election.”); Press Release, Sen. Grassley, *Grassley Statement on the President's Nomination of Merrick Garland to the U.S. Supreme Court* (Mar. 16, 2016), <https://www.grassley.senate.gov/news/news-releases/grassley-statement-presidents-nomination-merrick-garland-us-supreme-court> (“It's also important to remember the type of nominee President Obama said he's seeking. He says his nominee will arrive at 'just decisions and fair outcomes' based on the application of 'life experience' to the 'rapidly changing times.' The so-called empathy standard is not an appropriate basis for selecting a Supreme Court nominee.”); Reena Flores, *Ted Cruz Applauds Senate Inaction on Supreme Court Nominee*, CNN (Mar. 17, 2020), <https://www.cbsnews.com/news/ted-cruz-applauds-senate-inaction-on-supreme-court-nominee/> (“Merrick Garland is exactly the type of Supreme Court nominee you get when you make deals in Washington D.C . . . A so-called 'moderate' Democrat nominee is precisely the kind of deal that Donald Trump has told us he would make—someone who would rule along with other liberals on the bench like Justices Ginsburg and Sotomayor.”).

²⁵ See Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240-42 & nn.1, 9-13 (2019) (book review) (collecting sources that questioned the Supreme Court's “legitimacy” in the wake of these events); see, e.g., Michael Tomasky, Opinion, *The Supreme Court's Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018) <https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html>; Matthew Yglesias, Opinion, *Brett Kavanaugh's Confirmation Will Delegitimize the Supreme Court—And That's Good*, VOX (Oct. 5, 2018, 5:00 PM EDT), <https://www.vox.com/2018/10/5/17941312/brett-kavanaugh-supreme-court-legitimacy>; Andrew Gawthorpe, Opinion, *The Cost of Kavanaugh's Victory? The Legitimacy of the US Supreme Court*, GUARDIAN (Oct. 7, 2018, 10:42 EDT), <https://www.theguardian.com/commentisfree/2018/oct/07/brett-kavanaugh-victory-high-price-us-supreme-court-republicans>.

²⁶ See, e.g., Matt Ford, *Brett Kavanaugh Is the Point of No Return*, NEW REPUBLIC (Oct. 6, 2018), <https://newrepublic.com/article/151597/brett-kavanaugh-confirmed-supreme-court-point-no-return> (characterizing then-Judge Kavanaugh's comments as “[n]akedly partisan”); see also *Brett Kavanaugh's Opening Statement: Full Transcript*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/26/us/politics/read-brett-kavanaughs-complete-opening-statement.html> (“This whole two-week effort has been a calculated and orchestrated political hit, fueled with apparent pent-up anger about President Trump and the 2016 election, . . . revenge on behalf of the Clintons and millions of dollars in money from outside left-wing opposition groups.”); Brett M. Kavanaugh, Opinion, *I Am an Independent, Impartial Judge*, WALL ST. J. (Oct. 4, 2018), <https://www.wsj.com/articles/i-am-an-independent-impartial-judge-1538695822> (expressing regret for some of these comments, stating “I know that my tone was sharp, and I said a few things I should not have said”).

²⁷ See, e.g., Press Release, Sen. Kamala Harris, *Senator Harris Statement on Confirmation of Judge Brett Kavanaugh* (Oct. 6, 2018), <https://web.archive.org/web/20190304100145/https://www.harris.senate.gov/news/press-releases/senator-harris-statement-on-confirmation-of-judge-brett-kavanaugh> (accusing the Trump “White House” of “prevent[ing] the FBI from investigating critical aspects of the allegations or interviewing key witnesses,” including by “not even permitting the FBI to interview Judge Kavanaugh and Dr. Ford”).

²⁸ Chris Riotta, *Brett Kavanaugh 'Likely' to Be Investigated for Perjury, House Judiciary Members Says*, INDEPENDENT (Jan. 22, 2019), <https://www.independent.co.uk/news/world/americas/us-politics/brett-kavanaugh-perjury-investigation-probe-democrats-house-judiciary-committee-a8740831.html>.

²⁹ See generally MOLLIE HEMINGWAY & CARRIE SEVERINO, JUSTICE ON TRIAL: THE KAVANAUGH CONFIRMATION AND THE FUTURE OF THE SUPREME COURT (2019).

³⁰ Chris Keller, *Senate Vote on Kavanaugh Was Historically Close*, L.A. TIMES (Oct. 6, 2018, 5:35 PM) <https://www.latimes.com/nation/la-pol-scotus-confirmation-votes-over-the-years-20181005-htmstory.html>.

³¹ Press Release, Sen. Mitch McConnell, McConnell Statement on the Passing of Justice Ruth Bader Ginsburg (Sept. 18, 2020), <https://www.republicanleader.senate.gov/newsroom/press-releases/mcconnell-statement-on-the-passing-of-justice-ruth-bader-ginsburg>.

³² See, e.g., Marianne Levine, *McConnell Fends off Accusations of Hypocrisy over Holding Supreme Court Vote*, POLITICO (Sept. 22, 2020, 7:36 PM EDT), <https://www.politico.com/news/2020/09/21/mcconnell-pushes-back-hypocrisy-supreme-court-419569>; Liptak & Stolberg, *supra* note 5; Daniel McLaughlin, *History Is on the Side of Republicans Filling a Supreme Court Vacancy in 2020*, NAT'L REV. (Aug. 7, 2020, 2:48 PM), <https://www.nationalreview.com/2020/08/history-is-on-the-side-of-republicans-filling-a-supreme-court-vacancy-in-2020/>; Russell Wheeler, *McConnell's Fabricated History to Justify a 2020 Supreme Court Vote*, FIXGOV (Sept. 24, 2020), <https://www.brookings.edu/blog/fixgov/2020/09/24/mcconnells-fabricated-history-to-justify-a-2020-supreme-court-vote>.

³³ Letter from Sen. Dianne Feinstein, Ranking Member, S. Comm. on the Judiciary, et al., to Sen. Lindsey Graham, Chairman, S. Comm. on the Judiciary (Sept. 19, 2020), https://www.feinstein.senate.gov/public/_cache/files/3/7/3794b05a-089e-4189-990a-18ada53c1856/85EE07772C4042162149A34C10980331.letter-to-graham-on-rbg-vacancy.pdf.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See, e.g., Sahil Kapur, *With Eye on Election, Democrats Hammer Health Care on First Day of Barrett Hearing*, NBC (Oct. 12, 2020), (“Senate Democrats [bore] . . . a singular message: Health care coverage and protections for millions of Americans are at risk if Amy Coney Barrett is confirmed. . . . They noted that President Donald Trump, who nominated Barrett, has said he'd pick judges to rule against the Affordable Care Act); Russell Berman, *Democrats Go to War Over Neil Gorsuch*, ATLANTIC (Mar. 30, 2017) (“[M]ostly, the gathering Democratic opposition to Gorsuch is a reflection of the coarse political moment, as senators face pressure from . . . the likelihood that [President Trump] will be able to secure a conservative majority on the Supreme Court for decades more to come.”).

³⁷ See *supra* notes 31-35 and accompanying text.

³⁸ See, e.g., 163 CONG. REC. S6914 (daily ed. Oct. 31, 2017) (statement of Sen. Jeff Merkley, D-Or.) (“We are seeing the President engaged in a zeal to pack the court with extreme rightwing ideologues and to ram them through this confirmation process without due review.”). Such efforts to apply the “court packing” label to actions other than the outright addition of seats to courts were contrarian, but they were not altogether unprecedented. The term “court packing” had been invoked to criticize President Obama’s swift appointment of three judges to the D.C. Circuit upon the Senate’s elimination of filibusters for lower-court nominations. See Louis Jacobson, *Is Barack Obama Trying to ‘Pack’ the D.C. Circuit Court of Appeals?*, POLITIFACT (June 5, 2013), <https://www.politifact.com/factchecks/2013/jun/05/chuck-grassley/barack-obama-trying-pack-dc-circuit-court-appeals>. The term was also used to criticize President Ronald Reagan’s and President George H.W. Bush’s nominations to the Supreme Court. See Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 514 (2018); see also *id.* at 512-17 (tracing the use of “court packing” as a political epithet from the 1950s through 2017); see generally HERMAN SCHWARTZ, PACKING THE COURTS (1988).

³⁹ See Sam Stein, *Eric Holder Says Next Democratic President Should Consider Court Packing*, DAILY BEAST (Mar. 7, 2019), <https://www.thedailybeast.com/eric-holder-says-next-democratic-president-should-consider-court-packing>; Jamelle Bouie, *Mad About Kavanaugh and Gorsuch? The Best Way to Get Even Is to Pack the Court*, N.Y. TIMES (Sept. 17, 2019), <https://www.nytimes.com/2019/09/17/opinion/kavanaugh-trump-packing-court.html>.

⁴⁰ See E.J. Dionne, *Opinion, Enlarging the Supreme Court Is the Only Answer to the Right’s Judicial Radicalism*, WASH. POST (Oct. 28, 2020), https://www.washingtonpost.com/opinions/the-high-cost-of-confirming-amy-coney-barrett/2020/10/24/8d5a236a-156f-11eb-bc10-40b25382f1be_story.html; Press Release, Sen. Ed Markey, Expand the Supreme Court: Sen. Markey and Reps. Nadler, Johnson, and Jones Introduce Legislation to Restore Justice and Democracy to Judicial System (Apr. 15, 2021), <https://www.markey.senate.gov/news/press-releases/expand-the>

supreme-court-senator-markey-and-reps-nadler-johnson-and-jones-introduce-legislation-to-restore-justice-and-democracy-to-judicial-system; Michael Hiltzik, *How a New Court-Packing Scheme Could Save the Supreme Court from Right-Wing Domination*, L.A. TIMES (July 2, 2018, 6:30 AM PT), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-scotus-20180629-story.html>.

⁴¹ Astead W. Herndon & Maggie Astor, *Ruth Bader Ginsburg's Death Revives Talk of Court Packing*, N.Y. TIMES (Sept. 19, 2020), <https://www.nytimes.com/2020/09/19/us/politics/what-is-court-packing.html>.

⁴² See Google Trends: “Court Packing,” “Pack the Court,” “Pack the Supreme Court,” GOOGLE, <https://trends.google.com/trends/explore?date=today%205y&geo=US&q=court%20packing,pack%20the%20court,pack%20the%20supreme%20court>.

⁴³ Benjy Sarlin & Lauren Egan, *The Hot New Dem Plan to Score Policy Wins: Change the Rules of the Game*, NBC NEWS (Mar. 16, 2019, 7:31 AM EDT), <https://www.nbcnews.com/politics/2020-election/hot-new-dem-plan-score-policy-wins-change-rules-game-n983456>.

⁴⁴ *2020 Democratic Party Platform*, DEMOCRATIC PARTY 58 (2020), <https://democrats.org/where-we-stand/party-platform>.

⁴⁵ Barbara Sprung, *Biden Says He's 'Not A Fan' of Expanding the Supreme Court*, NPR (Oct. 13, 2020), <https://www.npr.org/2020/10/13/923213582/biden-says-hes-not-a-fan-of-expanding-the-supreme-court> (quoting then-candidate Biden as saying: “I’ve already spoken: I’m not a fan of court packing, but I don’t want to get off on that whole issue. I want to keep focused.”). Later, though he called the court system “out of whack,” he noted that “the last thing we need to do is turn the Supreme Court into just a political football, whoever has the most votes gets whatever they want.” See Sam Gringlas, *Asked About Court Packing, Biden Says He Will Convene Commission to Study Reforms*, NPR (Oct. 22, 2020), <https://www.npr.org/2020/10/22/926607920/asked-about-court-packing-biden-says-he-will-convene-commission-to-study-reforms>. In a tweet, then-President Trump said that court-packing would “permanently destroy the Court.” See Donald J. Trump, *Tweets of October 11, 2020*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/tweets-october-11-2020> (last visited September 19, 2021).

⁴⁶ Adam Gopnik, *The New, Conservative Supreme Court Is Returning to the Second Amendment*, NEW YORKER (May 7, 2021), <https://www.newyorker.com/news/daily-comment/the-new-conservative-supreme-court-is-returning-to-the-second-amendment>.

⁴⁷ Elie Mystal, *The Democrats Need to Prepare for the Supreme Court to Overturn 'Roe v. Wade,'* NATION (Oct. 7, 2020), <https://www.thenation.com/article/politics/biden-abortion-supreme-court>.

⁴⁸ Jeff Taylor, *How Safe is Gay Marriage? Advocates Fear Increasingly Conservative Court*, NBC NEWS (Oct. 6, 2020, 1:48 PM), <https://www.nbcnews.com/feature/nbc-out/fight-against-gay-marriage-still-alive-well-u-s-advocates-n1242272>.

⁴⁹ Adam Serwer, *The Supreme Court Is Helping Republicans Rig Elections*, ATLANTIC (Oct. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/dont-let-supreme-court-choose-its-own-electorate/616808>.

⁵⁰ Sahil Kapur, *Some Republicans Feel Protected by 6-3 Supreme Court, Even if Biden Wins*, NBC NEWS (Nov. 3, 2020, 12:15 PM), <https://www.nbcnews.com/politics/2020-election/some-republicans-feel-protected-6-3-supreme-court-even-if-n1245838>; Moira Donegan, *Enough Playing Nice. It's Time to Pack the Courts*, GUARDIAN (Apr. 19, 2019, 6:00 AM), <https://www.theguardian.com/commentisfree/2019/apr/19/pack-the-courts-democrats-2020>.

⁵¹ See *infra* Section III.B.1-3. See also *Presidential Commission on the Supreme Court of the United States 10-12* (July 20, 2021) (written testimony of Michael J. Klarman) [hereinafter Klarman Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Klarman-Testimony.pdf>.

⁵² U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

⁵³ See Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73.

⁵⁴ See Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89, 89.

⁵⁵ See Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.

⁵⁶ See Act of Feb. 24, 1807, ch. 16, § 5, 2 Stat. 420, 421.

⁵⁷ See Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176, 176.

⁵⁸ At the time, the federal judiciary consisted of district court judges and Supreme Court Justices. A federal district judge would sit alongside a Supreme Court Justice (riding circuit) to constitute a circuit court. For a description of this system, see Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1390-91 (2006) (“Beginning in 1789, each circuit court was staffed with two Supreme Court Justices and one local district judge. In 1793, the system was reformed so that only one Justice . . . was required.”); David R. Stras,

Why Supreme Court Justices Should Ride Circuit Again, 91 MINN. L. REV. 1710, 1714-26 (2007). Congress abolished the circuit riding practice in 1901. See Judicial Code of 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

⁵⁹ See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 33-37, 47-49 (Transaction Publishers 2007) (1928).

⁶⁰ See Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2759-63 (2020).

⁶¹ See *id.* at 2761-63.

⁶² The 1801 law established a system of lower federal circuit courts to handle appeals (in lieu of the circuits staffed by a Supreme Court Justice and a federal district judge). See Judiciary Act of 1801, §§ 7, 27, 2 Stat. 89, 90, 98.

⁶³ 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 189 (Beard Books ed. 1999) (1922) (noting Jefferson viewed this provision “as aimed directly at himself and as an intentional diminution of his powers”).

⁶⁴ See Act of April 29, 1802, ch. 31, §§ 4, 5, 2 Stat. 156, 157-58.

⁶⁵ The tight connection between the number of circuits and the number of Justices had begun to break down. In 1855, Congress created a circuit court for California, without creating a new position on the Supreme Court. JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* 133-34 (2012). But when Congress added a Justice in 1863, it transformed the California circuit into the Tenth Circuit and gave the new Justice the job of serving on that court. *Id.* at 138. See also Braver, *supra* note 60, at 2768-73 (arguing that the 1863 example can be seen as “the last example of the circuit-riding system at work” but asserting that subsequent changes were not tied to the circuit system).

⁶⁶ 60 U.S. (19 How.) 393 (1857); see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 415-17 (1998).

⁶⁷ See Act of March 3, 1863, ch. 100, § 1, 12 Stat. 794, 794; CROWE, *supra* note 65, at 138-39, 143-46.

⁶⁸ See Judiciary Act of 1866, ch. 210, 14 Stat. 209, 209. As in 1802, Congress did not terminate the position of any Justice but instead provided that the next three vacancies would not be filled.

⁶⁹ 3 WARREN, *supra* note 63, at 143-45. The reduction to seven Justices was not tied to the then-existing circuit court system. See Braver, *supra* note 60, at 2785 (“Reducing the number of Supreme Court Justices meant that the circuit courts would not be adequately staffed.”)

⁷⁰ See Circuit Judges Act of 1869, ch. 22, 16 Stat. 44, 44; 3 WARREN, *supra* note 63, at 223; see also CROWE, *supra* note 65, at 153-59 (noting the 1866 and 1869 changes are often seen as partisan attempts to manipulate the Court’s size but urging that the laws had more neutral purposes).

⁷¹ There has been a great deal of scholarship on President Roosevelt’s Court-packing plan. For a few of the accounts, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 217-29 (2009); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 82-162 (1996); JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010).

⁷² See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 317 (1936) (invalidating the Bituminous Coal Conservation Act); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542-51 (1935) (holding unconstitutional provisions of the National Industrial Recovery Act).

⁷³ See Message from the President of the United States: A Recommendation to Reorganize the Judicial Branch of the Federal Government, H. DOC. NO. 75-142, at 9-10 (1937).

⁷⁴ See Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 269-73 (2012).

⁷⁵ *Id.* at 273 (quoting Memorandum from Warner W. Gardner, Att’y, Dep’t of Justice, to Stanley Forman Reed, U.S. Solicitor Gen. 56-57, 65 (Dec. 10, 1936)).

⁷⁶ See Message from the President of the United States: A Recommendation to Reorganize the Judicial Branch of the Federal Government, H. DOC. NO. 75-142, at 1-3 (1937) (“The Judiciary has often found itself handicapped by insufficient personnel[.]”).

⁷⁷ See Franklin D. Roosevelt, Fireside Chat (Mar. 9, 1937), AM. PRESIDENCY PROJ., <http://www.presidency.ucsb.edu/ws/?pid=15381>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Reorganization of the Federal Judiciary, Part 1: Hearing Before the S. Comm. on the Judiciary*, 75th Cong. 38 (1937) (statement of Robert H. Jackson, Assistant Att’y Gen. of the United States).

⁸¹ *Id.* at 40.

⁸² *Id.* at 41.

⁸³ See *Presidential Commission on the Supreme Court of the United States* 1-2 (June 30, 2021) (written testimony of Laura Kalman, University of California, Santa Barbara) (noting that Roosevelt’s Court fight has often “been portrayed

as the idiotic brainchild of a hubristic FDR destined from its inception for defeat”), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Kalman-06.25.2021.pdf>.

⁸⁴ See LEUCHTENBURG, *supra* note 71, at 138; SHESOL, *supra* note 71, at 467.

⁸⁵ LEUCHTENBURG, *supra* note 71, at 137; SHESOL, *supra* note 71, at 315-16 (“The idea of giving any president, particularly Roosevelt, the authority to remake the Supreme Court virtually overnight was abhorrent to Senate progressives.”).

⁸⁶ Letter from Charles Evans Hughes, C.J., to Burton K. Wheeler, U.S. Sen. (Mar. 21, 1937), *reprinted in* S. REP. NO. 75-711, app. c at 40 (1937).

⁸⁷ See LEUCHTENBURG, *supra* note 71, at 135 (“In the first week, numbers of Democratic Senators announced themselves for the bill.”); SHESOL, *supra* note 71, at 514.

⁸⁸ See LEUCHTENBURG, *supra* note 71 at 135, 137-54 (“Despite all the antagonism, though, it still seemed highly likely in the last week of March [1937] that FDR’s proposal would be adopted.”).

⁸⁹ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937) (upholding the National Labor Relations Act); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 578-98 (1937) (upholding provisions of the Social Security Act); *Helvering v. Davis*, 301 U.S. 619, 639-46 (1937) (same); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 390-400 (1937) (upholding a state minimum wage law for women).

⁹⁰ Compare JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* 141-43 (1938) (“It seems probable . . . that all the justices realized that their only chance to save the Court lay in more self-reversals.”); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 19 (1996) (arguing that the Court “blinked” in response to the Court-packing plan), with BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 3-7 (1998) (challenging the view that the Court’s decisions were a “political response to political pressure”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, Ch. 8, § 8-6, 449 n.18 (1978) (casting doubt on the myth that a Justice changed his vote in response to the 1937 Court-packing plan).

⁹¹ See FRIEDMAN, *supra* note 71, at 226 (“The Court’s apparent change of direction [in *West Coast Hotel v. Parrish* and two weeks later in *NLRB v. Jones & Laughlin Steel Corp.*] was a major turning point for the plan, and everyone knew it.”); LEUCHTENBURG, *supra* note 71, at 143 (arguing that Justice “Roberts’ ‘somersault’ [in *West Coast Hotel*] gravely damaged the chances of the Court plan.”).

⁹² See S. REP. NO. 75-711, at 9 (1937); SHESOL, *supra* note 71, at 467.

⁹³ S. REP. NO. 75-711, at 23 (1937).

⁹⁴ *Id.* at 3, 8.

⁹⁵ *Id.* at 23.

⁹⁶ *Id.* at 14.

⁹⁷ See LEUCHTENBURG, *supra* note 71, at 147-48 (“The prospects for enacting this new bill appeared very promising.”).

⁹⁸ See SHESOL, *supra* note 71, at 481-89, 497-500.

⁹⁹ See Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 269-87 (2017); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 505-17, 538-44 (2018).

¹⁰⁰ See 99 CONG. REC. 1106 (1953) (statement of Sen. John Butler, R-MD).

¹⁰¹ *Id.*

¹⁰² 100 CONG. REC. 6256 (1954) (statement of Sen. John Butler, R-MD).

¹⁰³ 99 CONG. REC. 1106 (1953) (statement of Sen. John Butler, R-MD) (emphasizing that the amendment would “plug[] the loopholes in the Constitution’s protection for the Supreme Court”); *id.* at 1108 (statement of Sen. Russell Long, D-LA) (“Undoubtedly, one of the weak links is the possibility that the Supreme Court could be packed. . . . [T]hat is one loophole which we should close in order to protect ourselves in the future.”).

¹⁰⁴ See 100 CONG. REC. 6256 (1954) (statement of Sen. John Butler, R-MD).

¹⁰⁵ *Id.*

¹⁰⁶ See *id.* at 6347 (showing that the Senate voted 58 to 19 in favor of the amendment). A constitutional amendment requires a two-thirds supermajority vote in the House of Representatives and the Senate, and then ratification by three-fourths of the states. See U.S. CONST. art. V.

¹⁰⁷ See C.P. Trussell, *Court Amendment Tabled in House*, N.Y. TIMES, at 11 (Aug. 4, 1954).

¹⁰⁸ 100 CONG. REC. 10,454 (1954) (statement of Rep. Emmanuel Celler, D-NY). A similar objection was raised in the Senate. *Id.* at 6342 (statement of Sen. Thomas Hennings, D-MO) (arguing that Congress might in the future decide

that the Supreme Court should be either larger or smaller, depending on its workload, and for that reason a constitutional amendment was “undesirable”).

¹⁰⁹ U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

¹¹⁰ See U.S. CONST. art. I, § 8, cl. 18 (“[The Congress shall have power] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

¹¹¹ See *id.*

¹¹² Franklin Delano Roosevelt, *The Fight Goes On*, COLLIER’S WKLY., Sept. 20, 1941, at 16, 37 (also arguing that the approach “seemed . . . to have the best chance of passing both Houses of the Congress most quickly”).

¹¹³ See, e.g., AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 354-55 (2012) (“[I]f Congress has a sincere good-government reason for altering the Court’s size, it is hard to see why Congress’s views should not prevail, even if the Court sincerely disagrees about what size would be best for achieving good government . . . Even if . . . Congress was retaliating against what it perceived as Court abuses—say, a string of dubious rulings and judicial overreaches—the legislature should still prevail.”); Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1062-63 (2014); Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2134 (2002); *Presidential Commission on the Supreme Court of the United States* 19 (Aug. 9, 2021) (written testimony of Michael J. Gerhardt, University of North Carolina at Chapel Hill) (“There is little doubt about the constitutionality of the Congress’s authority to expand or contract the size of the Court”); *Presidential Commission on the Supreme Court of the United States* 3 (Aug. 9, 2021) (written testimony of G. Edward White, University of Virginia School of Law) (“There is no question that Congress can constitutionally change the size of the Court . . .”). But see *Presidential Commission on the Supreme Court of the United States* 2, 4 (July 20, 2021) (written testimony of Randy E. Barnett, Georgetown University Law Center) (arguing that “partisan court packing” is unconstitutional, because “seeking a partisan advantage on the Supreme Court is not a legitimate end”), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Barnett-Testimony.pdf>. As discussed in Section III.B.3 of this Report, some scholars do object on policy grounds to expansion of the Supreme Court in order to influence future decisions. But most agree that Congress has the power to modify the Court’s size for that reason.

¹¹⁴ See Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 269-87 (2017); Grove, *supra* note 38, at 505-17, 538-44.

¹¹⁵ Grove, *supra* note 38, at 505-06, 512-17.

¹¹⁶ S. 1141 & H.R. 2584, 117th Cong. (2021) (“The Judiciary Act of 2021”); see Carl Hulse, *Democrats’ Supreme Court Expansion Plan Draws Resistance*, N.Y. TIMES (Apr. 15, 2021), <https://www.nytimes.com/2021/04/15/us/politics/democrats-supreme-court-expansion.html>; see also Klarman Testimony, *supra* note 51, at 13 (arguing that Democrats should “expand[] the Court by four seats to ensure a temporary Democratic majority”).

¹¹⁷ See *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Christopher Kang, Demand Justice) [hereinafter Kang Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Kang-Testimony.pdf> (“In the past five years, Republicans have used their political power to: [c]hange the size of the Supreme Court for more than a year by stealing a Supreme Court seat from President Obama in 2016[;] . . . [u]nilaterally change the Senate Rules to confirm Neil Gorsuch[;] . . . [d]iscard multiple credible allegations of sexual assault and perjury against Brett Kavanaugh and confirm him without legitimate investigation, and[;] [d]eny the will of the voters and confirm Amy Coney Barrett . . .”); Klarman Testimony, *supra* note 51, at 12-13 (discussing the confirmation tactics of the Republican-controlled Senate).

¹¹⁸ See *Presidential Commission on the Supreme Court of the United States* 3-4, 7, 15 (July 20, 2021) (written testimony of Nan Aron, Alliance for Justice) [hereinafter Aron Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Aron-Testimony.pdf> (asserting that the Court could, among other things, “wipe away reproductive rights, in spite of decades of precedent and overwhelming public support for those rights,” “continually block[] the people’s efforts to protect themselves and their loved ones from the scourge of gun violence,” and undermine other important precedents related to campaign finance reform, administrative law, and religion); Kang Testimony, *supra* note 117, at 3 (“The problem is not that Democrats are unable to understand the impact of the courts on reproductive rights, LGBTQ+ equality, voting rights, gun violence prevention, labor, the environment, racial

justice, immigration, and more. We hold our collective breath every June to see what rights the Republican justices will allow to survive another year.”).

¹¹⁹ Cf. JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* 43-44 (2009) (“[O]ver the long haul, the repeated failure of an institution to meet policy expectations can weaken and even destroy that institution’s legitimacy in the eyes of disaffected groups. . . . From this perspective, Court support can change fairly quickly over time. . . .”); James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 206-07 (2014) (noting this risk to “diffuse [public] support”).

¹²⁰ Aron Testimony, *supra* note 118, at 1-2 (“[T]he Court’s legitimacy has already been tarnished [] after decades of partisan takeover. . . . Given this reality, it is clear that reform is in fact necessary to *restore* legitimacy to the Court.”); *id.* at 1-5, 11-12 (further arguing that “the most effective way to restore balance to our Court is through expansion”).

¹²¹ Cf. Carl Hulse, *McConnell Suggests He Would Block a Biden Nominee for the Supreme Court in 2024*, N.Y. TIMES (June 14, 2021), <https://www.nytimes.com/2021/06/14/us/politics/mcconnell-biden-supreme-court.html> (noting that then-Senate Majority Leader McConnell “threatened on Monday to block any Supreme Court nominee put forward by President Biden in 2024 if Republicans regain control of the Senate” and that McConnell declined to say whether a Republican-controlled Senate would confirm a nominee in 2023).

¹²² See *Presidential Commission on the Supreme Court of the United States* 5 (July 20, 2021) (written testimony of Jeffrey J. Peck), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Peck-Testimony.pdf> (noting, and proposing reforms to address, “the level of partisanship and tribalism associated with Senate processes on Supreme Court nominations”); *Presidential Commission on the Supreme Court of the United States* 1 (July 20, 2021) (written testimony of Benjamin Wittes, the Brookings Institution), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Wittes-Testimony.pdf> (emphasizing “the decay of the confirmation process”); see also *Presidential Commission on the Supreme Court of the United States* 8:31:32-8:34:27 (July 20, 2021) (oral testimony of Randy E. Barnett, Georgetown University Law Center), <https://www.whitehouse.gov/pcscotus/public-meetings/> (suggesting that the Senate’s repeated refusal to confirm a nominee could violate the spirit of the Constitution, given that “all discretionary power can be abused”).

¹²³ See *Presidential Commission on the Supreme Court of the United States* 9-10 (July 20, 2021) (written testimony of Larry Kramer, William & Flora Hewlett Foundation) [hereinafter Kramer Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Kramer-Testimony.pdf> (“Paradoxical as it sounds, enlarging the Court now might actually offer a way back to a less politicized process. . . . [F]aced with a credible threat that ‘tit’ really will be matched by ‘tat,’ opposing parties learn to cooperate.”).

¹²⁴ See *Presidential Commission on the Supreme Court of the United States* 4 (July 20, 2021) (written testimony of Wade Henderson, Leadership Conference on Civil Rights), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Henderson-Testimony.pdf>; *id.* at 10 (“Courts rely on public trust for legitimacy, and diversity among judges and justices helps improve both public trust and balanced judicial decisionmaking.”); Aron Testimony, *supra* note 118, at 12 (“By expanding the Court, we can ensure that it actually looks like America, and includes Justices with diverse backgrounds and experiences who will bring important perspectives to major decisions.”).

¹²⁵ See LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS* 74 tbls.2-6 (6th ed. 2015) (showing that the Court granted review in 184 cases in 1980; 149 cases in 1983; 186 cases in 1985; and 122 cases in 1989).

¹²⁶ We include statistics from the pre-pandemic era, given that more recent statistics may reflect the complexities of the past eighteen months. See JOHN G. ROBERTS, JR., 2019 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5-6 (2019), <https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf> (reporting that the Supreme Court decided sixty-nine cases in the 2018 term, and sixty-three in the 2017 term); JOHN G. ROBERTS, JR., 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY 13 (2017), <https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf> (reporting that the Supreme Court decided sixty-eight cases in the 2016 term, and seventy in the 2015 term); JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 13 (2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> (reporting that the Supreme Court decided seventy-five cases in the 2014 term and seventy-seven in the 2013 term).

¹²⁷ See *Presidential Commission on the Supreme Court of the United States* 8 (June 30, 2021) (written testimony of Noah Feldman, Harvard Law School) [hereinafter Feldman Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf> (“Under almost all ordinary circumstances,

court-packing would seriously undermine the legitimacy of the Supreme Court.”); *Presidential Commission on the Supreme Court of the United States* 1 (June 30, 2021) (written testimony of Michael W. McConnell, Stanford Law School) [hereinafter McConnell Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/McConnell-SCOTUS-Commission-Testimony.pdf> (“Any attempt to increase the size of the Court . . . would be a severe blow to the reputation of the Court as a legal institution . . .”); *Presidential Commission on the Supreme Court of the United States* 2 (July 20, 2021) (written testimony of Neil S. Siegel, Duke Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Siegel-Testimony.pdf> (“Court-packing would significantly undermine the Court’s independence and, in almost all circumstances, risk its legal and public legitimacy.”); *Presidential Commission on the Supreme Court of the United States* 90 (July 20, 2021) (written testimony of Supreme Court Practitioners’ Committee, co-chaired by Kenneth Geller and Maureen Mahoney), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Geller-Mahoney-Testimony.pdf> (“[T]he independence of the Court and its standing with the public would be gravely compromised if Congresses were to add seats for the purpose of affecting the Court’s jurisprudence . . .”).

¹²⁸ See *Presidential Commission on the Supreme Court of the United States* 7-8 (June 30, 2021) (written testimony of Maya Sen, John F. Kennedy School of Government, Harvard University), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Sen-Written-Testimony.pdf> (noting that “simply expanding the size of the Supreme Court is unpopular among the public” and citing polls showing that only 26% or 32% of Americans favor increasing the number of Justices).

¹²⁹ See *Presidential Commission on the Supreme Court of the United States* 2:58:15-2:58:44 (June 30, 2021) (oral testimony of Maya Sen, John F. Kennedy School of Government, Harvard University), <https://www.whitehouse.gov/pscotus/public-meetings/june-30-2021> (“How would the public perceive court expansion? . . . [I]t’s going to be filtered through partisan concerns at the public opinion level.”).

¹³⁰ See McConnell Testimony, *supra* note 127, at 2 (asserting that “judicial nominations and confirmations have become increasingly bitter and partisan for the past thirty-five years . . . [b]eginning with the unprecedented ideological assault on nominee Robert Bork in 1987, which Republicans still have not forgotten”); *id.* at 3-4 (“The Senate’s decision not to hold hearings or a vote on the Garland nomination was permissible under both the Constitution and the Senate’s rules. . . . The decision of the Republican majority in 2016 to block the Garland nomination was political hard-ball, but it provides no justification for violating the actual norm of a nine-Justice Supreme Court.”).

¹³¹ See *id.* at 1 (“Any attempt to increase the size of the Court would be widely, and correctly, regarded as a partisan interference with the independence of the Court. This would be a severe blow to the reputation of the Court as a legal institution . . .”); *Presidential Commission on the Supreme Court of the United States* 16 (July 20, 2021) (written testimony of Stephen E. Sachs, Harvard Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Sachs-Testimony.pdf> (“[R]eforms that are not perceived by both sides as enhancing the courts’ legitimacy will never succeed in doing so.”).

¹³² See Feldman Testimony, *supra* note 127, at 9 (“Court-packing would likely become a tit-for-tat practice” and would “drastically reduc[e] the court’s institutional legitimacy.”).

¹³³ See MORRIS FIORINA, *DIVIDED GOVERNMENT* 1 (2d ed. 1996); see also Mark Tushnet, *The Pirate’s Code: Constitutional Conventions in U.S. Constitutional Law*, 45 PEPP. L. REV. 481, 499-502 (2018) (offering reasons to doubt that Court expansion would result in a tit-for-tat).

¹³⁴ See Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *The Endgame of Court-Packing* 2-3 (May 3, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835502 (“We find that the median result of repeated partisan court-packing would be to increase the size of the Court to 23 justices within 50 years and to 39 justices within 100 years. . . . [I]f court-packing happens every time the president’s party has appointed a minority of justices on the Supreme Court and there is unified government—the worst-case tit-for-tat scenario cited by opponents of court-packing—we find that the median size of the Court across the simulations is 29 justices after 50 years and 63 justices after 100 years.”).

¹³⁵ *Presidential Commission on the Supreme Court of the United States* 20-21 (July 20, 2021) (written testimony of Vicki C. Jackson, Harvard Law School) [hereinafter Jackson Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf> (“[E]xpanding the Court simply to give one specific President the power to fill seats . . . risks turning the Court into even more of a perceived political football.”); see also Supreme Court Practitioners’ Committee Testimony, *supra* note 127, at 90 (“If Democrats were to [add seats for the purpose of affecting the Court’s jurisprudence] now, Republicans would surely adopt the same tactic when they next have the opportunity. This would exacerbate the public perception that the Court is a mere political body.”).

¹³⁶ See McConnell Testimony, *supra* note 127, at 5 (“As one who has sat on panels of three, eleven, and twelve judges . . . it is my opinion that the ideal size of the Supreme Court is seven or nine. . . . In my time on the Tenth Circuit, when all twelve judges sat en banc, it was often not a good experience for judges or litigants.”). State supreme courts vary in size from five to nine members. See Section III.B.3; *Presidential Commission on the Supreme Court of the United States* 9-11 (July 20, 2021) (written testimony of Marin K. Levy, Duke University School of Law), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Levy-Testimony.pdf>.

¹³⁷ Letter from Chief Justice Charles Evans Hughes to Senator Burton K. Wheeler (Mar. 21, 1937), reprinted in S. REP. NO. 75-711, app. c, at 40 (1937).

¹³⁸ See, e.g., Klarman Testimony, *supra* note 51, at 12 (arguing that Court expansion would “[e]nable a Democratic [m]ajority to [d]efend [d]emocracy”).

¹³⁹ See Feldman Testimony, *supra* note 127, at 11 (noting “the implicit threat of court-packing” and stating “if their interpretations over time go so far away from mainstream constitutional opinion that they cause the court to lose legitimacy, the justices know that it could lead to substantial loss of independence in the form of court-packing”); Kramer Testimony, *supra* note 123, at 6-7 (“Roosevelt’s effort was also *entirely* successful in getting him exactly what he sought: the Court reversed course and upheld the second New Deal. . . . As with any tool of deterrence, making clear that the other branches can and will push back against an overreaching Court makes it less necessary to do so. . . . [T]he Court adjusts its behavior to greater sensitivity in the other branches.”).

¹⁴⁰ Franklin Delano Roosevelt, *The Fight Goes On*, COLLIER’S WKLY., at 11 (Sept. 13, 1941) (“[1937] was the year which was to determine whether the kind of government which the people of the United States had voted for in 1932, 1934, and 1936 was to be permitted by the Supreme Court to function.”). Roosevelt insisted: “It would be a little naive to refuse to recognize some connection between these decisions and the Supreme Court fight.” *Id.* at 38.

¹⁴¹ See *supra* note 139 and accompanying text.

¹⁴² See *Electoral College Fast Facts*, HISTORY, ART, & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Electoral-College/Electoral-College/> (last visited Sept. 17, 2021) (“Five times a candidate has won the popular vote and lost the election. Andrew Jackson in 1824 (to John Quincy Adams); Samuel Tilden in 1876 (to Rutherford B. Hayes); Grover Cleveland in 1888 (to Benjamin Harrison); Al Gore in 2000 (to George W. Bush); Hillary Clinton in 2016 (to Donald J. Trump).”). The President is selected by the Electoral College. See U.S. CONST. art. II, § 1, cl. 2-4, amended by U.S. CONST. amend. XII. This system makes it possible for the President to take office without having won the popular vote.

¹⁴³ See U.S. CONST. art I, § 3, cl. 1, amended by U.S. CONST. amend. XVII. Some supporters of Court expansion argued in testimony before the Commission that the design of the Senate, at least in the foreseeable future, will tend to favor the Republican Party. See Klarman Testimony, *supra* note 51, at 13 (arguing that Democrats are “disadvantaged in the competition for control of the U.S. Senate”).

¹⁴⁴ See Klarman Testimony, *supra* note 51, at 16-17 (“[A] Republican-controlled Court could easily invalidate federal legislation containing . . . democracy-entrenching measures. . . . Those same Justices could easily invalidate measures designed to reduce the influence of money in politics, increase the transparency of political spending, restore the preclearance provision of the Voting Rights Act, and ameliorate economic inequality.”).

¹⁴⁵ See Siegel Testimony, *supra* note 127, at 11-12 (“If the Justices were to issue decisions that the American people viewed as extreme and damaging—as a radical lurch in a particular ideological or interpretive direction that decimated basic institutions or tore at the fabric of constitutional law—Court-packing might well be legitimacy-improving. . . . [Or] perhaps a Court that enabled a President to steal an election—to seriously damage American democracy—should be packed. Some things matter more than the Court’s legitimacy and efficacy.”); see also Feldman Testimony, *supra* note 127, at 10 (“There is, however, one set of circumstances in which court-packing and jurisdiction-stripping, or at least a credible threat of them, might have desirable effects. That is the situation where, over time, the Court manages to squander its institutional legitimacy on its own by a series of decisions that radically countermand the constitutional commitments held by the great majority of the American people.”).

¹⁴⁶ Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 1 (2020).

¹⁴⁷ Jackson Testimony, *supra* note 135, at 20-21.

¹⁴⁸ John C. Doolan, *The Old Court-New Court Controversy*, 11 GREEN BAG 177 (1899); Theodore Ruger, “*A Question Which Convulses a Nation*”: *The Early Republic’s Greatest Debate about the Judicial Review Power*, 117 HARV. L. REV. 827 (2004).

¹⁴⁹ Marin K. Levy, *Packing and Unpacking State Courts*, 61 WILLIAM & MARY L. REV. 1121, 1138-39 (2020); William Raftery, *Up, Down, All Around*, 100 JUDICATURE 7 (Autumn 2016).

¹⁵⁰ The size of foreign supreme courts varies dramatically. One study found that most of the supreme courts in Europe have more than twenty judges serving on them, and some have well over a hundred members. Alan Uzelac, *Supreme Courts in the 21st Century: Should Organisation Follow the Function?*, 81 STUDIA IURIDICA 125, 135 (2019). The Court of Justice of the European Union, which hears cases involving interpretations of the law of the European Union, has thirty-eight members (including eleven advocates-general who are appointed to hear cases alongside the judges). *The Court of Justice of the European Union (CJEU)*, EUR. UNION (last visited Oct. 12, 2021), https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en. The European Court of Human Rights, which hears cases arising from the European Convention of Human Rights, has forty-seven judges. *Composition of the Court*, EUR. CT. HUM. RTS. (last visited Oct. 12, 2021), <https://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=>. The Federal Supreme Court of Switzerland has thirty-eight, and the Supreme Court of the Netherlands also has thirty-eight. *The Swiss Federal Supreme Court: The Third Power Within the Federal State*, SWISS FED. SUP. CT. 9 (2021), https://www.bger.ch/files/live/sites/bger/files/pdf/Publikationen/BG_Brosch_Inhalt_A4_21_eng.pdf; Uzelac, *supra* (noting that the Supreme Court of the Netherlands is composed of thirty-eight judges). The Indian Supreme Court has thirty-three, and the Spanish Supreme Court has seventy-nine. *Chief Justice & Judges*, SUP. CT. INDIA (last visited Oct. 12, 2021), <https://main.sci.gov.in/chief-justice-judges>; Uzelac, *supra* (noting that the Spanish Supreme Court is composed of seventy-nine judges).

¹⁵¹ The number of members who sit on the French constitutional court is somewhat variable since former presidents are eligible to sit with the court but in practice rarely do. Nicolas Boring, *The Constitutional Court and Judicial Review in France*, LIBR. CONG. (Nov. 4, 2020), <https://blogs.loc.gov/law/2020/11/the-constitutional-council-and-judicial-review-in-france>.

¹⁵² David Kosar and Katarina Sipulova, *How to Fight Court-Packing?*, 6 CONSTITUTIONAL STUDIES 133 (2020).

¹⁵³ Jodi Finkel, *Judicial Reform in Argentina in the 1990s: How Electoral Incentives Shape Institutional Change*, 39 LATIN AM. RSCH. REV. 56, 63-64 (2004).

¹⁵⁴ Steven Levitsky & James Loxton, *Populism and Competitive Authoritarianism in Latin America*, in ROUTLEDGE HANDBOOK OF GLOBAL POPULISM, (Carlos de la Torre ed., 2018).

¹⁵⁵ Ozan O. Varol, Lucia Dalla Pellegrina & Nuno Garoupa, *An Empirical Analysis of Judicial Transformation in Turkey*, 65 AM. J. COMPAR. L. 187, 197-999 (2017).

¹⁵⁶ David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 209 (2013); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 551-52 (2018).

¹⁵⁷ Michał Ziółkowski, *Two Faces of the Polish Supreme Court After “Reforms” of the Judiciary System in Poland: The Question of Judicial Independence and Appointments*, 5 EUR. PAPERS 347, 350 (2020).

¹⁵⁸ See *Presidential Commission on the Supreme Court of the United States* 8:15:20-8:17:15 (July 20, 2021) (oral testimony of Marin K. Levy, Duke University School of Law), <https://www.whitehouse.gov/pscscotus/public-meetings> (stating that “[c]ertainly if we were to see expansion of the Supreme Court, that could be seen as some sort of green light” at the state level, although also emphasizing that any such impact would be uncertain, particularly given that such efforts are already “on the rise” at the state level); *infra* note 159 and accompanying text.

¹⁵⁹ See *Presidential Commission on the Supreme Court of the United States* 10-11 (June 30, 2021) (written testimony of Rosalind Dixon, UNSW Sydney) [hereinafter Dixon Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf> (noting that “[c]omparative scholars . . . highlight the potential for renewed use of court-packing in the US to be seen as legitimating new and expanded attempts at court-packing in a range of democracies under threat” while suggesting that the risk of such borrowing with respect to “court-packing” may be less severe because authoritarians are already able to rely on Roosevelt’s 1937 plan).

¹⁶⁰ See Jackson Testimony, *supra* note 135, at 16-17 (“I urge the Commission to consider proposals to provide for fluctuating Court membership, or a ‘decoupling’ of appointments from vacancies, by guaranteeing one, or two, presidential appointments each term, while letting the overall numbers on the Court fluctuate. . . . Such a mechanism could be capped (e.g. at 11) to keep the Court to a workable number.”); see also Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. ECON. PERSPS. 119, 136–38 (2021) (making a similar proposal, albeit without fixing an upper boundary on the number of Justices).

¹⁶¹ Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 181 (2019); *see also* John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 541 (1999) (making a similar proposal with six- to twelve-month stints on the Court); *Presidential Commission on the Supreme Court of the United States* 17 (July 20, 2021) (written testimony of Jamal Greene, Columbia Law School at 17), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Greene-Testimony.pdf> (“[T]he suggestion is for a 16-member Court whose members serve 16-year terms and are drawn from what are now designated as the courts of appeals. . . . [T]he first step in the proposal would be to expand the formal size of the Supreme Court to equal the size of the Article III appellate bench—currently 179 authorized positions. . . . The second step would be to enact, via statute, an appointment procedure that would designate which judges of the formally expanded Supreme Court exercise the powers of the functional Supreme Court. The remaining judges of the formal Supreme Court would exercise roughly the same powers, including appeals of right from federal district courts, that the courts of appeals enjoy today.”).

¹⁶² *E.g.*, Jack Balkin, *Don’t Pack the Court. Regularize Appointments*, BALKINIZATION (Oct. 5, 2020), <https://balkin.blogspot.com/2020/10/dont-pack-court-regularize-appointments.html>.

¹⁶³ *E.g.*, Bruce Ackerman, *Trust in the Justices of the Supreme Court is Waning. Here are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018, 3:15 AM), <https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html>.

¹⁶⁴ U.S. CONST. art. III, § 1 (emphasis added).

¹⁶⁵ Article III, Section 1 of the U.S. Constitution provides that: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” The Appointments Clause of Article II, Section 2 provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law” The concern under the “good Behaviour” Clause is that a statute that would have judges sit on the Supreme Court for only brief periods, interspersed with service on the lower federal courts, would significantly change the nature of the office. The concern under the Appointments Clause is that the Clause creates an office of Supreme Court Justice separate and apart from the office of lower federal court judge. These constitutional issues are complex, and scholars disagree over their appropriate resolution. If these rotation reforms were to be pursued via a constitutional amendment, these concerns would not arise.

¹⁶⁶ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21-22 (Max Farrand ed., 1911) (emphasis added) [hereinafter RECORDS]; *see* Ross E. Davies, *A Certain Mongrel Court: Congress’s Past Power and Present Potential to Reinforce the Supreme Court*, 90 MINN. L. REV. 678, 684 (2006) (noting that this proposal was “[t]he ninth ‘Resolve’ in the ‘Virginia Plan’ presented at the opening of the Philadelphia convention in late May 1787”).

¹⁶⁷ 1 RECORDS, *supra* note 166, at 95 (emphasis added).

¹⁶⁸ The only change was the capitalization. *See* 2 RECORDS, *supra* note 166, at 186 (showing that the draft from the Committee of Detail on August 6 provided that “[t]he Judicial Power of the United States shall be vested in *one Supreme Court*, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.” (emphasis added)); *id.* at 600 (showing that the draft from the Committee of Style in mid-September provided that “[t]he judicial power of the United States, both in law and equity, shall be vested in *one supreme court*, and in such inferior courts as the Congress may from time to time ordain and establish. . . .” (emphasis added)); *id.* at 660 (showing the final text adopted on September 17, 1787, which provided for “one supreme Court”).

¹⁶⁹ *See, e.g.*, James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1452-53 (2000) (“In providing for one supreme court and ruling out the possibility of multiple supreme courts, the Framers appear to have contemplated that the Supreme Court was to play a distinctive role as the hierarchical leader of the judicial department.”). *But see* David E. Engdahl, *What’s in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 IND. L.J. 457, 465 (1991) (disputing this understanding of the “wording change”).

¹⁷⁰ *See* 2 RECORDS, *supra* note 166, at 44-45; *id.* at 45 (statement of James Madison) (“The increase of business will be provided for by an increase of the number who are to do it.”).

¹⁷¹ *Id.* (statement of Gouverneur Morris); *see* Davies, *supra* note 166, at 685-86 (“In other words, [Morris was asserting that,] because the work of the Supreme Court could not be divided up among the members of the Court, adding Justices would only add to the number of people involved in each decision and every other piece of Court business.”).

¹⁷² See FRANKFURTER & LANDIS, *supra* note 59, at 73-76 (discussing the efforts of Senator Lyman Trumbull, R-IL, to establish a nine circuit-judge panel that would “ride circuit,” thus easing the circuit-riding burdens placed on Supreme Court Justices).

¹⁷³ CONG. GLOBE, 41st Cong., 1st Sess. 208-09 (1869) (statement of Sen. George Williams, R-OR); see FRANKFURTER & LANDIS, *supra* note 59, at 74-75.

¹⁷⁴ See CONG. GLOBE, 41st Cong., 1st Sess. 213-14 (1869) (statement of Sen. William Stewart, R-NV) (“The Constitution says there shall be one Supreme Court. You make a man a justice of that court and can you say that he shall not sit there after you have made him a justice of the Supreme Court? That raises a grave doubt.”); see also *id.* at 210 (statement of Sen. Allen Thurman, D-OH) (“[W]hile I am inclined to think that the very best model of a court in the world is the French court of cassation, consisting of twenty-four judges divided into three sections, yet with my understanding of the Constitution of the United States it is not competent for us to provide such a system.”).

¹⁷⁵ *Id.* at 214-15 (statement of Sen. Lyman Trumbull, R-IL) (predicting that “such a law would be held unconstitutional by that court, and then you would have eighteen judges of your Supreme Court of the United States”).

¹⁷⁶ *Id.* at 215.

¹⁷⁷ See *id.* at 212 (statement of Sen. George Williams, R-OR) (stating that “this bill, reported from the Judiciary Committee, provides that six of the judges shall constitute a quorum. . . . [And t]here is nothing in the Constitution that restricts the power of Congress [to set a quorum for the Supreme Court]”); *id.* at 217 (statement of Sen. George Edmunds, R-VT) (“[M]y friend says that the Constitution of the United States declares that there shall be one Supreme Court. I agree to that; but it does not declare how it shall be composed[.] . . . It leaves . . . that to general principles of legislation, where it ought to be left.”).

¹⁷⁸ See *id.* at 216 (statement of Sen. George Edmunds, R-VT) (noting that, under current law, “only a majority of th[e] Court’s] quorum are necessary to make a decision. . . . Do you find that when the whole number get together at the next meeting of the court they reverse that [decision]? Not by any means.”).

¹⁷⁹ See *id.* at 213 (statement of Sen. William Stewart, R-NV) (“[W]e can fix the quorum. But that does not meet the point. After you have fixed the quorum, the question arises, have not all the justices of the Supreme Court the right to sit there all the time?”); *id.* at 215 (statement of Sen. Lyman Trumbull, R-IL) (agreeing with this point and noting that “a law that should declare that the rest of the Senate besides the quorum had no right to vote and participate in [its] decisions would be utterly void”).

¹⁸⁰ See FRANKFURTER & LANDIS, *supra* note 59, at 75-76 (noting Congress instead passed a proposal by Senator Lyman Trumbull, R-IL, for additional circuit judges).

¹⁸¹ See Eugene Gressman, *Requiem for the Supreme Court’s Obligatory Jurisdiction*, 65 A.B.A. J. 1325, 1327 (1979).

¹⁸² FRANKFURTER & LANDIS, *supra* note 59, at 60-61 (noting that, from 1850 to 1890, the Court’s docket grew from 253 to 1,816 cases); see H.R. REP. NO. 51-1295, at 3 (1890) (noting that, according to Justice Harlan, the Court disposed of 451 out of 1,396 cases on its docket in 1886).

¹⁸³ See Evarts Act, ch. 517, §§1, 2, 5-6, 26 Stat. 826, 826-28 (1891) (authorizing discretionary review over cases from new appellate courts involving diversity, revenue laws, patent laws, federal criminal laws, and admiralty law). For discussions of the history behind this law, see Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 948-50, 952-59 (2013); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1649-57 (2000).

¹⁸⁴ S. REP. NO. 51-1571, at 3-5 (1890) (describing the views of a minority of senators).

¹⁸⁵ *Id.* at 3.

¹⁸⁶ See U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”); S. REP. NO. 51-1571, at 3 (“It is true that the Constitution provides that there shall be ‘one Supreme Court,’ but it also provides that the appellate jurisdiction of that court shall be exerted ‘both as to law and as to fact with such exceptions, and *under such regulations as Congress may make.*”).

¹⁸⁷ See S. REP. NO. 51-1571, at 3 (“Congress has from the beginning, from time to time, declared what number out of and less than the whole number of justices shall be such a quorum.”).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 4.

¹⁹⁰ See, e.g., 21 CONG. REC. 10,286 (1890) (statement of Sen. John Spooner, R-WI) (stating that he could “not vote for” the minority proposal because he had “some doubt . . . as to its constitutionality,” given the constitutional

provision for “one Supreme Court”); Grove, *supra* note 183, at 979 n.272; Hartnett, *supra* note 183, at 1654 (“Senators debated whether the proposal for panels was consistent with the constitutional mandate of one Supreme Court.”).

¹⁹¹ 21 CONG. REC. 10,227 (1890) (statement of Sen. Joseph Dolph, R-OR).

¹⁹² See, e.g., *id.* (stating that he “sympathize[d]” with the notion held by some senators that such a division “would detract from [the Court’s] dignity and importance and from the weight, if not from the authority, of its decisions”).

¹⁹³ See 21 CONG. REC. 10316 (1890) (showing that the proposal was rejected by a vote of 36-10).

¹⁹⁴ *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the House Comm. on the Judiciary*, 67th Cong. 3 (1922) (statement of Chief Justice Taft). To address the Court’s growing caseload, Congress instead expanded the scope of discretionary certiorari review. See Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936 (1925).

¹⁹⁵ Letter from Charles Evans Hughes, C.J., to Burton K. Wheeler, U.S. Sen. (Mar. 21, 1937), reprinted in S. REP. NO. 75-711, app. c at 40 (1937) (adverse report).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662; Grove, *supra* note 183, at 968-78 (discussing the legislative debates leading up to this measure).

¹⁹⁹ Letter from Warren E. Burger, C.J., to Roman L. Hruska, U.S. Sen. (May 29, 1975) (“It has occasionally been proposed that the Supreme Court be enlarged so that the Court could sit in divisions or panels, but any such proposals would meet with almost universal opposition, even assuming their constitutionality. Such a change would appear to alter the basic concept of ‘one supreme Court’ under Article III.”), reprinted in COMM’N ON REVISION OF FED. CT. APP. SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) app. d at 173.

²⁰⁰ See Lisa T. McElroy & Michael C. Dorf, *Coming off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 110 (2011) (“The Court sitting en banc would be the ‘real’ indivisible Supreme Court, while the panels could be understood as lower federal courts.”); see also Tracey E. George & Chris Guthrie, “The Threes”: *Re-Imaging Supreme Court Decisionmaking*, 61 VAND. L. REV. 1825, 1847 n.85 (2008) (providing several justifications for the constitutionality of panel proposals).

²⁰¹ CONG. GLOBE, 41st Cong., 1st Sess. 213-14 (1869) (statement of Sen. Lyman Trumbull, R-IL) (predicting that “such a law would be held unconstitutional by that court, and then you would have eighteen judges of your Supreme Court of the United States”).

²⁰² 21 CONG. REC. 10,227 (1890) (statement of Sen. Joseph Dolph, R-OR).

²⁰³ Letter from Charles Evans Hughes, C.J., to Burton K. Wheeler, U.S. Sen. (Mar. 21, 1937), reprinted in S. REP. NO. 75-711, app. c at 40 (1937) (adverse report).

²⁰⁴ See Epps & Sitaraman, *supra* note 161, at 193.

²⁰⁵ *Id.*

²⁰⁶ U.S. CONST. art. II, § 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court”).

²⁰⁷ One prominent proposal of this type would establish a system by which every judge on the courts of appeals also would be appointed as an Associate Justice of the Supreme Court. The Court would hear cases as a panel of nine Justices, and the Court’s membership would be replenished every two weeks through random assignment. See Epps & Sitaraman, *supra* note 160, at 181-82 (2019). Proponents of this reform combine it with other significant changes, including a prohibition on having more than five Justices nominated by a single political party at one time; a rule that only a 6-3 majority of Justices could invalidate federal legislation; and a provision that would have the Justices select cases for review for future, unknown panels, but not their own.

²⁰⁸ See *id.* at 183.

²⁰⁹ See *id.* at 182-83; see also John G. Grove, *Reforming the Court*, NAT’L AFFS. (2020), <https://www.nationalaffairs.com/publications/detail/reforming-the-court>.

²¹⁰ See *Presidential Commission on the Supreme Court of the United States* 1-5 (Aug. 2021) (written testimony of Erin F. Delaney, Northwestern University Pritzker School of Law), <https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Erin-Delaney.pdf> (arguing that federalism and the two-party political system are responsible for the Supreme Court’s status as a “federal apex court,” but that apex courts need not be “overly politicized.”)

²¹¹ See Epps & Sitaraman, *supra* note 160, at 183; Grove, *supra* note 209.

²¹² See *Presidential Commission on the Supreme Court of the United States* 9-14 (June 30, 2021) (written testimony of Kim Lane Scheppelle, Princeton University), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Scheppelle-Written-Testimony.pdf> (providing examples of high courts that sit in panels, and arguing that such a structure may be preferable).

²¹³ See *id.*; Dixon Testimony, *supra* note 159, at 12. Texas and Oklahoma “maintain[] a bifurcated structure of civil and criminal courts of last resort.” Brent M. Hanson, *Judicial Hot Potato: An Analysis of Bifurcated Courts of Last Resort in Texas and Oklahoma*, 12 TENN. J. L. & POL’Y 161, 164-65 (2018).

²¹⁴ Jackson Testimony, *supra* note 135, at 2, 19, 21-23; Greene Testimony, *supra* note 161, at 3-5.

²¹⁵ See Hemel, *supra* note 160.

²¹⁶ For different versions of this proposal, see Epps & Sitaraman, *supra* note 160 at 193 (proposing a Supreme Court of 15 Justices, with five Democrats, five Republicans, and five Justices to be chosen, with a unanimity requirement, from the lower courts by the sitting Justices); Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547, 550 (2018) (proposing that Congress set the number of Justices at eight, with four Democrats and four Republicans).

²¹⁷ See Segall, *supra* note 216, at 561-62. Some proponents of this approach note the likelihood of greater plurality opinions, which carry less weight as precedent. See Grove, *supra* note 209. This prospect could lower the stakes of any one decision by the Court. *Id.*

²¹⁸ See Epps & Sitaraman, *supra* note 160, at 199-200.