Presidential Commission on the Supreme Court of the United States

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I have questioned myself whether it is worthwhile to trouble this Commission with the very obvious observations I have to make. For if my account of the basis for judicial review is really as fundamental as I believe it to be, it will certainly not be "news" to the members of this Commission. Having read the testimony of some of the most ardent of those seeking to alter the conditions of judicial review by the US Supreme Court, however, it may be that a brief refresher course is in order. Why we have the system of judicial constitutional practice we do, not surprisingly, has to do with the nature of our Constitution and the practices of judges.

The Nature of the US Constitution of 1787

The US Constitution is a system of operating instructions designed to implement and protect the premises of the Declaration of Independence more perfectly than had the Articles of Confederation. The four most important of these premises are that (1) "That these United Colonies are, and of Right ought to be Free and Independent States; ...and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do;" (2) "that all men are created equal;" (3) "that they are endowed by their Creator with certain unalienable Rights;" and (4) "that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

These fundamental commitments have equally fundamental consequences for the State that the Constitution creates. The premise that the United Colonies are free and independent states empowers them to take those steps that are necessary to protect the independence and security of the State. Indeed it was this premise that provided the authority for the Constitutional Convention to propose a new constitution to replace the Articles of Confederation and provide for its ratification rather than simply to amend the Articles through the process they specified.

The premise that all men are created equal means that no person is another person's sovereign; it's not simply that the American state rests on popular sovereignty—many states can claim that—rather that the American state is incompatible with the claims of aristocracy, monarchy, and oligarchy that had dominated the European societies that colonized North America. I need to hardly add that this premise—as we understand it now and as many understood it then—is incompatible with slavery and indentured servitude. As Lincoln stated in 1854, "My faith in the proposition that each man should do precisely as he pleases with all which is exclusively his own lies at the foundation of the sense of justice there is in me." Only law can override the choices of any person, and only those rules that are supported by and permitted by the Constitution can be law.

The premise that all persons have unalienable rights—rights that can't be "alienated' in lawyers' language, that can't be bought or sold or traded or even given away—means that the American

State, uniquely when it was founded, is and cannot be fully sovereign. There are entire powers, e.g., for whom to vote or where to live, or which employment to pursue, whom to marry, how many children to have, and so on—that cannot be delegated to the State.

And finally the premise that the principal purpose of the State is to secure rights, by means to which the People have consented, rejects the notion that an increase in the power of the State necessarily means a diminution of the rights of the People. Only those powers that the People have given to the State---which must exclude those powers that cannot be given because they are "unalienable"—can be executed by the State but if the State is to act, it can be given competent powers to do.

So the first point I want to make is that the Constitution imposes certain constraints on the State that it creates and that the most basic of these constraints, ones that are more fundamental than the specific constraints of Article 1, Section 10 or elsewhere, are derived from the asserted premises that are the basis for the Declaration of Independence.

The Unusual Political and Legal Background to the Founding of the United States

The United States was, in two important respects, in a unique historical and legal position when it was founded in 1776-1788.

"Thus in the beginning all of the World was America" wrote John Locke in *Two Treatises of Government*. Of this famous and evocative passage, one historian wrote,

> Steeped in the colonial zeal of his patron, the Earl of Shaftesbury, John Locke saw America as the second garden of Eden; a new beginning of England should she manage to defend her claim in the American continent against those of the Indians and other European powers. America, like the world described in the original Genesis, is England's second chance at paradise, providing the colonial masters of the old world with a land full of all the promise known in that first idyllic state. America thus represents for Locke and his readers a two-sided Genesis, a place to find both the origins of their past and the promise of their future.[i]

The colonial Americans themselves didn't disagree. Nor were they entirely mistaken to think so. And by the time of the Revolution, after the expulsion of the French from the continental mainland and the removal of the British government from the colonies, they found themselves in a wondrous situation. Before them lay a continent unspoiled and vast with riches that they could exploit undisturbed by the corruption of the old order, while at the same time they inherited a centuries-old set of legal practices developed by English common law. Their genius—far beyond that of John Locke—was to do something neither he nor the common law had ever contemplated. This was to put the State itself under law. Thus they had a breath-takingly endowed future to which they could apply the methods of adaption and rationality that were accepted by consensus and sanctified by centuries of habit. Before establishing the new State, colonial Americans did not have to forge a legal consensus; they were free to develop the economy and the society as they wished relying on an inherited consensus with respect to legal methods.

As Grant Gilmore put it,

> It is entirely clear that the men who guided our affairs from the 1770s or 1780s would have understood the unique and privileged historical situation. It does not fall to the lot of every generation to make such a fresh start in a vigorous, literate, and sophisticated society already in full flood of economic and social development, conscious of its immense potential for ever-growing power and wealth.[1]

On the one hand, the framers and ratifiers wrote on a blank political canvas. They chose a bicameral legislature as one of a number of options in the colonial setting; they chose a presidential system in defiance of the monarchical and the prime ministerial models; they crafted a federal system of dual sovereignty. They could start from scratch, founding a new constitutional order. Elsewhere I have called this constitutional order the imperial state-nation, which would compete with the prevailing constitutional order of European states, the colonial, territorial state that dominated the 18th century and had been enshrined in the Treaty of Utrecht.

On the other hand, however, the framers and ratifiers did not write on a blank page legally. Rather they inherited a system of legal argument and legal decisionmaking that had long been in practice. It was therefore perfectly natural that the American innovation of putting the State under law—a dramatic, historic departure—would rely on the customary methods by which English common law had long been applied to private parties, methods not only used to construe private agreements but also to settle appeals, create and resolve precedents. Thus it was that the common law methods of interpreting an agreement, the methods applied in the construction of wills, deeds, contracts, and other arrangements have been applied to construing the provisions of the Constitution.

The consequences of this etiology have been profound. It has allowed the Americans, with one fateful breakdown that itself ushered in a rebirth of the principles of the Declaration of Independence and brough into being a new constitutional order, to achieve a broad fidelity and adherence to the Constitution even when there was deep division as to its proper meaning.

It is the common law of constitutional construction that is our surest underpinning. The principal reason we give legitimacy to courts, and to governments enforcing the law, is that we believe that judges and officials believe themselves to be bound by a power they do not wholly create and that they cannot wholly disregard.

The Implications of the Nature and Background of the US Constitution

The most important implication for this Commission of the description I have given is that judicial review—the review by courts of the constitutionality of an executive action or of the application of a legislative enactment---is a necessary, not a discretionary, function of courts in the American system. Before any purportedly legal act can be enforced by a court, it must be determined that the act is constitutional. If it is not, it is not law. If it is not law, it cannot be enforced no matter that it be written

[1] Grant Gilmore and Philip Bobbitt, *The Ages of American Law* (2d edition, 2014) at 9.

in the statute books or written in the stars. That is the nature of a constitution that limits governments; that is the nature of the US Constitution.

That is the holding in *Marbury*---despite the oft-repeated claim that in that case the Supreme Court "established" judicial review.[2] Chief Justice Marshall does not claim exclusivity for his constitutional judgment, indeed quite the contrary. He simply declines to rely on a jurisdictional statute that he adjudges to be unconstitutional. Nor is it the case that the framers and ratifiers did not contemplate judicial review. No one who has read *Federalist #78* could make such a claim with a straight face.

Nor is it correct that the constitutional text is silent on the matter. The words of the Supremacy Clause, "*This Constitution* and the Laws of the United States *which shall be made in pursuance thereof...*shall be the supreme Law of the Land and the Judges in every State shall be bound thereby...." could scarcely be clearer.

Moreover, although it is sometimes said that the exercise of judicial review has de-legitimated the US Supreme Court, as when the Court renders a controversial constitutional decision in a case of popular concern, this is a gross misperception. To see this, one has only to consider what the legitimacy of the Court would be were it deprived of the power of judicial review. As the late Hans Linde once wrote, consider the implications,

> of a decision saying that a bit of organized public prayer never hurt anyone? Or of a decision that a little inequality of voting rights did not matter as long as the state thought it served a useful purpose in some larger political scheme of things? Or that it was no injustice to ransack someone's home or wire it from floor to ceiling if the evidence obtained proved him guilty of a crime? Or that difficulties of effective schooling, or of peaceful public recreation might on occasion justify even-handed segregation?[3]

The Relevance of the Distinction Between Legitimacy and Justification

As I have observed, and as one of the most forceful of the advocates for Supreme Court reform has acknowledged, the questions before the Commission do not in fact arise because the legitimacy of the institution of the Supreme Court is in jeopardy. The necessity of judicial review, an unavoidable necessity in a system in which the State is under law, was greatly facilitated by the inherited methods of the common law because they had achieved a customary legitimacy that the new constitution did not have.

There are of course several kinds of legitimacy, as Commissioners Richard Fallon and Tara Grove have eloquently and persuasively contended.[4] What I have been writing about is the sort of legitimacy that is

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[2] Nor is it the case that judicial review was a novel invention of Marshall's see, W. M. Treanor, "Judicial Review Before Marbury," http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2010/04/treanor.pdf

[3] Hans Linde, "Judges, Critics, and the Realist Tradition," 82 *Yale L. J.* 227 (1972).

[4] *See* Richard Fallon, *Law and Legitimacy in the Supreme Court* (2018); Tara Leigh Grove, "The Supreme Court's Legitimacy Dilemma," 132 *Harv. L. Rev*. 2240 (2019).

manifested by a long practice of deference, and I will distinguish this legitimacy from that accorded a particular practice when that practice is deemed justified. I do this because I think that the principal reason the Commission was convened was that the practice of judicial review by the Supreme Court was considered by some to be unjustifiable and that the various proposals for reform are accompanied by highly dubious justifications on the implicit assumption that, if justified, these proposals would carry their own legitimacy. Were this the case, the sacrifice of the legitimacy that the US Supreme Court currently enjoys by augmenting its membership, curtailing its jurisdiction, changing the number of judicial votes that count as a majority, providing for overruling by Congress, etc. might then itself ultimately be *de minimis.*

As one of the most adamant of the advocates of reform told the Commission,

> The cause of the current public debate over reforming the Supreme Court is longstanding: Americans rightfully hold democracy as our highest political ideal, yet the Supreme Court is an antidemocratic institution. The primary source of concern is judicial review...[T]he justification for judicial review is not persuasive as a matter of practice or theory.[5]

What has brought us to a point when so many learned and distinguished members of the American bar have been called upon to evaluate various proposals for the reform of the federal judiciary and specifically before this Commission on the US Supreme Court, despite the fact that none of these reforms is particularly popular with the members of the government or the public? It is the sense that the practice of judicial review by the Supreme Court can no longer be justified or at least not justified on the basis considered essential by the Court's critics.

But judicial review by the Court is a theoretical necessity and a practical success in terms not only of the legitimacy it confers on judicial decisions---conferred on all courts, state and federal, within the appellate jurisdiction of the Supreme Court---but also that legitimacy conferred on executive actions and legislation that is affirmed when those are certified to be constitutional (by far the most frequent outcome of Court review). Therefore we must ask not only for a justification for reform but for the consensus around particular reform proposals that promises to deliver legitimacy. Let us consider some of the justifications then for such reforms.

Justifications for Reforming the practice and scope of Judicial Review by the Supreme Court

"The Supreme Court is an anti-democratic institution. The main problem is judicial review…. The question presented by judicial review is not whether the Constitution should be enforced. Rather the question is what should happen when over five hundred members of Congress and four justices of the Supreme Court interpret the Constitution to permit a particular law, yet five justices of the Court disagree and think the law is unconstitutional."

Actually, the question presented by judicial review is precisely whether the Constitution should be enforced, because judicial review—the review of a statute or executive action or its constitutionality—

[5] Nikolas Bowie, "The Contemporary Debate over Supreme Court Reform,: Origins and Perspectives," *Written Statement for the Presidential Commission on the Supreme Court of the United States.*

only occurs when a case or controversy has arisen over whether that statute or executive action should be enforced by courts. This is such a profound misunderstanding that it suggests some neglect of the bases for judicial review.

"The primary question therefore ought to be how much power the Supreme Court should enjoy under our democratic constitution, not the second order one of how it can exercise that power acceptably and effectively."

But there is nothing "primary" about this proposed analysis regarding first order/second order. The primary question is not how much power the Supreme Court should have but what is the power for? And when this first order question is answered, then the second order question arises: how much power and authority does it need?

"The problem to solve is not that the Supreme Court has lost legitimacy, understood as the current trust of enough observers, but that it thwarts the democratic authority that alone justifies our political arrangements."

What exactly is meant by 'democratic authority'? Is it the authority that proceeds from elections alone? If that were so, then presumably there is no democratic authority for any decision by any federal judge even though their nominations are confirmed by the Senate. Indeed, one might ask whether there is any democratic authority through the acts of anyone except the President, the Vice President and members of Congress since the entire body of senior civil officials are merely nominated by the President—as are Supreme Court justices—and confirmed by the Senate, but this scarcely states the insidious nature of the claim.

Do Court decisions really have no democratic authority? And if by democratic authority one means simply the endorsement of a particular act or measure by the voters, why is it that such authority "alone" justifies our constitutional and political arrangements?

"The problem to solve" is not a loss of legitimacy—that is true, and if in fact democratic authority were undermined by the US Supreme Court, legitimacy would be a problem—but rather the problem is how well-intentioned reforms can in fact undermine and even destroy that legitimacy.

To see why it is so important that we return to the basis for judicial review one has only to reflect on the implications of the charge that its supporters "pretend that [the power to edit and throw out major laws] is either mandated by our Constitution or essential to democracy."

I think we must assume that persons who make these profound accusations really believe that the idea that judicial review is mandated by the Constitution is a pretense or a deception.

"Political control of judiciaries is essential to all regimes."

But what is meant by "political control"? Oughtn't we to insist that political control, however fundamental to the appellate jurisdiction of the Supreme Court and its membership, must provide an

unfettered space in which the judiciary is free to decide cases and apply rules on the basis of legal argument rather than political direction from some external body?

Moreover the statement appears to confuse statutory interpretation with constitutional interpretation. While the Congress should have the determinate word regarding the construction of statutes, there is no warrant in the Constitution for a conclusive presumption as to their constitutionality.[6] While we must presume the members of Congress or some majority of those members believed they were voting for a statute that was constitutional, it would be error to leave it at that. If that presumption were accorded final authority, as it is with statutes, why have constitutional provisions that contemplate Congressional violations such as the presidential veto on constitutional grounds? Is it plausible to conclude that the Bill of Rights was assumed by its ratifiers to provide mere self-enforcing guidelines ("Congress shall make no law..)?

"Nor are the costs of 'juristocracy' merely in the excess power given to or taken by unelected judges. As our greatest constitutional theorist, Professor James Bradley Thayer, originally argued at the end of the 19th century, empowerment and self-empowerment of the judiciary stunts our common democratic life, and recent political experience confirms he was correct."

That Professor Thayer is regarded or should be regarded or has ever been regarded as our "greatest constitutional theorist" is risible but on the merits of this claim, one might ask: is what is wrong with US politics—our recent political experience—that our debates and divisions, "our common democratic life," have been stunted? That the debate has been somehow forestalled and muffled? Do we have an excess of decorum and deference to the opinions of those with whom we disagree? Have the subject of controversial Supreme Court opinions been taken off the table for discussion? If that is so, how do they achieve the status of controversy?

"In the most visible cases, the choices…are almost never constitutionally or legally compelled, which the close disagreement of our justices themselves already prove."

Surely it cannot be that the only constitutionally supportable decisions by judges are those in which the conclusions are reached unanimously by courts. Isn't it a matter of legal argument—no matter what the vote count is—whether a legal conclusion is *warranted*, which is not the same as indisputable or compelled.

"Disappointing as it may be to legal experts, which reforms or reforms to try, it turns out not to be a legal question but a political one…"

[6] The Dormant Commerce Clause doctrine is not to the contrary. Congress's role in defining its own assessments *vis-à-vis* the states' regulation of commerce does not confer automatic constitutionality on that judgment or on any act of Congress; nor on an arguably conflicting state statute, but merely sets the parameters of the putative conflict.

Putting aside the sarcasm, is it so difficult to grasp that constitutional questions can be both political and legal? Senate confirmation of members of the Judiciary, for example, has legal parameters[7]and is not nor should it be entirely free of political considerations.[8]

and

"The determination of the 'merits' of any of the currently debated reforms singly or together is a political one—anything but a neutral-technical matter. In most instances, the same turns out to be true of the 'legality' of the reforms."

This reveals an extraordinarily narrow view of legal argument, that it encompasses only the modality of doctrinal argument which is based on general, neutral principles. Isn't it troubling that the reformers believe that 'in most instances' the legality of the proposed reforms has nothing to do with the law?

"Congress has been the essential source of rights protection in our history."

This is a sweeping claim that is not obvious on its face. But it does call to mind this historical anecdote. The great Civil Rights lawyer Morris Abram happened to meet the majority leader of the Senate, Lyndon Johnson, the afternoon that *Brown* came down. Abram asked him what he thought. Johnson answered that he was very proud of the decision but that, "I wish it had been voting." There are many ways to read this answer, but I don't think it can be understood if we ignore the two-way relationship between the elected institutions of government and the Judiciary. It is because the Supreme Court is not elected and because its decisions are not controlled by the political branches that it can lead us and them in directions that the politics of the hour have otherwise walled off. To paraphrase D.H. Lawrence's remark about the novel, the Court can inform and lead into new places the flow of our sympathetic consciousness and can lead our sympathy away in recoil from things that are dead. One might cite the Court's striking down the Defense of Marriage Act passed by both houses of Congress and signed into law by the President.

and

"Judicial power was not only central to the maintenance of chattel slavery. After the Civil War, it was profoundly implicated in the abandonment of Reconstruction policies and helped to institutionalize African subordination in a new guise."

I should have thought that the actions of the legislatures that adopted the system of Jim Crowe laws and racial segregation, to say nothing of the actions of the Congress that determined what states might practice slavery and adopted the Fugitive Slave Acts, would be relevant to such a claim, because the claim isn't simply that judicial power was central to these horrific institutions but that the removal of judicial power—power, I remind you, that held that school segregation, segregation in housing and land transfer, and racial discrimination in voting was unconstitutional—would have confined the resolution of

[7] Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 660 (1970).
[8] Ibid.

these deplorable and disgraceful practices to the democratically elected legislatures that adopted them in the first place.

Regarding some specific reforms

Limiting the terms of Supreme Court justices seems to me pretty plainly unconstitutional because the text of Article III so clearly conditions continuance in office only on good behavior. Perhaps the best case for limiting terms has been made to the Commission by my co-teacher, Professor Akhil Amar.[9]

Similarly, there is a broad, unthinking assumption that changing the size of the Court has the weight of considerable 19th century precedent, an assumption that seems to me thoroughly cast into doubt by an excellent article, "Court-Packing: An American Tradition?" by Professor Joshua Braver.[10]

Whether it is "offensive to our ideals of the rule of law [to prohibit] Congress from experimenting with jurisdiction…" probably depends upon the experiment. But I am inclined to think that Congress, which is likely to act from motives a good deal less abstract than a vague attachment to "democracy," could well be vulnerable with respect to jurisdiction shaping or with respect to requiring heightened majorities for Supreme Court decisions, to the rule[11] that Congress cannot dictate the outcome of a particular judicial decision.

There is, in my view, nothing to the argument that the Court's review of such Congressional acts for their constitutionality amounts to begging the question whether it can in fact be so limited. A question is "begged" when its formulation assumes an answer. Whether or not jurisdiction-stripping of the kind

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[9] Akhil Amar, "In Support of a Congressional Statute Establishing an Eighteen-Year Limit on Active Supreme Court Service, With Emeritus Status Thereafter and a Purely Prospective Phase-In, *Written Statement for the Presidential Commission on the Supreme Court of the United States.* Professor Amar maintains that his proposal is not, strictly speaking, a term limit because the justices whose authority is so substantially curtailed continue service, are paid, and retained for life the title of 'justice.'

"A relaxed-service justice—whom we might also call an "emeritus justice"—would not routinely sit with active-service justices *en banc*; but would be available to do so in cases when the Court is short staffed—when (because of death or illness or resignation or recusal or the like) nine active-service Justices are not available for service. An emeritus justice would devote most of her daily attention to Court-related administrative, ceremonial, educational, public-relations, circuit-riding, and docket-management functions, following a more detailed set of rules to be promulgated and from time to time revised by the active-service justices

I am impressed, as always, with Professor Amar's ingenuity but confess I'm not persuaded. Justices who do not sit '*en banc*'—which is the most consequential duty of being a Supreme Court justice where every multi-member judicial hearing and decision is *en banc*, as opposed to an ordinary appeals judge, are no more "justices" than a senator who is forbidden to vote on legislation before the Senate is a Senator regardless of how she may be addressed.

[10] Joshua Braver, "Court-Packing: An American Tradition," 61 B.C. L. Rev. 2747 (2020), https://lawdigitalcommons.bc.edu/bclr/vol61/iss8/2

[11] Cf. *United States* v. *Klein*, 80 U.S. 128 (1871); see Gordon G. Young, "United States v. Klein: Then and Now," 44 *Loyola University of Chicago Law Journal* 265 (2012).

proposed can be determined by the US Supreme Court to be unconstitutional is simply a matter of whether or not the enforcement of such a statute arises in a Case or Controversy otherwise properly before the Court. Not to see that reflects a profound misunderstanding of how the Constitution placed the practices and habits of adjudication at the gates of protecting itself, a point that is not original by the "legal experts" the reformers profess to dismiss but rather is made with considerable force and clarity by Alexander Hamilton in *Federalist No. 78*.

Reformers don't agree on which of the disempowering proposed provisions they favor: jurisdiction channeling & stripping; supermajority rules for voting by the justices of the Supreme Court; reassigning finality to Congress who could override Supreme Court decisions by statute or resolution. The test for some is whether the reform is "oriented to disempowering the Supreme Court and thus to restoring democratic authority…."

But suppose "disempowering" the Court disempowers the enforcement of supreme law? That would be disempowering the votes of the ratifiers across more than two centuries to say nothing of disempowering the voters who elected their representatives based on the assumption that their acts would be reviewed by the Supreme Court. Not to acknowledge this is to rely on a rather over-simple even simplistic idea of the relationship between power and democratic authority.

"Disempowering [the Supreme Court] works a durable fix with less prospect of spiraling out of control and, in theory, it can appeal across the partisan spectrum, since its function is essentially to transfer authority to Congress…as a result it would immediately favor no side in present controversies."

I suppose these happy assumptions depend upon what issues are being taken off the table by the Congress: Abortion rights? Criminal rights? Immigration rights? Second Amendment rights? Gerrymandering? Same-sex marriage? It is not unreasonable to think that the Congress would find it challenging to ignore the partisanship of its members by simply taking off the table the issues that got them elected.

"A supermajority rule for Supreme Court decisions, requiring a 7-2 or other high threshold or constitutional validation can be institutionalized by statute under Congress' substantial powers under Article III to structure the judiciary and provide it jurisdiction."

It is true that exceptions to the Supreme Court's appellate jurisdiction may be regulated by Congress. It is highly unlikely, however, that imposing regulations on how the judicial power is to be implemented—which the text of Article III vests "in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish"—is subject to such imaginative tinkering. Could Congress actually make It a rule that the judicial power of the Supreme Court cannot be exercised in any case in which there is a dissent? Forget the chaos that would ensue with respect to contradictory state court decisions and federal circuit decisions; forget the problem that such a rule locks in all Supreme Court precedents at the time of the adoption of the regulation; how does one square such a modification of the centuries-old practice of judges with the text of Article III?

Congress "could also reassign finality of decision to itself through a jurisdictional statute that makes Supreme Court invalidations of federal law provisional unless and until Congress passes on the result…"

This legal assessment reveals a remarkable misunderstanding of the basis for judicial review. It seems to assume that judicial review is a kind of honour bestowed on legislation, when in fact a finding of constitutionality is an absolutely necessary predicate to enforcing the law sought to be enforced in the case or controversy before the Court. In light of the supremacy clause, "this Constitution…shall be the supreme Law of the Land and the Judges in every State shall be bound thereby…" A judge simply cannot enforce a law that is deemed by her to be unconstitutional. Full stop. "Reassigning the finality of decision to Congress" would indeed disempower the Supreme Court—it would disempower the Supreme Court from enforcing *any* federal law or executive action.

"…[A]ll three reforms can be conceived as jurisdictional fine-tuning by statute—jurisdiction-stripping, a supermajority rule for the Supreme Court, reassigning finality to Congress—with legislative override functionally transforming the Supreme Court jurisdiction in cases of constitutional invalidation of federal law in an advisory direction."

I would have thought that the option of advisory opinions by the US Supreme Court was one of the questions on which constitutional law was absolutely settled. But whether or not that is the case, it is very hard to square with the Case or Controversy requirement of Article III. Rendering Supreme Court decisions as merely suggestive until they are confirmed by Congress reduces them to advisory opinions that do not, and are not able to, render relief to the parties to the lawsuit.

Final Observations

Jurisdiction stripping has been held constitutional ---the Congress effectively banned the 1803 Term of the Court[12]--but in mind that this sacrifices the legitimating function of the judiciary. Consider the subjects likely to be stripped when the claim is made that the tit-for-tat cycle likely in court packing will be avoided. Aren't they likeliest to be the most rather than the least controversial? And if they are, what is the status of those Congressional acts when the federal courts can't enforce them---for let's get this straight, Congress can't strip the issue of constitutionality and merely leave jurisdiction to hear the case, because no statute can be enforced if a Court finds it is unconstitutional or, putting it differently, if a court does not find it to be constitutional? And whether the statute whose review has been stripped is highly polarizing or not, what is sacrificed when it is not and cannot be enforced? Not just the practicalities of relying on state courts that may conflict with one another, but also as Charles Black so

[12] *Stuart* v. *Laird,* 5 U.S. 299 (1803).

importantly wrote, the other side of the "Checking Function" that critics deplore is the legitimating function that sanctifies a statute in the mind of the public.[13]

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"In a divided country more and more characterized by geographic sorting, we should not want the Supreme Court to function as a kind of substitute for failure of citizens to agree nationally on basic values, using constitutional fiat to compensate for the negligence for the harder work of democratic conviction, not merely at a national level but between it and State fora."

I have written elsewhere about the problem of "constitutional fission"—the possibility that the uniformity of constitutional law that took the Supreme Court a century to achieve might be reversed. The United States is already the only major State that has local option capital punishment. It's not hard to imagine that a time will come when abortion will be illegal in some states but not all, *Miranda* rights will be required in some states but not all, narcotics will be illegal in some states, the same with pornography and hate speech, affirmative action and a requirement that a certain number of women make up a state's legislature. This may be an irresistible outcome of the change from the constitutional order of industrial nation-states to informational market-states. One can even imagine that the "geographic sorting" of our people will supercharge this development through the use of constitutional amendments in which a minority of the national population satisfies the requirement that ¾ of the states ratify an amendment. That such a situation enhances democracy is an unexpected inference, because the most important job of democracy is to protect the democracy and a fissioned State will be highly vulnerable to dissolution and defeat.

In fact, so much of the attacks on the Court depend upon a very narrow and improbable view of "democracy," which views that way of State governance and our political culture of self-governance, as little more than what is validated by elections. Perhaps we are going that way; referenda, recall votes, legislative initiatives, and the like are all mechanisms well-adapted to the market states I mentioned. But let's be clear: democracy is not to be simply equated with the majoritarianism of large groups. As Madison wrote of the Athenian democracy, "Had every Athenian citizen been a Socrates, every Athenian Assembly would still have been a mob." Apart from the structural requirements that support democracy—freedom from persecution for thoughts and words, tastes and styles of life; the guarantees of human rights to all persons whether or not they are voters, and yes, an independent judiciary to enforce those guarantees when governments succumb to the temptations of repression or politicians to the fear of twitter mobs---there are cultural norms that protect the individual conscience on which democracy ultimately relies. To say that a court is "anti-democratic" depends on what the court does, not whether it is elected (as it is in Texas, where I am writing this testimony) or appointed (as it is in the federal system).

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If the previous four years have taught us nothing else about our constitutional institutions, we should now know that the legitimacy of those norms, rules, and structures cannot be taken for granted and that preserving that legitimacy is the most important step we can take in preventing the undermining of our democracy.

[13] Charles L. Black, *Structure and Relationship in Constitutional Law*, Ox Bow Press, 2000.

There are many more things I might say about our current constitutional discourse and I hope to say them elsewhere. In concluding my testimony, however, I will confine myself to one assertion: the significant modification of the terms of supreme court justices or the addition of new members by Congressional statute are so destructive of the legitimacy of our judicial institutions as to be the equivalent of an institutional suicide note. The only parallel that comes to mind is James II's re-issuance of the Declaration of Indulgence and the order to every Anglican clergyman to read it aloud in his church in 1688.

One hears comments in many quarters today about a Cold Civil War in our society or sometimes, even a hot one. The militancy of our rhetoric, the collapse of voluntary restraints whether through ignorance or arrogance or simple indifference—these do precede cataclysms like civil wars and revolutions. But the real watermark of the disintegration of the political stability of societies is a lack of confidence in their institutions, which brings me back to the distinction between legitimacy and justification.

The legitimacy of judicial institutions rests on judges who feel compelled, and a public who perceives that compulsion, to provide rationales for their decisions, rationales founded in law. This is not a matter of creating persuasive political justifications whatever one may think of the law/politics distinction. It is analogous to historians who feel compelled by facts or congregants who feel compelled by faith.

Our institutions make peaceful change durable—difficult, but durable (and the difficulty, by the way, can contribute to the durability). I have long studied the alternatives to peaceful change as an historian but even as a simple contemporary of so much violence in the world, I beg you to consider whether shoring up what you take to be the justification for an institution might not in fact be de-legitimating. Once lost, legitimacy is hard to recover and even a divisive and fragmented society like ours—which is not necessarily a bad thing and, in any case, is what we have—is lost and will not be recreated without the coercion that unifies opinion about a particular justification by silencing contrary views through violence and the threat of violence. Because I have studied and written for so many years about strategy and war, I feel most keenly an abhorrence to such a development.

As I began with Lincoln, I will close with him. He said, "If destruction be our lot, we must ourselves be its author and finisher."
