

## *IMPORTANT NOTE ON THESE DISCUSSION MATERIALS*

*The following are discussion materials 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 and is informed by the Commission's public deliberations on October 15, 2021.*

*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 November 19, 2021.*

*Prior to its next public meeting, the Commission will post a draft final Report for deliberation and a vote on its submission to the President.*

## CHAPTER 2: MEMBERSHIP AND SIZE OF THE COURT

In recent years, calls to expand the size of the Supreme Court have become a significant part of the debate over the Supreme Court and its role in American government. Although there is widespread agreement among legal scholars that Congress has the constitutional authority to expand the Court's size, there is profound disagreement over whether Court expansion at this moment in time would be wise. We do not seek to evaluate or judge the weight of any of these arguments, and the Commission takes no position on the wisdom of expansion. In this Chapter, we begin in Part I by presenting an account of past efforts to expand or contract the size of the Court, which occurred at various points in the nineteenth century and perhaps most famously during the New Deal era. In Part II, we consider whether Congress has the authority to expand the size of the Court. In Part III, we articulate the arguments made by proponents of expansion, as well as the arguments made by those who oppose any such efforts. In Part IV, we consider other proposals that have been made during recent reform debates to restructure the Supreme Court.

### I. A Brief History of Efforts to Alter the Size of the 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 contracted or expanded the size of the Supreme Court several times in the nineteenth century, and President Franklin Roosevelt sought to expand the Court during the New Deal era. But the size of the Court has remained at nine Justices since 1869. This section details the history of efforts to alter the size of 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.”<sup>1</sup> But the constitutional text does not specify how many Justices 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.<sup>2</sup> 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.<sup>3</sup> (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.<sup>4</sup> In 1807, Congress added one Justice to increase the size to seven members,<sup>5</sup> and in 1837, Congress expanded the size to nine members.<sup>6</sup>

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”).<sup>7</sup> In 1789, Congress created a six-member Supreme Court to serve the existing 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> The new courts created also ensured that a majority of circuits would cover slave-holding territory and therefore that a majority of Justices would be friendly to slavery.<sup>11</sup>

The reforms in 1801 and 1802 can also be explained by a mix of institutional and political concerns. In 1801, the Federalist Congress temporarily ended circuit riding,<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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 are often said to have had a primarily political motivation.<sup>15</sup> 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.<sup>16</sup> Accordingly, there was a strong sense that the Court was in need of reform. During the Civil War, the Republican Congress in 1863 created a new tenth circuit, and added a tenth seat to the Supreme Court for its new circuit justice, enabling President Lincoln to appoint a pro-Union, anti-slavery justice.<sup>17</sup> 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.<sup>18</sup> The conventional view is that 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.<sup>19</sup> 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.<sup>20</sup> But other historical experts conclude that these changes “were motivated by practical and mundane performance goals,” including returning the Court to a workable (and odd) number of justices.<sup>21</sup>

### *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.”<sup>22</sup> As we explain in some detail in Chapter 1, the proposal was a response to a series of decisions by the Supreme Court in 1935 and 1936 invalidating major New Deal legislation enacted by Congress and championed by Roosevelt, as well as myriad state labor and social welfare laws, all directed at bringing the nation out of the economic and social calamity of the Great Depression.<sup>23</sup> With still more constitutional challenges to major New Deal enactments on the horizon, and after his commanding victory in the election of 1936, Roosevelt and his administration turned to protect the progressive New Deal from the courts.<sup>24</sup>

Under the Court-packing 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.<sup>25</sup> The legislative proposal 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.<sup>26</sup> 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.’”<sup>27</sup>

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.<sup>28</sup> But Roosevelt soon acknowledged that the real purpose was to alter the future course of the Court’s decisions.<sup>29</sup> 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.<sup>30</sup> “[W]e must take action to save the Constitution from the Court and the Court from itself,”<sup>31</sup> he proclaimed.

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.”<sup>32</sup> 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.”<sup>33</sup> 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.”<sup>34</sup>

Some modern observers assume that Roosevelt’s proposal was quickly rejected.<sup>35</sup> But at least in Congress, that appears not to have been the case. To be sure, the plan faced considerable opposition from Roosevelt’s fellow Democrats (notably, at a time when the Democrats controlled over 70% of the seats in both the House of Representatives and the Senate)<sup>36</sup> and prompted widespread media condemnation.<sup>37</sup> 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.”<sup>38</sup> 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.”<sup>39</sup>

But there was also considerable support in Congress for Roosevelt’s plan, and many in Congress expected throughout much of the debate that the legislation would succeed in some form.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup>

The political debate, which took place in the halls of Congress, across the editorial pages, and in numerous local venues throughout the country, 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.<sup>43</sup> Although scholars disagree as to why the Supreme Court changed its approach,<sup>44</sup> there is no question that this apparent “switch in time” in the spring of 1937 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.<sup>45</sup>

In June 1937, the Senate Judiciary Committee, voting 10 to 8, issued a strongly worded report recommending against the plan.<sup>46</sup> The majority of the Committee denounced Roosevelt’s plan as “a needless, futile, and utterly dangerous abandonment of constitutional principle.”<sup>47</sup> The bill was “an attempt to impose upon the courts . . . a line of decision” and thus “would undermine the independence of the courts.”<sup>48</sup> 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.<sup>49</sup>

But neither the Court’s upholding of New Deal legislation nor this vociferous criticism in Congress ended debate over the Court-packing plan in Congress. Considerable support for some type of Court expansion remained, and some historians contend that the harsh rebuke by the Judiciary Committee backfired by leading some Democrats, who thought the attack intemperate, to support the administration.<sup>50</sup> And 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).<sup>51</sup> 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, with the

defeat of the plan in July 1937.<sup>52</sup>

As we note in Chapter 1, scholars and commentators disagree about how to put the long debate over Court packing during the New Deal era into perspective. On some accounts, the plan and the debate surrounding it prompted changes in the Court's doctrine that left in place Roosevelt's existing New Deal and ended an era in which the Court frequently invalidated laws designed to protect workers, consumers, and the public. In that doctrine, the Court established that Congress and state legislatures have broad authority to regulate the economy. But the political controversy over the Court-packing plan clearly divided Democrats and took a major toll on the once broad political support Roosevelt enjoyed. According to some historians, this "undermined bipartisan support for the New Deal," which along with numerous other developments of the time helped bring about the end of major social reform until the 1960s.<sup>53</sup>

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

In the ensuing decades, a strong constitutional norm against any measure that might be deemed "Court packing" developed, leading some commentators today to describe Court expansion as a "third rail in American politics."<sup>54</sup> Members of Congress sought in the 1950s to amend the Constitution to fix the size of the Supreme Court at nine members.<sup>55</sup> (The proposed amendment would also have prevented Congress from restricting the Supreme Court's appellate jurisdiction over constitutional claims.)<sup>56</sup> 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."<sup>57</sup>

Supporters argued that the amendment would close "loopholes" in the constitutional structure.<sup>58</sup> 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."<sup>59</sup> 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."<sup>60</sup>

Senator Butler's amendment easily mustered the two-thirds supermajority needed to make it through the Senate.<sup>61</sup> But the measure failed in the House of Representatives. Some lawmakers worried that freezing the Supreme Court's size would be unwise.<sup>62</sup> 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."<sup>63</sup>

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 was through a constitutional amendment. But significant disagreement arose over whether fixing the size of the Court at nine members would be wise. Some observers see these congressional debates as reflecting a view that expanding the Court for partisan or ideological purposes is inappropriate, but that changing the size of the Court for reasons of institutional efficiency is legitimate.

Since these efforts and until recently, no other attempts have been made in Congress to fix or expand the size of the Court. But the longstanding norm against Court expansion is being challenged today, and bills that would expand the size of the Court and those that propose a constitutional amendment to fix the Court at nine have again re-emerged.<sup>64</sup> As we describe in Part III of this Chapter, the reasons for this re-emergence are specific to our time. But understanding the contested history of efforts at Court expansion is valuable in highlighting the myriad institutional and political interests relevant to evaluating this turn of constitutional events. As one witness before the Commission observed: “[S]eeking guidance from the past can mislead policymakers” but it also “provides a way to make sense of the world.”<sup>65</sup>

## **II. The Legality of Court Expansion**

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.<sup>66</sup> 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 include the Supreme Court.<sup>67</sup> Determining the size of the Court that might be “necessary and proper” to its functioning seems well within Congress’s formal discretion.<sup>68</sup>

The historical practice we recount above also supports the conclusion that Congress has broad authority to establish and change the Court’s size: Congress exercised that power on numerous occasions in the nation’s first century (in 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 in large part to influence the future course of its decisions: The Federalists in 1801, the Democratic Republicans in 1802, the Republicans in the 1860s, and the Roosevelt administration in 1937 had this objective. President Roosevelt explained a few years after the failure of his 1937 plan that he turned to Court expansion to influence the Court in part because of its “undoubted constitutionality.”<sup>69</sup> Two decades later, in the early 1950s, members of Congress continued to assume that the only way to permanently fix the size of the Supreme Court at nine members was through a constitutional amendment.

During the Commission’s public hearings, one witness argued that, although Congress has broad power to modify the size of the Supreme Court for many purposes, it cannot do so for “partisan” reasons.<sup>70</sup> This argument faces a few challenges.<sup>71</sup> First, it is doubtful that “partisan” reasons can be disentangled from “good-government” reasons. For example, the changes to the Supreme Court in 1807 and 1837 by the Democratic Republicans and Jacksonian Democrats, respectively, had both institutional and political motives;<sup>72</sup> lawmakers not only sought to give the

Court more personnel to serve a growing nation but also enabled their party leaders—Presidents Jefferson and Jackson—to shape the Supreme Court.<sup>73</sup> Second, and relatedly, the argument has little historical support; as discussed in Part I, *every* change to the Supreme Court’s size has tended, at least in part, to serve the interests of one political party.

### III. Arguments in Support of and Opposition to Court Expansion

This Part sets out the arguments made by proponents and opponents of expansion. The Commission as a whole takes no position on the validity or strength of these claims. Mirroring the broader public debate, there is profound disagreement among Commissioners on this issue. We present the arguments for and against expansion in order to fulfill our charge to provide a complete account of the contemporary Court reform debate.

#### A. *The Case for Expanding the Court*

The current calls to expand the size of the Court stem most immediately from the Senate’s refusal to act on President Obama’s nomination of Judge Garland to the Supreme Court, as well as its confirmation of the three Justices nominated by President Trump—and the effect those norm violations may have on both the health of the democratic process and the scope of bedrock constitutional rights. Proponents motivated by these developments contend that the Senate’s actions violated norms governing the confirmation process and that expansion of the Court would serve to counteract these violations and bring the Court’s jurisprudence into better alignment with prevailing values and views of the American public. Other proponents of expansion regard it as critical to prevent the continued undermining of our democratic system of government, which they regard as exacerbated by the Court’s jurisprudence. They view recent changes in the composition of the Court as accelerating these jurisprudential developments that began even before these most recent confirmations. On their view, expanding the size of the Court represents a constitutional and immediately achievable response to this threat to democracy that should not go unaddressed, even in the short term. Still others who believe expansion of the Court may be warranted cite the reform as a possible means of enhancing the diversity of the Court’s membership and assisting it to hear more cases each year.

#### 1. *Responding to Norm Violations*

In recent times, arguments to expand the Supreme Court have been relatively rare, but not nonexistent.<sup>74</sup> 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.<sup>75</sup> Supreme Court reform also became a pivotal topic in the 2020 Democratic primary, as several Democratic candidates endorsed significant reforms.<sup>76</sup> The Democratic Party Platform for the election of 2020 ultimately called for “structural court reforms to increase transparency and accountability,”<sup>77</sup> and candidates Trump and Biden debated the merits of Court expansion.<sup>78</sup> Events surrounding the last three nominations to the Supreme Court have helped spark the now-prominent calls for expansion of the Court.

Some proponents of Supreme Court expansion charge that Republican lawmakers since 2016 have disregarded institutional norms to secure a conservative supermajority on the Court.<sup>79</sup> They see expansion of the Court as particularly justified in light of Senate Republicans' handling of the election-year nominations of Judge Garland and Justice Barrett. When Justice Scalia died unexpectedly on February 13, 2016, 269 days—more than 38 weeks—before the 2016 presidential election, the Senate held neither a hearing nor a vote on President Obama's nomination of Judge Garland.<sup>80</sup> Yet when Justice Ginsburg died only 46 days before the election of 2020, Republicans quickly confirmed President Trump's nomination of Justice Barrett to fill the seat.<sup>81</sup>

Calls for expansion in response to these developments did not begin immediately. 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 respond 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.<sup>82</sup>

But calls for and by Democrats to expand the size of the Court first appeared in substantial numbers upon the announcement of his retirement by Justice Kennedy, who had long been seen as the median Justice on a closely divided Court, and during the subsequent controversial nomination process of Justice Kavanaugh.<sup>83</sup> These calls increased in late 2020 when Senate Republicans confirmed Justice Barrett, with Democrats arguing that Republicans had contradicted their own prior arguments that Justices should not be confirmed in close proximity to a presidential election.<sup>84</sup> According to news accounts, “[a]s soon as it became clear that the Republican-controlled Senate would almost certainly confirm Judge Amy Coney Barrett, creating a 6-3 conservative majority on the court,” a number of Democrats “argued that if Democrats won in November, they should seriously consider increasing the number of justices.”<sup>85</sup> 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.<sup>86</sup>

Proponents of expansion who point to this series of events argue that the addition of new seats to the Supreme Court, at the next opportunity, by a Democratic President and Congress, could help restore the balance on the Court that was disrupted by significant norm violations in the confirmation process, thus protecting the legitimacy of the Court.<sup>87</sup> Some of those who argue for expansion in light of recent events emphasize that they are not motivated by partisan politics but rather by a commitment to the protection of longstanding norms and important constitutional rights. They worry that the current conservative supermajority established by the recent norm violations threatens to take the law, and particularly federal constitutional law, in a still more troubling direction than where it was already moving—perhaps by reversing or continuing to revise longstanding precedents in the areas of reproductive rights, racial justice, workers' rights, the regulation of guns, religion, administrative law, voting rights, and campaign finance law.<sup>88</sup> But for the improper confirmation tactics of Republican lawmakers, the argument goes, the

Court’s doctrinal trajectory might have been considerably different.<sup>89</sup>

Others emphasize that a failure to respond to what they regard as confirmation “hardball” by Republicans since 2016—as well as a failure to advance expansion as a viable option in the political process—might encourage future aggressive measures in the confirmation process, such as a refusal to hold hearings on any judicial nominee put forward by a president of the opposite party.<sup>90</sup> The judicial selection process has already become, in the view of many, a partisan spectacle.<sup>91</sup> 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, by attaching consequences to the Senate’s actions during the Trump years in order to deter future conduct of this kind.<sup>92</sup>

## 2. *Preventing the Erosion of Democracy*

Some proponents of expansion believe it to be essential to address the urgent circumstances brought on by developments in the Court’s jurisprudence that predate recent confirmation controversies but that have been accelerated by those appointments. They believe that these developments threaten to seriously and perhaps irreversibly damage the democratic process. These critics maintain that the Supreme Court has been complicit in and partially responsible for the “degradation of American democracy” writ large.<sup>93</sup> On this view, the Court has whittled away the Voting Rights Act and other cornerstones of democracy, and affirmed state laws and practices that restrict voting and disenfranchise certain constituencies, such as people of color, the poor, and the young.<sup>94</sup> This has contributed to circumstances that threaten to give outsized power over the future of the presidency and therefore the Court to one political party and to entrench that power.<sup>95</sup> As one witness before the Commission put it, the current 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.”<sup>96</sup> Those holding this view regard expansion as required to ensure a Court more likely to uphold future voting rights and democracy-enhancing legislation constitutionally enacted by Congress and to prevent state legislatures from undermining or destroying the democratic process.<sup>97</sup> In arguing the case for expansion, proponents contend this moment is unlike any of the others in which this reform has been debated: Antidemocratic developments risk entrenching the judicial philosophy of the current Court majority for generations, while advantaging one political party.

Those who advance arguments for expansion along these lines emphasize that maintaining the status quo would amount to a failure to pursue available reforms with the potential to restore the Court’s role as ensuring the representativeness of government and the operation of democracy. On this view, any risks associated with expanding the Court at this time would not compare in severity to the failure to take action.

For some proponents of expansion, even the calls for such reform could help prevent further democratic backsliding. As some of the testimony before the Commission suggested, an *attempted* expansion—or even just the prospect of expansion—could lead the Supreme Court to be restrained in its jurisprudence and more respectful of the role of the political branches, at least

in the short term.<sup>98</sup> 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 Court’s jurisprudence.<sup>99</sup>

### 3. *Strengthening the Court*

Some participants in the debate over Court reform also regard expansion as worth considering because of its potential to strengthen the Court as an institution. An expanded Court might better incorporate diverse personal and professional perspectives. That diversity could come from the inclusion of Justices with experience in different sectors of the legal community or even the public sphere more generally. It also might include individuals of diverse religious, socioeconomic, racial, geographical, or other demographic backgrounds. Expanded diversity could enrich the Court’s decisionmaking, and a Court that was drawn from a broader cross-section of society would be well received by the public.<sup>100</sup> A larger Supreme Court might also be able to decide more cases and to spend more time on emergency petitions—an element of the Court’s work that has attracted considerable attention as is discussed in Chapter 5 of this Report.<sup>101</sup> 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.<sup>102</sup> In recent years, that number has fallen to seventy or eighty cases.<sup>103</sup> To the extent the public or lawmakers would like the Court to resolve more cases, a larger Court might have a greater capacity to do so.

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 as noted in public testimony before the Commission, proposals for Court expansion need not involve congressional action to expand the Court all at once.<sup>104</sup> Congress could enact a law providing for the expansion of the Supreme Court over time. 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. Proponents of expansion note that, though the longstanding convention has been for the Court to have nine members, it is possible for a high court to be productive and functional with significantly more than nine Justices. They note that other jurisdictions have larger courts that function efficiently and collegially, and that 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.

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

## B. *The Case Against Packing the Supreme Court*

Those who argue that efforts to expand or pack the Supreme Court at this time would be unwise hold a range of views. Some critics of the calls for expansion regard the recent nominations to the Court as appropriate reflections of electoral outcomes and as fully consistent with constitutional process and historical Senate practice.<sup>105</sup> They view the Court’s changing doctrine as reflecting a principled approach to constitutional interpretation. Meanwhile, other critics of expansion, including some who take issue with the current Court and its jurisprudence and conclude that other reforms of the Court would be beneficial,<sup>106</sup> believe efforts to expand the Court or otherwise alter its structure at this moment would threaten the independence of the Court. Critics of Court expansion worry that such proposals pose considerable risk to our constitutional system, including by spurring parties able to take control of the White House and Senate at the same time to routinely add Justices to bring the Court more into line with their ideological stances or partisan political aims. Court packing, in the critics’ view, would compromise the Court’s long-term capacity to perform its essential role of policing the excesses of the other branches and protecting individual rights. Opponents also conclude that packing the Court would not serve democratic values because such reforms would not address the Court’s power to resolve questions better left to the political process. Still other opponents argue that the reform would be contrary to rule of law principles and that what they see as an enduring bipartisan norm against Court packing should be reaffirmed and protected.

### 1. *Protecting Judicial Independence*

Opponents of Court packing contend that it would significantly undermine the Supreme Court’s independence. Courts cannot serve as effective checks on government officials if their personnel can be altered by those same government officials. In a system that permitted Court packing, any time the Supreme Court issued a decision that was at odds with the preferences of those in power—whether the matter related to the U.S. census,<sup>107</sup> immigration policy,<sup>108</sup> or the validity of a presidential election<sup>109</sup>—the party in power could respond by stacking the Court with loyalists. One witness before the Commission further explained: “Court-packing risks undermining the *willingness* of the Justices to maintain their independence” “from the very political forces they are supposed to police in the name of the Constitution.”<sup>110</sup>

Given these concerns, opponents underscore, it is crucial that for much of the past century, there has been a strong—and bipartisan—constitutional norm or convention treating Court packing as “something that just isn’t done.”<sup>111</sup> As one scholar wrote a few years ago, one could say confidently that “court packing is essentially considered a wholly illegitimate means of seeking to alter existing Supreme Court doctrine. No serious person, in either major political

party, suggests court packing as a means of overturning disliked Supreme Court decisions, whether the decision in question is *Roe v. Wade* or *Citizens United*.”<sup>112</sup> Scholars could say, until very recently, that even as compared to other Court reform efforts, “Court packing” is especially out of bounds. This is part of the convention of judicial independence.”<sup>113</sup>

For opponents of Court packing, the historical condemnation of the 1937 Court packing plan illustrates what they regard as a fundamental principle of American constitutional government. For example, in 2004, Democratic lawmakers celebrated how “President Franklin Roosevelt’s efforts to control the outcome of the Supreme Court by packing it with loyalists was rejected by Congress in the 1930s, thereby preserving the independence of the federal judiciary.”<sup>114</sup> Republican lawmakers have also repeatedly denounced Roosevelt’s Court-packing plan.<sup>115</sup> On this view, the 1937 reform has long been regarded as one of the most disgraceful assaults on the Supreme Court in American history.<sup>116</sup> Opponents of Court packing also emphasize that those who resisted Court packing in 1937—particularly those who stood up to the President and leader of their own party—are seen as having shown tremendous political courage.

Opponents of Court packing argue that the strong bipartisan rejection of it has helped to preserve the Supreme Court’s constitutional role for much of the past century. There has been considerable pressure on this norm in recent years—as evidenced by the fact that the issue has come before this Commission. But one witness during the Commission’s public hearings noted opposition to expansion on the ground that there continues to be “[a] strong norm ... that the political branches do not threaten or change the Court’s membership because of unhappiness with its decisions.”<sup>117</sup>

For opponents, the United States’s fidelity to this norm has particular significance in light of developments in other parts of the world where manipulation of the composition of the judiciary has been a worrying sign of democratic backsliding.<sup>118</sup> After his election in 1989, for example, 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.<sup>119</sup> In 2004, Hugo Chavez in Venezuela reined in judicial independence by expanding the size of the constitutional court from twenty to thirty-two.<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup> In 2018, a package of judicial reforms in Poland forced sitting judges off the bench and dramatically expanded the size of the supreme court.<sup>123</sup> By contrast, these critics argue, stable democracies since the mid-twentieth century have retained a strong commitment to judicial independence and have not tended to make such moves.<sup>124</sup> For these opponents of expansion, it is important that the United States remain firmly in the ranks of democracies standing behind this commitment.

## 2. *Safeguarding the Court’s Legitimacy*

Opponents also cite a concern related to the threat to judicial independence, underscored by witnesses before the Commission: that Court packing would almost certainly undermine or

destroy the Supreme Court’s legitimacy.<sup>125</sup> Some witnesses testified that the reform would be perceived by many as a partisan maneuver,<sup>126</sup> or a dangerous power grab by one political party, that would render the decisions of the resulting (larger) Supreme Court of questionable legitimacy to much of the public.<sup>127</sup> Critics argue that the public is less likely to treat the decisions of a packed Court as authoritative, diminishing the Court’s capacity to protect individual rights, equality, or constrain abuses of executive power.

Opponents of Court packing in this moment warn that it would also almost certainly generate a continuous cycle of future expansions. Expanding the Court would be on the agenda of every administration under unified government.<sup>128</sup> One (purportedly modest) estimate of the consequences of expansions as parties gain Senate majorities and add Justices concludes that 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.<sup>129</sup> Critics worry that these repeated fights over the Court could lead the public to see the Court as a “political football”—a pawn in a continuing partisan game.<sup>130</sup>

Relatedly, critics of Court packing argue that it would further degrade the confirmation process—a process that has already become a partisan spectacle.<sup>131</sup> There would be significant battles over any Justice added by a Court expansion measure. And past examples of Court packing would easily become an excuse for blocking the confirmation of any nominee.

Critics of Court packing emphasize that it is hard to predict which forces will find themselves at odds with the Court in the future. At some points in our history, the Court has faced resistance from progressive groups—as illustrated by President Roosevelt’s effort to pack the Court in 1937. By contrast, in the mid-to-late twentieth and early twenty-first centuries, the Court was repeatedly attacked by conservatives who objected to the Court’s jurisprudence on abortion, school prayer, desegregation, protections for criminal defendants, and other civil rights issues.<sup>132</sup> This uncertainty leads even some who fundamentally disagree with aspects of the current Supreme Court’s jurisprudence to believe it is better to preserve the Court’s long-term legitimacy and independence than to open up the Court to be packed by potentially dangerous and even authoritarian political movements going forward.

### 3. *Defending Democracy*

Opponents of Court packing emphasize that polls show that large majorities of the public oppose expanding the Supreme Court.<sup>133</sup> For that reason alone, they argue, it is difficult to justify Court packing on grounds that it might serve democratic interests. Moreover, to the extent that one goal of Supreme Court reform is to enhance the power of democratic bodies, Court packing would not serve that end. Expansion would leave the Supreme Court’s existing jurisdiction in place, as well as its existing approach to judicial review. An expanded Court could just as easily hold unconstitutional federal and state government conduct as the current Court. In addition, as noted above, given that Court packing could lead to cycles of Court expansion, critics of the measure believe it to be questionable that it would “balance” the Court to more closely align it with popular opinion over time.<sup>134</sup>

Other critics of Court expansion contend that, to the extent it aims to align the outcomes of Court decisions with the policy preferences and values of the country, the reform is misguided and misconceives the role of the Court.<sup>135</sup> They emphasize that no single American public exists and that popular views and opinions are divided across a range of issues the Court addresses. Moreover, opponents contend, some of the Court’s most prominent decisions on subjects ranging from school prayer to criminal justice were quite unpopular,<sup>136</sup> and that decisions that meet with considerable political backlash sometimes become “canonical,” as with *Brown v. Board of Education*.<sup>137</sup> These critics emphasize that, as *Brown* underscores, the Supreme Court may play its best role in our democracy when it polices the political process by working to ensure that the process is more open and responsive to *all* members of society—whether by helping to dismantle racial segregation; invalidating laws that discriminate upon the basis of gender or sexual orientation;<sup>138</sup> or requiring that each person’s vote be given equal weight.<sup>139</sup> Opponents conclude that Court packing would so deeply compromise the Court’s legitimacy and independence as to impede its capacity to serve this vital role.<sup>140</sup> In the long run, they argue, putting judges under the thumb of sitting politicians is unlikely to serve the broader interests of a democratic constitutional order.<sup>141</sup>

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As we noted at the outset of this Part, there is profound disagreement among Commissioners over whether adding Justices to the Supreme Court at this moment in time would be wise. As a Commission we have endeavored to articulate the contours of that debate as best as we understand them, without purporting to judge the weight of any of the arguments offered in favor or against calls to increase the size of the Court.

#### **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 may present more serious constitutional questions than basic Court expansion, but that they are not all clearly foreclosed by the Constitution. They may, however, 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, or for designated periods of time.<sup>142</sup> 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).<sup>143</sup> Or, one subset of Justices might be entrusted to resolve statutory questions and another subset could be entrusted to decide constitutional issues.<sup>144</sup> Or, the Justices might sit in randomly assigned panels on any given case, much like the judges of the courts of appeals sit today.

Both rotation and panel proposals, if enacted through statute, 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.”<sup>145</sup> 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.<sup>146</sup> Because some of the proposals for term limits raise similar concerns, we address these particular constitutional issues in Chapter 3. We focus here on the meaning of “one supreme Court.”

As a textual and structural matter, the “one supreme Court” provision requires an apex juridical body that operates in some meaningful sense as a single court and not merely as a scattering of individual jurists occasionally called upon to resolve questions of federal law. The Constitution thus would almost certainly 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, without mutual consultation or collaboration (and with no true opinion of the whole Court) in each case.

The Commission is not prepared, however, to conclude that rotation and panel systems are clearly unconstitutional simply on the ground that each would entail having less than the full set of sitting Justices making initial decisions in individual cases for the Court as a whole.<sup>147</sup> One could reasonably read the text of Article III to suggest that the Supreme Court must be a unitary apex court whose members sit together in every case the Court takes up on the merits. But the text is also arguably consistent with having a large apex body that is nonetheless organized into panels, at least as long as a mechanism exists to enable en banc hearings, or some other form of review that would ensure that the Court produces a single, authoritative answer to whatever questions of fact or law the “judges of the Supreme Court” are charged with resolving. Such a structure could plausibly be considered “one supreme Court.” The operation of the thirteen United States Courts of Appeals supports this understanding. They are understood to constitute thirteen unitary courts even though each of them typically sits in panels of three, treating each panel’s decision as binding on all future panels of the same circuit unless and until the full circuit court, sitting en banc, reverses that opinion.<sup>148</sup> In contrast, a system under which groups of justices were drawn, on a bi-weekly or other constantly rotating basis, from among all federal judges would raise more serious constitutional concerns, because it would be difficult to identify any single complement of Justices, sitting en banc or otherwise, to provide review as “one supreme Court.”

The history of the “one supreme Court” language at the Founding and its interpretation over subsequent centuries supports the view that the Court must operate in some meaningful sense as a single Court. But nothing in the history the Commission has reviewed surrounding the

drafting or adoption of this “one supreme Court” provision reveals the thinking that underlay the creation of one Supreme Court or resolves the question whether the Court could sit in smaller panels or rotating groups, subject to a potential en banc review process.

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. . . .”<sup>149</sup> 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.”<sup>150</sup> Subsequent versions of the constitutional text then consistently referred to “*one supreme Court*.”<sup>151</sup> Historians debate the significance of this textual change.<sup>152</sup> There is evidence that at least some Framers anticipated that the Supreme Court could divide into panels to complete its work more efficiently, while others anticipated that the Court would only hear cases as a single unit. For example, 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.<sup>153</sup> 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.”<sup>154</sup>

In the nineteenth century, Congress on a few occasions considered a rotation or a panel system for the Supreme Court. Each time, some lawmakers supported the scheme in question and others cast doubt on its constitutionality. In 1869, for example, when Congress increased the size of the Supreme Court from seven to nine members, it also considered expanding the size of the lower federal judiciary.<sup>155</sup> 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 at the time 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”).<sup>156</sup> That is, the judges would rotate between the Supreme Court and the circuit courts.

Several lawmakers objected that this rotation system would be inconsistent with the constitutional requirement for “one supreme Court.”<sup>157</sup> “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.”<sup>158</sup> Opponents also worried that this 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[.] . . .”<sup>159</sup> 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.<sup>160</sup> Moreover, supporters argued, past precedents had not proven unstable simply because they were decided by less than the full Court (but still a quorum).<sup>161</sup> Opponents countered 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 at any given time, if they so chose.<sup>162</sup> Ultimately, the proposal for an eighteen-member Court died in Congress.<sup>163</sup>

A few decades later, 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.<sup>164</sup> 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.<sup>165</sup> 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.<sup>166</sup>

During the debates over this 1891 measure, several members of the Senate Judiciary Committee proposed that the Court hear cases in panels. Under the proposal, 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."<sup>167</sup> 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."<sup>168</sup>

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.<sup>169</sup> 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.<sup>170</sup> 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."<sup>171</sup> 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."<sup>172</sup>

Other lawmakers were skeptical of the reform. Some insisted that a panel system would violate the constitutional requirement for one supreme Court. "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."<sup>173</sup> Some lawmakers also worried that a decision rendered by less than the full Court would lack legitimacy with the public.<sup>174</sup> Ultimately, the proposal was rejected by the Senate.<sup>175</sup>

Congress does not appear to have debated the validity or legality of rotation or panel systems after these various efforts at reform. But 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.”<sup>176</sup> Likewise, in responding to President Roosevelt’s 1937 Court-packing plan, Chief Justice Hughes expressed doubts about the wisdom and the constitutionality of a panel system. He argued that the proposed expansion would “impair [the Court’s] efficiency so long as the Court acts as a unit” but noted that a decision by less than the full Supreme Court may not be seen as legitimate or consistent with Article III.<sup>177</sup> In the 1970s and 1980s, Congress debated reforms that eventually led to the Judiciary Act of 1988, which granted the Supreme Court the discretion to decide whether to review virtually every appeal.<sup>178</sup> During the debates, Chief Justice Burger 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.”<sup>179</sup>

It is arguably of some significance that individual lawmakers and Justices in the past have questioned the legality of structural reforms such as rotation and panel systems; these views underscore that the claims should be taken seriously. But lawmakers have reached different conclusions, and the statements of the Justices made outside of the context of judicial opinions and in favor of preserving the existing structure, are not authoritative in establishing the meaning of Article III. Ultimately, we cannot conclude that the Constitution precludes rotation and panel reforms, at least as long as processes exist to ensure that a juridical body operates in some meaningful sense as a single “Court.”

## 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.”<sup>180</sup> 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.<sup>181</sup>

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.<sup>182</sup> Article II does not permit “Judges of the supreme Court” to be selected by other members of that Court. This reform also may 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, though these proposals may have real benefits, those benefits may not be sufficiently significant or assured to justify 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.”<sup>183</sup>

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.<sup>184</sup> 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 quality of the Court's decisionmaking or 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.<sup>185</sup>

Each of these potential benefits, however, may well be offset by significant costs. A rotation system could introduce inefficiencies into the Court's work or otherwise undermine the supervisory and unifying functions it performs within the U.S. legal system.<sup>186</sup> 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,<sup>187</sup> 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.

The question then becomes whether there would be virtues in the first instance in establishing a panel system. It is possible that this model would introduce some inefficiencies into the Court's decisionmaking. But constitutional and high courts in other jurisdictions function effectively on this model, whether by assigning particular types of cases to different panels or courts (constitutional vs. statutory cases, or criminal vs. civil cases, for example).<sup>188</sup> 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.<sup>189</sup>

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 we discuss 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.<sup>190</sup> 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, would give each President two nominations per term.<sup>191</sup> This proposal could reduce the partisan rancor of the confirmation process and lower 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, this particular benefit 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.<sup>192</sup> 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.<sup>193</sup> These virtues might 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 the Court insufficiently reflective of or connected 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 politic.<sup>194</sup> But institutionalizing such a requirement would block 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. Even the sort of more moderated outcomes that could result from these balancing proposals would still keep the Court central to political life.

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<sup>1</sup> 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.”).

<sup>2</sup> See Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73.

<sup>3</sup> See Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89, 89.

<sup>4</sup> See Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.

<sup>5</sup> See Act of Feb. 24, 1807, ch. 16, § 5, 2 Stat. 420, 421.

<sup>6</sup> See Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176, 176.

<sup>7</sup> 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 1911. See Judicial Code of 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

<sup>8</sup> 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).

<sup>9</sup> See Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2759-63 (2020).

<sup>10</sup> See *id.* at 2761-63.

<sup>11</sup> See Mark Graber, “No Better Than They Deserve:” *Dred Scott and Constitutional Democracy*,” 34 N. KY. L. REV. 589, 604 (2007) (“Federal law . . . structured the federal judicial system in ways that guaranteed that a majority of the justices on the Supreme Court would be citizens from slave states.”); *id.* at 609-10 (“The Court that decided *Dred Scott* had a southern majority because Jacksonians in the executive and legislative branches of the government passed legislation placing five of the nine federal circuit court districts entirely within the slave states, and presidents who depended on southern votes ensured that one representative from each federal circuit district sat on the Supreme Court.”); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 514 (2002) (“[T]o ensure the protection of Southern regional interests . . . the slave states were divided into five circuits, meaning that they would enjoy a majority on the Supreme Court.”).

<sup>12</sup> 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.

<sup>13</sup> 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”).

<sup>14</sup> See Act of Apr. 29, 1802, ch. 31, §§ 4, 5, 2 Stat. 156, 157-58.

<sup>15</sup> 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 9, 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).

<sup>16</sup> 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).

<sup>17</sup> See Act of March 3, 1863, ch. 100, § 1, 12 Stat. 794, 794; CROWE, *supra* note 15, at 138-39, 143-46.

<sup>18</sup> 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. *Id.*

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<sup>19</sup> See 3 WARREN, *supra* note 13, at 143-45. The reduction to seven Justices was not tied to the then-existing circuit court system; see Braver, *supra* note 9, at 2785 (“Reducing the number of Supreme Court Justices meant that the circuit courts would not be adequately staffed.”).

<sup>20</sup> See Circuit Judges Act of 1869, ch. 22, 16 Stat. 44, 44; 3 WARREN, *supra* note 13, at 223.

<sup>21</sup> See CROWE, *supra* note 15, 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).

<sup>22</sup> 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).

<sup>23</sup> 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). These decisions by the Court also followed decades in which the Court struck down numerous laws enacted to protect workers, consumers, and the public. See, e.g., *Lochner v. New York*, 198 U.S. 45, 64-65 (1905) (invalidating a New York state maximum-hour and minimum-wage law regulating the baking industry on grounds that it violated the freedom to contract); *Adkins v. Child. Hosp. of D.C.*, 261 U.S. 525, 561-63 (1923) (holding that a federal minimum-wage law for women was unconstitutional because it violated the freedom of contract and did not advance a compelling state interest).

<sup>24</sup> In 1936, Roosevelt won every state in the electoral college other than Maine and Vermont, with 61% of the popular vote, and Democrats won an overwhelming majority in Congress. E.g., *Presidential Commission on the Supreme Court of the United States* 6 (June 25, 2021) (written testimony of Laura Kalman, University of California, Santa Barbara) [hereinafter Kalman Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/06/Kalman-06.25.2021.pdf> (“Roosevelt had won every state except Maine and Vermont and nearly 61% of the popular vote. If Americans had voted against Herbert Hoover in 1932, they had given FDR a mandate in 1936, as in the 1934 midterm elections.”).

<sup>25</sup> See Message from the President of the United States: A Recommendation to Reorganize the Judicial Branch of the Federal Government, H.R. DOC. NO. 75-142, at 9-10 (1937).

<sup>26</sup> See Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 269-73 (2012).

<sup>27</sup> *Id.* at 273 (quoting Memorandum from Warner W. Gardner, Att’y, Dep’t of Just., to Stanley Forman Reed, U.S. Solic. Gen. 56-57, 65 (Dec. 10, 1936)).

<sup>28</sup> See H.R. DOC. NO. 75-142, at 1-3 (“The Judiciary has often found itself handicapped by insufficient personnel[.]”).

<sup>29</sup> See *Franklin D. Roosevelt, Fireside Chat (Mar. 9, 1937)*, AM. PRESIDENCY PROJ., <https://www.presidency.ucsb.edu/documents/fireside-chat-17> (last visited Nov. 14, 2021).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Reorganization of the Federal Judiciary, Part I: 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).

<sup>33</sup> *Id.* at 40.

<sup>34</sup> *Id.* at 41.

<sup>35</sup> Kalman Testimony, *supra* note 24, at 1-3 (noting that, although Roosevelt’s Court fight has often “been portrayed as the idiotic brainchild of a hubristic FDR destined from its inception for defeat, . . . the history of the Court fight tells a different story” and Roosevelt could reasonably have anticipated some success); see also Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR’s Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1148-49 (1987) (finding that public opinion did not turn decisively against Roosevelt’s proposal until the Court showed greater support for the New Deal); William D. Blake, “Justice Under the Constitution, Not Over It”: *Public Perceptions of FDR’s Court-Packing Plan*, 49 PRESIDENTIAL STUD. Q. 204, 205 (2019) (finding broad support among the general public for more liberal constitutional rules in 1937 but less support for Court-expansion as a means for getting that outcome).

<sup>36</sup> See LEUCHTENBURG, *supra* note 22, at 137-39; SHESOL, *supra* note 22, at 467; 5 Historical Statistics of the United States 201, tbl. Eb296-308 (Susan B. Carter et al. eds., 2006) (showing that the Democrats controlled the House 331-89 and the Senate 76-16 over Republicans in 1937-38).

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<sup>37</sup> Kalman Testimony, *supra* note 24, at 17.

<sup>38</sup> LEUCHTENBURG, *supra* note 22, at 138; SHESOL, *supra* note 22, at 315 (“The idea of giving any president, particularly Roosevelt, the authority to remake the Supreme Court virtually overnight was abhorrent to Senate progressives.”).

<sup>39</sup> 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) [hereinafter Hughes Letter].

<sup>40</sup> *See also* Kalman Testimony, *supra* note 24, at 21; Laura Kalman, Court Packing and Its Legacy 498 (2021) (unpublished manuscript) (on file with author) (observing that for much of the spring and summer of 1937, it appeared that Roosevelt might succeed to some degree in enlarging the Court).

<sup>41</sup> *See* LEUCHTENBURG, *supra* note 22, at 135 (“In the first week, numbers of Democratic Senators announced themselves for the bill.”); SHESOL, *supra* note 22, at 514.

<sup>42</sup> *See* LEUCHTENBURG, *supra* note 22 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.”).

<sup>43</sup> *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); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 390-400 (1937) (upholding a state minimum wage law for women).

<sup>44</sup> *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.”), *and* 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”), *and* 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).

<sup>45</sup> *See* FRIEDMAN, *supra* note 22, 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 22, at 143 (arguing that Justice “Roberts’ ‘somersault’ [in *West Coast Hotel*] gravely damaged the chances of the Court plan.”).

<sup>46</sup> *See* S. REP. NO. 75-711, at 9 (1937); SHESOL, *supra* note 22, at 467.

<sup>47</sup> S. REP. NO. 75-711, at 23.

<sup>48</sup> *Id.* at 3, 8.

<sup>49</sup> *Id.* at 14.

<sup>50</sup> Kalman, *supra* note 40, at 417-19.

<sup>51</sup> *See* LEUCHTENBURG, *supra* note 22, at 147-48 (“The prospects for enacting this new bill appeared very promising.”).

<sup>52</sup> *See* SHESOL, *supra* note 22, at 481-89, 497-500.

<sup>53</sup> LEUCHTENBERG, *supra* note 22, at 160; Chapter 1, *supra*; *see also* Shesol, *supra* note 22, at 525 (observing of the Court-packing plan that it was “not the cause, but the catalyst that helped fracture the New Deal coalition; reawaken the GOP; unite conservatives across party lines; and shatter the myth of FDR’s omnipotence.”).

<sup>54</sup> Garrett Epps & Ganesh Sitaraman, Essay, *Supreme Court Reform and American Democracy*, Yale L.J.F. 821, 822 (2021); *see also* 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).

<sup>55</sup> *See* 99 CONG. REC. 1106 (1953) (statement of Sen. John Butler, R-MD).

<sup>56</sup> *Id.*

<sup>57</sup> 100 CONG. REC. 6256 (1954) (statement of Sen. John Butler, R-MD).

<sup>58</sup> 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.”).

<sup>59</sup> *See* 100 CONG. REC. 6256 (1954) (statement of Sen. John Butler, R-MD).

<sup>60</sup> *Id.*

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<sup>61</sup> 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. U.S. CONST. art. V.

<sup>62</sup> See C.P. Trussell, *Court Amendment Tabled in House*, N.Y. TIMES, Aug. 4, 1954, at 11.

<sup>63</sup> 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”).

<sup>64</sup> Judiciary Act of 2021, H.R. 2584, 117th Cong. (2021); H.R.J. Res. 95, 116th Cong. (2020).

<sup>65</sup> Kalman Testimony, *supra* note 24, at 28.

<sup>66</sup> 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.”).

<sup>67</sup> 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.”).

<sup>68</sup> See *id.*

<sup>69</sup> 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”).

<sup>70</sup> *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), [hereinafter Barnett Testimony] <https://www.whitehouse.gov/wp-content/uploads/2021/07/Barnett-Testimony.pdf> (arguing that “partisan court packing” is unconstitutional, because “seeking a partisan advantage on the Supreme Court is not a legitimate end” under the Necessary and Proper Clause). Most scholars who have considered the issue, by contrast, have concluded that Congress has broad power to modify the Court’s size. 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 . . .”).

<sup>71</sup> *But see* Mike Rappaport, *Is Court Packing Constitutional?*, ORIGINALISM BLOG (Nov. 9, 2020), <https://originalismblog.typepad.com/the-originalism-blog/2020/11/is-court-packing-constitutionalmike-rappaport.html>.

<sup>72</sup> The witness recognized this point but asserted that the political motives were “suppressed” in 1807 and 1837, such that these Court reforms were valid. Barnett Testimony, *supra* note 70, at 4 (asserting that though “political motives may have existed with each change to the number of justices” in 1807 and 1837, “these motives were suppressed and there was a demonstrable justification for altering the number of judges as the number of states expanded”).

<sup>73</sup> See HOWARD GILLMAN, MARK A. GRABER, & KEITH E. WHITTINGTON, 1 *AMERICAN CONSTITUTIONALISM* 191-92, 248-51 (2d ed. 2017); *supra* notes 2-10 and accompanying text.

<sup>74</sup> 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).”).

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<sup>75</sup> 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>.

<sup>76</sup> 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>.

<sup>77</sup> *2020 Democratic Party Platform*, DEMOCRATIC PARTY 58 (2020), <https://democrats.org/where-we-stand/party-platform>.

<sup>78</sup> 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.” 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.” *Donald J. Trump, Tweets of October 11, 2020*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/tweets-october-11-2020> (last visited Sept. 19, 2021).

<sup>79</sup> 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 . . . .”); *Presidential Commission on the Supreme Court of the United States 12-13* (July 20, 2021) (written testimony of Michael J. Klarman) [hereinafter Klarman Testimony] (discussing the confirmation tactics of the Republican-controlled Senate).

<sup>80</sup> 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>.

<sup>81</sup> See Lisa Mascaro, *Barrett Confirmed as Supreme Court Justice in Partisan Vote*, ASSOCIATED PRESS (Oct. 26, 2020), <https://apnews.com/article/election-2020-donald-trump-virus-outbreak-ruth-bader-ginsburg-amy-coney-barrett-82a02a618343c98b80ca2b6bf9eafe07>; David Cohen & Josh Gerstein, *Justice Ruth Bader Ginsburg Dies at 87*, POLITICO (Sept. 18, 2020), <https://www.politico.com/news/2020/09/18/justice-ruth-bader-ginsburg-034990>.

<sup>82</sup> 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 Grove, *supra* note 54, at 514 ; 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).

<sup>83</sup> See Charlie Savage, *On the Left, Eyeing More Radical Ways to Fight Kavanaugh*, N.Y. TIMES (Oct. 7, 2018), <https://www.nytimes.com/2018/10/07/us/politics/democrats-kavanaugh-supreme-court.html>.

<sup>84</sup> 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](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

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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>.

<sup>85</sup> 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>.

<sup>86</sup> 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. *See Google Trends: "Court Packing," "Pack the Court," "Pack the Supreme Court,"* GOOGLE, <https://trends.google.com/trends/explore?date=today%20y&geo=US&q=court%20packing,pack%20the%20court,pack%20the%20supreme%20court> (last visited Nov. 14, 2021).

<sup>87</sup> *Presidential Commission on the Supreme Court of the United States* 1-2 (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> ("[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*."); *id.* at 1-5, 11-12 (further arguing that "the most effective way to restore balance to our Court is through expansion").

<sup>88</sup> *See id.* at 3-4, 7, 15 (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 79, 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."); 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>; 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/>; 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>; 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/>; 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>.

<sup>89</sup> *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").

<sup>90</sup> *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).

<sup>91</sup> *See Presidential Commission on the Supreme Court of the United States* 5 (July 20, 2021) (written testimony of Jeffrey J. Peck) [hereinafter Peck Testimony], <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*

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*States* 1 (July 20, 2021) (written testimony of Benjamin Wittes, the Brookings Institution) [hereinafter Wittes Testimony], <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/pscotus/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”).

<sup>92</sup> *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.”).

<sup>93</sup> Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 1 (2020).

<sup>94</sup> *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200-01 (2008) (upholding an Indiana voter identification law); *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021), No. 19-1257, (slip op. at 12-13, 18-32) (July 1, 2021) (upholding Arizona laws that excluded ballots for being deposited at the wrong precinct and criminalizing ballot harvesting, respectively); *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) (striking down the Voting Rights Act’s preclearance regime); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (holding that extreme partisan gerrymanders implicate non-justiciable political questions that courts cannot hear); *Democratic Nat’l Comm. v. Wis. State Leg.*, 141 S. Ct. 28 (2020) (reversing a federal district court’s decision to permit counting of ballots post-stamped after Election Day despite unclear instructions from state officials).

<sup>95</sup> *See infra* Section III.B.1-3; *see also* Klarman Testimony, *supra* note 79, at 10-12; *cf.* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1996).

<sup>96</sup> *See* Klarman Testimony, *supra* note 79, at 16-17.

<sup>97</sup> *See* Kang Testimony, *supra* note 79, at 6-7.

<sup>98</sup> *See Presidential Commission on the Supreme Court of the United States* 11 (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> (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 92, 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.”).

<sup>99</sup> *See supra* note 98 and accompanying text; Kramer Testimony, *supra* note 92, at 6.

<sup>100</sup> *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 87, 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.”).

<sup>101</sup> Emergency petitions are discussed at length in Chapter 5 of this Report.

<sup>102</sup> *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).

<sup>103</sup> 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),

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<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).

<sup>104</sup> See *Presidential Commission on the Supreme Court of the United States* 2, 16-17 (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> (“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).

<sup>105</sup> See Thomas E. Griffith, *The Degradation of Civic Charity*, 134 HARV. L. REV. F. 119, 122, 136 (2021).

<sup>106</sup> For example, during the Commission’s public hearings, some witnesses who opposed Court packing asserted that term limits could be a beneficial reform. See Jackson Testimony, *supra* note 104, at 2; *Presidential Commission on the Supreme Court of the United States* 17-20 (July 20, 2021) (written testimony of Neil S. Siegel, Duke Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Siegel-Testimony.pdf>.

<sup>107</sup> See *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2575-76 (2019) (holding that the federal executive branch failed to adequately explain its decision to add a citizenship question to the U.S. Census, and concluding that the matter must be sent back to the agency for further explanation).

<sup>108</sup> See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020) (holding that the rescission of the Deferred Action for Childhood Arrivals program was arbitrary and capricious under the Administrative Procedure Act because DHS did not “provide a reasoned explanation for its action”).

<sup>109</sup> See, e.g., *Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020) (rejecting, on standing grounds, an original action brought by a state to prevent several other states—Georgia, Michigan, Pennsylvania, and Wisconsin—from certifying presidential electors); see also Siegel Testimony, *supra* note 106, at 6 (“[B]y most accounts, the federal courts—including the Justices—performed well during the controversies surrounding the 2020 presidential elections, regardless of the political affiliations of the judges.”).

<sup>110</sup> Siegel Testimony, *supra* note 106, at 5-6. This position has considerable historical support. See TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 15–16, 193 (2011) (arguing, based on a statistical analysis of judicial reactions to legislative proposals to curb the Supreme Court from 1877–2008, that “when Court-curbing bills are introduced in Congress, the justices will exercise self-restraint by attenuating their use of judicial review to invalidate federal legislation”); see also WALTER F. MURPHY, *CONGRESS AND THE COURT* 62 (1962) (arguing that, historically, the Justices have been “acutely aware of the attacks against their decisions, and . . . willing to make concessions when they felt that danger had become too threatening”).

<sup>111</sup> Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 69, 79-81 (Matthew D. Adler & Kenneth Einer Himma eds., 2009) (“[W]hat Roosevelt had proposed to do was *something that just isn’t done*. It violated the customary norm obligatory on Congress even though not formally part of the Constitution.”); see Bradley & Siegel, *supra* note 54, at 269-87; Grove, *supra* note 54, at 505-17, 538-44; see also Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 OXFORD J. LEGAL STUD. 421, 424 (2012) (noting that “the rejection of Roosevelt’s court-packing plan in 1937 . . . is said by many to have created an unwritten constitutional norm against court-packing”); Tom Donnelly, Note, *Popular Constitutionalism, Civic Education and the Stories We Tell Our Children*, 118 YALE L.J. 948, 994 (2008) (“No contemporary textbook presents an account that even subtly suggests the potential legitimacy of an argument in favor of ‘packing’ the Court under similar circumstances.”); *infra* notes 105-141 and accompanying text.

<sup>112</sup> 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, 1063-64 (2014).

<sup>113</sup> David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 34 (2014).

<sup>114</sup> H.R. REP. NO. 108-691, at 110 (2004) (Minority Report) (invoking Roosevelt’s plan to criticize bills that would have restricted federal jurisdiction over challenges to the Defense of Marriage Act and to the use of “under God” in the Pledge of Allegiance, and arguing that, just as Roosevelt’s plan failed, “so too must this modern day effort to show the courts ‘who is boss’ fail as well”).

<sup>115</sup> See Grove, *supra* note 54, at 512-17 (recounting how, beginning in the 1950s, both Republican and Democratic lawmakers treated “Court packing” as a political epithet and repeatedly denounced Roosevelt’s plan).

<sup>116</sup> *Id.* at 532-33.

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<sup>117</sup> Jackson Testimony, *supra* note 104, at 20-21.

<sup>118</sup> David Kosar & Katarina Sipulova, *How to Fight Court-Packing?*, 6 CONST. STUD. 133 (2020).

<sup>119</sup> Jodi Finkel, *Judicial Reform in Argentina in the 1990s: How Electoral Incentives Shape Institutional Change*, 39 LAT. AM. RSCH. REV. 56, 63-64 (2004).

<sup>120</sup> Steven Levitsky & James Loxton, *Populism and Competitive Authoritarianism in Latin America*, in ROUTLEDGE HANDBOOK OF GLOBAL POPULISM (Carlos de la Torre ed., 2018).

<sup>121</sup> Ozan O. Varol, Lucia Dalla Pellegrina & Nuno Garoupa, *An Empirical Analysis of Judicial Transformation in Turkey*, 65 AM. J. COMPAR. L. 187, 197-99 (2017).

<sup>122</sup> 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).

<sup>123</sup> 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).

<sup>124</sup> Skeptics of expansion also argue that the American example in the world matters and that politicians at home and abroad who might wish to control their courts might find themselves emboldened to take such actions if the United States engages in Court packing, regardless of the reasons for the U.S. reform. 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/pscotus/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 noting that any such impact would be uncertain); *Presidential Commission on the Supreme Court of the United States* 10-11 (June 30, 2021) (written testimony of Rosalind Dixon, University of New South Wales, 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).

<sup>125</sup> Feldman Testimony, *supra* note 98, at 8 (“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 . . . .”); Siegel Testimony, *supra* note 106, at 2 (“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) [hereinafter Supreme Court Practitioners’ Committee Testimony], <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 . . . .”).

<sup>126</sup> 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.”).

<sup>127</sup> McConnell Testimony, *supra* note 125, 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.”).

<sup>128</sup> See Feldman Testimony, *supra* note 98 at 9 (“Court-packing would likely become a tit-for-tat practice” and would “drastically reduc[e] the court’s institutional legitimacy.”).

<sup>129</sup> 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](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

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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.”).

<sup>130</sup> Jackson Testimony, *supra* note 104, at 20-21 (“[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 125, 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.”).

<sup>131</sup> *See* Peck Testimony, *supra* note 91, at 5 (noting, and proposing reforms to address, “the level of partisanship and tribalism associated with Senate processes on Supreme Court nominations”); Wittes Testimony, *supra* note 91, at 1 (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/pscotus/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”).

<sup>132</sup> *See* FRIEDMAN, *supra* note 22, at 237-79 (2009); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 900-16 (2011).

<sup>133</sup> *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).

<sup>134</sup> Critics who reject democracy-based arguments for Court expansion also note that 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. And the Senate is designed to provide equal representation to the states, not to reflect a broad national mandate. *See* U.S. CONST. art. II, § 1, cl. 2-4, *amended by* U.S. CONST. amend. XII. *Electoral College Fast Facts*, HIST., 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).”).

<sup>135</sup> *Cf.* THE FEDERALIST No. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009) (“This independence of the judges is equally requisite to guard the [C]onstitution and the rights of individuals from the effects of those ill humors, which the arts of designing men . . . sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.”).

<sup>136</sup> *See* Alison Gash & Angelo Gonzales, *School Prayer*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 62, 68-70, 77 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (showing that, in the 1970s, over seventy percent of the public disapproved of the Court’s school prayer decisions); Amy E. Lerman, *The Rights of the Accused*, in PUBLIC OPINION, *supra*, at 42-43 (“In many ways,” the Warren Court’s criminal procedure decisions “were out of step with public opinion and may even have shifted public opinion against the Court’s pro-rights position.”).

<sup>137</sup> *See* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“Separate educational facilities are inherently unequal.”); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018 (1998) (describing *Brown* as “[t]he classic example” of a canonical case); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011) (“[T]he constitutional canon” is “the set of decisions whose correctness participants in constitutional argument must always assume. *Brown* . . . is the classic example.”). For discussions of the resistance to school desegregation, *see* JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 242-314 (2019); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 290-442 (2004); CHARLES J. OGLETTREE,

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JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION 124-34 (2004).

<sup>138</sup> See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 675-76 (2015) (holding that “under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of” the right to marry); *United States v. Windsor*, 570 U.S. 744, 774-75 (2013) (holding invalid the Defense of Marriage Act, which allowed states to refuse to recognize same-sex marriages that were lawful under another state’s law); *United States v. Virginia*, 518 U.S. 515, 556-58 (1996) (holding that a state university could not lawfully exclude women).

<sup>139</sup> See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (establishing the one-person, one-vote rule for legislative apportionment).

<sup>140</sup> Siegel Testimony, *supra* note 106, at 20 (“Repeated Court-packing, or repeated threats of it, would make it increasingly difficult for the Supreme Court to perform functions that no other governmental institution is likely to perform better.”).

<sup>141</sup> See Guillermo O’Donnell, *Delegative Democracy*, J. DEMOCRACY, Jan. 1994, at 55, 60 (asserting that elections, when elections exist at all, in political systems where courts are treated as “nuisances” and “impediments” to be overcome, “are [] very emotional and high-stakes events: candidates compete for a chance to rule virtually free of all constraints save those imposed by naked, noninstitutionalized power relations”); see also Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2134 (2002) (asserting that Roosevelt’s 1937 “Court-packing plan might have indicated that the President no longer took constitutional constraints seriously, that the Constitution was suffering a crisis of fidelity.”).

<sup>142</sup> 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) [hereinafter Greene Testimony], <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.”).

<sup>143</sup> 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>.

<sup>144</sup> 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>.

<sup>145</sup> U.S. CONST. art. III, § 1 (emphasis added).

<sup>146</sup> 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 . . . .” *Id.* § 2. 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.

<sup>147</sup> 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*,

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61 VAND. L. REV. 1825, 1847 n.85 (2008) (providing several justifications for the constitutionality of panel proposals).

<sup>148</sup> Some circuits are more numerous than others, and the size of the court might affect how often it might sit en banc to resolve disagreements on the Court: The number currently ranges from six judges on the First Circuit to twenty-nine on the Ninth.

<sup>149</sup> 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”).

<sup>150</sup> 1 RECORDS, *supra* note 149, at 95 (emphasis added).

<sup>151</sup> The only change was the capitalization. See 2 RECORDS, *supra* note 149, 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”).

<sup>152</sup> 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”).

<sup>153</sup> See 2 RECORDS, *supra* note 149, 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.”).

<sup>154</sup> *Id.* (statement of Gouverneur Morris); see Davies, *supra* note 149, 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.”).

<sup>155</sup> See FRANKFURTER & LANDIS, *supra* note 8, 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).

<sup>156</sup> CONG. GLOBE, 41st Cong., 1st Sess. 208-09 (1869) (statement of Sen. George Williams, R-OR); see FRANKFURTER & LANDIS, *supra* note 8, at 74-75.

<sup>157</sup> 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.”).

<sup>158</sup> *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”).

<sup>159</sup> *Id.* at 215.

<sup>160</sup> 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.”).

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<sup>161</sup> 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.”).

<sup>162</sup> 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”).

<sup>163</sup> See FRANKFURTER & LANDIS, *supra* note 8, at 75-76 (noting Congress instead passed a proposal by Senator Lyman Trumbull, R-IL, for additional circuit judges).

<sup>164</sup> See Eugene Gressman, *Requiem for the Supreme Court’s Obligatory Jurisdiction*, 65 A.B.A. J. 1325, 1327 (1979).

<sup>165</sup> FRANKFURTER & LANDIS, *supra* note 8, 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).

<sup>166</sup> 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).

<sup>167</sup> S. REP. NO. 51-1571, at 3-5 (1890) (describing the views of a minority of senators).

<sup>168</sup> *Id.* at 3.

<sup>169</sup> 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.*”).

<sup>170</sup> 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.”).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 4.

<sup>173</sup> 21 CONG. REC. 10,227 (1890) (statement of Sen. Joseph Dolph, R-OR).

<sup>174</sup> 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”).

<sup>175</sup> See 21 CONG. REC. 10,316 (1890) (showing that the proposal was rejected by a vote of 36-10).

<sup>176</sup> *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.

<sup>177</sup> Letter from Charles Evans Hughes, C.J., to Burton K. Wheeler, U.S. Sen., *supra* note xxxix.

<sup>178</sup> See Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662; Grove, *supra* note 166, at 968-78 (discussing the legislative debates leading up to this measure).

<sup>179</sup> 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.

<sup>180</sup> See Epps & Sitaraman, *supra* note 142, at 193.

<sup>181</sup> *Id.*

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<sup>182</sup> 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”).

<sup>183</sup> 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.

<sup>184</sup> *See id.* at 183.

<sup>185</sup> *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>.

<sup>186</sup> *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”).

<sup>187</sup> *See* Epps & Sitaraman, *supra* note 142, at 183; Grove, *supra* note 185.

<sup>188</sup> *See Presidential Commission on the Supreme Court of the United States* 10 (June 30, 2021) (written testimony of Kim Lane Scheppelle, Princeton University), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Scheppelle-Written-Testimony.pdf>; Dixon Testimony, *supra* note 124, 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).

<sup>189</sup> *See* Scheppelle Testimony, *supra* note, at 9-14 (providing examples of high courts that sit in panels, and arguing that such a structure may be preferable).

<sup>190</sup> Jackson Testimony, *supra* note 104, at 2, 19, 21-23; Greene Testimony, *supra* note 142, at 3-5.

<sup>191</sup> *See* Hemel, *supra* note 104.

<sup>192</sup> For different versions of this proposal, *see* Epps & Sitaraman, *supra* note 142, 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).

<sup>193</sup> *See* Segall, *supra* note 192, 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 185. This prospect could lower the stakes of any one decision by the Court. *Id.*

<sup>194</sup> *See* Epps & Sitaraman, *supra* note 142, at 199-200.