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.

INTRODUCTION: THE GENESIS OF THE REFORM DEBATE AND THE COMMISSION'S MISSION

On April 9, 2021, President Joseph R. Biden issued an executive order establishing this Commission. The Order charged the Commission with producing a Report for the President that addresses three sets of questions. First, the Report should include "[a]n account of the contemporary commentary and debate about the role and operation of the Supreme Court in our constitutional system and about the functioning of the constitutional process by which the President nominates and, by and with the advice and consent of the Senate, appoints Justices to the Supreme Court."[1] Second, the Report should consider the "historical background of other periods in the nation's history when the Supreme Court's role and the nominations and advice-and-consent process were subject to critical assessment and prompted proposals for reform."[2] Third, the Report should provide an analysis of the principal arguments for and against particular proposals to reform the Supreme Court, "including an appraisal of [their] merits and legality."[3]

This Commission is the most recent of various committees and commissions established over the last fifty years to explore judicial reform. These have addressed a wide range of issues, such as caseload management and capacity, judicial disciplinary codes and administration, and the organization of the lower federal courts. Consistent with this history, President Biden's Order charged this Commission to enlist experts, as well as the public, to "ensure that its work is informed by a broad spectrum of ideas" on the question of Supreme Court reform.[4]

I. The Genesis of Today's Reform Debate

In October of 2020, then-presidential candidate Biden stated his intention, if elected, to create a bipartisan commission to examine Supreme Court reform. In response to a question about whether he supported proposals to expand the number of Justices on the Court, Biden responded that "it's not about court packing" and observed that constitutional scholars have debated a range of Court reform proposals.[5]

The President's comments and the Commission's subsequent creation underscore that the nation has been engaged for some time in an intense and ongoing debate about the Court's composition, the direction of its jurisprudence, and whether one political party or the other has breached norms that guide the process of confirming new Justices. Political actors, lawmakers, and commentators have articulated sharply divergent accounts of why conflict over the Court has escalated in recent years. And they disagree about whether these political struggles have undermined the Court's legitimacy.[6]

The Commission does not purport to offer a consensus history of the last decades of conflict over the Supreme Court, nor does it come to a conclusion about whether the Court has suffered a loss or crisis of legitimacy. Commissioners hold very different views on these matters. Without purporting to resolve any of those differences, this introductory Chapter offers a set of observations that provide context for President Biden's decision to issue the April 2021 Executive Order and discusses a set of criteria by which the broader debate might be appraised.

A. Conflict Over the Court

The role the Court plays in major political and social conflicts has long made its composition and jurisprudence subjects of debate in the nation's civic life. Throughout American history, including in recent decades, conflict over the Court has played out with varying degrees of intensity in the processes by which the President nominates and the Senate confirms new Justices. In recent decades, both Democrats and Republicans have lamented that nominees, prepared by the White House staff, have systematically sidestepped candid answers to questions about their records and judicial philosophies, although many also agree that nominees should not answer questions in ways that might be seen as pre-committing themselves to particular outcomes in future cases.

Nominations to the Court have been fiercely opposed for a range of reasons. President Woodrow Wilson's nomination of Louis Brandeis generated aggressive opposition fueled by antisemitism.[7] President Herbert Hoover's nomination of John J. Parker was opposed by civil rights groups and labor organizations, and was ultimately defeated at least in part because of Parker's expressed opposition, while a candidate for Governor of North Carolina, to the participation of Black people in politics.[8] When President Lyndon Johnson nominated Judge Thurgood Marshall—a trailblazing civil rights lawyer, former federal appellate judge, and, at the time of his nomination, Solicitor General of the United States—to be the first Black member of the Court, Marshall was confronted with hostile and racist questions from segregationist Senators.[9]

Other nominations were fiercely contested because of opposition to the nominee's judicial philosophy.[10] When the Senate rejected President Ronald Reagan's nomination of Judge Robert Bork to the Court in 1987, Judge Bork's supporters contended that he was a highly qualified nominee who was subjected to deceptive and inflammatory partisan criticism; his record and views, supporters claimed, were mischaracterized by his opponents. Defenders of the Senate's treatment of Judge Bork, by contrast, asserted that he received an extensive hearing at which he had an opportunity to present and defend his views at length, and that his nomination failed by a bipartisan majority vote after a floor debate because of fundamental and legitimate disagreements with his legal views and judicial philosophy.

Three recent nominations have generated especially bitter partisan conflict. We explore those nomination battles in greater detail in Chapter 2 of this Report but note them here because of their role in the debates leading to the formation of this bipartisan Commission. First, after Justice Antonin Scalia died in February 2016, the Republican majority in the Senate refused to consider President Barack Obama's March 2016 nomination of Chief Judge Merrick Garland to fill that seat. The Republican Senate leadership argued that the nation was poised in a matter of months to elect a new President, who should be able to appoint Justice Scalia's successor. It thus declined to take any formal action, such as a hearing or a vote, on the Garland nomination. President Donald Trump later appointed Judge Neil Gorsuch to fill the vacant seat. Next, in the summer of 2018, Justice Anthony Kennedy—widely viewed as occupying the Court's ideological center—announced his retirement. President Trump then nominated Judge Brett Kavanaugh, whom the Senate confirmed in October 2018 after contentious hearings and floor

debate. Finally, Justice Ruth Bader Ginsburg died in September 2020, creating another election-year vacancy. Although the Senate's Republican majority had opposed the election-year confirmation of Judge Garland for nearly eight months before the 2016 election, this time it took up President Trump's nomination of Judge Amy Coney Barrett and confirmed her in less than one month, on October 26, after voting in the 2020 presidential election had already commenced. Senate Democrats participated in the Judiciary Committee hearings and final vote on Justice Barrett's nomination, but most declined individual meetings with her, and the Democrats on the Judiciary Committee boycotted the final committee vote to express their objection to the timing of the nomination.

These events directly motivate some of the current calls for Supreme Court reform by those who argue that the seats previously occupied by Justices Scalia and Ginsburg were "stolen" by Republicans from Democrats. According to these critics, Republicans achieved the current conservative dominance of the Court by disregarding the norms that should govern and have governed the appointments process in the past.[11] Critics of the treatment of the Garland nomination in particular emphasize that the Senate majority's refusal to take any formal action at all on that nomination broke important new ground, departing from historical practice dating back to the nineteenth century. In addition, according to critics, the fact that Republicans were willing to act on Justice Barrett's nomination just before the 2020 election undermines their claim that their refusal to consider Judge Garland's nomination was motivated by the principle that Supreme Court vacancies ought not be filled in an election year. In response, defenders of the Senate majority point out that Judge Garland was nominated when the White House and the Senate were controlled by different political parties, while Justice Barrett was nominated when both institutions were controlled by the same party. More broadly, these defenders assert that the Senate majority's actions during these two periods did not violate any well-established norms or disrupt any consistent historical practice. Over the course of American history, they note, Senate majorities periodically have declined to take up nominations in election years or have used the filibuster to deny a sitting President a confirmation, in order to reserve the choice for his successor.

Several witnesses who testified before or provided written submissions to the Commission observed that partisan conflict over nominations has occurred throughout the nation's history, particularly in election years.[12] According to one witness, historically the Senate has confirmed nearly ninety percent of Supreme Court nominees when the President's party is in power but "fewer than 60 percent of nominees under divided government."[13] Similarly, the same witness observed that over eighty percent of nominees are confirmed when nominated "in the first three years of a presidential term," but "barely more than half" when nominated "in the fourth (election) year."[14] Nonetheless, most witnesses agreed that conflict has intensified in recent years. One witness cited the history of confirmations since the Reagan Administration as one of a "continuous cycle of escalation" of partisan conflict over nominations to both lower courts and the Supreme Court.[15] This escalation originates in the belief, held by both parties, that "the other side plays dirty and will manipulate the rules to its own advantage," conferring on the party in power "a significant incentive to violate the current norms when it has the chance."[16] The witness summarized the current state of affairs: "[E]ach side . . . believ[es], probably rightly, that the other side would do the same as soon as it had the chance. It's a classic prisoner's

dilemma, and it operates according to its own logic."[17] Another witness characterized this recent history as "decades of political circus."[18]

The Commission also received a survey of a bipartisan group of former Senate staffers, including those who have served the current and former leadership of the Senate Judiciary Committee, documenting their views on the state of the confirmation process. The results reflected broad bipartisan agreement that the confirmation process has come under severe strain from partisan conflict, though Republican and Democratic staffers disagreed about the causes of the strain. Democrats cited the controversies surrounding the nominations of Judge Garland and Justice Barrett as evidence of Republican bad faith and disregard of longstanding norms. Republicans cited the hearings on the nominations of Judge Bork, Justice Clarence Thomas, and Justice Kavanaugh, and blamed Democrats for personal attacks on nominees designed to derail nominations for partisan or ideological reasons.[19]

The recent history of Senate confirmation votes supports witnesses' accounts of escalating partisanship. For seventy years until 1968, most Justices were confirmed by voice vote. Since then, roll call voting has become the norm, and votes have divided increasingly along party lines.[20] Justice Sonia Sotomayor received 68 votes (all Democrats and nine Republicans voting to confirm); Justice Elena Kagan, 63 (all but one Democrat and only five Republicans voting to confirm); Justice Gorsuch, 54 (all Republicans and only three Democrats voting to confirm); Justice Kavanaugh, 50 (all Republicans and just one Democrat voting to confirm); and Justice Barrett, 52 (all but one Republican and no Democrat voting to confirm).

To be sure, over the last fifty years, some nominees have received significant bipartisan support. Some of those nominations—including Justice Scalia (confirmed in 1986 with 98 votes), Justice Ginsburg (confirmed in 1993 with 96 votes), and Justice Stephen Breyer (confirmed in 1994 with 87 votes)—occurred when the Senate was controlled by the President's party. Others—including Justice Kennedy (confirmed unanimously in 1988, an election year, after Judge Bork's nomination was rejected) and Justice David Souter (confirmed in 1990 with 90 votes)—occurred when the Senate majority was not aligned with the President. Unmistakably, however, the trend over the last three decades has been toward more partisan conflict, which has affected nominations to the lower courts as well as to the Supreme Court.

The confirmation battles of recent years have given rise to multi-million dollar lobbying campaigns seeking to mobilize public pressure for or against particular nominations. Millions of dollars were spent for and against the nominations of Justices Kavanaugh and Barrett.[21] There is little reason to doubt that nominations will continue to trigger expensive campaigns to shape public opinion and pressure undecided Senators to vote in a particular way. Indeed, when vacancies arise, political and interest group allies now expect the President to thoroughly vet nominees for their substantive views in an effort to ensure that the nominee will advance the desired ideological outlook. Presidents are also expected to nominate individuals who, if confirmed, will be young enough to serve for many decades. In short, political actors now perceive the stakes of each nomination to be exceedingly high, especially if confirmation is seen as likely to lead to an immediate shift in the balance of power between Court "liberals" and "conservatives."

As witness testimony before the Commission suggested, the struggles over the confirmation process appear likely to persist, if not intensify. One witness testified that the partisan escalation of recent years may lead future Senate majorities to decline to take up any nomination from a President of the opposing party at any time at all, not just in the last year of the President's term.[22] At various times and to different degrees, party leaders have expressed a readiness to resort to these kinds of tactics as a matter of course. In 2021, Republican Leader Mitch McConnell stated that if his party won a majority in the Senate in the 2022 midterm elections, he would not commit to acting on any Supreme Court nomination by President Biden in 2023 and indicated that it was "highly unlikely" he would agree to any such consideration in the 2024 presidential election year.[23] In 2007, Senator Chuck Schumer, then a member of the Senate Democratic leadership and now the Senate Majority Leader, observed in a speech that, for the eighteen months remaining in George W. Bush's presidency, "[w]e should reverse the presumption of confirmation."[24] He set the nomination of a "moderate" as a condition of confirmation, asserting that "the Supreme Court is dangerously out of balance" and that a Bush nomination should not be confirmed "except in extraordinary circumstances."[25] Defenders of recent Republican actions point to these statements as evidence that both sides have engaged or have been prepared to engage in similar practices. They therefore contend that Republicans cannot fairly be charged with breaching any established norms. Critics of the Republicans' approach see a distinction between Senator McConnell's and Senator Schumer's respective statements. They view it as improper for the Senate simply to refuse to consider a President's nominees, but claim it is different, and appropriate, for a Senate majority that is not aligned with the President to insist that the President's nominees be relatively moderate. Of course, what it means for a nominee to be "moderate," and whether any given nominee is accurately described as such, are often matters of significant disagreement.

B. The Stakes of the Reform Debate

The Court reform debate is not merely a byproduct of recent partisan conflict. Rather, it is a high-stakes debate because of the unique role and structure of the Supreme Court. The Court's decisions have extraordinary impact on the lives of Americans generally. The Court also exercises enormous power within the U.S. system of government, as do the individual Justices themselves, who serve for life. The sharp polarization in contemporary American politics only exacerbates the conflict over the Court.

The Court has long occupied a central and often contested role in shaping American political and civic life. In the modern era, its decisions continue to have both immediate and long-term effects on the welfare of individuals and communities throughout the country, including by affecting the rights of people of the same sex to marry, the right to bear arms, religious liberty, property ownership, women's reproductive rights and freedoms, access to health care, participation in the political process and voting, the structure of government and the separation of powers, the operation of the criminal justice system, diversity in higher education, and the regulation of workplaces and the right to organize.[26] The stakes of the nomination process are so high precisely because they implicate matters of great public concern. Indeed, at various moments throughout history, conservatives and progressives alike have turned to the

Court to protect the rights they most value and to define the authority of the elected branches of the federal government and of the states in accord with their understandings of the Constitution.

The controversies surrounding the Court are heightened by the combination of—as one witness put it—a "very powerful Supreme Court" and "a nearly-impossible-to-amend constitution."[27] Consequently, when the Court generates "a firestorm of controversy, the only practical avenue for overturning decisions of the Court has been through changing the judges who sit on that Court."[28] The fact that Justices have life tenure—and therefore often serve for upwards of thirty years in the modern era—only heightens the stakes of who joins the Court. Up until the late 1960s, the average term of service was fifteen years. It has now risen to roughly twenty-six years, and a number of Justices have served three or more decades, spanning numerous election cycles and presidential administrations. It is hardly a surprise, then, that key segments of the American public are so heavily invested in making sure that the "right" nominee is confirmed.

The highly polarized politics of the current era threaten to transform this already high-stakes process into one that is badly broken.[29] Political scientists generally agree that "the period since the 1980s has largely featured deepening dispute and standoff between the parties, accompanied by intensifying political and social polarization."[30] This polarization is not simply a matter of partisan competition for its own sake, but also reflects a greater and more stable ideological divide between the two major political parties.[31] As the parties become more accurate proxies for deep ideological disagreements, the realistic potential for bipartisan compromise and cooperation decreases.[32] The depth and stakes of partisan polarization increase accordingly.[33] Indeed, contemporary politics generally has developed the "distinctive character of high-stakes warfare" associated with the "breakdown of norms of cooperation and civility across the aisle."[34] According to Chief Justice John Roberts, this extreme polarization has affected public perceptions of the Court: "When you live in a polarized political environment, people tend to see everything in those terms."[35]

The Commission did not attempt to identify the sources of polarization or come to conclusions about any role the Court may have played in it. These, too, are matters about which individual Commissioners disagree. The Commission did hear testimony, however, that acute polarization is likely to continue to affect the debate over the Court's role in the constitutional system, and to perpetuate partisan conflict over nominees to the Court.[36] On this point, there is consensus among Commissioners. Any account of the origins of the present debate about the role and operations of the Court, therefore, would be incomplete without taking note of how the deeply divided nature of our polity affects debates over the Court.

* * *

Before we turn to discussing proposals for Court reform and how best to evaluate them, two caveats to the above picture of partisan conflict are in order. *First*, even as the Court is at the center of escalating partisan conflict, its rulings have not fallen consistently along "party lines," where Justices appointed by Republicans vote in a predictably conservative fashion and Justices appointed by Democrats vote in a consistently liberal one. A significant portion of the Court's work is not highly ideological, and in these cases the Justices are often unanimous or aligned in

ways that cannot be predicted by partisanship or ideology.[37] However, this appears to be less true of late with respect to emergency orders (often referred to as the "shadow docket"), as discussed in Chapter 5 of this Report.[38]

Second, the extent to which extreme political polarization affects the public standing of the Court is not clear. Historically, the Court has maintained levels of public confidence higher than those accorded the other branches.[39] Though public opinion may shift in the wake of particularly controversial decisions and nominations, many have argued that basic trust in the Court as an institution has exhibited significant resilience.[40] At the same time, there is some evidence that partisan differences shape judgments about the Court's performance. Court "approval" among Democrats dropped to forty percent after President Trump assumed office and made his first appointment to the Court, while among Republicans it rose to nearly sixty-five percent.[41] And whether public trust in the Court will continue to be durable remains to be seen. One recent poll suggests the Court's approval is waning, with forty-nine percent of Americans disapproving of its performance and only thirty-seven percent approving—an all-time low.[42]

II. Proposals for Reform

A. The Commission's Process and Scope of Analysis

In considering the current reform debate, the Commission received oral testimony from 44 witnesses; written statements from 23 additional experts and organizations; and more than 6,500 submissions in the form of public comment. The views expressed regarding whether Court reform is needed and the proposals for such reform were wide-ranging and diverse.

Informed by that material and the broader public debate, the Commission divided its work into five parts: one devoted to a historical background and the other four devoted to the major categories of reform proposals.

- *The history of Supreme Court reform debates and proposals*. Debates about whether and how to adjust the size, role, and operation of the Supreme Court are as old as the Court itself. To put the present reform debates in context, in Chapter 1 we provide a historical overview of past efforts in favor of and opposed to Supreme Court reform.

- *The size and composition of the Court*. One prominent proposal would increase the number of Justices who sit on the Court. Other proposals suggest reorganizing the membership of the Court—for example, by having cases decided by panels instead of the entire Court, or by periodically rotating other Article III judges on to the Supreme Court. We address these proposals in Chapter 2.

- *The Justices' tenure*. Justices currently serve "during good Behavior," meaning for life, unless they voluntarily leave the Court or are impeached and removed from office. Another prominent proposal would limit the length of time that Justices serve on the Court and, relatedly, would define the intervals at which Justices are appointed. We consider these term-limits proposals in Chapter 3.

- *The powers of the Court and its role in the constitutional system*. Another set of proposals seeks to disempower the Court in relation to the political branches, particularly to limit the Court's power to declare legislative acts unconstitutional. This category includes modifying the Court's jurisdiction, as well as changing the Court's voting rules and the standards of review it uses when considering whether to invalidate the actions of elected officials. Finally, it includes proposals to allow Congress to override constitutional decisions of the Supreme Court and other courts. We analyze this category of proposals in Chapter 4.

- *Transparency and the Court's internal processes*. A final category of potential reforms includes proposals that would address internal operations of the Court. These proposals concern: the procedures and principles the Court applies to emergency applications; judicial ethics and transparency with respect to recusals and conflicts; and making the Court's proceedings more transparent through real-time audio or video transmission. We take up this set of reforms in Chapter 5.

With regard to each of the four categories of Court reform, we consider relevant historical background (in addition to the more general historical background provided in Chapter 1); we evaluate the case for and against the reform as framed by proponents and critics; we explore whether the proposed reforms promote the goals of their proponents and what the potential consequences of the reforms might be; and we consider the legal requirements and obstacles that must be met or overcome to implement the reforms.

We do not analyze at length the confirmation process or proposals for how the Senate might reform it. The Commission recognizes that the processes by which individuals are nominated to the Court by the President and considered by the Senate are central to today's debate. However, the Commission's charge was to address proposals for reforming the Court itself, not for reforming the confirmation process. At the same time, given the extensive and bipartisan testimony we received concerning the intense conflict that now characterizes that process, generating widespread concern that it has become dysfunctional, we have attached an Appendix to this Report that discusses specific reform proposals presented to the Commission—proposals we believe merit close attention and consideration.[43]

B. Evaluating Reform Proposals

Before proceeding to analyze particular reform proposals in subsequent chapters, we consider the values and principles that might be brought to bear in evaluating whether reform is needed and whether a particular reform might be worth pursuing or could be counterproductive. Three common and interrelated themes are frequently invoked in discussions about reform: the perceived need to protect, or enhance, the Court's "legitimacy;" concerns about preserving the independence of the federal judiciary and the Supreme Court in particular; and the Court's relationship to democracy. One challenge in defining these concepts is that they mean different things to different people. Thus, discussions cast in these terms sometimes create terminological confusion.

We do not try to assign specific meanings to any of these ideas. But we do think it is useful to articulate the values that underlie the ideas of legitimacy, judicial independence, and democracy, as those ideas pertain to the Court, with the hope of clarifying the terms of the debate and providing ways in which reform proposals might be evaluated. We also discuss concerns about transparency as they relate to debates about Court reform.

1. Legitimacy

Nearly all of the matters now being debated—the size and composition of the Court, the Justices' tenure, the Court's role in the constitutional system, the propriety and transparency of the Court's internal processes, and the way in which Justices are appointed and confirmed—are said to implicate questions of "legitimacy." There are, however, different ways to understand the idea of legitimacy as it is used in reform debates. "Legitimacy" might refer to the general level of support that the Court has among the people of the United States, perhaps as reflected in public opinion polls. Or, in a related and more specific use of the term, it might refer to whether people who disagree with a decision by the Court are willing to comply with it.

Those who use "legitimacy" in one of these ways commonly say that the Court's legitimacy is crucial to the institution because the federal judiciary has no military or other way to coerce people to comply;[44] the judiciary must rely on others to adhere to its decisions.[45] Alexander Hamilton formulated the point in *The Federalist* in a way that has become virtually a cliché: "The judiciary . . . has no influence over either the sword or the purse . . . and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[46] The Supreme Court's capacity to function in its accustomed way, at least in the long term, arguably depends on the Court retaining its "legitimacy" in this sense.[47]

Sometimes, though, "legitimacy" is used in these debates to mean something else—to express an evaluative judgment about the Court or its actions, not a prediction about whether it will be obeyed. In particular, people who believe that the Court is functionally a "political" or even partisan body might say that the Court is (or has become) illegitimate. That claim might be made irrespective of whether the Court has lost popular support or its ability to command obedience to its decisions. More generally, the assertion that the Court is "illegitimate" might be an evaluative judgment that the Court has made decisions that are seriously wrong. Of course, it would be rhetorical overkill, by any standard, to say that every mistaken decision draws into question the Court's legitimacy. But an observer who believes that the Court has made decisions that are wrong in some fundamental way might couch that criticism in terms of legitimacy.

Finally, assertions about "illegitimacy" might combine these two elements: both a criticism of the Court or its decisions and a commentary on its ability to command obedience. The claim may be that the Court has become so partisan, political, ideological, or that the Court's decisions are so fundamentally wrong, that it is not entitled to obedience.

Because claims about legitimacy play a large role in debates about the Court—and because the term has different possible meanings—there is a risk that participants in these debates will talk past each other and not clarify their areas of agreement or disagreement. For example, a claim that the Court is "illegitimate" because of the way in which some of its

members have been appointed or because it made a decision based on objectionable motivations might be met with an assertion that the Court still commands substantial popular support. But the assertion about popular support is not truly responsive to the evaluative claim about the Court. Or, in reverse, a weakening of the Court's popularity might be taken as evidence that the Court has embarked on a misguided course of decisions—which need not be true.

In fact, the relationship between popular acceptance of the Court and the correctness of the Court's decisions is a complex question that must be analyzed in its own right. Competing assertions about "legitimacy" that do not recognize the complexity of that term can obscure, rather than focus, the terms of debate.

2. Judicial Independence

Judicial independence is also invoked in varying ways. In one sense, judicial independence is commonly, and correctly, thought to be a core requirement of the rule of law. Judges must be free to decide cases without fear that they will be punished by the government or will suffer physical or financial harm at the hands of private individuals. They must not be corrupted by bribes. Their rulings must not be influenced by personal favoritism or family relationships.

In those ways, judicial independence is not different from what we expect of other government officials: that they be able to, and do, carry out the responsibilities of their office without fear or favor. But the ideal of judicial independence might be understood to include qualities that are distinctive and indispensable components of the work of judges in particular. Judges should not be partisans. Other government officials, depending on their positions, might legitimately set out to promote the interests of the political party with which they are associated; one requirement of judicial independence is that judges not do that. And, importantly—because federal judges are appointed and confirmed by political actors—the belief that the judiciary is independent can be undermined if judges are perceived to be "playing on the team" of one party or another.

Beyond that, it is sometimes said that judicial independence requires that judges decide cases solely according to the law. Of course, it is incontrovertible that judges should decide cases according to law. But there are difficult questions—they have been debated, literally, for centuries—about what making decision according to law means. In particular, legal decisions, especially those of a court like the Supreme Court that has responsibility to resolve the most challenging issues facing our system, will sometimes require the exercise of judgment on legal issues about which there can be reasonable disagreement and that may implicate—to quote Judge (later Justice) Benjamin Cardozo—"[h]istory or custom or social utility or some compelling sentiment of justice."[48] Difficult decisions of those kinds, especially when they involve controversial social issues, can leave judges and Justices open to the accusation that they have compromised judicial independence by advancing a partisan or otherwise improper agenda. That makes some of the duties associated with the judicial role and judicial independence—candor, consistency, reasoned elaboration, attention to both the appearance and reality of impartiality—all the more important.

There is a different meaning of judicial independence that raises more complex questions about the role of the judiciary as a whole, and the Supreme Court in particular, in our constitutional system. Judges and Justices should undoubtedly be independent in the sense of making decisions that are unaffected by improper influences, whether those influences are imposed from the outside (by threats, for example) or are the result of their own approach to the job (if, for example, their decisions are influenced by an intention to run for office after they leave the judiciary or if they simply act as members of a partisan "team").

But "judicial independence" might also refer to the separate idea that the judiciary as an institution has an independent role to play—a role that is distinct from that of the other branches. Some of the confusion in debates about Court reform may result from a blurring of these two different meanings of "judicial independence"—the unquestionable value of judges acting free from fear or favor and according to law, and the more complex issues raised by the relationship between the judiciary and the other institutions of our government. The question of how independent of the other branches the judiciary should be is not easy to answer.

On the one hand, especially because judges and justices sometimes must decide issues about which reasonable people disagree, there is an argument that the judiciary must not be entirely independent of the elected branches of government. Some aspects of our system—including not only the appointment and confirmation process, but also Congress's role in setting the Court's budget, jurisdiction, and size, and its control of the impeachment process—ensure that the judiciary is not entirely independent but is to some degree responsive to elected officials and therefore to public opinion. On the other hand, the role of the judiciary, in any system, is to decide cases according to law and not according to the desires of political actors. Beyond that, in our constitutional system the judiciary has the responsibility to protect minorities against impermissible exercises of political power. The independence of the judiciary as an institution is crucial to the courts' ability to carry out this responsibility. We consider this clash between ideals more fully in our discussion of the relationship of the Court to democracy.

3. Democracy

One far-reaching critique of the Court, also sometimes cast in terms of legitimacy, asserts that the Court is too willing to intrude into matters that should be left to democratic political processes. According to this line of criticism, many concerns about the Court are derivative of its outsized role in the system of government. When the Court's decisions are so important, the confirmation process becomes more contentious and partisan; the incentives to attempt to use the Court for partisan purposes become greater; and worries that the Court will entrench views that the people have rejected become more acute.

This criticism highlights the tension between the role of an independent judiciary as a check on the political process and the idea that our constitutional democracy must provide a democratic check on the judiciary as well. The democratic check advocated by some critics takes a variety of forms, each of which has different implications for the relationship between the Court and democracy. Because each of these suggested ways of defining the relationship between the Court and democracy also implicates the values associated with legitimacy and judicial independence, we consider them in some detail.

a. Deference to the Political Branches.

If the fundamental democratic goal is ensuring that decisions are made by relatively democratic institutions, such as the legislature, a goal of reform might be to ensure that the Supreme Court not interfere (or not interfere too readily) with the outcomes of the democratic process—by, for example, holding unconstitutional federal or state legislation. Some advocates for reform thus contend that the Court should be more reluctant to declare legislation unconstitutional, or that Congress should limit the Court's power to do so. This understanding, in various forms, has been advocated by commentators, judges, and Justices at various points in history, and some of the witnesses before the Commission forcefully advanced this view.[49] In fact, it is difficult to think of any issue related to the Court that has been discussed more extensively.

This conception gives rise to various questions. What is the category of decisions to which the Court should be more deferential? Is the concern that the Court exercises too much power just about the invalidation of Acts of Congress, or does it extend to the much more common instances in which the Court declares unconstitutional the actions of states or local governments? Those two forms of judicial review raise significantly different issues, but both implicate the power of the Court to overturn enactments by democratically elected bodies. In addition, the Court exercises power over the other branches of the federal government in ways apart from its constitutional holdings. The Court interprets federal statutes and can declare unlawful the actions of executive branch agencies. Though these decisions, unlike constitutional holdings, can in principle be overturned by legislation, in practice the difficulty of enacting legislation routinely means that what the Court says is the last word.

Perhaps the more fundamental question—the one that has attracted so much discussion for so long—is when deference is justified and when it is not. In prominent cases, the Court has intervened to try to protect racial or religious minorities or political dissidents from the abusive actions of majorities.[50] If the Court were to adopt a posture of across-the-board deference, it would no longer play that role. But some critics of the Court assert that greater deference would be worth it—that the gains from those celebrated decisions are outweighed by the instances in which the Court has prevented democratically-elected branches of government from serving the nation's interests, including by recognizing and protecting individual rights and the rights of minority and disadvantaged groups.[51]

b. A More Representative Court—and Avoiding Partisan Entrenchment.

A second democracy-related argument aims for a Court that reflects, in broad terms, the political makeup of the country. The assumption appears to be that such a Court would not issue decisions that diverge too greatly from the preferences of the broader public. The argument is that while the Court need not and should not be responsive to short-term swings in public opinion, it is not good for the Court or the country for the Court to be substantially out of line with public opinion for an extended period.

Some critics of the current system contend that it produces a persistent gap between the composition of the Court and long-term movements in popular opinion. This misalignment might occur by happenstance, because the fortuitous nature of vacancies enables some Presidents to make many more appointments to the Court than others and therefore to have a much greater influence on its direction.[52] It may also happen by design, if a transient governing majority, or one that is about to be superseded, succeeds in appointing to the judiciary a significant number of candidates whose legal philosophy matches that majority's preferences—a phenomenon sometimes referred to as partisan entrenchment. During such periods of misalignment, there may be a heightened risk that the Court's direction on political or social issues will be perceived as significantly or increasingly distant from the strongly held preferences of a large majority of the public.

Some commentators assert that such a misalignment exists today. They point to the fact that Republican Presidents have appointed fifteen of the last nineteen Justices and six of the current nine Justices, "even though Democrats have held the presidency for 16 of the last 28 years and have received more votes in six of the last seven presidential elections."[53] President Trump, for example, appointed three Justices in his single four-year term; his immediate Democratic predecessors, Presidents Barack Obama, Bill Clinton, and Jimmy Carter, made only four appointments total in a combined twenty years in office.[54] This argument dovetails with some of the concerns about Supreme Court legitimacy. Observers worry that, absent a change in membership, the Court will reverse longstanding precedents that may be favored by a large segment of the public, such as those concerning reproductive rights.[55]

The prospect of misalignment arguably deepens in light of certain structural features of the Constitution and their relationship to the country's demographic development. As larger states grow relative to smaller ones, the power imbalance in the Senate increases; Senators from smaller states, who represent increasingly smaller portions of the electorate, nonetheless retain the same power to move or block nominations. In addition, the vagaries of the Electoral College will increasingly magnify the risk that candidates who do not secure the popular vote will nonetheless win the presidency and with it the opportunity to appoint Justices to the Court.

What some critics cite as misalignment, however, others view as serving important values or purposes of the constitutional system. It is by design that members of the Court (and the rest of the federal judiciary) do not stand for reelection. The protection of life tenure may help maintain judicial independence by providing a degree of insulation from the partisan politics of the moment. This insulation also helps the Court to serve as a check on majority opinion in order to protect constitutional rights and other principles that political majorities may not favor. Indeed, some would contend that any concerted attempt to align the Court's decisions with the preferences of political majorities tends to overlook that the Court's obligation is to the Constitution and laws. From this point of view, if the Court's decisions are not favored by current political majorities, that may simply be the unavoidable consequence of a system in which the judiciary is expected to interpret and apply the law, not to do politics. Indeed, some of the Court's most consequential decisions on subjects ranging from school prayer to criminal justice were quite unpopular when first issued.[56] Even if misaligned with public opinion at first, the Court's decisions may garner support as the "popular will" changes over time. *Brown v.*

Board of Education was met with significant resistance when it was issued, for example, but is now one of the most respected Supreme Court decisions in history.[57]

Further, the severity of any misalignment between the Supreme Court and popular opinion is debatable. Some legal scholars argue that the Court has, for much of its history, issued decisions that generally reflect the wishes of the public.[58] Still, those who criticize the current Court on the basis of misalignment may see the present circumstances as meaningfully new and different from past ones, and thus may not see history as a reliable guide on this point. In any event, however, identifying whether misalignment exists is not straightforward. There is no obvious way of distinguishing between cases where the Justices have simply reflected the policy views of an earlier generation and those where they have provided a valuable and principled counterweight to majoritarian excesses. Moreover, there are historical examples of dominant political coalitions that tried to entrench themselves in the judiciary by systematically appointing Justices with certain views, only to have those very appointees decide cases in ways that diverged from the preferences or platforms of the appointing party.[59] This last point cuts against any assumption that nominees to the Court are nothing more than political instruments of the Presidents who nominate them.

Ultimately, Commissioners hold different views on the extent to which misalignment is a problem and on whether the Court is sufficiently deferential to the political branches. Throughout this Report, however, we address and take seriously these democracy-related concerns as we evaluate the various proposals that seek to advance different conceptions of democracy.

4. Transparency

Commentators have raised a distinct set of concerns about the Court's efficacy and transparency. One persistent critique is that the Court should make its proceedings and practices more visible to the public, such as by video or real-time audio transmission. Another is that the Justices should articulate more completely rationales for their decisions, such as reasons for the denial (or perhaps the granting) of certiorari. Relatedly, numerous critics have raised concerns about how the Court handles cases on its emergency docket, which do not receive plenary consideration. In such cases, the Court issues orders or other dispositions without the full explanation that typically accompanies cases decided on the merits docket. Critics also contend that the Court should be more transparent about the criteria governing the circumstances in which Justices recuse themselves from deciding particular cases. There are also recurrent calls for more explicit rules about conflicts of interest, and other forms and appearances of impartiality, to govern the Court.

[1] Exec. Order No. 14023, 86 Fed. Reg. 19,569 (Apr. 14, 2021) [hereinafter Exec. Order].
[2] *Id.*
[3] *Id.*
[4] *Id.*

[5] *Joe Biden 60 Minutes Interview Transcript*, REV (Oct. 25, 2020), https://www.rev.com/blog/transcripts/joe-biden-60-minutes-interview-transcript.
[6] *See, e.g.*, Bruce Ackerman, Opinion, *Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018), https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html (noting that partisan politics threaten to "destroy the court's legitimacy in the coming decade"); Erwin Chemerinsky, *With Kavanaugh Confirmation Battle, the Supreme Court's Legitimacy Is in Question*, SACRAMENTO BEE (Oct. 5, 2018), https://www.sacbee.com/opinion/california-forum/article219317565.html (noting a "cloud over the court's legitimacy"); Press Release, Office of Sen. Mitch McConnell, McConnell on Court-Packing Commission: Disdain for Judicial Independence (Apr. 9, 2021), https://www.republicanleader.senate.gov/newsroom/press-releases/mcconnell-on-court-packing-commission-disdain-for-judicial-independence- (describing the Commission as "squarely within liberals' years-long campaign to politicize the Court, intimidate its members, and subvert its independence").
[7] *Roll Call Vote on the Confirmation of Louis Brandeis, 1916*, U.S. CAPITOL VISITOR CTR., https://www.visitthecapitol.gov/exhibitions/timeline/image/roll-call-vote-confirmation-louis-brandeis-1916#top.
[8] *Senate Rejects Judge John J. Parker for the Supreme Court*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/nominations/judge-parker-nomination-rejected.htm.
[9] Matt Ford, *Thurgood Marshall's Patient but Relentless War*, ATLANTIC (Sept. 6, 2017), https://www.theatlantic.com/membership/archive/2017/09/thurgood-marshalls-patient-but-relentless-war/538854/ (describing Justice Marshall's confirmation process as a "national embarrassment").
[10] *See, e.g.*, Alfonso A. Narvaez, *Clement Haynsworth Dies at 77; Lost Struggle for High Court Seat*, N.Y. TIMES (Nov. 23, 1989), https://www.nytimes.com/1989/11/23/obituaries/clement-haynsworth-dies-at-77-lost-struggle-for-high-court-seat.html (describing "a tense battle between the Nixon Administration and a coalition of labor and civil rights groups" that led to the failed confirmation of Judge Clement Haynsworth to the Supreme Court).
[11] *See, e.g.*, Jackie Calmes, *How Republicans Have Packed the Court for Years*, TIME (June 22, 2021), https://time.com/6074707/republicans-courts-congress-mcconnell (describing "bare-knuckle tactics in the Senate" by Republicans to "stock … the federal bench at all levels with conservatives").
[12] *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Ilya Shapiro, Vice President & Dir., Robert A. Levy Ctr. for Const. Stud.) [hereinafter Shapiro Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Shapiro-Testimony.pdf.
[13] *Id.*
[14] *Id.*
[15] *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Benjamin Wittes, Senior Fellow in Governance Studies, Brookings Inst.) [hereinafter Wittes Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Wittes-Testimony.pdf.
[16] *Id.*
[17] *Id.*
[18] *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Curt Levey, President, Comm. for Just.) [hereinafter Levey Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Levey-testimony.pdf.
[19] *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Jeffrey J. Peck) [hereinafter Peck Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Peck-Testimony.pdf.
[20] The Democratic vote count includes independents who caucus with the Senate Democrats.
[21] Peter Overby, *Kavanaugh Nomination Battle Is Fought With Millions In Secret Cash*, NPR (Oct. 4, 2018, 5:00 AM), https://www.npr.org/2018/10/04/654187465/kavanaugh-nomination-battle-is-fought-with-millions-in-secret-cash; Jordan Fabian, *Trump-Allied Groups Pour $30 Million Into Barrett Confirmation*, BLOOMBERG (Oct. 22, 2020, 4:00 AM), https://www.bloomberg.com/news/articles/2020-10-22/trump-allied-groups-pour-30-million-into-barrett-confirmation.
[22] *Presidential Commission on the Supreme Court of the United States* 2 (June 30, 2021) (written testimony of Noah Feldman, Felix Frankfurter Professor of Law, Harvard Law School) [hereinafter Feldman Testimony] https://www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf.
[23] 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.

[24] Senator Charles Schumer, Remarks at the American Constitution Society (July 27, 2007), https://www.acslaw.org/expertforum/text-of-senator-schumers-speech/.
[25] *Id.*
[26] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* (Aug. 26, 2021) (written testimony of David D. Cole, National Legal Director, ACLU) [hereinafter Cole Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/08/ACLU.pdf (describing the federal judiciary as "the primary guarantor of the Bill of Rights"); *Presidential Commission on the Supreme Court of the United States* (July 26, 2021) (written testimony of Federal Capital Habeas Project) [hereinafter Federal Capital Habeas Project Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/08/Federal-Capital-Habeas-Project.pdf (describing the Court's crucial role in death penalty cases).
[27] *Presidential Commission on the Supreme Court of the United States* 2 (June 30, 2021) (written testimony of Kim Lane Scheppele, Laurance S. Rockefeller Professor of Sociology and International Affairs, Princeton University) [hereinafter Scheppele Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Scheppele-Written-Testimony.pdf. Some commentators have suggested that, as a practical matter, the infrequency of constitutional amendments may in part be a function of the Court's willingness to interpret the Constitution in ways that, from an originalist perspective, amount to amending the Constitution informally. *See, e.g.*, John O. McGinnis & Mike Rappaport, *Where Have all the Amendments Gone?*, LAW & LIBERTY (Nov. 1, 2021), https://lawliberty.org/forum/where-have-all-the-amendments-gone/.
[28] *Presidential Commission on the Supreme Court of the United States* 2 (July 5, 2021) (appendix to written testimony of Kim Lane Scheppele, Laurance S. Rockefeller Professor of Sociology and International Affairs, Princeton University), https://www.whitehouse.gov/wp-content/uploads/2021/09/Scheppele-Followup-response.pdf.
[29] NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 149 (2019).
[30] Donald Alexander Downs, *Supreme Court Nominations at the Bar of Political Conflict: The Strange and Uncertain Career of the Liberal Consensus in Law*, 46 LAW & SOC. INQUIRY 540, 542 (2021) (discussing LAURA KALMAN, THE LONG REACH OF THE SIXTIES: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT (2017)).
[31] *See* Alan I. Abramowitz and Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. POL. 545 (2008); Matthew Levendusky, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS (2009); Joseph Bafumi & Robert Y. Shapiro, *A New Partisan Voter*, 71 J. POL. 1 (2009).
[32] *See, e.g.*, Lee Drutman, *Why Bipartisanship in the Senate is Dying*, FIVETHIRTYEIGHT (Sept. 27, 2021), https://fivethirtyeight.com/features/why-bipartisanship-in-the-senate-is-dying/ ("[A] bipartisan record has become a liability in today's electoral environment.").
[33] *See, e.g.*, Frances E. Lee, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN (2016) (arguing that because of our polarized environment, both parties can reasonably believe in their prospects of controlling Congress, and have no incentive to compromise on legislation); Sarah A. Binder, *The Dynamics of Legislative Gridlock, 1947-96*, 93 AM. POL. SCI. REV. 519 (1999) (finding that less legislation passes under divided legislatures); James N. Druckman, Erik Peterson and Rune Slothuus, *How Elite Partisan Polarization Affects Public Opinion Formation*, 107 AM. POL. SCI. REV. 57 (2013) (showing that the way individuals make decisions fundamentally changes in polarized environments); Anne E. Wilson, Victoria A. Parker & Matthew Feinberg, *Polarization in the Contemporary Political and Media Landscape*, 34 CURRENT OPINION IN BEHAV. SCI. 223, 223 (2020) ("[P]eople's misperceptions of division among the electorate . . . can contribute to a self-perpetuating cycle fueling animosity (affective polarization) and actual ideological polarization over time.").
[34] SAM ROSENFELD, THE POLARIZERS: POSTWAR ARCHITECTS OF OUR PARTISAN ERA 3 (2018).
[35] Andrew Chung, *U.S. Supreme Court Not Politicized, Says Chief Justice Roberts*, REUTERS (Sept. 24, 2019), https://www.reuters.com/article/us-usa-court-chiefjustice/u-s-supreme-court-not-politicized-says-chief-justice-roberts-idUSKBN1WA08F.
[36] Wittes Testimony, *supra* note 15, at 5.
[37] *Stat Pack for the Supreme Court's 2020-21 Term*, SCOTUSBLOG (July 2, 2021), https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-07.02.2021.pdf (showing that forty-three percent of the October Term 2020 cases were decided unanimously, with only fifteen percent of cases neatly polarized along ideological lines).
[38] Not infrequently in recent years, the Court has divided along party lines when resolving issues of considerable importance by emergency orders. The Commission received testimony that emergency order decisions are "even more homogenously ideological" than "merits docket" decisions and are occurring with greater frequency now than

in the past. *Presidential Commission on the Supreme Court of the United States* 2 (June 30, 2021) (written testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law) [hereinafter Vladeck Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Vladeck-SCOTUS-Commission-Testimony-06-30-2021.pdf.

[39] *See* Ephrat Livni, *Americans Trust the Supreme Court More Than Other Government Branches*, QUARTZ (Oct. 26, 2019), https://qz.com/1735709/americans-trust-supreme-court-more-than-other-government-branches; Frank Newport, *Americans Trust Judicial Branch Most, Legislative Least*, GALLUP (Sept. 26, 2012), https://news.gallup.com/poll/157685/americans-trust-judicial-branch-legislative-least.aspx.

[40] Justin McCarthy, *Approval of the Supreme Court Is Highest Since 2009*, GALLUP (Aug. 5, 2020), https://news.gallup.com/poll/316817/approval-supreme-court-highest-2009.aspx.

[41] *Id.* (showing a table where the trend lines cross for Democrats and Republicans in early 2017).

[42] *Nearly 7 in 10 Say Recent Rise in COVID-19 Deaths Was Preventable, Quinnipiac University National Poll Finds; Job Approval For Supreme Court Drops to All-Time Low*, QUINNIPIAC POLL (Sept. 15, 2021), https://poll.qu.edu/poll-release?releaseid=3820.

[43] Peck testimony, *supra* note 19.

[44] *See* Mark D. Ramirez, *Procedural Perceptions and Support for the U.S. Supreme Court*, 29 POL. PSYCH. 675, 675 (2008) ("[T]he Supreme Court does not possess the budgetary power of Congress or the enforcement power of the President.").

[45] *See, e.g.*, Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 184 (2013) ("For an institution like the U.S. Supreme Court to render rulings that carry authoritative force, it must maintain a sufficient reservoir of institutional legitimacy.").

[46] THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).

[47] *See* Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992) ("The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.").

[48] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 43 (1921).

[49] *See, e.g.*, Dylan Matthews, *The Supreme Court is Too Powerful and Anti-Democratic. Here's How We Can Scale Back Its Influence.*, VOX (Sept. 29, 2020), https://www.vox.com/policy-and-politics/21451471/supreme-court-justice-constitution-ryan-doerfler; *Presidential Commission on the Supreme Court of the United States* 2 (June 30, 2021) (written testimony of Samuel Moyn, Henry R. Luce Professor of Jurisprudence and Professor of History, Yale University) [hereinafter Moyn Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf.

[50] *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (finding that the First Amendment protected Jehovah's Witness students from compulsorily saluting the American flag in public schools); Brown v. Bd. Of Educ., 347 U.S. 483 (1954) (finding public school segregation unconstitutional under the Equal Protection Clause); Tinker v. Des Moines Indep. Cmty. Sch. Dist. 393 U.S. 503 (1969) (finding that the First Amendment prevented a public school from punishing students for peacefully protesting the Vietnam War through the wearing of black armbands); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (striking down a Pennsylvania abortion restriction as creating an undue burden on women seeking abortions); Obergefell v. Hodges, 576 U.S. 664 (2015) (finding that the Fourteenth Amendment requires states to license and recognize same-sex marriages).

[51] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 2 (June 30, 2021) (written testimony of Nikolas Bowie, Assistant Professor of Law, Harvard Law School) [hereinafter Bowie Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf at 12 ("[A]s Tocqueville observed even before this history began, judicial review is also antidemocratic as a matter of theory."); Adrienne Stone, *Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law*, 60 U. TORONTO L. REV. 109 (2010).

[52] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Vicki C. Jackson, Laurence H. Tribe Professor of Constitutional Law, Harvard Law School) [hereinafter Jackson Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf at 16 ("[T]he current system makes vacancies depend on contingent, random events.").

[53] *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Jamal Greene, Dwight Professor of Law, Columbia Law School) [hereinafter Greene Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Greene-Testimony.pdf at 1 n.2.

[54] *Supreme Court Nominations (1789-Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm.

[55] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Nan Aron, President, Alliance for Justice) [hereinafter Aron Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Aron-Testimony.pdf at 15 ("If the Court proceeds to wipe away reproductive rights, in spite of decades of precedent and overwhelming public support for those rights, then the only possible conclusion is that reform is imperative.").

[56] *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 (noting that "[i]n 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").

[57] *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, 1016 (1998) (describing *Brown* as "[t]he classic example" of a canonical case); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011) (describing "the constitutional canon" as "the set of decisions whose correctness participants in constitutional argument must always assume" and naming *Brown* as "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 (2018); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 290–442 (2004); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 124–34 (2004).

[58] *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 16 (2009) (arguing that the Supreme Court "ratif[ies] the American people's considered views about the … Constitution"); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SAVE AMERICA 3 (2006) (arguing that Supreme Court decisions often reflect public opinion better than Congress). *But see* DEVINS & BAUM, *supra* note 29, at xi (2019) (arguing that the Justices are "elites who seek to win favor with other elites," rather than with the general public); Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 757–58 (2011) (doubting that Supreme Court decisions "reflect[] the 'consensus' views of the American public," because the public rarely has a united position on controversial constitutional issues); Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103 (2010).

[59] *See, e.g.*, Jeff Greenfield, *The Justice Who Built the Trump Court*, POLITICO MAG. (July 9, 2018), https://www.politico.com/magazine/story/2018/07/09/david-souter-the-supreme-court-justice-who-built-the-trump-court-218953 (noting how Justice Souter, a Republican appointee, "began to drift left" soon after his Court tenure began, ultimately becoming a "more reliable champion of liberal causes than Clinton appointees Ruth Bader Ginsburg and Stephen Breyer"); Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, *2020 Supreme Court Database, Version 2021 Release 01*, http://supremecourtdatabase.org (tracking the leftward drift of numerous Republican-appointed Justices).