

Essay

Reflections of a Supreme Court Commissioner

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In 2021, President Joseph Biden convened a presidential commission to consider proposals to reform the Supreme Court. Dozens of witnesses dressed up to provide live testimony to the commission, thousands of people wrote in with additional testimony, and the commission ultimately sent the President a 294-page report.¹ I served on that commission and agreed to submit our report to the President. But much is lost in committee. What follows are my own views on the subjects we considered.

In keeping with the structure of the commission's report, Part I addresses background, Part II addresses court packing, Part III addresses term limits, Part IV addresses jurisdiction stripping and related reforms, and Part V addresses the shadow docket. Part VI addresses the commission itself.

I. HOW DID WE GET HERE?

It is not surprising that the Supreme Court is the subject of great political controversy. Its decisions matter a great deal, nobody agrees with all of them, and many people disagree with at least half of the most important ones. It is not even clear there is anything particularly distinctive about our present moment—just ask the folks who drove by the “Impeach Earl Warren” signs or listened to Richard Nixon’s law and order speeches, to say nothing of Franklin Roosevelt’s speeches and many others that came before. But here we are.

Of course, many people blame the decisions. But they do not

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1. Presidential Comm’n on the Sup. Ct. of the United States, *Final Report*, WHITE HOUSE (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf> [<https://perma.cc/58K5-HKQ5>].

agree on which ones to blame. Some might say it was the Supreme Court's acceptance of the mantle of judicial supremacy. Justice Scalia famously blamed the substantive due process cases. Others would say those were the good parts, and that the need for reform became urgent when today's Justices failed to continue the trajectory of the Warren and Burger Courts, and sometimes turned their back on those precedents. Still others point to the nomination and confirmation process, although these claims too are usually entangled with what the nominees were likely to do or have done once on the Court. The lack of consensus over these basic premises looms over any discussion of reform.

As I see it, there are two ways to approach Supreme Court reform. One is to look for reforms that would be good *regardless of whether one agrees with the Court's current decisions*. Such an approach benefits from bipartisan expertise. The other approach is to look for reforms that will *make the Supreme Court's decisions better*. Such an approach is unlikely to be bipartisan given polarization about legal issues, but it is not trying to be.

In my view, both approaches to reform are valid. The Court's decisions have political consequences, and so of course people with political views might want to change them. At the same time, the fact that some approaches to reform are political in this sense does not mean that reform is *inherently* political. It is possible that something has just gone so wrong with the certiorari statute, or the All Writs Act, or the age of the Justices that it should be changed for reasons independent of the Court's decisions and can be distilled from political disputes.

But much mischief and frustration come from confusing these two approaches to reform. There is no point in having a bipartisan commission of experts to consider reforms designed to influence the Court's decisions. The Court's decisions are supported by experts on one side or another. If the experts do not agree on whether the decisions are bad, there will be no common ground for reform. And activists who think the Court's decisions are a threat to freedom or democracy will not be swayed by the lack of a consensus among those who lack their commitments. In my view, both methods of analysis and advocacy are valid, so long as we do not have illusions about what we are trying to do.

II. COURT PACKING

The Supreme Court has had nine seats since 1869, despite a famous failed attempt by President Franklin Roosevelt to add more

seats when he was losing cases in the Court. But the Constitution says nothing about nine, the Court started with six, and its size changed repeatedly during the first third of our history.² Is now the time to change that again?

I believe that court packing is lawful. But the question is not as obvious as it seems, and many lawyers are too quick to assume that it is lawful without reconciling it with their other legal views. I also believe that court packing is a bad idea. It is a costly way to solve a problem that I do not think we have.

A. THE LAW

As noted above, Congress has set the number of Justices on the Court, and it has also changed that number in the past. It is most likely that this is encompassed by Congress's general authority to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution . . . in any Department," such as the judicial power vested in the Supreme Court and other federal courts.³

The question is whether there is any limit on the lawful reasons Congress may have for using this power. Is there a limit on Congress's ability to use this power to effect a particular partisan distribution of seats or to cause the Court to change its decisions? If so, do the 2021 proposals exceed these limits?

I think court packing is constitutional. But it is important to understand how one could believe otherwise: for 150 years, Congress has not altered the size of the Court. And this is not a coincidence. In the most dramatic and high-profile debate about whether Congress could do so, the 1937 Senate Judiciary Committee (of the same party as President Franklin Roosevelt) concluded that results-oriented court packing would be unconstitutional.⁴ In the 1950s, an effort to amend the Constitution to fix the Court at nine Justices failed, though in part because it was seen as unnecessary and in part because people wished to preserve the option to make *non-results oriented* changes to the Court's size.⁵ And in subsequent years, "Roosevelt's 1937

2. See generally Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2758–88 (2020).

3. U.S. CONST. art. I, § 8, cl. 18.

4. SENATE JUDICIARY COMM., REORGANIZATION OF THE FEDERAL JUDICIARY, ADVERSE REPORT TO ACCOMPANY S. 1392, S. REP. NO. 75-711 (1937).

5. Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 285–86 (2017).

plan . . . became the paradigmatic example of an illegitimate threat to the judiciary.”⁶ It is plausible to think these generations of practice add up to a constitutional constraint on partisan or results-oriented court packing.⁷ Such a constraint would be analogous to arguments against partisan gerrymandering or results-oriented jurisdiction stripping.

As I see it, there are two possible ways to reject such an argument and conclude that today’s court-packing proposals are lawful.

1. No Limits

The first is to maintain that there are simply no implicitly impermissible purposes on Congress’s broad power under the Necessary and Proper Clause. It is simple enough for a textualist, formalist, originalist to take this view. The Constitution does not refer to any such limits, and practice closer to the Founding does not clearly point to any either, especially none that would be judicially reviewable.⁸ If those who would question the constitutionality of a federal statute bear the burden of proof, that burden has not been met. I will not say that this is the only textualist-originalist approach to the question, but it is a straightforward one, and it is more or less my view.

But it is not clear that everybody without such formalist premises should have this view. Again, compare the problem of improper purposes in legislative districting. If you believe that it is unconstitutional for a legislature to use its districting power to achieve a certain partisan makeup, then you believe that sometimes a partisan agenda makes a legislative choice unconstitutional. The question arises why gerrymandering the courts is not subject to the same limitations as gerrymandering the legislature.

This kind of argument against partisan court packing can be easily dismissed for court-packing supporters who are willing to embrace

6. Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 512 (2018); see also *id.* at 512–17.

7. With both great candor and great attention to detail, Neil Siegel describes both “a non-legally-binding constitutional convention (or norm) against Court-packing,” and an important structural argument against the constitutionality of court packing, though he concludes that “[m]aybe the best legal answer, if one needs to be given in the abstract, is that Court-packing is probably constitutional.” Neil S. Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. (forthcoming 2022) (Apr. 10, 2022 draft at 4, 24–29, 44) (available at <https://ssrn.com/abstract=4023686>).

8. See generally Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1795–812 (2008), which suggests that any purpose-based limits would not have been seen as justiciable. For the relevance of non-justiciable limits, see *infra* Part II.B.

*Rucho v. Common Cause*⁹ and say that partisan purposes do not invalidate legislative powers. But many court-packing proponents are not willing to embrace *Rucho*. Indeed, some think *Rucho* is so wrong that it is a reason to pack the Court, to repudiate *Rucho*.¹⁰ So they need a different story about when a partisan purpose would invalidate a legislative measure.¹¹

And putting aside partisanship, what about a broader limit on results-oriented court packing—i.e., court packing whose purpose and effect is to change Supreme Court doctrine? Again, if you believe that Congress can use its other enumerated powers to effectuate changes in Supreme Court doctrine, it is easy to say there is no limit here either. But many scholars of, say, jurisdiction stripping argue that there are such limits. We see scholars arguing that it is unconstitutional for Congress to use its conceded powers over federal jurisdiction for particular purposes or to disfavor particular doctrines, and so on.¹² If it is improper to legislate about jurisdiction for such purposes, why is it not equally improper to legislate about the number of Justices for similar purposes?¹³

Again, I think the best answers to these questions are likely to reject any such purpose-based limits on legislation unless they come from the original legal meaning of other provisions of the Constitution. But for those who do not think of themselves as originalists, they need to say something else before they can confidently reject these limits.

2. Complying with Limits

That brings us to the second possibility, which is that there *are* limits, but today's proposals *comply* with them. Almost nobody who proposes court-packing legislation today wants to argue in this fashion, presumably because they fear that once they open the door to

9. 139 S. Ct. 2484 (2019).

10. See Presidential Comm'n on the Sup. Ct. of the United States, *supra* note 1, at 102 n.94.

11. One possibility, of course, is a clause-bound comparison of the Necessary and Proper Clause versus the Equal Protection Clause (and other clauses invoked against partisan gerrymandering). See Siegel, *supra* note 7, at 42–43.

12. *E.g.*, Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1080–83 (2010); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981). This is not my view. See *infra* Part IV.A.1.

13. See also Siegel, *supra* note 7, at 39 (“[T]he consensus that Court-packing presents no constitutional difficulties at all seems questionable given the dissensus concerning the constitutionality of stripping the Court’s appellate jurisdiction.”).

constitutional analysis, they cannot control where it will go. But if it is not door number one, it must be door number two.

So, for instance, one might concede that while there are partisan limits on court-packing, today's measures do not violate those limits. Maybe one thinks that only extremely disproportionate partisan gerrymandering is unconstitutional, and the current proposals are permissible because they will result in only a modest majority of democratic appointees. Or maybe one thinks that these measures are not really *partisan*, because overturning *Citizens United*, *Janus*, *Heller*, *Rucho*, or what-have-you are really non-partisan policy issues (though you would not know that from the way the decisions were reported and criticized).¹⁴

Similarly, one then must make the same judgment about non-partisan but results-oriented court packing. If one concedes that there are limits on results-oriented control of the judiciary,¹⁵ again, one would have to argue that the 2021 legislation complies with those limits. This is difficult. To be sure, there have been a few claims that the reason to add four new Justices is to align the number of Justices with the number of judicial circuits, or that the real goal in expanding the bench is to increase various forms of diversity without regard to judicial results. If results-oriented court-packing is unconstitutional, everything rests on these claims.

Those who believe that today's court-packing proposals are indeed constitutional seem to be reluctant to explain their views in detail. But those who maintain that court packing is lawful ought to address the three basic legal questions: whether there are implied limits on Congress's power over the Court's size, how one's stance about that relates to implicit limits on other legislative powers, and whether proposed legislation complies with those limits.

14. *Citizens United v. FEC*, 558 U.S. 310 (2010); *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

15. To be sure, one could also define results-oriented limits on Congress's power more narrowly. For instance, Professor Fallon has written in the jurisdiction-stripping context that jurisdiction-stripping legislation is invalid if it has the "constitutionally forbidden purpose of encouraging defiance of applicable Supreme Court precedent." Fallon, *supra* note 12, at 1083. One could argue that packing the Supreme Court is distinguishable because it would have the purpose of encouraging *change* to Supreme Court precedent rather than *defiance*.

B. JUSTICIABILITY

To be sure, it is possible to concede that there are such limits on Congress's power and argue that they should be nonjusticiable by courts. It may be quite difficult to disentangle legitimate reasons from illegitimate ones, and one might rightly worry that the courts will not be well-motivated to draw these lines. (Of course, one could say the same thing about other areas that the courts *have* found justiciable, but let us put that aside.) In this case one could well ask: *Does it matter* whether there are any legal limits?

I don't know, but it might.

It is true that throughout history, those who have ardently proposed court packing have thought they were acting constitutionally. Perhaps they also ardently believed they were acting in a non-partisan fashion. (I doubt that they all believed they were not acting in a results-oriented fashion, but I do not presume to judge them all.) If one focuses on the ardent proponents, constitutional talk may seem irrelevant.

But it is a mistake to focus only on the ardent proponents. What of the many lawmakers who may be *uncertain* what to think about proposed court-packing legislation? If they take their constitutional obligations seriously, then they would have to satisfy themselves that the proponents are right, not only on policy (on which, see below), but also on the law.

And perhaps even more plausibly, imagine a moderate lawmaker (even a President . . .) who *opposes* court packing as a matter of policy. He believes it would be imprudent, unwise, or at least premature. But he is receiving great pressure from those on his left to support it anyway. If his only objections are matters of policy, it is simply a political question of whether to succumb to that pressure. But if *he* were to believe that it is unconstitutional, then his constitutional oath leaves him no choice but to do the right thing.

C. POLICY

While the law of court packing may be deceptively complicated, the policy of court packing may be deceptively simple. Court packing is a way to stop the Supreme Court from doing what it is doing and make it do something else. It may be the only way that is effective in the short run without amending the Constitution. It can therefore be justified if the Supreme Court's behavior is sufficiently bad and the stakes are sufficiently high.

Of course, this is a purely results-oriented reform, and so it has to be judged by its results. In my view, it is a solution to a problem we do not have. The Court's decisions are not generally bad. (I will not try to prove that point in this Essay, but the decisions themselves and the literature about them provide extensive defenses.)

But even assuming the Court's decisions were bad (and I have criticized a few), I am not convinced that the stakes are apocalyptically high, at least in historical perspective. For comparison, during the New Deal, in a seventeen-month period:

[T]he Court's challenge to the political branches was far more breathtaking than many recall. . . . [C]onsider the range of national and state legislation and presidential action the Court held unconstitutional in one seventeen-month period starting in January 1935: the NIRA, both its Codes of Fair Competition and the President's power to control the flow of contraband oil across state lines; the Railroad Retirement Act; the Frazier-Lemke Farm Mortgage Moratorium Act; the effort of the President to get the administrative agencies to reflect his political vision (*Humphrey's Executor*); the Home Owners' Loan Act; a federal tax on liquor dealers; the AAA; the new SEC's attempts to subpoena records to enforce the securities laws; the Bituminous Coal Conservation Act; the Municipal Bankruptcy Act, which Congress passed to enable local governments to use the bankruptcy process; and, perhaps most dramatically, in *Morehead v. Tipaldo*, minimum-wage laws on the books in a third of the states.¹⁶

However important I might think the preclearance formula for Section 5 of the Voting Rights Act, Section 5000A(a) of the Affordable Care Act, agency fee laws, and the like,¹⁷ I do not think it is fair to say that today's decisions—as a package—are comparable. Even the very recent decisions on abortion rights and gun rights do not change that.¹⁸

Now many advocates of court packing might instead say they are looking ahead. They might say that even if the decisions so far do not justify court packing, the things that the Court is sure to do in the future will: maybe the Court will dismantle the administrative state, eviscerate the tax and spending authorities needed to power the modern fiscal state, and dismantle American democracy during the 2024

16. Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 129–30.

17. For my criticisms of some of these decisions, see William Baude, *The Real Enemies of Democracy*, 109 CALIF. L. REV. 2407, 2414–15 (2021) [hereinafter Baude, *Real Enemies*] discussing the Voting Rights Act; William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1817–18 (2013) discussing the Affordable Care Act; and William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171 (2018) discussing agency fees.

18. *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022); *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111 (2022).

election. I think such predictions are exaggerated at best. But regardless, they suggest a theory of not just emergency court packing, but *anticipatory* emergency court packing. Again, others will make their own judgments about how dangerous the Court is and how clear and present the danger is, but I worry that these proposals will re-enact the Onion headline: “In Retrospect, I Guess We Might Have Resorted To Cannibalism A Bit Early.”¹⁹

This brings me to a final point here: even if we do disagree with the Court’s decisions, and even if we do think they are a big deal, we should not be too casual about turning to court packing as a solution. It is probably not a coincidence that it is a tool of autocratic takeovers around the world. As one non-lawyer has put it:

How do we prevent it from happening here? . . . I also have to recommend banning court-packing, by Constitutional amendment if necessary. I can’t stress enough how many descents into dictatorship go through something like that, and how much it’s a gaping security hole in our current system.²⁰

Now it is true that our judiciary may be unusually powerful, and I think judicial independence is not an unqualified good. It enables bad behavior as well as good behavior, and a free country does need to be able to do something about the bad behavior. But this is about balancing the risks. And if you ask me, I think at this point it would be wiser to amend the Constitution to fix the Supreme Court’s size at nine, trusting that any hypothetical future need to change the Court’s size would have to obtain enough consensus support to go through the constitutional amendment process again.

III. TERM LIMITS

A far less destructive court reform proposal is to limit Supreme Court Justices to eighteen-year terms. But it is not clear that it can be done by statute, and I am still not sure it is a good idea.

A. THE LAW

Perhaps one of the most important legal questions for court reform is whether Supreme Court term limits require a constitutional

19. *In Retrospect, I Guess We Might Have Resorted to Cannibalism a Bit Early*, ONION (June 18, 1998), <https://www.theonion.com/in-retrospect-i-guess-we-might-have-resorted-to-cannib-1819583474> [<https://perma.cc/A5K2-7MWZ>]. Nor do I think it makes sense to pack the Court *on principle*, without regard to its decisions, because of how its Justices were appointed. See Baude, *Real Enemies*, *supra* note 17, at 2415.

20. Scott Alexander, *Dictator Book Club: Orban*, SUBSTACK: ASTRAL CODEX TEN (Nov. 4, 2021), <https://astralcodexten.substack.com/p/dictator-book-club-orban> [<https://perma.cc/KT8S-HFVW>].

amendment or can be imposed by statute. I am inclined to think that the change would require a constitutional amendment, but the question is harder than it seems.

As a matter of first principles, I am skeptical of the lawfulness of statutory term limits. Article III judges hold their offices for life unless guilty of misbehavior.²¹ Imposing sufficiently major changes in the nature of a judge's office circumvents that qualified life tenure, so I would be inclined to read the Constitution to impose at least outer limits on attempts to redefine the office so as to circumvent judicial tenure.

This concern is not entirely eliminated if one imagines a purely prospective regulation, so that judges get their commissions on notice that their powers and duties will change dramatically in the future. If an office were defined to include no powers and duties after a certain number of years, that seems suspiciously like a termed office, not one held during good behavior. The same problem, to a lesser degree, affects the proposals to force judges into an emeritus provision at a certain age.

And the idea that the office can be redefined prospectively seems especially unlikely in the case of Supreme Court Justices, because the Constitution specifically recognizes the office of Supreme Court Justice, and provides for a single Supreme Court.²² Under a proposal for Supreme Court term limits, either the Justices start holding an office other than Supreme Court Justice after the term is up, or the Court has two tiers, in tension with the unitary Court implied by the Constitution.

21. U.S. CONST. art. III, § 1; *see also* Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 88 (2006) (describing this as "qualified life tenure"); *id.* at 90. What counts as misbehavior and how to adjudicate it are more complicated questions. In addition to Prakash and Smith, consider the debate about how Justice Douglas's votes were treated by his colleagues after his stroke. *Compare Judicial Disability and the Good Behavior Clause*, 85 YALE L.J. 706, 719 n.62 (1976), with David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1052–56 (2000). Consider also the debate about whether Supreme Court Justices should be impeached for misinterpretations of the Constitution. *Compare* Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J.L. & LIBERTY 18, 64–90 (2016), with DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801–1829*, at 31–38 (2001).

22. U.S. CONST. art. II, § 2 ("The President . . . shall appoint . . . Judges of the supreme Court . . ."); U.S. CONST. art. III, § 1 ("The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . ."); U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be . . . vested in one supreme Court . . .").

But this first-principles approach leads to a problem. The problem is, these same textual arguments would suggest that judges and especially Justices cannot take senior status without a new judicial appointment.²³ Justices on senior status are still regarded as Article III officers, with protected compensation and the ability to sit on lower courts.²⁴ Yet that reflects a major change in the nature of their office, because they no longer have any authority in Supreme Court cases.

The President and Senate do not appoint and confirm judges or Justices to their senior-status positions. And yet the senior-status practice is recognized by both judicial precedent and longstanding practice.²⁵ This seems to suggest that major changes to the nature of the judicial office *are* permissible, without the judge being said to hold a new office.

I am not sure that we should disturb the senior-status practice. But I am also not convinced that we should extend its argument to justify term limits. A central feature of the precedent of senior status is that the judge assumes the office *voluntarily*. I suspect that this is a core feature of our acceptance of the practice, and that it never would have been seen as constitutional if emeritus status were forced on judges over their objections.²⁶

Of course, this creates a mismatch between the formal account and the account of practice. The account of practice turns on voluntariness, but it is not clear what voluntariness has to do with the separation of powers.²⁷ It is not formally a feature of the definition of an office, or the question of who receives an appointment. But it still seems central to the senior status practice.

I am inclined to think that the best way to reconcile these facts is to differentiate between the formal requirements of Article III and the

23. See generally David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453 (2007).

24. *Booth v. United States*, 291 U.S. 339, 340, 350–51 (1934).

25. See *id.* But see Stras & Scott, *supra* note 23, at 480 (“[*Booth*] does not answer the question whether the *current* statutory scheme authorizing senior judges is unconstitutional.”).

26. Yet another possibility is that the office-redefinition entailed by senior status is permissible for lower court judges, but not for the constitutional office of Supreme Court Justice. Cf. William Baude, *The Unconstitutionality of Justice Black*, 98 TEX. L. REV. 327, 338–41 (2019) (discussing the possibility that Supreme Court Justices assuming senior status require a new appointment).

27. See Stras & Scott, *supra* note 23, at 492–94 (discussing the argument that Article III should accommodate senior judges because they voluntarily choose to assume senior status).

limited gloss, or liquidation, created by the practice of senior status, as follows:

A major change in the nature of the powers of a judge, especially a Supreme Court Justice, results in that judge holding a new office. It therefore cannot be imposed on well-behaved Justices consistent with Article III.

The practice of unilaterally taking senior status is a gloss or liquidation that makes an exception for judges who voluntarily accept the change as a kind of retirement package.

It is possible that such senior status is actually unlawful, but if it is not, it should be limited to voluntarily accepted changes.²⁸

The various statutory term-limit proposals are involuntary, not voluntary, and so they violate Article III.

B. POLICY

Term limits present different policy questions than court packing does. If term limits are considered through the lens of neutral, good-government reform, it is harder to figure out what problem they really solve. It is said, for instance, that term limits will ensure that Justices do not serve too long, ensure that Justices cannot time their retirements to their political tastes, and that term limits will ensure that judicial appointments correlate more closely with presidential elections. It is not clear to me that any of these things are worth pursuing in themselves, let alone that they are important enough to justify a major reform.

An additional problem with the good-government conception of term limits is that they are unlikely to accomplish these purposes unless they are also accompanied by reform of the confirmation system. They will not regularize appointments unless it is possible for a President to fill vacancies. But the various efforts to reform the confirmation system are untested and usually amount to reshuffling politicized decisions from one place to another. My own preference would be to reinstate, by constitutional amendment, a supermajority confirmation requirement. But I cannot claim to know whether that untested idea would in fact be better than the status quo or the alternatives.

If term limits are instead considered as a decision-influencing reform, they are much less destructive (but also therefore less consequential) than court packing. Term limits are more self-limiting, and would generally phase in sufficiently slowly, that their effect on the

28. Or limited to lower courts. *See id.* at 512-13.

Court's decisions is harder to predict. This makes them less destructive than court packing as a matter of judicial independence, but it also makes it harder to motivate them as an outcome-oriented reform.

That said, if term limits do change the behavior of the Justices, I fear it will be for the worse. Term limits decrease the chance that Justices will invest in their long-term reputation as Justices. And they increase the chance that the Justices will be investing in other kinds of reputations, anticipating a future welcome in law, business, government, media, or the academy. I suppose some people might think these are good things, but I think they are likely bad, because they would detract from the culture of law that currently surrounds the Court. (If I did not believe that the Court was still surrounded in a culture of law, I would likely feel differently.)

IV. JURISDICTION STRIPPING AND OTHER "DEMOCRATIZING" POSSIBILITIES

Another tactic for Supreme Court reform is to "democratize" it by reducing the Court's powers over the elected branches.²⁹ As a matter of principle, this kind of reform is far healthier than court packing. Rather than fighting over control of the nuclear superweapon of modern judicial supremacy,³⁰ this is an attempt at nuclear disarmament. But as a matter of details, the achievable methods are likely to be ineffective. And I am not sure I agree with the principle either.

A. THE LAW

Proposals to democratize Supreme Court decision-making fall into three major categories: jurisdiction stripping, direct override, and heightened requirements to hold legislation unconstitutional. These categories have different consequences and different legal constraints, and basically they are inversely correlated. The most effective proposals (like direct override) are the most unconstitutional, and as I will discuss below, the most constitutional (jurisdiction stripping) are the least effective.

1. Jurisdiction Stripping

As I see it, Congress has three different jurisdiction-stripping powers, of different scopes.

29. See generally Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021).

30. See generally Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J.F. 93 (2019).

As to *lower federal courts*, Congress has near-plenary power to remove jurisdiction. This is partly an incident of Congress's broader power to refuse to create lower federal courts at all (a.k.a. "the Madisonian compromise"). And it is partly an incident of the lack of textual limits on jurisdiction stripping and partly informed by historical practice.

Any exceptions to this jurisdiction-stripping power would come from direct constitutional constraints; for instance, a jurisdictional rule may not discriminate on a forbidden ground. By contrast, I do not think there is any constitutional problem with stripping the lower federal courts of jurisdiction over particular rights or claims, because for the most part those rights do not establish anti-discrimination rules or general purpose tests.

As to the *U.S. Supreme Court*, Congress's jurisdiction-stripping power is qualified in a couple of respects. First, Congress does not have the broader power to refuse to create the Supreme Court at all. The Constitution creates it.³¹ Second, the Constitution gives Congress power to make "exceptions" to the Court's appellate jurisdiction and does not mention any exceptions to the Court's original jurisdiction.³²

What this means is that Congress still has broad power to strip jurisdiction from the U.S. Supreme Court, but maybe not in original jurisdiction cases. And even in appellate jurisdiction cases, the jurisdiction stripping has to be something we could comfortably describe as an "exception." There is a famous debate about what "exception" means,³³ but so long as Congress strips less than fifty percent of the

31. U.S. CONST. art. III, § 1 (distinguishing the "one supreme Court" directly vested by Article III from "such inferior courts as the Congress may from time to time ordain and establish").

32. U.S. CONST. art. III, § 2.

33. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364–65 (1953) ("Q. If you think an 'exception' implies some residuum of jurisdiction, Congress could meet that test by excluding everything but patent cases. This is so absurd, and it is so impossible to lay down any measure of a necessary reservation, that it seems to me the language of the Constitution must be taken as vesting plenary control in Congress. A. It's not impossible for me to lay down a measure. The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan. . . . Q. The measure seems pretty indeterminate to me."). Paulsen offers another rejoinder:

May I be blunt? The Supreme Court's 'role' and 'function' is a function of the meaning of the Constitution's text and structure concerning the judicial power—what matters it may extend to, the assignment of its jurisdiction combined with the exceptions Congress is empowered to make to that jurisdiction—not the other way around.

Court's possible appellate jurisdiction, it seems to me like it would qualify. Maybe it could strip still more than that. And the rare constitutional constraints mentioned above would also still apply.

As to *state courts*, Congress's power is much more limited. Congress does not create the state courts and does not vest them with jurisdiction in the first place. Nor does it have any explicit authority over state courts. So its only authority to deny state jurisdiction comes from the Necessary and Proper Clause,³⁴ which would have to be invoked in one of two ways. First, one could strip jurisdiction in a state court because the jurisdiction was given *elsewhere* to a federal court, giving the federal court exclusive jurisdiction. This is both textually and historically uncontroversial, as in the example of exclusive admiralty jurisdiction in rem.³⁵ Second, one could try to strip jurisdiction from a state court even if federal courts *did not* have jurisdiction. But this would be much harder to justify. It would not be necessary and proper to exclusive federal jurisdiction, so it would have to be necessary and proper to some other federal power, and one would have to argue that eliminating all judicial review was an acceptable incidental means of implementing that power. I am not positive this would be unconstitutional,³⁶ but I think it would be a stretch.

What this means is that it is quite easy for Congress to eliminate lower federal court jurisdiction, and possible to eliminate most Supreme Court jurisdiction as well. But it is much more difficult to do that and eliminate state court jurisdiction at the same time.

2. Direct Overrides

The core of the judicial power is the power to issue binding judgments. I have written elsewhere about why the executive is bound to those judgments even in cases where he strongly disagrees with them.³⁷ And while I did not address the question there, I think the same principle largely applies to Congress as well. Direct overrides of

Paulsen, *supra* note 21, at 55.

34. U.S. CONST. art. 1, § 8.

35. *The Moses Taylor*, 71 U.S. 411, 429–30 (1866); Michael C. Dorf, *Congressional Power to Strip State Courts of Jurisdiction*, 97 TEX. L. REV. 1, 3 (2018) (“Legislation vesting exclusive jurisdiction in federal court is so uncontroversial as not to register as ‘jurisdiction stripping’ at all.”).

36. See Dorf, *supra* note 35, at 3–4 (arguing that state-court jurisdiction stripping is within Congress's enumerated powers if it targets a federal statutory claim or a challenge to a federal statute).

37. William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1821–24 (2008).

judicial decisions would have to be done by constitutional amendment.³⁸

That said, under principles of departmentalism the legislature can do something that might look superficially like an override. That is, it could pass legislation even though it is likely that the Court would hold that legislation unconstitutional, or even though current judicial precedent indicates the legislation would be unconstitutional. For instance, the Civil War Congress abolished slavery in the territories, even though Chief Justice Taney's opinion in *Dred Scott* indicated that doing so was unconstitutional.³⁹ This is not really an override because it does not overrule the judgment in any previous Supreme Court case, and it alone does not stop the Supreme Court from holding that legislation unconstitutional in future cases either. To be practically effective, such a tactic would have to be accompanied by something else, whether jurisdiction-stripping legislation, a change in the Court, a lack of willing litigants, or even a constitutional amendment.

3. Heightened Standards

The trickiest question is posed by legislating heightened standards to hold legislation unconstitutional. These could be either formal voting rules (six votes needed to hold a statute unconstitutional) or heightened standards of review (statutes will be treated as unconstitutional only if beyond a reasonable doubt).

I doubt that Congress could directly require courts to interpret the Constitution under a heightened standard of review, largely for the reasons given for judicial review in the first place. Congress has no power to change the meaning of the Constitution outside of the Amendment process. The judicial power includes the power to apply the law. And if the law of the Constitution cannot be changed by Congress, then the court would have a duty to apply its true meaning.⁴⁰

That said, Congress could likely indirectly require a heightened standard of review by restricting various remedies. For instance, it has legislated that a writ of habeas corpus for those held pursuant to a state judicial decision can only be issued under a heightened standard

38. See, e.g., U.S. CONST. amends. XI, XIV, XVI, XXVI.

39. David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1147-50 (2006).

40. This is not to say that the pre-existing standard is de novo. But whatever the standard of review is, I doubt Congress can change it. *But see* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1139 n.361 (2017) (equivocating over Congress's power to change "application rules" of constitutional interpretation "within some limits").

of review.⁴¹ Perhaps it could legislate that damages or injunctive relief are only available against various officials under a heightened standard of review. So long as the remedy is one that Congress has the power to withhold or regulate, it might be able to use a standard of review in that context. But that would likely not let it reach, for instance, federal criminal defendants, who have a non-negotiable right not to be convicted except according to law.

Voting rules are a trickier question. They have often been analogized to heightened standards of review,⁴² and if we follow that analogy, I suppose they would be unconstitutional for the same reason. But they are formally different, and it is plausible to think that Congress has more power over procedure than it does over substance, even though procedure can often be used to achieve substantive outcomes.

Even so, the constitutionality of imposing such a voting rule on the Supreme Court is a reach. It requires a fairly aggressive understanding of Congress's authority over judicial procedure. It deviates from historical practice and background assumptions about judicial voting. And it results in a procedural rule where judges' votes count differently depending on how they reason— giving one judge less power to vote for reversal than another, if one judge's reason is based in a conclusion of unconstitutionality, and the other judge's reason for the same outcome is based in statutory interpretation.⁴³ I am not sure whether those things add up to unconstitutionality, but they probably do.

B. POLICY

As noted above, democratization proposals follow a basic inverse relationship: the more constitutional, the less effectual.

Stripping the federal courts of jurisdiction is generally lawful.⁴⁴ But it is not likely to achieve much in the name of democracy, because it will leave the state courts with broad jurisdiction over the same issues. It is true that state courts frequently have more electoral accountability than federal courts do, but not enough to make them

41. Antiterrorism and Effective Death Penalty Act of 1996, § 104, 110 Stat. 1214, 1218 (codified at 28 U.S.C. § 2254(d)).

42. See generally Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676 (2007).

43. *Closing Reflections on the Supreme Court and Constitutional Governance: Hearing Before the Presidential Comm'n on the Sup. Ct. of the United States*, 9 (2021) (statement of Stephen E. Sachs, Antonin Scalia Professor of Law, Harv. L. Sch.).

44. See *supra* note 32 and accompanying text.

democratic exactly. Going farther and stripping jurisdiction from the state courts as well would be much less likely to be constitutional.

The other most lawful option would be stripping away discretionary constitutional remedies or imposing a heightened standard on them. But again, it is not clear how much that option could co-exist with the stripping of state-court remedies. And this option would do little when the federal government is the movant, either in a civil or criminal enforcement action.

This is not to say that Congress's control of remedies and jurisdiction is never useful. It is. But it seems that it has been more effective when used for narrower ad hoc purposes—curtailing the labor injunction, prison suits, or habeas corpus, for instance⁴⁵—rather than as a broader program of democratization of the courts.

Maybe, for instance, Congress ought to strip federal courts of any authority to issue so-called national injunctions, which escalate public law litigation especially when combined with forum (and courthouse) shopping.⁴⁶ As for the state court backstop, it is possible that state courts would issue national injunctions, but widespread doubt that state courts can issue federal-law injunctions against federal officers makes that less likely.⁴⁷ And in any event, in the bigger picture such a reform would still be relatively modest.

Outside of particular areas of systematic judicial mistake, however, I remain somewhat agnostic about the broad normative goal behind these democratization proposals. I am sympathetic to the view that a system that is functioning well without judicial review of legislation ought not adopt it.⁴⁸ And I also believe that judges ought to meet a fairly substantial epistemic burden before holding legislation unconstitutional, especially if it is important. But in our system, which has always had judicial review, and whose legislators have grown to depend on it more and more over time, I am not sure how much less judicial review we can afford to have.

45. See Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932); Prison Litigation Reform Act of 1995, 110 Stat. 1321 (codified at 42 U.S.C. § 1997e); Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214.

46. See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 457–62 (2017); *Rule by District Judge: The Challenges of Universal Injunctions: Hearing Before the S. Comm. on the Judiciary*, 116 Cong. (2020) (statement of Samuel L. Bray, Professor, Univ. of Notre Dame).

47. See Peter N. Salib & David K. Suska, *The Federal-State Standing Gap: How to Enforce Federal Law in Federal Court Without Article III Standing*, 26 WM. & MARY BILL RTS. J. 1155, 1189–93 (2018) (defending state-national injunctions and arguing that state courts can issue injunctions against federal officers).

48. See generally JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

V. THE SHADOW DOCKET

For better or worse, I have called the many things the Supreme Court does outside of the normal course of its merits docket “The Supreme Court’s Shadow Docket.”⁴⁹ This catch-all category encompasses many things, but among them are two forms of quasi-merits adjudication: summary reversals and emergency orders. When I wrote about the shadow docket a few years ago, I thought that the Court’s choices and explanations for summary reversals deserved more scrutiny. But it now appears that emergency orders are the more controversial topic. This might seem like an especially fruitful topic for bipartisan expert reform, but it is not clear there is in fact much fruit within reach.

A. LAW

Congress has as much authority to regulate shadow docket procedures and remedies as it does any other procedures and remedies in the Supreme Court. That authority is probably substantial. Presumably Congress could modify the All Writs Act⁵⁰ or the other statutes⁵¹ which form the basis for some of the Court’s most controversial emergency orders. It could create more mandatory jurisdiction in the Supreme Court. Presumably, though less clearly, it could also impose procedural requirements such as requiring the publication of votes or the writing of opinions, at least in the Court’s appellate jurisdiction.

B. POLICY

The policy question for lawmakers is whether there are any regulations that would be useful and practical to adopt. But the topic cannot be approached with generalities. The core problem with the Court’s emergency docket is that everybody agrees that the Supreme Court should have the power to act in a very quick, and thereby less procedurally elaborate, fashion in certain cases. And it is hard to lay down a clear rule defining that class of cases, so it is likely that the Court must be vested with substantial discretion over emergency rulings. At that point, objections to the Court’s emergency procedures are likely to reduce to objections to the Court’s decisions. Rules that would really cut back on emergency cases would be too likely to apply to real emergencies where we are unwilling to forego Supreme Court action.

49. William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015).

50. 28 U.S.C. § 1651(a).

51. *E.g.*, 5 U.S.C. § 705; 28 U.S.C. § 2101(f).

This is not to deny that there is some room for reform. At present, it seems elusive what distinguishes an injunction from a stay, what the standard is for each one, and what precedential effect such rulings should have on the lower courts.⁵² And there is a good case for more specific rules dealing with elections, executions, and many other topics the Court has struggled to manage. These specific topics could be handled by statute or even Supreme Court rule. I hope they do not get lost in the broader contests about the Court.

In any event, the Court also faces a bigger problem: It appears to have triggered a cycle of increasing requests for emergency relief.⁵³ The Court grants enough of these requests to encourage litigants to come back more often in the future. This leads to more requests, some more grants, and so on. The Justices have signaled some unhappiness with the volume and pace of the emergency docket, which is reasonable. It is hard for them to do their best work with suboptimal procedures and at an emergency pace. But their own willingness to grant such emergency relief in many recent cases is part of the problem. So for now, perhaps the best that we can hope for is that the Justices approach emergency cases with care and consideration of the long-run implications of their actions. And, for all we know, they are already doing the best they can at that.

VI. THE COMMISSION

I have great respect for my talented colleagues on the commission. I am sure some of them would disagree with some of the points above, and some of them might have persuasive counterarguments that would change my mind on some points. Unfortunately, the law and structure of the commission made it very difficult for us to have the kind of deliberations and discussions that the country deserved.

The biggest problem was the Federal Advisory Committee Act, a statute I had never thought much about, which required that all of the collective deliberations of the commission be done in public.⁵⁴ Public meetings are both cumbersome and politically fraught, so to many people the more attractive alternative is to accomplish as much as

52. See generally *Case Selection and Review at the Supreme Court: Hearing Before the Presidential Comm'n on the Sup. Ct. of the United States* (2021) (statement of Stephen I. Vladeck, Charles Alan Wright Chair in Fed. Courts, Univ of Tex. Sch. of L.).

53. See generally Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).

54. Federal Advisory Committee Act, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. §§ 1–15). For background see Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451 (1997).

possible through working groups, one-on-one conversations, and other interactions that fall outside of the statute.⁵⁵ By necessity, these interactions are not visible to most commissioners. That is part of what makes them lawful. Thus, the ironic effect of a statute designed to promote the transparency of the commission to outsiders was to instead dramatically reduce the transparency of the commission, *even to its own members*.⁵⁶

This was exacerbated by other factors—the size of the commission, the distribution of different views across different leadership roles, the lack of in-person meetings and hallway conversations, and other operational constraints—and I fear that the result was to squander the overflowing amounts of intellectual ability and political judgment that filled the commission.

At the same time, whatever the constraints, there would have been no escaping the fact that the commission found itself operating in two different modes—an intellectual one and a more political one. Those two modes produce a natural tension. A political problem can be solved through omitting, watering down, or waffling on the controversial parts. But doing so cuts against making an intellectual contribution. And vice versa: concrete intellectual claims can be unpalatable, especially to a committee.

Perhaps under better circumstances the commission could have navigated those two modes in a way that made a real contribution. But I guess we will never know.

55. On subgroups, see Croley & Funk, *supra* note 54, at 488–90.

56. See also David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1126, 1128 (2017) (describing FACA as harming deliberation).