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Daniel Epps

Washington University in St. Louis School of Law, epps@wustl.edu

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Essay

Nonpartisan Supreme Court Reform and the Biden Commission

Daniel Epps[†]

INTRODUCTION

Facing hard questions about Supreme Court reform from across the political spectrum, then-presidential candidate Joe Biden offered a clever feint. He promised that, if elected, he would “put together a national commission[, a] bipartisan commission of scholars, constitutional scholars, Democrats, Republicans, liberal/conservative. And I will ask them to over 180 days come back to me with recommendations as to how to reform the court system because it’s getting out of whack.”¹ On April 9, 2021, President Biden did just that, creating a thirty-six member Presidential Commission on the Supreme Court of the United States, charged with drafting a report that would describe and analyze historical and current debates about reforming the Supreme Court.² Although the membership was generally left-liberal, the Commission, consistent with Biden’s promise of bipartisanship, included several prominent conservative legal scholars.

Critical voices on the left piled on as soon as the Commission was formed. To critics, the “milquetoast”³ Commission was “doomed from

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1. Molly Nagle, *Biden, Under Pressure on ‘Court Packing,’ Says He Would Convene Commission on Reform*, ABC NEWS (Oct. 22, 2020), <https://abcnews.go.com/Politics/biden-pressure-court-packing-convene-commission-reform/story?id=73760039> [<https://perma.cc/C4YL-43BX>].

2. Exec. Order No. 14,023, 86 Fed. Reg. 19,569, 19,569 (Apr. 9, 2021).

3. Ian Millhiser, *Biden’s Supreme Court Reform Commission Won’t Fix Anything*, VOX (Apr. 10, 2021), <https://www.vox.com/2021/4/10/22375792/supreme-court-biden-commission-reform-court-packing-federalist-society> [<https://perma.cc/3CA5-53KF>].

the start”⁴—perhaps even “designed to fail.”⁵ Over the next few months, the Commission held public meetings and took testimony from witnesses with varying views on Court reform. Shortly after the Commission released initial draft chapters of the report, two conservative Commissioners resigned. While their reasons for resigning were not made public, and while not all conservative Commission members departed, their departures undermined the goal of producing bipartisan consensus. The remaining thirty-four Commissioners voted to submit the Commission’s final report to the President on December 7, 2021.⁶

Consistent with the Commission’s charge by the President, the 288-page report exhaustively recounted the history of Court reform efforts and laid out numerous recent proposals for reform.⁷ But the Commission interpreted narrowly the President’s instruction to provide “an appraisal of the merits and legality of particular reform proposals.”⁸ The report reached few firm conclusions on the legality of any reform proposals and even fewer conclusions on any reform’s merits. For that reason, the report seemed to make few observers happy. Indeed, several Commissioners followed up with separate statements taking positions that the report did not endorse.⁹

4. Theodor Meyer, *Biden’s Coming Court Conundrum*, POLITICO (May 17, 2021), <https://www.politico.com/newsletters/west-wing-playbook/2021/05/17/bidens-coming-court-conundrum-492880> [<https://perma.cc/Y4T2-6NXT>].

5. Elie Mystal, *Biden’s Supreme Court Commission Is Designed to Fail*, NATION (Apr. 13, 2021), <https://www.thenation.com/article/politics/supreme-court-commission> [<https://perma.cc/FC7U-X5EU>].

6. *Final Report*, PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S. (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/3DA4-CMBK>].

7. *Id.*; see Exec. Order No. 14,023, 86 Fed. Reg. 19,569, 19,569 (Apr. 9, 2021) (“The Commission shall produce a report for the President that includes (i) An 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; (ii) [t]he 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 . . .”).

8. Exec. Order No. 14,023, 86 Fed. Reg. at 19,569.

9. See Nancy Gertner & Laurence H. Tribe, Opinion, *The Supreme Court Isn’t Well. The Only Hope for a Cure Is More Justices.*, WASH. POST (Dec. 9, 2021), <https://www.washingtonpost.com/opinions/2021/12/09/expand-supreme-court-laurence-tribe-nancy-gertner> [<https://perma.cc/C6P5-HVCY>] (“We voted to submit the final report to President Biden not because we agreed with all of it—we did not—but because it accurately reflects the complexity of the issue . . .”).

It was, of course, hard to imagine that any commission could deliver recommendations that would persuade political actors of both parties of the need for major reforms. But was the *idea* behind the Biden Commission wrong-headed? That is, is the very notion of nonpartisan Supreme Court reform mistaken? This Essay will try to answer this question. Building on my testimony before the Commission,¹⁰ I try to develop a plausible, *nonpartisan* argument for reforming the Supreme Court: an argument why one could conclude that the current structure of the Court is flawed and needs to be changed without regard to the current partisan balance of power on the Court. I'll then briefly categorize and describe possible responses to that problem. I'll then discuss the Biden Commission's efforts—and failures—to build bipartisan support for Supreme Court reform. Finally, I'll use the Biden Commission as a springboard for discussing the difficult obstacles for nonpartisan structural reform of the Court in our polarized system.

I. A NONPARTISAN DIAGNOSIS

There are many reasons why one might want to reform or restructure the Supreme Court. The most obvious is that one is dissatisfied with the current membership of the Court and disagrees with the way the Court is using its power. That motivation lay behind President Franklin Roosevelt's failed "Court-packing plan" in 1937.¹¹ And it surely is a big part of recent interest in changing the composition of the Supreme Court. Democrats aren't happy with the current Republican-appointed supermajority on the Court and are upset about the circumstances under which those appointments were made.

As Professor Stephen Sachs puts it, "[i]t is hard to escape the conclusion that the sense of crisis depends on whose ox is gored."¹² Indeed, it's hard to imagine that, had the 2016 election come out differently, and were the Court now composed of a six-three Democratic-appointed majority, the current debate about Court reform would be happening, or at least happening in the same way. Although, in that alternate universe, there's reason to suspect that the shoe would be on the other foot and Republicans and their allies would be leading a

10. Parts I and II are built upon written testimony I submitted in connection with my appearance at the Commission's July 20, 2021 meeting.

11. See generally JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010).

12. Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 *YALE L.J.F.* 93, 103 (2019).

campaign of obstruction and delegitimization, perhaps leading to a crisis of a different sort.¹³

At the same time, seeing Supreme Court reform efforts wholly as the product of partisan politics could also miss a deeper truth. There could still be a problem with the structure of the Supreme Court that would be worth fixing—even if at any given moment in time only those on one side of the aisle have the incentives to seek to change that structure. Every status quo produces winners and losers; the fact that only the losers are motivated to complain does not necessarily prove that their complaints are ill-founded.

I think a case can be made that there are serious problems with the Supreme Court's structure. I'll try to explain the problems I see with the Court's structure as simply and briefly as I can. I'll do my best to argue why those problems should trouble even those whom the status quo presently benefits.

A combination of factors means that individual appointments to the Supreme Court are highly consequential, yet the way in which opportunities to appoint Justices are distributed bears an imperfect and unpredictable relationship to the results of democratic elections—or to any other defensible distribution of power among competing interests in society. The problems I see have, in my view, deepened as a result of a number of different changes to the Supreme Court and to American society and legal culture. And they seem unlikely to disappear on their own.

There are other structural features of the Court that one could find problematic, but that I will not address here. One is the classic countermajoritarian difficulty—the fact that unelected, life-tenured Justices have the power to strike down legislation enacted by democratically elected officials.¹⁴ Another is the fact that the political system, which shapes the selection of Justices, permits minoritarian rule due to the structure of the Electoral College and the Senate.¹⁵ And

13. See, e.g., Ilya Shapiro, *The Senate Should Refuse to Confirm All of Hillary Clinton's Judicial Nominees*, CATO INST. (Oct. 26, 2016), <https://www.cato.org/commentary/senate-should-refuse-confirm-all-hillary-clintons-judicial-nominees> [<https://perma.cc/E72F-3943>] (arguing that Senate Republicans could constitutionally refuse to confirm Clinton's prospective Supreme Court nominees).

14. See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty* (pt. 5), 112 YALE L.J. 153, 155 (2002) (noting further that judges are ostensibly unaccountable to anyone).

15. See, e.g., Michael Tomasky, Opinion, *The Supreme Court's Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html> [<https://perma.cc/S3SU-9VLM>] (explaining that Justice Kavanaugh's confirmation to the Supreme Court would be the second time

finally, there is the argument that the current Court itself presents a challenge to American democracy through its substantive decisions.¹⁶ While I share some concerns about those other problems, my argument here will ignore them. One need not agree with all or any of the other democracy-based critiques of the Court to agree with the critique I will develop here—or to agree that some solution to this problem is necessary. I will emphasize why the particular problem I highlight should be of concern to all who care about the rule of law irrespective of whether they approve or disapprove of the current composition of the Court that status quo arrangements have created.

To understand the problem, consider the following five facts about the current state of the Supreme Court and its selection process.

First, Justices have life tenure. That means they serve until death or voluntary retirement. This means that vacancies on the Court arise from a combination of strategic retirements and unpredictable deaths (or unpredictable health-related retirements).¹⁷

Second, Justices tend to serve for lengthy periods, and their typical length of service crept up significantly in the latter part of the twentieth century, with average tenures starting to approach three decades on the bench.¹⁸

Third, the Court is relatively small, with only nine Justices. Though this number is not specified in the Constitution,¹⁹ it has been fixed by statute at this number for more than 150 years.²⁰ A smaller

that a Justice, nominated and confirmed by a President and Senate representing the will of the minority of Americans, reached the Supreme Court).

16. See Michael J. Klarman, *Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 178–223 (2020) (outlining numerous recent Supreme Court decisions deemed contrary to democracy).

17. One problem life tenure creates is that some Justices stay on the Court into old age and beyond the point when they can still serve effectively. See generally, e.g., David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 996 (2000) (arguing that “judicial decrepitude” has been a recurring issue on the Supreme Court). That particular problem, while important and worth addressing, is not my focus here.

18. See Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. (forthcoming 2022) (manuscript at 14 fig.2), <https://papers.ssrn.com/abstract=3788497> [<https://perma.cc/BZ9F-LTKC>] (showing that only two Justices appointed after 1970 served fewer than twenty years); Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 777–79 (2006) (illustrating the average fourteen-year increase in years spent on the Supreme Court after 1970 compared to the 1941–1970 period).

19. See U.S. CONST. art. III.

20. See PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., *supra* note 6, at 67.

Court means fewer vacancies, and means that each vacancy is more important in shaping the overall composition of the Court.

Fourth, the Court is powerful. The Court is quite regularly asked to, and quite regularly does, declare federal statutes unconstitutional. And it does so today much more frequently than it did during its early years.²¹ Constitutional challenges to federal statutes that the Court has confronted in recent years involve such controversial matters as voting rights,²² healthcare reform,²³ campaign finance regulation,²⁴ gay marriage,²⁵ and abortion.²⁶ The Court also regularly declares state and local laws and practices unconstitutional, and does so in areas of intense controversy, such as abortion,²⁷ gay marriage,²⁸ firearms regulation,²⁹ and affirmative action.³⁰

Fifth, our political and legal cultures are both increasingly polarized. On the political side, there is evidence that American voters and the officials they elect have both become more polarized in their views.³¹ And there is reason to believe judicial ideology on the

21. For a comprehensive analysis of Supreme Court cases involving constitutional challenges to federal statutes, see Keith E. Whittington, *Judicial Review of Congress Database*, PRINCETON (May 2019), <https://scholar.princeton.edu/kewhitt/judicial-review-congress-database> [<https://perma.cc/7AXC-EBKN>].

22. See, e.g., *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) (declaring § 4(b) of the Voting Rights Act unconstitutional).

23. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 588 (2012) (holding the Affordable Care Act constitutional in part and unconstitutional in part).

24. See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 372 (2010) (holding 2 U.S.C. § 441(b)'s restrictions on corporate independent expenditures unconstitutional).

25. See *United States v. Windsor*, 570 U.S. 744, 774 (2013) (holding the Defense of Marriage Act unconstitutional as a deprivation of liberty of the person protected by the Fifth Amendment).

26. See *Gonzales v. Carhart*, 550 U.S. 124, 132–33 (2007) (holding the Partial-Birth Abortion Ban Act of 2003 constitutional).

27. See, e.g., *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (holding a Texas law unconstitutionally burdened access to abortion).

28. See *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (holding there is no lawful basis for a state to refuse to recognize a lawful same-sex marriage).

29. See *McDonald v. Chicago*, 561 U.S. 742, 750 (2010) (holding the Second Amendment right is fully applicable to the states).

30. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding the Equal Protection Clause does not prohibit use of race in admissions decisions to further interests in obtaining the educational benefits of a diverse student body); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (holding a university's use of race in undergraduate admissions was not narrowly tailored to achieve the legitimate interest of obtaining the educational benefits of a diverse student body and was therefore unconstitutional).

31. See, e.g., MARC J. HETHERINGTON & THOMAS J. RUDOLPH, *WHY WASHINGTON WON'T WORK: POLARIZATION, POLITICAL TRUST, AND THE GOVERNING CRISIS* 15–21 (2015)

Supreme Court is increasingly tracking partisan affiliation,³² perhaps due to the increasing tendency among Justices to inhabit different cultural and professional worlds and to speak to different audiences.³³

Now, let us combine these facts. Life tenure, the Court's small size, and the tendency of Justices to remain on the Court longer means vacancies are relatively rare. They're also unpredictable because some Justices choose to retire strategically and others choose to remain on the Court until death. But those unpredictable events are extremely consequential because the Court is powerful and because our polarized political and legal cultures produce Justices who decide cases quite differently depending on the political party of the President who appointed them.

Recognizing this last point isn't the same thing as asserting that the Justices decide cases in an entirely political or partisan fashion. Many of the Court's cases are unanimous, and many of the nonunanimous cases do not neatly break down on party lines.³⁴ Nonetheless, few people familiar with the Court's work would deny that the party of the appointing President matters for judicial ideology; nor would they deny that ideology matters a great deal in many of the cases with the highest stakes.

(discussing how political animosity and distrust drive partisan self-sorting and polarization in ways that are difficult to quantify); LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* 3–4 (2018) (discussing how the American electorate has become deeply socially divided along partisan lines); NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 12–13 (2d ed. 2016) (discussing how politicians in state and national legislatures, and the presidency, have become more polarized); Shanto Iyengar & Masha Krupenkin, *The Strengthening of Partisan Affect*, 39 *ADVANCES POL. PSYCH.* 201, 201–02 (2018) (discussing how party leaders of the two major American political parties have moved to ideological extremes); Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 *ANN. REV. POL. SCI.* 129, 130 (2018) (discussing how members of the two major American political parties have grown to dislike and distrust members of the opposite party).

32. See, e.g., Lee Epstein & Eric Posner, Opinion, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, *N.Y. TIMES* (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html> [<https://perma.cc/WAT9-P8YR>] (noting the broadening ideological gap between Republican-appointed and Democrat-appointed Justices).

33. See NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 40–46 (2019) (highlighting that Justices appear before elite legal and political audiences with ideological influence or agendas).

34. See, e.g., *SCOTUS Statistics*, *HARV. L. REV.*, <https://harvardlawreview.org/supreme-court-statistics> [<https://perma.cc/GF9Y-ERJV>] (“For example: [i]n the 2020 Term, Chief Justice Roberts found himself in a 5-4 majority with each of his colleagues, except Justice Thomas.”).

So individual appointments to the Court are immensely consequential. And though there is some unpredictability to when vacancies arise, strategic retirement and Senate obstructionism can mean that filling any given vacancy could leave that seat in one party's hands for more than a generation. This means that, in our system, the composition of the Court bears only an imperfect relationship to the results of democratic elections. Accordingly, some Presidents have much more influence on the Court's membership than others. Donald Trump was able to appoint three Justices to the Court in his one term as President, whereas Barack Obama appointed only two Justices in two terms as President, and Jimmy Carter appointed none in his single term. Even though Democrats controlled the White House for twenty of the fifty-two years between 1968 and 2020, happenstance and other factors meant that Democrats appointed only four Justices during that time while Republicans appointed fifteen (in addition to elevating William Rehnquist from Associate Justice to Chief Justice).³⁵

There is nothing inherently objectionable with the idea that Trump's victory over Hillary Clinton in the 2016 presidential election should matter for the Court's membership. As they say, elections have consequences. But having been elected, *how much* influence President Trump was able to have on the Court should not turn on the arbitrary fact that Justice Ruth Bader Ginsburg chose to serve on the Court until her death at age eighty-seven, rather than retiring in 2013 under President Obama when she was eighty.

There is no sensible reason for the composition of the Supreme Court to turn on essentially random, unpredictable events. Whether various rights are recognized, whether Congress has the power to enact major statutory reforms, and so on should not turn on when Justices die or retire. Matters of great national consequence should not turn on the health and retirement decisions of individual octogenarians. Quite simply, a system that distributes power over one branch of government as ours does is hard to justify.

Of course, many of our constitutional arrangements are imperfect or unfair in some way. We have lived with this system of Supreme Court Justice selection for more than two centuries; couldn't we continue living with it for many years to come? But something seems to have changed recently. Indeed, the very existence of the Biden Commission is evidence of that: structural changes to the Supreme Court

35. See *Supreme Court Nominations (1789–Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/E7Z8-V64S>].

have gone from “off the wall” to “on the wall.” What is it that has changed? As I acknowledged above, part of the story (of course) is one side’s unhappiness with the current composition of the Court.

Yet that can’t be the whole story. What’s changed, I think, is that some of the various factors I noted have intensified over time. The Court is powerful and plays an important role in a range of highly controversial policy disputes, politics and law are both increasingly polarized, and Justices are serving for longer tenures. All this, in turn, is placing additional stress on existing flaws in our current rules and institutional arrangements.

And this is dangerous. A reason that we have courts is to resolve conflicts in a way that is final, at least to some degree. But any such resolution will inevitably lead to an outcome that makes at least one side of the dispute unhappy. But a court’s role is to produce an outcome that even the losing parties will abide by. In order to produce this result, though, there must be some basic degree of respect for the decisionmaker. Indeed, this is why ethical rules suggest that judges should not hear cases where there is merely an *appearance* of bias.³⁶

Many courts’ primary role is to resolve relatively small disputes that matter only to the individual litigants. But the Supreme Court, for better or for worse, has been given (or taken on) the responsibility to resolve much bigger disputes—many of the disputes that divide our polity most deeply. Yet, to have any chance of success in resolving those disputes, there needs to be some shared willingness to agree—at least to believe—that the system that produced that resolution is fair. At the very least, there needs to be some willingness of the losing side to believe that adhering to the existing rules for resolving disputes will ultimately be more advantageous than refusing to honor those rules. For social peace, we need people to believe that it is better to continue living under existing arrangements, however imperfect, rather than trying to burn them down. True, there may be some disputes over which our society is too divided for a court to have a chance of producing any final resolution.³⁷ But there are surely many questions over which some kind of resolution, even if uneasy, is possible and desirable.

36. See, e.g., CODE OF CONDUCT FOR U.S. JUDGES Canon 2 (JUD. CONF. OF THE U.S. 2019).

37. The Court certainly failed to produce any satisfactory resolution in *Dred Scott v. Sandford*. 60 U.S. 393 (1857). To take a more recent (and slightly less extreme) example, the Court’s attempt in *Planned Parenthood of Southeastern Pennsylvania v. Casey* to “call[] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution” has seemingly produced no lasting peace on the question of abortion rights. 505 U.S. 833, 867 (1992).

This is a necessary prerequisite for a successful constitutional court. This is part of what it means to have a “rule of law.” And more generally, it is what a *constitution* is supposed to do. As Professor Daryl Levinson puts it, “the success of constitutional law, in both its constitutive and constraining roles, depends on the willingness and ability of powerful social and political actors to make sustainable commitments to abide by and uphold constitutional rules and institutions.”³⁸

At this moment in history, however, those on the losing side of important Supreme Court cases may be becoming less willing to simply accept results with which they disagree. This, I think, is why we are suddenly seeing increased openness to court expansion and other structural reforms seen as unthinkable until recently. And, I submit, that is at least in part a product of the various factors I’ve identified. We have a system that distributes control over a powerful institution in a way that is extremely hard to justify in terms of fairness, or even using the argument that the system’s benefits and burdens are likely to be roughly evenly distributed over time.

Why is this so bad? Shouldn’t the response be to simply tell the losers to get over it? The Court has faced similar legitimacy crises in the past, perhaps most recently in the Southern backlash to *Brown v. Board of Education*.³⁹ The short answer, though, is that there is no guarantee that the losers today will get over it. More fundamentally—though more controversially—it is not obvious why they *should*. Why should Democrats live with decisions produced by a Supreme Court majority whose decisions they see as inappropriately partisan, one produced by a selection process Democrats see as arbitrary and unfair, and which Democrats fear may be permanently entrenched in light of the prospect of strategic retirement and Republican obstruction in the Senate if vacancies do arise? Given this state of affairs, it is becoming increasingly less obvious to one side of our divided country why sticking with the system we have is better than trying to tear down the system and replacing it with something else.

II. REFORM STRATEGIES

I’ve explained a set of problems with our current system for determining the Court’s composition. If I’m right about the problem,

38. Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 662 (2011).

39. 347 U.S. 483 (1954).

what could be done to fix it? As I see it, there are a number of possibilities.

A. REGULARIZING APPOINTMENTS

One strategy is to *regularize appointments* in some way. That is, we could change the system so that vacancies are more predictable and thus more directly connected to the results of elections. Such reforms would be particularly attractive to those who think that the Court's membership should have a close relationship to the outcomes of presidential elections over time.

There are different ways to accomplish this goal. Staggered term limits is the most well-known option. Under the most common version of that reform, terms would last eighteen years, and each President would have two—and exactly two—vacancies to fill in each presidential term in office. This reform would have other benefits, such as preventing Justices from remaining on the Court into old age and thus possible senescence.

Another intriguing possibility is Professor Daniel Hemel's suggestion "to retain life tenure but decouple appointment opportunities from vacancies."⁴⁰ Under his proposal, "[e]ach [P]resident would have the opportunity to appoint two [J]ustices at the beginning of each term, regardless of how many vacancies have occurred or will occur."⁴¹

But other reforms could accomplish the same goal of more evenly distributing appointments across presidential terms, albeit more indirectly. Expanding the size of the Court by a significant degree would also tend to regularize appointments in practice even without changing our current approach to judicial tenure and appointments. The law of large numbers suggests that, as the Court's size increases, randomness in deaths and retirements would tend to even out, resulting in roughly similar numbers of appointments per presidential term. One proposal that may achieve this result is Professor Ganesh Sitaraman's and my "Lottery Court" system, in which the Court would be expanded to include all judges on the federal courts of appeals, with the Court sitting in panels.⁴²

40. Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. ECON. PERSP. 119, 121 (2021).

41. *Id.* at 136.

42. See Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 182-84 (2019).

B. POWER-SHARING

Another strategy is some kind of *power-sharing* arrangement. Rather than making the Court's membership more closely tied to the results of elections, a power-sharing arrangement would go in the other direction and make the Court's composition more stable and evenly divided in terms of party of appointment—without regard to the results of presidential elections. Underlying this kind of solution would be the view that warring political factions should come to a truce in the battle to capture the Court and that this goal is more important than ensuring a tight fit between election results and the composition of the Court.

Along these lines is Eric Segall's proposal for an eight-member Supreme Court evenly divided along partisan lines.⁴³ Ganesh Sitaraman's and my "Balanced Bench" proposal, in which the Court would have five seats reserved for Democratic appointees and five for Republican appointees (as well as five more Justices chosen by the other ten Justices collectively), also reflects a power-sharing strategy.⁴⁴

C. DISEMPOWERMENT

A third strategy is *disempowering the Court* in some way. Rather than changing the composition of the Court, reformers could make the Court less powerful. The way that the Court's membership is selected would still suffer from the deficiencies I've discussed above. But that would be less of a problem because the stakes would be reduced.

There are various options here. Professors Samuel Moyn and Ryan Doerfler have ably catalogued a number of them.⁴⁵ Stripping the Court of jurisdiction over particular classes of cases is one possibility.⁴⁶ I'm skeptical of this strategy as a long-term fix. Selectively removing certain areas of law from Supreme Court review will inevitably have partisan valence, as the possibility of Supreme Court review tends to have directionally predictable effects, and thus seems unlikely to serve as a stable solution.

43. Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547, 550 (2018).

44. See Epps & Sitaraman, *supra* note 42, at 193–200.

45. See Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1725–28 (2021).

46. See, e.g., Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1824 (2020) ("Note the Court's clear statement that where Congress does not otherwise attempt to prescribe a rule of decision, it has the authority to remove a class of cases from the jurisdiction of federal courts.").

Another option is to require supermajority votes for the Court to declare federal statutes unconstitutional.⁴⁷ This would presumably make decisions striking down federal statutes rarer, and thus could turn down the temperature of the nomination process to some degree. But again, this isn't an obviously complete solution. Rather than directly addressing the incentives for partisan politicians to seek to capture the Court, it merely moves the goalposts.

Finally, there is the prospect of a rule permitting a legislative or popular override of constitutional decisions by the Supreme Court.⁴⁸ This reform, too, would make the composition of the Supreme Court somewhat less important, if its decisions were not the last word on constitutional questions. But here again the solution seems incomplete. It addresses the problem of an out-of-control Court that is too eager to strike down laws. It does not satisfy those who see the problem as a Court that is too unwilling to *recognize* constitutional rights.

The value of these disempowering strategies as compared to power-sharing and appointments-regularization turns on what one sees as the proper role of the Supreme Court in relation to democratic governance. Power-sharing is perhaps the least democratic solution, as it distributes power over the Court without regard to which party has recently prevailed at the ballot box. Appointments-regularization is more democratic, in that it makes the Court's membership more dependent on election results. And disempowering reforms are most democratic, in that they envision giving more power over important decisions to democratically accountable institutions.

D. REBUILDING CONSENSUS

A final strategy is to try to *rebuild consensus* in our legal culture about what exactly Supreme Court Justices should be doing and what exactly counts as a right answer to a disputed legal question. This is the solution offered by Professor Sachs, who argues that we should

47. See Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 87–94 (2003) (documenting proposals to impose a supermajority requirement on the Supreme Court); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 894 (2003) (recommending a two-thirds majority requirement).

48. See, e.g., Barry Friedman, *"Things Forgotten" in the Debate Over Judicial Independence*, 14 GA. ST. U. L. REV. 737, 739–53 (1998) (discussing earlier proposals to permit overrides of Supreme Court decisions); Mark Tushnet, *Dialogic Judicial Review*, 61 ARK. L. REV. 205, 211–12 (2009) (discussing the "notwithstanding" clause in the Canadian Charter of Rights, which permits legislative override of constitutional decisions).

build consensus around “[l]imited government, federalism, originalism, and so on”⁴⁹

Sachs’s solution seems unlikely to come to pass, given that Democrats and the left would see it as unilateral disarmament.⁵⁰ Nonetheless, it may still be possible to work toward greater shared consensus in our legal culture, even if that seems increasingly impossible in the political arena. And, for that reason, efforts to build bridges, to try to find the lost middle ground—a goal that perhaps partly motivated the formation of the bipartisan Biden Commission—are worth trying, even if their odds of success are low.

E. INACTION AND ITS CONSEQUENCES

Having outlined a set of possible reforms, I must acknowledge that none is likely to come pass. Structural change is difficult; inertia is a powerful force. Democrats today control both Congress and the White House, but are themselves not unified in their desire for reform. And there is no appetite among Republicans for structural reform of the Court. Moreover, even if Democrats became more unified and tried to enact some kind of structural reform, it would face strong political opposition and legal challenges that might prevent it from being successfully implemented.

But if no structural reform like the ones I’ve identified succeeds, the underlying *problem*—the unwillingness of the losing side to “take a loss and move on”⁵¹—seems unlikely to evaporate, given its causes. The losers under the status quo will increasingly be unwilling to regard the Court’s decisions as legitimate when they resolve divisive questions in ways that track partisan ideology.

If so, one of three things might happen. *First*, the Court itself could, through its decisions, *self-moderate* and thus reduce the temperature and the eagerness for reform. Perhaps one reason why problems I identify with the Court’s structure didn’t create a crisis earlier in American history is that the Court has given both sides of our divided country decisions they are happy about, particularly in some culture wars disputes. This is not to say the Court has done so intentionally, or that the Justices will take that path intentionally in the years to come—though some certainly speculate that calls for Court-

49. Sachs, *supra* note 12, at 107.

50. See Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J.F. 821, 834 (2021) (“[Sachs’s] approach would entail not mutual disarmament but rather unilateral surrender by progressives as the Court advances conservative policy preferences under an originalist banner.”).

51. Sachs, *supra* note 12, at 104.

packing could push some of the Justices to moderate their views. Even if that isn't true, it is possible that the Justices' ideological and methodological differences will produce enough unpredictable results over time to defuse a currently ticking time bomb.

There's no guarantee that this will happen, and early returns on the six-three Republican-appointed supermajority show no indication of a tack to the center. Moreover, given that the link between partisan affiliation and judicial ideology seems to be growing tighter, self-moderation may accordingly become less likely. Moreover, the fact that the Court is increasingly the site of battles over the "rules of the game"—the distribution of power over politics itself—may make it unlikely that the tension will dissipate.

If the Court does not self-moderate, support for partisan Court-packing—the expansion of the Supreme Court solely to change its partisan, ideological composition—is likely to grow. That reform is generally seen as the easiest to accomplish and the least subject to constitutional objections. Nor is it obviously the wrong approach for Democrats to take. If one believes that Senate Republicans' handling of the Supreme Court vacancies in 2016 and 2020 was unprincipled and contrary to settled norms, it's hard to explain why a retaliatory escalation should be off the table. At the same time, though, partisan Court-packing is a change that many fear will be most destructive to the rule of law. Many fear that it will generate a cycle of retaliatory reprisals, leading to a Supreme Court with many Justices and little legitimacy.⁵²

I'm not certain whether that prediction is correct.⁵³ But certainly, partisan Court-packing is fundamentally different than the nonpartisan solutions discussed above. Rather than an attempt to change the Court's structure or power in a way that, over time, could benefit one party or another, the goal of partisan Court-packing is (by definition) immediate partisan advantage. For that reason, it seems less likely to create a stable equilibrium than a reform that seeks to establish a new, fairer baseline for the distribution of power over the Court. Even if Court-packing did not lead to a cycle of reprisals, it likely would significantly undermine the Court's legitimacy among those on the losing

52. See, e.g., Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2750–51 (2020) (“[C]ourt-packing could cause long-lasting, perhaps irreparable, damage to the Supreme Court’s legitimacy.”). For an empirical simulation of the possible long-term effects of a cycle of retaliatory partisan Court-packing, see Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *The Endgame of Court-Packing* 1–2 (May 3, 2021) (Working Paper), <https://papers.ssrn.com/abstract=3835502> [<https://perma.cc/J8BN-JUXV>].

53. For a brief discussion of arguments in both directions, see Epps & Sitaraman, *supra* note 42, at 177.

side. The arguments I've made above about why Democrats are increasingly unwilling to simply accept the results of the Court's decisions would, one can imagine, apply with similar force to a Court that Republicans viewed as stolen through norm-breaking means.

The third possibility is that no reform occurs, but that Democrats (the current losers) will attempt to disempower the Court through politics rather than through law. That is, they will seek to defang the Court through rhetoric painting it as illegitimate and partisan. They may even, if they are in power, refuse to respect the Court's authority. Republicans, for their part, could follow the same tack if Democrats packed the Court and they were unable to pack back.

In my view, a reform like power-sharing would be preferable to a legitimacy crisis. There are reasons to want an institution that can credibly resolve contentious disputes, even when its decisions will inevitably frustrate one side or the other. And to the extent that society comes to view judging as ultimately just another flavor of partisan politics, the very notion of the rule of law may be in jeopardy.

F. WHY NONPARTISAN REFORM FAILS

The case for pursuing some kind of nonpartisan structural reform is to prevent the results imagined above. The argument is that a Court that produces decisions even the losers will respect should over the long term be more desirable than transitory control over the Court. To put a finer point on it, the prospect of delegitimization makes partisan control over the Supreme Court less valuable. The Court has no power to enforce its own decisions, and its authority is entirely a product of other officials' and the public's willingness to respect its decisions as legitimate. So, there are perhaps some ultimately self-enforcing limits on how much the Court can be used to pursue partisan ends.

Of course, these arguments have thus far swayed no one on the Republican side that currently enjoys control over the Court. Does that show that my arguments are wrong, and that the benefits of a partisan Court majority outweigh the long-term costs of delegitimization? Not necessarily. There are several reasons why nonpartisan reforms may not command present support even if, over time, they would produce benefits that accrue to all actors throughout the system.

One might first ask why the status quo losers—Democrats—are themselves not united in favor of structural Supreme Court reform. Professor Adrian Vermeule offered a persuasive explanation for this

phenomenon in the pages of this law review.⁵⁴ Nonpartisan structural reform proposals are unlikely to generate political support: “Structural reforms adopted behind a veil of uncertainty will be and seem impartial, but in general, no politically influential group will be motivated to support them. Conversely, proposals that produce short-term benefits for particular groups will attract motivated supporters but will also provoke opposition.”⁵⁵ The reforms detailed above vary in how much short-term benefit they would provide to Democrats, the current status quo losers; those that provide little short-term benefit (such as a prospective-only term limits reform) may never reach the top of the agenda, whereas those that provide greater benefits (such as, say, stripping the current majority of jurisdiction over a large class of cases) would produce the fiercest opposition.

Why aren’t the status quo winners—Republicans—interested in defusing a looming crisis? There are several possibilities. First, the status quo winners could make a different predictive judgment about long-term consequences. They could conclude that the risks of Court delegitimization are smaller than the benefits of present control and the ability to use the Court’s power to achieve victories. They could plausibly believe that status quo losers will ultimately accept the decisions that they dislike rather than trying to blow up the system. In this way, partisan clashing over the Court is a game of chicken, with both sides waiting for the other to hesitate rather than driving off a cliff.

A second and related explanation has to do with time horizons. Even if it’s right that the long-term consequences of partisan battles over Court control are negative, political actors may not care as much about those long-term consequences as much as the short-term benefits of victories in politically salient cases.

The last, and most troubling, possibility is one suggested by Professor Richard Primus in his assessment of a proposal for Republicans to expand the lower federal courts for partisan ends. In his view, such a proposal would be attractive to Republicans despite the apparent risk of retaliation by Democrats under the following view:

We don’t think in terms of the Democrats one day coming back into power. We are building for a world in which they never exercise power. And if the Democrats do return to power, then the Republic won’t be worth saving anyway. In other words, competition between Republicans and Democrats is no longer an iterated game in which two rival parties who see each other as

54. Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1156 (2006).

55. *Id.*

legitimate contenders for political power expect to take turns exercising more and less influence within the system. It's the last round, and it's a fight to the finish.⁵⁶

Some combination of these different explanations could lie behind the status quo winners' lack of interest in reforming the Supreme Court.

III. THE BIDEN COMMISSION AND BEYOND

For those who are worried that the current state of affairs is heading to a crisis, and who thus support structural Supreme Court reform, where should they direct their efforts? There are two possible directions. The first is to focus on one's co-partisans. Democrats in favor of reform could try to persuade others on the left of the need for reform, and could develop a strategy and legal framework for implementing a reform. In that effort, those who believe in nonpartisan reform could seek to steer co-partisans away from explicitly partisan strategies like Court-packing.

Alternatively, one could focus one's efforts on building bridges across partisan divides. That would mean trying to convince those on the other side of the aisle that reform is in everyone's long-term interests. And it would mean trying to find common ground on legal theories that could make structural reform possible without overcoming the significant hurdles required to amend the Constitution.

The Biden Commission ultimately tried to split the difference between these two approaches. As a bipartisan Commission, it was not designed to persuade political actors on the left of the urgency of reform. At the same time, though, the Commission's commitment to bipartisanship was half-hearted. It had a handful of conservative or Republican members, but the bulk of its membership was liberal. For this reason, it was implausible that the Commission would have enough credibility on the right to make any kind of persuasive case for reform—even if the Commissioners had been able to reach bipartisan consensus on the need for any particular reform.

The Commission was thus, from the outset, unlikely to move the needle in favor of reform. Instead, the mostly likely result of the Commission's work would be to take reforms *off* the table than to spur reform along. A conclusion by a left-leaning Commission that any particular reform that Democrats might want to pursue is not legally viable

56. Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), <https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal> [<https://perma.cc/W7NP-GZ5G>].

would be more persuasive in future debates than any recommendation in favor of any particular proposal. Thus, perhaps the most that supporters of reform could hope is that the Commission would not try to rule out any options.

That would have been a mistake for several reasons. First, the constitutional issues raised by various reform proposals are novel and not easily resolved. Consider the prominent proposal for term limits for Supreme Court Justices. Some think such a reform can only be accomplished by constitutional amendment.⁵⁷ But others have argued that such a reform could be effectively achieved via statutory means, so long as the Justices would not be deprived of their titles and salaries and still were permitted to serve in certain types of cases.⁵⁸ The Constitution does not specify exactly what good-behavior tenure means.⁵⁹ And a well-crafted statutory term limits proposal would arguably still respect the underlying concerns that appear to have motivated the inclusion of good-behavior protections in the Constitution. Given those facts, it is far from obvious that such a statutory reform should be off the table.

True, such a reform has never been attempted. But the mere fact that a particular reform is novel is not necessarily a reason to conclude that such a reform is unconstitutional.⁶⁰ Moreover, the resolution of constitutional questions posed by statutory term limit proposals and

57. See, e.g., Calabresi & Lindgren, *supra* note 18, at 859–68 (raising constitutional arguments—based on the Appointments, Good Behavior, and Chief Justice Presiding Clauses—against statutorily imposed term limits).

58. See Roger C. Cramton, *Constitutionality of Reforming the Supreme Court by Statute*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 345, 359–60 (Roger C. Cramton & Paul D. Carrington eds., 2006) (proposing a statutory proposal that would relegate senior Justices to serving on lower courts or in rulemaking capacities); Jack M. Balkin, *Don't Pack the Court. Regularize Appointments.*, BALKINIZATION (Oct. 5, 2020), <https://balkin.blogspot.com/2020/10/dont-pack-court-regularize-appointments.html> [<https://perma.cc/R6PS-UC24>] (proposing the creation, by statute, of two en banc panels within the Court, thus allowing the President to nominate a new Justice every other year).

59. There has been a fascinating exchange on the meaning of “good behavior.” Compare Saikrishna Prakash & Steven D. Smith, *How To Remove a Federal Judge*, 116 YALE L.J. 72, 89–92 (2006) (arguing that, historically, good-behavior tenure was not synonymous with life tenure), with Martin H. Redish, *Response: Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139, 141 (2006) (“Prakash and Smith fail to meet their burden of historical proof . . . the Prakash-Smith proposal seriously endangers the ability of the independent federal courts to . . . protect individual rights from majoritarian incursion.”).

60. See Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1411–13 (2017) (casting doubt on Supreme Court assumptions that a federal statute’s novelty can be indicative of its unconstitutionality).

other reforms may depend, at least in part, on a choice between different methods brought to bear on constitutional interpretation—and that conflict over interpretive method is one dilemma that has generated our present predicament.

Second, the area of Supreme Court reform is one in which elected officials and the public may play a greater role in fleshing out constitutional meaning than many other questions of constitutional law. While today we assume most important constitutional questions will be settled by the Supreme Court through briefing, oral argument, and so on, it is less clear whether this is how disputes over the constitutionality of Supreme Court reform will, or should, be decided. The sitting Justices are not obviously the right decisionmakers to resolve questions of their own power. Moreover, elected officials are in the process of thinking through proposals to reform the Court via statute—most notably, statutory term limits proposals⁶¹—which necessarily involves their own consideration of constitutional questions. It would be unfortunate had the Commission sought to short-circuit this healthy debate.

Third, the conditions which have led to the present circumstances suggest it is quite unlikely that any solution requiring a constitutional amendment can be successfully enacted. Our country's deep polarization makes it difficult to imagine court-reform measures clearing the supermajority hurdles required for constitutional amendment. Making matters worse, the statutory reform that many see as most easily defended on constitutional grounds is the one that many find most troubling: partisan Court-packing. Any efforts to build consensus against the constitutionality of other reforms may make that path more likely.

For these reasons, I urged the Commission in my testimony to “first, do no harm.” On that score, the Commission's final report more or less passed muster. The report exhaustively canvassed the history of Supreme Court reform efforts and proposals to reform the Court. Though it suggested some reservations about some reform options, on the whole, it was cautious in reaching any firm conclusions about the wisdom or viability of particular proposals. That means the report is unlikely to move the needle on reform in any significant way. But doing no harm may have been the most that supporters of reform could have hoped for.

61. *See* Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Cong. § 8(b) (2020) (proposing term limits for Supreme Court Justices such that each President is guaranteed two nominations).

The Biden Commission did not, and will not, end the conversation about Supreme Court reform. That conversation may only grow louder as the conservative supermajority stretches its muscles and issues aggressive rulings in the years to come. In the meantime, those who support reform as a means to avoid a crisis must try to steer that conversation in the right direction. That means trying to build an intellectual and legal framework for nonpartisan reform strategies. And it means trying to persuade those whom the status quo benefits that a fairer, saner system for distributing power over the judicial branch is ultimately better for the country than continuing on our present course. One should have no illusions that such efforts are likely to succeed, but they are important and worthwhile nonetheless.