had protested "President Roosevelt's proposal to pack the Supreme Court . . . with such vehemence that Roosevelt never forgave me for it," Congress should not "force upon ourselves a rigidity which can in the future make much mischief. . . . In the event there is another such move to increase the members of the Court, the then Congress, in the final analysis, can approve or reject, as is deemed best in the national interest."[63]

Significantly, both supporters and opponents of this proposed constitutional amendment shared one assumption: Congress has broad formal power to expand or contract the Supreme Court, such that the only way to freeze the size of the Court in place was through a constitutional amendment. But significant disagreement arose over whether fixing the size of the Court at nine members would be wise. Some observers see these congressional debates as reflecting a view that expanding the Court for partisan or ideological purposes is inappropriate, but that changing the size of the Court for reasons of institutional efficiency is legitimate.

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

II. The Legality of Court Expansion

Article III of the Constitution, which establishes the judiciary, requires that there be "one supreme Court" but does not specify the number of Justices that shall serve on that Court.[66] Article I authorizes Congress to make all laws that are "necessary and proper" to carry out the powers conferred on various institutions of government, which include the Supreme Court.[67] Determining the size of the Court that might be "necessary and proper" to its functioning seems well within Congress's formal discretion.[68]

The historical practice we recount above also supports the conclusion that Congress has broad authority to establish and change the Court's size: Congress exercised that power on

numerous occasions in the nation's first century (in 1789, 1801, 1802, 1807, 1837, 1863, 1866, and 1869), expanding or contracting the Supreme Court's size for both institutional and political reasons. On several occasions, Congress adjusted the Court's size in large part to influence the future course of its decisions: The Federalists in 1801, the Democratic Republicans in 1802, the Republicans in the 1860s, and the Roosevelt administration in 1937 had this objective. President Roosevelt explained a few years after the failure of his 1937 plan that he turned to Court expansion to influence the Court in part because of its "undoubted constitutionality."[69] Two decades later, in the early 1950s, members of Congress continued to assume that the only way to permanently fix the size of the Supreme Court at nine members was through a constitutional amendment.

During the Commission's public hearings, one witness argued that, although Congress has broad power to modify the size of the Supreme Court for many purposes, it cannot do so for "partisan" reasons.[70] This argument faces a few challenges.[71] First, it is doubtful that "partisan" reasons can be disentangled from "good-government" reasons. For example, the changes to the Supreme Court in 1807 and 1837 by the Democratic Republicans and Jacksonian Democrats, respectively, had both institutional and political motives;[72] lawmakers not only sought to give the Court more personnel to serve a growing nation but also enabled their party leaders—Presidents Jefferson and Jackson—to shape the Supreme Court.[73] Second, and relatedly, the argument has little historical support; as discussed in Part I, *every* change to the Supreme Court's size has tended, at least in part, to serve the interests of one political party.

III. Arguments in Support of and Opposition to Court Expansion

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

A. The Case for Expanding the Court

The current calls to expand the size of the Court stem most immediately from the Senate's refusal to act on President Obama's nomination of Judge Garland to the Supreme Court, as

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

1. Responding to Norm Violations

In recent times, arguments to expand the Supreme Court have been relatively rare, but not nonexistent.[74] In 2017, an academic's call for congressional Republicans to expand the lower federal courts spurred an historian of President Roosevelt's Court-packing plan to worry that President Trump would adopt such a proposal.[75] Supreme Court reform also became a pivotal topic in the 2020 Democratic primary, as several Democratic candidates endorsed significant reforms.[76] The Democratic Party Platform for the election of 2020 ultimately called for "structural court reforms to increase transparency and accountability,"[77] and candidates Trump and Biden debated the merits of Court expansion.[78] Events surrounding the last three nominations to the Supreme Court have helped spark the now-prominent calls for expansion of the Court.

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

days before the election of 2020, Republicans quickly confirmed President Trump's nomination of Justice Barrett to fill the seat.[81]

Calls for expansion in response to these developments did not begin immediately. Even after Republican Senators refused to act on the Garland nomination and eventually confirmed Justice Gorsuch instead, Democratic critics who accused Republicans of "stealing" a Supreme Court seat largely refrained from calling for Democrats to respond with a Court-expansion plan. Indeed, references to "Court packing" consisted primarily of arguments that Republicans themselves had in fact "packed the courts" by refusing to act on the Garland nomination and by moving swiftly to confirm President Trump's nominations to the lower federal courts.[82]

Calls for and by Democrats to expand the size of the Court first appeared in substantial numbers upon the announcement of his retirement by Justice Kennedy, who had long been seen as the median Justice on a closely divided Court, and during the subsequent controversial nomination process of Justice Kavanaugh.[83] These calls increased in late 2020 when Senate Republicans confirmed Justice Barrett, with Democrats arguing that Republicans had contradicted their own prior arguments that Justices should not be confirmed in close proximity to a presidential election.[84] According to news accounts, "[a]s soon as it became clear that the Republican-controlled Senate would almost certainly confirm Judge Amy Coney Barrett, creating a 6-3 conservative majority on the court," a number of Democrats "argued that if Democrats won in November, they should seriously consider increasing the number of justices."[85] Public discussion of Court expansion surged noticeably between 2019 and 2020. In 2020, more than 400 articles appeared in the *New York Times*, *Wall Street Journal*, *Washington Post*, and *USA Today* invoking the term "Court packing" in the context of the Supreme Court, in contrast to approximately 100 articles in 2019.[86]

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

campaign finance law.[88] But for the improper confirmation tactics of Republican lawmakers, the argument goes, the Court's doctrinal trajectory might have been considerably different.[89]

Others emphasize that a failure to respond to what they regard as confirmation "hardball" by Republicans since 2016—as well as a failure to advance expansion as a viable option in the political process—might encourage future aggressive measures in the confirmation process, such as a refusal to hold hearings on any judicial nominee put forward by a President of the opposite party.[90] The judicial selection process has already become, in the view of many, a partisan spectacle.[91] Further escalation of the battles surrounding the Supreme Court could put additional pressure on the long-term legitimacy of the institution. On this account, a significant reform such as Court expansion may be needed to calm the controversy surrounding the Court, by attaching consequences to the Senate's actions during the Trump years in order to deter future conduct of this kind.[92]

2. Preventing the Erosion of Democracy

Some proponents of expansion believe it to be essential to address the urgent circumstances brought on by developments in the Court's jurisprudence that predate recent confirmation controversies but that have been accelerated by those appointments. They believe that these developments threaten to seriously and perhaps irreversibly damage the democratic process. These critics maintain that the Supreme Court has been complicit in and partially responsible for the "degradation of American democracy" writ large.[93] On this view, the Court has whittled away the Voting Rights Act and other cornerstones of democracy, and affirmed state laws and practices that restrict voting and disenfranchise certain constituencies, such as people of color, the poor, and the young.[94] This has contributed to circumstances that threaten to give outsized power over the future of the presidency and therefore the Court to one political party and to entrench that power.[95] As one witness before the Commission put it, the current Court "could easily invalidate federal legislation containing . . . democracy-entrenching measures . . . Those same Justices could easily invalidate measures designed to reduce the influence of money in politics, increase the transparency of political spending, restore the preclearance provision of the Voting Rights Act, and ameliorate economic inequality." [96] Those holding this view regard expansion as required to ensure a Court more likely to uphold future voting rights and democracy-enhancing legislation constitutionally enacted by Congress and to prevent state legislatures from undermining or destroying the democratic process.[97] In arguing the case for expansion, proponents contend this moment is unlike any of the others in which this reform has been debated: Antidemocratic developments risk

entrenching the judicial philosophy of the current Court majority for generations, while advantaging one political party.

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

For some proponents of expansion, even the calls for such reform could help prevent further democratic backsliding. As some of the testimony before the Commission suggested, an *attempted* expansion—or even just the prospect of expansion—could lead the Supreme Court to be restrained in its jurisprudence and more respectful of the role of the political branches, at least in the short term.[98] Soon after President Roosevelt unveiled his Court-reform plan in 1937, the Supreme Court began to uphold New Deal programs. Although scholars continue to debate the reason for this "switch," a few years after the failure of his plan, Roosevelt described it as "among the most important domestic achievements of [his] first two terms in office," because it led to changes in the Court's jurisprudence.[99]

3. Strengthening the Court

Some participants in the debate over Court reform also regard expansion as worth considering because of its potential to strengthen the Court as an institution.[100] An expanded Court might better incorporate diverse personal and professional perspectives. That diversity could come from the inclusion of Justices with experience in different sectors of the legal community or even the public sphere more generally. It also might include individuals of diverse religious, socioeconomic, racial, geographical, or other demographic backgrounds. Expanded diversity could enrich the Court's decisionmaking, and a Court that was drawn from a broader cross-section of society would be well received by the public.[101] A larger Supreme Court might also be able to decide more cases and to spend more time on emergency applications—an element of the Court's work that has attracted considerable attention as is discussed in Chapter 5 of this Report.[102] The Supreme Court's rulings in merits cases have decreased considerably in recent decades. In the 1980s, the Court decided around 150 cases per year.[103] In recent years, that number has fallen to seventy or eighty cases.[104] To the extent the public or lawmakers would like the Court to resolve more cases, expanding the size of the Court might prompt the Justices to do so,[105] though other means to this end also could include expanding the Court's mandatory appellate jurisdiction.

Most proponents of Court expansion have focused on the possibility of an immediate increase in the number of Justices sitting on the Supreme Court. But as noted in public testimony before the Commission, proposals for Court expansion need not involve congressional action to expand the Court all at once.[106] Congress could enact a law providing for the expansion of the Supreme Court over time. For example, the Court could be increased by one Justice during each four-year presidential term until the Court reached some maximum size (say, thirteen members). Alternatively, the Court could be expanded by two Justices immediately, followed by two more Justices after an intervening presidential election. Proponents of expansion note that, though the longstanding convention has been for the Court to have nine members, it is possible for a high court to be productive and functional with significantly more than nine Justices. They note that other jurisdictions have larger courts that function efficiently and collegially, and that countries other than the United States have tended to settle on more than nine seats and have not necessarily maintained an odd number of seats on their high bench.[107]

The table below puts the U.S. Supreme Court in context with other constitutional courts.

7 Judges	Australia
9 Judges	Canada, United States
10 Judges	Chile
11 Judges	France, South Africa
12 Judges	Belgium, Ireland, Spain, United Kingdom
14 Judges	Austria, South Korea
15 Judges	Italy, Japan
16 Judges	Germany, Sweden
18 Judges	Denmark

B. The Case Against Packing the Supreme Court

Opponents of efforts to expand—or "pack"—the Court at this time hold a range of views. Some critics of the calls for expansion regard the recent nominations to the Court as appropriate reflections of electoral outcomes and as fully consistent with constitutional processes and historical Senate practice.[108] They view the Court's changing doctrine as

reflecting a principled approach to constitutional interpretation. Meanwhile, other critics of expansion, including some who take issue with the current Court and its jurisprudence and conclude that other reforms of the Court would be beneficial,[109] believe efforts to expand the Court or otherwise alter its structure at this moment would threaten the independence of the Court. Critics of Court expansion worry that such efforts would pose considerable risk to our constitutional system, including by spurring parties able to take control of the White House and Congress at the same time to routinely add Justices to bring the Court more into line with their ideological stances or partisan political aims. Court packing, in the critics' view, would compromise the Court's long-term capacity to perform its essential role of policing the excesses of the other branches and protecting individual rights. Opponents also conclude that packing the Court would not serve democratic values because such reforms would not address the Court's power to resolve questions better left to the political process. Still other opponents argue that the reform would be contrary to rule of law principles and that what they see as an enduring bipartisan norm against Court packing should be reaffirmed and protected.

1. Protecting Judicial Independence

Opponents of Court packing contend that it would significantly undermine the Supreme Court's independence. Courts cannot serve as effective checks on government officials if their personnel can be altered by those same government officials. In a system that permitted Court packing, any time the Supreme Court issued a decision that was at odds with the preferences of those in power—whether the matter related to the U.S. census,[110] immigration policy,[111] or the validity of a presidential election[112]—the party in power could respond by stacking the Court with loyalists. One witness before the Commission further explained: "Court-packing risks undermining the *willingness* of the Justices to maintain their independence" from "the very political forces they are supposed to police in the name of the Constitution."[113]

Given these concerns, opponents underscore, it is crucial that for much of the past century, there has been a strong—and bipartisan—constitutional norm or convention treating Court packing as "something that just isn't done."[114] As one scholar wrote a few years ago, one could say confidently that "court packing is essentially considered a wholly illegitimate means of seeking to alter existing Supreme Court doctrine. No serious person, in either major political party, suggests court packing as a means of overturning disliked Supreme Court decisions, whether the decision in question is *Roe v. Wade* or *Citizens United*."[115] Scholars could say, until very recently, that even as compared to other Court reform efforts, "'Court packing' is especially out of bounds. This is part of the convention of judicial independence."[116]

For opponents of Court packing, the historical condemnation of the 1937 Court packing plan illustrates what they regard as a fundamental principle of American constitutional government. For example, in 2004, Democratic lawmakers celebrated how "President Franklin Roosevelt's efforts to control the outcome of the Supreme Court by packing it with loyalists was rejected by Congress in the 1930s, thereby preserving the independence of the federal judiciary."[117] Republican lawmakers have also repeatedly denounced Roosevelt's Court-packing plan.[118] On this view, the 1937 reform has long been regarded as one of the most disgraceful assaults on the Supreme Court in American history.[119] Opponents of Court packing also emphasize that those who resisted Court packing in 1937—particularly those who stood up to the President and leader of their own party—are seen as having shown tremendous political courage.

Opponents of Court packing argue that the strong bipartisan rejection of it has helped to preserve the Supreme Court's constitutional role for much of the past century. There has been considerable pressure on this norm in recent years—as evidenced by the fact that the issue has come before this Commission. But one witness during the Commission's public hearings noted opposition to expansion on the ground that there continues to be "[a] strong norm . . . that the political branches do not threaten or change the Court's membership because of unhappiness with its decisions."[120]

For opponents, the United States' fidelity to this norm has particular significance in light of developments in other parts of the world where manipulation of the composition of the judiciary has been a worrying sign of democratic backsliding.[121] After his election in 1989, for example, Argentinian president Carlos Menem worked to draw greater power into the executive branch, and in 1990 he successfully added four new members to a formerly five-member supreme court.[122] In 2004, Hugo Chavez in Venezuela reined in judicial independence by expanding the size of the constitutional court from twenty to thirty-two.[123] In 2010, Turkish leader Recep Tayyip Erdogan's populist party consolidated control over the Turkish constitutional court by expanding its membership from ten to seventeen and altering the process by which judges were selected.[124] In 2010, the populist Fidesz Party won a narrow majority in the Hungarian Parliament and quickly went about consolidating power, including through the addition of several new seats to the constitutional court.[125] In 2018, a package of judicial reforms in Poland forced sitting judges off the bench and dramatically expanded the size of the supreme court.[126] By contrast, these critics argue, stable democracies since the mid-twentieth century have retained a strong commitment to judicial independence and have not

tended to make such moves.[127] For these opponents of expansion, it is important that the United States remain firmly in the ranks of democracies standing behind this commitment.

2. Safeguarding the Court's Legitimacy

Opponents also cite a concern related to the threat to judicial independence, underscored by witnesses before the Commission: that Court packing would almost certainly undermine or destroy the Supreme Court's legitimacy.[128] Some witnesses testified that the reform would be perceived by many as a partisan maneuver,[129] or a dangerous power grab by one political party—a move that would render the decisions of the resulting (larger) Supreme Court of questionable legitimacy to much of the public.[130] Critics argue that the public is less likely to treat the decisions of a packed Court as authoritative, diminishing the Court's capacity to protect individual rights, equality, or constrain abuses of executive power.

Opponents of Court packing in this moment warn that it would also almost certainly generate a continuous cycle of future expansions. Expanding the Court would be on the agenda of every administration under unified government.[131] One (purportedly modest) estimate of the consequences of expansions as parties gain Senate majorities and add Justices concludes that the Supreme Court could expand to twenty-three or twenty-nine Justices in the next fifty years, and thirty-nine or possibly sixty-three Justices over the next century.[132] Critics worry that these repeated fights over the Court could lead the public to see the Court as a "political football"—a pawn in a continuing partisan game.[133]

Relatedly, critics of Court packing argue that it would further degrade the confirmation process—a process that has already become a partisan spectacle.[134] There would be significant battles over any Justice added by a Court-expansion measure. And past examples of Court packing would easily become an excuse for blocking the confirmation of any nominee.

Critics of Court packing emphasize that it is hard to predict which forces will find themselves at odds with the Court in the future. At some points in our history, the Court has faced resistance from progressive groups—as illustrated by President Roosevelt's effort to pack the Court in 1937. By contrast, in the mid-to-late twentieth and early twenty-first centuries, the Court was repeatedly attacked by conservatives who objected to the Court's jurisprudence on abortion, school prayer, desegregation, protections for criminal defendants, and other civil rights issues.[135] This uncertainty leads even some who fundamentally disagree with aspects of the current Supreme Court's jurisprudence to believe it is better to preserve

the Court's long-term legitimacy and independence than to open up the Court to be packed by potentially dangerous and even authoritarian political movements going forward.

3. Defending Democracy

Opponents of Court packing emphasize that polls show that large majorities of the public oppose expanding the Supreme Court.[136] For that reason alone, they argue, it is difficult to justify Court packing on grounds that it might serve democratic interests. Moreover, to the extent that one goal of Supreme Court reform is to enhance the power of democratic bodies, Court packing would not serve that end. Expansion would leave the Supreme Court's existing jurisdiction in place, as well as its existing approach to judicial review. An expanded Court could just as easily hold unconstitutional federal and state government conduct as the current Court. In addition, as noted above, given that Court packing could lead to cycles of Court expansion, critics of the measure believe it to be questionable that it would "balance" the Court to more closely align it with popular opinion over time. [137]

Other critics of Court expansion contend that, to the extent it aims to align the outcomes of Court decisions with the policy preferences and values of the country, the reform is misguided and misconceives the role of the Court.[138] They emphasize that no single American public exists and that popular views and opinions are divided across a range of issues the Court addresses. Moreover, opponents contend, some of the Court's most prominent decisions on subjects ranging from school prayer to criminal justice were quite unpopular,[139] and that decisions that meet with considerable political backlash sometimes become "canonical," as with *Brown v. Board of Education.*[140] These critics emphasize that, as *Brown* underscores, the Supreme Court may play its best role in our democracy when it polices the political process by working to ensure that the process is more open and responsive to *all* members of society—whether by helping to dismantle racial segregation; invalidating laws that discriminate upon the basis of gender or sexual orientation;[141] or requiring that each person's vote be given equal weight.[142] Opponents conclude that Court packing would so deeply compromise the Court's legitimacy and independence as to impede its capacity to serve this vital role.[143] In the long run, they argue, putting judges under the thumb of sitting politicians is unlikely to serve the broader interests of a democratic constitutional order. [144]

* * *

As we noted at the outset of this Part, there is profound disagreement among Commissioners over whether adding Justices to the Supreme Court at this moment in time

would be wise. As a Commission we have endeavored to articulate the contours of that debate as best as we understand them, without purporting to judge the weight of any of the arguments offered in favor or against calls to increase the size of the Court.

IV. Other Structural Reforms

At points in history, and in today's debate over Supreme Court reform, lawmakers and commentators have proposed different schemes for altering the composition of the Court beyond its basic expansion. In this Chapter, we focus on three categories of such reforms: proposals that would rotate the Court's membership; proposals that would introduce panels into the Court's decisionmaking; and proposals designed to ensure partisan or ideological balance on the Court.

The first set of reforms would structure the Supreme Court as a shifting or rotating set of nine (or more) Justices from among a larger set of Article III judges. The details of rotation schemes vary, but generally speaking, they would provide that judges rotate between service on the Supreme Court and the lower federal courts. Some subset of these judges would constitute "the Supreme Court" in a given case or controversy, or for designated periods of time.[145]

The second type of reform would have the Justices sit on panels to hear cases. A panel system could take a variety of forms: For instance, one subset of Justices might be entrusted to decide questions falling within the Court's "original Jurisdiction" and another subset of Justices might be empowered to hear appeals (that is, cases reviewing decisions of the lower courts).[146] Or, one subset of Justices might be entrusted to resolve statutory questions and another subset could be entrusted to decide constitutional issues.[147] Or, the Justices might sit in randomly assigned panels on any given case, much like the judges of the courts of appeals today. Such a panel system could be instituted with the Court as currently constituted with nine Justices, or it could be employed as a way to manage the decisionmaking of an expanded Court. In either case, the system could be designed to enable all of the Justices to sit en banc, or all together, to review the decisions of a single panel when necessary.

The final set of reforms would distribute partisan or ideological influence over the Court's composition in an attempt to achieve evenhandedness. One such proposal would authorize each President to appoint two Justices to the Court during a four-year term. Another proposal would design the appointments process to ensure that a roughly even number of Justices would

IV. Enacting Term Limits through Statute

Members of the Commission are divided about whether Congress has the power under the Constitution to create the equivalent of term limits by statute. Some believe that a statutory solution is within Congress's powers. Others believe that no statutory solution is constitutional, or that any statute would raise so many difficult constitutional and implementation questions that it would be unwise to proceed through statute. Opponents of term limits cite these complexities as reasons to eschew term limits altogether.

In this Part, we consider the primary statutory approach and two alternative approaches. In all three proposals, Presidents appoint new Justices in the first and third years of their terms in office. As noted in the introduction to this Chapter, we focus on these proposals to ground our analysis rather than to endorse these proposals over all others. In addition, because the Commissioners are divided as to whether it would be constitutional to implement term limits via statute, we offer what we take to be the best argument for each position but do not seek to resolve the matter. We also examine some of the prudential concerns arising from these proposals. If Congress were contemplating imposing term limits by statute, a constitutional amendment that simply specified the size of the Court might still be advisable, for the reasons discussed above.

The main focus of our analysis is the so-called Junior/Senior Justice proposal. It creates the functional equivalent of term limits by providing that, after eighteen years of service, Justices become Senior Justices and stop participating in the ordinary work of the Court. This proposal features elements common to other proposals that scholars and advocates have offered,[54] and the constitutional issues we discuss here are also common to those proposals. The two alternative solutions—the Original/Appellate Jurisdiction proposal and the Designated Justices proposal—attempt to address potential constitutional problems with the Junior/Senior Justice proposal, but they raise their own sets of constitutional issues.

In all three proposals, Justices would spend an eighteen-year nonrenewable term participating in the ordinary work of the Supreme Court. After that period, they would perform a different or a subsidiary set of duties.

A. The Junior and Senior Justices Proposal

In the Junior/Senior Justice proposal, Congress passes a statute that provides that, after eighteen years of service as a "Junior Justice" deciding cases, each Justice would assume

senior status. Thereafter, these "Senior Justices" would no longer participate regularly in the ordinary work of the Court. But they would perform other duties, including sitting by designation in the lower federal courts and assisting the Chief Justice with administrative duties. Congress could specify these duties by statute, or it could leave it to the Justices themselves to decide on them through an internal rule.[55]

If the duties of Senior Justices were not sufficiently germane to the office of a Supreme Court Justice, the change in duties might amount to appointment to a new office. This would require a new nomination by the President and confirmation by the Senate. However, it is not clear that the germaneness requirement applies to the prospective redefinition of an office. In any case, the Supreme Court's understanding of germaneness appears to be very broad. In *Weiss v. United States*,[56] for example, the Court held that the duties of a military judge were sufficiently germane to the duties of a commissioned officer that the officer could be designated to serve as a judge without going through the appointments process.

The Justices already perform the duties listed above and that would pertain to Senior Justices under the proposal. Current federal law authorizes Justices to sit on circuit courts.[57] And as a historical matter, federal law long *required* the Justices to sit on other federal courts in addition to hearing cases on the Supreme Court. For almost all of the first hundred years of the Republic, Supreme Court Justices "rode circuit": they heard and decided cases in the lower federal courts. With the Judiciary Act of 1801, Congress abolished circuit riding, only to reinstate it in the Repeal Act of 1802 after control of Congress changed hands. The Supreme Court rejected a constitutional challenge to the 1802 Act in *Stuart v. Laird*,[58] in which the challenger sought to reverse a circuit court's judgment partly on the ground that "the judges of the supreme court have no right to sit as circuit judges, not being appointed as such."[59] The Supreme Court responded that circuit riding was so well established that its validity was no longer open to question: "[P]ractice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction."[60] Justices continued to have circuit-riding duties until the late nineteenth century.[61]

Existing practice and precedent offer a model for the types of duties Senior Justices might perform. A federal statute, 28 U.S.C. § 371, provides two options for federal judges, including Supreme Court Justices, who meet certain service and age requirements. They may "retire from the office" under § 371(a), at which point they no longer hold the office of federal judge or Justice but continue to receive an annuity equivalent to their salary at the time of retirement. Or they may "retain the office but retire from regular active service" under § 371(b) and

"continue to receive the salary of the office" if they perform a different set of duties, which they may select from a list set out in later sections. Listed duties include "a caseload involving courtroom participation," "substantial judicial duties not involving courtroom participation," "substantial administrative duties directly related to the operation of the courts," or "substantial duties for a Federal or State governmental entity." For lower court judges, the status created in § 371(b) is usually called senior status.

Under the current rules, judges who take senior status need not sit on any cases at all. They may, however, sit by designation within their own circuit at the discretion of the chief judge or judicial council of their circuit. They may also sit by designation in other circuits at the discretion of the Chief Justice upon presentation of a certificate of necessity by the chief judge or circuit justice of the other circuit. Supreme Court Justices who retire from regular active service (and take the analogue of senior status for lower court judges) are not allowed to participate in any decisions or actions of the Supreme Court, but they may sit by designation in the lower federal courts.[62]

As with a constitutional amendment, drafters of a Junior/Senior Justice statute would have to make decisions about whether it would apply to sitting Justices, when the appointments of term-limited Justices would begin, how to handle vacancies that arose outside of the scheduled process, and whether there should be restrictions on the future employment of former Justices. The discussion of these issues in the constitutional amendment section applies equally to such a statute, with the caveat that applying the statute to sitting Justices might raise additional constitutional questions, as noted below.

1. Constitutional Issues Raised by the Junior/Senior Justice Proposal: The Good Behavior and Appointments Clauses

Article III, Section 1 provides that: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[63] The Appointments Clause of Article II, Section 2 provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . ."[64] The issues raised under these constitutional provisions by any term limits statute are complex, and what follows is a brief review of the relevant considerations. Commissioners disagree about the proper resolution of the questions raised.

Those who believe that the Junior/Senior Justice proposal is unconstitutional start with the Good Behavior Clause, which is conventionally interpreted to give federal judges "life tenure": Federal judges hold their offices for an indefinite period that ends only when they die, voluntarily resign, or are involuntarily removed through the process of impeachment and conviction. Although the Good Behavior Clause does not specify the details of the "Offices" that federal judges hold, the Appointments Clause arguably recognizes a separate office of "Judge[] of the supreme Court" that is different from other federal judicial offices. If so, people who have been appointed to the Supreme Court must remain "Judges of the supreme Court." Those who believe that the Junior/Senior Justice proposal is unconstitutional argue that Senior Justices (who would be barred from participating in the ordinary work of the Court after eighteen years) do not remain "Judges of the supreme Court" in the sense that the Constitution requires. Indeed, given the enormously consequential constitutional decisions of the Court that this Chapter emphasizes, these critics argue it is implausible to claim that individual Justices can be involuntarily removed from most of the Court's constitutional work without being deemed to have lost their "office." In addition, some believe that these specific textual provisions should be understood in the context of more general separation of powers principles, including the principle of judicial independence. Part of the reason the Good Behavior and Appointments Clauses are best understood to deny Congress the power to modify life tenure by statute, in this view, is to protect the structural principle of judicial independence that underwrites Article III of the Constitution.

Proponents of the Junior/Senior Justice proposal believe that Congress may redefine the office prospectively. Thus, for all new appointments made after the statute takes effect, the office of Justice of the Supreme Court would mean serving as a Junior Justice for the first eighteen years and serving as a Senior Justice thereafter. All Justices would have the same duties and powers, but the nature of these duties would change over time. Under this approach, every Justice, unless they retire, would eventually become a Senior Justice if they stay on the Court for more than eighteen years. Note that under the terms of this argument, the statutory changes would not apply to sitting Justices.

The debate hinges on the nature of the "office" of Justice of the Supreme Court that the Constitution creates and whether a statute that contemplates that the Justices' duties will change after eighteen years removes them from that office in violation of the Good Behavior Clause. Proponents, relying on the senior status statute, 28 U.S.C. § 371(b) and (e), conclude that a change in duties does not necessarily involve a change in office because senior status judges still hold their office. For the same reason, they believe that deciding cases is not

essential to continuing to hold office as a federal judge, and that deciding Supreme Court cases is not essential to continuing to hold the office of a Supreme Court Justice.

In support of this conclusion, proponents argue that the Supreme Court approved this system for senior judges in *Booth v. United States*.[65] In *Booth*, a unanimous Supreme Court held that a lower court federal judge who retired under the predecessor of § 371(b) "remains in office" within the meaning of Article III, Section 1.[66] The Court pointed out that senior judges exercise the judicial power of the United States in deciding cases when designated to do so. "It is scarcely necessary to say that a retired judge's judicial acts would be illegal unless he who performed them held the office of judge. It is a contradiction in terms to assert that one who has retired in accordance with the statute may continue to function as a federal judge and yet not hold the office of a judge."[67] On one reading of *Booth,* a statutory change of duties does not remove a judge from office as long as "[t]he purpose is . . . that he shall continue . . . to perform judicial service."[68] The Supreme Court reaffirmed this reasoning in 2003 in *Nguyen v. United States*.[69]

Booth thus distinguishes between a *change in duties*, which is within the power of Congress, and *removal from office* or *reduction in compensation*, which are not: "Congress may lighten judicial duties, though it is without power to abolish the office or to diminish the compensation appertaining to it."[70] Moreover, those who believe statutory term limits are constitutional argue that the reasoning of *Booth* and *Nguyen* also extends to retired Justices. Retired Justices such as David Souter and Sandra Day O'Connor have often participated in courts of appeals decisions pursuant to 28 U.S.C. § 294. When they do, proponents of the Junior/Senior Justice proposal believe they are best understood as having retained their office as Supreme Court Justices because they are exercising federal power and they have not been appointed to any new office. Hence, proponents conclude, Senior Justices retain the office of Justice of the Supreme Court even if their duties have changed and no longer include participation in the ordinary work of the Court. Critics, however, believe that retired Justices still hold federal judicial office, which is required under *Booth* if they are to exercise federal judicial power, but that they do not necessarily continue to occupy the constitutional office of Supreme Court Justice.[71]

Setting *Booth* aside, critics believe that the best understanding of the Constitution forbids the change in duties that the Junior/Senior Justice proposal entails. One constitutional scholar puts the argument this way: "To say there is a particular office of Supreme Court Justice, as opposed to federal judge in general, is to say that the Constitution contemplates some connection between the justices and the work of the Court."[72] On one view, because the Court

is a decisionmaking body in which members participate and deliberate together, the ability to "participat[e] in substantially all the body's final decisions" is a necessary constitutional feature of holding the office of "Judge[] of the supreme Court."[73] Because the Junior/Senior Justice proposal eliminates the right to participate in the Court's decisions after eighteen years, some think it marks a change in office that violates the Good Behavior Clause.

Commentators have also discussed an alternative understanding of what it means to be a "Judge[] of the supreme Court": Instead of participating in substantially all of the Court's final decisions, perhaps each Justice must be able to participate in *an equal share* of the Court's work. There is a sense in which the Junior/Senior Justice proposal establishes equality among the Justices, because each Justice has the same powers for the same period of time. But even so, critics argue that "the proposal is not consistent with the Constitution's idea of a term" (and with the prevailing view that the Good Behavior Clause prevents Congress from imposing straightforward term limits).[74] In the critics' view, Congress cannot establish a time limit after which Justices lose the ability to participate equally in the Court's decisions, even if all Justices are subject to the same time limit.

To the extent that the proponents' argument rests on the precedential authority of *Booth*, critics believe that the precedent is limited. *Booth* involved the Compensation Clause of Article III and the issue was whether Congress could cut the pay of lower federal court judges who had *voluntarily* taken what we now call senior status. As permitted by a 1919 amendment to the Judicial Code, they had chosen to "retire . . . from regular active service on the bench" but had not "resign[ed] [their] office,"[75] and they continued to hear cases or perform other judicial duties. The Court held that Congress could not constitutionally reduce their compensation because they still remained in office and exercised federal judicial power. Thus, critics of statutory term limits argue, *Booth* only holds that when judges *voluntarily* take senior status, but continue to hear cases, Congress may not reduce their compensation under the Compensation Clause. According to critics, it does not follow that Congress can *require* life-tenured Supreme Court Justices to stop participating in the Supreme Court's exercises of judicial power after eighteen years.[76]

Proponents argue that if judges who have elected senior status "[c]ontinu[e] in Office" within the meaning of the Compensation Clause, then a statute requiring judges to take senior status after eighteen years would not deprive them of their "Offices" within the meaning of the Good Behavior Clause. In the proponents' view, moreover, *Booth* and subsequent established practice with respect to retired Justices foreclose the critics' arguments about the essential nature of the offices of "Judges of the supreme Court." According to proponents,

there is no meaningful legal distinction between Supreme Court Justices and other federal judges as to whether they retain their judicial office after senior status, and whether or not that status is voluntarily chosen or imposed by statute. On this view, substantial participation or equal participation in all merits decisions is therefore not "inherent" in the nature of the office of Supreme Court Justice. The critics' assertion to the contrary, proponents argue, is belied by practice.

Critics respond that practice does not support allowing Congress to *mandate* a reduction in duties after a certain number of years. And the fact that our current practices make a reasonable accommodation for voluntary decisions does not mean that those practices establish a general principle that extends to a new set of arrangements in which Justices have no say in the matter.

Indeed, critics believe that the argument from history favors their position. Throughout most of American history, members of Congress have assumed that the only constitutional way to achieve term limits for Supreme Court Justices is through constitutional amendment. Starting as early as 1807,[77] and continuing to the present, more than two hundred proposals have been introduced in Congress to amend the Constitution to establish term limits for Supreme Court Justices or for federal judges more generally—sometimes in conjunction with other changes, sometimes as a stand-alone measure. But the first bill to establish the functional equivalent of term limits by statute was not introduced until 2020.[78] The very idea of mandating term limits by statute is a recent innovation.

B. An Alternative Proposal: Original/Appellate Jurisdiction

An alternative to the Junior/Senior Justice proposal is the Original/Appellate Jurisdiction proposal, under which all Justices continue to hear original jurisdiction cases throughout their tenure in office, but only the nine most junior Justices in service hear cases brought to the Court under its appellate jurisdiction.[79] The Court hears only a small number of cases through original jurisdiction every year. Most cases, and almost all of the controversial cases, come before the Court through its discretionary appellate jurisdiction. In addition to participating in cases involving original jurisdiction, Senior Justices may also perform other duties, as in the Junior/Senior Justice proposal above or under the current retirement statute. This proposal does not separate appellate jurisdiction cases for reasons of efficiency. Rather, the proposal offers another way of creating the effective equivalent of term limits that might avoid some of the constitutional problems of the main proposal.

certiorari jurisdiction did not deprive it of jurisdiction to consider original petitions for habeas. AEDPA would "inform" its consideration of such petitions, the Court said, but not exert a preclusive effect.

The Detainee Treatment Act of 2005, as amended by the Military Commissions Act of 2006, purported to strip all courts of the United States, including the Supreme Court, of habeas corpus jurisdiction in all cases brought by noncitizens being detained as enemy combatants. (Congress instead tried to provide a substitute for habeas corpus: providing the D.C. Circuit with limited review of detention decisions made by non-Article III military tribunals.) But the Supreme Court held in *Boumediene v. Bush*[43] that the withdrawal of habeas jurisdiction violated the Suspension Clause of Article I, Section 9 of the Constitution, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[44] The Court did not opine on jurisdiction stripping outside of the habeas context.

Overall, the Constitution gives Congress power to limit the Supreme Court's appellate jurisdiction. This was the conclusion of the various experts who testified before this Commission on the issue.[45] However, Congress's jurisdiction-stripping power is not unlimited, and neither the Court's jurisprudence nor past practice fully defines its reach or scope. Thus, the constitutionality and policy merits or demerits of jurisdiction-stripping proposals are contingent on the proposals' details. We evaluate those details below.

B. Evaluation of Current Jurisdiction-Stripping Proposals

In this Section, we consider proposals to strip courts of their jurisdiction to review the constitutionality of federal and state legislation. Jurisdiction-stripping legislation might also seek to shield executive action from judicial review, though we are aware of fewer proposals to do so. Our analysis necessarily takes a selective approach, given the many possible kinds of jurisdiction-stripping measures. We focus mostly on issue-specific jurisdiction-stripping legislation that would seek to disempower courts from ruling on a specific law or type of law. Examples include proposals that would bar jurisdiction over challenges to a wealth tax or to a law regulating abortion. We omit discussion of most general jurisdiction-stripping bills, such as those that exclude relatively unimportant cases (as measured by dollar amount, for example) from the federal courts. We do consider general jurisdiction-stripping efforts insofar as they would seek to temper or eliminate the federal courts' authority to declare legislation unconstitutional, and thereby to decrease the courts' power relative to other institutions of government.

In evaluating jurisdiction stripping, we also differentiate among proposals based on the courts they would affect: Some proposals would restrict the appellate jurisdiction of the Supreme Court alone, while leaving lower court jurisdiction intact. Others would withdraw jurisdiction from all federal courts, including the district courts and courts of appeals, while leaving state court jurisdiction intact. Still others would withdraw jurisdiction not only from the Supreme Court, but also from all other federal and state courts. The merits and consequences of each type of proposal would differ, as we explain.

To organize our analysis, we begin by considering the goals of jurisdiction-stripping proposals and the proposals' likely efficacy in achieving those goals. We then consider the consequences that successfully implementing the proposals might have for the functioning of the constitutional system.[46] We defer consideration of the constitutional issues that their enactment would present until Section I.C. We do not evaluate the specific policy goals that any jurisdiction-stripping proposal might serve.

1. Goals and Efficacy

Most prominent jurisdiction-stripping proposals today would shield specific, substantively defined issues, legislation, or policies from judicial review by the Supreme Court, by all federal courts, or by all federal and state courts. The goals of such proposals are overwhelmingly substantive in nature—to protect the particular laws in question from judicial invalidation. Nevertheless, proposals to curb judicial jurisdiction can also have more abstract goals, involving the redistribution of decisionmaking authority within our scheme of government. More specifically, some proponents of jurisdiction stripping regard it as a means of promoting greater democratic accountability by transferring power from the Supreme Court to more democratically responsive institutions.[47]

The Commission does not take a position on the desirability of any particular substantive proposal. These issues are ones over which Commissioners disagree. However, in analyzing the issue of jurisdiction stripping, we are skeptical that jurisdiction stripping could promote meaningful democratic accountability if Congress were to restrict the appellate jurisdiction of the Supreme Court alone.

The reallocation of authority would be most dramatic if Congress were to strip jurisdiction from all courts, including state as well as federal courts, to entertain constitutional challenges to particular substantive legislation. In foreclosing all judicial review of legislation, Congress might be viewed as effectively claiming authority to determine that any covered statutes—such as one imposing a wealth tax or those banning abortions—were constitutionally valid.

Proponents of such legislation, moreover, would likely defend it as enhancing political democracy and accountability by enabling Congress, as a democratically accountable institution, to authoritatively resolve a constitutional issue about which reasonable minds could be expected to differ.[48]

However, the ability of issue-specific jurisdiction-stripping legislation to promote political democracy seems by definition limited, since legislation of this kind would still leave responsibility for the overwhelming bulk of constitutional interpretation in the courts, despite stripping it from discrete contexts. Similarly, general jurisdiction-stripping bills that affect a smaller subset of courts rather than the full set of federal and state courts would have limited effect in enhancing democratic accountability in the domain of constitutional interpretation.

Measures that would restrict the appellate jurisdiction of the Supreme Court alone, for example, would not straightforwardly transfer interpretive authority from the judiciary to Congress or to any other democratically accountable institution. They would instead reallocate power from the Supreme Court to the lower courts. There seems to be little reason to preclude Supreme Court jurisdiction over specific constitutional questions that remain subject to decision by the lower courts. Precluding Supreme Court review alone would do little or nothing to enhance political democracy. Nor would it advance interests in justice or accuracy to permit different courts to issue incompatible rulings on the same substantive constitutional issue with no possibility of Supreme Court review.

Proposals that would withdraw jurisdiction from all federal courts but allow continued adjudication of a constitutional issue in the state courts might more plausibly aspire to promote a democracy-enhancing goal. They would leave responsibility for constitutional decisions in the hands of state judges who are, in many instances, democratically elected or otherwise amenable to the influence of public opinion. By contrast, Article III of the federal Constitution seeks to insulate federal judges from political influence through guarantees of life tenure and protection against salary reduction.

We are uncertain, however, about the precise extent to which a transfer of adjudicative power from federal to state courts would enhance the influence of political majorities over the resolution of constitutional issues. To reach such a conclusion would require resolution of myriad empirical and normative issues. State court judges would remain bound by the Supremacy Clause, which provides that the Constitution is the "supreme Law of the Land" and that "the Judges in every State shall be bound thereby,"[49] but it is not clear whether state court judges would be bound by preexisting Supreme Court precedents speaking to the

constitutional question over which Congress had precluded formal Supreme Court review. If state courts found that prior Supreme Court precedents tied their hands, then this sort of jurisdiction stripping would be limited as a means of promoting democratization of authority over constitutional interpretation. An unintended effect might even be to freeze in place the Supreme Court doctrine on the books at the time of the jurisdiction stripping.

Proposals that would strip the jurisdiction of all courts to rule on the constitutionality of federal (and possibly also state) legislation would undoubtedly have a major effect in allowing Congress and state legislatures to insulate their preferences and judgments of constitutional validity from judicial review. Whether congressional preclusion of all judicial review of specific legislation or policies could fairly be described as injecting political accountability into the process of constitutional interpretation would depend on (a) whether Congress actually purported to conclude that the legislation or policies that it shielded from judicial review were constitutionally valid and (b), if so, whether it took its responsibilities to apply and interpret the Constitution seriously. Some commentators believe that legislatures in countries that do not have judicial review discharge their responsibilities to protect individual rights with impressive conscientiousness.[50] It is also imaginable, however, that legislation precluding all judicial challenges to particular statutes or programs could have the purpose and effect of undermining constitutional rights, because Congress and state legislatures might not feel bound to protect them.

2. Consequences for the Functioning of the Federal System

The systemic consequences of jurisdiction-stripping legislation would similarly depend on the details of any particular measure that Congress might adopt. Legislation that withdrew appellate jurisdiction from the Supreme Court but retained jurisdiction in the lower federal courts and in state courts would obviously diminish the capacity of the Supreme Court to ensure uniformity in constitutional interpretation (and consistency in constitutional outcomes) across federal courts of appeals and state supreme courts. The courts of appeals and state supreme courts could become the courts of last resort with respect to the constitutional status of federal legislation. Thus, a federal statute could be held constitutional by one circuit and unconstitutional by another, with no apex court to resolve the circuit split. We would regard this resulting lack of uniformity on matters of great political or constitutional salience as a significant cost.

In some cases, moreover, the absence of opportunity for appeal to the Supreme Court could result in a single lower court having the capacity to utter the last, controlling word on

an important constitutional issue. This result would occur if, for example, a court of appeals upheld a nationwide injunction against the enforcement of a federal statute or policy based on a constitutional ruling. Partial jurisdiction stripping would thus empower the lower courts.

A statute that simultaneously withdrew jurisdiction from both the Supreme Court and the lower federal courts could have similar effects in producing unreconciled disagreements among state courts about important constitutional issues, leading to variation in the U.S. Constitution's reach and effects. Furthermore, many courts have concluded that state courts lack the power to issue injunctions against federal officials, which would contribute to further disagreement and tension.[51]

A jurisdiction-stripping statute that bars state as well as federal courts from exercising jurisdiction over constitutional challenges to legislation would have even farther-reaching systemic consequences. Whether by accident or design, it would impliedly reject longstanding assumptions about what it means to possess a constitutional right in the United States. More specifically, it would make rights more dependent on legislative exposition, a task that legislatures may not currently be well-positioned to undertake. Legislatures are not currently adept at anticipating all possible future applications of a statute and crafting exceptions for cases that would present constitutional difficulties. It is possible that legislatures might enhance their relevant skills and resources if courts no longer played such a dominant role, for example by expanding legal staff dedicated to constitutional analysis. To the extent that jurisdiction stripping reflects majoritarian impulses while depriving individuals of any right to seek redress in court, it might also make it harder for minorities to vindicate individual rights that, in some instances, are essential to constitutional democracy itself.

A final systemic consequence that merits consideration is the extent to which a particular jurisdiction-stripping measure would tend to contribute to partisan polarization and institutional instability.[52] There is little empirical data on this point.[53] One might worry that the turn by transient majorities in Congress to jurisdiction stripping to insulate their preferred policy objectives from judicial scrutiny could give rise to escalating jurisdiction stripping as control of Congress changes hands, ultimately resulting in serious abuses of power. Against this worry, it might be argued that the fact that Congress has long had this tool at its disposal and has used it infrequently suggests this concern is more hypothetical than real. However, we cannot rule out the possibility that in the current era, lawmakers might resort to jurisdiction stripping with increasing frequency in partisan political struggles.