Connecticut Debate Association
October 9, 2021

This House would reduce the power of the Supreme Court.

The Supreme Court shall be expanded and its powers limited.

The New York Times, By Barry P. McDonald, August 4, 2021

(This comes from an article that consists of suggestions for Constitutional amendments.)

The framers of the Constitution could not have seen how much the less representative branches of our democratic republic — the executive (elected by nonpopular Electoral College vote) and the judiciary (appointed for life) — would hold a grip on governing power.

This has left Americans engaged in bitter power struggles to control the presidency and Supreme Court.

This structural problem cannot be fixed by one constitutional amendment, but it can be alleviated by a change to the structure of the judiciary: This amendment would return important policy decisions to the people rather than have them decreed by life-appointed judges devising vague constitutional provisions. (On the right, think guns and campaign financing; on the left, abortion and same-sex marriage.) The amendment would create institutional constraints on the Supreme Court designed to foster impartial and restrained decision-making — enforcing the clear commands of the Constitution and leaving debatable issues to the democratic process.

A democracy-enhancing amendment would achieve four goals: increase the size of the Supreme Court, which would make it more difficult for partisan voting blocs to form and require broader decision-making consensus (and create an even number of seats to force compromise, if necessary); reasonably limit terms of justices to increase the frequency of nominations, lower the political heat over them and foster greater judicial modesty; require a supermajority of justices to invalidate laws as unconstitutional; and require that qualified potential justices be appointed from various geographic regions to better reflect the diversity and interests of the American people.

PROPOSED AMENDMENT:

SECTION 1: THE SUPREME COURT WILL CONSIST OF 16 JUSTICES, WITH A SEAT ADDED TO THE COURT EVERY TWO YEARS UNTIL THAT NUMBER IS REACHED. SEATS ON THE COURT SHALL BE ALLOCATED IN A GEOGRAPHICALLY UNIFORM MANNER ACROSS THE UNITED STATES, WITH SUCH MANNER TO BE REASONABLY DETERMINED BY CONGRESS.

SECTION 2: NO JUSTICE APPOINTED AFTER THE ADOPTION OF THIS AMENDMENT SHALL SERVE MORE THAN 15 YEARS. UPON SUCH ADOPTION, SITTING JUSTICES WILL SERVE FOR NO MORE THAN 35 YEARS FROM THE DATE OF THEIR APPOINTMENT TO THE COURT.

SECTION 3: NO LAW SHALL BE DECLARED UNCONSTITUTIONAL BY THE COURT EXCEPT BY A VOTE OF AT LEAST TWO-THIRDS OF JUSTICES PARTICIPATING IN A CASE.

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Experts Debate Reducing the Supreme Court's Power to Strike Down Laws

The New York Times, By Charlie Savage, June 30, 2021

In its first public hearing with witnesses, President Biden's reform commission largely stayed away from the idea of expanding the court.

Legal experts clashed on Wednesday over the wisdom of proposals to reduce the Supreme Court's power to strike down democratically enacted laws, as President Biden's commission on judicial branch overhauls held its first public hearing with witnesses.

But they spent limited time on the highest-profile idea associated with the panel — the push by some liberals to expand the Supreme Court, in response to Republican hardball moves that have left it with a 6-to-3 conservative majority even though Democrats have won the popular vote in seven of the past eight presidential elections.

While House Democrats have introduced a bill that would add four seats to the Supreme Court, it stands scant chance of being enacted under present political conditions.

Instead, the hearing largely focused on other ideas. In particular, the witnesses extensively debated ideas for limiting the court's power of judicial review — such as by stripping its jurisdiction to hear constitutional challenges to particular laws, requiring a supermajority vote of the justices to strike down an act of Congress, or giving lawmakers the power to

override rulings invalidating statutes.

Nikolas Bowie, a Harvard Law School professor, denounced the power of the Supreme Court to strike down laws enacted by Congress as an "antidemocratic superweapon" and said, "I encourage you to advocate for reforms that will abolish the practice."

Mr. Bowie cited a 2012 ruling that hobbled Congress's expansion of Medicaid coverage to millions of people, and one in 2013 that struck down a key part of the Voting Rights Act that had protected minority voters in jurisdictions with histories of discrimination. He noted that many foreign democracies function without a high court that wields such sweeping power.

But Noah Feldman, another Harvard Law professor, warned against reducing the Supreme Court's power of judicial review. While he agreed that the court had sometimes issued bad decisions, he argued that reducing judicial checks on the legislative and executive branches would pose greater risks.

"We should not fall into the habit of assuming that judicial review is antidemocratic — judicial review is counter-majoritarian," Mr. Feldman said. He added that if the United States has chosen to use the Supreme Court to protect democratic principles like equality and liberty, then it "is a democratic institution" even though justices are not elected.

Mr. Biden has charged the 36-member, ideologically diverse commission — which is led by Bob Bauer, an N.Y.U. Law professor who served as a White House counsel under President Barack Obama, and Cristina M. Rodríguez, a Yale Law School professor and former Justice Department official — with producing a report assessing ideas for changing the court.

The commission traces back to a wave of anger among liberals when Senate Republicans rushed to confirm President Donald J. Trump's nominee to fill the seat left vacant by the September 2020 death of Justice Ruth Bader Ginsburg, even though they had refused to hold a hearing or vote on President Barack Obama's nominee to fill the seat vacated by the February 2016 death of Justice Antonin Scalia on the argument that it was an election year.

Rather than clearly endorse or repudiate the court expansion proposal just ahead of the election, Mr. Biden punted in October by saying he would create a commission to assess potential changes to the judiciary. While the panel is not charged with making specific recommendations, its report may help set the stage for debate in Congress.

A few witnesses addressed court expansion, generally either arguing that it would delegitimize the court and inevitably lead to further expansions by Republicans, or portraying it as a "break glass" measure of last resort to deal with a hypothetical court that is consistently out of step with overwhelming popular opinion.

Among the ideas the witnesses engaged with more deeply: whether to change how the court selects which cases to hear in order to address the plummeting number it has decided in recent years, whether to reduce its ability to decide major legal issues without full briefings and arguments, and whether to replace lifetime tenure for Supreme Court justices with term limits.

"In an age of increasing polarization, there's no question that Supreme Court nominations have become an almost entirely partisan affair, and this is going to potentially cause grave harm to the court's legitimacy," said Maya Sen, a Harvard public policy professor. "And I strongly encourage members of this commission to consider term limits, which could represent a powerful tool to reverse this trend."

The term-limit discussion focused on a proposal to move to staggered, 18-year terms with seats regularly coming open every two years, rather than only when a justice dies or chooses to retire, perhaps coupled with mandating up-or-down Senate confirmation votes on nominees.

Such a change might help reduce the escalating partisan warfare over confirmations, argued Michael McConnell, a retired appeals court judge who is now a Stanford University law professor. He traced the fights back to the bitter confirmation battle in 1987 that defeated President Ronald Reagan's conservative nominee, Robert Bork.

Rosalind Dixon, a University of New South Wales law professor, argued that 18-year terms were too long. Pointing to other countries that restrict the service of high-court judges, through either term limits or mandatory retirement ages, she said their terms are shorter. In Germany, for example, they are 12 years, she said.

Even as the debate played out, Samuel Moyn, a Yale Law School professor — who backed the idea of shifting power away from the court to "remedy a democratic deficit in our constitutional law" — suggested that the law professors on Mr. Biden's commission and composing most of its witnesses should be humble about the scope of their influence. Ultimately, he said, the Constitution gives Congress broad authority to design the judiciary.

"Supreme Court reform is a political choice," he said. "The Constitution leaves it up to us — not on this Zoom call, but as a people always experimenting with what it should mean to rule ourselves instead of letting others do so even when it saves ourselves some trouble. Pending enough political support, the choice to rule ourselves more democratically rather than continuing the transfer of excessive power to the Supreme Court is our best choice."

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Judicial Review Solves a Problem of Power

The Atlantic, By Conor Friedersdorf, JUNE 10, 2019

A progressive's call to undermine it is shortsighted.

Progressives do not want Donald Trump, Mitch McConnell, or other powerful Republicans to ignore the Supreme Court when they disagree with its rulings. Doing so would upend a constitutional order that has prevailed for more than 200 years.

Under judicial review—the courts' ability to check the constitutional validity of laws that legislative majorities pass and executives sign—the postwar Supreme Court has repeatedly thwarted democratic majorities. It has struck down Jim Crow segregation, prohibitions on interracial marriage, laws denying the right to an abortion, laws prohibiting sodomy, and laws forbidding same-sex marriage.

Yet last week, the New York Times columnist Jamelle Bouie, anticipating a progressive majority governing alongside a conservative Supreme Court, argued that SCOTUS has always been political, that "no reform short of ending the power of judicial review will disentangle it from ordinary, partisan politics," and that progressive leaders should mimic past presidents "who resisted the Supreme Court's claim to ultimate interpretive authority," so that they can advance economic policies that Chief Justice John Roberts may find unlawful.

Like Ben Shapiro, who in 2005 published a Townhall column calling for an end to judicial review, Bouie marshals populist rhetoric about "the prospect of government by justices" that ostensibly "threatens to undermine both the court and our democracy." In his telling, a conservative court will force Americans "to conform to their particular understanding of the Constitution despite equally valid alternatives," as if there is any way of avoiding contested constitutional outcomes.

It may, he says "shackle future majorities for decades to come."

It is "a problem of power," he writes, and to solve it, adding extra SCOTUS justices to dilute the conservative majority, itself a radical proposal, isn't enough.

Calls to flout judicial review made more sense in the era of Dred Scott or the Civil Rights Act of 1875.

Today it is shortsighted and reckless, as anyone old enough to have lived through 9/11 and its aftermath ought to know. "Ending the power of judicial review would leave legislators free to do whatever they want, restrained only by their own consciences and their fear of political repercussions," Jacob Sullum points out at Reason. "Depending on who happens to be in power, legislators might enact Bouie's policy agenda, or they might endorse torture, approve warrantless searches, abolish the presumption of innocence, close down newspapers that criticize them, or exclude immigrants based on their race."

It's a problem of power—Bouie is proposing to remove a significant check on its abuse.

His talk of government by unelected judges that would shackle the majority also elides the degree to which the progressive coalition favors many judicially imposed, antimajoritarian outcomes on a wide range of policy matters.

Trying to paint the court's conservative majority in a negative light, Bouie complains that Chief Justice Roberts "dissented in the case that legalized same-sex marriage, voted to allow the death penalty even in cases where it might cause excruciating pain and suffering, and wrote the majority opinion upholding Trump's travel ban despite its clear roots in the president's anti-Muslim bias."

But Roberts grounded these opinions in democratic concerns. In the case that legalized same-sex marriage, Roberts's dissent complained that the Supreme Court was "stealing the issue from the people," and that the majority's opinion used judicial review to overturn duly enacted laws in states including Michigan, Ohio, Kentucky, and Tennessee.

In the death-penalty cases, Bouie wanted the court to use judicial review to overrule state laws, prohibiting some executions regardless of the democratic will.

Americans were fairly evenly split on the travel ban—depending on the wording used in each poll. Bouie wanted the court to prohibit its implementation through judicial fiat.

The Supreme Court ought to thwart the will of democratic and legislative majorities by fiat whenever a law or an action violates the Constitution. Justices will not always interpret the Constitution correctly, of course. Judicial review has led to wrongheaded results in the past and will again in the future. But the check it imposes on the tyranny of majorities is indispensable.

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The Supreme Court Is Coming Apart

The New York Times, by David Leonhardt, Sept. 23, 2018

It's not just the Kavanaugh mess. Over the long term, the court risks a crisis of legitimacy.

The Supreme Court is an unusual institution, because it somehow manages to be both majestic and intimate.

The court is housed in a marble temple with soaring columns, and it has made some of the most consequential decisions in American history. But it feels like a simpler institution than either the presidency or Congress. Its arguments are not televised but are open to the public. Spectators are often surprised by the courtroom's modest size. Outside the court, the nine justices tend to lead more normal day-to-day lives than senators, governors or other grandees.

This combination has long allowed the court to embody the American ideal of democratic government — powerful yet humble — and many people have revered it as a result.

But today the Supreme Court is in trouble. And the issues are much larger than the mess of Brett Kavanaugh's confirmation. Absent some kind of course correction, the court risks a crisis of legitimacy.

There are two fundamental problems. The first is that the court has become an intensely partisan institution that pretends otherwise.

The founders envisioned the justices as legal sages, free from the political scrum. They receive lifetime appointments to protect their independence. The justices themselves cherish this image. John Roberts, the chief justice, has famously equated himself with an umpire who merely calls balls and strikes. The comparison is meant to suggest that justices don't have their own opinions: They just follow the law.

But this is laughable. In almost every major decision last term — and many others over the past decade — the justices divided neatly along partisan lines. The five justices chosen by a Republican president voted one way, and the four chosen by a Democrat voted the other. If the justices are umpires, it sure is strange that Republican and Democratic umpires use vastly different strike zones.

This partisanship has turned each court vacancy into a pitched battle. It's why Republican senators took the extreme step of denying Barack Obama the ability to fill a seat. It's why the Kavanaugh fight feels so momentous. It's why liberals care so much about Ruth Bader Ginsburg's health.

And the biggest damage from the court's partisanship doesn't even come from the nasty confirmation battles. It comes from the fact that a major American institution defines itself in an evidently false way. Hypocrisy isn't good for credibility.

The second major threat to the court comes from the radicalness of Republican-appointed justices.

It's true that the Democratic-appointed justices are more reliably liberal than in the past. There are no more conservatives like Byron White (a John Kennedy appointee) or Felix Frankfurter (a Franklin Roosevelt appointee). But the court's Democrats still range from moderate to progressive. Stephen Breyer is only somewhat to the left of White and well to the right of Sonia Sotomayor, academic analysis shows. Merrick Garland, Obama's jilted nominee, was also a moderate.

There are no more Republican moderates. With Anthony Kennedy gone, every Republican justice is on the far end of the spectrum — among the most conservative since World War II. Kavanaugh would almost certainly join them, as would any other Trump nominee.

Already, the Roberts court has often shown itself to be zealously activist. It has thrown out bipartisan legislation on voting rights and campaign finance. It has overruled decades-old precedents on labor unions, antitrust and criminal justice.

In the future, there is real reason to worry that the court will block government action on the two biggest threats to this country's security and stability: climate change and stagnant middle-class living standards.

So what can be done about the court? There are no easy solutions.

Term limits for justices would be the best change. They would eliminate the high-stakes randomness of replacing justices and better connect the court to the long-term will of the people. With 18-year term limits, each four-year presidential term would automatically come with two appointments. Enacting this change is an enormous political lift, yet it's worth trying.

A less palatable option is for Democrats to expand the court when they next control Washington. Given the outrage of the Garland nomination, Democrats are right to be thinking about this. But I hope they don't have to resort to it, because

it would risk a tit-for-tat battle that could do even more damage.

Finally, there is the possibility that Roberts comes to understand the peril to the court. He clearly cares about the court's credibility, and he has shown flashes of judicial modesty, respecting both precedent and Congress. The biggest example was his split decision on Obamacare. More often, though, he has chosen radical activism.

Roberts is never going to turn into a liberal. But it is reasonable to hope that he will show more of the small-c conservatism that the Supreme Court needs. If he allows it to become an all-powerful version of Congress where the legislators happen to wear robes, both his legacy and the country will suffer.

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The Supreme Court Needs to Be Cut Down to Size

The New York Times, JAMELLE BOUIE, Opinion Columnist, July 23, 2021

On Tuesday, the Presidential Commission on the Supreme Court of the United States sat for its third public meeting. Formed in April by executive order, the 36-member commission exists to hear arguments for and against Supreme Court reform and to analyze and appraise the merits of specific proposals.

President Biden did not run on court reform and rejected "court packing" during the 2020 campaign. But after Donald Trump and Mitch McConnell pushed Amy Coney Barrett through the Senate in a hurried bid to replace Ruth Bader Ginsburg before the presidential election, he could not resist calls from within the Democratic Party to do something.

The commission is Biden's something, and it isn't much to look at. Not only is it not meant to make recommendations or suggest a course of action, but its members come from the upper echelon of the legal elite — exactly the people most comfortable with the institutional status quo on the Supreme Court.

But this doesn't mean the commission is worthless. It may not offer needed reforms, but in its three meetings so far it has already served as a valuable platform for scholars with a cleareyed view of the court and a powerful critique of its current role within the nation's constitutional order. If nothing else, the commission has helped elevate important ideas and perspectives the broader public needs to hear. It is interesting, illuminating and worthy of your attention.

In his written testimony, for example, Nikolas Bowie, an assistant professor of law at Harvard, takes aim at the idea of the Supreme Court as a defender of the rights of vulnerable minorities. That, he says, is a comforting myth. The truth is much uglier. "As a matter of historical practice," Bowie writes, "the Court has wielded an antidemocratic influence on American law, one that has undermined federal attempts to eliminate hierarchies of race, wealth, and status."

This is most apparent, Bowie notes, in the court's relationship to America's racial caste system. The 1857 case Dred Scott v. Sandford was one of the first decisions to invalidate a federal law and circumscribe Congress's ability to act, in this case asserting that the Constitution forbade the nation's representatives from restricting the spread of slavery or giving Black Americans the rights of citizenship.

"We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution," read the opinion of the court, "and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."

In the 1876 cases, United States v. Cruikshank and United States v. Reese, the Supreme Court forbade Congress from protecting the voting rights of Black Americans in the face of violent mobs and state disenfranchisement. In the Civil Rights Cases of 1883, it forbade Congress from outlawing discrimination in public accommodations, and in the infamous Plessy v. Ferguson in 1896, the court upheld the doctrine of "separate but equal."

Even the vaunted Brown v. Board of Education demonstrates the extent to which the court has been a hindrance in the fight for equal rights. Here's Bowie,

Brown is not an example of the Supreme Court disagreeing with Congress about the constitutionality of a federal law. To the contrary: the Brown Court enforced the Ku Klux Klan Act of 1871, one of the federal laws the Supreme Court had earlier gutted, but which nominally prohibited southern states from discriminating against Black people.

With Brown, in other words, the court was finally stepping out of the way of Congress after it had, as Bowie notes, "directly contributed to the rise of Jim Crow."

In a similar vein, Vicki C. Jackson, also of Harvard Law School, puts the antidemocratic elements of the court — specifically the indefinite tenure of Supreme Court justices — in the context of a democratic deficit within the entire constitutional system.

"It is an unstable situation for a party supported by a minority of the population to be able to control the Senate, frequently the presidency, and the Supreme Court," she writes, "If citizens cannot look to elections, nor to the Courts,

nor to the amending process, to achieve a federal government that is in broad terms responsive to democratic views, what remains are methods that should trouble all who believe in the rule of law."

And in his testimony, Samuel Moyn, a professor of law and history at Yale, urges the commission to focus less on the "maintenance or restoration of institutional legitimacy" to the Supreme Court, and instead support reforms that "curtail and manage the institution's power" and enhance "democratic authority over law."

Moyn writes that the "American higher judiciary has too much authority, allocated and arrogated, and this fact has been grievous for our national political experience" and that "rather than continuing a regime of politics by means of the higher judiciary, Americans deserve a more democratic politics for themselves."

Put a little differently, the public and its representatives can and should extend its authority over the Supreme Court, not by "packing" the court or imposing term limits, but by marking the boundaries of its autonomy. Using their broad power under the Constitution to shape and structure the judiciary, federal lawmakers can strip jurisdiction from the court, require a supermajority for decisions that would invalidate an act of Congress or, as Moyn writes, Congress could also reassign finality of decision to itself through a jurisdictional statute that makes Supreme Court invalidations of federal law provisional unless and until Congress passes on the result (or fails to exercise its option to do so in some time frame).

The point of all this is both to disempower the court and to make it less central to our politics and our constitutional order. This idea, that the court should work with our democratic aspirations and not against them — and that we should not hesitate to change and experiment with the court should we find ourselves struggling against it — is practically verboten among mainstream politicians. But it is a critical part of our political heritage, stretching back to President Thomas Jefferson's battles with a Federalist-dominated judiciary at the start of the 19th century.

Supreme Court reform is not on the horizon. There is no popular movement to reshape the institution, and too many on the elite end — on both sides of the political divide — are too invested in the status quo. But this commission, for whatever its worth, has opened a space within the political mainstream for serious consideration of major reform to the federal judiciary. It may not mean much now, but change has to begin somewhere.

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Is the Conservative Movement for Supreme Court Reform Dead?

National Review, By J. J. MCCULLOUGH, July 7, 2018

It shouldn't be.

As more and more of our political debates are settled by the judiciary, it has become uncontroversial to describe the Supreme Court as a political institution. We understand the ideologies of Supreme Court judges to be broadly continuous with the ideologies of the elected politicians who appoint and confirm them, and thus the rulings they generate. The consensus of the political class regarding Supreme Court appointments is that presidents should seek politically simpatico justices.

Justice Clarence Thomas was the last high-court nominee confirmed by a Senate of a different party from the president who nominated him. Liberal justices Ginsberg, Breyer, Sotomayor, and Kagan were appointed by Democratic presidents and ratified by a Democratic Senate; conservatives Roberts, Alito, and Gorsuch were appointed and approved by Republicans.

From one perspective this looks petty and partisan. Yet such ideological sorting also concedes the court's unglamorous modern reality. If judges are to be summoned to address matters that in an earlier era would have been managed by elected politicians — health-care policy, abortion, etc. — then it is democratically defensible for those judges to represent clearly and accurately the divide of American thought.

Justice Anthony Kennedy helped delay an inevitable conclusion, in which one side of America's ideological divide would eventually secure clear control of the Supreme Court. During his 2006–2018 peak of influence, four conservative justices faced down four liberal ones, and Kennedy's esoteric personal philosophy broke the ties in various, often seemingly random directions. But with Kennedy now gone, and a Republican president and Senate eager to confirm his successor, we are set to enter a new age in which the Supreme Court will likely be understood as more overtly political than ever. Having secured America's most-sought political prize, Republicans will shift their priorities defensively and opportunistically, as victorious political factions always do.

One likely casualty will be the death of the conservative movement for Supreme Court reform. During the Kennedy era, and the even more unsatisfying age before that, conservatives railed in countless books, columns, and speeches against the Supreme Court's power, partially on the basis of politics, but not entirely so. The Court, they argued, was too

powerful, being the only major constitutional institution whose decisions were not subject to the equivalent of a veto or veto override. As human lifespans increased, they said, the lifetime terms for Supreme Court justices were similarly metamorphosing into something grotesque and monarchical. Cloistered justices enjoyed terms that meandered across decades. A president who left office a generation ago, or even died, could still be exerting ideological influence on the country, fulfilling Thomas Paine's famous warning about "the vanity and presumption of governing beyond the grave," which he called "the most ridiculous and insolent of all tyrannies."

Supreme Court reform is a good idea whose time never seems right, because the court's powers have made the stakes so impossibly high.

Now poised to enjoy a 5–4 majority of the justices, conservatives will, one imagines, quickly abandon their irritation with the Court. But the accuracy of the Right's institutional critiques will not cease to be valid simply because the Court's outcomes will now be more politically agreeable. The debate over how to best hold accountable a Supreme Court that cannot help but act as a political institution remains valid, even when — perhaps especially when — conservatives are less interested in it.

There's certainly little reason to believe a newly desperate Left will fill the reformist void competently. Already, there appears to be a conscious progressive effort afoot to mainstream the idea that the next Democratic president and Senate should engage in FDR-style court packing, expanding the SCOTUS bench with additional judges via ordinary legislation. Their political calculation holds blunt control of the Court to be the only thing that matters; they are mostly disinterested in any deeper critique of its authority in our constitutional system.

Supreme Court reform is a good idea whose time never seems right, because the court's powers have made the stakes so impossibly high. When you're in government, as Republicans are now, the temptation is to not look a gift horse in the mouth. When you're in opposition, as Democrats are now, calling a time out to question the rules of the game looks weak and cynical. Conservatives do have an advantage, though, in that their pedigree on this issue is more established, which makes an era like this the best test of their seriousness.

Like Rand Paul and Marco Rubio, I'm personally a fan of term and/or age limits for Supreme Court justices, which already exist at the state level everywhere except Rhode Island. Implementing some sort of mechanism through which the Constitution's insistence that justices "shall hold their offices during good behavior" can be enforced would probably be advisable as well, in order to give this most-unchecked branch some degree of ongoing oversight, beyond the extraordinarily high bar of judicial impeachment. In National Review, Ted Cruz once argued on behalf of a constitutional amendment forcing justices to run in a national retention election every eight years. A Senate vote of confidence on the same schedule could be equally effective.

A more rightward Supreme Court will yield many good things, yet political enthusiasm for outcomes should not supersede all other concerns. Supreme Court reform remains a worthy cause because it will help rein in an institution prone by design to imperial overreach, prevent the normalization of a black-robed House of Lords, and lessen exaltation of the president on the basis of his ability to nominate members of this aristocracy.

Our political understanding of the Supreme Court shifted dramatically last week. The case against its current institutional form did not.

J. J. MCCULLOUGH — J. J. McCullough is a columnist for National Review Online and the Global Opinions section of the Washington Post.

Yes, it's time to reform the Supreme Court — but not for the wrong reasons

Salon, by ERIC J. SEGALL, DECEMBER 4, 2018

Everyone agrees the Supreme Court wields too much power. But almost all the reform ideas are deeply flawed

In the wake of the national nightmare known as the Brett Kavanaugh confirmation hearings, we have seen an avalanche of proposals by Supreme Court watchers, pundits and experts with the express purposes of weakening the court and trying to turn down the political temperature of future confirmation battles. Most of these court-altering suggestions have come, not surprisingly, from the left. After all, as many have observed, the nation's highest court is likely to be a conservative bulwark for the next 20 to 40 years. These proposals include ending life tenure, reforming recusal practices, requiring a supermajority vote to overturn laws and even stripping the Supreme Court of jurisdiction over various controversial areas of constitutional law.

But weakening the court because of its current political makeup is looking for answers in all the wrong places. This country needs to restructure the U.S. Supreme Court not because it is too conservative, too liberal or even too moderate. We need to change the court because it wields far too much power and influence regardless of which political side benefits from its decisions. In 2012, I made many of the suggestions listed above in the final chapter of my book "Supreme Myths: Why the Supreme Court is not a Court and its Justices are not Judges." At the time, most liberals

strongly opposed these ideas while conservatives were slightly, though not dramatically, more sympathetic. Now the urge to reform comes mostly from the left -- but not for the right reasons.

Why do we allow judges to overturn laws voted on by the people? The original reason, and still today the most persuasive rationale, for allowing federal judges to invalidate laws was stated succinctly by Alexander Hamilton in the most important Federalist Paper discussing judicial review, No. 78:

The courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

In a representative democracy, governed by a written constitution, it makes perfect sense for an independent judiciary to enforce that document's written limitations when they are violated by the other branches of government. But notice the limitation on this power articulated by Hamilton; before judges should overturn legislation there must be an "irreconcilable variance" between the law and the Constitution. Another way that some people at the time thought of this standard was that judges should act with humility and modesty when reviewing legislative acts, and only invalidate them in cases of "clear error."

What the founding fathers did not anticipate was that the Supreme Court would over time assume the authority to use vague constitutional limitations, which in most situations are more accurately called aspirations, to legislate morality for the American people. Where the Constitution places a clear limit on our structure of government, such as that the president must be 35 years old, or that all impeachments must begin in the House and be tried in the Senate, it makes sense to speak of "irreconcilable variances." And where the history behind a vague text is clear, such as the First Amendment's obvious prohibition on prior restraints, it might make sense to allow the court to strike down what Jed Rubenfeld has called "paradigm" constitutional violations. But conceding all that is worlds away from allowing the Supreme Court to use imprecise constitutional text and contested historical accounts of that text to resolve many of our country's most difficult and controversial issues of social, economic, educational and political policy.

From 1903 to 1936, the court took it upon itself to limit progressive calls for state and federal laws to regulate workplace safety, minimum wages, overtime rules and a myriad of other statutes dealing with workers' rights. The justices struck down hundreds of statutes dealing with these issues despite no clear text or history supporting that laissez-faire ideology. All that overreaching led to a liberal backlash and the court's retreat from the economic arena but not before many laws were overturned due to political differences, rather than violations of text or history.

The court mostly stayed out of politics between 1936 and the early 1960s except for ending formal legal segregation in public schools (substantial de facto segregation of course exists to this very day). But starting around 1963, the liberal and aggressive Warren and early Burger courts issued a series of social and moral decisions redefining how much of the country governed itself, culminating, of course, with Roe v. Wade in 1973. As my new book, "Originalism as Faith," points out, the justices didn't even try in many of these cases to support their opinions through constitutional text or history. Many of these decisions, such as Griswold v. Connecticut, which overturned a state law banning contraception devices, were less than 10 pages long and read more like edicts than judicial opinions.

There was a predictable backlash to the court's many liberal opinions and once conservatives seized the court, they too started overturning laws without any showing of an "irreconcilable variance" between the laws they were striking down and the Constitution. The court has inserted itself over the last 50 years in our country's politics by invalidating laws dealing with affirmative action, gay rights, difficult free speech questions impossible to resolve on the basis of text or history, voting rights, districting maps (one person, one vote), congressional power to enforce the 14th Amendment and numerous other disputes that in most countries would be voted on by the people, not left to the political preferences of life-tenured judges. Where the Constitution is not clear, and history contested, the justices have no legal basis to choose one outcome over the over other than their own collective ideologies.

All this explains why the confirmation process for Supreme Court justices has become so political and heated. They are not judges resolving legal disputes but a political veto council exercising authority over all 50 states and the federal government. Conservatives are happy with the court today, but there will come a time when either liberals will be in charge again or the political backlash to the court's decisions will severely hurt the Republican Party, as the backlash to Roe has damaged Democrats. Either way, these political swings hurt democracy and our ability to govern ourselves.

We need a bipartisan effort to restructure the Supreme Court of the United States to weaken it for all time. Term limits would help, but are not nearly enough. Structural reform to make it harder for the court to overturn laws is essential, whether it takes the form of a supermajority voting requirement or jurisdiction-stripping, meaning limiting the court's

influence in areas where text and history cannot resolve hard constitutional questions.

I proposed these limitations years before the court turned sharply to the right but it is even more important today, not because of that turn but because an overly ideological court, in either direction, not only distorts our politics for the worse but allows unelected, life-tenured judges to dictate policy even when no reasonable person could argue there is an "irreconcilable variance" between the decisions made by elected officials and our written Constitution. Giving that authority to judges, liberal, conservative or moderate, is not only inconsistent with the original plan of those who first governed our country, it is a terrible idea -- as we learn every time our polity must endure yet another confirmation process nightmare.

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