

COURT PACKING: A THREAT TO THE SUPREME COURT'S LEGITIMACY

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, INTELLECTUAL
PROPERTY, ARTIFICIAL INTELLIGENCE, AND
THE INTERNET

OF THE

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COURT PACKING: A THREAT TO THE SUPREME COURT'S LEGITIMACY

Thursday, May 21, 2026

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND
ARTIFICIAL INTELLIGENCE, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC

The Committee met, pursuant to notice, at 10 a.m., in Room 2141, Rayburn House Office Building, the Hon. Darrell Issa [Chair of the Subcommittee] presiding.

Members present: Representatives Issa, Jordan, Fitzgerald, Cline, Gooden, Kiley, Lee, Fry, Baumgartner, Schmidt, Johnson, Raskin, Lofgren, and Ross.

Mr. ISSA. The Subcommittee will come to order. Without objection the Chair is authorized to declare recess at any time. We welcome everyone here today on today's hearing on Court packing. Without objection, Mr. Schmidt will be able to participate in today's hearings for the purpose of questioning the witness if a Member yields him time for that purpose.

I will now recognize myself for an opening statement. Although the title today is Packing of the Supreme Court, it is more than that. This Committee, this Subcommittee's primary goal is to empower the Supreme Court to do its job, while retaining its independence. That often means that we are being asked to consider pay, benefits, budget, and in fact as there is a need to lobby from this body to the Court.

We do so with the recognition that the U.S. Supreme Court, unlike any other court in history, is in fact a court of independent decision. The Supreme Court has that critical constitutional responsibility. Unlike branches one and two, which move back and forth with the will of the people. The Constitution itself created a court empowered to act as a check against the other branches.

As a check against the branches that reflect the current will of the people. Throughout our history the U.S. Supreme Court has been at its best when it told the reflection of the will of the people of the moment that they could not do what they wanted to do. It is likely that at its worst, when it succumbed to the fever of the crowd, or the feeling of the moment.

Whether that is *Dred Scott*, as may be brought up today, or in fact questions of locking up Americans in concentration camps during World War II. We have had a long history of being proud of the Court the vast majority of the time. That doesn't change the fact that the Court must reflect that which the American people can in fact live with.

No question at all that the Court moves at a slow pace, as the American people come along sometimes behind them. The Court has delivered wins and losses for both political parties, not just throughout history, but throughout the last nearly two years. The Court at our founding was different than it is today only in one major sense.

It was viewed as the second court, meaning the U.S. Supreme Court justices rode circuit, the U.S. Supreme Court justices were effectively the Appellate Court, in addition to being the single Supreme Court, as our country grew, that changed.

Whether or not the American people anticipated in the Constitution the fact that the population would go from single digit millions to 350 million, and likely to double again in the next century, they did create the ability under the Constitution for the high court to remain supreme, while lower courts have been created by this very Committee.

Democrat leaders have threatened specific justices by name, slandered family members and justices, called for all manner of laws explicit to undermine the Court's power under the Constitution. I have not been the greatest student of history, but I strongly suspect there were times when the other party did so, whether that party was the Republican party or the Whigs, politicians have been unhappy with the Court for the Court doing its job in a professional manner.

The witness that our Democrat Minority has chosen to invite today to this very hearing demonstrates my point. Many of the writings of Professor Bowie clearly anticipates the view of the Democrat party, that which tends to be more populous, more the will of the moment, more will of the people, that in fact democratizing the Supreme Court has been well written by our witness.

I take no exception to his words, these are his words, his studies, and he is well written. The question is today, in this hearing and beyond, will the U.S. Congress side with the idea that we should be more democratic in our third branch, or that our third branch should remain more independent, less if not completely outside the will of the people's will of the moment as reflected through either direct will of Americans, or through their elected representatives in both Article I and Article II.

It appears the Democrats believe the Supreme Court should be prohibited from second guessing any Federal laws, unless the Court is unanimous. Allowing any single justice, no matter how radical, to veto the entire Court. I find that interesting, and I reject it in every possible way. Democrats believe Congress should decide when the Supreme Court meets, delay when it hears arguments, force justices to resume the pre-Civil War practice of riding Circuit and acting as District judges.

Democrats seem to believe that they should regulate what anyone can ask any court to do, blocking Americans from seeking relief

from Supreme Court for unconstitutional laws. It appears Democrats believe the Court should be packed with more justices who share their views. If written testimony of these views on behalf of the Democratic colleagues isn't enough for the Committee, Professor Bowie has written extensively in support of anti-Supreme Court views.

I now ask unanimous consent to enter into the record many of these articles, I will not go through them one by one, but I will make sure they are available to all the Members. These are in fact the writings of Professor Bowie, who I have in fact given a brief synopsis of. Without objection, so ordered.

In contrast, Republicans understand that even the Court rules against us, that is its constitutional work. We can revise laws and even amend the Constitution if we want to. As I told to some of the individuals in the audience today, we have one of our original constitutional amendments still before the American people.

If the American people so chose thorough its States, they could choose to go from the House of Representatives having 435 Members determined by the body itself, or we could have over 6,000 members if we simply enacted one of the original constitutional amendments, the 12th of the 12 original. That would in fact cap at 60,000 the number of people each member on the dais could represent.

At the time of our founding, it seemed like a good idea to at least some of our founders. If anyone on the dais here today thinks that a baseball park filled with House Members pushing their thumbs up and down would give us more democracy, or if any of the witnesses think that it is more than just a relic of the past, I ask them all to please consider opining on it during the hearing.

With that, I would like to recognize the Ranking Member of the Subcommittee, Mr. Johnson, for his opening statement.

Mr. JOHNSON. Thank you, Mr. Chair, and thank you to witnesses for your appearance today. Last summer Kash Patel took a taxpayer funded snorkel tour of Pearl Harbor, one of our Nation's most hallowed grounds, while the cost of living for Americans skyrocketed. The Trump Administration just created a taxpayer funded 1.8 billion dollar relief fund for the January 6th insurrectionists, and others, in exchange for dropping a 10 billion dollar personal lawsuit that he filed against the IRS, which he controls.

He is doing this while millions of Americans are losing their health insurance. President Trump is blocking clean energy projects for his fossil fuel campaign donors, while the rest of us pay, and pay, and pay at the pump more and more every day. What do these facts have to do with this hearing?

On its face, the daily demonstrations of incompetence and corruption of the Trump Administration have little to do with the Supreme Court. If you look closer, these stories mirror the far Right, and how far the far Right has created a corrupt U.S. Supreme Court that too often works for the corporations, the billionaires, and the oligarchs at the expense of the American people.

For decades MAGA Republicans have systematically chipped away at the impartiality of our third branch. They have already delegitimized our judiciary, yet they now stand before the American people pretending to be guardians of judicial integrity. Today's

blatant attempt to rewrite history would be laughable if the consequences were not so dangerous for our democracy.

History matters, the American people deserve to understand how we got to this moment. To understand how we got here, we must follow both the money and the machinery behind the modern conservative legal movement. The Roberts' court is the culmination of a plot that began 50 years ago.

In the early 1970s, soon to be Justice Powell wrote quote,

The judiciary may be the most important instrument for social, economic, and political change.

He said that to reassert corporate power over the needs of the individual. This Powell memo set off a decades long crusade by Republicans to concentrate power in the hands of the few at the expense of the many.

Wealthy donors and corporate interests spent billions of dollars to reshape the judiciary in their image. Nowhere is the success of this decades-long effort more visible than at the U.S. Supreme Court. Where a carefully appointed conservative super majority, a MAGA super majority, now delivers the MAGA conservative outcomes this movement spent billions of dollars to achieve, and achieve they did.

In the last several years the Roberts' Court opened the floodgates to unlimited dark money in our political system. Empowering billionaires and oligarchs like Elon Musk, the Koch brothers, Leonard Leo, Harlan Crow, and other powerful special interests to reshape the Court, and drown out the voices of ordinary Americans.

This Court has decimated reproductive freedoms that generations of women fought to secure. Stripping away rights that millions of Americans relied on for nearly half a century. It has granted Trump vast immunity, placing him virtually above the law. Now, the Court has put the nail in the coffin of the Voting Rights Act, dismantling protections that generations of Americans fought, marched, and died for.

Abraham Lincoln once said this government cannot endure half slave and half free. Yet, that seems to be the vision for America that Chief Justice Roberts and the conservative super majority on the Supreme Court envision. Where some enjoy easy access to the ballot, others are forced to overcome legal barriers designed to make our voices quieter.

Our Nation is now in Jim Crow 2.0. We are a Nation where the right to vote once again can be diluted, restricted, or simply ignored, and where the voices of rich and powerful people carry more weight than the voices of ordinary Americans, but particularly Americans who look like me. Our 250-year experiment in self-governance can only succeed if Americans decide that the clock has run out on the far Right's attempt to overturn our democracy.

We can either sit back as our Supreme Court continues to act without any restraints, or checks and balances, or we can do something about it. The American people deserve accountability for the damage that has been done. The American people deserve a judiciary that serves our democracy, not a narrow ideological agenda that only benefits the rich and powerful.

I want to thank the witnesses again for being here, I am looking forward to a discussion about how to ensure that our democracy

serves everyone, all of us, not just the wealthy, and the well-connected few.

With that, I yield back.

Mr. ISSA. The gentleman yields back. We now recognize the Chair of the Full Committee, Mr. Jordan, for his opening statement.

Chair JORDAN. Thank you, Mr. Chair.

I want to tell you, Gorsuch, I want to tell you, Kavanaugh, you have released the whirlwind, and you will pay the price. You won't know what hit you if you go forward with these awful decisions.

Chuck Schumer, March 4, 2020.

Highest ranking Democrat in our government threatening a separate and equal branch of government.

If you doubt it is a threat, just remember where he made that statement, on the steps of the Supreme Court. That threat began the six-year assault on the Court by the Democrats. It started with that threat, then you had Senator Markey say the Court is illegitimate. Well, how is that? Every justice I know in the Court was actually confirmed by the U.S. Senate, that is how our Constitution works, how could it be illegitimate?

Senator Markey thought it was. Then, we went to something that has never happened, the Democrats leaked the *Dobbs* opinion in 2022. You talk about trying to undermine a separate and equal branch of government, start leaking the opinions, that's what they did, which resulted in protests at justices' homes, which by the way the Justice Department at the time under the Biden Administration and Attorney General Garland refused to enforce the law.

The 18 U.S.C. 1507 says you can't protest at a judge's home, and they refused to enforce the law. Which of course led to some crazy guy going to Justice Kavanaugh's house with the design to kill a Justice of the Supreme Court. Then, of course, we had all the hearings by the Democrats when they were in charge attacking Justice Thomas and attacking Justice Alito.

We had a hearing where a guy came in and lied about Justice Alito and said he leaked some document, which go back and watch the hearing, definitely a lie by this guy. Why do they do it? Why do they do it? To concoct some basis for packing the Court. Now, they are saying it again, time to pack the Court. By the way, why do they want four justices, four new justices on the Court?

Why not one, why not two, why not three, and why not five? Why do they want four? Because it is a six three majority for conservatives, a six three majority for people who actually interpret what the Constitution, the law says, versus making it up as you go, and making some new policy. They want four because they want a seven-six majority, plain and simple, raw political power.

They have been willing to do almost anything, threaten the Supreme Court on the steps of the Supreme Court, leak opinions, bring witnesses in to lie about justices, that is why this hearing is important. Frankly, I hope we move the constitutional amendment on the floor, I hope there is a vote, and we will see if these guys want to keep the Court at nine, which it should be, it has been there for what, 160 years or something?

This whole Carville was talking about it, former Vice President Harris is, they are all talking about it, the Ranking Member is

talking about it, we have got to pack the Court. Why, why? Because they don't like the decisions that this good Court is giving this country. Thank the Chair for this hearing, thank our witnesses for being here, I look forward to hearing your testimony.

I yield back.¹

Mr. ISSA. The gentleman yields back. I now recognize the Ranking Member of the Full Committee for his opening statement.

Mr. RASKIN. Thank you very much, Mr. Chair. I suppose that Court packing, like justice itself, lies in the eye of the beholder. There are many different kinds of Court packing. Here is one, when Justice Scalia died in February 2016 when Barack Obama was President, Senator Mitch McConnell announced 10½ months before the Presidential election that the Senate would not be considering any replacement.

The Judiciary Committee would not have any hearing, there would be a vote in Committee, and there would be no vote on the floor. When people asked why, that makes no sense to hold the Supreme Court seat open, to hold that vacancy open for nearly a year, he said it was too close to the next Presidential election, and the people should decide.

Of course, the people had decided in electing Barack Obama to one of those genuine, bona fide four-year terms in office, like every other President. Well, we have got a controlled experiment about what would happen, because that was held open, Merrick Garland was nominated by Barack Obama, and was left twisting in the wind for nearly 11 months after the death of Justice Scalia.

Then Trump, when he got in was able to nominate Neil Gorsuch to the seat, his first week in office, and that seat was open for 422 days. Mitch McConnell bragged about it, calling it the most consequential decision of his entire public career. Of course, it cemented the rapid movement of the Supreme Court to the Right, to incarnate the MAGA agenda on the Supreme Court.

Here is what happened when Ruth Bader Ginsberg died, now she died on September 18, 2020. Close to the next election, which was less than two months away, that early voting had started in a lot of the States. It wasn't even two months away, and then the Democrats asked Mitch McConnell, some reporters asked Mitch McConnell, well of course you are not going to have hearings, or vote, or anything are you?

He laughed it off, he laughed off the suggestion that they would maintain the same rule that they had used to block Merrick Garland and President Obama from having a seat. Then, they rammed through the nomination of Amy Coney Barrett within two months, consolidating the Right wing, antichoice, anti-environmental regulation, antilabor, antivoting rights, antidemocracy majority on the Supreme Court.

Had the original McConnell rule been applied, or even a reasonable approach taken with just a few weeks before the election, that Supreme Court seat would have been filled by President Biden, not by Donald Trump. Biden won that election by the way, by more than seven million votes if you are interested in what the people want, 306 to 232 in the electoral college.

I know some people came down to overthrow the election, attack our police officers to accomplish a political coup to deny that, but

that is what happened. Right there we have got two seats officially stolen by Mitch McConnell and the Republican Senate, giving them a six–three mega court, with a majority of the court now made up of nominees of Presidents who lost the popular vote.

Roberts, Alito, Gorsuch, Kavanaugh, and Amy Coney Barrett, all nominated to the Court by Presidents who lost the popular vote. Now, if you don't believe that this Supreme Court has conceived, and achieved a remarkable transformation in constitutional jurisprudence, ethics, and behavior on everything from abortion, to voting rights, to political-corruption cases, then you don't have to believe me, or you don't have to believe your own eyes.

Just listen to Donald Trump, who openly says it is really OK for them to be loyal to the person that appointed them to almost the highest position in the land, a Justice of the U.S. Supreme Court. He berates and vilifies justices and judges up and down the Federal system who disagree with him, or who he feels have been insufficiently robotic in their loyalty to the MAGA agenda.

It is true he doesn't want a justice loyal to the people, as the good Chair of the Subcommittee says, or the Constitution. He wants a Supreme Court loyal to him, and whatever is going to advance his interests, his money, his family, and his corporations. He has got a Supreme Court majority so robotically loyal that they will pluck a doctrine out of thin air.

Nothing to do with originalism, nothing to do with textualism, out of thin air to insulate the President from liability for felony crimes committed in office. We went for more than two centuries without any President ever claiming the right to commit crimes under his office and not to be prosecuted for it, but here we are today.

The Supreme Court, we must acknowledge, has been a profoundly conservative, reactionary institution for the vast majority of our history. What did the Supreme Court ever do for enslaved people between the founding and the Civil War? Nothing, other than in 1857 in the *Dred Scott* decision cement their subjugation into place.

Saying that the African slave and his descendants have no rights a White man is bound to respect in any way. Then even after the Civil War, after the passage of the 13th, 14th, and 15th Amendments drawn from the blood, sweat, and tears of the Union, and the people who fought to defend our country against the Confederacy, the Supreme Court gutted the meaning of the reconstruction amendments in the civil rights cases.

Then, in 1896 in *Plessy v. Ferguson* constitutionalized the reign of Jim Crow, separate but equal. We have a couple decades around the Warren Court, maybe the first few years of the Burger Court, where the Supreme Court acted on the side of the people. *Brown v. Board of Education*, striking down American apartheid, the White primary line of cases, *Terry v. Ohio* and *Roe v. Wade*.

It didn't last long before it all sank away with the Rehnquist Court, and the Roberts' court. Now they have returned to the historic baseline of political White supremacy. They wiped out our Voting Rights Act, first in *Shelby County v. Holder* in 2013, and a couple months ago in the *Callais* decision.

We are about to see, they are not going to be able to accomplish it all in 2026, but by 2028 we will probably see all White Congressional delegations from the deep South, wherever the Republicans control the State legislatures. That is Court packing, that is political packing by a packed Supreme Court.

The Court today has a legitimacy crisis, not just because of the way it has been composed, stacked, packed, gerrymandered, and divided by Mitch McConnell, who laughs about it, he thinks it is funny what they did. Why do some people want 13 circuits, Mr. Chair, 13 members of the Court?

You don't need a conspiracy theory for that; there are 13 Federal circuits in America. Traditionally the Supreme Court has been made up of the number of justices equal to the number of circuits. We have got 13 circuits, but we only have nine justices. That means that under the best of circumstances, four entire Federal regions, four Federal circuits will be left out completely.

It is much worse than that today, because we have got five justices from New York City alone, one for each borough. You are telling a majority of the people who live in a majority of the States that they can't find anybody qualified to serve on the Supreme Court. That is the answer to that particular question.

We have got a complete structural, ethical, and jurisprudential crisis in the Supreme Court, whose name is in the gutter because of these terrible decisions that they keep issuing. Like the overthrow of *Roe v. Wade* and *Planned Parenthood v. Casey*, the complete construction out of thin air of immunity of Presidents to commit felony crimes while in office, and so on.

I hope that this Court will do its best to try to behave like a Supreme Court, but there are things that we can do, and I introduced one bill yesterday called the SCOTUS Act, and the SCOTUS Act is creating a new way for a cert to be granted, because this Supreme Court is obviously acting like a legislature.

They set up an agenda where they want this case about the Voting Rights Act, they want to destroy it. Now, it is time for us to overthrow abortion rights, we are going to take that case. A lot of countries don't leave the agenda setting authority on the court itself, and certainly we should not leave it in the hands of this Supreme Court.

It belongs with the 13 Federal circuits, we should have a panel made up of the Chief Judge of each Federal circuit, or their designee if they want another judge to do it, and they should decide when there is a meaningful circuit split, or a Federal question that should go up to the Supreme Court. This Court obviously cannot be trusted with that agenda setting authority.

Let us begin to create a real Supreme Court in the country by moving in this direction. I thank you, Mr. Chair.

I yield back to you.

Mr. ISSA. I thank the distinguished Member from Maryland, your length of time as a professor shows in the history dating back to 1929 when the Tenth Circuit was created. Can I just ask one question as a point of inquiry? Are you saying that the circuits should push involuntarily to the high court the cases they should take?

Mr. RASKIN. Not involuntarily, we should setup a new system where cert is granted by a cert panel that is made up of 13 judges,

the lead judges of each Federal circuit in the country, and those would be the cases that go to the Court, instead of the Court determining like a legislature what bills it wants to bring up to overthrow this or that particular policy, or law they don't like.

Mr. ISSA. Interesting, I look forward to seeing your bill for that.

Mr. RASKIN. I will get it to you, I will get you a copy right now.

Mr. ISSA. I thank the gentleman. Without objection, all other statements will be included in the record. We would now like to introduce our panel.

Mr. Louis Capozzi is the Solicitor General of Missouri. He previously worked in private practice at Jones Day, growing up in Cleveland, that is a household word I appreciate. Has served as an Adjunct Professor at the University of Pennsylvania Carey Law School.

He clerked for Justice Neil Gorsuch, and Judge Wilkinson on the Fourth Circuit Court of Appeals, Judge Anthony Scalia on the Third Circuit Court of Appeals. Thank you, and welcome.

Professor William Ross, Mr. Ross is the Albert P. Brewer Professor of Law and Ethics at Stanford University Cumberland School of Law.

Professor Ross teaches courses on professional responsibility, civil procedure, constitutional law, and American legal history.

Mr. Gene Schaerr is a partner at his own firm of Schaerr Jaffe LLP, where his practice focuses on civil appellate matters. He has argued seven cases before the U.S. Supreme Court, and previously was Chair of the U.S. Supreme Court and Appellate Practice Group at Winston and Strawn.

He is a constituent of our Ranking Member in Maryland, and perhaps will be able to answer the Ranking Member's questions in full.

Professor Nikolas Bowie, Mr. Bowie is the Louis D. Brandeis Professor of Law at Harvard University. Professor Bowie teaches courses on Federal constitutional law, State constitutional law, and local government law.

We welcome our witnesses here today, and as is the rule of the Committee, I would ask all our witnesses to rise to take the oath, and raise their right hand. Do all of you solemnly swear or affirm under penalty of perjury that the testimony you are about to give will be true and correct to the best of your knowledge, information, and belief, so help you God?

Let the record reflect that all witnesses answered in the affirmative, you may be seated. I know all of you are learned, and have certainly watched us on C-SPAN intently in the years leading up to this. I have to say for the record that your entire statements will be placed in the record, and that what you say in your opening statement preferably will be abbreviated portions of it, or extemporaneous.

Most importantly your entire written statement will be placed in the record. The five-minutes in an opening statement can be either similar or dissimilar, it is your choice, but we do ask you to stay as close as you can to those little timers that tell you your time is coming close to an end, and then eventually that it has ended.

With that I would ask Mr. Capozzi to begin. OK, now this is a major test, even Members of Congress get it wrong, so we will test

each of you for your ability to get the mic on and then back off again. This is your second chance, sir.

STATEMENT OF LOUIS J. CAPOZZI, III

Mr. CAPOZZI. Chair Issa, Ranking Member Johnson, Chair Jordan, and Ranking Member Raskin, thank you for the opportunity to testify today. I will do my best to turn the mic on for the rest of the hearing. The framers of the Constitution guaranteed the Supreme Court's independence because they understood that independent courts are essential to the rule of law.

The Supreme Court's insulation from partisan politics preserves its ability to adjudicate disputes on what the law requires, not the fleeting goals of political actors. Nevertheless, at various points in our history, partisans have proposed reforms that would undermine the Supreme Court's independence, with Court packing being the obvious example.

Today I urge Congress to reject proposals to interfere with the Court's independence. I would like to start by emphasizing what is at stake. The Supreme Court, as with all courts, relies on respect for its judgments. This critical respect did not arise automatically. As Justice Breyer has explained, during the 19th century an independent judiciary was more an aspiration than a reality.

As an illustration Justice Breyer pointed to President Andrew Jackson's infamous refusal to respect the Supreme Court's decision in *Worcester v. Georgia*, which led to the removal of the Cherokee from their Native homeland. Fortunately, by the 20th century respect for the Supreme Court became firmly entrenched.

Thus, despite Southern efforts to resist desegregation, State officials eventually followed the Court's orders to do so. Today we take it for granted that government officials will follow the Supreme Court's orders. That could change if politicians interfere with the Supreme Court's independence.

That is why I am alarmed by the current trend of attacking the Supreme Court's legitimacy. Even on their own terms, the trending criticisms of the Supreme Court make little sense. First, critics frequently claim that the Supreme Court consistently rules in favor of President Trump and Republicans, but this is not true.

During his first term the Supreme Court ruled against President Trump in several crucial cases, including on rescinding DACA, adding a citizenship question to the 2020 census, and allowing subpoenas of the President's personal financial records. The Supreme Court has also not hesitated to rule against President Trump early in his second term.

For example, the Court struck down the President's tariffs, prevented him from deploying the National Guard in major cities, and barred the removal of Lisa Cook from the Federal Reserve. Another common attack on the Supreme Court's legitimacy is that it has been more willing to overrule precedent than in the past.

A quick look at history refutes this proposition. During the 1930s and 1940s the Supreme Court revolutionized constitutional law, and allowed for the massive growth of the Federal Government. The Warren Court also regularly covered precedent, and dramatically overhauled many areas of the law. For example, in *Reynolds v. Sims*, the Supreme Court restructured State legislatures across

the country, finding the State's equivalents of the U.S. Senate unconstitutional.

Compared to its predecessors, the current Supreme Court overrules precedents at a slower pace. Indeed, the Supreme Court has conspicuously declined to overrule precedent in several recent important cases, including *Fulton v. City of Philadelphia*. At the same time the Supreme Court can and should overrule precedent when it believes a past decision was wrong, with *Brown v. Board of Education* being an obvious example.

The Supreme Court continues to strike a balance between preserving precedents and correcting its mistakes, just as it has always done. As solicitor general of Missouri and a recent Supreme Court clerk, I can attest the Supreme Court is working exactly as it should be. The Supreme Court derives its legitimacy from the fact that it is not a partisan institution.

No political group gets everything it wants there, disagreeing with the Court's decisions is no excuse to threaten judicial independence, a cornerstone of our republic that took centuries to build. I urge Congress to continue its tradition of respecting the Supreme Court's independence. Thank you again for your invitation to be here today, I look forward to your questions.

[The prepared statement of Mr. Capozzi follows:]

WRITTEN TESTIMONY – MISSOURI SOLICITOR GENERAL LOUIS CAPOZZI

HEARING BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
Subcommittee on Courts, Intellectual Property, Artificial Intelligence, and the Internet

May 19, 2026

I. Introduction

Chairman Issa, Ranking Member Johnson, and distinguished members of the Subcommittee, thank you for the opportunity to appear before you this morning.

In Federalist 81, Alexander Hamilton responded to objections raised against the structure of the federal judiciary under the proposed Constitution. These objectors argued that, instead of creating an independent Supreme Court, the Constitution should vest the judicial power in a component of Congress—as Great Britain did with its House of Lords. This would, they argued, allow Congress to remedy decisions of the lower courts that it perceived as incorrect.

We should be grateful that our Constitution’s framers rejected that approach. They understood that an independent Supreme Court was essential to the rule of law. The Supreme Court’s insulation from partisan politics preserves its ability to adjudicate disputes on what the law requires, not the fleeting goals of political actors.

Nonetheless, at various points in our history, partisans have proposed reforms that would undermine the Supreme Court’s independence—with court packing being the obvious example. Thankfully, past American statesmen were wise enough to reject such proposals. Today, I urge Congress to do the same.

II. The Supreme Court’s ability to command respect for its judgments has been a centuries’ long effort.

I’d like to start by emphasizing what is at stake. The Supreme Court, as with all courts, relies on respect for its judgments. This critical respect did not arise automatically. As Justice Breyer has explained, during the nineteenth century, “an independent judiciary was on occasion

more an aspiration than a reality.”¹ As an illustration, Justice Breyer pointed to President Andrew Jackson’s infamous refusal to respect the Supreme Court’s decision in *Worcester v. Georgia*—leading to the removal of the Cherokee from their native homeland in Georgia and enduring the forced march to Oklahoma dubbed the Trail of Tears.²

Fortunately, by the twentieth century, respect for the Court became firmly entrenched. Thus, despite southern efforts to resist desegregation, state officials eventually followed the courts’ orders to do so.³ This was possible only because respect for the Supreme Court’s authority had grown substantially since the mid-1800s.

Today, Americans take it for granted that government officials will follow the Supreme Court’s orders. But that could change if politicians keep trying to undermine the Court’s legitimacy. If too many come to view the Supreme Court as a partisan actor rather than a neutral arbiter of the law, losing parties will be tempted to disregard court orders. If that occurs, an essential underpinning of our constitutional government will be lost.

That is why I am alarmed by the current trend of attacking the Supreme Court’s legitimacy. But even on their own terms, the current criticisms of the Supreme Court make little sense.

III. The Supreme Court does not favor President Trump.

First, critics frequently claim the Supreme Court consistently rules in favor of President Trump. But this is false. During his first term, the Supreme Court ruled against President Trump in several crucial cases—including on rescinding DACA, adding a citizenship question to the 2020 Census, and allowing subpoenas of the President’s personal-financial records.⁴

¹ Stephen Breyer, *Judicial Independence: Remarks by Justice Breyer*, 95 GEO. L. REV. 903, 906 (2007).

² *Id.*

³ See *Cooper v. Aaron*, 358 U.S. 1, 8–9 (1958).

⁴ See, e.g., *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1 (2020) (finding rescission of DACA arbitrary and capricious); *Dep’t of Commerce v. New York*, 588 U.S. 752

The Supreme Court also has not hesitated to rule against President Trump during his second term. For example, the Court struck down the President's tariffs, prevented him from deploying the National Guard in major cities, and barred the removal of Lisa Cook from the Federal Reserve.⁵

At the same time, the Supreme Court upheld several of the Biden Administration's controversial policies—including his refusal to detain illegal immigrants at the border and a COVID vaccine mandate for healthcare workers.⁶ No presidential administration in modern history can seriously claim that it has been treated differently than the rest. Each administration has signature policies that are challenged and upheld, and each has policies that the Supreme Court finds unlawful. This is as it should be.

IV. The Supreme Court's treatment of its own precedent is in line with history.

Another common attack on the Supreme Court's legitimacy is that it has been more willing to overrule precedent than in the past. A quick look at history refutes this proposition. During the 1930s and 1940s, the Supreme Court revolutionized constitutional law and allowed for the massive growth of the federal government.⁷ The Warren Court regularly overruled precedent and

(2019) (initially rejecting citizenship question for 2020 Census); *Trump v. Mazars USA, LLP*, 591 U.S. 848 (2020) (allowing congressional subpoenas of President Trump's personal financial records); *Trump v. Vance*, 591 U.S. 786 (2020) (allowing state criminal subpoena of President Trump's personal financial records).

⁵ *Learning Res., Inc. v. Trump*, 146 S. Ct. 628 (2026) (invalidating tariffs President Trump imposed under IIEPA); *Trump v. Illinois*, 146 S. Ct. 432 (2025) (per curiam) (preventing deployment of National Guard in Illinois); *Trump v. Cook*, 146 S. Ct. 79 (2025) (refusing to immediately stay lower court order reinstating executive branch official fired by President Trump).

⁶ See, e.g., *United States v. Texas*, 599 U.S. 670 (2023) (holding that States do not have standing to challenge President's arrest or prosecution policies in immigration context); *Biden v. Missouri*, 595 U.S. 87 (2022) (upholding vaccine mandate for healthcare workers); *Biden v. Texas*, 597 U.S. 785 (2022) (allowing Biden Administration to terminate Trump Administration immigration policy); *Murthy v. Missouri*, 603 U.S. 43 (2024) (finding plaintiffs lacked standing to challenge alleged social media censorship during COVID-19 pandemic).

⁷ See, e.g., Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459, 462–63 (2001).

dramatically overhauled many areas of the law.⁸ For example, in *Reynolds v. Sims*, the Supreme Court restructured state legislatures across the country—finding the States’ equivalents of the U.S. Senate unconstitutional.⁹

Compared to its predecessors, the current Supreme Court overrules precedent at a *slower pace*.¹⁰ Indeed, the Supreme Court has conspicuously declined to overrule precedent in several recent, important cases.¹¹ But at the same time, the Supreme Court can and should overrule precedent when it believes a past decision was wrong—with *Brown v. Board of Education* being an obvious example.¹² The Supreme Court continues to strike a balance between preserving precedent and correcting its mistakes—just as it has always done.

V. Conclusion: The Supreme Court and its judgments demand respect.

As Solicitor General of Missouri and a recent Supreme Court clerk, I can attest that the Supreme Court is working exactly as it should be. The Supreme Court derives its legitimacy from the fact that it is not a partisan institution—no political group gets everything it wants there. This is inherent to a healthy legal system. Disagreeing with the Court’s decisions is no excuse to threaten judicial independence—a cornerstone of our Republic that took centuries to build. I urge Congress to continue its tradition of respecting the Supreme Court’s independence.

Thank you again for your invitation to be here today. I look forward to your questions.

⁸ Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 397 (2007).

⁹ *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

¹⁰ See, e.g., Jonathan H. Adler, *Still the Stare Decisis Court (At Least For Now)*, Volokh Conspiracy (2025), <https://reason.com/volokh/2025/10/20/still-the-stare-decisis-court-at-least-for-now/>.

¹¹ See, e.g., *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021); *Gamble v. United States*, 587 U.S. 678, 707–10 (2019).

¹² See, e.g., *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 484, 494–95 (1953).

Mr. ISSA. Thank you, sir. We now recognize Professor Ross. OK, you get two chances too. Don't feel bad, like I say, we have had senators not be able to get it right, sir.

STATEMENT OF WILLIAM G. ROSS

Mr. ROSS. Chair Issa, Ranking Member Johnson, Chair Jordan, and Ranking Member Raskin, and the distinguished Members, thank you very much for inviting me to testify here today. I am here to testify in opposition to proposals to expand the number of U.S. Supreme Court Justices, and to provide historical perspectives about so called Court packing.

Increasing the Court's size for political reasons could diminish judicial independence, and interfere with separation of powers, because it would permit the President and the Senate to manipulate the outcome of judicial decisions by appointing additional justices who would be expected to conform to the political predilections of the President and his or her party.

Moreover, the prospect of Court packing could intimidate justices, and influence the Court's decisions. The Court's independence from political pressure and intimidation has helped to ensure its ability to protect the civil liberties of Americans in countless cases involving racial, religious, political, and ethnic minorities whose rights were ignored or impugned by Congress, the President, and State governments.

Similarly, the Court generally has protected the liberties of speech, press, religion, and assembly more faithfully than have the President, the Congress, or the three branches of State government. A politically motivated increase in the number of justices could also erode public respect for the Court, since it would exacerbate the growing tendency of Americans to believe that the Court's decisions are guided by political prejudices, rather than by constitutional principles.

Advocates of Court packing claim that the appointment of additional justices, presumably by a Democratic President, would restore balance to a Court the conservatives have allegedly high-jacked. How and where would Court packing end once it began? Court packing is a game that both parties can play. If a Democratic President could obtain a liberal majority on the Court by appointing additional justices, a subsequent Republican President could restore a conservative majority by appointing still more justices.

It is therefore clear that both parties and both conservatives and liberals should have compelling reasons to fear and oppose Court packing. Tampering with the size of the Court also is ill advised because the nine member Court is deeply rooted in tradition and is based on practical considerations.

Supreme Court justices and legal scholars have tended to agree that nine is the ideal size of the Court, since that is large enough to distribute the Court's heavy workload, and provide a range of viewpoints, but small enough to promote collegiality, and efficient deliberation. Increasing the Court's size could impair the Court's ability to function effectively.

In particular, an increase in justices would provide individual members with less time and opportunity to ask questions during oral arguments, and to participate in the Court's conferences. It

could also dilute the clarity and force of the Court's opinions by increasing the number of concurring opinions.

As Chief Justice Charles Evans Hughes in opposing Franklin Roosevelt's ill-fated Court packing plan in 1937, quote,

There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced, and to decide. The present number of justices is large enough so far as the prompt, adequate, and efficient conduct of the work is concerned.

Although advocates of the Court packing contend that the Court's new conservative majority should not frustrate the programs of the other two branches of government, it is the very role of the Court to filter political agendas through a constitutional lens, tethering the Court to the President and Congress contravenes the fundamental concept of separation of powers.

The Court often has fulfilled its most important function when it has overturned unconstitutional legislation. Although proponents of the Court packing also argue that the present Court is out of step with public opinion, the Court throughout its history has broadly remained within the general parameters of public opinion, even during periods when it has a distinctly liberal or conservative tinge.

Justices are keenly aware that, as Alexander Hamilton wrote in the *Federalist*,

The Court has neither the power of the purse, nor the power of the sword, and that its decisions are ultimately dependent upon the good will of the coordinated branches of government and the American people.

Since Court packing proposals jeopardize the Court's integrity and independence, it is my hope and expectation that Americans today will reject such interference with the Court just as they did in 1937. Thank you.

[The prepared statement of Mr. Ross follows:]

COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE COURTS, INTELLECTUAL PROPERTY, ARTIFICIAL INTELLIGENCE, AND THE INTERNET

Hearing on “Court Packing: A Threat to the Supreme Court’s Legitimacy”

TESTIMONY OF WILLIAM G. ROSS

Introduction

My name is William G. Ross. I am the Albert P. Brewer Professor of Law and Ethics at the Cumberland School of Law at Samford University in Birmingham, Alabama, where I have taught since 1988. My courses include Constitutional Law and American Constitutional History.

I offer this testimony for two purposes. First, I will provide historical perspectives about various movements during the past two centuries to curtail the institutional powers of the United States Supreme Court and will explain why such movements have failed. Second, I will offer historical perspectives about proposals to increase the number of Supreme Court Justices and explain why I oppose such legislation.

I base my testimony upon my studies of organized efforts to change the political direction of the federal courts by curtailing or altering their institutional powers or enlarging the size of the Supreme Court. I have published several books and articles that address this subject, including *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (Princeton University Press, 1994). That book includes a chapter about President Franklin D. Roosevelt’s ill-fated effort in 1937 to “pack” the Court by adding six Justices, an episode that I also analyzed in a chapter of another of my books, *The Chief Justiceship of Charles Evans Hughes, 1930-1941* (University of South Carolina Press, 2007). I also addressed Court packing in an article, “The Role of Religion in the 1937 Court Packing Controversy,” 23 *Journal of Law and Religion* 629-72 (2007-08). My other relevant publications include “The Resilience of *Marbury v. Madison*: Why Judicial Review Has Survived by Many Attacks,” 38 *Wake Forest Law Review* 733-92 (2003) and “Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail,” 50 *Buffalo Law Review* 483-612 (2002).

I have expressed opposition to Court packing in solicited testimony I submitted in 2021 to the Presidential Commission on the Supreme Court of the United States, and in a commentary in the online journal *JURIST*, “Court Packing: As Perverse Today as it Was in 1937” (May 21, 2021).

Court-curbing movements in American history and why they have failed

Judicial review has been a source of perennial controversy ever since *Marbury v. Madison*, the celebrated 1803 decision in which the U.S. Supreme Court established the principle that the Court could review the constitutionality of federal legislation, a doctrine that the Court later extended to state legislation and the decisions of state courts. Throughout the past two centuries, various persons and political movements have proposed a multitude of measures to curtail judicial review. These include bills to permit Congress to re-enact legislation that the Court has nullified; limit judicial review to decisions that have the support of a super-majority of Justices (ranging in various proposals from six to a unanimous nine); recall judicial decisions by popular vote (advocated mostly by former President Theodore Roosevelt in 1912); and create a “Court of the Union” consisting of all fifty state chief justices that could overturn the Supreme Court’s decisions (a measure that generated much support among political conservatives during the early 1960s). The most frequently and seriously considered proposal has been to deny the Court the power to adjudicate certain classes of cases pursuant to the Exceptions Clause of Article I, section 2, clause 1 of the Constitution, which allows Congress to make exceptions to federal jurisdiction. The Court acquiesced to a very narrow curtailment of its jurisdiction in *Ex parte McCordle* (1869), but the full limits of congressional power to abrogate or curtail the jurisdiction of the federal courts never have been tested.

In addition to attempting to curtail the Court’s institutional powers, critics of judicial review also have proposed constitutional amendments to overturn various judicial decisions. Since the constitutional amendment process is so arduous, only a very few amendments have overturned specific decisions of the Court. Some critics of judicial review also have advocated constitutional amendments to limit the tenure of federal judges, to provide for election of federal judges, or to permit the recall of federal judges by popular vote. Although judges in most states are elected for limited terms and some states permit recall of judges, efforts to limit judicial power in these ways have foundered on respect for tradition, concerns about impairing judicial independence, and the practical difficulties of the constitutional amendment process. Impeachment of federal judges would be another method of discouraging judicial review, but the principle that judges may not be impeached for political reasons was established in 1805, when the Senate acquitted Justice Samuel Chase after the House had impeached him because of his intense Federalist partisanship. Another means of influencing judicial behavior is manipulating judicial compensation. Although Article I of the Constitution prohibits Congress from retaliating against federal judges by reducing their compensation while they are in office, Congress may freeze judicial salaries.

Opposition to judicial review has arisen on various points along the political spectrum. Opposition to judicial review first arose during the early 19th century among Jeffersonians, who objected to decisions aggrandizing the Court’s power in relation to Congress and the President and its decisions increasing the power of the federal government in relation to the states. In 1857, after the Court in *Dred Scott* held that Congress could not prohibit slavery in the territories, many members of the newly formed Republican party questioned the scope of judicial review.

From the late nineteenth century until 1937, proponents of economic regulatory legislation objected to the Court's occasional nullification of statutes that were intended to ameliorate problems caused by the nation's rapid industrialization. During this same period, labor unions opposed judicial decisions that interfered with the efforts of unions to engage in various activities that promoted the interests of organized labor. Frustrated by these decisions, progressives and labor unions proposed various measures to curtail judicial review, particularly legislation to permit Congress to overturn judicial decisions, and legislation to require super-majorities of Justices to invalidate federal and state legislation. During the 1950s and 1960s, criticism of judicial review erupted on the right side of the political spectrum in response to the Warren Court's decisions protecting the rights of African Americans, criminal defendants, and political radicals, as well as its rulings regarding prayer and Bible reading in the public schools and its reapportionment decisions, which required equal population in voting districts ("one person, one vote").

Since the Court during the past half century has not, at least until very recently, been dominated by either political conservatives or liberals, criticism of the Court since 1970 has become more diffuse, and there has been a diminution of efforts to curtail judicial review. Critics of specific decisions or series of decisions have increasingly tended to believe that judicial review has become such an integral part of the American political and constitutional system that its curtailment is impracticable. Since opposition to judicial review has always tended to be more instrumental than principled, the critics of the Court's exercises of judicial review have increasingly recognized that judicial review could favor their political causes if the Court were dominated by Justices who shared their own political views. Rather than trying to curtail judicial review, political activists across the political spectrum since the 1970s have tried to influence the federal judicial selection process. The confirmation process for federal judges, particularly Supreme Court justices, has consequently become increasingly contentious. The vetting of candidates by the President has become more careful, the hearings on nominees have become increasingly protracted and tumultuous, and a growing number of senators have voted against the nominees of the opposing political party.

There are many reasons why Court-curbing movements have failed. Here is a list of the major reasons:

1. *Institutional obstacles*: The arduousness of the constitutional amendment process, which requires concurrence of two-thirds of both houses of Congress and three-quarters of state legislatures, explains why so few judicial decisions have been overturned by constitutional amendment. It likewise explains why proposals for election of federal judges and limitation of the length of their tenure never have made serious headway. The lack of need for a constitutional amendment to strip federal courts of jurisdiction pursuant to the Exceptions Clause helps to explain why bills are introduced in virtually every session of Congress to curtail federal jurisdiction over certain classes of controversial issues. It also helps to explain why Court-packing proposals presently are in vogue since changing the size of the Court does not require a constitutional amendment.

2. *Divisions among critics of judicial review regarding remedies:* Critics of the ways in which the Supreme Court has exercised judicial review often have failed to unite in support of a single remedy, particularly because such critics often disagree about whether to curb the Court's institutional powers or merely to try to place different kinds of Justices on the Court. This fissure was one of the major reasons for the failure of Roosevelt's Court-packing plan in 1937, which did not satisfy many longtime critics of judicial review because it did not curtail the Court's institutional powers. Although there is less criticism of judicial review itself today than there was in 1937, some critics of a "conservative" Court may prefer more fundamental and less overtly political alternatives, such as limitations on tenure or constitutional amendments to embody various progressive reforms.

3. *Reluctance of the Court's critics to transfer power to Congress, the President, or the states:* Throughout the past two centuries, even many of the Court's harshest critics have expressed reluctance to curb the Court's powers in ways that would increase the powers of the other two branches of the federal government or the states. Despite the Court's many unpopular decisions, there has been widespread agreement that the Court is more protective of fundamental rights and the interests of racial, ethnic, and religious minorities than are the President, Congress, or state governments.

4. *Broad harmony between the Court's decisions and public opinion:* Despite its many controversial decisions, the Court generally has not strayed far from the general political consensus on major issues. This is hardly surprising since Justices are nominated by presidents and confirmed by senators who are broadly representative of public opinion, or they could not have won election. Justices themselves, moreover, are citizens who are influenced by changing social, political, and economic attitudes and therefore are likely to modify their views in accordance with broad currents of change in society. Furthermore, the Justices are keenly aware that any sustained and significant departure from broad political consensus could provoke serious and perhaps successful efforts to curb the Court's institutional powers, which Justices, especially Chief Justices, have jealously and carefully guarded. Perennial proposals for curbing the Court's powers or altering its composition therefore may serve a useful purpose by reminding the Justices that their powers could be curtailed or diluted if they depart too far from prevailing public opinion.

5. *The Court's flexibility in transforming or adapting its decisions to conform to public opinion:* Closely related to the Court's broad harmony with public opinion is its deliberate flexibility in transforming or adapting its decisions to conform to broad public consensus on major issues. At times when criticism of the Court has been particularly harsh, the Court often has ameliorated hostility by rendering decisions that have placated public opinion. This occurred during the 1920s, when the Court handed down significant civil liberties decisions that muted criticism of its decisions striking down economic regulatory legislation, and it happened again in 1937, when the Court sustained the constitutionality of major New Deal legislation in the wake of Roosevelt's Court-packing plan.

6. *Absence of principled opposition to judicial review*: Most Court-curbing movements have suffered from the widespread and usually accurate public perception that they are motivated by short-term political goals rather than by objective and principled opposition to the power of an unelected federal judiciary. This perception has been validated by the many times in which harsh critics of judicial review have turned into proponents of a strong judiciary once the federal courts have altered their ideological or political direction. One of the major reasons for the failure of Roosevelt's Court-packing plan was the general perception that Roosevelt's motives were entirely instrumental and provided no principled basis for curtailing possible abuses of judicial power.

7. *Organized defenses of judicial review by political and economic elites*: Elite lawyers, prestigious bar associations, judges, journalists, and academicians have helped to frustrate past efforts to curtail judicial power. The recent criticisms of Court-packing by the late Justice Ruth Bader Ginsburg and Justice Stephen J. Breyer are examples of the kind of opposition that Court-packing legislation is likely to encounter even among progressives such as Ginsburg and Breyer.

8. *Recognition by the Court's critics that the Court can be an ally*: Efforts to curtail judicial review also have failed because critics of the Court have perceived that a powerful judiciary can help to serve their own ends. This is one of the reasons why critics of the Court's decisions during the past half century have directed their energies toward influencing the judicial selection process and perhaps is one of the reasons why Court-packing rather than Court-curbing has emerged as the favored expedient among present-day progressives who fear a Court that increasingly is dominated by conservatives.

9. *Absence of monolithic opposition to judicial decisions*: Relatively few critics of the Court even during the most intense periods of Court-curbing proposals have opposed all or even most of its decisions. Despite the apparent growth of political polarization during recent years, the Court has handed down both "liberal" and "conservative" decisions and often displayed as high level of consensus, as it did in many ways during its most recent term. Americans who agree with at least some of the Court's decisions are unlikely to favor efforts to curtail judicial power or to manipulate the Court's size for political reasons.

10. *The widespread, profound, and enduring public respect for the federal courts, particularly the Supreme Court*: Perhaps the major reason for the resilience of judicial review is that federal courts enjoy a deep reservoir of respect among a broad base of the American people. The federal courts are widely perceived as the most reliable bastions for protecting civil liberties and they are regarded as a balance wheel for providing the ultimate mediation of conflicting social, economic, and political viewpoints in a highly pluralistic society.

Proposals to increase the number of U. S. Supreme Court Justices

As is explained in the previous section, the recent proposals for increasing the number of Justices are consistent with the tendency of the Court's critics during the past fifty years to influence the Court's decisions without curtailing its institutional powers.

This expedient does not require a constitutional amendment since the Constitution allows Congress to establish the number of Justices. The Court's size has ranged from five to ten, and has been set at nine Justice since 1837, except for the period from 1863 to 1869, when there were ten.

The most serious effort to significantly expand the membership of the Court occurred in 1937, when President Franklin D. Roosevelt proposed adding six Justices to the Court. Since the Court had recently invalidated several of his "New Deal" measures extending the scope of economic regulatory legislation, Roosevelt believed that the addition of these Justices was necessary to ensure the Court's approval of Social Security Act, including both its old age pension and unemployment compensation provisions, and the National Labor Relations Act, which was designed to help resolve to labor-management disputes during a time of widespread strikes and other industrial turmoil. Roosevelt's proposal ignited a firestorm of controversy and was widely regarded as an assault on judicial impendence and was opposed even by many of Roosevelt's most ardent supporters.

Roosevelt's so-called "Court-packing" proposal was so soundly defeated that Court packing did not emerge again as a subject of public discussion until some Democrats began to advocate it during the 2020 political campaign. Democratic legislators introduced legislation in the House and Senate in 2021 to add four Justices to the Court. In the wake of this controversy, President Biden appointed a commission to study Court curbing and other proposals to alter or reform the Court. Even though most of the members of this Presidential Commission on the Supreme Court of the United States could be categorized as "liberal" or "progressive," it is noteworthy the Commission did not endorse Court packing or any other measure that would alter or interfere with the composition of the Court or the selection and tenure of the Justices.

There are several reasons why I oppose any increase in the number of Justices.

Increasing the Court's size for political reasons could diminish judicial independence and interfere with separation of powers because it would permit the President and Congress to manipulate the outcome of judicial decisions by appointing additional Justices who would be expected to conform to the political predilections of the President and his or her party. Moreover, the prospect of legislation to authorize the appointment of even more Justices if the Court's decisions did not placate the President and his or her supporters might intimidate the Court so much that it might influence the Court's decisions.

The Court's independence from political pressure and intimidation has helped to ensure its ability to protect the civil liberties of Americans in countless cases involving racial, religious, political, and ethnic minorities whose rights were ignored or impugned by Congress, the President, and state governments. Similarly, the Court, with some exceptions, has protected the liberties of speech, press, religion, and assembly more faithfully than have the President, Congress, or the three branches of state governments.

A politically motivated increase in the number of Justices also could erode public respect for the Court since it would exacerbate the growing tendency of Americans to believe that the Court's decisions are guided by political prejudices rather than by constitutional principles. Justice Ruth Bader Ginsburg expressed this fear only a few weeks before her death in 2020, as did Justice Stephen J. Breyer during a speech at Harvard Law School in 2020.

Advocates of increasing the Court's size claim that appointment of more Justices, presumably by a Democratic president, would restore balance to a Court that "conservatives" have hijacked and that the need for Court packing is particularly compelling if Democrats regain control of the presidency and Congress and succeed in enacting politically controversial legislation, much of which presumably would be challenged on constitutional grounds.

But how and where would Court packing end once it began? If, for example, a Democratic president was able to obtain a "liberal" majority on the Court by appointing more Justices, and Republicans won the presidency and the Senate in the next presidential election year, would the new Republican President appoint more Justices to restore a "conservative" majority? Such continuing and cyclical Court packing could hoist today's Court packing advocates on their own petard, for future "conservative" Presidents could pack the Court with Justices whose ideologies might be anathema to the "progressives" who are presently advocating Court packing. It is therefore clear that Court packing ought to be a non-partisan issue since both Republicans and Democrats have compelling reasons to fear it and oppose it.

Tampering with the size of the Court also is ill-advised since a nine-member Court is deeply rooted in tradition and is based on important practical considerations. Justices and legal scholars have tended to agree that nine is the ideal size for the Court since it is large enough to distribute the Court's heavy workload and provide a range of viewpoints, while small enough to promote collegiality and efficient deliberation. Increasing the Court's size could impair the Court's ability to function effectively. In particular, the addition of Justices would provide individual Justices with less time and opportunity to ask questions during oral arguments and to participate in the Court's post-argument conferences to discuss cases. Although the length of arguments and conferences could be extended, dragging them out in this manner could dilute the quality of the Court's analysis of complex legal issues. A growth in the number of Justices also might dilute the clarity and force of the Court's opinion since it probably would increase the number of concurring opinions.

Moreover, as the size of the Court expanded, presidents might need to pack the Court with increasingly large number of Justices. Two more Justices might be able to tilt the ideological orientation of a nine-member Court, but many more might be needed to alter the composition of a Court that had fifteen or twenty members. At some point, the Court no longer would be capable of functioning as a judicial body.

When Roosevelt disingenuously attempted to disguise the political nature of his proposal to add six additional Justices in 1937 by claiming that the six Justices who were older than seventy were overworked and could use additional assistance, Chief Justice Charles Evans Hughes publicly torpedoed Roosevelt's claim. In a letter to Senator Burton K. Wheeler of Montana, Hughes declared that more Justices would impair the Court's efficiency. "There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide. The present number of justices is...large enough so far as the prompt, adequate, and efficient conduct of the work is concerned," Hughes wrote.

Hughes's warning is as relevant today as it was in 1937. Indeed, nine Justices today may work more even more effectively without additional help than they could have in 1937 since Justices now have many more resources at their disposal, particularly an array of modern technologies. Each Justice now also has four law clerks rather than the one clerk that each had in 1937.

Although advocates of Court packing contend that the Court's new "conservative" majority should not frustrate the programs of the other two branches of government, particularly if Democrats regain control of the Senate in 2026 and the presidency in 2028, it is the very role of the Court to filter political agendas through a constitutional lens. If the Court naturally worked in tandem with the President, the Congress, and state governments, there would be little need for the Court. In a speech a month after he announced his Court packing plan, Roosevelt offended many Americans by comparing the three branches of government to three plough horses, explaining that the government cannot function effectively if all three branches do not work in unison, just as three horses cannot plough a field if one horse does not cooperate with the other two. Roosevelt's critics pointed out that this represented a fundamental misunderstanding of the Court's role.

Advocates of today's Court packing proposal similarly need to appreciate that tethering the Court to the President and Congress contravenes fundamental concepts of separation of powers. The Court often has fulfilled its most important function when it has overturned unconstitutional legislation passed by Congress and signed by the President.

From a partisan standpoint, Roosevelt arguably had more compelling reasons for wanting to pack the Court in 1937 than do today's advocates of Court packing. When Roosevelt announced his plan on February 5, 1937, the Court was on the verge of deciding cases involving the constitutionality of both the old age and unemployment compensation provisions of the Social Security Act of 1935 and the National Labor Relations Act. Decisions of the Court in

analogous cases striking down economic regulatory legislation during the past two years provided strong indications that the Court would strike down these statutes by at least a five-to-four vote. The Social Security Act was a more monumental statute than any legislation that is likely to come before the Court during the foreseeable future, and the National Labor Relations Act was at least as important as any statute that Congress is likely to enact during the next few years. During the past eighty years, the old age pension provisions of the Social Security Act have spared tens of millions of elderly Americans from destitution, while the unemployment compensation features of the legislation have rescued tens of millions of workers and their families from impoverishment during periods of unemployment. The National Labor Relations Act has gone far toward ameliorating the industrial turmoil that roiled the United States throughout the Great Depression and threatened the nation with economic and political chaos.

Faced with a high probability of the nullification of these cornerstones of his New Deal, it is not surprising that Roosevelt would have resorted to a radical expedient to rescue this legislation. Roosevelt also reasonably feared that the Court would stymie additional measures he intended to propose, including those included in what became the Fair Labor Standards Act of 1938, which established minimum wages and prohibited the most egregious forms of child labor. Although Roosevelt considered seeking a constitutional amendment to expand the power of Congress to enact economic regulatory legislation, he regarded the prospects of such an amendment as too hazardous since it would have necessitated a constitutional amendment, requiring two-thirds approval by both houses of Congress and the assent of three-quarters of the state legislatures.

The Supreme Court itself helped to defeat Roosevelt's Court packing plan by sustaining important regulatory measures, including both the old age and unemployment compensation provisions of the Social Security Act and the National Labor Relations Act, while the Senate Judiciary Committee was deliberating on the plan. Most of these decisions were five-to-four, with Justice Owen Roberts tipping the Court's balance, just as he had cast deciding votes in opposition to similar statutes during the previous two years. Historians continue to disagree about the extent to which the Court packing plan influenced Roberts and Chief Justice Hughes, who like Roberts seemed to become markedly more receptive to the constitutionality of regulatory legislation after Roosevelt announced his plan.

Even if no Justices were specifically intimidated by the Court packing plan, it is not surprising that a majority of the Justices eventually tilted in favor of sustaining New Deal legislation, for Justices are more sensitive to public opinion than they usually care to admit. As Alexander Hamilton pointed out in Number 78 of *The Federalist Papers*, the Court has "no influence over either the sword or the purse." Keenly aware of this, Justices recognize that their power ultimately depends upon the support of the President, Congress, state governments, and the American people. Even if today's Court seems to tilt toward the right, the Court ultimately is unlikely to stray very far for very long outside of the political mainstream. It never has.

It is a fallacy to suppose that the Democratic victories in any elections provide any mandate for a “liberal” Court insofar Democratic voters do not necessarily have views that align with one bloc or the other on the Court. Although seven or eight members of the Court during the past several decades have mirrored the positions of the Republican or Democratic parties in many high-profile decisions to a degree that is quite remarkable, the political views of most Americans presumably are more eclectic. Most persons I know agree sometimes with the “liberal” Justices and sometimes with the “conservatives,” regardless of their general political inclinations or partisan preferences. This makes sense since the bundle of positions espoused by both parties have little internal logic and largely reflect the preferences of the interest groups which support those parties.

Indeed, the Court itself is not monolithically divided upon ideological lines. During the Court’s 2024-25 term, 42 percent of its decisions were unanimous, and another 24 percent were decided by margins of eight to one or seven to two. Although the Court indeed often splits six-to-three in high-profile cases, there are numerous cases in which “liberal” Justices have espoused seemingly “conservative” opinions, and vice versa.

Moreover, Court packing is unlikely to command widespread support even among many vociferous critics of the present Court since even many of the Court’s critics are likely to object to a measure that could erode the Court’s integrity or independence. In 1937, vast number of Americans who had voted for Roosevelt only months earlier and were critical of the Court’s recent anti-regulatory decisions balked at the Court packing plan and ensured its defeat because they recognized that it threatened the Court’s institutional integrity. Gutzon Borglum, who was in the process of carving Mount Rushmore, urged Senator George W. Norris of Nebraska to oppose the plan even though Borglum, a progressive, expressed outrage over the Court’s decisions. Borglum believed that such tampering with the Court would mock the ideals espoused by the presidents whose images he was carving.

One way to reform the Court without packing it or altering its institutional powers would be to enact a constitutional amendment limiting the terms of Justices and/or providing a mandatory retirement age. Although I have publicly expressed opposition to such measures because they could interfere with judicial independence, those expedients would be less likely than Court packing to impair the Court’s integrity. Although these perennial proposals for limitations on tenure have received more attention than usual during the past few years, Court packing seems more appealing to many critics of the Court because it is a quick political fix.

Today’s Court packing proposals jeopardize the Court’s integrity and independence no less than did Roosevelt’s plan in 1937. As in 1937, Americans today of all political persuasions should oppose such interference with the Court.

William G. Ross
May 19, 2026

Mr. ISSA. Thank you, Professor. Mr. Schaerr?

STATEMENT OF GENE SCHAERR

Mr. SCHAERR. Good morning, Chair Issa, Ranking Member Johnson, Chair Jordan, Ranking Member Raskin, and the distinguished Members of the Subcommittee. Thank you for this opportunity to address recent proposals for packing the U.S. Supreme Court, which is an issue of enormous importance to all who care about the rule of law, as I know each of you does.

In 1983 a well-known Democratic politician, Senator Joe Biden, pointedly referred to Franklin Roosevelt's 1937 attempt at packing the Supreme Court as quote "A terrible mistake, and a bone headed idea." Let me offer five reasons why that remains true today in addition to those that have been mentioned by my esteemed colleagues here on the panel.

First, the current Court packing proposals are really based on an incorrect factual premise, namely that the Roberts' court is relentlessly partisan, and consistently reaches conservative outcomes. Now, we have heard already today about a handful of decisions that people on the Left don't like. We have heard about Citizens United, which recognized First Amendment limitations on the government's ability to curb or regulate political speech.

People on the Left are also concerned about *Dobbs*, which we have heard about, and the recent Supreme Court decision in *Louisiana v. Callais*, which some people claim gutted the Voting Rights Act. In fact, and I will come back to those specific examples in a minute, but in fact the Roberts' court, often joined by some of President Trump's nominees, has also ruled against what most people view as Republican or conservative interest in several hotly contested cases.

Mr. Capozzi mentioned the recent tariff decision. Another example of that phenomenon is the *Obergefell* decision from a few years ago, which ruled that States are constitutionally forbidden from limiting the definition of marriage to man—woman unions. Then, there was the *Bostock* decision which extended Title VII's protections against nondiscrimination to gay, lesbian, and transgender people.

Don't forget the Supreme Court's earlier decision in *NFIB v. Sebelius*, which upheld the individual mandate that was the heart of Obamacare. Each of those decisions was excoriated by folks on the Right, and they were as a political matter and a policy matter, they were big wins for progressives. The claim that the Roberts' court is somehow in the pocket of conservatives or Republicans just doesn't withstand analysis of the facts.

Second, current proposals rest on an unrealistic predictive judgment about new justice's likely voting patterns. In *Roe v. Wade* for example the key votes supporting abortion rights came from justices appointed by the conservative President Nixon, while one of the most vocal dissents in *Roe v. Wade* came from Justice Byron White, who had been appointed by President Kennedy.

We have all seen examples of where Supreme Court Justices vote against the wishes of the President who appointed them. Even adding four more justices to the Supreme Court is by no means any

guarantee that the Court would shift more toward progressive priorities.

Third, as has been mentioned, Court packing proposals really ignore the incentives of the other side once they regain power.

If Democrats have a trifecta in the next election, and are able to expand the Supreme Court to 13, does anybody think that Republicans are going to stand still for that and not do the same thing the next time there is a Republican trifecta? Before long the only venue that will be large enough to accommodate the Supreme Court's conferences, their private conferences, will be the new White House ball room, and I don't think that is in anybody's interest.

Mr. ISSA. You are assuming that there will be one.

Mr. SCHAERR. I am assuming that I am not advocating for it, but I am assuming it.

Fourth, Court packing proposals distract from the more important work of building political and legislative coalitions. That is illustrated by some of the recent Court decisions that we have discussed today.

If you look at the *Callais* decision for example, that decision was premised on the Court's interpretation of a Federal statute, namely the Voting Rights Act, and the Court held that there was a violation of equal protection in that case because the Voting Rights Act did not establish that majority-minority districts were required.

Well, if Congress goes back and changes the Voting Rights Act to do what progressives would like, and require majority-minority districts, my guess is that this decision would come out very differently. *Dobbs* is another example, many progressives, and even not so progressive States have already effectively neutered *Dobbs* within their own State boundaries by passing laws that protect abortion to an equal or greater extent than *Roe* ones did.

Fifth, other panelists have already discussed how Court packing would erode public trust in the Court, and ultimately in the entire Federal Government. Because the Supreme Court has long been viewed correctly as a bit of a ballast or a counterweight to the other branches of the government. They can correct the mistakes that the other branches occasionally make.

It is also instructive that Court packing in other countries has become a favorite tool of tyrannies around the world, like Robert Mugabe in Zimbabwe, Victor Orban in Hungary, and Hugo Chavez in Venezuela. There are many reasons to reject the current Court packing proposals. Thanks you.

[The prepared statement of Mr. Schaerr follows:]

**Prepared Statement of Gene Schaerr¹
Before the Subcommittee on Courts of the House Judiciary Committee
May 21, 2026**

Chairman Issa, Ranking Member Johnson, Chairman Jordan, Ranking Member Raskin, and distinguished members of the Subcommittee, thank you for this opportunity to address recent proposals for “packing” the U.S. Supreme Court—an issue of enormous importance to all who care about the rule of law, as I do and I know you do as well.

In 1983, a well-known Democratic politician pointedly referred to Franklin D. Roosevelt’s 1937 attempt at packing the Supreme Court “a terrible mistake” and a “bone-head[ed] idea.”² He even quoted Congressional Democrats of the FDR era to the effect that Court-packing was “dangerous.”³

That politician, as you may have guessed, was then-Senator Joe Biden. And not only did he adhere to that position as President, but his position on the “bone-headedness” of Court-packing has been reaffirmed by numerous respected Democratic politicians, including Nancy Pelosi and Dick Durbin.⁴ That view has also been supported by every Democratic-appointed Supreme Court Justice that has addressed the issue.

So why exactly is packing the Supreme Court a “bone-headed idea” today? Let me offer five reasons.

The factual justification for Court-packing is incorrect.

First, the Court-packing proposals we hear today are based on an incorrect factual premise—that the Roberts Court is unprecedentedly partisan and consistently conservative. And that incorrect premise remains the animating belief of the activist wing of the Democratic Party, pushing elected leaders to pack the Supreme Court.

This began in response to Justice Amy Coney Barrett’s confirmation, when Rep. Alexandria Ocasio Cortez posted on X, “Expand the Court.”⁵ Senator Ed Markey

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² Presidential Nominations to the Civil Rights Commission: Hearings Before the S. Comm. on the Judiciary, 98th Cong. 54–55 (1983) (statement of Sen. Joseph R. Biden, Jr.) (“President Roosevelt clearly had the right to send to the United States Senate and the United States Congress a proposal to pack the Court. . . . [B]ut it was a bone-head idea. It was a terrible, terrible mistake to make . . .”).

³ S. Rep. No. 75-711, at 23 (1937) (describing Roosevelt’s proposal as a “needless, futile, and utterly dangerous abandonment of constitutional principle”); see also Press Release, Sen. James Lankford, Lankford Quotes Then-Senator Biden’s Own Words to Oppose Packing the Supreme Court (Apr. 23, 2021).

⁴ Sahil Kapur, Democrats Introduce Bill to Expand Supreme Court from 9 to 13 Justices, NBC News (Apr. 15, 2021) (reporting that Speaker Nancy Pelosi said she had “no plans to bring it to the floor” and that Senate Judiciary Chairman Dick Durbin said President Biden’s Supreme Court commission was “the right move”).

⁵ Alexandria Ocasio-Cortez (@AOC), X (Oct. 26, 2020, 9:28 PM), <https://x.com/AOC/status/1320881248861126663> (“Expand the court.”); see also David Brand, AOC Says Expand the Supreme Court. Meeks, Meng and Jeffries Say

similarly wrote that the Court should be expanded because “Republicans stole the Court’s majority, with Justice Amy Coney Barrett’s confirmation completing their crime spree.”⁶ And Democratic political consultant James Carville captured the voice of the activist wing when he recently said, “If the Democrats win the presidency and both houses of Congress, I think on day one ... they should expand the Supreme Court to 13”—adding, with an expletive, that Republicans should “[e]at our dust.”⁷

These advocates for Court-packing focus on decisions they don’t like, such as the Court’s opinion in *Citizens United v. FEC*, which recognized First Amendment limitations on the government’s ability to curb or regulate political speech.⁸ They’re also incensed by the Court’s decision in *Dobbs v. Jackson Women’s Health*,⁹ which overruled *Roe v. Wade*,¹⁰ returning the ability to regulate abortion to the States. And they claim the Court has “gutted” the Voting Rights Act in such decisions as *Louisiana v. Callais*.¹¹ And yes, each of these decisions was reasonably seen as favoring conservative positions often espoused by Republicans.

But in reality, the Roberts Court – often joined by some of President Trump’s own nominees – has also ruled *against* Republican or conservative interests in several hotly contested cases.

A recent example was the Court’s decision in the *Learning Resources* case, striking down most of the tariffs imposed by President Trump.¹² Another was the Court’s decision in *Obergefell v. Hodges*, which ruled that States are constitutionally forbidden from limiting the definition of marriage to man-woman unions.¹³ Then there was *Bostock v. Clayton County*, which extended Title VII’s protections against discrimination to gay, lesbian and transgender people.¹⁴ And don’t forget the Court’s earlier decision in *NFIB v. Sebelius*, upholding the “individual mandate” that was the heart of Obamacare.¹⁵

They Are Open to Dramatic Reforms, Queens Daily Eagle (Oct. 27, 2020), <https://queenseagle.com/all/aoc-says-pack-the-supreme-court-meeks-meng-and-jeffries-say-they-are-open-to-dramatic-reforms>.

⁶ Press Release, Sen. Edward J. Markey, Expand the Supreme Court: Senator Markey and Reps. Nadler, Johnson, and Jones Introduce Legislation to Restore Justice and Democracy to Judicial System (Apr. 15, 2021), <https://www.markey.senate.gov/news/press-releases/expand-the-supreme-court-senator-markey-and-reps-nadler-johnson-and-jones-introduce-legislation-to-restore-justice-and-democracy-to-judicial-system>.

⁷ Alexander Hall, Carville Tells Dems to Quietly Prepare Power Grab with D.C., Puerto Rico Statehood and Supreme Court Packing, Fox News (Apr. 17, 2026), <https://www.foxnews.com/media/carville-tells-dems-quietly-prepare-power-grab-dc-puerto-rico-statehood-supreme-court-packing>.

⁸ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

⁹ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

¹⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

¹¹ See Press Release, Sen. Mazie Hirono, Hirono Statement on Supreme Court Further Gutting Voting Rights Act (Apr. 29, 2026) (describing *Louisiana v. Callais* as “further gutting” the Voting Rights Act); see also Sen. Raphael Warnock, “The Democracy Doesn’t Belong to the Politicians”: Warnock Stands with Faith Leaders to Decry Gutting of Voting Rights Act (May 11, 2026) (describing the Supreme Court’s decision in *Louisiana v. Callais* as “gutting” the Voting Rights Act).

¹² *Learning Res., Inc. v. Trump*, 607 U.S. ____ (2026).

¹³ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

¹⁴ *Bostock v. Clayton County*, 590 U.S. 644 (2020).

¹⁵ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

Politically, each of these decisions favored Democratic and progressive interests at the expense of conservative interests. And therefore the claim that the Roberts Court is somehow in the pocket of conservatives or Republicans simply does not square with that Court's record.

Court-packing rests on an unrealistic predictive judgment about how additional Justices would vote.

Another reason Court-packing is a "bone-headed" idea is that it rests on an erroneous *predictive* judgment about how newly appointed Justices are likely to rule in controversial cases.

While the House of Representatives is, by design, a sensitive barometer of public opinion – in which Members must face the voters every two years – the Founders used an opposite design for the Supreme Court. With lifetime tenure, the Founders deliberately insulated Justices from political pressure and majoritarian impulses. This has given Justices, once installed at the apex of the judiciary, to exercise their independence in ways that continue to surprise observers.

Consider Earl Warren, the Republican California governor appointed by President Eisenhower in 1953 to serve as Chief Justice. At the time of his death in 1974, Warren was described by *The New York Times* as a "liberal reformist judge." *The Times* noted: "Privately, President Eisenhower made clear in later years he had been surprised and not always pleased by the judicial record of the man he moved from the governorship of California to the Supreme Court."¹⁶

Or consider how key votes in favor of abortion in *Roe v. Wade* came from Justices appointed by the conservative Nixon, while one of the most vocal dissents was from Justice Byron White, appointed by the more liberal Kennedy. Similarly, many conservatives rued the day they supported President Gerald Ford's nominee, John Paul Stevens, as well as President George H.W. Bush's first nominee, David Souter. And President Trump has famously expressed frustration with the votes of some of his nominees—most recently in the tariff decision.

To be sure, Justices Elena Kagan and Sonia Sotomayor, both nominated by President Barack Obama, have been relatively more reliable in favoring the positions advanced by the party of the president who appointed them. But that has not kept them from siding with the more conservative majority in a number of hotly contested cases. The most recent example was this very Term in *Chiles v. Salazar*, in which they both—correctly in my view—supported a Christian counselor who challenged Colorado's ban on "conversion therapy."¹⁷

¹⁶ John D. Pomfret, Earl Warren, 83, Who Led High Court in Time of Vast Social Change, Is Dead, *N.Y. Times* (July 10, 1974), <https://www.nytimes.com/1974/07/10/archives/earl-warren-83-who-led-high-court-in-time-of-vast-social-change-is.html>.

¹⁷ *Chiles v. Salazar*, 146 S. Ct. 1010 (2026).

In short, when it comes to nominees to the Court, the SEC-approved disclaimer applies: *Past performance is no guarantee of future results*. Even if the Court-packers got their way—and expanded the Court to 13—it would take only one “surprise,” like Justice White, to swing the Court back to a majority that most progressives would find too conservative for their tastes. Accordingly, to have sufficient assurance of a Court willing to rule in their favor even most of the time, progressive majorities in Congress would probably have to expand the Court even more dramatically—probably to 15 or even 18. And even then there would be no assurance the Court majority would consistently vindicate their interests.

The Court packers ignore the inevitable effect on the incentives of the other side once they regain power.

The most bone-headed assumption of the court-packers—the third major flaw in their argument—is that one side or the other could ultimately win this judicial arms race. This optimism overlooks the principle of mutual assured destruction, with both sides and the American system as the ultimate target. Once a precedent is set, the other side is likely to resort to the same tactic the next time it's in power.

For example, one might assume that, if and when Democrats next sweep the White House and Congress, they might expand the court to 13 and call it a day. But Republicans likely wouldn't be satisfied with that outcome. With the election of the next Republican president and Congress after that, advocates would likely seek at least three more Justices to swing the Court back to the right.

This arms race could continue until the U.S. Supreme Court looks less like a group of legal scholars who, like Antonin Scalia and Ruth Bader Ginsburg,¹⁸ were fierce but always genial debaters, and more like a college of partisans. Indeed, they could well become a whole busload of jurists who, because of their number, would require a dramatic widening of the existing Supreme Court Building on One First Street to accommodate their new, expanded bench. (Or perhaps the enlarged Court could make good daytime use of the White House's new ballroom.)

Calls for Court-packing distract from the real work of building the legislative coalitions needed to achieve each side's objectives.

The fourth fatal problem in the Court-packers' argument is that, like a magician's deception, it deflects attention and focus from the critical role this body and other legislative bodies can and should play in setting policy for the Nation.

Consider some of the recent Supreme Court decisions that seem to provoke the most ire in progressive circles. The most recent—*Callais*—was an interpretation of a statute, the Voting Rights Act. This body, therefore, could effectively reverse that decision

¹⁸ Remarks for the Second Circuit Judicial Conference 8–9 (May 25, 2016), <https://www.supremecourt.gov/publicinfo/speeches/remarks%20for%20the%20second%20circuit%20judicial%20conference%20may%2025%202016.pdf> (quoting Justice Scalia as saying, “I attack ideas. I don’t attack people. Some very good people have some very bad ideas.”)

through a simple amendment, as it has done in response to prior Court interpretations of that same law.¹⁹

Or take *Dobbs*—the abortion decision. Many progressive and even not-so progressive states have already effectively neutered that decision within their boundaries simply by passing laws protecting abortion to an equal or greater extent than *Roe* once did. Whatever conservatives might think of the outcome, it's the political process at work.

And of course the same point holds on the other side: If Republicans don't like the tariff decision in *Learning Resources* or the LGBT protections adopted in *Bostock*, or the approval of the individual mandate in *NFIB v Sibelius*, the productive response is not to try to change the makeup of the Court that issued those decisions. The productive response is to develop the political allies and muscle necessary to amend the underlying statutes.

The point is further illustrated by the history of Franklin D. Roosevelt's Court-packing debacle. After the Supreme Court invalidated several New Deal programs during the 1930s, President Roosevelt made proposals that would have the practical effect of adding up to six additional Justices to the Court. Democrats who controlled the Senate Judiciary Committee released a report describing FDR's proposal as a "needless, futile, and utterly dangerous abandonment of constitutional principle."²⁰

In their rebellion against an immensely popular president basking in his recent re-election, Democrats in Congress underscored the importance of their standing as the Article I institution. Senator Biden would later illustrate this point by quoting Arthur Schlesinger's observation that President Roosevelt's plan would likely have succeeded if the United States had a parliamentary system. But, as Schlesinger wrote, "the Founders envisioned a different kind of legislature, an independent institution that would think for itself."

What is notable about the Roosevelt history, then, is not merely that Roosevelt lost. It is that so many of his congressional allies thought for themselves. They ultimately understood that undermining the independence of the Supreme Court would have cheapened and devalued the independence of the Congress as well. They realized it is better to engage in traditional politics, to settle the issues of the day in Congress, than to rely on the Supreme Court to do it for them.²¹

¹⁹ See *City of Mobile v. Bolden*, 446 U.S. 55, 60–61, 66–74 (1980) (plurality opinion); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301); *Thornburg v. Gingles*, 478 U.S. 30, 35, 43–44 (1986); see also *Veasey v. Abbott*, 830 F.3d 216, 243–65 (5th Cir. 2016) (en banc).

²⁰ S. Rep. No. 75-711, *supra* note 2, at 23.

²¹ Ironically, as my friend and legal scholar Ilya Shapiro has noted, "By mid-1941, just four years after court-packing failed, only two Justices remained whom Roosevelt hadn't appointed — and one of those, Harlan Stone, he had elevated to Chief Justice. In a very real sense, then, FDR packed the court the old-fashioned way, by maintaining control of the White House and Senate and waiting for natural attrition." Ilya Shapiro, Don't Pack the Court, *Cato Inst.* (Mar. 12, 2021), <https://www.cato.org/commentary/dont-pack-court>.

Court-packing would erode public trust in the Court and, ultimately, in the entire federal Government.

The final flaw in the Court-packers' approach is the most important, namely, the erosion in the public's trust in the Court. As Justice Breyer succinctly put it in 2021, in a lecture at Harvard Law School, "Structural alteration motivated by the perception of political influence can only feed [the perception that the Supreme Court is political], further eroding that trust."²²

Similarly, in 2019, the late Justice Ruth Bader Ginsburg told NPR: "Nine seems to be a good number. It's been that way for a long time. I think it was a bad idea when President Franklin Roosevelt tried to pack the Court. If anything, you would make the Court look partisan."²³

These Justices' comments honor the integrity of the American judicial system. As a former clerk to Justices Warren Burger and Antonin Scalia, I learned, as have so many others, to hold the integrity of the Court somewhat in awe. For much of American history, ever since 1803 when *Marbury v. Madison* defined the role of the Supreme Court, it has occupied a unique position in the American system as a neutral arbiter of constitutional principle. While it has not always filled that role with perfection, I believe it has done so the vast majority of the time.

The Court, moreover, possesses neither the power of the purse nor the power of the sword. What it has is the prestige of impartiality. Its composition is influenced by elections, but Justices strive to remain above partisanship and generally refrain from commenting on controversial matters. The Court's authority ultimately depends on public confidence in its legitimacy as an institution dedicated to applying the law according to neutral principle rather than advancing purely political interests.

Confirmation battles already regularly resemble political campaigns, and many Americans view the confirmation process and Justices through ideological lenses. Yet court-packing would not reduce politicization. It would dramatically increase it.

In a democracy, the legitimacy of any institution rests on trust, which is always conditional and fragile. The Court has survived wars, economic crises, social upheavals, and bitter political disputes because Americans have generally accepted that judicial decisions should not be met with efforts to alter the structure of the Court whenever one party dislikes its rulings.

The intensified partisanship of such a new arrangement would become clear with every new appointment. Supreme Court vacancies currently occur unpredictably through retirement, death, or resignation. Political actors may fight like a pack of wolves over an open nomination, but the structure of the institution itself remains stable. Court-packing

²² Press Release, S. Comm. on the Judiciary, *Sitting Supreme Court Justices Denounce Court Packing. Will Judge Jackson?* (Mar. 22, 2022), https://www.judiciary.senate.gov/press/rep/releases/sitting-supreme-court-justices-denounce-court-packing_-will-judge-jackson.

²³ *Id.*

would take a process of turnover that is predicated on chance and turn it into a process that is the result of political calculation.

Every election would become a battle over how many Justices should sit on the Court and which party should control those seats. Judicial independence would suffer because the public would increasingly perceive Justices not as interpreters of law but as political operators, as if they were running for office themselves. And those jurists who accepted these terms might well be compromised by this process, thinking of themselves in partisan terms rather than as independent judicial thinkers.

It is one thing for the Court to be perceived by some as a partisan entity. Once it actually became a partisan entity, the reputation of the Court would suffer in a way it never has before. This would further the coarsening of our national dialogue, further encouraging the view that the law is not a neutral arbiter, but a weapon to be wielded by the majority against the minority. Such a move would further reduce respect for the rule of law, replacing the words on the west pediment of the Court, "Equal Justice Under Law," with "*Cui bono?*"

Imagine a Court considering a politically sensitive case involving abortion, gun rights, religious liberty, executive authority, election law, or free speech. Or imagine the adjudication of *Bush v. Gore* in such an environment. If Justices know that adverse rulings could trigger efforts to add new members to the Court, the pressure on judicial decision-making becomes obvious. And even if no Justice consciously changes a vote due to such pressure, the public will still perceive that their votes are influenced by threats of institutional retaliation.

Expanding the Court, moreover, would not reduce ideological conflict. It would spread the infectious contagion of partisanship to the judiciary itself. This could feed public cynicism that Washington is nothing but pure political theater. And, since the Supreme Court oversees and can overturn lower courts, the perception of partisanship would filter downward from the 13-Justice Court through the Circuits and the whole judicial branch.

The Court is the ultimate protector of our most basic rights—freedom of speech, religious liberty, privacy, criminal procedure protections, voting rights, restraints on executive power, and more. A constitutional democracy requires institutions that citizens regard as legitimate, even when they disagree with specific outcomes. Court-packing risks weakening that foundation of a democratic society.

Conclusion

Changing the rules has become a favorite tool of tyrannies around the world as a way to impose greater control while maintaining the façade of a democracy. For example, in 2004 under President Hugo Chavez, the Venezuela National Assembly dominated by that caudillo's allies expanded that nation's Supreme Tribunal of Justice from 20 to 32

members. With these new judges, and the addition of replacements for resignations, the court usually rubber-stamped whatever Chavez and his successor, Maduro, wanted.²⁴

The same thing happened during the reign of Robert Mugabe in Zimbabwe. When that country's Supreme Court ruled against the government's land reform policies—which essentially took property from white citizens and gave it to black citizens—the government expanded the court from 5 to 8 justices, adding three new loyalists.²⁵ And in Hungary, former Prime Minister Viktor Orbán maintained his long hold on power in part by increasing the size of Hungary's Constitutional Court, while lowering the retirement age to push out judges the government did not want. Packed with loyalists, the Hungarian court propelled the political fortunes of Orbán's Fidesz party for years.²⁶

These are not the machinations of great nations. And we cannot go down that path without risking the health of our republic. Which calls to mind the well-known event at the end of the Constitutional Convention in 1787, in which a Philadelphia socialite named Elizabeth Powel asked Benjamin Franklin, “Well, Doctor, what have we got, a republic or a monarchy?” And you recall the famous reply: “A republic—if you can keep it.”²⁷ Fortunately, we’ve managed to keep our Republic for nearly 250 years since the Declaration of Independence in 1776, through a Civil War, two World Wars, and a Cold War. But let’s not put all that at risk through a “boneheaded” Court-packing scheme.

That’s not to say we shouldn’t be critical of the Court when we disagree with its rulings. Throughout our history, citizens have rightly criticized the Court and sought to reverse its decisions through legislation and constitutional amendments – even as they accepted the legitimacy of those rulings in the interim. But expanding the Court to achieve a momentary partisan advantage would deepen politicization, invite retaliatory escalation, undermine judicial independence, weaken public confidence, and destabilize a stabilizing institution whose authority depends on its perceived legitimacy.

As my mentor and former boss, the late Antonin Scalia, wrote, “A Bill of Rights that means what a majority wants it to mean is worthless.” And the same would be true of a Supreme Court whose size has been manipulated in hopes of reversing rulings with which one faction or another disagrees.

²⁴ Venezuela: Judicial Independence Under Siege, Human Rights Watch (June 16, 2004), <https://www.hrw.org/news/2004/06/16/venezuela-judicial-independence-under-siege>; see also Venezuela: Chávez Allies Pack Supreme Court, Human Rights Watch (Dec. 13, 2004), <https://www.hrw.org/news/2004/12/13/venezuela-chavez-allies-pack-supreme-court>.

²⁵ U.S. Dep’t of State, Zimbabwe: Country Reports on Human Rights Practices—2002 (Mar. 31, 2003), <https://2001-2009.state.gov/g/drl/rls/hrrpt/2002/18234.htm>.

²⁶ Johan Norberg, How Viktor Orbán’s Hungary Eroded the Rule of Law and Free Markets, Cato Inst. (Mar. 31, 2026), <https://www.cato.org/policy-analysis/how-viktor-orbans-hungary-eroded-rule-law-free-markets#dismantling-barriers>.

²⁷ See September 17, 1787: A Republic, If You Can Keep It, Nat’l Park Serv. (Sept. 22, 2023), <https://www.nps.gov/articles/000/constitutionalconvention-september17.htm>; Julie Miller, “A Republic if You Can Keep It”: Elizabeth Willing Powel, Benjamin Franklin, and the James McHenry Journal, Libr. of Cong. Blogs (Jan. 6, 2022), <https://blogs.loc.gov/manuscripts/2022/01/a-republic-if-you-can-keep-it-elizabeth-willing-powel-benjamin-franklin-and-the-james-mchenry-journal/>.

Mr. ISSA. I thank the gentleman. We now go to Professor Bowie for his, I'm terribly sorry to mangle your name.

STATEMENT OF NIKOLAS BOWIE

Mr. BOWIE. No worries, but thank you, Chair Issa, Ranking Member Johnson, Chair Jordan, and Ranking Member Raskin, thank you for inviting me to testify before the distinguished Members of the Subcommittee. My name is Nikolas Bowie, and I am the Louis D. Brandeis Professor of Law at Harvard Law School. For the past seven years with my colleague Daphna Renan, I have researched a forthcoming book called *Supremacy*, how rule by the Court replaced government by the people.

The book shows how the Supreme Court acquired the power it now wields, and what Congress can do about it. We are here to assess whether Court packing is a threat to the Supreme Court's legitimacy. We first need to answer a more basic question, which is what is the legitimate role for the Court to play under our Constitution? As Professor Renan and I wrote in our book, this question was a critical one for the people who founded the Republican Party.

Their mission was to fight the spread of slavery. In 1857, in *Dred Scott v. Sanford*, the Supreme Court declared that mission unconstitutional for Congress to put into practice. That founding generation of Republicans had never before experienced an attempt by the Supreme Court to override Congress.

They called such an attempt despotic, and unwarranted by the Constitution. When Abraham Lincoln and other Republicans won in the 1860 elections, Congress enacted statutes that rejected *Dred Scott*, and began reconstructing the South into a multiracial democracy. That Republican controlled Congress wanted Courts to enforce their laws, but they were wary of a second *Dred Scott* decision.

They changed the Court's size, they stripped it of jurisdiction to review its most important laws, and they proposed further regulations to check and balance the Court. They understood that under our Constitution, the legitimate role for the Court is to enforce Federal law against anyone who considers themselves above it, whether that person is a corporate executive, a State official, or the President.

The Court's role is not to defy Federal law by placing itself above you all, our Nation's representatives of we the people, to whom the Constitution gives primary responsibility to determine the Constitution's meaning. The Supreme Court's assertion of power to defy Federal law has a name, judicial supremacy.

The founding generation of Republicans argued that this idea undermines Republican governance. They failed to bury it, and it re-emerged when the Court declared Congress constitutionally incapable of banning lynching, of banning racial discrimination by businesses, or banning widespread disenfranchisement.

In the years since then the Court has continued to undermine Federal voting laws, Federal civil rights laws, and Federal laws that prevented the wealthy from dominating our elections, and your daily call time. Judicial supremacy has also unleashed Presidential authoritarianism, disabling the laws Congress enacted to

prevent corruption, self-dealing, and attacks on the peaceful transition of power.

Those early Republicans, we need not accept judicial supremacy any longer. Those Republicans, and their abolitionist allies, advocated for an alternative tradition that Professor Renan and I call democratic constitutionalism. This is the idea that we the people have the power to interpret and define the meaning of the Constitution through the process of Federal law making.

This was the position of the lawyers who argued *Brown v. Board of Education* in the 1950s. They urged the Court to stop defying Congress' civil rights laws, and to start enforcing it against discrimination in the South. One law in particular, the Ku Klux Klan Act of 1871 explicitly directed courts to prevent State officials from violating anyone's constitutional rights.

The Court applied that Federal law in *Brown* to end segregation in the South, and it has applied it in many landmark cases since. Meanwhile, a bipartisan Congress inaugurated a second reconstruction of the Voting Rights Act of 1965. That law overrode Supreme Court decisions that had interpreted the Constitution to be consistent with all the Jim Crow laws that disabled Black people from voting in the South.

You have the power to continue this legacy and replace judicial supremacy with democratic constitutionalism. The Constitution says nothing about the Court's power to defy acts of Congress, but it explicitly empowers Congress to regulate the Court. Your predecessors used that power to curb the Court's defiance of Federal statutes, and to override harmful constitutional interpretations.

In fact, nearly everything about the Court can be regulated by statute, including the number of justices, where it sits, and what it has the power to do. If the current majority of the Court is exercising an illegitimate supremacy over Federal law, one the Constitution does not grant, and that is being used to make Republican governance unviable, then regulating the Court is not just legitimate, it is your duty. Thank you very much.

[The prepared statement of Mr. Bowie follows:]

United States House Committee on the Judiciary

Subcommittee on Courts, Intellectual Property,
Artificial Intelligence, and the Internet

Hearing on “Court Packing: A Threat to the Supreme Court’s Legitimacy”

Thursday, May 21, 2026, 10:00 am

Testimony of Nikolas Bowie

Louis D. Brandeis Professor of Law, Harvard Law School

Chairman Issa, Ranking Member Johnson, Chairman Jordan, Ranking Member Raskin, and Distinguished Members of the Subcommittee:

Thank you for inviting me to testify. My name is Nikolas Bowie. I am the Louis D. Brandeis Professor of Law at Harvard Law School, where I teach and write about the U.S. Constitution, among other topics. With my colleague Daphna Renan, I have spent the last seven years researching a forthcoming book called *Supremacy: How Rule by the Court Replaced Government by the People* (W.W. Norton & Co. September 2026). Our book shows how the Supreme Court acquired the power it now wields, and what Congress can do about it.

I am also the author of a casebook, *Federal Constitutional Law* (West 2022), which is used to teach law school classes across the country.

You have asked whether “court packing” is “a threat to the Supreme Court’s legitimacy.” Before we can make sense of that issue, we first need to be on the same page about a more basic question: what is the legitimate role for the Court to play under our Constitution?

As Daphna Renan and I describe in our book, this question has been a critical one not only for our generation, but also for the generation that founded the Republican Party in the 1850s to fight against slavery. This was a generation familiar with the claims of some judges that the role of the Supreme Court was to declare federal laws unconstitutional, a claim the

Court asserted in an 1803 case called *Marbury v. Madison*. But it was also the generation that lived through 1857, when the Court actually disagreed with Congress for the first time. That decision, *Dred Scott v. Sandford*, defied a federal law by declaring it unconstitutional for Congress to limit the spread of slavery.

Rather than accept this new role for the Court, Republicans and their abolitionist allies responded that the Court's assertion of power to override Congress was unwarranted by the Constitution, "despotic," and would replace government by the people with a Court "inflated with supremacy." As Abraham Lincoln campaigned against *Dred Scott* in the 1860 presidential election, Republicans in Congress declared that "whenever a decision is, in the judgment of Congress, subversive of the rights and liberties of the people, or otherwise hurtfully erroneous, it is not only the right, but the solemn duty of Congress, persistently to disregard it." The next Congresses proceeded to enact statutes that rejected *Dred Scott* and created the beginning of a multiracial democracy in the defeated South.

Congress wanted the Court to enforce its legislation against defiant states and vigilantes. But to protect its legislation from the Court's own defiance, Congress changed the Court's size, stripped the Court of jurisdiction to review its most consequential laws, and proposed further legislation to prevent a "Second 'Dred Scott' Decision."

The early Republican Party offers an important lesson for our own generation. Drawing on their experience, the legitimate role for the Court is to *enforce* federal law against anyone who considers themselves above it, whether that anyone is a corporate executive, a state official, or a president. The role for the Court is not to *defy* federal law by placing themselves above you all—the national representatives of we the people—to whom our Constitution and elections give primary responsibility to determine what our Constitution means.

You all take oaths to support the Constitution. The legislation you enact on behalf of your constituents incorporates your collective understanding of how to interpret the document. The Constitution itself declares your laws the supreme law of the land.

But when the Court defies federal law by declaring it unconstitutional—by announcing that the views of five or six unelected lawyers are superior to and beyond the reach of every official 340 million Americans have the power to elect—the Court disrespects your oaths and undermines the possibility of republican governance itself. It fosters an undemocratic system in which none of us have the power to govern ourselves or attempt to resolve our most important political disagreements.

The Supreme Court's assertion of power to defy federal law has a name: *judicial supremacy*. Unfortunately, the idea was not fully buried by Congress in the 1860s. It reemerged in the 1870s after Congress drafted the 13th, 14th, and 15th amendments along with legislation to enforce the amendments' guarantees of freedom and equality. Rather than apply Congress's new legislation, the Court seized for itself the power to declare Congress constitutionally incapable of banning lynching, racial discrimination by businesses, or widespread disenfranchisement. A century-long era of Jim Crow followed.

But like those early Republicans, we do not need to accept judicial supremacy. In fact, since the beginning of U.S. history, judicial supremacy has been rejected by the leaders of Thomas Jefferson's party, abolitionists such as Frederick Douglass, and civil rights and labor icons. They have instead advocated for an alternative tradition that Daphna Renan and I call *democratic constitutionalism*. This is the idea that we the people have the power to interpret and define the meaning of the Constitution through the process of federal lawmaking. That the best interpretation of what the Constitution means is found not in any Supreme Court opinion but instead in the federal statutes you enact.

This was the position of the lawyers who argued *Brown v. Board of Education* in the 1950s. They urged the Court to stop defying Congress's civil rights laws and start enforcing them against racial discrimination in the South. As they understood, Congress during Reconstruction opposed the Court's review of federal legislation but supported judicial enforcement of its new federal statutes and constitutional amendments against states. One act in particular, the Ku Klux Klan Act of 1871, explicitly directed courts to prevent state officials from violating anyone's rights under the Constitution

or federal law. The Court finally applied this act of Congress to overturn harmful state laws in *Brown* and in many landmark cases since then.

Unfortunately, we have lost sight of democratic constitutionalism in our own time. The lesson of *Brown* for many people—especially lawyers—is that the Court’s view of the Constitution must be supreme even over Congress, and that this supremacy has been accepted since *Marbury* in 1803. These lawyers incorrectly conflate the Court’s defiance of Congress with its enforcement of federal authority against states, advancing the misleading conclusion that judicial supremacy is needed to protect a functional political process, powerless minorities, and the Constitution itself from tyrannical majorities.

But judicial supremacy has, in fact, had the opposite effect. In the years since *Dred Scott*, the Court has deployed its claimed supremacy over Congress to gut voting rights laws, undermine civil rights laws, and eliminate laws that prevented the wealthy from dominating our elections—and your daily call time.

Judicial supremacy has also unleashed presidential authoritarianism. By disabling many of the most important laws Congress and the president have enacted over the decades to regulate the executive branch, the Court has invited presidents to claim “conclusive and preclusive” authority to defy laws that protect the peaceful transition of power, that limit the use of military force, and that prevent the corruption of federal agencies.

It is difficult to imagine how any constitutional democracy could long survive this role the Court has asserted for itself. Ours may not be able to. Because the role is not established by our Constitution, we should not tolerate it any longer.

You have the power to replace judicial supremacy with democratic constitutionalism by statute. Where the Constitution says nothing about the Court’s power to defy acts of Congress, it explicitly empowers Congress to regulate the Court and determine for yourselves which laws are necessary and proper to carry into execution the Constitution’s guarantees. Your predecessors have handed down a playbook for how to enact your understanding of the Constitution and prohibit unelected judges from replacing it with their own:

- **Curb defiance of federal statutes.** You could follow the example of the authors of the 13th, 14th, and 15th amendments who proposed declaring by statute that the constitutionality of all federal laws or specific federal laws are political questions, and therefore the Supreme Court must enforce the laws instead of defying or second-guessing them.¹
- **Introduce a consensus rule.** You could follow the example of their proposals to prohibit the judiciary from second-guessing any federal law absent a consensus rule among the justices that you specify, such as a unanimous or supermajority vote.²
- **Override harmful constitutional interpretations.** You could follow the examples of laws such as the Territorial Slavery Act of 1862, Civil Rights Act of 1866, and more recent laws such as the Voting Rights Act of 1965 and Indian Civil Rights Act Amendments of 1990 in overriding harmful Supreme Court interpretations of the Constitution.³
- **Regulate how the Supreme Court acts.** You could follow the examples of laws such as the Judiciary Act of 1789, Process Act of 1792, Habeas Corpus Act of 1868, Judiciary Act of 1925, and Rules Enabling Act of 1934 in specifying what procedures the Supreme Court must follow in reaching decisions, what kind of evidence or claims it may consider, what it has the power to do on its own initiative, what information must be publicized, and what kinds of questions, cases, or controversies it has jurisdiction to hear, including on its so-called shadow docket.⁴
- **Regulate where and when the Supreme Court sits.** You could follow the examples of laws such as the Judiciary Acts of 1789 and 1802 and Public Buildings Act of 1926 in regulating the Supreme Court's calendar, delaying when the justices are allowed to next meet, specifying where the Court is allowed to sit, or requiring the justices to ride circuit and spend time in local communities as trial judges.⁵
- **Regulate what anyone can ask any court to do.** You could follow the examples of laws such as the All Writs Act of 1789, Anti-Injunction Act of 1793, Tax Anti-Injunction Act of 1867, Norris-La Guardia Act of

¹ See, e.g., S. 363, 40th Cong. (1868) (specific law); S. 274, 41st Cong. (1869) (all laws).

² See, e.g., S. 163, 40th Cong. (1868) (supermajority); Cong. Globe, 40th Cong., 2d Sess. 479 (1868) (unanimous).

³ 12 Stat. 432 (territories); 14 Stat. 27 (1866); 79 Stat. 437 (VRA); 104 Stat. 1892 (ICRA).

⁴ 1 Stat. 73 (1789); 1 Stat. 275 (Process); 15 Stat. 44 (Habeas); 43 Stat. 936 (1925); 48 Stat. 1064 (Rules).

⁵ 1 Stat. 73 (1789); 2 Stat. 132 (1802); 2 Stat. 156 (1802); 44 Stat. 630 (Buildings).

1932, Johnson Act of 1934, Portal to Portal Act of 1947, Immigration and Nationality Act of 1952, Antiterrorism and Effective Death Penalty Act of 1996, and Fiscal Responsibility Act of 2023 in regulating who can bring a particular case in any court, including the Supreme Court; what issues no court has jurisdiction to decide; and what kinds of writs, injunctions, or other orders a court has the power to issue.⁶

- **Allow new or specific courts to resolve certain issues.** You could follow the examples of laws such as the Judiciary Acts of 1801 and 1802, Evarts Act of 1891, Emergency Price Control Act of 1942, Voting Rights Act of 1965, Foreign Intelligence Surveillance Act of 1978, and Federal Courts Improvement Act of 1982 to create new courts, abolish existing courts, reassign judges, or allow only certain courts—including the courts you create—to exercise jurisdiction over specific questions.⁷
- **Specify when the United States or its officials may be sued.** You could follow the examples of laws such as the Tucker Act of 1887, Federal Tort Claims Act of 1946, and Westfall Act of 1988 in specifying when, if at all, the United States or its officials may be sued and whether they are entitled to sovereign, qualified, or other forms of immunity.⁸
- **Create administrative alternatives to Article III courts.** You could follow the examples of laws such as the Court of Claims Act of 1855, Freedmen’s Bureau Act of 1866, Immigration Act of 1891, Federal Trade Commission Act of 1914, and Dodd–Frank Act of 2010 in channeling law enforcement through agencies rather than courts.⁹
- **Specify how to interpret federal law.** You could follow the examples of laws such as the Dictionary Act of 1871, Administrative Procedure Act of 1946, Religious Freedom Restoration Act of 1993, and Iran Threat Reduction and Syria Human Rights Act of 2012 in instructing courts how to interpret federal laws and whether or not to apply canons of interpretation such as the so-called major questions doctrine.¹⁰

⁶ 1 Stat. 73, 81 (AWA); 1 Stat. 333, 334 (AIA); 14 Stat. 471, 475 (Tax); 47 Stat. 70 (Norris–La Guardia); 48 Stat. 775 (Johnson); 61 Stat. 84 (Portal to Portal); 66 Stat. 163 (INA); 110 Stat. 1214 (AEDPA); 137 Stat. 10, 47 (Fiscal Responsibility).

⁷ 2 Stat. 89 (1801); 2 Stat. 132 (repeal); 2 Stat. 156 (1802); 26 Stat. 826 (Evarts); 56 Stat. 23 (EPCA); 79 Stat. 437 (VRA); 92 Stat. 1783 (FISA); 96 Stat. 25 (FCIA).

⁸ 24 Stat. 505 (Tucker); 60 Stat. 842 (FTCA); 102 Stat. 4563 (Westfall).

⁹ 10 Stat. 612 (Court of Claims); 14 Stat. 173 (Freedmen); 26 Stat. 1084, 1085 (Immigration); 38 Stat. 717 (FTC); 124 Stat. 1376, 1955 (CFPB).

¹⁰ 16 Stat. 431 (dictionary); 60 Stat. 237 (APA); 107 Stat. 1488 (RFRA); 126 Stat. 1258 (Iran).

- **Define “good Behaviour.”** You could expand federal ethics laws enacted since 1792 that define what counts as “good Behaviour” for a federal judge, that establish oversight institutions for the federal judiciary, and that require Supreme Court justices to disclose certain gifts, to abstain from receiving bribes or honoraria, and to recuse from cases in which their impartiality might reasonably be questioned.¹¹
- **Regulate the Supreme Court’s budget and discretionary benefits.** You could change how you appropriate funds to the Supreme Court, using this power to regulate how it hires clerks and other staff and when justices receive raises, vacation, retirement benefits, and other perks.¹²
- **Change the number of justices.** You could follow the examples of federal laws enacted in 1789, 1801, 1802, 1807, 1837, 1863, 1866, and 1869 that specify the number of justices who sit on the Supreme Court.¹³

This final example brings us back to the subject of this hearing: whether “court packing” is a “threat to the Court’s legitimacy.”

The answer to this question is that the number of justices, like nearly everything else about the Court, can be regulated by statute. Section 1 of title 28 of the U.S. Code currently sets the number of justices at nine. Congress can amend that number. And if the current majority of the Court is exercising an illegitimate supremacy over federal law, a supremacy that the Constitution does not give the Court, that the Court should not possess, and that is being used to undermine multiracial democracy while making the future of republican governance unviable, then regulating the Court is not just legitimate—it is Congress’s responsibility.

¹¹ Process Act of 1792, 1 Stat. 275 (recusal); Judicial Disqualification Act of 1974, 88 Stat. 1609 (recusal); Ethics in Government Act of 1978, 92 Stat. 1824 (disclosure); Judicial Conduct and Disability Act of 1980, 94 Stat. 2035 (oversight); Ethics Reform Act of 1989, 103 Stat. 1716 (bribe and honoraria ban). *See also* S.J. Res. 193, 64th Cong. (1917) (proposing that the judicial defiance of federal law violates the “good behavior” standard).

¹² *See, e.g.*, 28 U.S.C. §§ 671–77 (Supreme Court staff); Judiciary Act of 1869, 16 Stat. 44 (pensions); Act of Mar. 1, 1929, ch. 419, 45 Stat. 1422 (senior status).

¹³ Judiciary Act of 1789, 1 Stat. 73 (6 justices); Judiciary Act of 1801, 2 Stat. 89 (5); Act of Mar. 8, 1802, 2 Stat. 132 (6); Seventh Circuit Act of 1807, 2 Stat. 420 (7); Eighth and Ninth Circuits Act of 1837, 5 Stat. 176 (9); Tenth Circuit Act of 1863, 12 Stat. 794 (10); Judicial Circuits Act of 1866, 14 Stat. 209 (7); Judiciary Act of 1869, 16 Stat. 44 (9).

Mr. ISSA. Thank you. We will now proceed to the five-minute rule. I will ask for unanimous consent at this time to place into the record the Judges Act, H.R. 1702, a bill to expand the District Courts over a phased-in period. Additionally, I will put in H.R. 3422, the Judiciary Act of 2023 to expand the court.

I will put in a news story from 2026, just a few days ago, "Democrats renewed call for U.S. Supreme Court overall after the Voting Rights Act decision." Without objection, so ordered.

We now proceed to the gentleman from Wisconsin, Mr. Fitzgerald, for five minutes.

Mr. FITZGERALD. Thank you, Chair. Mr. Ross, for the first 80 years of our Nation's history, the size of the Supreme Court changed with some regularity, why was that? Microphone. Microphone.

Mr. ROSS. Pardon. The expansion of population, originally the justices were chosen largely on geographical grounds, and every of course the justices rode circuits, the justices wore two hats until 1891. They served as Circuit Court judges, and they also served as U.S. Supreme Court Justices. In a smaller Nation, there were only four million people in the 1790 census, there was less need for a larger Court.

As the country expanded, as the number of circuits expanded, the number increased, but only to nine, from five to nine. A maximum of ten, and then only for six years, from 1863 to 1869 there were ten. Since 1869 we have had nine. That is a long history, a century and a half with nine members, and it has worked very well so far. In my opinion that ought to be the number.

Mr. FITZGERALD. Well, let me followup then. In 1869, when Congress did pass that Judiciary Act, why did they set it at nine justices at that point, do you figure?

Mr. ROSS. Well, if the Court divided, that would be five to four, if you have ten then the Court could be split, if the Court splits, then the lower court decision stands. It is generally better to have a decisive decision of the Court. Nine permits the Court to divide one way or the other.

Mr. FITZGERALD. As Ben alluded to a couple times, when President Roosevelt tried to unsuccessfully, in 1937, to expand the Court to 15 justices, was there any sound logic to this expansion that the President was using, or making, or was it merely an overreaction to a Supreme Court that had repeatedly struck down the New Deal?

Mr. ROSS. Historians are unanimous, or virtually unanimous, historians are never unanimous on anything, but about as unanimous as they can be that the Court packing plan in 1937 was politically motivated. The Supreme Court had struck down a number of significant New Deal statutes in the previous two years, and the Social Security Acts, and the National Labor Relations Act were coming up for adjudication before the Court.

These were the signature legislation of the New Deal, and Roosevelt was understandably worried that the Court would strike those down. His remedy was to increase the number of justices to pack the Court so that the Social Security Acts, both the old age pension and the unemployment compensation laws, and the Na-

tional Labor Relations Act, which was hugely important at the time of industrial unrest, would be secured.

Franklin Roosevelt originally claimed that he was doing this because the Supreme Court was overworked, and the justices were geriatric, there were six of them who were over the age of seventy, that is why he chose six, one new justice for every justice who was over the age of seventy. The older justices were, for the most part, quite vigorous, including Louis Brandeis, and Chief Justice Hughes was in the peak of health, despite his age, over seventy.

It was so disingenuous that it was almost laughed at. Roosevelt, about a month after he introduced the plan, admitted that his motives were frankly political. By the way, the then Chair of the House Judiciary Committee, Hatton Sumners, a Democrat, opposed Roosevelt's plan from the very first day, that is why Roosevelt introduced it in the Senate, rather than in the House.

Mr. FITZGERALD. Very good, thank you. Already this morning there has been some attacks on the Supreme Court by some of my colleagues on the other side over—well just as a former Clerk, Mr. Capozzi, you State in your testimony that if too many come to view the Supreme Court as a partisan actor rather than a neutral arbitrator of law, the losing parties would be tempted to disregard court orders. What would that mean for our government as a whole? I know that is a big question.

Mr. CAPOZZI. It would mean the end of the rule of law, plain and simple.

Mr. FITZGERALD. Do you think that are there certain parameters to criticizing the Court, or is that unacceptable beyond the First Amendment?

Mr. CAPOZZI. It is perfectly acceptable to criticize the Supreme Court, people always have, Presidents from the beginning of our country have lost major cases before the Supreme Court. President Jefferson frequently criticized decisions from the Supreme Court. There is a line between criticizing decisions, criticizing their reasoning, and attacking the legitimacy, and the independence of the Supreme Court itself.

Mr. FITZGERALD. Very good, I yield back.

Mr. ISSA. The gentleman yields back. We now go to the Ranking Member of the Subcommittee, the gentleman from Georgia for five minutes.

Mr. JOHNSON. Thank you, Mr. Chair. Professor Bowie, the Supreme Court's recent decision in *Louisiana v. Callais* represents the culmination of a decades long campaign led in part by Chief Justice Roberts to dismantle the Voting Rights Act, from *Shelby County* to *Brnovich*, and now *Callais*, there has been a systemic, and systematic effort to substitute judicial skepticism for Congress' explicit constitutional authority to protect the right to vote.

Professor Bowie, how does the *Callais* decision compare to the Supreme Court's treatment of Reconstruction era protections, and the initial passage of the Voting Rights Act?

Mr. BOWIE. It is directly related, because for the first century after Congress proposed the 15th Amendment to protect the right of people to vote, and to prohibit States from violating that right on account of race, the Supreme Court interpreted the 15th

Amendment to prohibit only laws that it thought had the intent of discriminating on the basis of race.

Applying that test, the Court allowed literacy tests, poll taxes, and all sorts of other State laws to effectively disenfranchise all Black people, or nearly all in the South.

When Congress passed the Voting Rights Act in 1965, its goal was to overcome those decisions, and instead apply an effects test, or something that said when a State law has the effect of making it more difficult for people of color or any other group to vote on account of their race, then that is illegal.

When the Supreme Court interpreted that law in the 1980s, it said that actually what Congress did was apply the same sort of intent test, had to prove that a State legislature intended to discriminate against Black people. Congress again said no, you are getting this wrong. We think the problem is all these laws that have the effect of making it more difficult for people to vote.

What happened in the recent decision just a few weeks ago is the Court said no, we think what Congress actually did was apply this same test that we have applied for generations that has had the effect of making it far more difficult for people of color to vote, and we are seeing the consequences right now as every Southern State considers laws to take away representation in Congress that is currently occupied by Black or Hispanic representatives.

Mr. JOHNSON. Many Americans increasingly view the Court as acting less like a neutral judicial body, and more like a political institution, advancing a particular ideological agenda. When the Court repeatedly invalidates laws enacted through the democratic process to expand voting rights and representation, does that contribute to a crisis of legitimacy of the institution itself?

Mr. BOWIE. It does in the sense that what people expect from the Supreme Court is what Congress has asked the Court to take an oath to do before anyone can become a justice. Which is to apply the law without fear or favor to rich and poor alike. When people look at the kinds of rulings coming out of the Court that seem to systematically favor one party, or the wealthy, or corporations, or any number of people on a pretty predictable basis.

Just knowing kind of what is going on in the case before the Court even issues a decision I think does have an effect on what people think the Court is in effect doing. I agree with my colleagues on this panel that to the extent what people think the Court is doing is simply issuing Truth Social posts, then no one will take it seriously.

The Court's power comes from the idea that what the justices are doing is different from what you are all doing as politicians. When all the evidence, and all the public information about the Court suggests that actually the same kinds of policy decisions are happening on the bench that are happening in Congress, it becomes very difficult to treat the Court as a different kind of institution than your esteemed body.

Mr. JOHNSON. Thank you. If the Court continues to narrow Congress' ability to protect voting rights under the Reconstruction amendments, what does that mean for the balance of powers as envisioned by our Constitution, and for the future of multiracial democracy in this country?

Mr. BOWIE. The Constitution is ours to interpret as Americans. It is a document for all of us, and people have marched in protest and died in order for the Constitution to reflect that we are a democracy, we should protect the ability of all of us who can vote to do so, and that we should not tolerate laws that make it more difficult for people to access the ballot.

When the Supreme Court interprets the Constitution to say that this kind of rule is not constitutional, that the 15th Amendment, when it specifically empowers Congress to adopt appropriate legislation, but that a law as fundamental as the Voting Rights Act is not appropriate, that is a misreading of the document that we do not have to accept.

Because if we do, the consequence is going to be the end of our ability to govern ourselves, and the end of our ability to enact voting protections.

Mr. JOHNSON. Thank you, with that, I yield back.

Mr. ISSA. The gentleman yields back. With that, we recognize the Chair of the Full Committee, Chair Jordan.

Chair JORDAN. Their argument is the Court is too political, so let us let the political body add four new seats. That is one of the dumbest things I have ever heard, but that is the arguments the Democrats are making, and their witness is articulating. It makes no sense. That is why we need to keep the Court at nine.

I will yield to the former Attorney General from the great State of Kansas the remainder of my time.

Mr. SCHMIDT. Thank you, Mr. Chair. I appreciate the Chair and the Chair convening this hearing. I am sitting here listening to this today, I was musing about something I often think about when there is no point in debating it, and that is what things in Independence Hall would have been like all those years ago if we had all had cameras, cell phones, and social media, where every statement is calibrated for consumption by a particular audience somewhere not in this room.

This is one of those heavy issues that is not solely about the issues of the day. This is one of those questions that is about, to paraphrase the professor, how we choose to govern ourselves. The discussions we are having here aren't materially different in nature than the ones they had in Independence Hall about how you balance out the decisionmaking, and who does what.

The difference is we have come to focus on looking at this through a lens of the issues of the day, not a lens of how we should structure our self-determination. Our history is one that when we have attempted to do that before, when we have erred in looking at these important structural questions through the issue of the day, we have so far rejected that notion.

I would like to on that point go back to what we have referenced many times, but not talked a lot about today, which is the failed effort to pack the Court by expanding its numbers in the Roosevelt Administration in 1937 I believe it was.

Remember the context of that time, it has been mentioned by Professor Ross and others about the Court overturning a number of—modifying and reversing its view in some cases on the appropriate limitations on the constitutional powers of Congress to act in the economic space in particular.

Remember what was happening politically. Less than a year before there had been a Presidential election in this country, and Franklin Roosevelt was re-elected, and these issues were central in that election. I wasn't alive then, but it is a little personal for me, the Republican nominee for President that year was Alf Landon, he is from my little home town of about 9,000 people.

He was the only Republican Governor re-elected in the country in 1934, which is why he became our nominee in 1936, and he lost in a landslide. In fact, he only carried Maine and Vermont, he didn't even carry Kansas. Roosevelt had a mandate we might say, and yet he overreached. It took a bipartisan Majority to say notwithstanding that clear message from the people and notwithstanding the power of the Presidency, we are going to defend the structure of this democracy, and of this Court.

As has been mentioned, the Chair of the House Judiciary Committee at the time, a Democrat, didn't favor packing the Court. Ultimately, when it came to a vote in the Senate, the Democrat led Senate Judiciary Committee said they don't favor the packing of the Court. The U.S. Senate, which was a Majority Democrat at the time, voted overwhelmingly, it was 70 to something, not to adopt a Court packing plan.

What is happening in this room today, and in our politics today is different. It is different because for some reason we seem incapable of having what I would believe to be a more reasoned bipartisan or a partisan nonpartisan discussion about how we want our Supreme Court to function, and what its appropriate role is.

I won't read all the statements, they have been entered into the record, but right now at this moment in our history it is my friends on the other side who seem intent because they don't like the direction the Court is headed to pack it with new members. I suppose those of us on the more conservative side could have made the same argument for many years after the Roosevelt courts because we didn't like a lot of those decisions.

We, for the most part, didn't as vociferously argue about just fundamentally changing the structure. I want to return to just a couple of questions here that have been touched on before. Can any of you tell me, let me start, Professor Ross, you have addressed this, Mr. Capozzi, let me ask you, and Mr. Schaerr, and then Mr. Bowie.

Let us assume that a Court expansion plan is adopted in some form, what is the limiting principle that will limit its further expansion in the future if we succumb again to the political passions of the moment? Mr. Capozzi?

Mr. ROSS. I don't think that there is any limit. That is one of the fatal flaws of the proposal. If one President packed the Court, then the next President could pack the Court, and it would just be a never ending cyclical process and end up with potentially hundreds of Supreme Court Justices.

Mr. SCHMIDT. Thank you, Mr. Ross. Mr. Capozzi?

Mr. CAPOZZI. The only limit would be what each side can get away with.

Mr. SCHMIDT. Mr. Schaerr?

Mr. SCHAERR. There is no limit.

Mr. SCHMIDT. Professor, what is the limiting principle?

Mr. BOWIE. The role of the Court is an important question as you have laid out, and the role is not to be this undemocratic super weapon in the middle of our democracy. The role is not to try to put as many of our—

Mr. SCHMIDT. Is there a limiting principle if we expand it today because one side is mad, do we expand it tomorrow because somebody else is? What is the limiting principle?

Mr. BOWIE. Putting justices on the Court for their own sake is not a good idea, nor is changing the size of the Court simply because nine is a better number than eight, or ten is a better number than nine.

Mr. SCHMIDT. Thank you, Professor, I yield back, I am out of time.

Mr. ISSA. I appreciate that, the gentleman yields back. We now go to the Ranking Member of the Full Committee, the gentleman from Maryland for his questions.

Mr. RASKIN. Thank you, Mr. Chair, and thank you, Mr. Schmidt, for those thoughtful comments. One of the things you say is we should be talking about how the Supreme Court should function, and is it consistent with the Constitution, and the rule of law? Let us talk about the shadow docket, and what is actually going on in the Supreme Court today.

When Trump's policies, whether it is an attempt to directly nullify the first sentence of the 14th Amendment, which establishes birthright citizenship, or his attempt to usurp the spending powers of Congress are challenged, he is losing 60 percent of the time in the District Courts he has lost, 57 percent of the time in the Federal Circuit Courts.

Then, it gets up to the Supreme Court, and its shadow docket, and there he has won 84 percent of the time. He goes from losing 40 percent of the time to winning more than 80 percent of the time when it gets up into the Supreme Court. Now, obviously, we would disagree about substance, those who want to go with Trump, and say that he can nullify birthright citizenship in the country, just going to disagree about that, fine.

What about the shadow docket, and how it operates? Nobody has uttered a word about what that does to undermine the legitimacy of the Court. We have hundred-page opinions, authoritative, magisterial opinions being written by District Court judges, or panels, Circuit Court judges that are being overturned with one sentence or one paragraph in the shadow docket.

Is that legitimate, or is that illegitimate? Maybe we can just go down the line, Mr. Schaerr?

Mr. SCHAERR. In general, it is legitimate, every Appellate Court has the authority to stay a decision of a lower court—

Mr. RASKIN. OK, Mr. Ross, do you think it is legitimate, what is taking place with the shadow docket?

Mr. ROSS. I share your concern about the shadow docket; I am troubled by it too. I don't think criticism of the shadow docket provides any justification for Court packing—

Mr. RASKIN. Is it legitimate or illegitimate, I am just asking whether it is legitimate or illegitimate.

Mr. ROSS. I don't think it is illegitimate.

Mr. RASKIN. OK, Mr. Capozzi?

Mr. CAPOZZI. It is legitimate, it has been around for a long time. You look at the stay of execution litigation going back decades—

Mr. RASKIN. OK, thank you. Mr. Bowie, what about you?

Mr. BOWIE. I don't think it is legitimate, in part because of the damage that it is doing to the Court's credibility, as well as to our country. We have a Court right now that is issuing decisions without the benefit of argument, without the benefit—

Mr. RASKIN. That really is Truth Social, meet the Supreme Court, we will send you one sentence and overturn an entire analysis. The legitimacy of the rule of law depends on the character of the analysis that is given to the legal question. Nobody has taken me up on my invitation to discuss the legitimacy or the illegitimacy of the Court based on what Senator McConnell did.

Is there anybody who would argue that what he did was legitimate in saying we will not even have a hearing on President Obama's nominee, Merrick Garland, and we will not have any votes 11 months before the election, but we will rush through the nominee to take Justice Ginsberg's seat. Anybody want to argue that this is legitimate?

Mr. SCHAEFFER. I will certainly take you up on the first part of that. When McConnell did that, he announced that he was applying the pre-existing Biden rule, which is that we don't consider new Supreme Court nominees during an election year. I agree that the Amy Coney Barrett hearing was an exception to that, but—

Mr. RASKIN. OK, anybody else wants to defend the legitimacy of what Senator McConnell did, and would anybody agree with me that this is a form of Court packing? Just as much as the mythical Court packing that we are denouncing today, since I am not aware of any proposal on the table.

Mr. CAPOZZI. It is fundamentally different, the Senate plays a role in our separation of powers, it has to check and balance the President, the people that are in the Senate matter. If they don't want to confirm a Justice of the Supreme Court, they don't have to—

Mr. RASKIN. If the Senate does it, it is OK, it is just you don't want a President nominating, but of course if a President nominated under a new law, then that would be legitimate, wouldn't it?

Mr. CAPOZZI. It is a different thing when the Senate plays its constitutionally—

Mr. RASKIN. Do you know how many times we have changed the number of people in the Supreme Court?

Mr. CAPOZZI. It has been almost 160 years since it happened.

Mr. RASKIN. No, it has happened six different times, a total of eight times.

Mr. ISSA. Ending in 1869 is the last time.

Mr. RASKIN. Yes. Right, well in any event it has changed numerous times throughout our history, there is nothing remotely illegitimate about it; it is not frozen in the Constitution, would you agree?

Mr. CAPOZZI. I agree, it is not frozen in the Constitution, but we have a tradition dating back to 1869—

Mr. RASKIN. All right, but in any event, I don't know why we went off on this numerical thing, because that is not what this is really about, the question is about the legitimacy of a Court that

is demolishing the voting rights of the people. Essentially overruling democracy at every turn.

I wonder, Professor Bowie, in the time remaining, if you could discuss what it means for the Supreme Court to intervene in elections like in *Bush v. Gore*, or like with the Voting Rights Act in a way that undermines the people's ability to govern?

Mr. BOWIE. Well, one thing to speak about in terms of the 1869 precedent that keeps coming up, is in 1866 Congress passed the Civil Rights Act to guarantee citizenship to all people born in this country. They feared that President Johnson was going to appoint justices to the Court that were going to try to overrule that law, which has become foundational for our democracy.

Congress changed the number of justices; it reduced the size of the Court to prevent the President from appointing new justices.

Mr. RASKIN. Thank you, I yield back, Mr. Chair.

Mr. ISSA. Thank you. For the Ranking Member, apparently Congressman Green did put in a Court expansion in this Congress, and there were ones in the last Congress, would you join with me in a discharge petition to do that immediately?

Mr. RASKIN. The fact that I have not heard of it tells you exactly how much political traction it has. Look, there are a lot of things we should do in terms of Supreme Court ethics—

Mr. ISSA. The question is, do you support that it—

Mr. RASKIN. I have never seen it; you would have to—

Mr. ISSA. If I drop one today, will you cosponsor it for this Congress?

Mr. RASKIN. Cosponsor what?

Mr. ISSA. An expansion of the Court pursuant to what you had in the last Congress?

Mr. RASKIN. We haven't had a single hearing about it. If you have a hearing about it then we can analyze it. We have got to take this seriously, right? I honestly don't even know what his proposal is.

Mr. ISSA. Why don't I just take the one that you had when you were in the Majority, and present it?

Mr. RASKIN. Well, I am interested in term limits of 18 years, the vast majority of the American people support term limits for justices, and if they want to stay on the Court as a District judge or an Appeals Court judge, that is consistent with—

Mr. ISSA. It is a constitutional change, you would—

Mr. RASKIN. No, it is not, if they stay on the Court as a District judge or a Circuit Court judge, that is consistent with the command of life tenure. I am interested in term limits for Members of Congress. We can look at the question of whether every Federal Circuit should be represented on the Supreme Court, which was the whole original idea behind it, that is what Circuit riding is all about.

Mr. ISSA. Do you really mean to say for Members of Congress?

Mr. RASKIN. For the Supreme Court.

Mr. ISSA. OK, just checking.

Mr. RASKIN. I am actually for that, I am actually for that.

Mr. ISSA. Just checking, after you and I have been here the past the six years.

Mr. RASKIN. It was a Freudian slip, I am actually not opposed to term limits.

Mr. ISSA. The longer I stay, the more in favor of that I am, including in this term. I thank the gentleman from the colloquy. With that we go to the gentleman from Virginia, Mr. Cline.

Mr. CLINE. Thank you, Mr. Chair. This hearing is very important, especially when, and I appreciate the consistency of the Ranking Member, or the attempt thereof, the importance of consistency when talking about judicial decisions, when you have judicial decisions that may not comport with your understanding of the Constitution, that somehow democracy is being overturned.

That was the rhetoric that was just used by the Ranking Member, and it is offensive to me.

Mr. RASKIN. Would the gentleman yield for just a second?

Mr. CLINE. I will not. Well, yes, for a second.

Mr. RASKIN. I actually wrote a book with that title, which I will give to you, called "Overruling Democracy," the *Supreme Court v. The American People* about *Bush v. Gore*, and Right-wing judicial—

Mr. CLINE. I appreciate that the gentleman is being consistent with the book that he wrote. It is equally frustrating to see that in not all cases do you have, especially in the shadow docket, you have examples where they did not rule in favor of a conservative philosophy, if you look at just the *Mifepristone* ruling last week, or this week.

Mr. RASKIN. If you would yield for one second?

Mr. CLINE. I will yield.

Mr. RASKIN. There have been 27 cases in the shadow docket, and Donald Trump has won 25 of them. You may have identified one of the two that he didn't win.

Mr. CLINE. I understand that. One of the things I want to talk about is just because you agree with the decision a court makes shouldn't determine whether or not democracy is being upheld or overturned. It is going down a road that is very destructive, and I want to talk about what is happening in Virginia.

Because in Virginia right now we have a destructive path that is being pursued by the Majority in our legislature. Now, we are one of two States where the legislature actually appoints the judiciary, so you have a somewhat convoluted process that actually doesn't work as efficiently as some other States.

Mr. Capozzi, you may be aware that Virginia Democrats passed a redistricting amendment through a procedurally flawed process. The Virginia Supreme Court struck that process down as a violation of the Virginia Constitution. Undeterred by their State court loss, Democratic Attorney General Jay Jones appealed to the U.S. Supreme Court.

Although in his filing it indicated he was appealing to the Supreme Court of Virginia again, and it was "Virginia," and it was "Sentator," but there were a lot of misspellings. He appealed to the U.S. Supreme Court despite raising no Federal claims, and was denied. Rather than accept that, Senate Majority Leader Scott Surovell took to X to spin the ruling, claiming that only one justice had weighed in.

In fact, the denial itself stated quote, "The application for stay presented to the Chief Justice, and by him referred to the Court

is denied.” No noted dissents, not even from the three Democrat appointed justices. Yet, Democrats immediately attacked quote, “Far right extremists on the Supreme Court.” Quickly used the unanimous rejection to continue their campaign against the Court’s conservative justices.

Mr. Capozzi, how damaging is it to the rule of law when political actors use a legally correct unanimous court ruling as a pretext for attacking judicial legitimacy?

Mr. CAPOZZI. Yes, just to clarify, a decision like that would have been referred to the full Supreme Court. It wasn’t just a single justice, all nine justices agreed that this appeal lacks merit, and most intelligent observers in the Supreme Court bar agreed that this was a borderline frivolous appeal. It presented only a question of State law.

At minimum, I would encourage people not to attack the Supreme Court when they unanimously reject a frivolous appeal.

Mr. CLINE. Mr. Schaerr, Court packing isn’t just a Federal ambition, after the Virginia Supreme Court struck down the State’s re-districting map, Democrats floated the idea encouraged by alleged phone conversations with Federal Democrats, slashing the mandatory retirement age for its justices from 75 to 54 to purge the entire bench.

Virginia delegate Dan Helmer went further, publicly vowing to remove Justice Kelsey, who wrote the opinion, from the bench when he is up for reappointment this coming year. For a party that has made no kings its rallying cry, isn’t threatening a justice by name and purging an entire bench a rather dictatorial definition of democracy?

Mr. SCHAERR. Absolutely, Mr. Cline, and it is a move reminiscent of the authoritarians that we discussed earlier, like Robert Mugabe in Zimbabwe, and Hugo Chavez in Venezuela. That is the kind of stuff they did to their judiciaries to try to get them in line with their programs.

Mr. CLINE. Agreed, I appreciate the comments of the gentleman. I yield back.

Mr. ISSA. The gentleman yields back. We now go to the gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Mr. Chair, with all due respect, keep hearing about how Court packing is the greatest threat facing the judiciary and the rule of law, but I don’t think that is the crisis facing the Court right now. The real crisis is a growing ethics and corruption problem at the Supreme Court, and it is one that Congress can actually do something about.

Unfortunately, my time does not allow me to list every undisclosed luxury trip, private jet flight, billionaire-funded vacation, yacht excursion, and lavish gift uncovered so far, but the scale is staggering. According to Fix the Court, Justice Clarence Thomas alone reportedly received more than 100 gifts worth over 2.4 million dollars.

While all his fellow justices combined received gifts worth only 248,000 dollars over the same period, a 20-year period. Here are just a few examples Justice Thomas reportedly accepted. Luxury vacations on a billionaire’s super yacht in Indonesia that ProPublica estimated likely exceeded half a million dollars.

More than two decades of repeated private jet flights on billionaire-owned aircraft, including trips on a Bombardier Global 5000, and even a private Boeing 737, with some individual flights estimated in the tens of thousands to over 100,000 dollars. At least 26 private jet flights and eight helicopter trips identified by investigators.

Annual stays at an exclusive, private Adirondacks resort, where nearby rooms can cost more than 2,000 dollars a night. Luxury resort stays in Florida and Jamaica, VIP sky box access, and luxury suite tickets to major sporting events, trips to Bohemian Grove, private school tuition payments for a child he was raising, and real estate transactions involving property tied to his family.

According to Fix the Court, Justice Alito accepted approximately 170,000 dollars in gifts over the same period, including private jet transportation to a luxury Alaska fishing lodge, expensive lodging, and fishing accommodations tied to billionaire Paul Singer, and gifts that the Senate Judiciary Committee concluded should have been disclosed under Federal law.

Now, Americans watching at home understand that this is wrong. Billionaires should not be getting the kind of undisclosed access and luxury relationship with Supreme Court Justices. Let me ask you this, Professor Bowie, yes or no, do you believe these kinds of gifts and luxury travel arrangements undermine confidence in the Court?

Mr. BOWIE. Yes.

Ms. LOFGREN. Thank you. Mr. Chair, I would ask unanimous consent to put into the record a <it>CNBC article on Justice Thomas' acceptance of gifts, two *ProPublica* articles on the same topic, a Senate Judiciary Committee press release, and an additional article from *ProPublica*.

Mr. ISSA. Without objection, so ordered.

Ms. LOFGREN. I will yield the balance of my time to the Ranking Member.

Mr. RASKIN. Thank you kindly, Ms. Lofgren. Just picking up on that point, there is a 50-dollar gift ban that applies to all of us in Congress, and to the Executive Branch as well. Would you agree that it would enhance the independence of the Court, from not just congressional and Presidential attacks, but special interest domination, to apply a 50-dollar gift ban to the Supreme Court Justices? Professor Bowie, if you would go first?

Mr. BOWIE. Yes, I will just note that Congress has already passed laws that prohibit justices from taking bribes. Congress has also passed laws that require the justices to recuse from cases in which their impartiality may be reasonably questioned.

Mr. RASKIN. Yes. Attorney General Capozzi, do you agree that a 50-dollar gift ban should apply to all three branches, not just two?

Mr. CAPOZZI. I am skeptical that such a ban is needed for the Supreme Court, but at the same time, I don't have strong opposition to such a proposal.

Mr. RASKIN. OK, Mr. Ross?

Mr. ROSS. I would agree with the solicitor general.

Mr. RASKIN. OK, and Mr. Schaerr?

Mr. SCHAERR. Well, there is a fundamental difference between Members of Congress and Supreme Court Justices in this regard.

When you are a Member of Congress, just about every person in your district, and elsewhere in the country is a potential supplicant for your services, and your assistance. When you are in the Supreme Court, you are only dealing with a relatively limited number of cases with people who have direct interests in your work.

It is certainly appropriate, and I know Justice Thomas, and he is scrupulous about avoiding accepting gifts from anybody who has business before the Supreme Court—

Mr. RASKIN. Really, well we need to have a hearing on that then. Because we have a completely different point of view on that point, but don't you think just in terms of public perception, it would be much better not to believe that justices could be compromised by virtue of receiving gifts from people who appear before them? After all, they have no binding ethics code now.

They are the only Supreme Court in America that doesn't have a binding ethics code. Without a binding ethics code, we are leaving it up to them to decide.

Mr. SCHAERR. I don't think it would affect the reality of their independence. It might affect the public's perception of their independence; it would take away a talking point.

Mr. RASKIN. Do you think it is OK for a billionaire to pay for Clarence Thomas' nephew's private school tuition, that is OK?

Mr. SCHAERR. If the billionaire doesn't have any business before Justice Thomas, there is nothing wrong with that.

Mr. RASKIN. When, if he does, you would agree that is wrong? If he does have business before the Court, you would agree that is wrong?

Mr. SCHAERR. If he has concrete business before the Court, then that would be a different matter, and I am confident in that situation, Justice Thomas would recuse from cases that involved him.

Mr. RASKIN. You are?

Mr. SCHAERR. Yes.

Mr. RASKIN. OK, what about a situation where somebody with potential business before the Court—

Mr. ISSA. I ask unanimous consent that the gentlelady to have an additional thirty seconds, without objection.

Mr. RASKIN. Just to complete this point—

Ms. LOFGREN. Reclaiming my time, if I may say also, that you can have a pecuniary interest before the Court, but many of these billionaires have philosophical points of view that is before the Court, and that is why they are paying off the justices. I yield back.

Mr. RASKIN. Then, just to complete that question, so if Justice Thomas or any justice were to get a free recreational vehicle from somebody who has an interest in the work of the Court, do you think that would be legitimate, or do you think that they should be held to the same standard we are, a 50-dollar gift ban, somebody can take you out for lunch.

Mr. SCHAERR. If they have a concrete business interest before the Court, then yes, it would be inappropriate for Justice Thomas to accept that kind of a gift, and then sit on a case that involves that—

Mr. RASKIN. What if they have a general business before—

Mr. SCHAERR. I am sorry?

Mr. RASKIN. What if they have a general business interest before the Court?

Mr. SCHAEER. Well, I don't—

Mr. RASKIN. See, we don't get into that in Congress. We basically say we are going to cut it off at the pass, none of us are going to be compromised in that way—

Mr. SCHAEER. That is true—

Mr. ISSA. OK, I apologize, but I am going to close this off, because Mr. Gooden is next. I will say to the gentlelady, and to the gentleman, that although I can't support the full bill that was offered earlier this year on forcing a set, I would be happy to entertain discussion between our staff and, individually, the Members on trying to harmonize some aspect of what is nonreimbursable between us.

As you know, the Senate, you pay for a first-class seat if you want to fly on that aircraft, while the House has prohibition. I would be happy to work with the Minority on trying to set a cap on how much could be received as a gift, versus how much would have to be reimbursed. I believe that is certainly middle ground that we could look into doing this Congress.

Mr. RASKIN. I would welcome that, thank you, Mr. Chair.

Mr. ISSA. OK, look forward to it. With that, we go to the gentleman from Texas for his time.

Mr. GOODEN. Mr. Ross, you were speaking earlier, I believe with the Ranking Member, about the number of times that the number of Supreme Court Justices has changed. When was the last time we changed the makeup of the Supreme Court, when was that?

Mr. ROSS. In 1869.

Mr. GOODEN. In 1869, and I believe it was 1863 that the Emancipation Proclamation came out. What I am hearing is that Democrats want to go back to slavery era politics with respect to the Supreme Court makeup. One of the arguments is, well, it has been done several times, but you just said it has been no time since 1869. Six years after the Emancipation Proclamation is when Congress stopped playing games with the makeup of the Supreme Court.

Now, Democrats are defending this idea. Fortunately, some are well, some are not living, but some were not quite outrageous. In 2019, Justice Ruth Bader Ginsberg stated,

I think it was a bad idea when President Franklin Roosevelt tried and failed to pack the Court, and if anything, it would make the Court look partisan.

In 2021, Justice Stephen Breyer remarked during a Harvard Law School speech that,

Packing the Court would be a structural alteration that would result in eroding trust in the judiciary.

More recently, in September 2021, Justice Breyer again criticized packing the Court. President Joe Biden expressed skepticism about Court packing proposals during his Senate tenure in 1983. When speaking about FDR's proposal, he called it a bonehead idea.

Former President Biden's own Presidential commission on the Supreme Court expressed hesitation in 2021, the commissioners noted that court expansion is likely to undermine rather than en-

hance the Supreme Court's legitimacy and its role in the constitutional system. I really appreciate my Republican colleagues for not pushing this slavery era idea that was last successful during the slavery days that I think we are trying to move past.

I yield the balance of my time to the Chair, Mr. Jordan.

Chair JORDAN. Thank you. Mr. Capozzi, if you don't like what the Court is doing, and you would like it changed, how do you do it?

Mr. CAPOZZI. Well, you can ask the Supreme Court to reconsider its decisions, that is something the Supreme Court has done from time to time.

Chair JORDAN. In a more broad way how do you do it?

Mr. CAPOZZI. Well, you can take your case to the public, you can buildup a record of opposition you can advocate for change. The conservative legal movement did that after *Roe v. Wade* for example.

Chair JORDAN. Yes, you go make the argument, and you win elections, right? You win the White House, you have a Majority in the Senate, that is how the Courts figure it out, straight from the Constitution. No, they don't want that. They don't want that because a Republican is in the White House, and you've got to nominate people, and you have Republicans in the Senate who control the Senate, and they got to confirm them.

That is how the process of law, we don't like that. One point they are saying, it is too political, but there is a political process to it as well, that is how it works, you have got to go winning elections. Do you believe leaking the *Dobbs* decision was designed to undermine and change the Court's decision, Mr. Schaerr?

Mr. SCHAERR. It certainly appears to have been done with that intent. It was an attempt to try to get one or two of the justices who ended up in the majority on *Dobbs* to back away. It didn't work—

Chair JORDAN. Thank goodness it didn't work.

Mr. SCHAERR. Thank heavens.

Chair JORDAN. I think it was an effort to intimidate the Court. Do you think so, Mr. Ross, Professor Ross, do you think that was the case?

Mr. ROSS. I would agree with that.

Chair JORDAN. Yes, it was wrong, it was bad, right? We don't want that to happen again; it should have never happened before, do you agree, Mr. Capozzi?

Mr. CAPOZZI. I was a clerk when the leak happened, I am not going to discuss details of the leak, but I will say that it was a cowardly act, and I hope it never happens again.

Chair JORDAN. Yes, do you agree with that, Mr. Bowie?

Mr. BOWIE. I don't really have a strong opinion about the leak; I was not a clerk on the Court at the time.

Chair JORDAN. Good thing or bad thing?

Mr. BOWIE. That more publicity for what the Court does would be good, but I think that sacrificing one's ethics is not good, no.

Chair JORDAN. Just yes or no, is it a good thing to leak a decision before it is final, before the Court has actually weighed in, is that a good thing or bad thing?

Mr. BOWIE. I don't think it is good for anyone to sacrifice their ethical responsibilities.

Chair JORDAN. OK, by the way, why don't we know who leaked the *Dobbs* opinion? Mr. Capozzi, you were there. Why don't we know that?

Mr. CAPOZZI. I am going to respectfully decline to answer that question.

Chair JORDAN. Yes, I am not asking if you do know it, I am just saying, why don't we know that? Mr. Schaerr, why don't we know that?

Mr. SCHAERR. I believe there was an investigation done by the—

Chair JORDAN. I know there was an investigation done by the Court.

Mr. SCHAERR. It was inconclusive.

Chair JORDAN. Yes, amazing, they couldn't figure it out. Mr. Ross, do you any thoughts on that?

Mr. ROSS. I really don't know.

Chair JORDAN. All right, I yield back.

Mr. ISSA. The gentleman yields back. We now go to the gentlelady from Florida, Ms. Lee.

Ms. LEE. Thank you, Mr. Chair. As a former judge, I understand that the legitimacy of the judiciary does not depend on whether people agree with every decision. It depends on whether judges interpret and apply the law independently, without political intimidation, threats to their safety, or pressure to deliver preferred opinions.

Today we are seeing increasing efforts, we are hearing them today, to delegitimize the Court through Court packing proposals, spurious personal attacks on justices, and criticisms of judicial philosophies like originalism simply because some disagree with outcomes in particular cases. An independent judiciary cannot function if judges are treated like politicians whenever they issue an unpopular opinion.

Baseless, unfounded allegations impugning the ethics of judges and justices, incoherent attacks on principled application of judicial philosophy, and failure to appreciate that a disciplined adherence to the laws and the Constitution as written is actually the hallmark of a good and successful judge.

On that note, Mr. Schaerr, I would like to discuss one thing that concerns me about modern discourse surrounding the judiciary is the growing expectation that judges should reach politically preferred outcomes rather than faithfully apply the law. Critics sometimes today portray originalism as if it is some sort of political project to achieve conservative outcomes.

At its core, isn't originalism actually about judicial restraint requiring judges to interpret the Constitution as written, as opposed to applying their personal preferences?

Mr. SCHAERR. Yes, I was a law clerk to Justice Scalia, and I had several experiences with him where he felt like the Constitution, or a given statute, required a result that he didn't like as a policy matter. The very first opinion that I helped him write as a new justice was an opinion sustaining a Fourth Amendment objection to the admission of certain evidence in a trial.

He sided with the liberal justices on that issue because he felt that is what the Constitution required. The morning after that opinion came out, there was an editorial in *The Wall Street Journal* that said we wonder whether President Reagan has made a mistake in putting Justice Scalia on the Court. We saw that in several different areas, so to me that is the hallmark of a good judge.

Is he or she willing to follow the law as written, even if it leads to places that the judge disagrees with as a policy matter, that is judging in my view.

Ms. LEE. That is exactly right, and I can tell you I shared that very same experience on the bench, that at times personally as a jurist you don't want the outcome that the law tells you that you must reach. That is actually something, tell me about that distinction between being a judge and essentially policymaking, reaching that decision which maybe you as a person would like.

Tell me why it is so important that our judges are able to make that distinction, and apply the law as it is written, and is that part of our very system, as we would learn in eighth-grade American history of checks and balances?

Mr. SCHAERR. Yes, I agree, that is an essential part of our system. I go back to the Chief Justice's decision in the *Obamacare* case, and he was excoriated for that decision by conservatives. He believed, persuasively explained in his opinion that the individual mandate that was kind of at the heart of *Obamacare* could properly be considered as a tax.

For that reason, he decided well, we then should defer to Congress' judgment, even though we hate the policy outcome. He decided we should defer to Congress' judgment on this matter because what they did is within their authority. To me that is also the hallmark of a good judge. To be willing to defer to this body, even when you disagree as a matter of policy, because—

Ms. LEE. One final question, because this is important as we sit and we listen to our justices, and their ethics being impugned with baseless and spurious allegations. Isn't it also correct that they cannot respond; that judges cannot call a press conference, that they cannot speak publicly, that they have no opportunity to come out and say to the American people actually this is blatantly false. I did none of these things. The allegations that are being made are completely untrue. Isn't it correct that judges and justices cannot do that for themselves?

Mr. SCHAERR. It is very difficult for them to be able to respond to those kinds of personal attacks, correct.

Ms. LEE. Thank you, Mr. Chair, I yield back.

Mr. ISSA. The gentlelady yields back. I now ask unanimous consent to place in the record the ruling of Judge John Bates, an appointee of President George W. Bush, who ruled against George W. Bush in the *Harriet Miers* case, and the outcome, and ruling of Amy Berman Jackson, a Obama appointee who ruled against Obama in that case. Without objection, so ordered.

Mr. RASKIN. Then, Mr. Chair, can I add one too?

Mr. ISSA. Absolutely, it is tit for tat. What do you have?

Mr. RASKIN. It is a unanimous consent just answering the last point about how justices cannot speak out. This is an oped by Jus-

tice Samuel Alito in *The Wall Street Journal*, *ProPublica* misleads its readers, June 20, 2023.

Mr. ISSA. Without objection, so ordered. With that we go to the gentleman from South Carolina, Mr. Fry.

Mr. FRY. Thank you, Mr. Chair. Justice Ruth Bader Ginsburg stated,

It was a bad idea when President Franklin Roosevelt tried to pack the court, and that if anything would make the Court look partisan, it would be that.

Justice Breyer said that,

It would be a structural alteration, and it would erode public trust if we packed the Court.

What goes around comes around, and if the Democrats can do it, the Republicans can do it. Even our former President while he was in the Senate, Joe Biden admonished FDR, and said it was a bone-headed idea to consider packing the Court. We now find ourselves in this curious position where political thought leaders on the other side are actively engaged in this idea that packing the Court would solve the Nation's problems.

We have heard from James Carville, "If we win, don't talk about it, we are just going to go pack the Court." Kamala Harris, in her intellectual stamina, said the same thing a couple weeks ago. That is a dangerous move. Mr. Ross, what is the most accurate historical lesson of FDR's 1937 Court packing plan, what do you think that would be?

Mr. ROSS. The bipartisan opposition is perhaps the most important lesson, as has been pointed out earlier. Roosevelt had recently been elected with an enormous landslide; he carried 46 out of the then 48 States, he had more than 60 percent of the popular vote, he had assembled one of the most powerful political coalitions in the Nation's history.

He thought he was invincible, he thought that the Court packing plan would naturally have to sail through Congress, which at that point it was overwhelmingly Democratic, the Democrats won unprecedented majorities in the 1936 elections that re-elected Roosevelt himself. How Roosevelt was stunned when his plan encountered immediate and significant opposition, which eventually sunk it.

The reason was that Americans' low persuasions recognized that this was an attack on the independence of the Court itself. If I could give an example, Gutzon Borglum, who was the Mount Rushmore sculptor, was a political on everything except race, and he was outraged by the Supreme Court's recent decisions striking down New Deal regulatory legislation.

He wrote a letter to Senator Norris of Nebraska urging him to vote against the Court packing plan, because he said it would interfere with the independence of the Court. He was, at that time, engaged in sculpting the faces on Mount Rushmore. He said that, "If the Court packing plan passed, he would throw down his chisel and wouldn't go back to Mount Rushmore to finish carving those faces."

Because he thought that the packing of the Court would make a mockery of what those four Presidents stood for. Again, this was across the board, and that is the most important lesson.

Mr. FRY. Let us play an exercise. If FDR had been successful in altering the structure of the Supreme Court, what do you think the ramifications would have been at the time, and then moving forward?

Mr. ROSS. Well, the immediate ramifications wouldn't have been all that great, because although Roosevelt lost the battle, he won the war because of deaths and resignations of the justices during the next few years. Within a few years, Roosevelt had a Court that was overwhelmingly supportive of his proregulatory legislation. Though, if the packing itself had occurred, it wouldn't have changed the outcome of the cases that much, because the Court shifted its positions fairly rapidly anyway.

The long-term effect would have been the same effect as if it would have happened if it occurred today, which would be an erosion of judicial independence, and a diminution of public respect for the Court. Of course, the prospect of ever-increasing numbers on the Court. A bigger and bigger Court, subsequent Presidents pack the Court on their own.

Mr. FRY. Or contractions, right? We could have taken, I guess Congress could have taken the same approach as Virginia, right? That they are trying to do, we don't agree with the opinion, so we are just going to sunset you all, right?

Mr. ROSS. Yes, right.

Mr. FRY. Do you think, Mr. Schaerr, that expanding the number of justices would heal some sort of partisan divide in this country?

Mr. SCHAERR. Not at all.

Mr. FRY. Expand on that for a minute. How would that not fix what I am hearing on the Left right now, which is that there is an illegitimate court, and it is dangerous, and what they are doing is undemocratic, so we can fix it by adding four new justices. How would that not heal the partisan divide?

Mr. SCHAERR. Well, actually it would undermine what really needs to be done to heal those divides. That is because it distracts from the more important projects, as we discussed earlier, of building the political coalitions that allow you to achieve your legislative objectives. We have talked earlier about the Voting Rights Act for example, and people are complaining about who the Supreme Court quote, "Gutted the Voting Rights Act," well, they didn't do that at all.

This body could amend the Voting Rights Act, and if this body wants to impose majority-minority districts on the country, or various places in the country, that is something that this body can do. My guess is that the Supreme Court would probably sustain that. For just about every one of the problems that we have discussed, there is a legislative solution that requires persuading voters, and then winning elections, and then—

Mr. FRY. Then doing it.

Mr. SCHAERR. Then doing it, yes.

Mr. FRY. Thank you. Mr. Chair, I see my time is expired, and I yield back, sir.

Mr. ISSA. Good use of your time, though. We now go to the gentleman from Washington for his time.

Mr. BAUMGARTNER. Thank you, Mr. Chair, and thank you gentlemen, for coming for this important hearing. I am going to ask for some concise answers to these questions. There are a number of things I would like to cover. Can a court be unpacked? Could the legislature vote to remove members of the Supreme Court? We will go down the line. If they can add, can they subtract?

Mr. SCHAEER. They have subtracted once before; I am not sure it would be constitutional to subtract in a way that would require sitting justices to resign.

Mr. BAUMGARTNER. You think yes, with some caveats?

Mr. SCHAEER. Correct.

Mr. BAUMGARTNER. Mr. Ross?

Mr. ROSS. I agree, I don't think that sitting justices could be removed, but clearly the Constitution permits the size of the Court to be reduced. There should be one Supreme Court, and it says there is a Chief Justice. Theoretically, I guess you could have two or three associate justices. I don't think there is any constitutional obstacle as long as it's prospective rather than retrospective.

Mr. BAUMGARTNER. Very good.

Mr. CAPOZZI. You could phase a seat out; you just couldn't force a sitting justice off the bench.

Mr. BAUMGARTNER. OK.

Mr. BOWIE. Well, that is right, Congress can change the number of justices, the justices sit for good behavior. What good behavior means is also the subject of Federal law, so if justices are doing things that Congress regard as unethical, corrupt, or undemocratic, then Congress can do something about it—

Mr. BAUMGARTNER. Very good, so that is a yes. As a way of background, when I was in our State Senate in Washington State, our State had originally started with five Supreme Court Justices, the Court had been packed up to nine for political reasons, people wanted different cases. We have elected Supreme Court Justices, they are politicians, just as I am, and this body is.

What our teacher's union discovered is that they could put significant financial resources into judicial elections, and then get some rulings on mandatory spending on education. That was when our State legislature thought the Supreme Court was over its skis. I sponsored a piece of legislation to actually shrink it back from nine to seven.

I had the Supreme Court Justices drawing straws at high noon on January 1st, which is a legal remedy in our State, but it was undetermined, so actually my bill is studied in law schools in Washington State; fortunately, we didn't get the opportunity. Broader point I just wanted to make on this is packing the Court, and really, its evil twin of adding States for political purposes are probably the most dangerous and destabilizing things that this body could consider for the future of the Republic.

It really will be a recipe for potential civil war in this country. By background, I spent some time doing counterinsurgency during the Iraq surge, and used to teach counterinsurgency to the U.S. military, and you think about our own Nation, why did we rebel? Why did people not feel they had a voice in the legitimate political

process? We actually look at the foundation of American, what we teach in counterinsurgency, and population-centric counterinsurgency.

It is based on two principles, that people feel they have an effective government, and that they have a legitimate government. What Court packing will do is take a game of Chutes and Ladders in politics, where you win elections, you lose elections, but it is a game that everybody understands, and it will turn it, midstream for political purposes into Battleship.

That is something I do not think in this highly polarized political environment that the American people will countenance. It is extremely risky to talk about packing the Court, adding the States, because you want political outcomes. Each and every time somebody is disgruntled with the political process, and talks about it in a way that delegitimizes the Supreme Court, who are not elected, it is not like at the State level.

It really, really is a dangerous thing for the future of the Republic. I just wanted to make that statement. I only have about a minute left.

I am going to yield to the good gentleman from Kansas if he would like my time.

Mr. SCHMIDT. Thank you to my friend from Washington, and I would just say the baseball metaphor, calling balls and strikes, as Justice Roberts famously said in his confirmation hearing, nobody here has actually talked about what this hearing, I believe, is supposed to be about, other than our witnesses. Nobody has defended the idea that we ought to expand the number of justices on the Supreme Court.

We have had an airing of the grievances, just as you have people complaining about the umpire all the time, but nobody is defending the idea that I have heard, that the remedy to the grievances is you have a three judge panel metaphorically of umpires behind home plate because more gets you a better outcome.

There has been plenty of complaining from one party right now, including the Minority leader of this House, sitting Members of this House, the last Presidential nominee of the other party suggesting that Court packing by expanding ought to be a remedy to be considered. That has never been a good idea.

I would simply ask our panelists in whatever time the Chair allows them to respond, what is wrong with allowing the people of this country, through the constitutional amendment process, to decide whether that specific remedy ought to be allowed or taken off the table, what is wrong with that?

Mr. ISSA. Briefly, any responses?

Mr. SCHAERR. I don't think anything is wrong with that; it seems like a good idea to me.

Mr. ROSS. I don't think that the constitutional amendment process is necessarily the best way to handle this issue.

Mr. CAPOZZI. I would support an amendment to fix the number of seats on the Supreme Court at nine.

Mr. BOWIE. Justice Robert Jackson was asked this question, and his answer was it is the responsibility of Congress to see that the Court is an instrumentality in the maintenance of a just and constitutional government, and that it does not become an instrumen-

tality for the defeat of constitutional government. He testified about that in 1937 when he was asked in a hearing like this one about whether Court packing was an appropriate remedy.

Mr. ISSA. I thank all the gentlemen. We now go to the gentleman from California for his questioning.

Mr. KILEY. Thank you, Mr. Chair. Court packing is, of course, a really bad idea. Mainly because it seeks to change our institutions for the purpose of short-term political gain by one side or another. Then, it is very short-sighted, because when you change the institution, that has a lot of downstream consequences that you can't predict.

It makes just our overall system not really function when you don't have a stable institutional foundation for our political battles to play out. We don't just see this with proposals to pack the Court. We see it with this redistricting war that is going on, where in one State or another a party has control of the legislature, so rather than trying to win congressional seats by persuading people that their party has the right views, they say let us move the lines around, and give ourselves a structural advantage.

I saw it all the time when I was in the State legislature in California. If they didn't have the votes in the Committee, they would just remove people from the Committee or add people to the Committee. We see it here when the House rules, if they aren't convenient in a given circumstance, the rules just get waived or suspended.

Then, on the other side of the coin, as the Chair mentioned, we had a bill, the Judges Act, that actually instituted some needed institutional changes by giving us more District Court judges to hear claims when they have this huge back log so people actually get access to justice, and it had broad bipartisan support, but then suddenly it was vetoed because of the perceived short-term political consequences.

I guess my question for our esteemed panel here, for anyone that would want to weigh in, is how do we more assure that our institutions are insulated from the currents of short-term politics?

Mr. CAPOZZI. One thing that I will say is it is helpful what the Supreme Court just did in the *Callais* decision. That has been mischaracterized quite a bit during the hearing today. The Supreme Court said that it is a statutory interpretation case, but the Court strongly suggested that the Constitution also requires this, you can't discriminate against individuals on the basis of race during redistricting.

For decades, some States were forced to intentionally sort voters on the basis of race to maximize political advantage for one political party. The fact that we don't have to do that anymore, we don't have to discriminate on the basis of race in redistricting, is a good step forward.

Mr. KILEY. Professor Bowie?

Mr. BOWIE. I would just like to say you all on the panel are Members of Congress, you took an oath to support the Constitution, and I trust your judgment that you can determine what counts as appropriate legislation for enforcing the Constitution. If you think the Voting Rights Act needs to be updated for our mod-

ern time, you can amend the Voting Rights Act, you can make it better.

We did not elect a Supreme Court to do that job for you. We did not vote for justices to override your interpretation of what the Constitution means. We have never as a country been asked should the Supreme Court have this role of putting itself above you all. It disrespects your oaths if the Court takes your words that you have taken responsibility to enact into legislation, and say actually, you are wrong.

Mr. KILEY. Surely part of this, and maybe you are agreeing with me, that it is the fault of Congress for relinquishing its constitutional authority. Like, if you look at, let us just take the last two Presidents, we had a decision in the Biden Administration, the Supreme Court struck down the student loan scheme, of course, we just had the tariff decision with this President.

Congress could have easily reclaimed its own authority on either count before the Court stepped in, it just chose not to, right?

Mr. BOWIE. Frankly, my job is not to tell you how to do yours, but that said, you do have the responsibility to interpret the Constitution. I trust that you can do justice to that responsibility. When you think that the law needs to be updated, it is your job, not someone else's, and especially not someone who the American people have not chosen to decide what does the Constitution mean.

How do we give effect to its guarantees of freedom and equality rather than letting someone who no one has chosen taken that away from us?

Mr. KILEY. Yes, there is clearly a very important role for the Courts in our system, in maintaining the Constitution, in defending the Constitution, and upholding its principles. That Congress has, over time, relinquished more and more of its authority, both to administrative agencies and to the courts. Maybe we are saying the same thing, but in different words.

That there is a responsibility for Congress to reclaim some of that authority, and in particular, we are the house, we are the people's house, closest to the people. That our system works better when more policymaking happens here, and can take into account the views of folks all across the country.

Mr. BOWIE. That is absolutely true. One of the reasons why Congress is feeling so disabled is because there are past Supreme Court decisions that have taken away your ability to police the President, your ability to prevent corruption, and your ability to ensure that Americans can vote. As long as we continue to have this system in which you are not in charge of the laws that you pass, then it is difficult for the American people to, in an election, to discern for ourselves what kind of country we want to live under.

Mr. KILEY. Thanks very much, I yield back.

Mr. ISSA. I am recognizing myself now. Professor Ross, Congress does have—did I miss someone? OK, appropriately, I go last because I have the least to say, but I learn the most from these. Professor Ross, briefly, isn't one of Congress' authorities the right to limit what can be considered by the Court? Isn't that already a power that we can use if we want essentially decisions of Congress to stand?

Mr. ROSS. Yes, in many statutory interpretation cases, the Supreme Court has invited, indeed almost begged Congress to offer a contrary interpretation. The Court can often only guess what Congress intends, and so it doesn't say that it is having the last word in statutory interpretation cases. It is saying that this is the way we interpret the Constitution, and if Congress disagrees, Congress is perfectly free to enact a statute that reaches a different conclusion.

Mr. ISSA. Just to followup, in the *Chevron* decision, to a certain extent, the Court just gave Congress back a tremendous amount of power that for years we didn't have.

Mr. ROSS. Yes.

Mr. ISSA. Thank you. Professor Bowie, one quick question, I authored a bill, I put it on the record, to expand the Court significantly, about 10 percent more District Court judges. It phased them in over more than a decade so that no one Congress, and certainly no one President, would do that. Would you support this expansion of the Court as vigorously if, in fact, there was a strong possibility that it would be balanced in its expansion?

Mr. BOWIE. I am sorry I haven't read this bill, but I will agree with the principle behind it that yes, to make the court less partisan would be a great thing, to have your decisions take effect—

Mr. ISSA. OK, just for argument's sake, since none of these Court packing bills originating from the House did that, they all gave immediately, and gave it during a time in which the President of their party was in power. I would say in part of our closing that very clearly, this is Congress trying to get an outcome for their President, rather than trying to enhance the Court.

Would anyone doubt that, considering they didn't give that same consideration that Mr. Nadler and I did with our bipartisan bills to expand the Court? Mr. Schaerr?

Mr. SCHAERR. I don't disagree with that, but I am not very familiar with the bills that you are talking about.

Mr. ISSA. Well, right now we are still trying to get that expansion of the Court phased in overtime.

Mr. SCHAERR. You are talking about an expansion of the number of lower-court judges, right?

Mr. ISSA. District Court, to meet the caseload that many have opined about here. There are 179 or so Appellate judges spread over 11 regular circuits and two special circuits. That comes out to be about 16 to one if you evened out the Districts, if the First Circuit wasn't just six and so on, and that is not including the two special circuits; it is 20 to one if you include those.

When you look at that ratio, my question to each of you is as people talk about expanding the high court, the court that must make a decision for it to be universally the law of the land, or to fail to take a case to make it essentially sustained, or denied at a lower court, should we in the future when we are having this debate consider those 179 judges that did not exist at the origination of our country, and the earlier days of the court moving up and down?

Mr. CAPOZZI. My personal view is that the only Federal judges that are overworked in our system are District Court judges. Congress should create more District Court positions, Congress should also consider expanding the number of staff. It doesn't make any

sense to me that District Court judges can hire fewer law clerks than Court of Appeals judges, they are the ones who need them more.

Mr. ROSS. I strongly agree with what Mr. Capozzi has said.

Mr. SCHAEER. Same here, as do I.

Mr. ISSA. Professor, have you looked at the caseload of the District versus the Appellate, and the role relative to the Supreme Court? Because we have talked extensively about the expansion, yes or no of the Court, but not about the total number of judges, the caseload, and what they do.

Mr. BOWIE. No, I agree with the principle, and one of the things that Congress used to do is require Supreme Court Justices to ride as District Court judges, as Circuit judges, to ease the caseload of trial courts. That is one option available to Congress right now. If the Supreme Court is under worked, but District Courts are over worked, then you can enact legislation to require the justices to spend their time as District judges.

Mr. ISSA. Or even serving on Appellate. My time is expiring, but since there is no one else seeking, I will take just another minute. I have been generous with both sides, I think. This has been a serious but partisan discussion, no question at all. It is an important issue. I am going to ask a question to each of you as scholars in your area. There was a lot of discussion about the vacancy of the Courts and the filling of them.

Should we, in fact, have a system that allows for there never to be a vacancy in the court, meaning we certainly could create a high court, but we could have a process where an Appellate Court, through some process, became the designate to fill a temporary or permanent vacancy, or even an alternate to the Court that would step in when there was a vacancy.

Is the idea that there should never be events like the Ranking Member talked about, through a process that would ensure that we always have a full court. Professor, I would opine to you that that would potentially even include that idea that this alternate would serve whenever a justice has to recuse themselves.

Mr. BOWIE. Yes, I believe the Ranking Member of the Subcommittee has introduced legislation that would give Presidents a regular appointment schedule so that vacancies would be more predictable, less likely to lead to the sort of partisan campaigns around nominations, and otherwise ensure that if the Court is doing its job then we can—

Mr. ISSA. I included recusals because currently if there is a recusal, the Court goes from nine to eight, or nine to seven, whatever the recusal is. There have been very few refusals, but there have been certainly plenty of cases in which there was a case for recusal, but that person did not recuse, and perhaps because the Court would be without that vote.

Mr. BOWIE. Absolutely, and to be honest, if anything, that is a sign that perhaps the number of concurrent justices is not the number that it should be. For an individual recusal to have that kind of effect, and therefore there are no refusals, if anything, that is a sign that refusals need to be easier to do so that justices—

Mr. ISSA. Right, but in any lower court, a recusal simply means that a different judge steps in, there is not a lack of—a three-judge

panel doesn't become a two-judge panel if there is a recusal. Mr. Capozzi?

Mr. CAPOZZI. There is a statutory process for if there are not enough justices to have a quorum on the Supreme Court. You can look at the *Alcoa* case, it is from 1939, where the Second Circuit had to hear a case in lieu of the Supreme Court. I would oppose the proposals that you suggested, Mr. Chair.

The power to appoint justices is tremendously important; we need checks and balances in our system, and we shouldn't weaken the Senate's role in checking the President on the appointment of justices.

Mr. ISSA. Professor Ross?

Mr. ROSS. I agree with Mr. Capozzi.

Mr. ISSA. You get the closing opinion because I am well past my time.

Mr. SCHAERR. Well, I would say there is also not a great need for that a process in the Supreme Court, because it is not really a disaster if a single justice has to recuse, then the number of justices who are sitting on the case is eight rather than nine. Generally, they are going to be able to decide the case without splitting four to four. That happens once in a while, but not enough, to make it the kind of problem that requires a solution.

Chair JORDAN. Mr. Chair?

Mr. ISSA. The Chair recognizes the Chair of the Full Committee.

Chair JORDAN. Just one quick question, I am just curious what the panel thinks, why don't we just add four justices now, if 13 circuits, we need to go to nine to 13 as the Ranking Member of the Full Committee suggested at the start of the hearing, why wouldn't we just add them now if we are going to add them? What do you think of that, just maybe go down the line.

Mr. CAPOZZI. The first rule of justice is what is good for the goose is good for the gander, I oppose doing that now, just as I would oppose doing it under a different President.

Chair JORDAN. That is where I am at, totally agree. It seems to me if we are going to do it, and 13 is some important number that we have got to get to base on the number of circuits, then we should, if we are going to do four, do it now. Mr. Bowie, would you support doing that, doing four? You said if Congress thinks it is the right thing to do we should go for it, so if it is the right thing to do can we go for it now?

Mr. BOWIE. Well, I agree with the principle, it is in your prerogative, you have the prerogative to determine how the Supreme Court works. The Court did not descend from on high in its current form in the palace across the street. It is your job to determine what kind of court—

Chair JORDAN. You would have no problem with us doing it now?

Mr. BOWIE. Look, I disagree with many of the policies that come out of Congress right now, but I really have faith in your ability to live up to your office, and I think that you have the authority to determine what kind of justice we want to see in this country.

Chair JORDAN. OK, that is great. I know what Professor Ross, and Mr. Schaerr's answer is as well, which is where I am out.

Mr. ROSS. Again, I would oppose any expansion of the Court.

Chair JORDAN. I am there too, OK. Thanks guys. I yield back to the Chair, thank you for the hearing.

Mr. ISSA. I want to thank all our witnesses today, this concludes today's hearing. Pursuant to Committee rules, all Members will have five legislative days in which to submit written questions for the witnesses, and additional materials for the record. For all of you what that means is within five days additional questions will be forwarded. Would all of you agree within a short period of time so we can close the record, that you would attempt to respond to them?

All witnesses answered in the affirmative, so without objection, that is ordered. Without objection, we stand adjourned.

[Whereupon, at 12:22 p.m., the Subcommittee was adjourned.]

All materials submitted for the record by Members of the Subcommittee on Courts, Intellectual Property, and the Internet can be found at: <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=119310>.

