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Congressional Control over the Supreme Court

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SUMMARY

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Congressional Control over the Supreme Court

The Constitution's Framers structured the Constitution to promote the separation of powers and protect the federal courts from undue influence by Congress and the executive branch. Among the federal courts, the Constitution grants the Supreme Court special status. As a historical matter, Congress has also traditionally recognized that the Supreme Court plays a unique role within the constitutional system.

However, the Constitution does not impose complete separation between the judiciary and the political branches. Although it establishes a federal judicial branch that is separate from the legislative and executive branches and benefits from certain important protections, the Constitution also grants the political branches, and especially Congress, substantial power to regulate and otherwise influence the federal courts. Supreme Court decisions and long-standing practice also establish that Congress has the power to regulate many aspects of the Supreme Court's structure and procedures.

Discussion of Supreme Court regulation and reform has attracted significant public attention at various points in American history and has garnered renewed public attention in the past decade. Key areas of discussion include the Court's procedures for handling emergency litigation; concerns about politicization, both in the selection and confirmation of judicial nominees and in the Court's rulings; and some observers' substantive disagreement with certain Court decisions.

Many prominent Court reform proposals from recent years fall into two main categories: those that would change the size of the Supreme Court (sometimes called "court packing") and those that would impose term limits or age limits for Supreme Court Justices. Congress has broad authority to set or change the size of the Supreme Court through ordinary legislation, but implementation of term or age limits would likely require a constitutional amendment. Some proposals would change the size of the Court or modify Justices' tenure while also making other structural changes, such as having Justices rotate between the Supreme Court and the lower federal courts, dividing the Supreme Court into panels, or seeking to ensure ideological balance on the Court. Those proposals might raise various constitutional questions on a case-by-case basis.

Legislators and commentators have also advanced other proposals to change the Supreme Court's jurisdiction or procedures. Prominent proposals include making changes to the Court's motions docket (which some commentators call the "shadow docket"); limiting the Court's appellate jurisdiction over certain categories of cases (sometimes called "jurisdiction stripping"); imposing voting rules on the Court, such as requiring the agreement of a supermajority of Justices before the Court can declare a law unconstitutional; allowing Congress to override Supreme Court decisions; imposing new judicial ethics rules for Justices; and expanding transparency through means such as allowing video recordings of Supreme Court proceedings.

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The Constitution's Framers structured the Constitution to promote the separation of powers and, in particular, to protect the federal courts from undue influence by the political branches—Congress and the executive branch.[1] In the *Federalist Papers*, Alexander Hamilton advocated for constitutional provisions designed to promote "the complete separation of the judicial from the legislative power."[2] In reality, the Constitution does not impose complete separation between the judiciary and the political branches. Instead, it establishes a federal judicial branch that is separate from the legislative and executive branches and benefits from certain important protections[3] but also grants the political branches, and especially Congress, substantial power to regulate and otherwise influence the federal courts.[4]

The political branches' influence over the federal courts may take several forms. The President and the Senate control the appointment and confirmation of federal judges, including Supreme Court Justices.[5] In addition, Articles I and II of the Constitution give Congress the power to impeach and remove federal officers, including judges and Justices, for "Treason, Bribery, or other high Crimes and Misdemeanors."[6] Beyond the authority to confirm and impeach individual judges, Congress also has authority to structure the federal judiciary and set judicial procedures.[7]

This CRS Report provides legal analysis of the extent of, and limits on, Congress's authority to regulate or reform the Supreme Court outside the constitutional processes of judicial confirmation and impeachment.[8] Many prominent Court reform proposals from recent years fall into two main categories: (1) those that would change the size of the Supreme Court[9] and (2) those that would impose term or age limits for Supreme Court Justices.[10] As discussed below, Congress has broad

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[1] *See, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 44 (Max Farrand ed., 1911) (discussion of how salary protection for judges could support judicial independence); *id.* at 429 (statement of Mr. Wilson, in discussion of the Good Behavior Clause, that "Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Govt."); *cf.* THE FEDERALIST NO. 78 (Alexander Hamilton).

[2] THE FEDERALIST NO. 79 (Alexander Hamilton).

[3] *See* Cong. Research Serv., *Overview of Federal Judiciary Protections*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-10-1/ALDE_00013554/ (last visited Jan. 5, 2023).

[4] *See* Cong. Research Serv., *Overview of Congressional Control Over Judicial Power*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-5-1/ALDE_00013528/ (last visited Jan. 5, 2023); Cong. Research Serv., *Overview of Establishment of Article III Courts*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-8-1/ALDE_00013557/ (last visited Jan. 5, 2023).

[5] Article II grants the President the power to appoint federal judges, including Supreme Court Justices, with the "Advice and Consent" of the Senate. U.S. CONST. art. II, § 2, cl. 2. The Senate may opt to confirm or reject the President's nominees, including for political reasons, or it may choose not to act on them. *See generally* Cong. Research Serv., *Appointments of Justices to the Supreme Court*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S2-C2-3-5/ALDE_00013096/ (last visited Jan. 5, 2023).

[6] U.S. CONST. art. II, § 4; *id.* art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6. Congress has at times exercised the impeachment power to address perceived violations of the law and abuses of power by federal judges, though it has never impeached and removed a Supreme Court Justice. The Constitution strictly limits involuntary removal of federal judges by any means other than impeachment. *Id.* art. III, § 1 (providing that federal judges "shall hold their Offices during good Behaviour"); *see also infra* "Constitutionality of Legislation Modifying Life Tenure."

[7] *See* Cong. Research Serv., *Exceptions Clause and Congressional Control Over Appellate Jurisdiction*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C2-6/ALDE_00013618/ (last visited Jan. 5, 2023).

[8] Proposed changes to judicial nominations, confirmation, or impeachments are generally outside the scope of this report. This report also does not discuss proposed changes to the inferior federal courts except to the extent lower court reforms are intended to affect the Supreme Court.

[9] *See infra* "Changes to the Size of the Supreme Court."

[10] *See infra* "Changes to Supreme Court Justices' Tenure."

authority to set or change the size of the Supreme Court through ordinary legislation, but implementation of term or age limits would likely require a constitutional amendment.

Some proposals would change the size of the Court or modify Justices' tenure while also making other structural changes, such as having Justices rotate between the Supreme Court and the lower federal courts, dividing the Supreme Court into panels, or seeking to ensure ideological balance on the Court.[11] Legislators and commentators have also advanced other proposals to change the Supreme Court's jurisdiction or procedures. Prominent proposals in this area include making changes to the Court's motions docket;[12] limiting the Court's appellate jurisdiction over certain categories of cases;[13] imposing voting rules on the Court, such as requiring the agreement of a supermajority of Justices before the Court can declare a law unconstitutional, or allowing Congress to override Supreme Court decisions;[14] imposing new judicial ethics rules for Justices;[15] or expanding transparency through means such as allowing video recordings of Supreme Court proceedings.[16] Those proposals might raise various constitutional questions on a case-by-case basis. Moreover, even if not expressly limited by the Constitution, some Court reform proposals may raise questions about separation of powers and the role of the judiciary within the American system of government.

Legal and Historical Background

Among the federal courts, the Constitution grants the Supreme Court special status. Article III provides that federal judicial power "shall be vested in one supreme Court" while leaving Congress discretion over whether to create inferior federal courts.[17] That provision appears to require that there must be a Supreme Court.[18] Article III further provides that the Supreme Court "shall have original Jurisdiction" over certain categories of cases.[19] The Supreme Court has generally interpreted that provision to grant the Court the power to hear all matters that fall within its original jurisdiction in a manner that Congress cannot limit.[20]

As a historical matter, Congress has also traditionally recognized that the Supreme Court enjoys a unique status within the constitutional system. At times, Congress has enacted legislation that applies only to the inferior federal courts, leaving the high court greater leeway to manage its own

[11] *See infra* "Other Structural Changes to the Supreme Court."

[12] *See infra* "Motions Practice: the "Shadow Docket"."

[13] *See infra* "Limits on Jurisdiction."

[14] *See infra* "Voting Rules and Congressional Override."

[15] *See infra* "Judicial Ethics."

[16] *See infra* "Cameras in the Courtroom and Other Transparency Measures."

[17] U.S. CONST. art. III, § 1; *see also* Cong. Research Serv., *Historical Background on Establishment of Article III Courts*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-8-2/ALDE_00013558/ (last visited Jan. 5, 2023).

[18] While Congress has never tested the limits of this text, it arguably prohibits Congress from abolishing the Supreme Court; dividing into more than one tribunal; or restructuring the federal judiciary so that the Court is not meaningfully "supreme," such as by depriving it of authority to review decisions of other tribunals. *See infra* "Rotation Between Courts and Supreme Court Panels"; *see also* Cong. Research Serv., *Supreme Court and Congress*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-8-3/ALDE_00013559/ (last visited Jan. 5, 2023).

[19] U.S. CONST. art. III, § 2, cl. 2.

[20] *See, e.g.*, Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861). *See generally* Cong. Research Serv., *Supreme Court Original Jurisdiction*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C2-2/ALDE_00001220/ (last visited Jan. 5, 2023).

affairs.[21] Thus, there are some areas where the scope of Congress's regulatory authority over the Court is not clearly defined, because Congress has declined to test the limits of its power.[22] There are also areas where the Constitution's text does not clearly prevent Congress from legislating but where some observers and stakeholders nonetheless argue that constitutional norms such as separation of powers and inter-branch comity counsel against Congress regulating the Supreme Court.[23] Nonetheless, Supreme Court decisions and long-standing practice also establish that Congress has the power to regulate many aspects of the Supreme Court's structure and procedures.

Discussion of Supreme Court regulation and reform has attracted significant public attention at various points in American history. For instance, in the early 1800s, Congress enacted far-reaching alterations to the federal judiciary—including a change to the Court's size—only to repeal the changes when control of Congress shifted.[24] Following the Civil War, Congress passed legislation limiting the Court's jurisdiction in an effort to prevent judicial review of certain Reconstruction policies.[25] During the Great Depression, President Franklin Delano Roosevelt's Administration proposed Court expansion legislation, sometimes called the "court packing plan," which many viewed as an attempt to shift the ideological leaning of the Court and prevent it from striking down New Deal legislation.[26] In the 1960s, in response to decisions such as *Brown v. Board of Education*,[27] some legislators advanced proposals that would limit the power of the Court to hold state actions unconstitutional.[28]

Supreme Court reform has garnered renewed public attention in the past decade. Key areas of discussion include the Court's procedures for handling emergency litigation;[29] concerns about

[21] For example, Congress exercises significant oversight over the procedural rules for the lower federal courts but has deferred to the Supreme Court to make its own procedural rules. *See* CRS In Focus IF11557, *Congress, the Judiciary, and Civil and Criminal Procedure*, by Joanna R. Lampe.

[22] For instance, Congress has never enacted legislation to impose voting rules on the Court, *see infra* "Voting Rules and Congressional Override," or to restructure the Court beyond changing its size, *see infra* "Other Structural Changes to the Supreme Court."

[23] For example, some oppose changing the size of the Supreme Court in order to change the Court's ideological balance, *see infra* "Constitutionality of Changes to the Size of the Supreme Court," or legislating to impose new ethical requirements on the Justices, *see infra* "Judicial Ethics."

[24] *See* Judiciary Act of 1801, ch. 4, 2 Stat. 89; Act of Mar. 8, 1802, ch. 9, 2 Stat. 132.

[25] *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869) (applying legislation limiting jurisdiction over a petition for a writ of *habeas corpus* from a civilian convicted of acts obstructing Reconstruction).

[26] *See, e.g.*, Fed. Jud. Ctr., *FDR's "Court-Packing" Plan*, https://www.fjc.gov/history/timeline/fdrs-court-packing-plan (last visited Jan. 5, 2023); *see also infra* "History and Practice on the Size of the Court."

[27] 347 U.S. 483 (1954).

[28] *See* PRESIDENTIAL COMM'N ON THE SUPREME CT. OF THE UNITED STATES, FINAL REPORT 57 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [hereinafter, *SCOTUS Commission Report*].

[29] *See, e.g.*, William Baude, *The Supreme Court's Secret Decisions*, N.Y. TIMES (Feb. 3, 2015), https://www.nytimes.com/2015/02/03/opinion/the-supreme-courts-secret-decisions.html; *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 117th Cong. 1 (2021).

politicization, both in the selection and confirmation of judicial nominees and in the Court's rulings;[30] and some observers' substantive disagreement with certain of the Court's decisions.[31]

On April 9, 2021, President Joe Biden issued Executive Order 14023 forming the Presidential Commission on the Supreme Court of the United States.[32] Members of the commission were to include "distinguished constitutional scholars, retired members of the Federal judiciary, or other individuals having experience with and knowledge of the Federal judiciary and the Supreme Court of the United States."[33] The group's task was to produce a report for the President describing contemporary debate "about the role and operation of the Supreme Court in our constitutional system" and the functioning of the Supreme Court nomination and confirmation process; historical background on prior "critical assessment" and proposals for reform related to the Court; and "analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals."[34]

In December 2021, the commission issued a report outlining the history of Supreme Court regulation and discussing numerous Supreme Court reform proposals.[35] The preface explained that "the Report identifies prominent proposals for reform and provides a critical evaluation of the strengths and weaknesses of the proposals," including "consideration of whether specific proposals could reasonably be expected to achieve the objectives that their proponents desire," "other potential consequences that might result from the reforms," and analysis of "the constitutional and other legal requirements that would have to be met or resolved to implement the reforms."[36] It further stated that the report reflected "bipartisan, diverse perspectives from Commissioners" who "hold various and sometimes opposing views on the legal and policy issues raised in the Court reform debate."[37] Noting that the executive order did not call for the commission to issue recommendations, it nonetheless stated that "the Report does provide a critical appraisal of arguments in the reform debate" and that the commissioners had approved the report unanimously "in the belief that it represents a fair and constructive treatment of the complex and often highly controversial issues it was charged with examining."[38]

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[30] *See, e.g.*, John Fritze & Chelsey Cox, *Poll: Most Americans see politics over substance in Supreme Court confirmation process*, USA TODAY (Apr. 15, 2022), https://www.usatoday.com/story/news/politics/2022/04/15/ketanji-brown-jackson-poll-finds-skepticism-over-confirmation-process/7310985001/ (politicization of the confirmation process); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 53–55 (2019) (nationwide injunctions and politicization); Walter Shapiro, *The Case Against Court-Packing*, BRENNAN CTR. FOR JUSTICE (June 24, 2019), https://www.brennancenter.org/our-work/analysis-opinion/case-against-court-packing (court expansion and politicization).

[31] *See, e.g.*, James Arkin, *Democrats Renew Call To Expand Supreme Court Post-Dobbs*, LAW360 (July 18, 2022), https://www.law360.com/articles/1512716/democrats-renew-call-to-expand-supreme-court-post-dobbs; Ian Millhiser, *10 Ways to Fix a Broken Supreme Court*, VOX (July 2, 2022), https://www.vox.com/23186373/supreme-court-packing-roe-wade-voting-rights-jurisdiction-stripping.

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

[33] *Id.*

[34] *Id.*

[35] *SCOTUS Commission Report*, *supra* note 28. The commission did not consider changes to the nomination and confirmation process except in an appendix.

[36] *Id.* at 1.

[37] *Id.*

[38] *Id.*

Many of the issues and proposals for reform discussed in this CRS Report are also examined in the commission report. This report focuses on legal issues related to Supreme Court regulation that are most relevant to Congress. Readers seeking additional historical background or policy analysis of Supreme Court reform proposals may also wish to consult the commission report.

Changes to the Size of the Supreme Court

In living memory, the Supreme Court has always had nine members.[39] However, the Constitution does not mandate a nine-Justice Court. Rather, the size of the Court changed multiple times in the early history of the Republic, and some recent proposals advocate further changes.

Article III, Section 1, of the Constitution provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[40] Although the Constitution provides that there shall be "one supreme Court," it does not specify that court's size or composition.

In the absence of controlling constitutional text, Congress determines the size of the Court through legislation. While Article I gives Congress the power to "constitute Tribunals inferior to the supreme Court," the Constitution does not expressly grant Congress the authority to set or modify the size of the Supreme Court.[41] Instead, Congress is understood to possess that power by virtue of the Necessary and Proper Clause, which allows Congress to legislate as needed to support the exercise of its enumerated powers and "all other Powers vested by th[e] Constitution in the Government of the United States," including those of the judicial branch.[42]

Proposals to expand the Supreme Court are often premised on the belief that, if more seats were added to the Court, it would give the President who nominates the new Justices significant power to shape the Court in a way that aligns with the policy preferences of the President and the political party that controls the Senate. Thus, both historically and recently, proposed legislation related to the size of the Supreme Court has prompted debate about the role of the judiciary and the means by which political actors may influence the Supreme Court's approach to interpreting the law.

History and Practice on the Size of the Court

As a legal matter, Congress possesses substantial authority to change the size of the Supreme Court, though legislation that would eliminate an occupied seat on the Court might violate the constitutional requirement that Justices hold their offices "during good Behaviour."[43] Historical practice generally reflects that understanding.

[39] *See* 28 U.S.C. § 1.

[40] U.S. CONST. art. III, § 1.

[41] *Id.* art. I, § 8, cl. 9.

[42] *Id.* art. I, § 8, cl. 18. Using these powers, Congress has enacted legislation to constitute the Supreme Court and establish federal district courts, courts of appeals, and numerous courts of special jurisdiction. For additional discussion of Congress's authority to structure the federal courts, see Cong. Research Serv., *Overview of Establishment of Article III Courts*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-8-1/ALDE_00013557/ (last visited Jan. 5, 2023).

[43] U.S. CONST. art. III, § 1; *see also infra* "Constitutionality of Legislation Modifying Life Tenure."

For over 150 years, the size of the Supreme Court has been set by statute at nine Justices—one Chief Justice and eight Associate Justices.[44] However, the Constitution does not specify the size of the Supreme Court, and the Court has not always had nine members. Rather, Congress changed the Court's size multiple times during the 19th century.

Congress first exercised its authority to structure the federal courts in the Judiciary Act of 1789.[45] In addition to establishing federal district and circuit courts, the 1789 act created a six-member Supreme Court with one Chief Justice and five Associate Justices.[46] In 1801, Congress reduced the size of the Court to five Justices.[47] However, the 1801 statute did not eliminate an occupied seat on the Court; instead, it provided that the change would take effect "after the next vacancy."[48] Congress repealed the 1801 law before any vacancy occurred, leaving the size of the Court at six Justices.[49]

Over the following decades, Congress enacted multiple statutes changing the size of the Court.[50] At its largest, during the Civil War, the Court had 10 Justices.[51] While some scholars assert that the expansion to 10 Justices was driven by docket needs, others contend that Congress enlarged the Court to allow President Abraham Lincoln to "appoint Justices who favored the Republicans' agenda of combatting slavery and preserving the union."[52] In 1866, Congress reduced the size of the Court to seven Justices.[53] Like the 1801 legislation, the 1866 law provided that the Court would decrease in size as vacancies arose rather than eliminating any occupied seats on the bench. Some commentators argue the reduction stemmed at least in part from concerns that a 10-Justice Court was too large or from the sitting Chief Justice's desire to increase the Justices' salaries, but others assert that political conflict between Congress and President Andrew Johnson motivated the change.[54] In 1869, under a new presidential Administration, Congress expanded the Court to include nine Justices,[55] and the size of the Court has since remained unchanged. The 2021 Report of the Presidential Commission on the Supreme Court of the United States concluded that each of the 19th-century changes to the size of the Court "seems to have been motivated by a mix of institutional and political concerns."[56]

The Reconstruction Era was not the last time that Congress considered legislation that would expand the Supreme Court. In the 1930s, President Franklin Delano Roosevelt backed sweeping

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[44] *See* 28 U.S.C. § 1.

[45] Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73.

[46] *Id.*

[47] Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89, 89.

[48] *Id.*

[49] Act of Mar. 8, 1802, ch. 9, § 1, 2 Stat. 132, 133.

[50] *See, e.g.*, Act of Feb. 24, 1807, ch. 16, § 5, 2 Stat. 420, 421; Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176, 176.

[51] *See* Act of Mar. 3, 1863, ch. 100, § 1, 12 Stat. 794, 794.

[52] *Compare* JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 153–59 (2012), *with* Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 507 (2018).

[53] *See* Judiciary Act of 1866, ch. 210, 14 Stat. 209, 209.

[54] *Compare* Erick Trickey, *The History of 'Stolen' Supreme Court Seats*, SMITHSONIAN MAG. (Sept. 25, 2020), https://www.smithsonianmag.com/history/history-stolen-supreme-court-seats-180962589/, *and* Timothy Huebner, *The First Court-packing Plan*, SCOTUSBLOG (July 3, 2013), https://www.scotusblog.com/2013/07/the-first-court-packing-plan/, *with The 19th-Century History of Court Packing*, NAT'L CONSTITUTION CTR. (Sept. 24, 2020), https://constitutioncenter.org/news-debate/podcasts//the-19th-century-history-of-court-packing.

[55] *See* Circuit Judges Act of 1869, ch. 22, 16 Stat. 44, 44.

[56] *SCOTUS Commission Report*, *supra* note 28, at 68.

measures designed to promote recovery from the Great Depression only to see the Supreme Court strike down multiple pieces of New Deal legislation.[57] In response, the Roosevelt Administration developed a plan to appoint additional Supreme Court Justices, seeking to swing the Court in his favor. The resulting proposal, the Judicial Procedures Reform Bill of 1937, would have authorized the President to nominate one new judge for each federal judge with 10 years of service who did not retire within six months of reaching the age of 70, including up to six new Supreme Court Justices.[58] President Roosevelt argued for the proposal partly on practical grounds, asserting that more Justices were needed to manage the Court's caseload, but he also contended that changes to the Court were needed because the Supreme Court was "acting not as a judicial body, but as a policy-making body" in invalidating New Deal programs.[59]

Many viewed the court packing plan as an effort to make the Court more favorable to President Roosevelt's New Deal policies, and the proposal provoked significant public opposition. The Senate Judiciary Committee issued a report emphatically condemning the measure.[60] Members of the Supreme Court also publicly opposed the proposal on both practical and separation-of-powers grounds.[61] The bill did not advance in Congress.

While the court expansion proposal was pending before Congress, Justice Owen Roberts, who had previously voted with a majority of the Supreme Court to strike down New Deal legislation, voted to uphold a minimum wage law in *West Coast Hotel Co. v. Parrish*.[62] He later also voted to uphold other New Deal policies.[63] The precise reasons for Justice Roberts's vote in *Parrish* remain disputed, but his action became known as the "switch in time that saved nine," and President Roosevelt eventually abandoned his plan to enlarge the Supreme Court.[64] Academic discussion continues around the broader historical and legal implications of the New Deal court expansion proposal, but many view the episode as a political failure that undermined President Roosevelt's New Deal agenda and deterred subsequent attempts to enlarge the Supreme Court.[65]

While Congress has not changed the size of the Supreme Court by statute since the 1860s, it has also declined to pursue a constitutional amendment that would formally entrench a nine-Justice Court. In the 1950s, some Members of Congress proposed a constitutional amendment that would have set the size of the Court at nine members. Two-thirds of the Senate approved the measure, but the House Judiciary Committee declined to advance the proposal.[66]

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[57] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 317 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542–51 (1935).

[58] S. 1392, 75th Cong. (1937). Among other things, the proposal would also have allowed the President to appoint additional judges to the lower federal courts.

[59] Franklin D. Roosevelt, *Fireside Chat* (Mar. 9, 1937), AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/fireside-chat-17.

[60] S. REP. NO. 75-711 (1937).

[61] Letter from Charles Evans Hughes, Chief Justice, to Burton K. Wheeler, U.S. Sen. (Mar. 21, 1937).

[62] 300 U.S. 379, 390–400 (1937).

[63] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937); Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 578–98 (1937).

[64] *See, e.g.*, David E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69 (2010).

[65] *See, e.g.*, Shapiro, *supra* note 30; Adam Liptak, *The Precedent, and Perils, of Court Packing*, N.Y. TIMES (Oct. 12, 2020), https://www.nytimes.com/2020/10/12/us/supreme-court-packing.html; *see also, e.g.*, Daniel Epps & Ganesh Sitaraman, Essay, *Supreme Court Reform and American Democracy*, YALE L.J.F. 821, 822 (2021) (describing Court expansion as a "third rail in American politics").

[66] *See* 99 CONG. REC. 1106 (1953); C.P. Trussell, *Court Amendment Tabled in House*, N.Y. TIMES, Aug. 4, 1954, at 11, https://www.nytimes.com/1954/08/04/archives/court-amendment-tabled-in-house-judiciary-group-118-kills-bid-

Constitutionality of Changes to the Size of the Supreme Court

Legal scholars almost universally agree that Congress has the constitutional authority to enact legislation changing the size of the Supreme Court for practical reasons, such as managing caseload.[67] While Congress has not recently changed the size of the Supreme Court, it has repeatedly expanded the lower federal courts to accommodate increasing caseloads.[68]

One key limit on legislative changes to the Court's size is that legislation that would remove a sitting Justice from the Court other than through impeachment is likely to be unconstitutional. Article III provides that all federal judges "shall hold their Offices during good Behaviour," a provision that the Supreme Court has interpreted to mean that federal judges enjoy life tenure unless impeached.[69] Based on that provision, most commentators agree that Congress cannot legislate to reduce the size of the Supreme Court in a way that would remove a sitting Justice.[70] As a result, historical legislation reducing the size of the Court has always provided that any reduction would occur as Justices left the bench.[71]

Aside from the foregoing limitation, the Constitution entrusts control over the size and structure of the federal courts to Congress. Nothing in the Constitution's text expressly restricts Congress's ability to expand the Supreme Court, whether for practical reasons or as an attempt to influence the Court's ideology. Outside the context of court expansion, political and policy considerations often affect the selection of Supreme Court Justices. For instance, Presidents and presidential candidates may publicly indicate their intent to nominate Justices with viewpoints that they believe will further their policy preferences.[72] Senators evaluating a judicial nominee may consider how they believe the nominee might vote on certain issues if confirmed, and

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to.html. The measure would also have required Justices to retire at age 75.

[67] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 19 (Aug. 9, 2021) (written testimony of Michael J. Gerhardt, Prof., Univ. of N.C. at Chapel Hill), https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Michael-J.-Gerhardt.pdf ("There is little doubt about the constitutionality of the Congress's authority to expand or contract the size of the Court."); *Presidential Commission on the Supreme Court of the United States* 3 (Aug. 9, 2021) (written testimony of G. Edward White, Prof., Univ. of Va. Sch. of Law), https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-G.-Edward-White.pdf ("There is no question that Congress can constitutionally change the size of the Court . . . ."). *But see Presidential Commission on the Supreme Court of the United States* 2, 4 (July 20, 2021) (written testimony of Randy E. Barnett, Prof., Georgetown Univ. Law Ctr.), https://www.whitehouse.gov/wp-content/uploads/2021/07/Barnett-Testimony.pdf; Peter Nicolas, *"Nine, of Course": A Dialogue on Congressional Power to Set by Statute the Number of Justices on the Supreme Court*, 2 N.Y.U. J. L. & LIBERTY 86 (2006).

[68] *See* Admin. Off. of the U.S. Cts., *U.S. Courts of Appeals Additional Authorized Judgeships*, U.S. CTS., https://www.uscourts.gov/sites/default/files/appealsauth.pdf (last visited Jan. 5, 2022).

[69] U.S. CONST. art. III, § 1; United States v. Hatter, 532 U.S. 557, 567 (2001) (explaining that the Good Behavior Clause grants federal judges "the practical equivalent of life tenure"). Article III also states that judges may not have their compensation reduced while in office. U.S. CONST. art. III, § 1. *See generally* Cong. Research Serv., *Overview of Federal Judiciary Protections*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-10-1/ALDE_00013554/ (last visited Jan. 5, 2023).

[70] For further discussion of Justices' life tenure, see *infra* "Constitutionality of Legislation Modifying Life Tenure."

[71] *See* Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89, 89; Judiciary Act of 1866, ch. 211, 14 Stat. 209, 209. *But see* Act of Mar. 8, 1802, ch. 9, § 1, 2 Stat. 132, 132 (repealing legislation authorizing certain federal circuit court judgeships without making any provision for the judges who held the abolished seats).

[72] *See, e.g.*, Dr. Adam Feldman, *The Next Justice – In The Candidates' Own Words*, EMPIRICAL SCOTUS (June 5, 2016), https://empiricalscotus.com/2016/06/05/the-next-justice/; Mark Berman, *Trump promised judges who would overturn Roe v. Wade*, WASH. POST (Mar. 21, 2017), https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/trump-promised-judges-who-would-overturn-roe-v-wade/.

confirmation hearings have given the Senate Judiciary Committee the ability to ask nominees about their judicial philosophies.[73] Supreme Court Justices may also choose to retire at a time that allows a particular President to select their successors.[74] In light of those practices, and absent constitutional language to the contrary, many scholars contend that Congress possesses the constitutional authority to enlarge the Supreme Court even if the expansion is intended to shape the Court's political composition.[75]

On the other hand, legislative efforts to alter the political composition of the federal judiciary may raise concerns related to the constitutional principle of separation of powers. The Constitution's Framers aimed to ensure that the judiciary would be independent from the political branches of government.[76] Reflecting that concern, Alexander Hamilton advocated in the *Federalist Papers* for courts that would interpret the law impartially and explained that the "independence of the judges is . . . requisite to guard the Constitution and the rights of individuals" from encroachment by the legislature.[77] The considerations that Hamilton discussed are embodied in Article III, which established the federal judiciary as a fully discrete branch of government (in contrast to the British system at the time, where a branch of the legislature also functioned as the tribunal of last resort).[78] Article III's life tenure requirement and salary protections were also designed to insulate judges from political pressure.[79]

If Congress were to change the size or composition of the federal courts in an attempt to obtain desired outcomes in future cases, some might raise separation-of-powers objections that the legislative branch was improperly attempting to control a coequal branch of government.[80] Congress itself has voiced such objections in the past: In its report rejecting the Judicial Procedures Reform Bill of 1937, the Senate Judiciary Committee declared that the bill "applies force to the judiciary and . . . would undermine the independence of the courts" and that the "theory of the bill is in direct violation of the spirit of the American Constitution."[81] Some

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[73] *See* CRS Report R45300, *Questioning Judicial Nominees: Legal Limitations and Practice*, by Valerie C. Brannon and Joanna R. Lampe.

[74] *See, e.g.*, Christine Kexel Chabot, *Do Justices Time Their Retirements Politically? An Empirical Analysis of the Timing and Outcomes of Supreme Court Retirements in the Modern Era*, 2019 UTAH L. REV. 527 (2019); Adam Feldman, *Empirical SCOTUS: Retirement Plan Blues*, SCOTUSBLOG (May 23, 2018), https://www.scotusblog.com/2018/05/empirical-scotus-retirement-plan-blues/.

[75] *E.g.*, Daniel Epps, *Non-Originalism and Constitutional Arguments About Changing the Supreme Court's Size*, DORF ON LAW (Nov. 2, 2020), http://www.dorfonlaw.org/2020/11/non-originalism-and-constitutional.html; Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal/.

[76] *See, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 44 (Max Farrand ed., 1911) (discussion of how salary protection for judges could support judicial independence); *id.* at 429 (statement of Mr. Wilson, in discussion of the Good Behavior Clause, that "Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Govt.").

[77] THE FEDERALIST NO. 78 (Alexander Hamilton).

[78] *See* THE FEDERALIST NO. 81 (Alexander Hamilton).

[79] *See infra* "Constitutionality of Legislation Modifying Life Tenure"; *see also* Cong. Research Serv., *Overview of Federal Judiciary Protections*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-10-1/ALDE_00013554/ (last visited Jan. 5, 2023).

[80] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 2, 4 (July 20, 2021) (written testimony of Randy E. Barnett, Prof., Georgetown Univ. Law Ctr.), https://www.whitehouse.gov/wp-content/uploads/2021/07/Barnett-Testimony.pdf (arguing that "partisan court packing" is "unconstitutional because it violates both the letter and spirit of the Constitution").

[81] S. REP. NO. 75-711, at 3 (1937).

commentators have likewise opposed recent Court expansion proposals on separation-of-powers grounds.[82]

Other commentators base their arguments not on the explicit rules and structure of the Constitution but on precedents and norms. These non-textual rules, norms, and institutions that guide American government are sometimes referred to as the "small-c" constitution.[83] One argument in this vein asserts that, by remaining stable for a century and a half, a nine-Justice Supreme Court has now become a settled constitutional norm that would be undermined by efforts to expand the Court for political reasons.[84] Some scholars cite the rejection of the 1937 court expansion proposal as further support for such a norm.[85] On the other hand, some scholars contend that lack of precedent in recent years, standing alone, does not signal that a proposal is unconstitutional.[86] And some dispute whether politically motivated court expansion proposals would be novel, pointing to the historical changes to the Court's size discussed above, among other congressional actions, as prior examples of political influence over the Court.[87]

Assuming politically motivated expansion of the Supreme Court would raise constitutional questions, the Court itself might consider those issues, though there is some question whether the federal courts would exercise jurisdiction over a challenge to a court expansion statute or would deem such a challenge to present a non-justiciable political question.[88] In addition, Members of Congress and the President may independently consider constitutional arguments for and against proposed court expansion legislation when deciding whether to support Court reform proposals.[89]

Considerations for Congress

Discussion of Supreme Court expansion experienced a resurgence following the death of Justice Ruth Bader Ginsburg and the nomination and confirmation of Justice Amy Coney Barrett in the weeks leading up to the 2020 presidential election.[90] A number of bills introduced during the 116th and 117th Congresses and recent proposals from legal commentators would change the size

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[82] *See, e.g.*, Casey Mattox, *Packing the Court Risks Destroying Its Legitimacy*, NEWSWEEK (Oct. 26, 2020), https://www.newsweek.com/packing-court-risks-destroying-its-legitimacy-opinion-1541755; Henry Olsen, *Packing the Supreme Court is a Horrible Idea. Democrats Must Reject it*, WASH. POST (Sept. 21, 2020), https://www.washingtonpost.com/opinions/2020/09/21/packing-supreme-court-is-horrible-idea-democrats-must-reject-it/.

[83] *E.g.*, M. Todd Henderson, *Court-Packing Is Unconstitutional*, NEWSWEEK (Oct. 30, 2020), https://www.newsweek.com/court-packing-unconstitutional-opinion-1543290; Primus, *supra* note 75; *cf.* Richard A. Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079 (2013).

[84] *E.g.*, Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 269–87 (2017); Fred Bauer, *Biden, Court-Packing, and Constitutional Norms*, NAT'L REV. (Oct. 1, 2020), https://www.nationalreview.com/corner/joe-biden-court-packing-and-constitutional-norms/.

[85] *E.g.*, Will Baude, *Why Isn't Court-Packing Unconstitutional?*, VOLOKH CONSPIRACY (Oct. 31, 2020), https://reason.com/volokh/2020/10/31/why-isnt-court-packing-unconstitutional/.

[86] *See* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017).

[87] *E.g.*, Epps, *supra* note 75.

[88] *See* Baude, *supra* note 85; Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 760 (1997).

[89] The President and Members of Congress each swear an oath to support or defend the Constitution. *See* U.S. CONST. art. II, § 1, cl. 8; *id.* art. VI.

[90] *See, e.g.*, Maggie Astor, *Ginsburg's Death Revives Calls for Court Packing*, N.Y. TIMES (Sept. 19, 2020), https://www.nytimes.com/2020/09/19/us/politics/ginsburgs-death-revives-calls-for-court-packing.html; Eric Levitz, *If the McConnell Rule Is Dead, Court-Packing Is Permitted*, N.Y. MAG. (Sept. 22, 2020), https://nymag.com/intelligencer/2020/09/mcconnell-hypocrisy-rbg-trump-democrats-court-packing.html.

or structure of the Supreme Court. The proposals vary in scope. Some commentators have suggested increasing the size of the Supreme Court, for example by adding two or four seats.[91] Other proposals would alter the size of the Court while also changing the Court's structure or composition. For example, a proposal known as the "Balanced Bench" would expand the Court to include 15 Justices: five permanent Justices affiliated with Republicans, five permanent Justices affiliated with Democrats, and five temporary Justices drawn from the lower federal courts and chosen unanimously by the 10 permanent Justices.[92] Another proposal would reduce the size of the Court to eight Justices, evenly divided between Democratic- and Republican-selected jurists.[93]

To the extent a proposal would enlarge the Supreme Court while otherwise maintaining the Court's current structure, most scholars agree that Congress may pursue that change through legislation, as it has in the past. By contrast, any proposal that would immediately decrease the size of the Court or otherwise remove a sitting Justice from the bench would likely violate the constitutional requirement that federal judges enjoy life tenure during good behavior. Congress could avoid that issue, as it has in prior legislation, by making any reduction effective only once a vacancy occurs due to the death or retirement of a sitting Justice.[94]

Specific proposals may also raise other constitutional questions. For instance, if it were understood to create temporary judgeships, the "Balanced Bench" proposal might violate Article III's life tenure requirement.[95] Any legislation that would restrict the President's discretion to select judicial nominees might also run afoul of the Appointments Clause.[96] Moreover, partisan balance proposals might raise questions under the First Amendment by limiting eligibility for judgeships based on Justices' political party affiliation.[97] If a Court reform proposal conflicted with existing constitutional limitations, the reform would require a constitutional amendment.

Proposals to modify the size and composition of the Court with the aim of obtaining favorable judicial outcomes also raise complex questions about the role of the judiciary within the American system of government. Supreme Court expansion is not the only practice that can raise such issues. Although proposals to enlarge the Supreme Court have attracted popular attention recently, supporters of both major political parties have previously proposed or adopted different means to increase the number of federal judges appointed by a President of their own party or decrease the number of judges appointed by a President of the opposing party. Examples include encouraging strategic retirements by sitting Supreme Court Justices;[98] delaying, expediting, or

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[91] *E.g.*, Quinta Jurecic & Susan Hennessey, *The Reckless Race to Confirm Amy Coney Barrett Justifies Court Packing*, ATL. (Oct. 4, 2020), https://www.theatlantic.com/ideas/archive/2020/10/skeptic-case-court-packing/616607/; Sarah Roberts, *Packing the Supreme Court: Will the Passing of RBG Lead to an End of the Nine?*, LAW COMMENTARY (Sept. 25, 2020), https://www.lawcommentary.com/articles/packing-the-supreme-court-will-the-passing-of-rbg-lead-to-an-end-of-the-nine.

[92] Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 193–205 (2019).

[93] Eric J. Segall, *Eight Justices Are Enough: A Proposal To Improve The United States Supreme Court*, 45 PEPP. L. REV. 547 (2018).

[94] *See* Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89, 89; Judiciary Act of 1866, ch. 211, 14 Stat. 209, 209.

[95] For discussion of Justices' life tenure, see *infra* "Constitutionality of Legislation Modifying Life Tenure."

[96] U.S. CONST. art. II, § 2, cl. 2; *see also* Cong. Research Serv., *Appointments of Justices to the Supreme Court*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S2-C2-3-5/ALDE_00013096/ (last visited Jan. 5, 2023).

[97] U.S. CONST. amend. I. A political independent has challenged a state court partisan balance requirement on First Amendment grounds, but the Supreme Court did not reach the First Amendment question because it held the challenger lacked standing to sue. Carney v. Adams, 141 S. Ct. 493 (2020).

[98] *E.g.*, Scott Lemieux, *When Do Supreme Court Justices Retire? When the Politics Are Right.*, WASH. POST (Aug. 28, 2019), https://www.washingtonpost.com/outlook/2019/08/28/when-do-supreme-court-justices-retire-when-politics-are-

taking no action on judicial confirmation hearings;[99] and seeking to expand or shrink the lower federal courts to increase or decrease the number of judges the President could nominate.[100] All of those strategies may raise certain overlapping issues.

First, many of the foregoing practices or proposals are premised on the view that a judge appointed by a certain President is likely to rule in ways that advance the policy agenda of that President or the President's political party. However, selecting judges based on their perceived ideology may not necessarily be an effective way to control the outcome of future cases. As recent CRS Reports discuss in more detail, it is difficult to predict how judicial nominees will rule in future cases based solely on their past writings and statements.[101] There are many areas of law where Supreme Court alignments may not divide neatly along political lines.[102] Moreover, even assuming it is possible to determine a judge's personal partisan affiliation, the judge may follow a judicial philosophy—encompassing the judge's approach to constitutional and statutory interpretation—that yields results that differ from his or her perceived political affiliation.[103]

Second, proponents of Supreme Court expansion may assert that Congress should enlarge the Court in order to preserve certain legal doctrines or to correct a perceived political imbalance on the Court.[104] On the other hand, some who oppose court expansion worry that if one political party enlarges the Supreme Court, the other party could later retaliate by adding additional Justices.[105] They contend that a Court expansion tit-for-tat could thwart attempts to shift the Court's political balance and, if carried to the extreme, yield an absurdly large Court.[106]

Third, efforts to control the political composition of the federal judiciary may conflict with the traditional understanding of courts as independent, non-political entities. Besides the possible constitutional issues discussed above, many commentators worry that proposals that seek to

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right/.

[99] *E.g.*, Carl Hulse, *How Mitch McConnell Delivered Justice Amy Coney Barrett's Rapid Confirmation*, N.Y. TIMES (Oct. 27, 2020), https://www.nytimes.com/2020/10/27/us/mcconnell-barrett-confirmation.html; CRS Report R44773, *The Scalia Vacancy in Historical Context: Frequently Asked Questions*, by Barry J. McMillion.

[100] Steven G. Calabresi, *Republicans Should Expand the Federal Courts*, NAT'L REV. (Nov. 15, 2017), https://www.nationalreview.com/2017/11/gop-tax-bill-should-expand-federal-courts/; Carrie Johnson, *Senators Tussle Over Proposal To 'Unpack' Key D.C. Court*, NPR (May 29, 2013), https://www.npr.org/sections/itsallpolitics/2013/05/29/186952724/Senators-Tussle-Over-Unpacking-Key-D-C-Court.

[101] *See, e.g.*, "Making Predictions About Nominees" section of CRS Report R47050, *The Nomination of Judge Ketanji Brown Jackson to the Supreme Court*, coordinated by David Gunter; "Predicting a Nominee's Future Court Decisions" section of CRS Report R46562, *Judge Amy Coney Barrett: Her Jurisprudence and Potential Impact on the Supreme Court*, coordinated by Valerie C. Brannon, Michael John Garcia, and Caitlain Devereaux Lewis.

[102] *See, e.g.*, Brannon et al., *supra* note 101, "Criminal Law and Procedure" section ("Criminal law and procedure is an area where Supreme Court alignments are often not divided neatly between the Court's more conservative and liberal wings.").

[103] *See, e.g.*, *id.*, "Predicting a Nominee's Future Court Decisions" section.

[104] *E.g.*, Michael Hiltzik, *Column: Ginsburg's Death Makes Supreme Court Expansion Much More Urgent*, L.A. TIMES (Sept. 21, 2020), https://www.latimes.com/business/story/2020-09-21/ginsburg-death-court-packing-scheme; Todd Gitlin, *Republicans Have Already Packed the Supreme Court. Unpack it by Making it Bigger.*, USA TODAY (Oct. 29, 2020), https://www.usatoday.com/story/opinion/2020/10/29/republicans-packed-supreme-court-expand-repair-damage-column/6054522002/.

[105] *E.g.*, Barbara Sprunt, *Biden Campaign Continues To Deflect On Court-Packing*, NPR (Oct. 11, 2020), https://www.npr.org/2020/10/11/922806310/biden-campaign-continues-to-deflect-on-court-packing.

[106] *E.g.*, Jennifer Rubin, *Why Court-Packing Is a Really Bad Idea*, WASH. POST (Mar. 19, 2019), https://www.washingtonpost.com/opinions/2019/03/19/why-court-packing-is-really-bad-idea/; *Nomination of Amy Coney Barrett to the U.S. Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 2 (2020) (statement of Sen. Mike Lee).

control which party nominates federal judges may increase the perceived politicization of the judiciary and decrease its perceived legitimacy.[107] They contend that if the public comes to view courts, and especially the Supreme Court, as political bodies, people may lose confidence in the ability of the federal judiciary to administer justice impartially.[108] Some proponents of Court expansion counter that the Supreme Court has already become overly politicized in recent decades and argue that structural changes may help depoliticize the Court.[109] In response to concerns that Court expansion would upset institutional norms, some commentators contend that those norms are overstated or observed inconsistently[110] or that the policy benefits that would result from changing the Court's composition would outweigh any institutional harm.[111]

While Court expansion proposals have multiplied in recent years, many commentators and policymakers oppose attempts to change the size of the Supreme Court. Some Members of Congress recently proposed a constitutional amendment that would have set the size of the Supreme Court at nine members, preventing future attempts to enlarge the Court through legislation.[112] Another recent bill would have barred the Senate from considering legislation to change the size of the Supreme Court unless two-thirds of Senators assented to such consideration.[113] Other commentators advocate for judicial reform but favor alternatives to expansion that would not involve changing the size of the Supreme Court, often including reforms discussed elsewhere in this report.[114]

Changes to Supreme Court Justices' Tenure

Among other provisions intended to safeguard judicial independence,[115] the Constitution guarantees that Supreme Court Justices "shall hold their Offices during good Behaviour."[116] Under prevailing interpretations of the Constitution and long-standing historical practice, this constitutional provision gives Supreme Court Justices life tenure unless they leave the bench

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[107] *E.g.*, Shapiro, *supra* note 30; Shoshana Weissmann & Anthony Marcum, *Packing the Supreme Court Won't Work. Confirmation Hearings Are Already Highly Politicized.*, USA TODAY (Apr. 4, 2019), https://www.usatoday.com/story/opinion/2019/04/04/packing-supreme-court-would-further-politicize-column/3339783002/; Talia Kaplan, *Law Professor Explains Why Court Packing Is a Threat to the Supreme Court's Credibility*, FOX NEWS (Oct. 20, 2020), https://www.foxnews.com/politics/law-professor-explains-why-court-packing-is-a-threat-to-the-supreme-courts-credibility; Megan McArdle, *The Tit-for-tat Supreme Court Game is About to Reach a Catastrophic Conclusion*, WASH. POST (Sept. 22, 2020), https://www.washingtonpost.com/opinions/the-tit-for-tat-supreme-court-game-is-about-to-reach-a-catastrophic-conclusion/2020/09/22/77453cda-fd0b-11ea-b555-4d71a9254f4b_story.html.

[108] *E.g.*, Kathryn Haglin et al., *Americans Don't Trust the Supreme Court. That's Dangerous*, WASH. POST (Oct. 10, 2022), https://www.washingtonpost.com/politics/2022/10/10/supreme-court-public-opinion-legitimacy-crisis/.

[109] *E.g.*, Pema Levy, *How Court-Packing Went From a Fringe Idea to a Serious Democratic Proposal*, MOTHER JONES (Mar. 22, 2019), https://www.motherjones.com/politics/2019/03/court-packing-2020/.

[110] *E.g.*, Eric Levitz, *Republicans Oppose Court Packing (Except When They Support It)*, N.Y. MAG. (Oct. 14, 2020), https://nymag.com/intelligencer/2020/10/republicans-court-packing-hypocrisy-georgia-arizona-study.html.

[111] *E.g.*, Jurecic & Hennessey, *supra* note 91.

[112] H.J.Res. 95, 116th Cong. (2020).

[113] S. 4805, 116th Cong. (2020).

[114] *E.g.*, Ian Millhiser, *9 Ways to Reform the Supreme Court Besides Court-Packing*, VOX (Oct. 21, 2020), https://www.vox.com/21514454/supreme-court-amy-coney-barrett-packing-voting-rights.

[115] *See, e.g.*, U.S. CONST. art. III, § 1 (providing that Supreme Court Justices shall "receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office"); *see also* THE FEDERALIST NO. 78 (Alexander Hamilton); THE FEDERALIST NO. 79 (Alexander Hamilton).

[116] U.S. CONST. art. III, § 1.

voluntarily or are impeached.[117] The Good Behavior Clause may be relevant to several arguments and proposals related to structural reform or changes to the Supreme Court.[118]

History and Practice on Justices' Tenure

When the American colonists declared independence from England, they noted as one of their grievances against the king that he had "made Judges dependent on his Will alone, for the tenure of their offices."[119] Thus, when establishing the federal judiciary, the Constitution's Framers decided to insulate judicial tenure from political control. For instance, Alexander Hamilton stated in the *Federalist Papers* that federal judges could not be expected to enforce constitutional limitations on the federal government or protect individuals' rights if they held temporary office at the will of the political branches.[120] Hamilton also argued that qualified jurists would be disinclined to join and remain on the federal bench unless they enjoyed life tenure.[121]

To that end, Article III of the Constitution provides that Supreme Court Justices "shall hold their Offices during good Behaviour."[122] Although the Constitution does not define *good Behaviour*,[123] the *Federalist Papers* suggest that federal judges will be "secured in their places for life" so long as "they behave properly."[124] Likewise, the Supreme Court has stated repeatedly that federal judges enjoy life tenure and may not be removed from office except by impeachment.[125] Because Congress has never removed a Supreme Court Justice by impeachment, Justices have historically remained on the Court until they pass away or voluntarily leave the bench.[126]

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[117] *See infra* "History and Practice on Justices' Tenure."

[118] In addition to the proposals discussed in this section, see *supra* "Constitutionality of Changes to the Size of the Supreme Court"; *infra* "Partisan Balance and Regularized Appointments" and "Rotation Between Courts and Supreme Court Panels."

[119] THE DECLARATION OF INDEPENDENCE (1776), https://www.archives.gov/founding-docs/declaration-transcript. *See also, e.g.*, United States v. Hatter, 532 U.S. 557, 567–69 (2001).

[120] *See* THE FEDERALIST NO. 78 (Alexander Hamilton) ("That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.").

[121] *See, e.g.*, *id.* ("[A] temporary duration in office, which would naturally discourage [qualified jurists] from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity.").

[122] U.S. CONST. art. III, § 1.

[123] *See* Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 639–40 (2005) ("The Constitution does not directly address the question of what 'good Behaviour' means.").

[124] THE FEDERALIST NO. 79 (Alexander Hamilton).

[125] *See, e.g.*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955) (explaining that Article III courts "are presided over by judges appointed for life, subject only to removal by impeachment"); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 (1982) (plurality opinion of Brennan, J.) ("The 'good Behaviour' Clause guarantees that Art[icle] III judges shall enjoy life tenure, subject only to removal by impeachment."); United States v. Hatter, 532 U.S. 557, 567 (2001) (explaining that the Good Behavior Clause grants federal judges "the practical equivalent of life tenure").

[126] *See, e.g.*, Daniel J. Meador, *Thinking About Age and Supreme Court Tenure*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 115 (2006) ("As a practical matter, only death or a voluntary act of the justice can terminate service on the Court."); Todd C. Peppers & Chad M. Oldfather, *Till Death Do Us Part: Chief Justices*

Existing law contemplates several ways a Justice may leave the Court voluntarily. First, Justices who satisfy statutory age and length of service requirements may voluntarily *retire from judicial office*.[127] Justices who do so cease performing judicial duties but receive a salary for life.[128]

Second, Justices who satisfy certain age and length of service requirements may *take senior status*—that is, retain judicial office but retire from active service.[129] Senior Justices continue collecting a salary.[130] Senior Justices may not hear Supreme Court cases or vote on which cases the Court will accept,[131] but they may hear cases in the intermediate federal courts of appeals and perform other judicial and administrative duties.[132] For instance, Retired Associate Justice David H. Souter frequently sits on the U.S. Court of Appeals for the First Circuit.[133] Despite having this opportunity to retire from active service with a full salary, Justices often remain in active service after they become eligible to take senior status,[134] and it is fairly common for Justices to remain in active service until death.[135]

Third, Justices who become unable to perform the office's duties may *retire for disability*.[136] Justices who retire for disability after 10 years of judicial service continue receiving the same salary as their non-retired colleagues, while Justices who retire for disability after fewer than 10 years of service receive half of that salary.[137]

Finally, a Justice who is ineligible to retire with a salary may *resign* from the Court.[138] For instance, Justice Arthur Goldberg resigned after three years to become the ambassador to the United Nations.[139]

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and the United States Supreme Court, 95 MARQ. L. REV. 709, 721 (2012) (explaining that the House of Representatives has impeached one Justice since the Constitution's ratification, whom the Senate ultimately acquitted).

[127] *See* 28 U.S.C. § 371(a). *See also id.* § 371(c) (age and length of service requirements).

[128] *See id.* § 371(a); David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 460–61 (2007).

[129] *See* 28 U.S.C. § 371(b). *See also id.* § 371(c) (age and length of service requirements).

[130] *See id.* § 371(b), (e).

[131] *See id.* § 294(d) ("No . . . designation or assignment [of retired Justices] shall be made to the Supreme Court."); David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute,"* 83 WASH. U. L.Q. 1397, 1465 (2005) [hereinafter Stras & Scott, *Golden Parachute*] ("Senior Justices . . . do not vote on certiorari petitions [or] sit by designation on the Court . . . .").

[132] *See* 28 U.S.C. §§ 294(a), 371(e)(1)(A)-(E).

[133] *See, e.g.*, Newton Covenant Church v. Great Am. Ins. Co., 956 F.3d 32 (1st Cir. 2020) (Souter, J.).

[134] *See, e.g.*, Roger G. Cramton, *Reforming the Supreme Court*, 95 CAL. L. REV. 1313, 1318 (2007) (observing that Supreme Court Justices "only rarely take senior status when eligible to do so").

[135] *See, e.g.*, J. Gordon Hylton, *Supreme Court Justices Today Are Unlikely to Die With Their Boots On*, MARQUETTE U. L.SCH. FAC. BLOG (Mar. 12, 2012), https://law.marquette.edu/facultyblog/2012/03/supreme-court-justices-today-are-unlikely-to-die-with-their-boots-on/ ("Since 1789, 102 men and one woman have left the United States Supreme Court after varying periods of service. Forty-seven of the 103 died while still on the Court, while the other 56 retired."). Since that article was written, four Justices have left the Court, two through retirement and two through death. *See* Sup. Ct. Hist. Soc'y, *Previous Associate Justices*, https://supremecourthistory.org/associate-justices/ (last visited Jan. 5, 2023).

[136] 28 U.S.C. § 372(a).

[137] *Id.*

[138] *See* Lisa T. McElroy & Michael C. Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 105 (2011).

[139] *See, e.g.*, Charles S. Doskow, *The Juvenile Death Penalty: The Beat Goes On*, 24 J. JUV. L. 45, 56 (2004).

A President may appoint a new Supreme Court Justice when a sitting Justice either dies, voluntarily leaves the Court, or is impeached and convicted.[140]

The Debate over Life Tenure

Commentators who support life tenure assert that it may promote various policy goals:

- *Judicial Independence*—Life tenure prevents the political branches from using the threat of removal to influence the Justices' decisions.[141] Requiring Justices to leave the bench before they want to retire could also encourage Justices to modify their rulings to curry favor with future employers and clients.[142]
- *Doctrinal Stability*—Life tenure reduces turnover on the Court, which may promote stability in Supreme Court precedent.[143]
- *Judicial Experience*—Lifetime appointments give Justices more time to develop skills and expertise, which may improve the Court's decisionmaking.[144]
- *Attracting and Retaining Qualified Candidates*—Life tenure may encourage highly qualified jurists to join and remain on the Court.[145]

Others dispute that Supreme Court Justices should enjoy life tenure.[146] Opponents criticize life tenure on the following grounds:

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[140] *See, e.g.*, 28 U.S.C. § 371(d) ("The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice . . . who retires under this section."); *id.* § 372(a) ("Any justice . . . of the United States appointed to hold office during good behavior who becomes permanently disabled from performing his duties may retire from regular active service, and the President shall, by and with the advice and consent of the Senate, appoint a successor."). A Justice may announce his retirement in advance, and the political branches may nominate and confirm a successor before the retirement takes effect, in anticipation of the vacancy. For instance, on January 27, 2022, Justice Stephen G. Breyer announced that he would retire from active service as an Associate Justice of the Supreme Court at the end of the Court's current Term, "assuming that by then [his] successor has been nominated and confirmed." Letter from Stephen Breyer, Justice, U.S. Supreme Ct., to Joseph Biden, Pres. of the United States, White House (Jan. 27, 2022), https://www.supremecourt.gov/publicinfo/press/Letter_to_President_January-27-2022.pdf. President Biden nominated then-Judge Ketanji Brown Jackson to fill Justice Breyer's seat, and the Senate confirmed her on April 7, 2022. Justice Breyer's retirement took effect on June 30, 2022, and Justice Jackson was sworn into office the same day. Dareh Gregorian, *Ketanji Brown Jackson Sworn in as First Black Woman on the Supreme Court*, NBC NEWS (June 30, 2022), https://www.nbcnews.com/politics/supreme-court/ketanji-brown-jackson-sworn-supreme-court-justice-rcna36115. *See also* Authority of the President to Prospectively Appoint a Supreme Court Justice, 46 Op. O.L.C. (Apr. 6, 2022), https://www.justice.gov/olc/file/1494816/download.

[141] *See, e.g.*, Mary L. Clark, *Judicial Retirement and Return to Practice*, 60 CATH. U. L. REV. 841, 888 (2011) (arguing that life tenure "promotes institutional independence because a high degree of security of tenure promotes the judiciary's autonomy to review and interpret the law").

[142] *See, e.g.*, Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407, 446 (2005); William G. Ross, *The Hazards of Proposals to Limit the Tenure of Federal Judges and to Permit Judicial Removal Without Impeachment*, 35 VILL. L. REV. 1063, 1137 (1990).

[143] *See* Stras & Scott, *Golden Parachute*, *supra* note 131, at 1422 (arguing that life tenure "decelerates the rate of legal change"); Arthur D. Hellman, *Reining in the Supreme Court: Are Term Limits the Answer?*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 308–09 (2006) (predicting that "stare decisis would get even less respect on a Court whose membership was changing every two years"); Christopher Sundby & Suzanna Sherry, *Term Limits and Turmoil:* Roe v. Wade*'s Whiplash*, 98 TEX. L. REV. 121, 156 (2019) (suggesting that Supreme Court term limits could "destabilize important constitutional precedents" and "change the way that constitutional jurisprudence evolves by pushing it away from gradual shifts and towards more sudden jolts").

[144] *See, e.g.*, Clark, *supra* note 141, at 889; Ross, *supra* note 142, at 1087.

[145] *See* Clark, *supra* note 141, at 889; THE FEDERALIST NO. 78 (Alexander Hamilton).

[146] *See, e.g.*, L.A. Powe Jr., *Old People and Good Behavior*, 12 CONST. COMMENT. 195, 196 (1995) (characterizing life

- *Physical and Mental Decline*—Life tenure may result in Justices remaining on the bench after failing health renders them unable to perform judicial duties.[147]
- *Strategic Retirements*—If Justices can choose when to retire, they may time their retirements so a President with similar ideological views can appoint their successors.[148]
- *Judicial Inexperience*—Life tenure may encourage Presidents to nominate younger, less experienced jurists.[149]
- *Irregular Vacancies*—If Justices remain on the Court until they die or voluntarily retire, judicial vacancies may arise at irregular intervals.[150] This may cause uncertainty and political disruptiveness and has given different Presidents unequal opportunities to appoint Supreme Court Justices.[151]
- *Political Unresponsiveness*—Life tenure may render Justices unresponsive to the electorate and prevailing social views.[152]
- *Judicial Activism*—Life tenure may embolden Justices to behave more like policymakers than neutral arbiters.[153]

Some who oppose life tenure support term limits for Supreme Court Justices.[154] Term limit proposals are not new. Commentators and legislators have advanced such proposals at various points in the nation's history, sometimes in response to high-profile judicial decisions.[155] To date, no such proposals have been enacted.

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tenure for Supreme Court Justices as "the Framers' greatest lasting mistake").

[147] *See, e.g.*, David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 995 (2000) [hereinafter Garrow, *Mental Decrepitude*] (claiming that the Court's history "is replete with repeated instances of [J]ustices casting decisive votes or otherwise participating actively in the Court's work when their colleagues and/or families had serious doubts about their mental capacities"); Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 838 (2006) (arguing that "[l]imiting the length of service of any Justice to only eighteen years would reduce greatly the likelihood of a Justice continuing service on the Court despite incapacity").

[148] *See, e.g.*, Calabresi & Lindgren, *supra* note 147, at 802; Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 805 (1986).

[149] *See, e.g.*, James E. DiTullio & John B. Schochet, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court With Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1096 (2004); Calabresi & Lindgren, *supra* note 147, at 836–37.

[150] *See, e.g.*, Calabresi & Lindgren, *supra* note 147, at 832–33.

[151] *See, e.g.*, Cramton, *supra* note 134, at 1321 ("Because vacancies are uneven over time but sometimes are bunched, one President may make five appointments in a four-year term and others make none."); DiTullio & Schochet, *supra* note 149, at 1096.

[152] *See, e.g.*, Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 GONZ. L. REV. 131, 156 (2004) (arguing that "[r]otating offices helps a country's institutions stay in touch with the people whom they are supposed to serve"); Cramton, *supra* note 134, at 1321 ("[D]ecisions having great moment for the nation's future are made by Justices whose appointments came many years before and who may not be influenced by, or even knowledgeable about, the views of those voters who are members of generations other than that of the most elderly.").

[153] *See, e.g.*, Calabresi & Lindgren, *supra* note 147, at 823; John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 541–42 (1999); Saikrishna B. Prakash, *America's Aristocracy*, 109 YALE L.J. 541, 544 (1999).

[154] *See, e.g.*, Calabresi & Lindgren, *supra* note 147, at 772; John Harrison, *The Power of Congress Over the Terms of Justices of the Supreme Court*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 373 (2006); Prakash, *supra* note 153, at 568; Oliver, *supra* note 148, at 800. *See also* Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Cong. (2020).

[155] *See, e.g.*, 103 CONG. REC. S10863 (daily ed. July 3, 1957) (Res. of the Leg. of Ala. to the S. Comm. on the

In recent years, commentators have offered numerous Supreme Court term limit proposals that vary with respect to (1) the term's length, (2) whether the term would be renewable, and (3) whether Justices could continue to hear lower court cases or perform other duties after their terms expire.[156] The most common proposal is to limit Supreme Court Justices' terms to 18 years.[157] Such proposals would stagger Justices' terms so that one Justice would depart the bench every two years.[158] Justices would receive a fixed salary for life after their terms expire.[159] While retired Justices could continue hearing cases on the federal appellate courts, they would no longer rule on Supreme Court cases or would sit on the Supreme Court only to fill temporary vacancies.[160]

Alternatively, some opponents of life tenure advocate a mandatory retirement age for Supreme Court Justices rather than a term limit.[161]

Constitutionality of Legislation Modifying Life Tenure

Because Article III guarantees that Supreme Court Justices "shall hold their Offices during good Behaviour,"[162] most commentators agree that Congress could not impose a term or age limit for Supreme Court Justices without amending the Constitution.[163] Some commentators dispute that modifying judicial tenure would require a constitutional amendment.[164] Emphasizing that Article III states that Justices "shall hold their Offices *during good Behaviour*" rather than "hold their Offices *for life*," these scholars interpret the Good Behavior Clause as a protection from partisan impeachment rather than a guarantee of life tenure.[165] According to these commentators, so long

Judiciary) (proposal in the wake of *Brown v. Board of Education* for a constitutional amendment setting term limits for federal judges and changing how judges would be selected).

[156] *See, e.g.*, Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511, 1511 (2006).

[157] *See, e.g.*, Calabresi & Lindgren, *supra* note 147, at 772; DiTullio & Schochet, *supra* note 149, at 1096–97; Powe, *supra* note 146, at 197; Oliver, *supra* note 148, at 800.

[158] *See, e.g.*, Calabresi & Lindgren, *supra* note 147, at 772; DiTullio & Schochet, *supra* note 149, at 1119; Powe, *supra* note 146, at 197. Assuming the Court continued to comprise nine Justices, this would mean that each President could appoint two new Justices during each four-year presidential term.

[159] *See, e.g.*, Calabresi & Lindgren, *supra* note 147, at 843; Charles S. Collier, *The Supreme Court and the Principle of Rotation in Office*, 6 GEO. WASH. L. REV. 401, 424 (1938).

[160] *See* Calabresi & Lindgren, *supra* note 147, at 825; DiTullio & Schochet, *supra* note 149, at 1120 n.105; Collier, *supra* note 159, at 423.

[161] *See, e.g.*, Garrow, *Mental Decrepitude*, *supra* note 147, at 1086–87 (proposing "a constitutional amendment mandating compulsory retirement at age seventy-five").

[162] U.S. CONST. art. III, § 1.

[163] *See, e.g.*, David J. Garrow, *Protecting and Enhancing the U.S. Supreme Court*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 278 (2006) [hereinafter Garrow, *Protecting and Enhancing*] (claiming that "the overwhelming consensus of the critical commentary . . . indicates that only a change in the Constitution itself could properly convert Justices of the Supreme Court into simply lesser Article III federal judges"). *See also, e.g.*, Stras & Scott, *Golden Parachute*, *supra* note 131, at 1421 ("The Constitution prevents Congress from tinkering with life tenure through the ordinary legislative process."); DiTullio & Schochet, *supra* note 149, at 1097 ("Ending life tenure would require a constitutional amendment.").

[164] *See, e.g.*, Cramton, *supra* note 134, at 1334; Alan B. Morrison, *Opting for Change in Supreme Court Selection, and for the Chief Justice, Too*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 209 (2006); Sanford Levinson, *Life Tenure and the Supreme Court: What Is To Be Done?*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 377 (2006).

[165] *See, e.g.*, Levinson, *supra* note 164, at 379 ("[N]either the text nor the presumed purpose of [Article III] rules out the following argument: The 'good behaviour' clause guarantees that judges, *whatever their term of service*, cannot be removed from office for partisan political reasons that would, by definition, threaten the very idea of judicial

as Justices enjoy tenure that is long enough to guarantee their decisional independence, and so long as Justices may continue to exercise judicial duties on the lower courts for the rest of their lives after their terms expire, congressional modifications to judicial tenure would not violate the Good Behavior Clause.[166]

Assuming that a dispute over legislation modifying Justices' tenure would be justiciable, a court might reject that argument for several reasons. Beginning with the Constitution's text,[167] it is not clear that Justices barred from participating fully in the Court's activities still "hold their Offices" within the meaning of Article III.[168] If that is correct, a court could find that precluding Supreme Court Justices from hearing Supreme Court cases solely because they have served for a specified number of years or reached a certain age to be tantamount to removing Justices from office for reasons other than their behavior in contravention of the Good Behavior Clause.[169]

A court considering the constitutionality of a term or age limit might also examine the Constitution's structure.[170] Article III grants the Supreme Court a unique constitutional status by distinguishing the "one supreme Court" from the "inferior Courts"—that is, the lower federal courts created by Congress.[171] Thus, a court might hold that a Justice barred from hearing cases on the "one supreme Court" and relegated to hearing cases on the "inferior Courts" no longer holds the office of Supreme Court Justice under the Good Behavior Clause.[172]

Historical sources may also suggest that Congress cannot modify life tenure by statute. For instance, courts often consult the *Federalist Papers* when interpreting the Constitution.[173] As discussed above, the *Federalist Papers* describe the Good Behavior Clause as "secur[ing]

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independence. . . . [O]ne could argue that the 'good behaviour' clause is a protection against partisan impeachment, but most definitely not an assignment of the office literally for life.").

[166] *See, e.g.*, Cramton, *supra* note 134, at 1334 (arguing that Congress could impose term limits legislatively so long as Justices whose terms expired continued to enjoy "life tenure on a constitutional court" and the term was "lengthy, fixed in time, non-renewable and [could not] be affected by the political branches of government").

[167] *See, e.g.*, NLRB v. New Vista Nursing & Rehab., 719 F.3d 203, 221 (3d Cir. 2013) ("When interpreting the Constitution, 'we begin with its text.' ") (quoting City of Boerne v. Flores, 521 U.S. 507, 519 (1997)).

[168] *See, e.g.*, Stras & Scott, *Golden Parachute*, *supra* note 131, at 1418 (arguing that "any plan that exiles Supreme Court Justices to the lower courts after serving a term of years or reaching a certain age would violate the Constitution" because "the essential powers and duties of a 'judge' include the power to adjudicate disputes that come before the court"); William Van Alstyne, *Constitutional Futility of Statutory Term Limits for Supreme Court Justices*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 391 (2006); Richard A. Epstein, *Mandatory Retirement for Supreme Court Justices*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 416 (2006).

[169] *See* Stras & Scott, *Golden Parachute*, *supra* note 131, at 1404, 1407 (arguing that "[w]hatever misbehavior meant at the founding, it did not include serving eighteen years on the bench or turning seventy").

[170] *See, e.g.*, Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1656 (2020) (examining the Constitution's structure as an aid to constitutional interpretation).

[171] *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested *in one supreme Court, and in such inferior Courts* as the Congress may from time to time ordain and establish." (emphasis added)).

[172] *See, e.g.*, Epstein, *supra* note 168, at 417 ("[Article III's text] make[s] tolerably clear that the appointment for each judge is to a particular office, and that service in that office is what is guaranteed for the length of good behavior. The Constitution's reference to judges on both the Supreme and inferior courts suggests that judges are appointed to a single position, and not to the bench . . . ."); Stras & Scott, *Golden Parachute*, *supra* note 131, at 1418 (arguing that "[b]ecause the essential powers and duties of a 'judge' include the power to adjudicate disputes that come before the court, any plan that exiles Supreme Court Justices to the lower courts after serving a term of years or reaching a certain age would violate the Constitution"); Calabresi & Lindgren, *supra* note 147, at 863 (arguing that the Constitution "contemplates a separate office of Supreme Court Justice to which individuals must be appointed for life and not merely for eighteen years").

[173] *See, e.g.*, Evenwel v. Abbott, 136 S. Ct. 1120, 1127 (2016).

[Supreme Court Justices] in their places for life" to ensure their "complete independence" from the political branches.[174] Consequently, the Framers appear to have understood the Good Behavior Clause to preclude congressional modifications to judicial tenure.[175]

No court has considered whether a term- or age-limit statute would be constitutional because Congress has never enacted one.[176] However, the Supreme Court has interpreted the Good Behavior Clause to guarantee life tenure and curb legislative influence over the federal judiciary.[177] Thus, existing precedent may counsel against an interpretation of Article III that would authorize Congress to affect judicial tenure legislatively.

Some commentators argue that the Supreme Court's 1803 decision in *Stuart v. Laird* supports the constitutionality of a term- or age-limit statute.[178] In *Stuart*, the Court upheld a statute that required Supreme Court Justices to "ride circuit"—that is, to spend a portion of each year hearing lower federal court cases—on the grounds that Congress had required circuit riding since the establishment of the lower courts through the Judiciary Act of 1789.[179] If Congress can require Supreme Court Justices to spend a portion of *each year* hearing lower court cases, this argument goes, Congress could require Justices to spend the *final years of their judgeships* hearing lower court cases exclusively.[180] However, *Stuart* did not hold that Congress could require Justices to sit on the lower courts to the exclusion of participating in the work of the Supreme Court.

Considerations for Congress

If Congress opts to modify Supreme Court Justices' tenure, the approach least likely to raise constitutional issues would be to amend the Constitution.[181] If Congress proposed such an amendment, it would face choosing whether to impose a *term* limit, an *age* limit, or some other modification to life tenure. The option Congress selects could depend on its policy goals. For instance, if Congress's primary reason for modifying life tenure is to regularize Supreme Court

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[174] THE FEDERALIST NO. 78 (Alexander Hamilton); THE FEDERALIST NO. 79 (Alexander Hamilton); *see also* United States v. Hatter, 532 U.S. 557, 567 (2001) (explaining that granting federal judges "the practical equivalent of life tenure[ ] helps to guarantee what Alexander Hamilton called the 'complete independence of the courts of justice' "); *supra* "History and Practice."

[175] *See, e.g.*, Stras & Scott, *Golden Parachute*, *supra* note 131, at 1402–03 ("The debate at the founding gives no indication that Congress enjoys the power to modify life tenure. For example, Alexander Hamilton in the *Federalist Papers* and the author of the 'Brutus' essays disagreed sharply over the virtues of life tenure, but neither doubted that the proposed Constitution required it.") (footnote omitted); Van Alstyne, *supra* note 168, at 390 (arguing that the founding generation would not have interpreted Article III to allow term limits).

[176] *See, e.g.*, Burbank, *supra* note 156, at 1512–13.

[177] *See supra* note 125 and accompanying text.

[178] *See* Cramton, *supra* note 134, at 1333–34.

[179] *See* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803). *See generally* David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710 (2007) (discussing circuit riding); Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386 (2006) (same); Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003) (same).

[180] *See* Cramton, *supra* note 134, at 1333–34.

[181] Congress may propose constitutional amendments by a two-thirds vote of both houses of Congress. *See* U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . ."). *See also id.* (authorizing "the Legislatures of two thirds of the several States" to "call a Convention for proposing amendments"). An amendment proposed in this way becomes effective if three-fourths of the states vote to ratify it. *See id.* (providing that amendments "shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress").

vacancies, it might prefer terms that expire at fixed intervals.[182] By contrast, if Congress's primary concern is the risk that older Justices may remain on the bench after failing health renders them unable to perform judicial duties, it might prefer a mandatory retirement age.[183]

Congress could also consider ways to address Supreme Court Justices' tenure through ordinary legislation. Several recent proposals would seek to limit Justices' time on the bench while adhering to the limitations of the Good Behavior Clause.[184]

Term Limits by Constitutional Amendment

If Congress decided to limit Justices' terms via a constitutional amendment, it would face selection of the term's length. Scholars have proposed terms of varying durations ranging from six months to 20 years.[185] The most common proposal involves staggered 18-year terms that would create a vacancy every two years.[186] While some maintain that shorter terms could encourage judicial restraint, others contend that shorter terms could undermine judicial independence.[187]

Because the Constitution does not specify how many Justices the Court will have,[188] staggered terms present unique practical considerations. Although a federal statute presently sets the Court's membership at nine Justices,[189] Congress has changed the Court's size various times and could conceivably do so again.[190] For mathematical reasons, proposals to establish staggered, 18-year terms that create a vacancy every two years may not operate as intended if the Court does not have nine Justices.[191] Thus, if Congress amended the Constitution to impose term limits, it might consider also amending the Constitution to prohibit changes to the Court's size or creating variable terms that change depending on the Court's size to try to ensure that only one vacancy arises every two years.

Another question is whether terms should be renewable. While many term limit proposals would establish nonrenewable terms,[192] others would permit the President to reappoint Justices after their terms expire.[193] While some commentators claim that the prospect of reappointment would

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[182] *See supra* notes 150–151 and accompanying text.

[183] *See supra* note 147 and accompanying text.

[184] *See infra* "Statutory Options."

[185] *See, e.g.*, L.H. Larue, *"Neither Force Nor Will,"* 12 CONST. COMMENT. 179, 182 (1995) (proposing 10–15 year terms); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1212 (1988) (advocating 15–20 year terms); Collier, *supra* note 159, at 419 (supporting terms of "twelve years or less"). *Cf.* McGinnis, *supra* note 153, at 541, 546 (proposing that "federal judges sitting on the inferior courts of the United States" be "randomly assigned to the Supreme Court for short periods, such as six months or a year").

[186] *See supra* "The Debate over Life Tenure."

[187] *Compare, e.g.*, McGinnis, *supra* note 153, at 542 (arguing that judges who served on "the Supreme Court only for a short time" would be "more likely to treat constitutional issues and other momentous decisions" like "quotidian matters"), *with, e.g.*, DiTullio & Schochet, *supra* note 149, at 1128–29 (maintaining that "shorter nonrenewable terms (six years, for instance)" could "increase the risk of justices seeking to curry favor with potential post-Court employers").

[188] *See supra* "History and Practice on the Size of the Court"; *see also* U.S. CONST. art. III.

[189] *See* 28 U.S.C. § 1 ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices . . . .").

[190] *See supra* "History and Practice on the Size of the Court."

[191] *See* DiTullio & Schochet, *supra* note 149, at 1146 n.178.

[192] *See, e.g.*, *id.* at 1127–28; Powe, *supra* note 146, at 197.

[193] *See* Prakash, *supra* note 153, at 568.

make Justices more productive and responsive to the electorate,[194] others argue that opportunities for reappointment would encourage Justices to alter their votes to appease the appointing President.[195]

Finally, there are practical questions about what should happen if a Justice leaves the bench before his or her term expires or if the Senate refuses to consider or confirm nominees as term-limited Justices leave the Court. Some proposals would allow term-limited Justices to sit on the Court temporarily to fill unscheduled vacancies due to the retirement, death, or disability of a Justice.[196] The drafters of a constitutional amendment could also consider how to ensure that the Senate considers and confirms qualified nominees or that the Court is adequately staffed if the Senate fails to do so.

Age Limits by Constitutional Amendment

Establishing a mandatory retirement age for Supreme Court Justices would implicate different considerations. For instance, while a mandatory retirement age could mitigate concerns about aging Justices, it would not affect the President's incentive to appoint younger, less-experienced nominees.[197]

Some have argued that amending the Constitution to impose a *specific* maximum age could be shortsighted, as future medical advances could increase life expectancies or reduce the incidence of disabling health conditions in older populations.[198] Thus, Congress might explore amending the Constitution to authorize Congress to set the mandatory retirement age by statute. However, if the Constitution permitted Congress to change the mandatory retirement age by ordinary legislation, future Congresses might modify the maximum age when they approved or disapproved of the Court's composition—a result that could introduce additional political considerations into the appointment process.[199]

Statutory Options

Notwithstanding the constitutional limits discussed above,[200] some Members of Congress have proposed legislation that would have imposed term limits for Supreme Court Justices. One such proposal, the Supreme Court Term Limits and Regular Appointments Act of 2021, would have allowed the President to appoint two Supreme Court Justices during each four-year presidential term, one each "during the first and third years after a year in which there is a Presidential

[194] *See id*. at 571 ("Presidents would not bother attempting to reappoint lazy, senile, or incompetent judges."); *id*. at 576 ("The representative branches and the people should hold judges accountable for their failures and faults by declining to reappoint . . . them.").

[195] *See, e.g.*, Oliver, *supra* note 148, at 826; DiTullio & Schochet, *supra* note 149, at 1127.

[196] *E.g.*, H.R. 5140, 117th Cong. (2021); H.R. 8500, 117th Cong. (2022).

[197] *See supra* notes 147, 149, and accompanying text.

[198] *See, e.g.*, Calabresi & Lindgren, *supra* note 147, at 840 ("[I]t is a mistake in general to write numbers into the Constitution because they can become obsolete with the passage of time . . . It seems quite possible that in fifty or one hundred years a mandatory retirement age of seventy or even seventy-five might seem absurdly young if people were routinely living to be over 100.").

[199] *Cf.* Harrison, *supra* note 154, at 372 (arguing that if Congress could modify life tenure by statute, Congress might engage in "gamesmanship" by granting Justices life tenure when it approves of the Court's composition and then imposing tenure limits when it disapproves of the Court's membership).

[200] *See supra* "Constitutionality of Legislation Modifying Life Tenure."

election."[201] It would further provide that "[a]fter a Justice has served 18 years, that Justice shall be deemed a Justice retired from regular active service" and shall not hear Supreme Court cases except when designated to fill a seat vacated by a Justice who dies, becomes disabled, or is removed.[202] The proposal would exempt currently sitting Justices from the retirement provision. A related proposal, the Supreme Court Tenure Establishment and Retirement Modernization Act of 2022, would work similarly except that it would have also provided for automatic retirement of Justices on the Court at the time of enactment.[203] Exempting sitting Justices from an automatic retirement provision might mitigate some constitutional concerns, because it avoids changing the tenure of those Justices. However, it is likely that imposing term limits on new Justices would also violate the Good Behavior Clause.

As an alternative to imposing age or term limits, some scholars advocate retaining life tenure but creating stronger incentives for Justices to retire voluntarily.[204] While these commentators maintain that life tenure promotes doctrinal stability and judicial independence, they also recognize that life tenure creates a risk that Justices may remain on the Court after they are unable to perform judicial duties.[205] Thus, these scholars advocate encouraging Justices to retire earlier by increasing their pensions.[206] Because this proposal would still allow Justices to choose when to retire, it would likely not require a constitutional amendment to implement.[207] Congress could also consider encouraging earlier retirement in other ways. For example, some have advocated making long service on the Court less attractive by increasing the Justices' workload, including by reestablishing the discontinued circuit-riding requirement[208] or by reducing how many law clerks Justices may hire.[209]

Other Structural Changes to the Supreme Court

While Supreme Court expansion and the imposition of term limits are the proposals that have garnered the most attention in recent years, some commentators have proposed other structural reforms. Often, those reforms would involve changes to the Court's size or Justices' tenure in addition to other changes.

Congress has never enacted legislation similar to the proposals discussed in this section, and therefore the federal courts have had no occasion to consider their constitutionality. To the extent any proposal would raise constitutional issues if implemented by ordinary legislation, Congress could instead seek to amend the Constitution.

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[201] H.R. 5140, 117th Cong. (2021).

[202] *Id.*

[203] H.R. 8500, 117th Cong. (2022).

[204] *See, e.g.*, Clark, *supra* note 141, at 856; Stras & Scott, *Golden Parachute*, *supra* note 131, at 1439.

[205] *See* Stras & Scott, *Golden Parachute*, *supra* note 131, at 1422, 1424, 1437.

[206] *See, e.g.*, Clark, *supra* note 141, at 890; Stras & Scott, *Golden Parachute*, *supra* note 131, at 1402; Kevin T. McGuire, *Are the Justices Serving Too Long? An Assessment of Tenure on the U.S. Supreme Court*, 89 JUDICATURE 8, 15 (2005). *See also supra* "History and Practice" (discussing existing laws governing pensions for retired Justices).

[207] *See* Stras & Scott, *Golden Parachute*, *supra* note 131, at 1461 (arguing that this proposal would "not require a constitutional amendment").

[208] *See* Stras, *supra* note 179, at 1734; Calabresi & Presser, *supra* note 179, at 1416. *See also supra* note 179 and accompanying text.

[209] *See* Garrow, *Protecting and Enhancing*, *supra* note 163, at 285.

Partisan Balance and Regularized Appointments

Some Court reform proposals would both change the size of the Court and seek to impose ideological balance on the tribunal. Specifically, a proposal known as the "Balanced Bench" would expand the Court to include 15 Justices: five permanent Justices affiliated with Republicans, five permanent Justices affiliated with Democrats, and five temporary Justices drawn from the lower federal courts and chosen unanimously by the 10 permanent Justices.[210] Another proposal would reduce the size of the Court to eight Justices, evenly divided between Democratic- and Republican-affiliated jurists.[211] A prior section of this report analyzes the constitutionality of these provisions to the extent they would change the size of the Court.[212] The proposals might also raise other constitutional issues.

First, partisan balance proposals may conflict with Article II's Appointments Clause, which provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court."[213] In particular, the Balanced Bench proposal might violate that provision by allowing Supreme Court Justices, rather than the President and Senate, to appoint other Justices. The proposal's authors assert that their proposal would comply with the Appointments Clause because Justices would be selected from among Article III judges who had already been nominated and confirmed to the lower courts. They point to practices such as judges sitting by designation on courts other than the ones they were confirmed to and contend that "existing law and practice permit significant flexibility in the movement of Article III judges within the federal judiciary."[214] This proposal raises the question, discussed above, whether the "office" of a Supreme Court Justice is equivalent to a judge that has been confirmed to serve on the courts of appeals.

The proposal for an eight-Justice Court would base the partisan balance requirement on the Justices' own party affiliation rather than that of the nominating President. The author of the proposal suggests that the Senate could impose the requirement by modifying its rules for confirming Supreme Court nominees.[215] Because that proposal would not require nomination by someone other than the President, it might be less likely to raise concerns under Article II. Moreover, to the extent the requirement hinged on the Senate's own internal procedures, the federal courts might deem a challenge to the requirement to pose a nonjusticiable political question.[216]

In addition, some commentators have noted that partisan balance requirements might undermine the First Amendment's protections for freedom of speech and political association because, by basing the requirement on membership in the two currently dominant political parties, such proposals "may be seen as locking the major parties as they exist today into control over Court appointments."[217] Relatedly, by explicitly associating Justices with a political party, some might

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[210] Epps & Sitaraman, *supra* note 92.

[211] Segall, *supra* note 93.

[212] *See supra* "Constitutionality of Changes to the Size of the Supreme Court."

[213] U.S. CONST. art. II, § 2, cl. 2; *see also* Cong. Research Serv., *Appointments of Justices to the Supreme Court*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S2-C2-3-5/ALDE_00013096/ (last visited Jan. 5, 2023).

[214] Epps & Sitaraman, *supra* note 92, at 201.

[215] Segall, *supra* note 93, at 554.

[216] *See* Cong. Research Serv., *Congressional Governance as a Political Question*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-9-7/ALDE_00001289/ (last visited Jan. 5, 2023).

[217] *SCOTUS Commission Report*, *supra* note 28, at 89. In a recent Supreme Court case, a political independent

argue that partisan balance requirements would be inconsistent with the ideal of judges as non-political actors.[218]

As an alternative to partisan balance requirements, some proposals would regularize the timing of Supreme Court appointments. These proposals would provide for each President to appoint the same number of Justices, usually two per term.[219] They would not require that the Court have any particular political composition—if candidates from one political party won several presidential elections in a row, Presidents from that party would have multiple opportunities to nominate Justices and, potentially, significantly shift the ideological balance of the Court. Instead, the proposals would seek to reduce the randomness of Supreme Court appointments, depoliticize the confirmation process, and reduce the incentive for Justices to retire strategically.[220]

The proposals vary in how they would manage the Court's size following new appointments. One proposal would require the longest-tenured sitting Justice to retire from active service with each new appointment.[221] Another proposal would impose the same requirement on Justices nominated after the proposal was enacted, so new Justices would serve 18-year terms, but Justices on the bench at the time of enactment would be exempt from the retirement rule.[222] A third proposal would divide the Court into two panels, with only the nine most junior justices hearing most cases.[223] Each of these means of managing the Court's size might raise constitutional questions, which are discussed in other sections of this report.[224] Legislation that authorized Supreme Court appointments at regular intervals would likely be found constitutional.

Rotation Between Courts and Supreme Court Panels

Some Court reform proposals would have federal judges rotate between the Supreme Court and the lower federal courts. One proposal, dubbed the "Supreme Court Lottery," would provide that "every judge on the federal courts of appeals would also be appointed as an Associate Justice of the Supreme Court."[225] A panel of nine Justices would be selected at random to hear each Supreme Court case. Among other things, this proposal would also impose a partisan balance requirement such that "each panel would be prohibited from having more than five Justices

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challenged a state court partisan balance requirement on First Amendment grounds, but the Supreme Court did not reach the First Amendment question because it held the challenger lacked standing to sue. Carney v. Adams, 141 S. Ct. 493 (2020).

[218] *Cf.* 2A GUIDE TO JUDICIARY POLICY, CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 5, at 18 (Mar. 12, 2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf ("A Judge Should Refrain From Political Activity") [hereinafter *Code of Conduct*]. As discussed further below, the Code of Conduct does not bind Supreme Court Justices, but Justices consult the Code when considering ethical questions. *See infra* "Judicial Ethics."

[219] *E.g.*, H.R. 5140, 117th Cong. (2021); H.R. 8500, 117th Cong. (2022); Jack M. Balkin, *Don't Pack the Court. Regularize Appointments*, BALKINIZATION (Oct. 5, 2020), https://balkin.blogspot.com/2020/10/dont-pack-court-regularize-appointments.html.

[220] *See* Balkin, *supra* note 219.

[221] H.R. 5140, 117th Cong. (2021). Retired Justices would be able to sit by designation on the lower federal courts but would not be able to hear Supreme Court cases except to replace Justices who died or retired before their terms expired.

[222] H.R. 8500, 117th Cong. (2022).

[223] *See* Balkin, *supra* note 219.

[224] S*ee supra* "Changes to Supreme Court Justices' Tenure"; *infra* "Rotation Between Courts and Supreme Court Panels."

[225] Epps & Sitaraman, *supra* note 92, at 181–93.

nominated by a President of a single political party."[226] Another proposal would "simply . . . eliminate the position of Supreme Court Justice," instead allowing randomly selected judges from the lower federal courts to sit on the Supreme Court for temporary terms, such as six months or a year.[227] A third proposal would "increase the size of the Supreme Court to 16 justices, drawn exclusively from the pool of Article III appellate judges, sitting in panels, serving 16-year terms."[228]

Other proposals would divide the Supreme Court into multiple panels. One such proposal would allow the President to appoint one Supreme Court Justice in each odd-numbered year, meaning that each President would appoint two Justices in a four-year term.[229] Congress would then create "two en banc courts:" one "for deciding cases under the Court's original jurisdiction, consisting of all the active Justices," and a second "for deciding cases under the Court's appellate jurisdiction, consisting of the nine Justices most junior in service."[230] Another proposal would divide the Court into two seven-Justice chambers, with one panel considering issues of statutory interpretation and the other considering constitutional issues.[231] The full 14-member Court could "convene in joint sessions to rule on matters of the highest importance."[232]

Proposals that would rotate judges between courts or divide the Supreme Court into panels might conflict with Article III's provision that there shall be "one supreme Court," distinct from "such inferior Courts as the Congress may from time to time ordain and establish."[233] Supporters of such proposals argue that the Constitution does not require a strict division between the Supreme Court and the inferior courts. They point to the historical practice of circuit riding, where Supreme Court Justices regularly heard cases on the federal circuit courts,[234] as well as the current practice of sitting by designation, where active or retired judges (including Supreme Court Justices) sit temporarily on courts other than the ones to which they were confirmed.[235] While Congress has enacted legislation allowing judges to sit by designation on the lower federal courts, no federal statute or current or historical practice allows federal judges from the lower courts to sit temporarily on the Supreme Court.

It is doubtful whether legislation purporting to make all federal judges, or even all circuit judges, part-time Supreme Court Justices would meaningfully retain the "one supreme Court" set forth in Article III of the Constitution, but some rotation or panel proposals might withstand constitutional scrutiny.[236] With no judicial precedent on point, it is difficult to know where courts would draw the line. However, a proposal might be more likely to comply with the "one supreme Court"

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[226] *Id.* at 181.

[227] McGinnis, *supra* note 153, at 541.

[228] *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Jamal Greene, Prof., Columbia Law Sch.), https://www.whitehouse.gov/wp-content/uploads/2021/07/Greene-Testimony.pdf.

[229] Balkin, *supra* note 219.

[230] *Id.*

[231] Bruce Ackerman, *Trust in the Justices of the Supreme Court is Waning. Here are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018), https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html. Among other things, the proposal would also limit service on the Supreme Court to 14 years, after which Justices would move to the courts of appeals. *Id.*

[232] *Id.*

[233] U.S. CONST. art. III, § 1.

[234] *See* Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75. The Supreme Court upheld the circuit riding requirement in Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803).

[235] *See* 28 U.S.C. §§ 291–297.

[236] *See SCOTUS Commission Report*, *supra* note 28, at 85.

requirement if it limited Supreme Court duties to a relatively small number of Justices specifically nominated and confirmed to sit on the high court, even if not all of those Justices participated in every case. It might also weigh in favor of constitutionality if all members of a multi-panel Court could provide final review of matters of particular importance, similar to the current practice of en banc review in the U.S. Courts of Appeals.[237]

To the extent rotation or panel proposals would apply to sitting Justices either by significantly changing their duties or effectively removing them from the high court, the proposals might also violate the Good Behavior Clause.[238]

Changes to Supreme Court Jurisdiction and Procedures

Congress has significant power to specify the jurisdiction and procedures of the federal courts, including the Supreme Court, though the Constitution imposes some limits on such legislation. Prominent recent proposals in this area include changing how the Court handles certain emergency motions;[239] limiting the Court's appellate jurisdiction over certain categories of cases;[240] imposing voting rules on the Court, such as requiring the agreement of a supermajority of Justices before the Court could declare a law unconstitutional;[241] allowing Congress to override Supreme Court decisions;[242] imposing new judicial ethics rules for Justices;[243] or implementing transparency measures, such as allowing photographs or video recordings of Supreme Court proceedings.[244]

Motions Practice: the "Shadow Docket"

An area of Supreme Court practice that has gained increased attention in recent years is the Court's motions docket, which some commentators call the "shadow docket."[245] In contrast to merits cases, which the Court typically decides after full briefing and oral argument,[246] the Supreme Court also issues orders on matters that typically receive less briefing and no argument. These may include orders granting or denying petitions for writs of certiorari; ruling on

[237] *See* 28 U.S.C. § 46.

[238] *See supra* "Constitutionality of Legislation Modifying Life Tenure."

[239] *See infra* "Motions Practice: the "Shadow Docket"."

[240] *See infra* "Limits on Jurisdiction."

[241] *See infra* "Voting Rules and Congressional Override."

[242] *See id.*

[243] *See infra* "Judicial Ethics."

[244] *See infra* "Cameras in the Courtroom and Other Transparency Measures."

[245] *See, e.g.*, Baude, *supra* note 29; *see also* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U J. L. & LIBERTY 1 (2015) [hereinafter Baude, *The Shadow Docket*].

[246] The Supreme Court and Court observers often use the phrase *merits decision* to refer to any written opinion of the Court following full briefing and argument, even if the case is ultimately decided on technical or procedural grounds. *See, e.g.*, James Romoser, *Symposium: Shining a Light on the Shadow Docket*, SCOTUSBLOG (Oct. 22, 2020), https://www.scotusblog.com/2020/10/symposium-shining-a-light-on-the-shadow-docket/; *see also* Supreme Ct. of the United States, *Briefs on the Merits*, https://www.supremecourt.gov/meritsbriefs/meritsbriefs.aspx (last visited Jan. 5, 2023).

emergency matters, such as requests to stay lower court decisions pending appeal; and setting deadlines and other procedures for litigation before the Court.[247]

Most decisions on the Court's non-merits docket involve either grants or denials of certiorari or routine procedural questions,[248] but some of the Court's non-merits orders in emergency matters have a major impact on high-profile litigation. For example, emergency litigation before the Supreme Court often concerns requests for preliminary injunctive relief.[249] In theory, such relief is designed to preserve the status quo while a case is pending and remains in effect only until the courts can fully consider the merits of the case. However, emergency matters are often based on imminent real-world events, and sometimes the federal courts are not able to consider the merits in full before those deadlines pass. For instance, cases related to elections or the scheduled execution of prisoners are often litigated on an emergency basis, and recent years have seen emergency litigation on topics including immigration policies and the government response to the COVID-19 pandemic.[250] In many of these cases, a decision to grant or deny a preliminary injunction (or a stay of a preliminary injunction issued by a lower court) may be the last meaningful ruling in the case.[251]

The Supreme Court's procedures in non-merits matters differ significantly from its procedures in merits cases. In merits cases, the Court typically considers briefs and oral argument from the parties.[252] In addition, the Court often receives input from non-parties known as *amici curiae*, who raise additional issues and arguments potentially relevant to the case.[253] For non-merits matters, the Court generally does not hear oral argument and receives limited input from non-parties.[254] Briefs from the parties are generally shorter than merits briefs, may be prepared on a tight timeline, and may be based on a limited factual record. In some cases, the Court does not wait for full briefing before issuing an order.[255]

The Supreme Court's decisions also generally take different forms in merits cases and in non-merits matters. When issuing a merits decision, the Court usually publishes a written opinion that explains the Court's reasoning and notes which Justice authored the opinion and which Justices

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[247] *See, e.g.*, *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 117th Cong. 1–2 (2021) (statement of Loren L. AliKhan, Solicitor Gen., Dist. of Columbia) [hereinafter AliKhan Testimony].

[248] *See, e.g.*, Baude, *The Shadow Docket*, *supra* note 245, at 5; AliKhan Testimony, *supra* note 247, at 1.

[249] A preliminary injunction is a court order that either requires an entity to take a certain action or forbids an entity from taking a certain action while a case is litigated. For additional discussion of injunctive relief, see "Overview of Injunctive Relief" section of CRS Report R46902, *Nationwide Injunctions: Law, History, and Proposals for Reform*, by Joanna R. Lampe.

[250] *See* CRS Legal Sidebar LSB10637, *The "Shadow Docket": The Supreme Court's Non-Merits Orders*, by Joanna R. Lampe.

[251] *See, e.g.*, AliKhan Testimony, *supra* note 247, at 3–7.

[252] *See, e.g.*, *id.* at 1.

[253] *Id.*

[254] *See, e.g.*, *id.* at 10 ("Although . . . stakeholders may do their best to file *amicus* briefs in emergency litigation . . . , the accelerated timelines and unpredictable scheduling of these cases make coordinating *amicus* efforts extremely challenging. And . . the Court's official guidance notes that '[t]he filing of *amicus* briefs in connection with emergency applications is strongly discouraged.' ") (brackets in original); *see also The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 117th Cong. 2 (2021) (statement of Stephen I. Vladeck, Chair in Fed. Cts., Univ. of Tex. Sch. of Law) [hereinafter Vladeck Testimony], https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-VladeckS-20210218-U1.pdf.

[255] Vladeck Testimony, *supra* note 254, at 2.

joined it.[256] Justices may also file separate opinions concurring or dissenting in full or in part. Those separate opinions are also signed by their authors and any other Justices who joined them.[257] By contrast, the Court frequently decides non-merits matters using summary orders.[258] While those orders sometimes include a brief explanation of the legal reasoning underlying the decision, they often lack legal analysis.[259] In addition, summary orders typically do not reveal how the Justices voted.[260]

Commentators generally agree that, in recent years, the Court has issued an increased number of orders on its non-merits docket that concern high-profile litigation relating to issues of public interest.[261] They offer several possible reasons for the change. Some point to the litigation strategy of parties, particularly the federal government.[262] Some observers trace the increase in high-profile non-merits rulings to changes in the Court itself, citing possible changes in how the Justices apply the legal test for emergency relief.[263] Others debate whether use of the non-merits docket is driven in significant part by lower courts' issuance of nationwide injunctions—court orders that bar a party (often the federal government) from taking a certain action not only against other parties to the litigation but also against anybody else.[264] Regardless of its origin, the rise of the "shadow docket" raises legal and policy issues that may be of interest to Congress as it considers legislation that would affect Supreme Court practices and procedures.

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[256] *Id.* The Court sometimes issues unsigned *per curiam* opinions in merits cases, but such orders are more common on the motions docket. *See* Josh Blackman, *Invisible Majorities: Counting to Nine Votes in Per Curiam Cases*, SCOTUSBLOG (July 23, 2020), https://www.scotusblog.com/2020/07/invisible-majorities-counting-to-nine-votes-in-per-curiam-cases/.

[257] *See* Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 138 (1990).

[258] *See, e.g.*, AliKhan Testimony, *supra* note 247, at 2.

[259] *See, e.g.*, *id.* at 7–8.

[260] *Id.* at 7. As with merits decisions, Justices may concur in or dissent from non-merits decisions and may elect to file separate statements explaining their positions. If some Justices write separately to note concurring or dissenting votes, the public may be able to infer which Justices voted in favor of a particular order, but this often does not reveal how each Justice voted.

[261] *See, e.g.*, *id.* at 1–2. Some observers have noted that this increase comes as the Court appears to be issuing fewer merits decisions. *See, e.g.*, Vladeck Testimony, *supra* note 254, at 16.

[262] Vladeck Testimony, *supra* note 254, at 4 ("In contrast to the eight applications for emergency relief filed by the Justice Department between January 2001 and January 2017, the Trump administration filed 41 applications for such relief over four years."); *id.* at 5 (noting that many of those applications were successful); *see also* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019) [hereinafter Vladeck, *Solicitor General*]. As of July 2022, one commentator estimated that the Biden Administration had sought emergency relief in six cases, which would represent a decrease compared to the Trump Administration but an increase compared to earlier administrations. @steve_vladeck, TWITTER (July 8, 2022, 3:12 PM), https://twitter.com/steve_vladeck/status/1545486062579073036.

[263] Vladeck Testimony, *supra* note 254, at 9–10; Vladeck, *Solicitor General*, *supra* note 262, at 126.

[264] *See The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 117th Cong. 4–7 (2021) (statement of Michael T. Morley, Prof., Fla. State Univ. Coll. of Law) [hereinafter Morley Testimony], https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-MorleyM-20210218-U1.pdf. Nationwide injunctions have garnered considerable attention in recent years, and two members of the Court have authored separate opinions disapproving of such orders, so it is possible that some of the Court's non-merits decisions seek to curb the practice. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring). However, one scholar notes that appeals involving nationwide injunctions comprise "only one modest slice of the shadow docket" and thus do not fully explain the increase in high-profile non-merits decisions. Vladeck Testimony, *supra* note 254, at 8. For additional discussion of nationwide injunctions, *see generally* Lampe, *supra* note 249.

Some commentators worry that the Court's non-merits orders may create confusion, especially given that there is some uncertainty about whether and how those decisions should be considered precedential.[265] Observers often look to the Court's orders in an attempt to divine how the Court might rule in similar cases.[266] The disposition of high-profile matters through summary orders may create challenges for lower courts, policymakers, and regulated parties as they seek to determine the legal standards to apply, particularly when the orders do not include a substantive majority opinion.[267]

Some commentators also take issue with the Court's procedures for resolving important matters through non-merits decisions.[268] They note that because many "shadow docket" matters are litigated on an emergency basis in the trial court as well as on appeal, the factual and legal records may not be fully developed.[269] Moreover, when these appeals arise from orders issued early in the litigation process, the Court may unnecessarily reach issues that would have become moot or otherwise dropped out of the litigation had it proceeded through more usual processes.[270] And, due to the expedited timeline of emergency litigation, some argue, the Court has less time to consider the issues, reach a well-reasoned decision, and seek compromise when appropriate.[271] The Court's non-merits decisions may issue at inconsistent times (sometimes in the middle of the night) and do not always indicate which Justices voted for or against the disposition.[272] These procedures, some contend, interfere with the Court's important function of establishing uniform national law for lower courts to follow and may reduce accountability for the Justices.[273]

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[265] *Compare* Vladeck Testimony, *supra* note 254, at 7, *with* Richard C. Chen, *Summary Disposition as Precedent*, 61 WM. & MARY L. REV. 691, 723 (2020), *and* Trevor McFadden & Vetan Kapoor, *Symposium: The Precedential Effects of Shadow Docket Stays*, SCOTUSBLOG (Oct. 28, 2020), https://www.scotusblog.com/2020/10/symposium-the-precedential-effects-of-shadow-docket-stays/. However, at least one recent order of the Court suggests that these orders carry precedential weight and should dictate the outcome of future litigation in the lower courts. *See* Gateway City Church v. Newsom, 141 S. Ct. 1460 (2020) (mem.)

[266] AliKhan Testimony, *supra* note 247, at 12–13.

[267] *Id.*; *see also* Chen, *supra* note 265, at 701.

[268] *See generally, The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 117th Cong. 3 (2021) (written statement of Amir H. Ali) [hereinafter Ali Testimony], https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-AliA-20210218-U2.pdf (asserting that the Court "has at times taken extraordinary liberties with the ordinary litigation process."); *see also* Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591, 592 (2016) (noting that the Supreme Court's "summary decisions have long been criticized," and providing examples); *but cf.* Baude, *The Shadow Docket*, *supra* note 245, at 16 ("[I]t may not be possible to have a fully prescribed set of procedures for orders. The orders sometimes respond to unexpected or unusual developments in a given case, and the nature of the unexpected is that it is hard to prepare for it in advance.").

[269] AliKhan Testimony, *supra* note 247, at 9. *See also* Chen, *supra* note 265, at 703–04 (noting, in the context of summary dispositions, that "[w]hen the Supreme Court reverses on the basis of the certiorari papers alone, it does so without the benefit of the full adversarial process").

[270] Vladeck Testimony, *supra* note 254, at 14–16; AliKhan Testimony, *supra* note 247, at 9.

[271] AliKhan Testimony, *supra* note 247, at 10–11 (stating that Justice Breyer had "requested that the Court take no action until tomorrow, when the matter could be discussed at Conference," but the "Court nevertheless grant[ed] the State's application to vacate the stay"—a ruling handed down "in the middle of the night without giving all Members of the Court the opportunity for discussion") (citing Dunn v. Price, 139 S. Ct. 1312, 1314–15 (2019) (mem.) (Breyer, J., dissenting)).

[272] *Id.* at 3 ("[P]resently, the Supreme Court's final word on whether the defendant will be executed, or whether his claims will receive full consideration, is often delivered in the middle of the night, while the public is asleep."); *see also* Vladeck Testimony, *supra* note 254, at 13–14.

[273] AliKhan Testimony, *supra* note 247, at 11 (noting that "just last week, a 'mystery' Justice joined Justices Barrett, Breyer, Kagan, and Sotomayor to halt an execution" and asserting that "anonymous voting in a divisive case is troubling" because it fails to promote accountability and consistency); *see also* Baude, *The Shadow Docket*, *supra* note

Moreover, the lack of published legal reasoning from the majority in many non-merits cases may "make[ ] it impossible to scrutinize the merits of the Court's action"[274] or to determine whether the Court as a whole remains consistent across cases.[275]

These procedural concerns may, in turn, give rise to broader concerns about judicial legitimacy.[276] Some commentators note that it may undermine public confidence in the judiciary when the Supreme Court sets aside a lengthy and carefully reasoned district court decision through a brief summary order.[277] Moreover, some contend that the rise of the "shadow docket" may exacerbate concerns about the Court's alleged politicization.[278] Some Supreme Court Justices have raised these concerns,[279] although other Justices have defended non-merits orders as an ordinary part of the Court's decisionmaking process.[280]

Scholars and legislators have advanced numerous recent proposals that could address the Supreme Court's issuance of consequential decisions through summary orders. One key question about such proposals is which branch of government should implement any reforms. Some commentators assert that, out of deference to the judicial branch and to avoid any possible constitutional issues related to the separation of powers, it would be most appropriate for Congress to allow the Court itself to address these issues.[281] To the extent the rise of the "shadow docket" stems from the federal government's litigation strategy, the executive branch could also play a role in reform.[282]

245, at 17 ("[T]he orders list suggests that when individual personalities, and therefore individual reputations, are taken out of the Court's practice, the results might not always be as thoughtful.").

[274] Vladeck Testimony, *supra* note 254, at 13.

[275] *See, e.g.*, Ian Millhiser, *The Supreme Court's Enigmatic "Shadow Docket," Explained*, VOX (Aug. 11, 2020), https://www.vox.com/2020/8/11/21356913/supreme-court-shadow-docket-jail-asylum-covid-immigrants-sonia-sotomayor-barnes-ahlman ("The ordinary requirement that judges explain their decisions in reasoned opinions can be a tremendous check on judicial power. It discourages those judges from ruling in arbitrary ways.").

[276] *See, e.g.*, Baude, *The Shadow Docket*, *supra* note 245, at 10–11 ("[P]rocedural regularity begets substantive legitimacy. . . . But the orders process, by contrast, is sometimes ad hoc or unexplained."); Zachary B. Wolf, *The Supreme Court is Fighting over its Own Legitimacy*, CNN (Sept. 29, 2022), https://www.cnn.com/2022/09/29/politics/supreme-court-legitimacy-what-matters/index.html.

[277] Ali Testimony, *supra* note 268, at 3 (noting that when this occurs in the context of death penalty litigation "it means that a person may be executed even though the only reasoned judicial decision on the books tells us there was a serious likelihood the execution violates the laws of our country") (emphasis omitted).

[278] *See, e.g.*, Chen, *supra* note 265, at 711–12.

[279] Miller v. Mulligan, 142 S. Ct. 879, 883–89 (Mem) (2022) (Kagan, J., dissenting). In another dissent, Justice Kagan, joined by Chief Justice Roberts, Justice Breyer, and Justice Sotomayor, objected that the majority "provides a stay pending appeal, and thus signals its view of the merits, even though the applicants have failed to make the irreparable harm showing we have traditionally required. That renders the Court's emergency docket not for emergencies at all. The docket becomes only another place for merits determinations—except made without full briefing and argument." Louisiana v. Am. Rivers, 142 S. Ct. 1347, 1349 (Mem) (2022) (Kagan, J., dissenting). *See also* Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021) (Kagan, J., dissenting); Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3 (Mem) (2019) (Sotomayor, J., dissenting). Cf. Dr. A. v. Hochul, 142 S. Ct. 2569 (Mem) (2022) (Thomas, J., dissenting).

[280] *Miller*, 142 S. Ct. at 879 (Kavanaugh, J., concurring); Adam Liptak, *Alito Responds to Critics of the Supreme Court's 'Shadow Docket'*, N.Y. TIMES (Sept. 30, 2021), https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html.

[281] Vladeck Testimony, *supra* note 254, at 17 ("[J]ust as the rise of the shadow docket has largely been the result of judge-made shifts in judge-made norms and procedures, the first place where reforms to address these concerns should be pursued is at the Supreme Court itself."). *See also* Will Baude, *Death and the Shadow Docket*, THE VOLOKH CONSPIRACY (Apr. 12, 2019), https://reason.com/volokh/2019/04/12/death-and-the-shadow-docket/; Chen, *supra* note 265, at 719, 736–53.

[282] *See, e.g.*, Shoba Wadhia, *Symposium: From the Travel Ban to the Border Wall, Restrictive Immigration Policies*

However, many commentators agree that Congress also has authority to act in this area.[283] Judicial procedures are generally based on statutes or court-created rules rather than constitutional mandates, and Congress can alter those procedures through legislation.[284] For example, if Congress concluded that the rise of the "shadow docket" stems in significant part from the proliferation of nationwide injunctions in the lower federal courts, it could enact legislation intended to limit such injunctions.[285] Congress could also allow the federal government to transfer cases seeking nationwide injunctions to a particular district court to mitigate forum-shopping concerns or speed up the appeals process for cases involving injunctions against government action to "tak[e] pressure off of the shadow docket."[286] Congress might consider reforms targeting other specific topics, such as enacting procedures for death penalty litigation that might forestall some emergency litigation or establishing standards for the Court to apply in those cases.[287] More generally, commentators have suggested that Congress could codify the legal test for emergency relief[288] or enact legislation imposing more stringent standards for when the Supreme Court may overrule a lower court.[289]

Limits on Jurisdiction

Some Court reform proposals would limit the jurisdiction of the Supreme Court, or of courts generally, over certain categories of cases, a practice sometimes called *jurisdiction stripping*.[290] Often, such proposals aim to prevent courts from invalidating actions of state governments or the federal government's political branches.[291] Jurisdiction-stripping proposals have a long history. Some jurisdiction-stripping measures have been enacted and evaluated by courts,[292] while others

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Thrive on the Shadow Docket, SCOTUSBLOG (Oct. 27, 2020), https://www.scotusblog.com/2020/10/symposium-from-the-travel-ban-to-the-border-wall-restrictive-immigration-policies-thrive-on-the-shadow-docket/ ("It is my hope that a new administration will minimize its use of the shadow docket and return immigration policymaking to the realm of legislation, notice-and-comment rulemaking and regular court process.").

[283] AliKhan Testimony, *supra* note 247, at 13–14 (arguing that Congress has the constitutional authority to alter the Supreme Court's appellate jurisdiction or change court procedures for granting injunctions or stays); Vladeck Testimony, *supra* note 254, at 19 (supporting "encouraging" the Court to provide explanation for orders that alter the status quo or to hold oral argument on such matters).

[284] *See* Lampe, *supra* note 21.

[285] *See, e.g.*, Injunctive Authority Clarification Act of 2021, H.R. 43, 117th Cong. (2021); Court Shopping Deterrence Act, H.R. 893, 117th Cong. (2021); Nationwide Injunction Abuse Prevention Act of 2019, H.R. 4292, S. 2464, 116th Cong. (2019); *see also* Morley Testimony, *supra* note 264, at 7.

[286] Vladeck Testimony, *supra* note 254, at 18 (emphasis omitted).

[287] *Id.* (suggesting giving the Supreme Court "*mandatory* appellate jurisdiction at least over direct appeals" and "mak[ing] it easier for death-row prisoners to bring timely method-of-execution challenges *before* an execution date has been set").

[288] *Id.*

[289] *See* Ali Testimony, *supra* note 268, at 5 (in the context of death penalty litigation, calling for "clear guidance on the standard that must be applied to overrule the decisions of a lower court that has granted a stay for further consideration of an execution issue" and advocating a deferential standard of review such as the standard for review of certain state court decisions under 28 U.S.C. § 2254(d)).

[290] This section focuses on proposals that would limit the jurisdiction of the Supreme Court. For additional discussion of jurisdiction-stripping measures that apply primarily to the lower federal courts, see CRS Report R44967, *Congress's Power over Courts: Jurisdiction Stripping and the Rule of Klein*, coordinated by Kevin M. Lewis.

[291] *See, e.g.*, *SCOTUS Commission Report*, *supra* note 28, at 159 (citing examples and stating, "The goals of [jurisdiction-stripping] proposals are overwhelmingly substantive in nature—to protect the particular laws in question from judicial invalidation.").

[292] *See, e.g.*, Lauf v. E.G. Shinner & Co., 303 U.S. 323, 329 (1938) (upholding statute depriving federal courts of jurisdiction to issue injunctions "in any case involving or growing out of a labor dispute").

raise novel legal considerations. Proposals vary in scope: Some would limit the jurisdiction of the Supreme Court only,[293] some would curb the jurisdiction of all federal courts but not state courts,[294] and some would limit the jurisdiction of both federal and state courts.[295] Current law and practice make clear that Congress has some authority to enact legislation limiting jurisdiction over certain types of cases but do not precisely define the scope of that power.

Beginning with Supreme Court jurisdiction, the Constitution authorizes the federal courts to hear certain enumerated types of "Cases" and "Controversies."[296] Article III, Section 2, clause 2, provides that the Supreme Court shall have original jurisdiction over a subset of those matters: "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[297] This constitutional grant of original jurisdiction means that those cases may commence in the Supreme Court rather than reaching the Court on appeal from another court, if at all.[298] The Supreme Court has held that its original jurisdiction flows directly from the Constitution and is therefore self-executing without further action by Congress.[299] Congress cannot expand or restrict the Supreme Court's original jurisdiction except through a constitutional amendment.[300]

With respect to all other cases subject to federal court jurisdiction, Article III, Section 2, clause 2, grants the Supreme Court appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[301] Known as the "Exceptions Clause," that provision allows the Court to review both decisions of the inferior federal courts and final judgments of state courts if such cases fall within both the constitutional grant of federal court jurisdiction and an authorizing statute.[302] The Supreme Court has generally indicated that the constitutional grant of appellate jurisdiction is not self-executing, meaning that Congress must enact legislation to empower the Court to hear cases on appeal. Congress has exercised its power to implement the

[293] Proposals targeting only the Supreme Court would often deprive the Court of appellate jurisdiction to review state court decisions. For discussion of historical examples, see Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 159–61 (1960). A more recent proposal would seek to "prevent the Supreme Court from reviewing the constitutionality or legality" of the Women's Health Protection Act. *See* Kenny Stancil, *House Progressives Cite Clarence Thomas to Argue SCOTUS Should Lose Jurisdiction Over Abortion*, COMMON DREAMS (July 15, 2022), https://www.commondreams.org/news/2022/07/15/house-progressives-cite-clarence-thomas-argue-scotus-should-lose-jurisdiction-over.

[294] For discussion of such legislation through the 109th Congress, see Travis Christopher Barham, Note, *Congress Gave and Congress Hath Taken Away: Jurisdiction Withdrawal and the Constitution*, 62 WASH. & LEE L. REV. 1139, 1143–47 (2005).

[295] *E.g.*, Portal-to-Portal Act of 1947, Pub. L. No. 80-49, ch. 52, § 2(d), 61 Stat. 84, 86 (codified in relevant part at 29 U.S.C. § 252(d)).

[296] U.S. CONST. art. III, § 2, cl. 1. Like all federal courts, the Supreme Court cannot hear matters that fall outside the scope of federal court jurisdiction. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[297] U.S. CONST. art. III, § 2, cl. 2.

[298] *See generally* Cong. Research Serv., *Supreme Court Original Jurisdiction*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C2-2/ALDE_00001220/ (last visited Jan. 5, 2023).

[299] E.g., Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861).

[300] *Cf. Marbury*, 5 U.S. (1 Cranch) 137 (invalidating a statutory provision that gave the Court power to issue a writ of mandamus in an original proceeding, which the Constitution did not authorize).

[301] U.S. CONST. art. III, § 2, cl. 2.

[302] *See generally* Cong. Research Serv., *Exceptions Clause and Congressional Control Over Appellate Jurisdiction*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C2-6/ALDE_00013618/ (last visited Jan. 5, 2023).

provision by granting the Supreme Court appellate jurisdiction over a subset of the cases included in the constitutional grant.[303]

In contrast to Congress's limited power to modify the Supreme Court's original jurisdiction, Congress and the Court have construed the Exceptions Clause to provide Congress significant control over the Court's appellate jurisdiction.[304] Congress has used its power to regulate Supreme Court jurisdiction to forestall a possible adverse decision from the Court,[305] and the Supreme Court has upheld multiple legislative limits on its jurisdiction.[306]

While the Exceptions Clause grants Congress significant power over the Supreme Court's appellate jurisdiction, some legislation limiting that jurisdiction might raise constitutional questions. In particular, any proposal that would allow certain cases to proceed through the lower federal courts or state courts but prohibit the Supreme Court from reviewing those courts' decisions might violate the Article III text creating one "supreme Court."[307] The Supreme Court arguably would not be meaningfully "supreme" if it were unable to correct other courts' errors in the application of the Constitution or federal law.[308] A lack of Supreme Court review could also lead to non-uniform application of the Constitution or federal law if multiple federal or state courts interpreted the law differently and the Supreme Court was unable to resolve the resulting conflicts.[309]

Congress also has some power to prevent Supreme Court appellate review by generally limiting the federal courts' jurisdiction over certain classes of cases or even specific cases.[310] The Constitution grants Congress expansive authority to structure the lower federal courts and regulate their jurisdiction and procedures.[311] Separation-of-powers considerations bar Congress from requiring courts to reopen final judicial decisions[312] or dictating the substantive outcome in pending litigation.[313] However, Congress has never granted the federal courts jurisdiction over all "Cases or Controversies" within the meaning of the Constitution and has at times enacted

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[303] *See, e.g.*, Judiciary Act of 1789, ch. 20, 1 Stat. 73, 80.

[304] *See generally* Cong. Research Serv., *Exceptions Clause and Congressional Control Over Appellate Jurisdiction*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C2-6/ALDE_00013618/ (last visited Jan. 5, 2023).

[305] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869).

[306] *See* Francis Wright, 105 U.S. (15 Otto) 381, 385–86 (1882); Luckenbuch S.S. Co. v. United States, 272 U.S. 533, 537 (1926); Am. Constr. Co. v. Jacksonville, T. & K. W. Ry., 148 U.S. 372, 378 (1893); United States v. Bitty, 208 U.S. 393 (1908); United States v. Young, 94 U.S. (4 Otto) 258 (1876); Insurance Co. v. Ritchie, 72 U.S. (5 Wall.) 541 (1866); Railroad Co. v. Grant, 98 U.S. (8 Otto) 398 (1878); Bruner v. United States, 343 U.S. 112 (1952); Dist. of Columbia v. Eslin, 183 U.S. 62 (1901); Patchak v. Zinke, 138 S. Ct. 897 (2018).

[307] U.S. CONST. art. III, § 1.

[308] *See, e.g.*, Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1435 (2000).

[309] *See* Sup. Ct. R. 10 (listing circuit splits as one factor in the decision whether to grant certiorari).

[310] *See generally* Lewis, *supra* note 290.

[311] The Constitution provides for the existence of a Supreme Court but leaves to Congress the decision whether to establish inferior federal courts. That broad grant of discretion has been interpreted to also give Congress almost plenary authority to regulate the lower federal courts if it elects to establish them. *See* Cong. Research Serv., *Establishment of Inferior Federal Courts*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-8-4/ALDE_00013560/ (last visited Jan. 5, 2023).

[312] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

[313] United States v. Klein, 80 U.S. (13 Wall.) 128 (1871); *see also* Bank Markazi v. Peterson, 578 U.S. 212, 231 (2016) (Congress may not enact legislation "that directs, in 'Smith v. Jones,' 'Smith wins.'").

legislation limiting federal court jurisdiction over particular cases or classes of cases. The Supreme Court has upheld legislation that deprives the federal courts of jurisdiction over certain matters, including legislation that removed jurisdiction over a specific pending case.[314]

Congress might seek to strip jurisdiction from the lower federal courts to prevent certain cases from reaching the Supreme Court on appeal. However, some litigants might be able to obtain Supreme Court review through other procedures. First, if any affected cases fell within the Supreme Court's original jurisdiction, litigants could file them directly in the Supreme Court. As noted above, Congress cannot limit the Court's original jurisdiction through ordinary legislation.[315] Second, state courts have concurrent jurisdiction to hear many cases that federal courts can hear.[316] If state courts retained jurisdiction over cases excluded from federal court, those cases could proceed in state court and potentially reach the Supreme Court on appeal.

Specific withdrawals of federal court jurisdiction might raise constitutional issues on a case-by-case basis. For instance, the Supreme Court has held that the Constitution limits Congress's ability to restrict federal court jurisdiction over petitions for writs of habeas corpus.[317] At times, the Supreme Court has construed jurisdiction-stripping statutes narrowly to avoid possible constitutional problems.[318] That practice may reduce the risk that the Court would strike down future jurisdiction-stripping legislation but may also limit the practical effect of such legislation.

With respect to state courts, the Constitution does not expressly provide Congress the power to regulate their jurisdiction. Any such power comes from the Necessary and Proper Clause and the Supremacy Clause.[319] Congress has often enacted legislation restricting state courts' jurisdiction over certain federal law issues, giving the federal courts exclusive jurisdiction over such matters.[320] While that practice is broadly accepted, legislation that would strip jurisdiction from both state and federal courts might raise constitutional issues. In particular, if a proposal would foreclose any judicial avenue to vindicate one or more constitutional rights, it might violate the Due Process Clause.[321] One commentator also argues that Congress would exceed its enumerated

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[314] Patchak v. Zinke, 137 S. Ct. 2091 (2017) (mem.).

[315] *See* Cong. Research Serv., *Supreme Court Original Jurisdiction*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C2-2/ALDE_00001220/ (last visited Jan. 5, 2023). The Supreme Court's original jurisdiction is not exclusive, meaning that litigants can (and often do) elect to file cases subject to original jurisdiction in the lower courts in the first instance. Limiting the lower courts' jurisdiction over such cases might increase the number of cases invoking the Court's original jurisdiction and burden the Court.

[316] *See* Cong. Research Serv., *State Court Jurisdiction to Enforce Federal Law*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-6-4/ALDE_00013232/ (last visited Jan. 5, 2023).

[317] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008).

[318] Felker v. Turpin, 518 U.S. 651 (1996) (holding that Antiterrorism and Effective Death Penalty Act barred Supreme Court appellate review of certain habeas cases but did not prevent the Court from considering original habeas petitions); *see also* Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869).

[319] U.S. CONST. art. I, § 8, cl. 18; *id*. art. VI, cl. 2.

[320] *See, e.g.*, 18 U.S.C. § 3231 (granting the federal district courts original jurisdiction, exclusive of the courts of the States, over federal criminal proceedings); 28 U.S.C. § 1334 (granting district courts jurisdiction over bankruptcy cases); *id.* § 1337 (granting district courts jurisdiction over antitrust cases).

[321] *See* Michael C. Dorf, *Congressional Power to Strip State Courts of Jurisdiction*, 97 TEX. L. REV. 1, 3–4 (2018); *see also* Battaglia v. Gen. Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) ("[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.") (footnote omitted); *cf.* Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. 129, 141–46 (1981).

powers if it sought to strip state courts of jurisdiction to hear federal constitutional challenges to state laws.[322]

Beyond the foregoing legal considerations, commentators also debate whether jurisdiction-stripping proposals would promote or undermine policy goals such as increasing democratic accountability, promoting bipartisanship and political stability, protecting constitutional rights, and ensuring the uniform application of federal law.[323] Given the significant variation among proposals, the legal and practical implications of each proposal are best assessed on a case-by-case basis.

Jurisdiction stripping is not the only means through which Congress might seek to prevent the Supreme Court from invalidating government action. In addition to methods discussed in the following section,[324] the political branches may be able to forestall specific legal challenges by amending a challenged law or otherwise changing policy while a case is pending.[325] On occasion, Congress has even changed the Supreme Court's term in an attempt to prevent it from considering a constitutional challenge.[326]

Voting Rules and Congressional Override

Some Supreme Court reform proposals would seek to shift the existing balance of power between the judicial and legislative branches by making it more difficult for the Court to declare a law unconstitutional or allowing Congress or some other entity to override Supreme Court decisions. Legislators and others have proposed such reforms at various times in the nation's history, but Congress has never enacted them.

One main way that reform proposals seek to make it more difficult for the Court to declare a law unconstitutional is by imposing voting rules, such as requiring the agreement of a supermajority of the Justices before a law can be held unconstitutional. For all of its history, the Supreme Court has decided cases by a simple majority vote. With the current nine-member panel, this means that the Court can strike down a statute or other government action if at least five Justices believe the law is unconstitutional.[327] Legislators have proposed supermajority voting requirements many times in the past two centuries.[328] In recent years, some legal commentators have advocated for

[322] Dorf, *supra* note 321, at 4.

[323] *See SCOTUS Commission Report*, *supra* note 28, at 159–62.

[324] *See infra* "Voting Rules and Congressional Override."

[325] As one example, in September 2022, the Biden Administration clarified its student loan forgiveness plan in response to litigation, leading a federal judge to deny a motion to enjoin the policy. *See* Zach Schonfeld, *Judge Denies Student Debt Cancellation Lawsuit after Education Department Clarifies Plan*, HILL (Sept. 29, 2022), https://thehill.com/regulation/court-battles/3668006-judge-denies-student-debt-cancellation-lawsuit-after-education-department-clarifies-plan/. Other challenges to the plan have proceeded. *See* CRS Legal Sidebar LSB10876, *Student Loan Cancellation Reaches the Supreme Court*, by Edward C. Liu and Sean M. Stiff.

[326] Congress enacted legislation to change the Court's term to forestall a constitutional attack on the repeal of the Judiciary Act of 1801, with the result that the Court did not convene for 14 months. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 222–224 (rev. ed. 1926).

[327] If an even number of Justices participate in an appeal and the Court divides equally, the decision of the lower court is affirmed. This may lead to affirmance of a lower court decision holding a law unconstitutional but is not a binding Supreme Court precedent striking down the law.

[328] One scholar has counted more than 60 proposals dating back to 1823. Evan Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rules: Lessons from the Past*, 78 IND. L.J. 73, 88 (2003); *id.* at 117 (appendix listing proposals).

supermajority voting rules—for instance, requiring the votes of six of the nine Justices to strike down government action.[329]

Other proposals would not alter numerical voting requirements but would instead direct federal courts, including the Supreme Court, to apply a deferential standard of review when assessing the constitutionality of government actions. For instance, Congress might direct courts not to strike down government action unless it was "clearly unconstitutional."[330]

Attempts to impose more deferential standards for judicial review or to change the Court's voting rules may raise both legal and practical questions. One key legal question concerns Congress's power to enact such requirements. The Constitution imposes no express limits on Congress's ability regulate Supreme Court voting, but it likewise does not expressly grant Congress the power to do so. Congress might draw the power to impose voting rules or review standards from the Exceptions Clause, which provides that the Court's appellate jurisdiction is subject to "such Exceptions, and under such Regulations as the Congress shall make."[331] It is debatable whether voting rules or deferential standards of review constitute regulations of "jurisdiction." Moreover, to the extent Congress were to rely on the Exceptions Clause to impose Supreme Court voting rules, it would not be able to reach cases brought under the Court's original jurisdiction.[332]

It is also possible that Congress could rely on the Necessary and Proper Clause to impose voting rules or deferential standards of review. The Necessary and Proper Clause empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution" the powers of the federal government.[333] Congress has relied on the Clause to regulate the Supreme Court in other ways, such as setting the size of the Court and when and where the Court sits.[334] However, legislation imposing voting rules or deferential standards of review may be distinguishable from those types of regulations. Legislation structuring the Court or defining its term helps to "carry[ ] into Execution" the judicial power in a way that legislation limiting the Court's power arguably does not.[335]

Even if Congress could identify an enumerated power allowing it to enact voting rules or deferential standards of review, it is possible the Supreme Court would hold such measures unconstitutional on separation-of-powers grounds. Since *Marbury v. Madison*, the Court has held that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[336] The Court has struck down legislation that it held improperly directed the courts to decide

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[329] *E.g.*, Epps & Sitaraman, *supra* note 92 at 182, Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021).

[330] *E.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

[331] U.S. CONST. art. III, § 2, cl. 2.

[332] *See* Cong. Research Serv., *Supreme Court Original Jurisdiction*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C2-2/ALDE_00001220/ (last visited Jan. 5, 2023). One proposal related to voting rules would have excepted cases subject to Supreme Court original jurisdiction. *See* S. 4483, 67th Cong. (1923).

[333] U.S. CONST. art. I, § 8, cl. 18.

[334] *See, e.g.*, 28 U.S.C. §§ 1–2.

[335] Congress might also assert that limits on judicial review were necessary and proper to effectuate Congress's own power. It is unclear whether the Court would accept such an argument if Congress sought to effectuate its own power by limiting the Court's ability to exercise its constitutional function. *See SCOTUS Commission Report*, *supra* note 28, at 180.

[336] 5 U.S. (1 Cranch) 137, 177 (1803).

cases in certain ways,[337] as well as legislation in which Congress interpreted constitutional rights differently from how the Court interpreted them.[338] The Court might apply these and similar precedents to hold that legislation regulating Supreme Court voting improperly intrudes on the Court's authority under Article III. There is substantial precedent for Congress enacting legislation that establishes a standard of review for the courts to apply in particular types of cases, including review that is deferential to the findings or actions of executive branch agencies and state courts.[339] However, prior legislation applied only in limited contexts, generally to cases based on statutory rather than constitutional rights. That type of law may raise fewer constitutional concerns than legislation that would limit the Court's review more generally.

As a practical matter, it appears supermajority voting rules might decrease the likelihood that the Supreme Court would strike down actions of the political branches or the states. Although 5-4 decisions constitute a minority of the Court's rulings, a supermajority voting rule could be consequential during particular periods, or for particular kinds of cases, when the Court is closely divided.[340] Deferential review standards might also limit how often the Court would strike down government actions, though it would depend on how Justices applied the standards.

In considering the possible effects of a voting rule or deferential standard, the Presidential Commission on the Supreme Court noted that rules that apply only to the Supreme Court might undermine the Court's ability to oversee state courts and lower federal courts. For instance, a state court or federal appeals court might hold that a certain action was constitutional, but five Justices of the Supreme Court might disagree. Under a supermajority voting rule, the lower court's decision would presumably stand, even though a majority of the highest court believed it to be incorrect. This could undermine the Court's authority and create confusion as to how other lower courts should apply the law.[341] Some commentators also worry that this arrangement would improperly limit the Court's ability to protect constitutional rights.[342] Supporters of deferential voting standards counter that those standards would support judicial legitimacy by fostering consensus on the Court and limiting judicial interference in political matters except when clearly necessary.[343]

With respect to overriding Supreme Court decisions, it is important to note that Congress already has the power to override Supreme Court decisions involving statutory interpretation.[344] If

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[337] United States v. Klein, 80 U.S. (13 Wall.) 128 (1871); *see also* Bank Markazi v. Peterson, 578 U.S. 212, 231 (2016) (Congress may not enact legislation "that directs, in 'Smith v. Jones,' 'Smith wins.'").

[338] City of Boerne v. Flores, 521 U.S. 507 (1997).

[339] For instance, the Administrative Procedure Act directs courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and the Antiterrorism and Effective Death Penalty Act of 1996 allows a district court to issue a writ of habeas corpus on behalf of a person in state custody only if the underlying state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "based on an unreasonable determination of the facts in light of the evidence presented," 28 U.S.C. § 2254(d).

[340] *See* Angie Gou, Ellena Erskine, & James Romoser, *STAT PACK for the Supreme Court's 2021–22 Term* 9, SCOTUSBLOG (July 1, 2022), https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf (last accessed Oct. 13, 2022); *but see SCOTUS Commission Report*, *supra* note 28, at 176 (citing recent examples of high-profile 5-4 decisions).

[341] *See SCOTUS Commission Report*, *supra* note 28, at 174–75.

[342] *Id.* at 173.

[343] *See, e.g.*, Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 932 (2003); John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 437–38 (1999).

[344] *See, e.g.*, Ganesh Sitaraman, *How to Rein In an All-Too-Powerful Supreme Court*, ATL. (Nov. 16, 2019),

Congress disagrees with the Court's interpretation of a federal statute, it can amend the law to impose its preferred interpretation so long as that interpretation is constitutional.[345] Thus, most proposals to expand the override of judicial decisions would allow Congress or another entity to reject the Supreme Court's *constitutional* rulings.

Like supermajority voting requirements, proposals that would allow other entities to override Supreme Court decisions have a long history. A number of proposals would allow Congress to override judicial decisions. For instance, the 1924 Progressive Party platform called for "a constitutional amendment providing that Congress may by enacting a statute make it effective over a judicial veto."[346] By contrast, some proposals would grant the override power to other entities. For example, following the Supreme Court's decision in *Brown v. Board of Education*,[347] legislators proposed a constitutional amendment that would have granted the Senate the authority to review Supreme Court decisions in cases "where questions of the powers reserved to the States, or the people, are either directly or indirectly involved and decided, and a State is a party or anywise interested in such question."[348] Separate contemporaneous proposals would have allowed a "Court of the Union" composed of state supreme court judges to review certain decisions of the federal Supreme Court[349] or authorized the states themselves to overrule Supreme Court decisions limiting states' rights.[350]

Any proposal that would allow Congress to directly override constitutional decisions of the Supreme Court would likely require a constitutional amendment. If Congress attempted to enact such reforms through ordinary legislation, it is likely that the Court would strike them down as congressional usurpation of the judicial role. Consequently, most advocates for legislative override proposals have suggested that they be imposed by constitutional amendment.[351]

As an alternative to generally authorizing congressional review of the Supreme Court's constitutional decisions, Congress could seek to respond to such decisions on a case-by-case basis. While Congress cannot reject the Court's constitutional interpretations, it is sometimes possible to enact new substantive legislation to replace a prior law that was held unconstitutional or to protect a right that the Court has held is not enshrined in the Constitution.[352]

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https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/.

[345] *Eg.*, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)); ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b), 133 Stat. 3553, 3554 (codified as amended at 42 U.S.C. § 12101 et seq.). This approach is subject to the usual political limitations on enacting legislation. Moreover, if the Court decision issues in a later Congress, any legislation in response may reflect the intent of the amending Congress rather than the Congress that passed the original legislation.

[346] *See, e.g.*, *Progressive Party Platform of 1924*, *Am. Presidency Project* (Nov. 4, 1924), https://www.presidency.ucsb.edu/documents/progressive-party-platform-1924; S.J. Res. 80, 75th Cong. (1937). *See also* Robert H. Bork, *The End of Democracy? Our Judicial Oligarchy*, FIRST THINGS (Nov. 1996), https://www.firstthings.com/article/1996/11/the-end-of-democracy-our-judicial-oligarchy.

[347] 347 U.S. 483 (1954).

[348] 103 CONG. REC. S12787 (daily ed. July 26, 1957) (Res. of the Leg. of Fla. to the S. Comm. on the Judiciary).

[349] 109 CONG. REC. S2071–72 (daily ed. Feb. 11, 1963) (Res. of the Leg. of Fla. to the S. Comm. on the Judiciary).

[350] 107 CONG. REC. S2154 (daily ed. Feb. 16, 1961) (Res. of the Leg. of Ark. to the S. Comm. on the Judiciary). *Cf.* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, 130–54 (2014) (discussing proposal of former President Theodore Roosevelt to allow citizens to recall state judicial decisions invalidating a statute under either the federal or state constitutions).

[351] *See, e.g.*, *Progressive Party Platform of 1924*, *Am. Presidency Project* (Nov. 4, 1924), https://www.presidency.ucsb.edu/documents/progressive-party-platform-1924; S.J. Res. 80, 75th Cong. (1937); Bork, *supra* note 346.

[352] *See, e.g.*, CRS Legal Sidebar LSB10768, *Supreme Court Rules No Constitutional Right to Abortion in Dobbs v.*

One recent proposal, the Supreme Court Review Act of 2022, would have established special procedures for Congress to respond to Supreme Court decisions.[353] The bill would have required the Comptroller General of the United States to provide notice to Congress of certain Supreme Court decisions, including decisions interpreting federal statutes and any decision that "interprets or reinterprets the Constitution of the United States in a manner that diminishes an individual right or privilege that is or was previously protected by the Constitution of the United States."[354] The bill would then have provided expedited procedures for Congress to amend federal statutory law "in a manner that is reasonably relevant to the covered Supreme Court decision."[355] It would not have provided for direct legislative override of Supreme Court constitutional decisions and would have thus avoided possible constitutional questions related to legislation allowing for such override.

Judicial Ethics

Another reform proposal that has attracted attention in recent years involves imposing new judicial ethics rules on Supreme Court Justices.

The Judicial Conference of the United States (Judicial Conference) has adopted a set of ethical canons known as the Code of Conduct for United States Judges (the Code) in order to promote public confidence in the integrity, independence, and impartiality of the federal judiciary.[356] The Code is not a binding set of laws but rather a set of "aspirational rules" by which federal judges should strive to abide.[357] The Code contemplates the possibility of discipline for judges who violate its tenets but also states that "[n]ot every violation of the Code should lead to disciplinary action."[358]

Jackson Women's Health Organization, by Jon O. Shimabukuro (discussing legislation that would support abortion access after the Supreme Court held there is no constitutional right to abortion).

[353] S. 4681, 117th Cong. (2022). *See also* Sitaraman, *supra* note 344 (advocating for a "Congressional Review Act for the Supreme Court" that "would apply to Court decisions that interpret legislation").

[354] *Id.*

[355] *Id.*

[356] *See* United States v. Microsoft Corp., 253 F.3d 34, 111 (D.C. Cir. 2001). The Judicial Conference of the United States is composed of "[t]he Chief Justice of the United States[,] . . . the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit." 28 U.S.C. § 331. Among other things, the Code instructs federal judges to uphold the integrity and independence of the judiciary; avoid not only impropriety but the appearance thereof; perform the duties of their offices fairly, impartially, and diligently; avoid extrajudicial activities that would be inconsistent with the obligations of judicial office; and refrain from political activity.

[357] White v. Nat'l Football League, 585 F.3d 1129, 1140 (8th Cir. 2009). *See also In re* Charges of Judicial Misconduct, 769 F.3d 762, 766 (D.C. Cir. 2014) (mem) (noting that the "main precepts" of the Code of Conduct "are highly general; the Code is in many potential applications aspirational rather than a set of disciplinary rules") (quoting Judicial Conference of the United States, Rules for Judicial-Conduct and Judicial-Disability Proceedings, Rule 3 cmt. (2008)).

[358] *Code of Conduct* Canon 1 cmt. Judges who fail to abide by the Code risk judicial discipline (such as being temporarily barred from hearing new cases) or disqualification from an existing case. Neither of those remedies is often granted. Metro. Opera Ass'n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 332 F. Supp. 2d 667, 671 (S.D.N.Y. 2004); Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835, 844 (1995); Jeffrey W. Stempel, *Playing Forty Questions: Responding to Justice Roberts's Concerns in Caperton and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 39 SW. L. REV. 1, 28 n.117 (2009).

By its explicit terms, the Code governs only the judges of the lower federal courts.[359] It does not apply to Supreme Court Justices, nor has the Supreme Court formally promulgated its own ethical code. As a result, no single body of ethical canons binds the nation's highest court at present.

The absence of such a body of rules does not mean that Supreme Court Justices are wholly unconstrained by ethical norms and guidelines. Even though the Code does not formally apply to Supreme Court Justices, the Justices have indicated that they nonetheless "consult the Code of Conduct" and other authorities "to resolve specific ethical issues."[360] Moreover, although Congress has not enacted legislation mandating the adoption of a Supreme Court code of conduct, several statutes impose various ethical requirements on the Justices. For example, 28 U.S.C. § 455 requires federal judges, including Supreme Court Justices, to recuse themselves from particular cases under specified circumstances, such as when the judge or Justice "has a personal bias or prejudice concerning a party" or "a financial interest in the subject matter in controversy."[361] Congress has also directed Supreme Court Justices to comply with certain financial disclosure requirements that apply to federal officials generally.[362] In addition, the Court has voluntarily resolved to comply with certain Judicial Conference regulations pertaining to the receipt of gifts by judicial officers, even though those regulations would otherwise not apply to Supreme Court Justices.[363]

Some observers have called for Supreme Court justices to be subject the same code of ethics that other federal judges are required to follow. Those calls gained increased prominence in March 2022 following reports that Virginia Thomas, wife of Associate Justice Clarence Thomas, sent text messages in January 2021 to then-White House Chief of Staff Mark Meadows encouraging him to contest the result of the 2020 presidential election.[364] In response to those reports, some debated whether Justice Thomas should recuse himself from certain cases voluntarily,[365] while others more broadly discussed whether Congress should—or even could—impose a code of ethics on the Supreme Court.[366]

In response to calls to mandate a code of ethics for the Supreme Court, some Members of the 117th Congress introduced bills known as the For the People Act[367] and the Supreme Court Ethics

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[359] *Code of Conduct* Introduction.

[360] JOHN G. ROBERTS JR., U.S. SUP. CT., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (2011), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[361] 28 U.S.C. § 455(b).

[362] *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, tit. I, § 101, 92 Stat. 1824.

[363] CRS Legal Sidebar LSB10255, *A Code of Conduct for the Supreme Court? Legal Questions and Considerations*, by Joanna R. Lampe.

[364] *See, e.g.*, Melissa Quinn, *Appetite Grows on Capitol Hill for Code of Conduct for Supreme Court Justices after Ginni Thomas Revelations*, CBS NEWS (Mar. 31, 2022), https://www.cbsnews.com/news/supreme-court-code-of-conduct-ginni-thomas/.

[365] *Compare* Editorial Board, *Justice Thomas Shouldn't Recuse From Elections Cases*, WALL ST. J (Mar. 30, 2022), https://www.wsj.com/articles/justice-clarence-thomas-shouldnt-recuse-ginni-thomas-texts-donald-trump-supreme-court-11648678766, *with* Nina Totenberg, *Legal Ethics Experts Agree: Justice Thomas Must Recuse in Insurrection Cases*, NPR (Mar. 30, 2022), https://www.npr.org/2022/03/30/1089595933/legal-ethics-experts-agree-justice-thomas-must-recuse-in-insurrection-cases; *see also* Ruth Marcus, *The Supreme Court Has Lost its Ethical Compass. Can it Find One Fast?*, WASH. POST (Nov. 22, 2022), https://www.washingtonpost.com/opinions/2022/11/22/supreme-court-ethics-alito-ginni-thomas/.

[366] *E.g.*, Alexandra Hutzler, *Supreme Court Might Get a Code of Ethics Thanks to Clarence Thomas*, NEWSWEEK (Mar. 31, 2022), https://www.newsweek.com/supreme-court-might-get-code-ethics-thanks-clarence-thomas-1693908.

[367] H.R. 1, 117th Cong. (2021); S. 1, 117th Cong. (2021).

Act,[368] both of which would have required the Judicial Conference to issue a code of conduct that applies to Supreme Court Justices. Those proposals echo similar bills from past Congresses that would have likewise subjected the Supreme Court to a code of conduct.[369]

Legislative proposals to impose a code of conduct on the Supreme Court raise an array of legal questions. One is a question of policy: Who should formulate the ethical standards to govern the Justices? A proposal from the 115th Congress would have entrusted the Supreme Court itself with the task of "promulgat[ing] a code of ethics" and would have given the Justices substantial (albeit not unbounded) freedom to design the rules that would govern their own conduct.[370] Similarly, a House resolution introduced during the 117th Congress would have expressed "the sense of the House of Representatives that the Justices of the Supreme Court should make themselves subject to the existing and operative ethics guidelines set out in the Code of Conduct for United States Judges, or should promulgate their own code of conduct."[371] The For the People Act and the Supreme Court Ethics Act, by contrast, would not have allowed the Court to design its own ethical code but would instead have granted that authority to the Judicial Conference—a body composed of judicial branch officials but not itself a court.

A related question is whether legislative efforts to require the Supreme Court to abide by a code of judicial conduct would violate the constitutional separation of powers. To ensure that federal judges would decide cases impartially without fear of political retaliation, the Framers of the Constitution purposefully insulated the federal judiciary from political control.[372] Chief Justice John Roberts invoked those ideals in his *2021 Year-End Report on the Federal Judiciary*, asserting that the courts "require ample institutional independence" and that "[t]he Judiciary's power to manage its internal affairs insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and coequal branch of government."[373]

There is no dispute that the Court can voluntarily impose its own ethical rules. However, some observers have argued that legislation imposing a code of conduct on the Supreme Court would amount to an unconstitutional legislative usurpation of judicial authority. The House resolution discussed above notes that separation of powers and the independence of the judiciary "may be compromised by extensive legislative or executive interference into that branch's functions" and would thus avoid imposing any binding requirement on the Court.[374] On the other hand, there are a number of ways that Congress may validly act with respect to the Supreme Court, including its authority to impeach Justices and to decide whether Justices are entitled to salary increases.[375] By extension, requiring the Supreme Court to adopt a code of conduct could constitute a permissible exercise of Congress's authority.

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[368] H R. 4766, 117th Cong. (2021); S. 2512, 117th Cong. (2021).

[369] Anti-Corruption and Public Integrity Act, S. 3357, 115th Cong (2018), H.R. 7140, 115th Cong. (2018); Supreme Court Ethics Act of 2017, S. 835, 115th Cong. (2017), H.R. 1960, 115th Cong. (2017).

[370] Supreme Court Ethics Act of 2017, S. 835, 115th Cong. (2017), H.R. 1960, 115th Cong. (2017).

[371] H. Res. 702, 117th Cong. (2021).

[372] *See, e.g.*, THE FEDERALIST NO. 79 (Alexander Hamilton).

[373] JOHN G. ROBERTS JR., U.S. SUP. CT., 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (2011), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

[374] H. Res. 702, 117th Cong. (2021).

[375] *E.g.*, Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443 (2013); Brandon A. Mullings, Comment, *Impropriety of Last Resort: A Proposed Ethics Model for the U.S. Supreme Court*, 58 HOW. L.J. 891, 918 (2015).

Distinct from the separation-of-powers issue is the question of whether Congress may authorize the Judicial Conference—which is composed almost entirely of judges from the inferior federal courts—to promulgate ethical rules to govern Justices on the high court.[376] The Constitution explicitly contemplates that the Supreme Court will be "supreme" over any other "inferior" courts that Congress may establish.[377] Some have therefore suggested that it would be unconstitutional, or at least inappropriate, for the Judicial Conference to make rules for the Supreme Court.[378] As one example, Senior Associate Justice Anthony Kennedy has stated that it would raise a "legal problem" and would be "structurally unprecedented for district and circuit judges to make rules that Supreme Court judges have to follow."[379]

Because the Supreme Court possesses the authority to determine the constitutionality of legislative enactments, the Supreme Court itself would appear to have a critical role in determining whether Congress may validly impose a code of ethical conduct upon it. It is difficult to predict how a challenge to such a code might come before the Court and whether the Court would uphold its constitutionality, as existing judicial precedent offers minimal guidance on how the Court might resolve this constitutional question.[380] For instance, the Supreme Court has never explicitly decided whether the federal statute requiring Supreme Court Justices to recuse themselves from particular cases is constitutional, nor has the Court ever directly addressed whether Congress may subject Supreme Court Justices to financial reporting requirements or limitations upon the receipt of gifts.[381]

It is also possible that the Supreme Court would decline to consider constitutional questions related to legislation imposing ethical obligations. If Congress sought to compel the Supreme Court to comply with a code of judicial conduct, the Justices might simply comply with its mandates without challenging Congress's constitutional authority to impose them. The Court has often acquiesced to congressional attempts to subject Justices to specific ethical standards. For example, when Congress decided to subject the Justices to financial disclosure requirements, the Justices opted to comply with those provisions rather than challenge their constitutionality in court.[382] Justices have likewise implicitly accepted the validity of 28 U.S.C. § 455, discussed above, and recused themselves pursuant to that statute without questioning whether Congress possesses the constitutional authority to enact a judicial disqualification statute.[383]

In addition to the foregoing constitutional questions, a Supreme Court code of conduct could also raise practical issues. One such issue concerns the effect of any ethical provisions that would

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[376] 28 U.S.C. § 331.

[377] U.S. CONST. art. III, § 1.

[378] Kevin Hopkins, *Supreme Court Leaks and Recusals: A Response to Professor Steven Lubet's SCOTUS Ethics in the Wake of NFIB v. Sebelius*, 47 VAL. U. L. REV. 925, 933 (2013); JOHN G. ROBERTS JR., U.S. SUP. CT., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2011), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf ("Because the Judicial Conference is an instrument for the management of the lower federal courts, its committees have no mandate to prescribe rules or standards for any other body.").

[379] *Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 112th Cong. (2012) (statement of Hon. Anthony Kennedy, Senior Associate Justice, U.S. Supreme Court), https://www.crs.gov/products/Documents/hrg-2011-hap-0022_from_1_to_359/pdf#page=164.

[380] *See* CRS Legal Sidebar LSB10189, *Calling Balls and Strikes: Ethics and Supreme Court Justices*, by Cynthia Brown.

[381] JOHN G. ROBERTS JR., U.S. SUP. CT., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (2011), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[382] *See id.*

[383] Hopkins, *supra* note 378, at 902.

require Justices to disqualify themselves from particular cases. Unlike in the lower courts, where a district or circuit judge from the same court may step in to take a recused judge's place, no statute or Supreme Court rule or practice allows a lower court judge or a retired Justice to hear a case in a recused Justice's stead.[384] The disqualification of a Supreme Court Justice from a particular case may leave the Court with an even number of Justices to decide the case and thus increase the likelihood that the Court would be evenly divided and unable to create binding precedent for future litigants.[385] Conversely, if the other Justices would otherwise be evenly divided, it may be especially important for a Justice with an appearance of partiality to avoid casting the deciding vote.

A Justice's refusal or failure to comply with a newly created code of conduct might also raise enforcement issues. As discussed above, the Constitution forbids Congress from reducing Supreme Court Justices' salaries or removing them from office except via the extraordinary and blunt remedy of impeachment.[386] Thus, Congress may lack precise tools to induce recalcitrant Justices to behave ethically.

Cameras in the Courtroom and Other Transparency Measures

Some commentators and legislators advocate for increased transparency around Supreme Court proceedings. One of the most prominent proposals in this area involves allowing video recording of oral arguments.

Currently, the Supreme Court creates audio recordings and written transcripts of oral arguments, which are available on the Court's website soon after each argument is completed.[387] Beginning during the COVID-19 pandemic, the Court has also provided live audio streaming of oral arguments.[388] The Supreme Court does not allow photography or video recordings of proceedings.[389]

In contrast to the Supreme Court, state courts in all fifty states allow video recording of at least some proceedings.[390] Some lower federal courts have also experimented with the practice.[391]

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[384] *See* Cheney v. U.S. Dist. Ct., 541 U.S. 913, 915 (2004) (mem.) (Scalia, J.) ("Let me respond, at the outset, to Sierra Club's suggestion that I should 'resolve any doubts in favor of recusal.' That might be sound advice if I were sitting on a Court of Appeals. . . . There, my place would be taken by another judge, and the case would proceed normally.") (internal citation omitted); Microsoft Corp. v. United States, 530 U.S. 1301, 1303 (2000) (Rehnquist, C.J.) ("It is important to note the negative impact that the unnecessary disqualification of even one Justice may have upon our Court. Here—unlike the situation in a District Court or a Court of Appeals—there is no way to replace a recused justice.").

[385] *See* "Disqualification" section of CRS Report R45300, *Questioning Judicial Nominees: Legal Limitations and Practice*, by Valerie C. Brannon and Joanna R. Lampe.

[386] U.S. CONST. art. III, § 1; *see also* Cong. Research Serv., *Overview of Federal Judiciary Protections*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-10-1/ALDE_00013554/ (last visited Jan. 5, 2023); *see also supra* "Constitutionality of Legislation Modifying Life Tenure."

[387] U.S. Supreme Court, *Argument Audio*, https://www.supremecourt.gov/oral_arguments/argument_audio/2022 (last visited Jan. 5, 2023).

[388] Press Release, Media Advisory Regarding October Teleconference Argument Audio (Oct. 1, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/ma_10-01-20.

[389] U.S. Supreme Court, *Visiting the Court – Etiquette*, https://www.supremecourt.gov/visiting/etiquette.aspx (last visited Jan. 5, 2022).

[390] *See* CRS Report R44514, *Video Broadcasting from the Federal Courts: Issues for Congress*, by Sarah J. Eckman.

[391] *SCOTUS Commission Report*, *supra* note 28, at 225 n.163. The courts of appeals significantly expanded audio and video streaming during the COVID-19 pandemic, though at least one circuit has since limited streaming. Christopher D. Kromphardt, *The 9th Circuit Live-Streams all of its Arguments. Will that Spread?*, WASH. POST (Sept. 14, 2022),

Some commentators argue that the Supreme Court, too, should allow video recording of its proceedings to increase transparency into the Court's work.[392] Others oppose such proposals, arguing that video recording of oral arguments might lead advocates and even Justices to change how they approach argument by prioritizing how questions and answers would appear to the public rather than thorough and candid discussion of each case.[393] Some express concerns that excerpts of recorded arguments might be taken out of context.[394] Several current and former Supreme Court Justices have stated their opposition to video recordings of Supreme Court oral arguments, though others have expressed openness to the possibility.[395]

Several recent legislative proposals would authorize video recording of Supreme Court proceedings.[396] Congress could likely enact such measures via legislation. However, in light of some Justices' opposition to such measures, Congress might instead opt for other means to increase transparency as a matter of inter-branch comity.

Other recent proposals would seek to increase transparency around Supreme Court proceedings in different ways. Some proposals related to the Court's motions docket would seek to encourage disclosure of the Justices' votes on certain emergency matters or the Court's reasoning in deciding those matters.[397] Other proposals would require certain disclosures by persons filing *amici curiae* briefs with the Court, including disclosure of who prepared and paid for each *amicus* brief.[398]

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https://www.washingtonpost.com/politics/2022/09/14/ninth-circuit-livestreams-all-its-arguments-will-that-spread/. With respect to the federal district courts, the Coronavirus Aid, Relief, and Economic Security Act, enacted in March 2020, allowed the chief judges of federal district courts to authorize the use of video or telephone conferencing to conduct certain criminal proceedings, with the consent of the defendant, in response to the national emergency related to COVID-19. Pub. L. No. 116-136, § 15002, 134 Stat. 281, 527 (2020).

[392] *E.g.*, Editorial Board, *Good on the Supreme Court for Keeping Live Audio. Now it's Time to Go Further.*, WASH. POST (Oct. 2, 2022), https://www.washingtonpost.com/opinions/2022/10/02/supreme-court-audio-broadcasts-cameras-video/; Edith Roberts, *Courtroom Access: Legislative Efforts to Allow Cameras in Supreme Court Chamber*, SCOTUSBLOG (Apr. 27, 2020), https://www.scotusblog.com/2020/04/courtroom-access-legislative-efforts-to-allow-cameras-in-supreme-court-chamber/.

[393] *E.g.*, Nancy S. Marder, *Keep Cameras Out of Supreme Court: Opposing View*, USA TODAY (Mar. 27, 2013), https://www.usatoday.com/story/opinion/2013/03/27/cameras-supreme-court-nancy-marder/2026517/.

[394] *E.g.*, Zachary B. Wolf, *Hear Ye! No See Ye! Why the Supreme Court is so Afraid of Cameras*, CNN (Oct. 6, 2022), https://www.cnn.com/2022/10/06/politics/supreme-court-cameras-what-matters/index.html.

[395] *See*, *e.g.*, *id.*; *Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 116th Cong. (2019) (statements of Samuel Alito & Elena Kagan, Associate Justices, U.S. Supreme Ct.), https://www.govinfo.gov/content/pkg/CHRG-116hhrg38124/html/CHRG-116hhrg38124.htm; The Daily Show With Trevor Noah, *"Just Ask" & Life as a Supreme Court Justice – Extended Interview*, YOUTUBE (Sept. 16, 2019), https://www.youtube.com/watch?v=Nztz3yuF3lY; *see also* Robert Kessler, *Why Aren't Cameras Allowed at the Supreme Court Again?*, ATL. (Mar. 28, 2013), https://www.theatlantic.com/national/archive/2013/03/case-allowing-cameras-supreme-court-proceedings/316876/.

[396] Cameras in the Courtroom Act, H.R. 4257, 117th Cong. (2021); S. 807, 117th Cong. (2021); S. 822, 116th Cong. (2019).

[397] *See supra* "Motions Practice: the "Shadow Docket"."

[398] AMICUS Act, H.R. 6266, 117th Cong. (2021); S. 3385, 117th Cong. (2021).

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