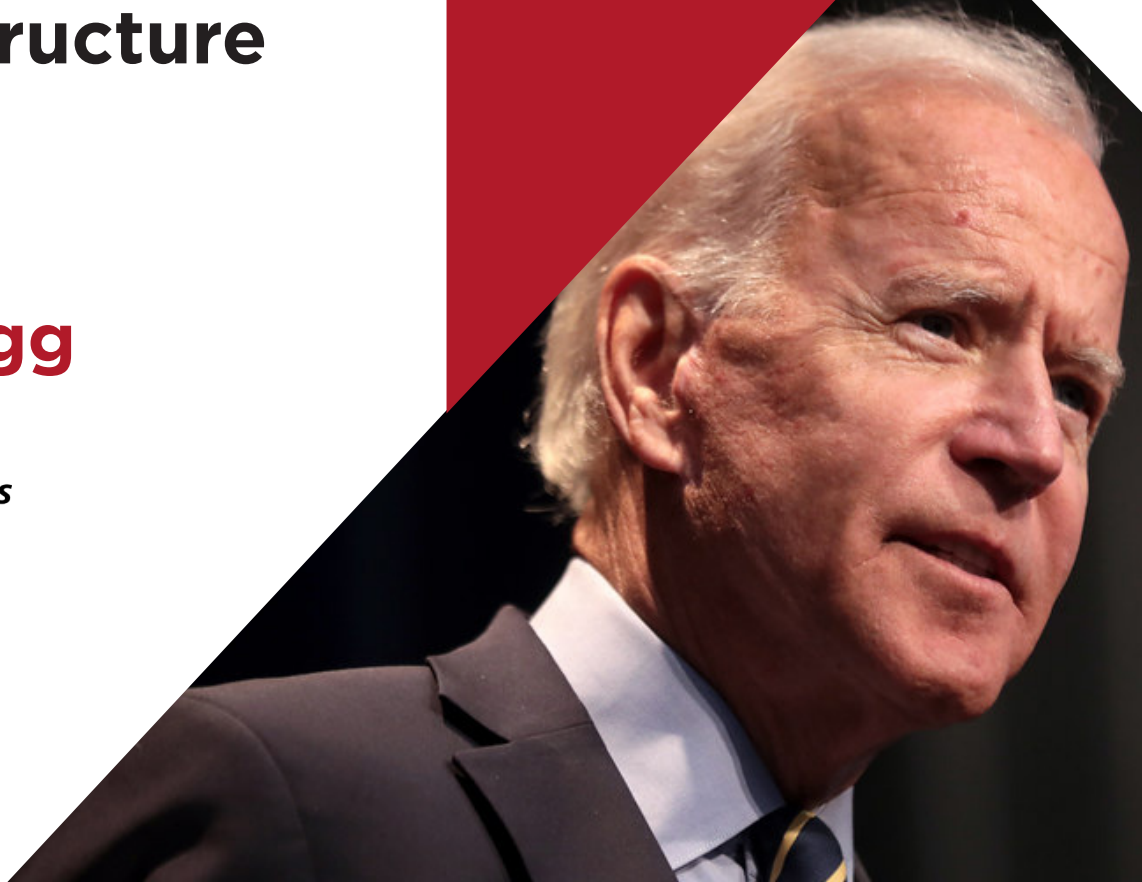




Joe Biden & the Supremes: History and Modern Considerations on Supreme Court Structure

Luke Hogg



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By Luke Hogg

Nine seems to be a good number. It's been that way for a long time.

- Justice Ruth Bader Ginsburg¹

Despite attempts by some to change the paradigm, the size of the Supreme Court has remained at nine since 1869. This tradition has survived Reconstruction, industrialization, the Great Depression, two World Wars, the Cold War, multiple impeachment trials, and thousands of political spats. Yet, it appears that the progressive movement currently sweeping the left wing of American political life may finally be the death knell of this long-standing practice.

History of the Court

When the delegates to the Constitutional Convention met to establish a new framework of governance in 1787, there was very little that the Federalists and Anti-Federalists agreed on. On the issue of the courts, some saw the establishment of the federal judiciary “as a source of danger to individual liberty.”² Prominent Anti-Federalists like Patrick Henry and George Mason who had seen the abuse of American colonists at the hands of the English courts worried that “the federal courts would accrue more power as they allowed federal power to expand at state expense.”³

The Federalists -- led by Alexander Hamilton, James Madison, and John Jay -- characteristically disagreed. “[The] judiciary...will always be the least dangerous to the political rights of the Constitution,” wrote Hamilton. Having “no influence over either the sword or the purse...[the courts] may truly be said to have neither force nor will, but merely judgment.”⁴ As with most other issues at the time, the Federalists won the day and the federal judiciary was born.

From Hamilton to Marshall

It is clear that the framers were far less concerned with the details of the judiciary than they were with the legislative and executive branches. In fact, it came third among the

1 Nina Totenberg. “Justice Ginsburg: ‘I Am Very Much Alive.’” National Public Radio. July 24, 2019. <https://www.npr.org/2019/07/24/744633713/justice-ginsburg-i-am-very-much-alive>

2 “The Debate Over the Judicial Branch.” Center for the Study of the American Constitution. <https://csac.history.wisc.edu/document-collections/constitutional-debates/judiciary/>

3 Ibid.

4 Alexander Hamilton. “The Federalist Papers : No. 78.” The Avalon Project. https://avalon.law.yale.edu/18th_century/fed78.asp

three, relegated to Article III of the Constitution after Hamilton had expounded the formation of the Congress and Presidency in great detail. Composed of just over 360 words, Article III is mute on most questions of how the courts should be structured. The most important piece of Article III comes in Section I which simply states:

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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

While Article III specifically establishes the Supreme Court (SCOTUS), and grants Congress the right to establish “inferior courts,” that is where the directions end. For most other issues about the size, scope, and structure of the court, one must turn to the Necessary and Proper Clause. It is from this enumerated power “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers,” that Congress derives its authority over the structure of the Supreme Court.⁵

Following the ratification of the Constitution, establishing the judicial system was a top priority for the new government. Congress recognized that they would soon require an arbiter. Consequently, the very first bill to be introduced in the Senate was the Judiciary Act of 1789.⁶

The first Judiciary Act filled in the gaps left by the Constitution by laying out 13 judicial districts that were split into 3 circuits. More importantly, it further defined the structure of the Supreme Court which sat in the nation’s first capital of New York. Made up of a Chief Justice and five Associate Justices, the Supreme Court was also required to travel around the various districts and hold court. “Riding circuit,” as this practice became known, would come to be a major bone of contention.

The three branches of government were ostensibly created to be co-equal. In reality, the judiciary was rather subordinate in its infancy. The first three Chief Justices -- John Jay, John Rutledge, and Oliver Ellsworth -- were often unwilling to impose themselves in federal feuds or exercise judicial review. It wasn’t until John Marshall assumed the bench that the Supreme Court began to assert itself as the Constitutional watchdog.

Marbury v. Madison (1803) is often considered the landmark case that established

5 U.S. Constitution. Article I, Section 8, Clause 18. <https://www.law.cornell.edu/constitution/articlei>

6 “The Court as an Institution.” The Supreme Court of the United States: About the Court. <https://www.supremecourt.gov/about/institution.aspx>

the Supreme Court as we know it. It was in this case that John Marshall affirmed the principle of judicial review, writing that “it is emphatically the province and duty of the judicial department to say what the law is.”⁷

In the simplest terms, judicial review means “that the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judiciary.”⁸ In other words, the Supreme Court is the sole decider of constitutionality. Since “the Constitution is superior to any ordinary act of the legislature,” the Supreme Court can invalidate any law that they find to be in conflict with the Constitution.⁹ It is this elementary but fundamental observation by John Marshall that confirmed the Supreme Court’s co-equality.

The Early Years

Since its conception, the size of the Supreme Court has waxed and waned from as few as five members to as many as ten. The number of justices has been modified only six separate times in American history, and the current number of nine justices has remained unchanged since 1869. The two most significant changes came with the Judiciary Acts of 1801 and 1869.

Today, pundits and politicians often lament the “politicization” of the Supreme Court. The confirmation fights over Brett Kavanaugh and Amy Coney Barrett are cases in point. Yet, the fight over the Judiciary Act of 1801 demonstrates that the makeup of the Supreme Court has always been a hot-button political issue.

In the election of 1800, Thomas Jefferson’s Democratic-Republicans soundly defeated sitting President John Adams and the Federalists. But President Adams didn’t give up without a fight. As he saw it, the judiciary was the best way to ensure the Federalist cause didn’t die with the ascension of Jefferson.

“[Less] than three weeks before the end of his term and that of the Federalist majority in the Sixth Congress,” President Adams signed the Judiciary Act into law on February 13, 1801.¹⁰ Twelve short years after the passage of the Judiciary Act of 1789, President Adams sought to insulate the Supreme Court from the Democratic-Republicans. Using the court’s request to end “court riding” as justification, the new law ended that practice, but also shrunk the Supreme Court to only five members. Adams’ intention

7 Marbury v. Madison, 5 U.S. 137. <https://www.law.cornell.edu/supremecourt/text/5/137>

8 “Judicial Review.” Wex Law Dictionary. https://www.law.cornell.edu/wex/judicial_review

9 Marbury v. Madison, 5 U.S. 137.

10 “Landmark Legislation: Judiciary Act of 1801.” Federal Judicial Center. <https://www.fjc.gov/history/legislation/landmark-legislation-judiciary-act-1801>

was clear: by shrinking the court, the Judiciary Act of 1801 effectively eliminated the possibility of the Democratic-Republicans appointing their own justice.

Fortunately for Jefferson, the Supreme Court would have decreased in size only once there was a vacancy. Before any justice left the bench, the new Democratic-Republican majority repealed the law, leaving the Court at six. The first threat of “court packing” had been averted.

The Judiciary Act of 1869 was the next watershed moment in the structure of the Supreme Court. It was this law that set the number of Supreme Court Justices at nine, which has remained unchanged since its passage. According to Joanna Lampe of the Congressional Research Service:

Overall, scholars dispute Congress’s motives in changing the Court’s size during the nineteenth century. While some argue that practical needs justified most or all of the changes, many point to political considerations, with one scholar asserting that every change in the Court’s size “was intended to affect the Court’s balance of partisan or ideological control.” Regardless, the 1869 legislation was the last time Congress changed the size of the Supreme Court.

Since 1869, restructuring the Supreme Court has remained a politically infeasible task. However, that hasn’t stopped some of America’s more ambitious politicians from trying. The next threat to the Supreme Court didn’t come until the Progressive Era and the ascension of Franklin Roosevelt.

Roosevelt’s Boondoggle

Few politicians in American history have been more ambitious than President Franklin Roosevelt. It was under his leadership that the greatest challenge to the independence of the Supreme Court took place.

When Roosevelt was reelected in 1936 at the height of the Great Depression, his strong-man policies led to “the best showing in the electoral college since James Monroe ran unopposed in 1820.”¹¹ With this incredible mandate, Roosevelt continued to implement his New Deal at breakneck pace. There was only one problem: the Supreme Court continually stood in his way.

Dubbed the “Four Horsemen” by Roosevelt’s supporters, Justices Pierce Butler, James McReynolds, George Sutherland and Willis Van Devanter saw Roosevelt as a tyrant and much of the New Deal as dangerously unconstitutional federal overreach. Along

11 William E. Leuchtenburg. “When Franklin Roosevelt Clashed With the Supreme Court—and Lost.” *Smithsonian Magazine*. May 2005.
<https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/>

with Chief Justice Charles Evans Hughes, and Justice Owen Roberts as the swing vote, the Hughes Court “struck down more significant acts of Congress...than at any other time in the nation’s history, before or since.”¹² Most significantly, the Court struck down minimum wage laws and the establishment of several key New Deal agencies such as the National Recovery Administration and Agricultural Adjustment Administration.

With the Social Security Act and National Labor Relations Act in the Supreme Court’s crosshairs, Roosevelt could not sit idly by. Supposedly it was Attorney General Homer Comings who told Roosevelt, “Mr. President, they mean to destroy us. . . . We will have to find a way to get rid of the present membership of the Supreme Court.”¹³ It was that same Homer Comings who became the architect of Roosevelt’s scheme to pack the court so that the “Four Horsemen” would not have the majority necessary to invalidate the New Deal.

Roosevelt took Congress by surprise when, on February 5, 1937, he unveiled his plan. Just as Adams had used the issue of Court riding as guise for his attempt to influence the Court, Roosevelt used the issue of age as pretense for packing the Court. The Judicial Procedures Reform Bill of 1937 would empower the President to appoint one new justice to the Court for each sitting member over the age of 70 who refused to retire. Had this plan come to fruition, the size of the Supreme Court could have ballooned to 15 justices.

Around the country, politicians and pundits were shocked at Roosevelt’s audacity. Yet, many believed that Roosevelt’s coattails were long enough to see the Judicial Procedures Reform Bill passed into law. The fight was so contentious that Chief Justice Charles Evans Hughes -- the same man who had sworn Roosevelt in just a year before -- testified against the scheme before the Senate Judiciary Committee, which condemned the bill.¹⁴

As it turned out, Roosevelt didn’t even need to actually pack the court to get his way. The mere threat of doing so was enough.

Following the introduction of the scheme, the Court suddenly became far more amenable to Roosevelt and the New Deal. When the Supreme Court took up yet another case concerning minimum wage laws, Justice Owen Roberts switched his

12 *Ibid.*

13 *Ibid.*

14 U.S. Congress, Senate, Committee on the Judiciary. Reorganization of the Federal Judiciary. 75th Congress, First Session, 1937. S. Report No. 711.

<https://reason.com/wp-content/uploads/2020/10/Senate-Judiciary-Committee-Report-on-1937-Court-Packing-Legislation.pdf>

vote. He subsequently went on to vote in Roosevelt's favor on the National Labor Relations Act and Social Security Act.

In what later became known as the "switch in time that saved nine," Roberts' swing vote to uphold the New Deal lost Roosevelt the support he needed to pass the Judicial Procedures Reform Bill. As one member apocryphally put it, "why shoot the bridegroom after a shotgun wedding?"¹⁵ The scheme was dead by the end of July 1937.

As William Leuchtenburg so eloquently wrote for Smithsonian Magazine:

The 168-day contest also has bequeathed some salutary lessons. It instructs presidents to think twice before tampering with the Supreme Court. FDR's scheme, said the Senate Judiciary Committee, was "a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America." And it never has been...These are lessons -- for the president and for the court -- as salient today as they were in 1937.¹⁶

Then-Senator Joe Biden put it a bit less tactfully:

[Roosevelt's scheme] was a bone-head idea...It was a terrible, terrible mistake to make it (sic) and to put it into question for an entire decade the independence of the most significant body...the Supreme Court of the United States of America.¹⁷

Indeed, Mr. President, it was -- and is -- a bone-head idea.

The Presidential Commission on the Supreme Court

To take from Ecclesiastes, what has been done will be done again; there is nothing new under the sun.

The confirmation fights over Justices Kavanaugh and Barrett brought the issue of Supreme Court structure back into the limelight in a way not seen since the New Deal. Yet, the arguments being raised today are reminiscent of that bygone era.

In response to a "conservative court," the progressive left has once again called for expanding the Supreme Court to thwart what they perceived to be threats to their

15 William E. Leuchtenburg. "When Franklin Roosevelt Clashed With the Supreme Court—and Lost." Smithsonian Magazine. May 2005.

<https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/>
16 Ibid.

17 James Lankford. "Lankford Quotes then-Senator Biden's Own Words to Oppose Packing the Supreme Court." Press Release. April 23, 2021.

agenda.¹⁸ In a press conference announcing the Judiciary Act of 2021 that included House Judiciary Chairman Jerry Nadler, Sen. Ed Markey proclaimed that “the United States Supreme Court is broken, it is out of balance, and it needs to be fixed.”¹⁹ Sen. Markey went on to say “too many Americans view our highest court in the land as a partisan political institution...make no mistake about it, the court is broken because Leader Mitch McConnell, his Senate Republican colleagues, and Donald Trump broke it.”²⁰

While Speaker Nancy Pelosi quickly told reporters that she has “no plans to bring it to the floor,” the very thought that there are some in Congress that wish to solve questions of the Court’s partisanship with a hyper-partisan legislative proposal is preposterous. Clearly, the irony is lost on members of the Progressive Caucus.

Regardless, either for sincere reasons or to placate the more radical wing of his party, President Biden heeded their call. On April 9, 2021, days before the Judiciary Act of 2021 was unveiled, President Biden signed Executive Order (EO) 14023 establishing the Presidential Commission on the Supreme Court of the United States.²¹ This 36-member commission was established with the sole objective of producing a report to guide future reform of Supreme Court structure.

More specifically, the SCOTUS Commission was directed to make an “account of the contemporary commentary and debate about the role and operation of the Supreme Court,” historical background on previous periods when the structure of the Supreme Court was altered, and “analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform.”²² In the press release, the Biden White House further specified that the Commission “will examine...the genesis of the reform debate; the Court’s role in the Constitutional system; the length of service and turnover of justices on the Court; the membership and size of the Court; and the Court’s case selection, rules, and practices.”²³

After wading through the legalese, it is clear that the SCOTUS Commission was

18 Alexander Solender. “Progressives In Congress To Introduce Bill Expanding Supreme Court From 9 to 13 Seats.” Forbes. April 14, 2021.

<https://www.forbes.com/sites/andrewsolender/2021/04/14/progressives-in-congress-to-introduce-bill-expanding-supreme-court-from-9-to-13-seats/?sh=15b11dc56bbb>

19 Kevin Freking. “WATCH: Democrats introduce legislation to expand the Supreme Court.” PBS Newshour. April 15, 2021. <https://www.pbs.org/newshour/politics/watch-live-democrats-expected-to-introduce-legislation-to-expand-supreme-court>

20 Ibid.

21 Exec. Order. No. 14023, 86 FR 19569. April 9, 2021.

<https://www.federalregister.gov/documents/2021/04/14/2021-07756/establishment-of-the-presidential-commission-on-the-supreme-court-of-the-united-states>

22 Ibid.

23 “Presidential Commission on the Supreme Court of the United States.” The White House.

<https://www.whitehouse.gov/pscscotus/>

established with a singular purpose in mind: examining the arguments for and against expanding the Supreme Court. Considering the fact that the Commission's Co-Chairs are Bob Bauer, a former White House Counsel to President Obama, and Cristina Rodriguez, who served as Assistant Attorney General in the Office of Legal Counsel for the Department of Justice in the Obama Administration, it is not hard to imagine where they will land on the question of court packing.

However, there is light at the end of the tunnel. In EO 14023, President Biden directed the Commission to solicit public comments. While this provision is directed more towards legal experts and academics, it also presents an opportunity for the American people to have their voices heard.

Threats and Future Implications

As Chief Justice John Roberts famously opined during his confirmation, "Judges are like umpires. Umpires don't make the rules, they apply them...I will remember that it's my job to call balls and strikes, and not to pitch or bat."²⁴

Regardless of one's feelings about the Supreme Court, throughout the decades, it has managed to maintain a remarkable amount of independence in the face of overwhelming partisanship. Now, progressives are threatening to undo centuries of precedent in a thinly-veiled attempt to turn the Court into a rubber stamp for their agenda. What follows below is an overview of the most imminent threats to the Supreme Court's judicial independence.

Court Packing

The most pressing threat to the judicial independence of the Supreme Court should be obvious by this point: court packing. The progressive left's obsession with remaking the Court in their image presents a dangerous break with tradition and precedent. As we have seen in other areas, breaking with tradition for temporary partisan gains always results in an endless cycle of tit-for-tat. One fantastic example of this is the aptly named Nuclear Option.

For decades, the filibuster served as a bulwark against the tyranny of the majority in the Senate. That was until the majority began to utilize a loophole in Senate rules to circumvent the filibuster for judicial nominees. The Nuclear Option was first employed by Democratic Senate Majority Leader Harry Reid in 2013, and then by Republican Majority Leader Mitch McConnell to great effect. The result has been a type of Congressional one-upmanship where each side continually pushes the envelope to achieve their political objectives by disregarding the traditional consideration given to

24 John G. Roberts, Jr. "Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States." Hearings before the Committee on the Judiciary, United States Senate, 109th Congress. Government Publishing Office. September 12-15, 2005.

<https://www.govinfo.gov/content/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf>

the Senate minority.

Justice Ruth Bader Ginsburg put it best. “If anything would make the court look partisan, it would be that -- one side saying, ‘when we’re in power, we’re going to enlarge the number of judges, so we would have more people who would vote the way we want them to.’”²⁵

The American people agree with this sentiment. A recent poll conducted by Mason-Dixon Polling and Strategy found that 68 percent of registered voters oppose “court-packing,” with an astonishing 90 percent of registered Republicans stating their opposition. Even more telling, the poll asked “If Donald Trump had been reelected as President and he proposed increasing the size of the Supreme Court from nine members to thirteen members, would you support or oppose his efforts?” Of registered voters, 83 percent responded that they would oppose.²⁶

As happened in 1801 and 1937, seeking to alter the Court’s makeup for blatantly partisan purposes not only jeopardizes judicial independence, but also erodes public trust in the institution. Regardless of one’s opinions on Justices Gorsuch, Kavanaugh, and Barrett, they were appointed through the proper statutory procedures and subject to the advice and consent of the Senate. Just as was the case for Roosevelt, any attempts to pack the Court will be seen for what they are: partisan quackery. We can only hope that the more moderate members of the Democratic Caucus will rein in their more radical comrades and cease their calls to pack the court.

Term Limits

Not dissimilar to court packing, instituting term limits on members of the Supreme Court is a flagrant attempt to erode judicial independence. While the Constitution is technically mute on age restrictions, the implication of Justices serving so long as they display “good behavior” is that they remain on the bench for as long as they choose. This system of life appointments helps insulate the Court from the political squabbles of the present moment.

The average age of the Roberts Court is currently 64 years old, with Justices serving an average of 16-year terms.²⁷ While some may think this harms the Court’s credibility, it bolsters judicial independence and protects judicial doctrine from radical shifts.

Suzann Sherry, the Herman O. Loewenstein Chair of Law at Vanderbilt Law School, wrote in a law review article analyzing the theoretical impact of term limits on *Roe*

25 Nina Totenberg. “Justice Ginsburg: ‘I Am Very Much Alive.’” National Public Radio. July 24, 2019. <https://www.npr.org/2019/07/24/744633713/justice-ginsburg-i-am-very-much-alive>

26 “April 2021 National Voter Poll.” Mason-Dixon Polling & Strategy. <https://firstliberty.org/wp-content/uploads/2021/04/National421FinalPollResults.pdf>

27 “The Court as an Institution.” The Supreme Court of the United States: About the Court. <https://www.supremecourt.gov/about/institution.aspx>

v. Wade that the “longevity and stability” provided by life appointments “means that doctrine changes slowly and incrementally.” On the contrary, term limits would result in a continually evolving Court where we would be likely to see “sudden and radical changes in doctrine.”²⁸

Anyone who even casually follows the news cycle knows that our political institutions pivot back and forth between issues at breakneck speed. By design, the Supreme Court is shielded from this political whiplash. Life appointments mean that Justices do not need to concern themselves with the issue of the day. Instead, they can focus their efforts on the nuances of their caseload and properly interpreting the Constitution. Instituting term limits for the Supreme Court would further erode the independence that is so crucial to the proper functioning of our judiciary.

Case Selection, Rules, and Practices

The question of more moderate reforms to Supreme Court procedure surrounding case selection and other practices is far more nuanced than that of legislatively-imposed court packing or term limits. One important consideration when discussing such potential changes is that, similar to Congress, the Supreme Court has wide latitude to set its own rules.

In a recent essay published in the *Harvard Law Review*, Daniel Epps and Ganesh Sitaraman point out that broad sweeping statutory reforms to the court are politically untenable. That does not, however, preclude the Court from taking steps to address waning faith in their objectivity. As Epps and Sitaraman wrote:

The final source of Supreme Court reform could come from an unlikely source: the Court itself. The Justices could choose to adopt rules constraining themselves. They might choose to do so in order to improve perceptions of the Court among members of the public. But doing so might also be a way to help the Court stave off more aggressive reform efforts by Congress down the road.

The most obvious starting point would be for the Justices to voluntarily adopt ethics rules. Doing so might undercut efforts in Congress to impose an ethics code on the Justices. And the rules the Justices designed for themselves might be more amenable to the Justices themselves than whatever Congress would come up with. In fact, the Court may already be at work on this effort.²⁹

28 Suzanna Sherry and Christopher Sundby. “Term Limits and Turmoil: *Roe v. Wade*’s Whiplash.” *Texas Law Review*, Forthcoming. July 20, 2019. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3334545

29 Daniel Epps and Ganesh Sitaraman. “The Future of Supreme Court Reform.” 134 *Harv. L. Rev. F.* 398. May 20, 2021.

Beyond ethics rules, Epps and Sitaraman also note several other areas where the Court could reform itself. Among these are gift and financial transaction disclosures, reining in the powers of the Chief Justice, *amicus curiae* funding disclosure, and other transparency reforms.

Regardless of these possibilities, it is clear that reforming Supreme Court practice is not the focus of either the SCOTUS Commission or the Progressive Caucus.

Conclusion

Changing the rules of the game when you are not getting your way is childish. When a game of Monopoly or Risk doesn't turn out the way you want it to, that doesn't grant you the license to rewrite the rulebook. Just as Progressives' continued calls to eliminate the filibuster threaten to erode the strength of the Senate, proposals to significantly alter the makeup of the Supreme Court threaten to further erode faith in the Court and judicial independence.

Judicial independence is a cornerstone of our republican form of government. Without proper judicial review, the Constitution becomes little more than a piece of parchment. Regardless of individual feelings about the Court's current makeup, radically altering for political gains a paradigm that has stood for more than 150 years is incredibly short-sighted.

There is the possibility that establishing the SCOTUS Commission is simply a way for President Biden to assuage Progressives. The fact that Speaker Pelosi and Majority Leader Schumer have so far been unwilling to consider legislation on packing the court supports this line of thinking.

However, President Biden, Speaker Pelosi, and Majority Leader Schumer have all remained incredibly tight-lipped about future plans. This unwillingness to fully come out against court packing is worrying to say the least. It is likely that Democratic Leadership is anxiously waiting for the SCOTUS Commission's report so that they can use it as political cover for radical Supreme Court reform. In this sense, the best way to prevent court packing and the imposition of term limits is to make it clear to the Commission that the American people are strongly against these proposals.