SUPREME COURT LEGITIMACY AND REFORM: PROBLEMS WITH PERSONNEL AND COMPOSITION REFORM PROPOSALS

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Some people claim that the United States Supreme Court—which is currently dominated by a conservative supermajority—is in a legitimacy crisis. Unsurprisingly, many people are, therefore, calling for institutional reform. Several types of reform proposals have been presented over the years.

This Note evaluates and presents a normative claim concerning a particular group of reform proposals: “personnel” or “composition” reform proposals—those reform proposals that directly address the number of Justices, when Justices get replaced, how seats on the Court are allocated, and which Justices hear cases. This Note proceeds in three Parts. Part I provides an overview of the legal background, including the constitutional provisions and the corresponding doctrine, understandings, and norms concerning the Supreme Court. Part II discusses and evaluates current personnel and composition reform proposals, including altering the number of Justices, introducing term limits, allocating seats on the Court based on partisanship, and mandating that the Court decide cases as panels. Part III discusses the problems common to these personnel and composition reform proposals that emerge after evaluating them.

This Note then concludes that reformers should jettison the notion that personnel and composition reform proposals can solve all of the Court’s legitimacy problems on their own. Instead, reformers should consider and develop other, more neutral types of reform proposals that do not fetishize directly changing the Court’s personnel and composition in order to reduce its politicization. Reformers’ fixation on the Court’s current personnel and composition is understandable, but focusing long-term institutional reform efforts on changing the same is misguided and counterproductive.

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INTRODUCTION

Has the United States Supreme Court lost legitimacy? Chief Justice John Roberts does not think so. At a judicial conference in Colorado, not long after Dobbs was decided, he defended the Court’s role. He explained, “If the court doesn’t retain its legitimate function of interpreting the constitution, I’m not sure who would take up that mantle.” He cautioned, “You don’t want the political branches telling you what the law is[,] and you don’t want public opinion to be the guide [about] what the appropriate decision is.” He suggested that the legitimacy of the Court should not be called into question simply because people disagree with its opinions or its jurisprudence.

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2 See id.
4 Barnes & Karlik, supra note 1.
5 Id.
Considering the legitimacy distinctions set forth by Harvard Law Professor Richard H. Fallon Jr., it appears that Chief Justice Roberts was focusing exclusively on the Court’s “legal legitimacy”—that is, the legitimacy concerned with whether the Court’s decisions are legally permissible—while giving short shrift to its “sociological legitimacy”—that is, the legitimacy concerned with prevailing attitudes towards the Court.

Nonetheless, the Court’s legitimacy—particularly its sociological legitimacy—has been called into question. Some are concerned about what the consequences would be if the Court were viewed as “just another partisan institution.” Douglas Keith of the Brennan Center has questioned whether the current Court is actually performing its legitimate function. He contended that the Court’s conservative majority does not appear willing to decide cases “in ways that do not serve their personal or partisan preferences.” The Editorial Board of the New York Times has opined that, recently, “the court’s legitimacy has been squandered in the service of partisan victories.” This type of perceived illegitimacy in decision-making may be categorized as an intrinsic illegitimacy of the Court. There are many, however, who believe that the Court has been deciding cases properly and that there is no cause for concern.

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7 Id. at 35 (describing “legal legitimacy,” in the context of the Supreme Court, as “concerned with whether the Justices’ decisions accord with or are permissible under constitutional and legal norms.”).
8 Id. at 21 (describing “sociological legitimacy” as “involv[ing] prevailing public attitudes toward governments, institutions, or decisions”). Roberts also takes the Court’s “moral” legitimacy for granted. See id. (describing “[m]oral legitimacy” as “a moral concept, concerned with the attitudes that we ought to hold (regardless of what others say or think) toward claims of authority”).
10 Stare indecisus?, Harv. L. Today (Oct. 5, 2022), https://hls.harvard.edu/today/does-overturning-precedent-undermine-the-supreme-courts-legitimacy/ [https://perma.cc/SY9N-4PNH] (“Richard Fallon[] said that many experts, who ‘have argued that adherence to precedent is crucial to the Supreme Court’s legitimacy,’ worry what the fallout would be ‘[i]f the perception broadly took hold that the Supreme Court is just another partisan institution.’”) (second alteration in original).
11 Keith, supra note 9.
12 Id.
Some of the Court’s critics think that conduct of the other branches of government has additionally undermined the Court’s legitimacy—leading to a perception of an extrinsic illegitimacy of the Court. Some, for example, have criticized “defects in the judicial appointments process.” They have pointed to the conduct of the Republican-led Senate during Obama’s presidency—particularly, the conduct of Senator Mitch McConnell, who was then Senate Majority Leader. In what is understood to have been an “unprecedented” move, McConnell, supported by several other Senators, failed to initiate confirmation hearings or hold votes in relation to the appointment of President Obama’s Supreme Court nominee, Merrick Garland. Garland was Obama’s intended replacement for Justice Antonin Scalia following Scalia’s death in 2016. President Trump, who took office shortly thereafter, nominated Neil Gorsuch who was later confirmed by the Senate. Some have suggested that the vacant Court seat was “stolen.”

Unsurprisingly then, many have been calling for Supreme Court reform. Given the age of the institution, it is unsurprising that there have been calls to reform the Supreme Court; however, lately, there have been increasing calls for reform. There are many rationales for wanting to effect Supreme Court reform, including concern for the increased life expectancy of the Justices, wanting to reduce the partisan nature of the Court and its

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17 Kar & Mazzone, supra note 16, at 58.

18 Grove, supra note 16.

19 Id.

20 Id.


23 See Keith, supra note 9.

use as a political shortcut,\textsuperscript{25} and seeking to limit what some consider to be extreme opinions by a conservative supermajority.\textsuperscript{26}

There are many challenges associated with reforming the Supreme Court, including gaining sufficient bipartisan support.\textsuperscript{27} Reform advocates disagree about what feature or features of the Court should be reformed. Should reform focus on the composition of the Court?\textsuperscript{28} Should the way the Court decides cases be changed?\textsuperscript{29} Should the Court, as an institution, be weakened?\textsuperscript{30} Or, should the Court’s ethics rules be overhauled?\textsuperscript{31} Many proposals implicitly target multiple features.

Selecting the appropriate mechanism for effecting a particular type of reform is another major consideration for reformers. Should the reform be implemented by constitutional amendment?\textsuperscript{32} Should Congress pass a statute?\textsuperscript{33} Should an institution amend its own rules?\textsuperscript{34} Or, should the Justices themselves change their judicial behavior? Ultimately, however, all reform proposals seek to improve, or at least address, the legitimacy of the Court—often the Court’s sociological, or popular, legitimacy.\textsuperscript{35}

This Note evaluates and presents a normative claim concerning a particular group of Supreme Court reform proposals: “personnel” or “composition” reform proposals—those reform proposals that directly address the number of Justices, when Justices get replaced, how seats on the Court are allocated, and which Justices hear cases. This Note proceeds in three Parts. Part I provides an overview of the legal background, including the constitutional provisions and the corresponding doctrine, understandings, and norms concerning the Supreme Court. Part II discusses and evaluates current personnel and composition reform proposals, including altering the number of Justices, introducing term limits, allocating seats on the Court based on partisanship, and mandating that the Court decide cases as panels. Part III

\textsuperscript{26} See, e.g., David Orentlicher, \textit{Judicial Consensus: Why the Supreme Court Should Decide Its Cases Unanimously}, 54 Conn. L. Rev. 303, 303 (2022).
\textsuperscript{27} See id.
\textsuperscript{28} See infra Sections II.A, II.B, II.C.
\textsuperscript{29} See infra Section II.D; see also Orentlicher, supra note 26 (proposing unanimity requirement); Ryan D. Doerfler & Samuel Moyn, \textit{Democratizing the Supreme Court}, 109 Cal. L. Rev. 1703, 1704 (2021) (discussing supermajority requirement).
\textsuperscript{30} See infra Sections II.B, II.C, II.D; see also Orentlicher, supra note 26; Doefler & Moyn, supra note 29 (discussing jurisdiction-stripping proposals).
\textsuperscript{31} See, e.g., Supreme Court Ethics Act, H.R. 4766, 117th Cong. (2021).
\textsuperscript{32} See infra Section II.B.
\textsuperscript{33} See infra Sections II.C, II.D.
\textsuperscript{34} See infra Section II.C.
\textsuperscript{35} See Fallon, supra note 6.
discusses the problems common to these personnel and composition reform proposals that emerge after evaluating them.

This Note concludes that reformers should jettison the notion that personnel and composition reform proposals can solve all of the Court’s legitimacy problems on their own. Instead, reformers should consider and develop other, more neutral types of reform proposals that do not fetishize directly changing the Court’s personnel and composition to reduce its politicization. Reformers’ fixation on the Court’s current personnel and composition is understandable, but focusing long-term institutional reform efforts on changing the same is misguided and counterproductive.

I. BRIEF LEGAL BACKGROUND ON THE JUDICIARY

Article III of the United States Constitution is dedicated to the “Judicial Branch.”36 It provides that “[t]he 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 Judicial Vesting Clause) and that federal judges “shall hold their Offices during good Behaviour” (the Good Behavior Clause).37 The latter clause—the Good Behavior Clause—has been interpreted to mean that federal judges are guaranteed life tenure, which is subject only to impeachment.38

Alexander Hamilton, in The Federalist No. 78, famously advocated for the “permanent tenure” of federal judges to ensure the independence of the judicial branch—to promote, in his words, an “independent spirit in the judges.”39 He felt that life tenure was necessary for the judiciary to be considered a defender of the Constitution “against legislative encroachments” and for it to “guard the Constitution and the rights of individuals from . . . dangerous innovations in the government, and serious oppressions of the minor party in the community.”40

Article III does not expressly confer a power of judicial review. It was in Marbury v. Madison that Chief Justice John Marshall declared that the Supreme Court has such a power; Marshall explained that it is “the province and duty of the judicial department to say what the law is.”41 In declaring

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36 U.S. CONST. art. III.
37 U.S. CONST. art. III, § 1.
39 THE FEDERALIST NO. 78 (Alexander Hamilton).
40 Id.
41 Marbury v. Madison, 5 U.S. 137, 177 (1803).
this judicial power, Marshall relied on Hamilton's exposition of the judicial function in *The Federalist* No. 78.42

The President and Congress together have the greatest control over the composition of the federal judiciary.43 The President, under Article II, “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint... Judges of the supreme Court.”44 In other words, a Supreme Court Justice may be appointed (that is, take office) only after having been nominated by the President and confirmed by the Senate. The Senate’s check on the President’s appointment power is itself a power that may be used to thwart a president’s attempt to seat a Justice on the Court.45 The Appointments Clause of Article II “is more than a matter of ‘etiquette or protocol’; it is among the significant structural safeguards of the constitutional scheme...[It] prevents congressional encroachment upon the Executive and Judicial Branches...[and] serves...to curb executive abuses of the appointment power.”46

Congress has the sole authority to remove federal judges from office.47 Unlike an appointment of a Justice or other federal judge, a removal of the same requires action to be taken by both the House of Representatives and the Senate.48 The House has the “sole Power of Impeachment” (i.e., the power to indict),49 and the Senate has “the sole Power to try all Impeachments” (i.e., the power to convict).50 A conviction by the Senate, permitting removal from office,51 requires a supermajority concurrence of “two thirds of the Members present.”52

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42 See id. In *The Federalist* No. 78, Hamilton reasoned that “where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental. *The Federalist* No. 78, supra note 39.

43 See U.S. Const. art. II, § 2, cl. 2; see also U.S. Const. art. I, § 3, cl. 6 & 7.

44 U.S. Const. art. II, § 2, cl. 2.

45 See supra INTRODUCTION.


47 See U.S. Const. art. I, § 3, cl. 6 & 7.

48 Compare U.S. Const. art. II, § 2, cl. 2 (giving the president the power to appoint judges of the Supreme Court with the consent of the Senate), with U.S. Const. art. I, § 2, cl. 2 (providing for the qualifications to be a member of the House of Representatives), and U.S. Const. art. I, § 3, cl. 6 (giving the Senate sole power to try all impeachments), and U.S. Const. art. I, § 3, cl. 7 (providing that judgment in impeachments by the Senate only extends to removal from office).

49 U.S. Const. art. I, § 2, cl. 5.

50 U.S. Const. art. I, § 3, cl. 6.

51 U.S. Const. art. I, § 3, cl. 7.

52 U.S. Const. art. I, § 3, cl. 6.
Grounds for impeachment of the Justices are not explicitly set forth in Article III.\textsuperscript{53} Historical practice, however, has established that only “serious ethical or criminal misconduct” is a ground for impeachment.\textsuperscript{54} Chief Justice William Rehnquist, in a book on impeachment, has explained that it is an established norm that a judicial act—that is, how a judge rules in a case—is not a basis for removal.\textsuperscript{55} In other words, it is near impossible to remove a Justice once appointed, absent some egregious, ethical misconduct.

There are currently nine Justices on the Supreme Court.\textsuperscript{56} That number is not constitutionally mandated.\textsuperscript{57} Instead, the Constitution implicitly leaves to Congress the issue of setting the number of Justices.\textsuperscript{58} The number fluctuated in the earlier days of the Republic, but the number has remained at nine for the past 150 years.\textsuperscript{59} The last major attempt to “pack the Court” occurred in 1937, during Franklin D. Roosevelt’s presidency.\textsuperscript{60} In short, Congress may change the number of Justices by statute—a Constitution Amendment is not required.

\section*{II. Current Personnel and Composition Reform Proposals}

This Part discusses and evaluates current personnel—or composition—based reform proposals. Section II.A briefly discusses increasing or decreasing the number of Justices because many of the other proposals involve an increase or decrease in the number of Justices. Section II.B discusses and evaluates proposals involving the introduction of term limits for the Justices. Section II.C discusses and evaluates proposals involving the allocation of seats of the Supreme Court based on partisan or political-party affiliation. Finally, Section II.D discusses and evaluates proposals involving the use of panels of the Court to hear and decide cases. All of these types of proposals would be constitutionally problematic if not implemented by a constitutional amendment or would otherwise be problematic for the Court’s legitimacy based on their likely effect.

\textsuperscript{53} See U.S. CONST. art. III.
\textsuperscript{56} See 28 U.S.C. § 1.
\textsuperscript{57} See U.S. CONST. art. III.
\textsuperscript{59} \textit{Court Packing}, supra note 58, at 2.
\textsuperscript{60} Id. at 1.
A. Increasing (or Decreasing) the Number of Justices

Although not considered a true reform proposal, and instead viewed as more of a political “smash and grab,” increasing (or decreasing) the number of Justices on the Supreme Court is, in legal terms, a relatively simple way in which the Court’s composition could be altered by statute. Increasing or decreasing the number of Justices is mentioned briefly here because many of the reform proposals discussed in this Note combine this feature with some other type of reform.

Increasing the number of Justices is often referred to by the pejorative term “court packing.” As already discussed, the number of Justices is not set in the Constitution. Congress is vested with the authority to set the number of Justices, but nine Justices has become the norm. To increase (or decrease) the number of Justices, Congress may simply pass a statute to that effect. In recent years, there have been increasing calls from progressives to “pack the Court” if the opportunity ever presented itself—in order to, in their view, effectively neutralize the current Court’s conservative majority. While theoretically straightforward to achieve, and certainly not requiring a constitutional amendment, increasing or decreasing the number of Justices would almost certainly delegitimize the Court. It represents the controlling political party adding one or more Justices to the Court in an at-

62 See COURT PACKING, supra note 58, at 4.
63 See infra Sections II.C.1 (discussing a proposal involving a decrease in the number of Justices to eight), II.C.2 (discussing a proposal involving an increase in the number of Justices to fifteen), II.D.1 (discussing a proposal involving an increase in the number of Justices to fifteen but utilizing three Justice panels to hear cases), II.D.3 (discussing a proposal involving an increase in the number of Justices to potentially in excess of one hundred Justices); see also infra Section II.B (discussing term-limit proposals involving fixing the number of Justices at nine by constitutional amendment).
64 COURT PACKING, supra note 58, at 1.
65 Id. at 2.
66 Id.
67 Id. at 4 (“[A]ny proposal that would immediately decrease the size of the Court or otherwise remove a sitting Justice from the bench would 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.”).
68 Id.
69 Siegel, supra note 61, at 73, 78; Phillips, supra note 61.
70 Siegel, supra note 61, at 87–92.
tempt to make the Court, as a whole, more partial to its side of the political aisle.\textsuperscript{71}

If the goal is to improve the sociological legitimacy of the Court, simply increasing or decreasing the number of Justices cannot be considered an actual “reform” proposal. Such an approach would be unlikely to receive widespread bipartisan praise unless it were coupled with some other reform feature. To reiterate, increasing or decreasing the number of Justices is mentioned here solely because many of the reform proposals discussed in this Note incorporate this feature into their proposals.

B. Term Limits

Two decades ago, in a Washington Post article, Professors Akhil Reed Amar and Steven G. Calabresi explained their idea of introducing term limits for the Justices of the Supreme Court.\textsuperscript{72} The short article questioned the wisdom of judicial life tenure.\textsuperscript{73} The article criticized Justices’ politically timing their retirements,\textsuperscript{74} as well as the Court’s seniority system, which incentivizes the Justices to “stay past their prime.”\textsuperscript{75} They drew attention to the fact that “[m]ost state and foreign constitutions prescribe a fixed number of years in office or a mandatory retirement age or both.”\textsuperscript{76} The United States bucks the trend as far as judicial term limits are concerned.\textsuperscript{77}

Amar and Calabresi’s original proposal was for “Congress and the president [to] move future justices toward a tradition of fixed terms.”\textsuperscript{78} That solution, they suggested, could be implemented without the need to amend the Constitution.\textsuperscript{79} For example, judges would sit on the Supreme Court “by designation” and then, after their term, they would serve on a lower federal court, which would not interfere with the life-tenure requirement.\textsuperscript{80} Alter-

\textsuperscript{71} Id. at 91 (“Court-packing is not motivated by genuine good-government reasons, whether sounding in increases in caseload or the creation of new circuits. Rather, the primary purpose of packing the Court is to alter its substantive decision-making all at once by appointing Justices who are likely to cast votes that are aligned with the wishes of the president and Congress.”).


\textsuperscript{73} Id.

\textsuperscript{74} Id.

\textsuperscript{75} Id.

\textsuperscript{76} Id.

\textsuperscript{77} VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 489 (1st ed. 1999).

\textsuperscript{78} Amar & Calabresi, supra note 72.

\textsuperscript{79} Id.

\textsuperscript{80} Id.
natively, nominees could publicly agree to term limits in their Senate confirmation hearings.\textsuperscript{81}

The authors invoked George Washington’s establishment of the presidential two-term limit, a tradition which was eventually codified in a constitutional amendment,\textsuperscript{82} to suggest that the Justices themselves could be the facilitators of reform.\textsuperscript{83} The article suggested that the Justices themselves could similarly codify retirement guidelines or “creat[e] an ethical norm of retirement at certain milestones.”\textsuperscript{84} An obvious flaw with this proposal is that it does not solve the issue of the political timing of retirement because the Justices would not be legally prohibited from retiring from their position on the Supreme Court before the expiry of their term.\textsuperscript{85} The authors suggested that “[s]uch manipulation should be deterred by a general sense of fair play.”\textsuperscript{86} However, some would argue that in recent years neither ethical norms nor “a general sense of fair play” have deterred members of Congress from violating constitutional norms, such as by failing to hold confirmation hearings and votes.\textsuperscript{87} We should not rely on our elected—or our unelected—officials to “do the right thing”; they should be compelled to do so by legal force, not mere political pressure.

Calabresi, along with Professor James Lindgren, finessed the term limit proposal in a 2006 law journal article.\textsuperscript{88} Calabresi and Lindgren’s idea was for each Justice to serve an eighteen-year term.\textsuperscript{89} The terms would be staggered such that, every two years, one of the nine seats of the Court would become vacant and need to be filled.\textsuperscript{90} During each presidential term, there would therefore be two vacant seats to fill.\textsuperscript{91} Calabresi and Lindgren proposed that the terms be structured such that Justice turnover occurs during the first and third years of the President’s four-year term.\textsuperscript{92} Each Justice would be limited to a single term.\textsuperscript{93}

Although Amar and Calabresi originally implied that imposing term limits on the Justices would be achievable without a constitutional amend-

\textsuperscript{81} Id.
\textsuperscript{82} U.S. CONST. amend. XXII, § 1.
\textsuperscript{83} Amar & Calabresi, supra note 72.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} See supra INTRODUCTION.
\textsuperscript{88} Calabresi & Lindgren, supra note 24, at 824.
\textsuperscript{89} Id.
\textsuperscript{90} Id. This proposal relies on there being nine Justices. For example, if the number of Justices were instead increased to fifteen by Congress, the core features of the proposal would break down or would be frustrated. Id. at 824 n.174.
\textsuperscript{91} See id. at 824–25.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 825 (“[N]o Justice could be reappointed to a second term.”).
Calabresi and Lindgren’s most recent proposal would use a constitutional amendment because they believed that the two statutory alternatives that they considered would be unconstitutional. Under this approach, retired Justices would still be permitted to serve on another lower Article III court for life, if they so wished.

Those two statutory alternatives were the Calabresi-Lindgren Proposal and the Carrington-Cramton Proposal. The Calabresi-Lindgren Proposal would involve designating a lower federal judge to the Supreme Court for a fixed term of eighteen years. Essentially, a Justice (judge) would enjoy life tenure, not on the Supreme Court, but as a member of the federal judiciary. This approach would resemble the practices of circuit riding and of allowing federal judges to sit on other lower federal courts by designation.

Under the Carrington-Cramton Proposal, the number of Justices would be constitutionally fixed at nine. In each two-year session of Congress, one new Justice would be appointed. The Supreme Court would consist of only the nine most junior commissioned Justices. The more senior Justices would be eligible to sit on lower federal courts by designation.

Calabresi and Lindgren thought that both statutory proposals would be unconstitutional primarily because “the Appointments Clause specifically contemplates a separate office of Supreme Court Justice.” Therefore, constitutionally, life tenure seemingly applies to the specific office of "Supreme

94 Amar & Calabresi, supra note 72.
95 Calabresi & Lindgren, supra note 24, at 855 (“[W]e consider two statutory proposals: one of our own devising and one by Professors Paul Carrington and Roger Cramton. Because we conclude both are unconstitutional, we believe instituting term limits will require a constitutional amendment . . . .”). See generally 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 (1986) (presenting the first term limits proposal and advocating for its implementation by constitutional amendment).
96 See Calabresi & Lindgren, supra note 24, at 855; see also Cramton, supra note 38, at 1313 (discussing life tenure).
97 Calabresi & Lindgren, supra note 24, at 855, 858.
98 Id. at 856.
99 Id. at 855–56.
100 Id. at 856–58 (“[L]ower federal court judges would ‘ride’ temporarily for eighteen years on the Supreme Court, in exactly inverse fashion to the way Supreme Court Justices originally rode on the circuit courts. Moreover, the act of designating a lower court judge to ride on the Supreme Court for eighteen years would be by a separate act of presidential nomination and senatorial confirmation instead of by the order of a chief judge or the Chief Justice.”).
101 Id. at 858.
102 Id.
103 Id.
104 Id.
105 Id. at 859.
Court Justice,” not the more general office of “member of the federal judiciary.”

Notwithstanding the issues surrounding whether a constitutional amendment is required, or whether a statutory provision would suffice, imposing term limits on the Justices may provide many advantages. Calabresi and Lindgren claimed that their proposal would “guarantee Justices a term longer than the historical average,” would “likely lead in practice to younger average retirement age for Justices,” and would avoid “the problem of hot spots [of multiple vacancies] and the increasingly irregular timing of vacancies.” It is difficult to argue with the claim that the proposal “would significantly further the goal of preventing mentally or physically [infirm] Justices from serving on the Court.” It might also “reduce the incentive Presidents currently have to appoint the youngest confirmable candidate.”

Of course, many issues would remain, but the proposal, according to its proponents, would improve the Court’s legitimacy “by providing for regular updating of the Court’s membership through the appointment process.” Arguably, it “would reinforce the one formal check on the Court’s understanding of the Constitution that actually works.”

One of the more controversial claims that Calabresi and Lindgren made was that “popular understanding of the Constitution’s meaning ought to guide the Supreme Court’s understanding more directly” because “the general public is more likely than are nine life-tenured lawyers to interpret the Constitution in a way that is faithful to its text and history.” They also made another controversial claim: the proposal “would greatly reduce the intensity of partisan warfare in the confirmation process.”

Some commentators take issue with these claims. Professor Ward Farnsworth is highly critical of the proposal as well as the arguments and

106 See id. at 861. Calabresi and Lindgren do not believe that someone who has been confirmed to a lower federal court judgeship can be authorized to sit by designation on the Supreme Court for eighteen years, since the duty of serving for eighteen years on the Supreme Court would not be germane to the job of being a lower federal court judge.

Id.

107 Id. 831–42.

108 Id. at 831. According to Calabresi and Lindgren, the average tenure of all Justices between 1789 and 2006 was 16.2 years. Id.

109 Id. at 832.

110 Id.

111 Id. at 838.

112 Id. at 836.

113 Id. at 833.

114 Id.

115 Id.

116 Id. at 835.
evidence put forward by Calebresi and Lindgren.\textsuperscript{117} In response to the proposal, Farnsworth pointed to the lack of (or weak) empirical evidence for phenomena such as ideological drift\textsuperscript{118} and the increased rancor surrounding confirmation battles.\textsuperscript{119} Farnsworth found unpersuasive the argument that the public are the best interpreters of the Constitution.\textsuperscript{120} Farnsworth explained that “I don’t think the voting public has much interest in originalism or any other theory of interpretation; they do care about the results the Court reaches, but interpretive theories are of interest only as means to those ends.”\textsuperscript{121}

Farnsworth presented some strong arguments against term limits.\textsuperscript{122} For example, he suggested that “fixed terms would make two nominating chances a guaranteed spoil of every presidential election.”\textsuperscript{123} This could lead, for example, to a practice of presidential candidates declaring which two individuals they plan to nominate if they were to be elected President, and hence increase the politicization of the Supreme Court during elections.\textsuperscript{124}

Professor David Stras and Ryan Scott are ardent defenders of life tenure who, like Farnsworth, take issue with Calabresi and Lindgren’s proposal.\textsuperscript{125} Instead of term limits, they have proposed what they call a “golden parachute”—a package of retirement incentives to encourage elderly Justices, who are beginning to struggle intellectually, to retire in a timely manner.\textsuperscript{126} In response to Calabresi and Lindgren’s proposal, Stras and Scott challenged the underlying empirical claim that there has been a dramatic and unprecedented increase in average tenure on the Supreme Court in recent decades.\textsuperscript{127}

There are several other potential disadvantages to the term limit proposal, which Calabresi and Lindgren themselves acknowledged and attempted to neutralize, including impairing judicial independence,\textsuperscript{128} increas-

\textsuperscript{118} Id. at 882.
\textsuperscript{119} Id. at 883–84.
\textsuperscript{120} Id. at 885.
\textsuperscript{121} Id.
\textsuperscript{122} See id. at 885–86.
\textsuperscript{123} Id. at 886.
\textsuperscript{124} But see id. (“A presidential candidate’s likely choice of Supreme Court appointments tends to be low on the list of things that most voters use as a basis for decision, ranking far behind considerations of economic and foreign policy.”).
\textsuperscript{127} Stras & Scott, supra note 125, at 799. In particular, Stras and Scott alleged that Calabresi and Lindgren’s data suffers from “period-selection” and “date-of-observation” problems. Id. They also took issue with the regression models used. Id. at 814.
\textsuperscript{128} Calabresi & Lindgren, supra note 24, at 842.
ing the likelihood of Supreme Court capture, \(^{129}\) forcing the Justices to become more activist, \(^{130}\) eroding the prestige of the Court by producing constant turnover, \(^{131}\) making the Court more obviously responsive to public opinion, \(^{132}\) and risking the promotion of more strategic behavior by senators. \(^{133}\)

In spite of the potential drawbacks, this term limit proposal has gained longstanding bipartisan support relative to other reform proposals and is now deemed by some to be one of the proposals most likely to be successful-ly implemented. \(^{134}\) Although Calabresi and Lindgren cautioned that a statutory approach would likely be unconstitutional, a Bill seeking to implement eighteen-year term limits was introduced in the House in 2021. \(^{135}\) The Bill was sponsored by a California Democrat and co-sponsored by seventeen other Democrats. \(^{136}\) In addition to proposing term limits, the Bill also included a provision that was seemingly directed at preventing the Senate from thwarting future Presidential attempts to nominate new Justices by merely failing to hold hearings and votes\(^ {137}\)—as it did under Mitch McConnell's leadership. \(^{138}\) This addition would have been unconstitutional—such a change would require a constitutional amendment. \(^{139}\) By the end of the session, the Bill had been referred to the House Committee on the Judiciary and the Subcommittee on Courts, Intellectual Property, and the In-

\(^{129}\) Id. at 845.

\(^{130}\) Id. at 849.

\(^{131}\) Id. at 851.

\(^{132}\) Id.

\(^{133}\) Id. at 853.

\(^{134}\) Fisher, supra note 22.


\(^{137}\) Supreme Court Term Limits and Regular Appointments Act of 2021, H.R. 5140, 117th Cong. § 9 (2021) ("Waiver of advice and consent authority[.] If the Senate does not exercise its advice and consent authority with respect to a President’s nominee to the Supreme Court within 120 days after the nomination, the Senate shall be deemed to have waived its advice and consent authority with respect to such nominee, and the nominee shall be seated as a Justice of the Supreme Court.").

\(^{138}\) Grove, supra note 15.

\(^{139}\) Section 9 of the Act would have been unconstitutional because it would have violated Article II, Section 2, Clause 2, of the Constitution. See infra Part I. In a situation in which the President and Senate are politically aligned, the Senate could have simply decided not to hold any hearings or votes, thereby “waiving” advice and consent—the Senate’s constitutional prerogative—and seating a Justice without exposing that nominee to proper Senate scrutiny. Notwithstanding the constitutional problems, the Bill ought to have included a provision limiting Section 9 to situations in which the President and Senate majority are not politically aligned.
Similarly, in the summer of 2022, a related Bill was introduced in the Senate, which was sponsored by a Rhode Island Democrat and cosponsored by five other Democrats. By the end of the session, the Bill had been read twice and referred to the Committee on the Judiciary. In short, despite there being relatively more support for term limits than other reform proposals, recent attempts to introduce term limits—by statute—have failed.

Introducing term limits would require a constitutional amendment. Term limits could impair judicial independence, increase the politicization of the Court, promote Court capture, and ultimately decrease—rather than increase or merely stabilize—the Court’s sociological legitimacy.

C. Partisan-Based Seat Allocation

Unlike term limits, some reform proposals address the perceived partisan imbalance of the Court or the potential for such an imbalance. This Section discusses two such proposals. Under the first proposal, discussed in Section II.C.1, the Court would have an even number of seats, with half allocated to Democrat Justices and half to Republican Justices. The second proposal, discussed in Section II.C.2, is similar in some respects to the first. However, under the second proposal, the number of seats would instead be increased to a higher odd number, with a third allocated to Democrat Justices, a third to Republican Justices; those first two-thirds of the Justices would then themselves allocate the remaining third of the seats. Like term limits, and despite their proponents’ claims, both seat-allocation proposals would require a constitutional amendment.

1. An Eight-Justice Partisan-Balanced Bench

Professor Eric Segall has proposed tackling the Court’s perceived partisan problem head on. Segall proposed reducing the number of Justices to eight and then allocating four seats to “Republican” Justices and four to “Democrat” Justices. Segall argued that this approach could be imple-
mented without a constitutional amendment. He claimed that “[o]ne way to effectuate this balance would be for the entire Congress to pass a statute to that effect.” However, Segall acknowledged that a “potentially easier method . . . would be for the Senate to pass an internal rule to that effect.”

After only a cursory glance at his proposal, one doubts whether Segall was attempting to put forward a serious and practical proposal for reforming the Supreme Court or simply engaging in a purely academic exercise. According to Segall, his burden was “not to demonstrate that this proposal is perfect or even very good.” Instead, he thought that his job was “to show that an evenly divided Supreme Court would result in an institution that significantly improves our constitutional democracy when compared to our current Court.”

Segall’s proposal would arguably create problems that are more serious for our constitutional democracy than the ones the proposal would solve. Segall claimed that, in contrast to Calabresi and Lindgren’s proposal, his proposal “does not raise constitutional concerns, and its implementation would be relatively easy.” That claim appears to be false, at least as it relates to raising no constitutional concerns. Segall’s proposal, despite his claims to the contrary, would require a constitutional amendment.

The mechanisms Segall proposes using to implement his proposal present the most serious constitutional and legitimacy concerns. Segall suggested that the requirement for a balance of four Republican Justices and four Democratic Justices could be achieved by statute. This approach is at odds with the presidential prerogative of nomination, and likely at odds with the senatorial prerogative of confirmation under Article II. Segall stated that “[e]ven if Congress enacted such a bi-partisan requirement for the Supreme Court, the President could nominate whomever he wanted pursuant to his constitutional prerogatives.” He continued by stating that “[p]ursuant to its own prerogatives, however, the Senate could refuse to confirm a nominee who would disrupt the balance on the Court.”

Segall therefore undermined his own proposal by declaring that, constitutionally, neither the President nor the Senate would be bound by the legislation. In other words, the legislation would be either legally futile or un-

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146 Id.
147 Id.
148 Id. at 554.
149 Id. at 551 (emphasis added).
150 Id.
151 Id. at 556.
152 Id. at 553.
153 See supra Part I; see also U.S. CONST. art. II, § 2, cl. 2.
154 Segall, supra note 25, at 554.
155 Id.
constitutional. Any constraints that would be imposed on the President or Senate would be effectively political constraints—not legal constraints.

Because of its dubious constitutionality, Segall’s proposal could undermine the “public accountability” rationale behind the Appointments Clause. On the one hand, if the President were to abide by the legislation, the President would be improperly delegating some of his or her decision-making power to Congress by respecting the legislation, but the President may nonetheless be viewed by the electorate as solely responsible for the appointment decision. On the other hand, if the President were to ignore the legislation, the President may appear to be acting beyond the scope of his or her authority (or abusing its power) in the eyes of the electorate by failing to follow the law. Ideally, and by Constitutional design, it should be clear to voters which political entity—the President or Congress—is effectively making such significant decisions.

Alternatively, Segall suggested that the Senate could simply pass an internal rule to implement the proposal. He acknowledged that this approach would not be binding on future Senates. That is, of course, a major flaw with the proposal. This approach would be more vulnerable to subsequent amendment and repeal than a federal statute because the Senate may act unilaterally to effect a change. Segall implied that there is little reason to believe that a future Senate would amend its internal rule because the Senate has followed some internal rules, such as those relating to internal procedural matters like the filibuster, since the nineteenth century. However, Segall presented no evidence of the Senate respecting a rule affecting another branch of government—a rule that is more substantive than procedural in nature. There is no reason to think that internal Senate rules are suitable for implementing this type of reform.

Like the proposed mechanisms for implementation, the substance of Segall’s proposal raises concerns. One of the most obvious concerns with its substance is that it would expressly entrench the nation’s two-party political system—in Segall’s words, it may “further ensconce the two-party system

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156 See Edmond v. United States, 520 U.S. 651, 660 (1997) (“By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one.” (emphasis added)).
157 See id.
158 See id.
159 See id.; see also Buckley v. Valeo, 424 U.S. 1, 120–23 (1976).
160 Segall, supra note 25, at 554.
161 Id.
163 Segall, supra note 25, at 554–55.
164 See id.
into our government."\textsuperscript{165} And, of course, it would also “marginalize independents.”\textsuperscript{166} True, the current system effectively marginalizes independents \textit{in fact} because in modern times the President has been a member of either the Democratic or the Republican party, and the Senate has been controlled by one of those parties.\textsuperscript{167} However, Segall’s proposal would convert this de facto characteristic into a de jure one. Segall attempted to neutralize this concern by explaining that it is impossible to point to any modern Justice who was truly independent before taking office.\textsuperscript{168}

Notwithstanding that originalism is a dubious theory of constitutional interpretation,\textsuperscript{169} the Framers would have likely thought that enshrining the names of political parties—“Democrat” and “Republican”—in legislation relating to the composition of the Supreme Court would be incompatible with our constitutional democracy.\textsuperscript{170} At the time of the Founding of the Republic, the Framers feared a two-party system.\textsuperscript{171} Explicitly incorporating the names of political parties in legislation concerning membership of the Supreme Court in an effort to counteract political polarization would, therefore, have deeply concerned the Framers.

A balance of four “Democrat” judges and four “Republican” judges would not necessarily create a generally “balanced” Court.\textsuperscript{172} Segall concealed that his “proposal cannot guarantee [ideological balance], as political party affiliation does not always align with liberal or conservative ideology.”\textsuperscript{173} Party affiliation is not always a useful or reliable proxy for a particular type of judicial philosophy.\textsuperscript{174} Without considering, for example, a prospective Justice’s preferred theory of constitutional interpretation or preferred mo-

\textsuperscript{165} Id. at 571.

\textsuperscript{166} Id.


\textsuperscript{168} Segall, \textit{supra} note 25, at 572.


\textsuperscript{170} See Lee Drutman, \textit{America Is Now the Divided Republic the Framers Feared}, \textit{Atlantic} (Jan. 2, 2020), https://www.theatlantic.com/ideas/archive/2020/01/two-party-system-broke-constitution/604213/ [https://perma.cc/2FYD-8M5E] (explaining that John Adams, Washington’s successor worried that “a division of the republic into two great parties . . . is to be dreaded as the great political evil.”).

\textsuperscript{171} See \textit{id}.

\textsuperscript{172} Segall, \textit{supra} note 25, at 561, 571–72.

\textsuperscript{173} Id. at 561.

\textsuperscript{174} Id. at 572 (“Political party affiliation has not always been a reliable proxy for a nominee’s liberal, conservative, or moderate views.”).
The modalities of constitutional argument, the labels “Democrat” and “Republican” are somewhat crude and static.

The requirement for party affiliation could create an avenue for gamesmanship. Segall put forward proposals for ensuring bona fide political-party affiliations, including durational requirements for would-be candidates who have recently switched party affiliations. It is unclear how successful these safeguards would be at preventing abuses by each political party. If party registration and length of registration are to determine party affiliation, it seems possible that this could be exploited by either party and incentivize gamesmanship. Legislation that requires only party affiliation—not inherent characteristics of or any commitments by a candidate—is fundamentally flawed and open to abuse. Essentially, a self-imposed label would determine eligibility for office. Determining a candidate’s “true” party affiliation is one of the challenges with Segall’s proposal. Ultimately, Segall’s proposal would rely heavily on the democratic process to force the relevant players to act in good faith and in accordance with newly-established norms—the proposed legislation itself would not do that.

Segall also gave short shrift to the difficulties associated with a situation in which a President of one party must nominate a candidate from the opposing party. This problem would be compounded when the Senate is aligned with the President because, despite Segall’s hopes of “coordination between the two parties before the actual selection is made,” none would actually be required. Moderate candidates might be selected when the President and Senate are not aligned. At first glance, this appears to be advantageous. However, a moderate Justice could disrupt the four-four balance by shifting the Court out of the desired equilibrium state and would provide an advantage to one political side over the other. This could also


176 See, e.g., Farnsworth, supra note 117, at 882 (explaining that “Harry Blackmun and John Paul Stevens [were] both Republican appointees who seemed to move to the left during their careers”).

177 Segall, supra note 25, at 554–55.

178 See, e.g., id. at 555 (“The political incentives for the Senate’s majority party to confirm a Supreme Court nominee of the opposing party are similar to the incentives that have supported the filibuster for all this time—the majority party knows that someday it will be the minority.”).

179 Id. at 563.

180 But see id. at 564.

181 Id. at 563.

182 Id. (suggesting that this is an “additional benefit”); see also infra Section II.D.2 (discussing moderate justices).

183 The polarization would effectively be 3-4, with an additional moderate Justice as a swing voter. Assuming arguendo that the swing voter sided with each side with equal
lead to a “What-Will-Justice-Kennedy-Do?” type problem and give great power to a single centrist Justice regarding the making of important constitutional law.\textsuperscript{184} Even without the presence of a moderate Justice, four-four ties, which would likely be common, would lead to the effective passive affirmance of lower courts’ rulings because of the failure to gain a majority. This could reduce the judicial oversight of lower courts by the Supreme Court.\textsuperscript{185}

Segall’s proposal may not survive a challenge under the First Amendment. The First Amendment guarantees the freedom of association.\textsuperscript{186} Forcing prospective Justices to join, or to be affiliated with, particular political organizations to be eligible for consideration for public office may violate their rights to freedom of association.

The Third Circuit recently had to decide whether a similar provision of the Delaware Constitution violated the First Amendment’s right to freedom of association.\textsuperscript{187} The Delaware Constitution includes a provision that “requi\textsuperscript{es} that appointments to Delaware’s major courts reflect a partisan balance.”\textsuperscript{188} For example, one provision states that “three of the five Justices of the [Delaware] Supreme Court . . . shall be of one major political party, and two of said Justices shall be of the other major political party”\textsuperscript{189}—that is, three of the Justices must be either all Democrat or all Republican, and the other two Justices must both be from the other political party (either Demo-

\begin{itemize}
\item<1> Segall’s proposal may not survive a challenge under the First Amendment. The First Amendment guarantees the freedom of association.\textsuperscript{186}
\item<2> For a discussion of the “What-Will-Justice-Kennedy-Do?” problem, see Elizabeth Slattery, \textit{Is Kennedy Still the Swing Vote on the Supreme Court?}, HERITAGE FOUND. (June 26, 2015), http://www.heritage.org/courts/commentary/kennedy-still-the-swing-vote-the-supreme-court [https://perma.cc/4RQQ-YJRM] (“For many of the highest-profile U.S. Supreme Court cases, it all comes down to one man. Though only 20 percent of cases each term are decided by one vote and 65 percent in the last term were unanimous decisions, litigants often craft arguments aimed at capturing his vote and pander to him at oral argument. Anthony Kennedy runs the court, according to conventional wisdom.”).
\item<5> Carney, 141 S. Ct. at 496–97.
\item<6> \textsc{Del. Const.} art. IV, § 3.
\end{itemize}
The Third Circuit held that the provision of the Delaware Constitution did violate the First Amendment. However, the United States Supreme Court reversed, declaring that the attorney who challenged the provision lacked Article III standing to bring the suit because he had not shown that he was “able and ready” to apply for a judicial vacancy.

That provision of the Delaware Constitution is, of course, subject to the First Amendment through the operation the Supremacy Clause of the United States Constitution. However, if the United States Constitution were amended to include a similar provision related to the United States Supreme Court, the amendment could be drafted in such a way as to remove it from the purview of the First Amendment. These First Amendment concerns should further caution against any attempt to implement Segall’s proposal, especially without a constitutional amendment.

There are, of course, many potential advantages to Segall’s proposal, including limiting the Court’s ability to “overturn decisions made by elected government officials unless there are substantial reasons for that reversal”; promoting bi-partisan agreement which would “serve[] the interests of consistency, fairness, and the core rule of law principle that similarly situated litigants should be treated similarly”; and promoting “more consensus-driven decision-making and narrower opinions by the Justices, who would have to be more modest and cautious.”

None of these advantages, however, outweigh the numerous pitfalls associated with Segall’s proposal. Segall’s proposal would require a constitutional amendment and would be unlikely to improve the Court’s sociological legitimacy.

2. A Fifteen-Justice “Balanced Bench”

Just over a year after Segall’s proposal appeared in a law review article, a somewhat-related proposal appeared in the Yale Law Journal. This newer proposal has been viewed as “a twist on the various ‘court-packing’ pro-

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190 Adams, 914 F.3d at 829, 832 (“[T]he provision . . . effectively limits service on state courts to members of the Democratic and Republican parties.”).
191 Id. at 843.
192 Carney, 141 S. Ct. at 498, 503.
193 U.S. CONST. art. VI, cl. 2.
194 U.S. CONST. art. V. The only restriction on amending the Constitution is that it may not be amended in a way that deprives States of “equal Suffrage in the Senate.” Id.
195 Segall, supra note 25, at 561.
196 Id. at 562.
197 Id. at 563.
posals for the Supreme Court that have been bandied about for decades.” 199
This proposal, termed the “Balanced Bench,” was offered by Professors Epps and Sitaraman. 200 While similar to Segall’s proposal in some respects, there are several significant differences, although both proposals are generally aimed at solving the same problem. 201

Under Epps and Sitaraman’s “Balanced Bench” proposal, the number of Justices would be initially increased to ten. 202 “Five [of these Justices] would be affiliated with the Democratic Party, and five with the Republican Party.” 203 Once these first ten Justices are established, they would then select five additional Justices to sit on the Court for one-year terms. 204 These additional five Justices would be “chosen from current circuit (or possibly district) court judges.” 205 The selection would need to be unanimous “or at least by a strong supermajority requirement.” 206 The five “independent Justices would serve for one-year, nonrenewable terms.” 207 The Supreme Court would lack a quorum to hear cases if the ten party-affiliated Justices could not agree on their selection of the additional five Justices. 208

Democrat Pete Buttigieg championed the Balanced Bench proposal during his 2020 presidential campaign. 209 He committed that “structural democratic reform”—including implementing the proposal—“would be his top priority” if he were elected President. 210 Democrat Beto O’Rourke also suggested that the proposal is one that “we should explore.” 211

Although Epps and Sitaraman insisted that any reform proposal “must be capable of implementation via statute, given the near impossibility of a constitutional amendment in an age of severe polarization,” 212 they failed to carefully detail the appropriate statutory or rule-based approach for implementing their proposal. 213 As already discussed, it is constitutionally permis-

200 Epps & Sitaraman, supra note 198, at 193.
201 Id. (“The idea behind [the Balanced Bench proposal] is that it provides a mechanism to restore the notion that Supreme Court Justices are deciding questions of law, in ways that don’t invariably line up with their political preferences in the biggest cases.”).
202 Id.
203 Id.
204 Id.
205 Id.
206 Id.
207 Id. at 195.
208 Id. at 193.
209 Lederman, supra note 199.
210 Id.
211 Id.
212 Epps & Sitaraman, supra note 198, at 152.
213 See id. at 193–200 (showing no such articulation of a statutory or rule-based proposal).
sible for Congress to alter the number of Justices by statute.\textsuperscript{214} Congress may not however, without a constitutional amendment, interfere with the presidential and senatorial prerogatives of nomination and confirmation of the Justices,\textsuperscript{215} or with the life tenure of the Justices.\textsuperscript{216} The Balanced Bench proposal suffers from many of the problems that plague other proposals.\textsuperscript{217}

With Segall’s proposal as a reference point, it is easy to see that the Balanced Bench proposal is doubly problematic with regards to the constitutionally bestowed prerogatives under the Appointments Clause. First, as with Segall’s proposal, the presidential prerogative of nomination would be infringed because the President would be forced to nominate Justices affiliated with particular political parties.\textsuperscript{218} Second, which is unique to the Balanced Bench proposal, the selection of the five non-affiliated Justices would not only infringe—but would completely violate—both the relevant presidential and senatorial prerogatives because the other ten Justices would have plenary authority over appointment of the five non-affiliated Justices.\textsuperscript{219} In a sense, the legislature would be attempting to improperly delegate the constitutional powers of both the executive and legislative branches to the judiciary, creating separation-of-powers concerns.\textsuperscript{220}

Epps and Sitaraman themselves acknowledged that their proposal “seems unconstitutional” because Supreme Court Justices must be appointed in accordance with the Appointments Clause.\textsuperscript{221} Epps and Sitaraman attempted to escape the constraints imposed by the Appointments Clause by explaining that “existing law and practice permit significant flexibility in the

\textsuperscript{214} See supra Part I.
\textsuperscript{215} See supra Part I.
\textsuperscript{216} See supra Part I, Section II.B.
\textsuperscript{217} See supra Sections II.B, II.C.1 (discussing Segall’s proposal). One potential improvement of Epps and Sitaraman’s proposal over Segall’s proposal vis-à-vis constitutionality is that, arguably, the First Amendment—freedom of association—concerns that plagued Segall’s proposal are at least less severe with this proposal because some candidates would not be required to affiliate with any particular political party and could be completely unaffiliated to be appointed. See supra Section II.C.1. Put simply, it would be permissible for some “Independents” to be appointed to the Court under Epps and Sitaraman’s proposal but not under Segall’s proposal.
\textsuperscript{218} See Epps & Sitaraman, supra note 198, at 202 (“Would requiring that the President appoint Justices of particular parties unconstitutionally limit her appointment power or otherwise violate the Constitution?”).
\textsuperscript{219} See id. at 200.
\textsuperscript{220} See Buckley v. Valeo, 424 U.S. 1, 120–24 (1976); see also Edmond v. United States, 520 U.S. 651, 659 (1997). See generally 16A Am. Jur. 2d Const. L. § 308 (“The separation of powers doctrine encompasses two fundamental prohibitions; the first is that no branch may encroach upon the powers of another, and the second is that no branch may delegate to another branch its constitutionally assigned authority.”).
\textsuperscript{221} See Epps & Sitaraman, supra note 198, at 200 (“Under our proposal, some of the Justices would be selected by other Justices, an arrangement that is permissible for ‘inferior Officers’ but not for so-called ‘principal’ officers—and explicitly not for ‘Judges of the supreme Court.’”).
movement of Article III judges within the federal judiciary.” As evidence of their proposal’s potential constitutional permissibility, they highlighted the fact that federal district court judges and federal circuit court judges regularly sit on other courts by designation, and that retired Supreme Court Justices regularly sit on federal circuit courts by designation. They also pointed out that judges of the Foreign Intelligence Surveillance Court (“FISC”), and of an appellate court that reviews its decisions, may be appointed exclusively by Justices of the Supreme Court.

Although Epps and Sitaraman acknowledge that Supreme Court Justices must be nominated by the President and confirmed by the Senate, they essentially disregard that requirement and the interaction between Articles II and III of the Constitution. Article III, Section 1, of the Constitution, mandates that “[t]he 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”—that is, Congress has discretion to create lower Article III courts. Article II provides that the President shall nominate, with the Senate’s advice and consent,

Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

In short, Congress may decide that judges of lower courts—if they qualify as “inferior Officers”—are to be appointed by the courts or heads of departments, without any direct oversight from the President or Senate. Generally, an inferior officer is one “whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”

While some lower court judges may be considered “inferior” officers and therefore may be appointed by courts or department heads, it is clear from the text of Article II that Supreme Court Justices are not inferior officers. Even if the text were not explicit, the Justices’ work is not "directed
and supervised” by anyone—not even the Chief Justice. The lack of oversight of the Justices is intentional and meant to ensure each Justice's independence. It is therefore an inescapable constitutional reality that Justices must be nominated by the President and confirmed by the Senate.

Articles II and III do not prohibit Congress from dictating the relationships between each of the lower federal courts, such as the relationship between the district and circuits courts, or deciding that federal district court judges may sit on federal circuit courts (or vice versa). However, the Constitution implicitly limits Congress' ability to dictate similar relationships between the “one” Supreme Court and a lower federal court. The Constitution itself specifically mandates the creation of a Supreme Court and how its Justices are appointed, while the Constitution merely authorizes Congress to create lower federal courts and gives Congress some discretion to choose how judges of those lower federal courts may be appointed. In that respect, the lower federal courts are fundamentally—and constitutionally—different from the Supreme Court because of these different constitutional mandates. In sum, a Justice appointing another Justice would violate the

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233 See, e.g., Chief Justice: Supreme Court of the United States of America, BRITANNICA, https://www.britannica.com/topic/chief-justice-of-the-Supreme-Court-of-the-United-States [https://perma.cc/X9ST-YV9X] (“The primary functions of the office [of Chief Justice] are to preside over the Supreme Court in its public sessions when the Court is hearing arguments and during its private conferences when it is discussing and deciding cases. Chief justices serve as chair of the Court and have authority to assign the writing of opinions when they are members of the majority; otherwise their powers are the same as those of other Supreme Court justices.” (emphasis added)).

234 See supra Part I (discussing the importance of judicial independence); see also Edmond v. United States, 520 U.S. 651, 663 (1997). Direction and supervision are not the only ways in which judicial independence may be compromised. Recently, Justices Thomas and Alito have been criticized for violating ethics rules by failing to report gifts from wealthy conservative donors and failing to appropriately recuse themselves in certain cases. See Joshua Kaplan et al., Clarence Thomas and the Billionaire, PROPUBLICA (Apr. 6, 2023, 5:00 AM), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/BDN5-KBNM]; see also Jesse Wegman, Does Justice Alito Hear Himself?, N.Y. TIMES (June 22, 2023), https://www.nytimes.com/2023/06/22/opinion/justice-alito-propublica.html [https://perma.cc/9MTW-BM3]. These accusations give the appearance of lack of, or at least partially compromised, judicial independence. Many are therefore calling for ethics reform. See Burgess Everett, Dems Push Forward on Supreme Court Ethics Bill Following Alito Report, POLITICO, https://www.politico.com/news/2023/06/21/durbin-announces-vote-on-supreme-court-ethics-bill-00102935 [https://perma.cc/7NEQ-BTL5] (June 21, 2023, 3:12 PM).

235 U.S. CONST. art. II, § 2, cl. 2.

236 See U.S. CONST. arts. II & III.

237 See U.S. CONST. art. III, § 1.

238 U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. III, § 1.

239 See Epps & Sitaraman, supra note 198, at 202 (“We...note that the Appointments Clause challenge could further be reduced by adopting the strategy [of] formally appoint[ing] all circuit judges as Supreme Court Justices. That...would eliminate the objection that the additional Justices needed to be nominated and confirmed as Justices of the Supreme Court.”).
Appointments Clause of the Constitution and create a separation-of-powers problem.

In addition to these concerns, the proposal raises two other concerns. First, although Congress may set quorum requirements, the quorum requirement of Epps and Sitaraman’s proposal could create another separation-of-powers problem: it would represent an attempt by Congress to suspend the Court’s function—by preventing it from hearing cases—unless and until the Court acquiesces in Congress’ unconstitutional scheme. While Congress may strip the Court of jurisdiction in certain kinds of cases, doing so is such a coercive manner—by effectively conditioning jurisdiction on the Justices’ willingness to act in a manner that would violate the Appointments Clause—is likely constitutionally impermissible. Second, for the same reasons discussed in Section II.B, introducing “one-year” terms for the five so-called independent Justices would violate the Good Behavior Clause and the life-tenure requirement.

In sum, both Epps and Sitaraman’s and Segall’s seat-allocation proposals are constitutionally problematic and would likely not improve the Court’s legitimacy.

D. Panels

Some composition-based reform proposals seek to mitigate the effects of the Court’s partisan imbalance using panels—instead of the full Court—to hear and decide cases. These proposals would effectively modify the Court’s composition on a case-by-case basis. This Section has three subsections. Section II.D.1 introduces the idea of using panels with an expanded Court. Section II.D.2 discusses and evaluates a methodology for selecting panels of a nine-Justice Court that seeks to mitigate against the partisan

240 28 U.S.C § 1 (“The Supreme Court . . . shall consist of [nine Justices], any six of whom shall constitute a quorum.” (emphasis added)).

241 Generally, Congress may strip the Supreme Court of appellate jurisdiction. U.S. Const. art. III, § 2, cl. 2 (“[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” (emphasis added)). For a discussion of jurisdiction stripping as a reform proposal, see Doerfler & Moyn, supra note 29, at 1756–57.

242 See, e.g., Humphrey’s Ex’r v. United States, 295 U.S. 602, 629 (1935) (“The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question.” (emphasis added)).

243 See supra Part I, Section II.B.

preferences of the individual Justices. Section II.D.3 discusses and evaluates the so-called “Supreme Court Lottery” proposal, in which rotating, nine-Judge panels of the federal Courts of Appeals would form the Supreme Court. As with many other proposals, these panel-based reform proposals are constitutionally or otherwise problematic.

1. Three-Judge Panels of a Fifteen-Justice Bench

In an attempt to address the concern that the Supreme Court decides too few cases, Professors Tracey George and Chris Guthrie have argued that “Congress should remake the Supreme Court in the U.S. courts’ of appeals image.”245 Although it does not address the Court’s political-polarization problem, this proposal is discussed here simply because it is an illustrative panel proposal. Under their proposal, Congress would first increase the number of Justices on the Supreme Court.246 The recommended expansion is to fifteen Justices.247 Congress would then establish “panel decision-making” as the Court’s “default mode” of decision-making,248 with George and Guthrie endorsing three-judge panels.249 The panels would be randomly assigned.250 Finally, Congress would adopt an en banc procedure for selected cases,251 with all fifteen Justices reviewing only a “handful of important cases.”252 Some scholars agreed that basic panel-based reform proposals could be implemented by statute.253

Although the originators of this proposal were not necessarily attempting to address the increased politicization of the Supreme Court,254 the proposal could nonetheless weaken the influence of individual justices—each with a particular partisanship—because of the increased number of Justices and limitations placed on en banc review.255 But, for important constitutional cases involving abortion, affirmative action, and religious freedoms, it seems likely that an ideological supermajority would utilize en banc review to prevail.

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245 Tracey E. George & Chris Guthrie, Remaking the United States Supreme Court in the Courts’ of Appeals Image, 58 DUKE L.J. 1439, 1454 (2009).
246 Id.
247 Id. at 1457.
248 Id. at 1454.
249 Id. at 1459.
250 See id. at 1462.
251 Id. at 1454.
252 Id. at 1467, 1468 (“The statutory authorization should direct the Court to sit en banc to resolve challenges to the constitutionality of federal statutes, to overturn Court precedent, and to answer other questions of exceptional importance.”).
253 See, e.g., Jacobi & Sag, supra note 244.
254 See George & Guthrie, supra note 245, at 1442 (arguing that because “the current Supreme Court decides only a trickle of cases[,] . . . Congress should expand the Court’s decisionmaking capacity.”).
255 See id. at 1467.
Generally, however, if the goal is to reduce the politicization of the Court, this proposal is problematic. First, the initial “Court-Packing” phase would likely be highly politicized because, for example, the sitting President would be required to nominate (and the Senate would be required to confirm) six new Justices to arrive at the new total of fifteen. Second, if the Supreme Court has discretion to hear cases en banc, an ideological supermajority of the Justices would likely exercise that discretion for important constitutional cases involving, for example, abortion rights, affirmation action, and religious freedoms, in order to prevail. It is arguably the decisions originating from these types of cases that spur the of the most calls for reform. Third, if the panels are randomly assigned, in some instances, the panels would be strongly aligned with a particular political party.

Although George and Guthrie’s proposal is not necessarily designed to improve the Court’s legitimacy, it is presented here simply to introduce the concept of panel decision making reform proposals and demonstrate that, simply, panels would be unlikely to improve the Court’s sociological legitimacy.

2. Three-Justice Panels Selected Using the “PERC” Methodology

In an effort to modify panel decision making to address partisanship problems, Professor Ian Bartrum has proposed the “Partition-Eliminate-Repartition-Choose” (“PERC”) methodology of assigning the three-judge panels for a nine-Justice Court. With the assistance of mathematicians employing “fair division theory” (a type of game theory), Bartrum demonstrated that the PERC method of panel assignment leads to a final panel that “reflect[] the parties’ perception of the Court’s ideological center in regard to their particular case.” Justices with the most extreme judicial philosophies and viewpoints would be routinely excluded, incentivizing Presidents to appoint more moderate Justices over time—one of the core virtues of Bartrum’s proposal (but arguably also one of its major pitfalls).

256 See Epps & Sitaraman, supra note 198, at 175.
257 See id.
258 Bartrum et al., supra note 25, at 536–37; see also Epps & Sitaraman, supra note 198, at 175 (“[A] Court that is able to take on a larger docket would have more opportunities for ideological activism.”).
259 Bartrum et al., supra note 25, at 538.
260 Id. at 533, 538. For a discussion of another proposal for Supreme Court reform using game theory, see Jeremy N. Sheff, I Choose, You Decide: Checking the Judiciary from Within, 42 CARDOZO L. REV. 2869, 2877 (2021).
261 See Bartrum et al., supra note 25, at 540 (suggesting the PERC-panel approach could lead to “more stable and moderate doctrine”). The unstated premise underpinning Bartrum’s proposal is that moderate Justices are desirable and would produce the best Supreme Court jurisprudence. This may not be so. The Anglo-American legal tradition is centered on the adversarial process—favoring the clash of adverse interests to, in theory, produce the best outcome. Similarly, the clash of Justices with opposing viewpoints—
Under the PERC methodology for panel selection, (1) the petitioner first creates three potential three-judge panels, using each of the nine Justices one time; (2) the respondent then removes one panel; (3) next, the respondent repartitions the remaining six Justices into two new panels; and (4) finally, the petitioner chooses one of the reorganized panels to decide the case.\footnote{Bartrum et al., supra note 25, at 538.} En banc reconsideration would require unanimity.\footnote{Id. at 535 (“Appeal to an en banc sitting of the entire Court would require a unanimous vote of all non-recused Justices.”).} Although Bartrum conceded that there is nothing constitutionally special about there currently being nine Justices,\footnote{Id. at 535 (“[T]here is no constitutional magic in the number nine—nor, again, is there any specific requirement on how the Justices reach, or publish, their decisions.”).} his proposal assumes nine Justices.\footnote{See id. at 538.} The PERC methodology would need to be modified for a fifteen-Judge Court, for example, by including additional iterations of the Eliminate and Repartition stages; it could be even more complicated to modify the methodology for numbers of Justices not divisible by three.

It is unclear to what extent it may be constitutional for Congress (i) to permit litigants to choose the panel’s composition and (ii) to effectively foreclose en banc review by providing a single-Justice veto. Assuming arguendo that Bartrum’s proposal could be implemented by statute, Bartrum himself acknowledges that there are substantive weaknesses with the proposal, including that it would “place a greater workload on a few Justices.”\footnote{Id. at 536 (“Appeal to an en banc sitting of the entire Court would require a unanimous vote of all non-recused Justices.”).} But, there are other weaknesses too. First, although court of appeals cases are heard as three-judge panels,\footnote{28 U.S.C. § 46(c) (“Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered . . . “).} litigants selecting in this manner which Justices of the Supreme Court would hear their case is unprecedented. It seems unlikely that the proposal would improve the “sociological legitimacy” of the Court because the litigants themselves must choose their own customized panel of Justices to mitigate the effects of an egregiously politicized and unbalanced Court.\footnote{For a discussion of “sociological legitimacy,” see generally Fallon, supra note 6.} In essence, the proposal may highlight the Supreme Court’s partisan problem and could invite further reform efforts. The proposal arguably offends basic notions of uniformity and fairness because the parties (who could quite easily collude with each other) would
themselves be permitted to select their own bespoke arbiter—an arbiter with the power to create binding precedent for everyone.\footnote{269}{“Judge shopping,” or arbiter selection, may be common at the lower-court level. See Lindsay Whitehurst & Alanna Durkin Richer, Abortion Pill Order Latest Contentious Ruling by Texas Judge, ASSOCIATED PRESS (Apr. 8, 2023, 7:07 AM), https://apnews.com/article/texas-judge-matthew-kacsmaryk-abortion-pill-fda-75964b777ef09593a1ad948c6cfc0237 [https://perma.cc/UH7J-KB3G] (discussing conservative litigant’s preference for selecting Trump-appointed U.S. District Judge Matthew Kacsmaryk, the sole federal district judge in Amarillo). This one-sided judge selection arguably makes Bartrum’s proposal seem benign. However, theoretically at least, no district court judge may create lasting and binding precedent for all.}\n
Second, the proposal unsurprisingly suffers some of the same infirmities as George and Guthrie’s proposal. At first glance, the Justices could escape the constraints imposed by the PERC methodology by utilizing en banc review for significant cases.\footnote{270}{Bartrum et al., supra note 25, at 536.} However, under Bartrum’s proposal, the possibility of en banc review is severely restricted: en banc reconsideration would require unanimity.\footnote{271}{Id. ("Appeal to an en banc sitting of the entire Court would require a unanimous vote of all non-recused Justices.").} Therefore, the Justices could intentionally thwart granting en banc review to ensure panel opinions they find favorable control. What is the probability that the two Justices of a two-Justice majority would vote for en banc review if there was a chance they could be overturned? Seemingly low. Practically, therefore, en banc review would be unavailable, and the Supreme Court would only ever decide cases as three-Justice panels. This could lead to inconsistent Supreme Court jurisprudence as panel holdings could conflict with others.

Third, the transaction costs associated with Supreme Court litigation would likely be significantly increased due to the ancillary proceedings required to select the panel. The litigants would conceivably utilize extensive modelling to determine which panel permutation would be optimal for the best possible chance of prevailing on the particular issue. A case may be won or lost based on a litigant’s performance in the PERC process.

Regardless of whether Congress may implement this proposal by statute, Bartrum’s proposal would stabilize the Court’s legitimacy problem instead of curing it, and in doing so would likely create additional legitimacy problems for the Court.

3. A “Supreme Court Lottery”

The Balanced Bench proposal was not the only proposal put forward by Epps and Sitaraman.\footnote{272}{See Epps & Sitaraman, supra note 198, at 181.} In the same journal article, they proposed what they termed a “Supreme Court Lottery.”\footnote{273}{Id.} Similar to the two other panel-based
proposals discussed above, the Supreme Court Lottery proposal also takes inspiration from the federal circuit courts. Its proponents have argued that this proposal could also be implemented by statute.\textsuperscript{274}

Under the Supreme Court Lottery proposal, every judge on the federal circuit courts would be additionally appointed as a Justice of the Supreme Court.\textsuperscript{275} The Supreme Court would hear cases as nine-Justice panels, each panel being randomly selected from all the Justices—\textsuperscript{276}that is, all the judges of the federal circuit courts. The panel would hear Supreme Court oral arguments for two weeks, before another nine-Justice panel replaces them.\textsuperscript{277} No more than five Justices nominated by a President affiliated with a single political party could make up a single panel.\textsuperscript{278} Epps and Sitaraman also tacked on a 6-3 supermajority voting requirement for holding federal statutes unconstitutional.\textsuperscript{279} Their proposal includes no details on how certiorari would be granted in this new arrangement, particularly which and how many judges would be required to vote on whether to hear the case.\textsuperscript{280}

The proponents insisted that this approach would "depoliticize the appointments process by making confirmations more numerous and less consequential"\textsuperscript{281} and "decrease the ideological and idiosyncratic nature of Court decisions."\textsuperscript{282} And, as with almost all other composition-focused reform proposals that are statute based, there are constitutional concerns lurking.\textsuperscript{283} There are two primary reasons, which the proponents recognize, as to why the proposal may be unconstitutional if it were implemented by statute: first, is the issue of dual appointments;\textsuperscript{284} second, is the issue of the Vesting Clause.\textsuperscript{285}

Epps and Sitaraman attempted to dismiss the concerns about dual appointments by reiterating that the Justices would be appointed in full accordance with the Appointments Clause.\textsuperscript{286} They also explained that the Framers, in their drafting of the Constitution, did not bar Justices from holding multiple judicial appointments.\textsuperscript{287} They claim that historical and contemporary practice appears to suggest that such a practice may be per-
They attempted to dismiss the concern about the Vesting Clause by explaining that that clause was designed to address issues of federalism and nationalism, not to mandate a Supreme Court with a single set of individuals. They also argue that there is no constitutional prohibition on the Supreme Court, as a singular institution, being "composed of multiple people in rotation."

Epps and Sitaraman present scant evidence, however, that dual appointments involving a Justice have been historically tolerated. They present some evidence of a Justice simultaneously holding the office of Justice of the Supreme Court and a secondary office, as well as a Justice temporarily holding only the secondary office in exigencies. They present no evidence, however, of a "Justice" holding a lower federal judgeship as its primary office and the office of "Justice of the Supreme Court" as its secondary one. As Calabresi and Lindgren pointed out in relation to statutory term-limits proposals, the Constitution clearly "contemplates a separate office of Supreme Court Justice—an office that, because of its importance, the Constitution specifically enumerates. It was obviously not designed to be a trivial, secondary office.

Epps and Sitaraman’s proposal could also contribute to instability in doctrine. The Constitution is structured to ensure stability. The proposal would subvert the prevailing understanding of there being a unitary Supreme Court by furcating the Court into many unique “Supreme Courts”—each of which would statistically only ever sit once (at most).

288 Id. at 187–88.
289 Id. at 188–89.
290 Id. at 190.
291 Id. at 187–88.
292 See id.
293 Calabresi & Lindgren, supra note 24, at 859.
294 The Constitution specifically refers to the "supreme Court" and the "Judges of the supreme Court" but does not refer to another other court and its judges by name. See U.S. Const. art. III, § 1; see also U.S. Const. art. II, § 2, cl. 2.
295 See Frank H. Easterbrook, Stability and Reliability in Judicial Decisions, 73 CORNELL L. REV. 422, 430 (1988) (“The observation that it is hard to amend the Constitution does not imply that judges should revise their work more freely. Consider why the Constitutional Convention made amendment so hard. One reason is to ensure that a super-majority of the people supports any constitutional rule—whether a grant of power to the national government, or a constraint on the exercise of power by government—at the time of its inception. Another is to ensure stability in the structure of government. . . . Ready overruling of constitutional cases interferes with both objectives. It reduces the stability of governmental institutions, denying the polity the benefit (if such it is) of continuity.” (emphasis added)).
296 U.S. Const. art. III, § 1 (stating that there is only "one supreme Court" (emphasis added)).
297 There are currently 179 congressionally authorized judgeships on the federal court of appeals. 28 U.S.C. § 44(a). Ignoring—for simplicity—the requirement that there must be no more than five Justices nominated by Presidents of the same party, there would be
The proposal could further undermine stability in doctrine following the *Dobbs* decision. For example, the differing panels of the Court could easily render conflicting constitutional interpretations from one term to the next—or even within a single term. The doctrine of stare decisis is meant to prevent this. Stare decisis is meant to "promote[] the evenhanded, predictable, and consistent development of legal principles, foster[] reliance on judicial decisions, and contribute[] to the actual and perceived integrity of the judicial process." But, some current Justices, including Justice Thomas, "have expressed skepticism that stare decisis should be much of a restraint at all," especially in relation to matters of constitutional interpretation at the Supreme Court level.

The new "Justices" may be even less likely to respect the doctrine of stare decisis. The proposal could detrimentally erode the hierarchical structure between the Supreme Court and the circuit courts, which could lead to a convergence of, and further reduce respect for, horizontal and vertical stare decisis. For example, the new "Justices" might have less respect for horizontal stare decisis at the "Supreme Court" level because mere circuit judges, albeit in their peculiar capacity as Supreme Court Justices, would have created the "Supreme Court" precedent. Similarly, the circuit judges might have less respect for vertical stare decisis at the circuit level because the new "Supreme Court" precedent would not necessarily reflect the views over 179!/(9!(179-9)!) = 423,793,110,276,910 unique nine-Justice panels. See Binomial Coefficient, WOLFRAM MATHWORLD, https://mathworld.wolfram.com/BinomialCoefficient.html [https://perma.cc/8WH6-E3D6]. Therefore, based on randomly selecting nine Justices, each panel would likely only ever occur once at most.

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299 Because each panel would hear cases for only a two-week period, there would be several different and unique panels per term. See Epps & Sitaraman, *supra* note 198, at 181.
300 *Stare decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "stare decisis" as "[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation").
303 *Stare decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "horizontal stare decisis" as "[t]he doctrine that a court . . . must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself" and defining "vertical stare decisis" as "[t]he doctrine that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction").
304 *Cf.* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 790 (2012) (explaining that "circuits are far less willing to extend [inter-circuit] comity than they are to ignore the demands of [intra-circuit] stare decisis"); *id.* at 795–96 (noting that intra-circuit horizontal stare decisis is a relatively modern phenomenon; panels of the circuit courts traditionally did not feel bound by the decisions of other panels within the same circuit).
of the “Supreme Court” as a whole. This problem could be compounded (at least while distinct circuits judgeships exist) by the fact that, statistically, some circuits would provide more judges to sit on Supreme Court panels than other circuits. Ultimately, the proposal could further reduce the Court’s sociological legitimacy, rather than enhance it, because the Supreme Court would never speak as a whole because en banc review would be unwieldy.

In short, the proposal would erode the established hierarchy between the Supreme Court and circuit courts. The Supreme Court—as an institution—might therefore be weakened. While this is likely the proponents’ unstated aim, the problem sought to be solved would be merely transferred to the circuits and, ultimately, remain unsolved. The Supreme Court Lottery proposal is of dubious constitutionality. But, regardless of whether the proposal is actually constitutional, the problem sought to be solved would be merely transferred to the circuits and, ultimately, remain unsolved. The Supreme Court Lottery proposal is of dubious constitutionality. But, regardless of whether the proposal is actually constitutional, the proposal could further delegitimize the Court by generating more disarray surrounding Supreme Court jurisprudence and further undermining the doctrine of stare decisis.

In sum, like seat-allocation proposals and term-limit proposals, panel-based reform proposals are also problematic, either constitutionally or if the goal is to improve the Court’s legitimacy, or both.

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305 Cf. Michael Abramowicz, En Banc Revisited, 100 Colum. L. Rev. 1600, 1623 (2000) (explaining that en banc panels of the Ninth Circuit do not necessarily represent the views of the Ninth Circuit as a whole). Epps and Sitaraman’s reform proposal is analogous in some respects to en banc review in the Ninth Circuit. Fed. R. App. P., 9th Cir. R. 35-3; 28 U.S.C. § 44(a). An en banc case in the Ninth Circuit is heard by a randomly selected eleven-judge panel of the twenty-nine judges—a third of all Ninth Circuit judges hear an en banc case. Fed. R. App. P., 9th Cir. R. 35-3; 28 U.S.C. § 44(a). Under Epps and Sitaraman’s proposal, however, only 5 percent (9/179) of all circuit judges would form the Supreme Court panel to hear any given “Supreme Court” case. Any given Supreme Court panel would therefore not necessarily reflect the views of all the circuit judges—that is, the “Supreme Court” as a whole.

306 See Marin K. Levy, Visiting Judges: Riding Circuit and Beyond, 106 Judicature 20, 23 (2023), https://judicature.duke.edu/articles/visiting-judges-riding-circuit-and-beyond/ [https://perma.cc/F5RR-UEK5]; see also Marin K. Levy, Visiting Judges, 107 Calif. L. Rev. 67, 131 (2019) (implying that circuit judges do not currently visit other circuits to sit on en banc panels); Abramowicz, supra note 305 (suggesting that circuit judges should visit other circuits for en banc review).

307 The Ninth Circuit, for example, has almost five times as many judges as the First Circuit. 28 U.S.C. § 44(a).

308 See George & Guthrie, supra note 245, at 1465–66 (“Given the Court’s lack of enforcement power, its institutional legitimacy is important, at least in those cases involving deeply controversial issues. To give effect to rulings [on controversial issues], the Court might need to stand together as a whole, even if the justices are not fully in agreement with one another.” (emphasis added)). Under Epps and Sitaraman’s proposal, the Court would never “stand together.”
III. PROBLEMS WITH PERSONNEL AND COMPOSITION PROPOSALS

If the aim is to improve the sociological legitimacy of the Court, there are many problems with current personnel and composition reform proposals.

Many personnel and composition reform proposals opt for a statutory— or rules-based implementation—presumably because of the “near impossibility of a constitutional amendment,” or because their proponents believe that a statutory approach would be constitutional. Many proposals would be theoretically straightforward to implement according to their proposed implementation mechanisms but at the expense of constitutionality. Many personnel and composition reform proposals would be unconstitutional, or their constitutionality would at least be seriously questioned, if implemented by statute. As their proponents acknowledge, term limits would need to be introduced by a constitutional amendment, otherwise those proposals would violate the Good Behavior Clause. Similarly, partisan-based seat allocation must be introduced by a constitutional amendment, otherwise those proposals would violate the Appointments Clause, general constitutional separation-of-powers requirements, and possibly even the First Amendment. Additionally, Epps and Sitaraman’s Supreme Court Lottery proposal may violate the Judicial Vesting Clause. Implementing a reform proposal of dubious constitutionality could undermine the Court’s legal and sociological legitimacy.

Even if the substance of a proposal— independent of its constitutionality—tended to increase the Court’s sociological legitimacy, the Court’s legal legitimacy could nonetheless suffer because of the questionable constitutionality of the implementation mechanism. This could give rise to countless (and non-frivolous) allegations highlighting this fact, which could, in turn, reduce the Court’s sociological legitimacy. A negative feedback loop could be created. Consider, for example, Epps and Sitaraman’s Balanced Bench proposal discussed in Section II.C.2. The proposal would require Justices to appoint other Justices to the Court in violation of the Appointments Clause. While the Court’s politicization problem might be solved, which could result in an increase in the Court’s sociological legitimacy, the

309 See supra Section II.C.2.
310 See supra Sections II.A, II.C.2, II.D.1.
311 See supra Section II.B.
312 See supra Section II.C.2.
313 See supra Section II.C.2.
314 See supra Section II.C.1.
315 See supra Section II.D.3.
316 For a discussion of sociological and legal legitimacy, see supra INTRODUCTION.
317 See supra Section II.C.2.
318 See supra Section II.C.2.
extensive and continued debate about the constitutionality of Justices appointing other Justices could highlight the Court’s lack of legal legitimacy, which in turn could undermine the Court’s sociological legitimacy.

These proposals would therefore need to be implemented by a constitutional amendment lest the Court’s sociological legitimacy be adversely affected. As discussed, a statutory-based personnel or composition reform proposal has the potential to decrease the Court’s legitimacy if its constitutionality is genuinely questionable. A constitutional amendment would guarantee that the reform effort would not violate the Constitution.319 While this is generally true for any new law, it is a particularly important consideration when that law interferes directly and substantially with a core constitutionally mandated institution, such as the Supreme Court.

Notwithstanding their constitutional issues, the substance of personnel and composition proposals would actually tend to decrease, or have little effect on improving, the Court’s sociological legitimacy. For example, as explained in Section II.A, court packing would surely delegitimize the Court.320 Term limits proposals are generally not aimed at improving the Court’s politicization problem and are instead focused on addressing concern for the aging of Justices.321 Introducing term limits could impair judicial independence,322 increase—rather than decrease—the politicization of the Court by including among the spoils of each presidential election the chance to nominate two replacement Justices,323 and make Court capture more easily achievable.324 Similarly, partisan-based seat allocation proposals could also undermine the Court’s sociological legitimacy by explicitly politicizing the Court,325 failing to ensure an ideologically balanced Court,326 inviting political gamesmanship,327 and ensconcing the two-party system within a constitutionally mandated institution.328 Some panels-based reform proposals are focused, not on improving legitimacy, but on allowing the Court to hear more cases.329 Some panels-based reform proposals, however, are focused on improving the sociological legitimacy of the Court.330 These latter proposals

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319 But see Shelby A. Mars, An Unconstitutional Constitutional Amendment in the Context of Article III: Why We Can’t—and Shouldn’t—Tell United States Supreme Court Justices When to Retire, 13 SETON HALL CIR. REV. 203, 218 (2017) (suggesting that some constitutional amendments would be unconstitutional on separation-of-powers grounds).
320 See supra Section II.A.
321 See supra Section II.B.
322 See supra Section II.B.
323 See supra Section II.B.
324 See supra Section II.B.
325 See supra Section II.C.1.
326 See supra Section II.C.1.
327 See supra Section II.C.1.
328 See supra Section II.C.1.
329 See supra Section II.D.1.
330 See supra Sections II.D.2, II.D.3.
fail in that quest because they could unjustifiably weaken the Court, lead to conflicting jurisprudence, highlight the Court’s legitimacy problem more than they solve, and increase the complexity of and transaction costs associated with Supreme Court litigation. Many of these newly-created problems would be worse than the problem that reformers were initially attempting to solve. The Court’s sociological legitimacy could therefore actually decrease.

Some personnel and composition reform proposals place the Court in a delicate state regarding its intended ideological balance or make the Court’s composition vulnerable to rapid and undesirable changes. For example, Segall’s eight-Judge proposal, which is discussed in Section II.C.1, could do just that. The proposal relies on perfect ideological balance of four Democrats and four Republicans to limit the political polarization of the Court. The appointment of a relatively moderate or centrist Justice or a Justice who is not aligned with their party, or the ideological drift of one of the Justices, would effectively polarize the Court ideologically. Only a quixotic version of the proposal could ensure true ideological balance.

Similarly, term limits, which are discussed in Section II.B, could allow the Court to become quickly ideologically unbalanced because rapid Court capture would be possible even without tactical resignations or deaths. Assume, for example, the Court initially has five conservative Justices—even less than the current Court. Within only a single presidential term (four years), a conservative President could increase that five-Justice conservative majority to seven. And, if a seven-Justice majority were not sufficiently overwhelming, within just two presidential terms (eight years), the Court could be completely captured, with all nine Justices having been elected by conservative Presidents, to produce a truly monolithic, conservative Court. Ideally, the Court should be at least somewhat insulated from short-term political preferences.

Also, Epps and Sitaraman’s Supreme Court Lottery proposal was expressly designed to allow the composition of Justices sitting on the Court to

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331 See supra Sections II.D.2, II.D.3.
332 See supra Section II.D.3.
333 See supra Section II.D.2.
334 See supra Section II.D.2.
335 See supra Section II.C.1.
336 See supra Section II.C.1.
337 See supra Section II.B.
338 See supra Section II.C.1.
339 See supra Section II.B.
340 As of April 2024, there are six Republican-appointed Justices. Table of Supreme Court Justices, CONST. ANN., https://constitution.congress.gov/resources/supreme-court-justices/ [https://perma.cc/DMH8-4WFT].
341 See supra Section II.B.
342 See supra Section II.B.
change every two weeks.\textsuperscript{343} As discussed in Section II.D.3, these rotating panels of nine Justices could result in an institutional weakening of the Court by permitting instability in doctrine.\textsuperscript{344} It would be naïve to think that every circuit judge would respect a small minority of randomly selected circuit judge’s interpretation of important constitutional issues.\textsuperscript{345} In other words, the ideological balance of the Court could change from one fortnight to the next.\textsuperscript{346} This could reduce the Court’s legitimacy.

If Supreme Court reform is implemented by statute, the Court could be vulnerable in another regard: it could be vulnerable to subsequent changes in legislation concerning the Court. An easy and practicable implementation mechanism, such as a statute, would provide subsequent Congresses with a simple way to repeal or otherwise override the reform effort.\textsuperscript{347} In reforming the Court, it is important to strike the right balance between ensuring the Court’s stability (in a broad institutional sense) and affording Congress the flexibility to effect further reform as necessary. An implementation mechanism other than a constitutional amendment could lead to a reduction in its sociological legitimacy because the Court may be perceived as being in reform flux.\textsuperscript{348} Reformers should be especially concerned about such a prospect when a statute concerns major disruption to one of the nation’s core institutions—a constitutionally-created institution, albeit one that is currently in a legitimacy crisis according to some.\textsuperscript{349}

To illustrate the risks associated with a statutory approach, consider Segall’s proposal, which would decrease the size of the Court to eight, as discussed in Section II.C.1.\textsuperscript{350} What would happen if a subsequent Congress wanted to revert to the previous arrangement of nine Justices? Congress and the President could capture the Supreme Court by Congress simply increasing the number of Justices back to nine, creating a new seat for the sitting President to fill.\textsuperscript{351} This could be easily achievable—and politically safe—when the Presidency and Congress are politically aligned.\textsuperscript{352}

Similarly, consider Epps and Sitaraman’s Supreme Court Lottery proposal.\textsuperscript{353} What would happen if a subsequent Congress wanted to revert to the previous arrangement following the reform experiment? There would then likely be tens of—maybe even over 100—circuit judges who would al-

\begin{footnotesize}
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\item[343] See supra Section II.D.3.
\item[344] See supra Section II.D.3.
\item[345] See supra Section II.D.3.
\item[346] See supra Section II.D.3.
\item[347] See U.S. CONST. art. I, § 7, cl. 2.
\item[348] See supra Section II.D.2.
\item[349] See supra INTRODUCTION.
\item[350] See supra Section II.C.1.
\item[351] See supra INTRODUCTION.
\item[352] See supra INTRODUCTION; see also U.S. CONST. art. I, § 7, cl. 2.
\item[353] See supra Section II.D.3.
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so technically be Justices of the Supreme Court. How would the permanent nine Justices be selected from this huge pool? This could create a major political battle over the selection of the nine permanent Justices, potentially further undermining the legitimacy of the Court.

These two examples highlight the fact that a statutory approach to reform could encourage political gamesmanship under the guise of merely reverting to the previous arrangement. This should caution reformers against a statutory approach and highlights the virtues of a constitutional amendment in the context of implementing major personnel and composition reform proposals—the reform would be less vulnerable to change, and the institution could be viewed as being more stable. While obviously removing some flexibility for further reform efforts, a constitutional amendment would reduce the opportunities for political gamesmanship and the potential for chaotic collapse or unraveling of any implemented reform, and thus could better stabilize or improve the Court’s legitimacy.

Some may point to the fact that the number of Justices has remained—by statute—at nine for over 150 years to discredit concerns about the undoing of any statutory reform effort. However, every proposal discussed in this Note, except increasing and decreasing the number of Justices, is utterly unprecedented. These new proposals would less likely be tolerated by opponents than other features of the Supreme Court that have a lengthy historical precedent and have become constitutional norms. Calabresi and Lindgren, for example, implicitly recognized this type of subsequent problem and even suggested, in their term-limit proposal, setting the number of Justices at nine by a constitutional amendment.

There is often a disparity between what proponents say are the intended effects of a proposal and what the proposal’s likely actual effects would be. Some reform proposals, which are not discussed in this Note, are explicitly directed at weakening the Supreme Court as an institution. Although many of the reform proposals discussed in this Note are aimed at simply addressing the Court’s apparent increased politicization, it appears that many of these proposals seek to weaken the Court by limiting its ability to decide and issue opinions, limiting its ability to issue ideologically one-sided opinions, or by decreasing the Court’s importance as an institu-

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354 See supra Section II.D.3.
355 Compare U.S. CONST. art. V (requiring a supermajority), with U.S. CONST. art. I, § 7, cl. 2 (implicitly requiring only a simple majority).
356 See supra INTRODUCTION.
357 See supra INTRODUCTION; see also supra Section II.A.
358 See supra Section II.B.
359 See supra note 30 and accompanying text; see also supra Sections II.D.2, II.D.3.
360 See supra Sections II.A, II.C, II.D.2, II.D.3.
361 See supra Section II.C.1.
362 See supra Sections II.C.2, II.D.2.
tion.\textsuperscript{363} For example, an eight-Judge, partisan-balanced Court, in its intended equilibrium state, would likely find it difficult to issue a coherent majority opinion because of likely four-four deadlock—the likelihood of stalemate seems greater than the possibility of a defection of one Justice to the other side in cases involving important constitutional rights.\textsuperscript{364} Similarly, the Supreme Court Lottery proposal would weaken the Court by essentially giving greater power to the circuit courts and their judges at the expense of the Supreme Court.\textsuperscript{365}

It is unsurprising that proponents of personnel and composition reform proposals, in particular, desire to weaken the Court. If the goal is to improve sociological legitimacy, it is not necessarily sound to hurriedly weaken an institution (with almost a quarter-millennium of history), using a statutory personnel or composition reform proposal of dubious constitutionality,\textsuperscript{366} primarily because of disagreement with its recent decisions.\textsuperscript{367} Achieving long-term institutional reform does not appear to be the driving force behind many personnel and composition reform proposals; many of the reform proposals discussed in this Note appear to prioritize immediate implementation over a solution that would stand the test of time.\textsuperscript{368} A desire to obtain an immediate impact on the current Court should not be allowed to spoil efforts seeking to obtain genuine, long-term institutional reform. Any reform proposal should be aimed at creating an institution whose legitimacy is likely to have longevity. If reform is to be pursued, it must because the Court—as an institution—is inherently in need of it, not merely because one dislikes the Court’s current composition. The process of seeking a constitutional amendment could provide more opportunity for candid and extensive bipartisan discourse about potentially modifying the Court’s powers and authority—including weakening the Court.

Enacting a statutory personnel or composition proposal for the Court to then declare it unconstitutional would be a waste of resources, and it could further undermine the Court’s legitimacy. It is possible that proponents

\textsuperscript{363} See supra Section II.D.3.
\textsuperscript{365} See supra Section II.D.3.
\textsuperscript{367} See supra Sections II.B, II.C, II.D.2, II.D.3.
\textsuperscript{368} See supra INTRODUCTION (discussing the Court’s critics following its recent decisions).
\textsuperscript{369} See supra Sections II.A, II.C, II.D.
could use the Court’s striking down of such reform for political gain: they may try to create further controversy surrounding the Court by suggesting, for example, that the institution lacks legal legitimacy because it resists external reform efforts. Forcing the Court to decide whether a reform proposal is constitutional would create a Catch-22 situation for the Court: the Court could declare the implemented statute or rule unconstitutional but expose itself to further legitimacy-related critiques that would undermine the Court’s sociological legitimacy. Alternatively, the Court could declare the matter non-justiciable and effectively let an unconstitutional law remain in force.\footnote{A constitutional amendment could avoid this type of separation-of-powers controversy because the People directly (or Congress, by a supermajority vote) would be making the change to the Court. This could avoid a subsequent inter-branch battle over the constitutionality of a would-be enacted reform proposal and avoid the need for the Court to determine whether such a controversy is justiciable.}

Some personnel and composition proposals are so radical that they appear to be the products of purely academic endeavors having little regard for practicality.\footnote{See supra Sections II.D. and II.E.} Election candidates and elected officials may publicly support such a proposal merely to virtue signal and benefit from appearing to be a committed reformer amongst their party’s base, knowing that, ultimately, they may be able to capitalize on the proposal’s failure to gain sufficient bipartisan support for implementation.\footnote{A balance must be struck between developing a reform proposal that would gain widespread bipartisan support and one that would actually solve the Court’s legitimacy crisis—not merely modify the problem. Many personnel and composition proposals would likely not gain sufficient bipartisan support for implementation.} One ma-
major obstacle to gaining bipartisan support is that when one party dominates the Court,\(^376\) that party and its supporters would likely not have a great appetite for reforming a branch of government from which they are currently benefiting.\(^377\) Seeking a constitutional amendment, which would likely be contemplated over several years and even decades, may be advantageous for promoting bipartisan cooperation and compromise.

CONCLUSION

Implementing current personnel and composition reform proposals would generally be counterproductive to the goal of improving the legitimacy of the Court and reducing its politicization. Some of the proposals discussed in this Note opt for a statutory approach despite raising major constitutional concerns. An implemented reform proposal of dubious constitutionality would tend to decrease the Court’s legitimacy. Generally, however, all of the personnel and composition reform proposals discussed in this Note, even those that would not require a constitutional amendment, would pose other serious problems that would undermine the Court’s legitimacy. If reformers nonetheless insist on pursuing the implementation of personnel and composition reform proposals, for the many reasons discussed, such proposals should be implemented by constitutional amendment.

Ultimately, and preferably, reformers should jettison the notion that personnel and composition reform proposals can solve all of the Court’s legitimacy problems on their own. Instead, reformers should consider and develop other, more neutral types of reform proposals that do not fetishize directly changing the Court’s personnel and composition to reduce its politicization.\(^378\) Reformers’ fixation on the Court’s current personnel and composition is understandable, but focusing long-term institutional reform efforts on changing the same is misguided and counterproductive.

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376 As of February 2024, the Court comprises a supermajority of Justices appointed by Republican Presidents. *Table of Supreme Court Justices*, supra note 340.


378 *See supra* INTRODUCTION (briefly discussing other types of reform proposals).