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How to Reform the Supreme Court Without Destroying It

The proposals being advanced for Supreme Court reform are ineffectual, unconstitutional or just plain terrible, writes Mark H. Alcott of Paul, Weiss, Rifkind, Wharton & Garrison.

By **Mark H. Alcott** | October 28, 2020

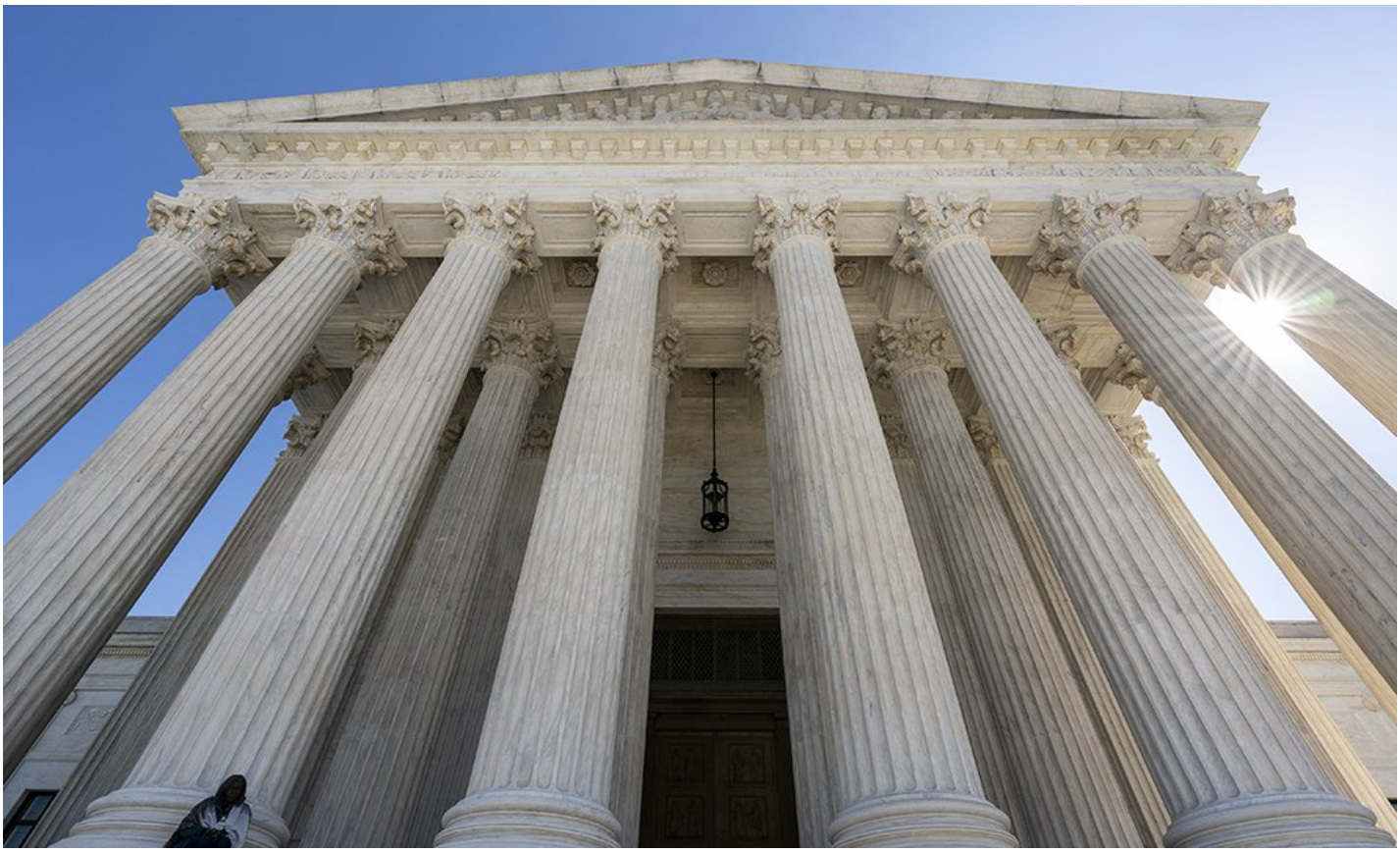

Photo: J. Scott Applewhite/AP

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Let's start with the worst: court-packing. The idea is deeply unpopular and would inflict severe damage on former Vice President Joe Biden, just as it did to Franklin D. Roosevelt more than 80 years ago. In "Those Angry Years," the esteemed journalist/historian Lynne Olson writes that Roosevelt's court-packing scheme

was the "biggest mistake of his presidency." The proposal was never enacted, but merely by advocating it, the president wound up "undercutting his influence and authority and [thereby] severely damaging his administration, the country, and the world for years to come."

Even if it could be adopted today, which is unlikely, the plan would accomplish nothing. An expanded Supreme Court packed with liberal judges appointed by a Democratic president would eventually be replaced by a more greatly expanded court packed with additional right wing judges appointed by a Republican president. The latter would overturn the decisions and precedents of the former, and the process would repeat itself again and again.

Meanwhile, we would destroy the institution that, among other things, banned racial segregation, enabled marriage equality, saved the Affordable Care Act, crafted the one man/one vote rule, ordered President Richard Nixon to produce the tapes, rejected President Donald Trump's claim that presidents are immune from criminal prosecution, and preserved civil liberties on numerous occasions. Does it make any sense to argue that the way to save *Roe v. Wade* is to delegitimize the Court that gave us *Roe v. Wade*? Let's not go there.

The other current proposals are also fatally flawed.

Term limits? Unconstitutional. Federal judges "shall hold their Offices during good Behaviour" (Article III, section 1), not for finite terms imposed by Congress.

In any case, when do we want to force justices to leave the Court? After 10 years? 12 years? 14 years? If we had a 14-year term limit, Justice Ruth Bader Ginsburg would have been required to step down in 2007, and her replacement would have been chosen by President George W. Bush; Justice Louis Brandeis never would have written his great opinion in the Erie Railroad case, which every law student is required to read in the first week of school and which has been cited more than 25,000 times; Justice Oliver Wendell Holmes would have served for less than half of his extraordinary tenure. Let's not shoot ourselves in the foot with rules of this kind.

A screening/nominating commission of legal experts?

Unconstitutional. "The President … shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … Judges of the Supreme Court ." (Article II, section 2). There is no constitutional room for any other entity in this process. In any case, how would the commission members be selected? The process of doing so would immediately become just as fraught as the current process of court appointments.

Divest the court of jurisdiction over certain kinds of politically controversial cases?

Unconstitutional. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties … etc." (Article III, section 2). And this plan—like the others—would surely backfire. The very kind of case that Democrats want to keep away from the court today is the kind they will want the court to decide tomorrow. The same is true of the Republicans. Anyway, if the Supreme Court doesn't decide such cases, who will?

Congress? Oy!

But there is a reasonable, constitutional way to ameliorate our extremely troubled Supreme Court appointment process: require a supermajority—60 or more votes—for Senate confirmation of the justices. That would require the president to choose nominees who are not extreme and have at least some bipartisan appeal. It is not hard to find such people. Some of the court's most distinguished Justices have been confirmed by overwhelming majorities, with very few dissenting votes. These include, for example, major centrists appointed by Republican presidents, such as Kennedy,

O'Connor, Stevens, Blackmun et al., each of whom was confirmed unanimously. A comparable list of appointees by Democratic presidents could easily be compiled. The super majority requirement could be adopted by a simple change in Senate rules—for example, by reinstating the filibuster for the Supreme Court confirmation process. Granted, the filibuster is repugnant to (small d) democratic norms; but in this instance, the disease is worse than the cure. Right now, the filibuster rule is in place for legislation generally, but no longer applies when the Senate considers Supreme Court appointees. Let's reverse that.

Of course, this would not be an instant fix, and a future Senate could change gears once again. But there is reason to believe that, over time, this reform would restore balance to the Court; and that both parties—and especially the public—would embrace it as a prophylactic against the appointment of their extreme ideological opposites. It is our best hope for repairing a process that is now totally broken.

Mark H. Alcott *of Paul, Weiss, Rifkind, Wharton & Garrison is the former president of the New York State Bar Association.*
