

The Supreme Court and the 117th Congress

Andrew K. Jennings* & Athul K. Acharya**

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INTRODUCTION

If the late Justice Ruth Bader Ginsburg’s successor is confirmed before the 2020 presidential election or in the post-election lame-duck period, and if Democrats come to have unified control of government on January 20, 2021, how can they respond legislatively to the Court’s new 6-3 conservative ideological balance? This Essay frames a hypothetical 117th Congress’s options, discusses its four simplest legislative responses—expand the Court, limit its certiorari discretion, restrict its jurisdiction, or reroute its jurisdiction—and offers model statutory language for enacting those responses.

Justice Ginsburg’s passing on September 18, 2020 has elicited an outpouring of mourning for her life and service as an advocate and jurist. But this sudden vacancy, forty-six days before a presidential election, also evokes shades of the 2016 election. Justice Antonin Scalia had passed away earlier that

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* Fellow and Lecturer in Law, Stanford Law School

** Impact Litigation Associate, BraunHagey & Borden LLP.

year, and a Republican-led Senate steadfastly refused to consider Judge Merrick Garland, President Barack Obama's nominee, to fill the seat. The Senate majority then justified its refusal on the grounds that in a presidential-election year, the people should have a say on the nomination in the form of choosing the next president.¹ But now, Senate Republicans have abandoned their 2016 position and promised to fill the vacancy, either before the election or in the lame-duck period before a new Senate is seated on January 3.²

Senate Democrats, as the minority caucus, have few plausible levers to stop a determined President Donald Trump and Senate majority from filling the vacancy, whether before the election or in the lame-duck period. At the same time, it is possible that in the election Democrats could win the presidency, win a majority in the Senate, and retain their majority in the House of Representatives. In theory, this unified control of government would allow the 117th Congress to respond in kind to a pre-election or lame-duck confirmation, which many legislators and members of the public would view as hypocritical or norm-violating by the current Senate majority.

Already, scholars are raising the prospect of the 117th Congress adding seats to the Court, which would allow a newly inaugurated President Biden to appoint Justices who would dilute the numerical power of President Trump's nominee, or who might even flip the Court's ideological balance.³ Indeed, prominent members of Congress, including Representative Jerry Nadler (the chair of the House Judiciary Committee, which has jurisdiction over federal courts), have suggested that expanding the Court would be an appropriate response to a pre-election or lame-duck confirmation.⁴ Senate Minority Leader Chuck Schumer, who would become majority leader if his party wins control of the Senate, reportedly told his Democratic colleagues that "if Leader McConnell

1. John Avlon, *GOP's Supreme Court Hypocrisy in Their Own Words*, CNN (Sept. 19, 2020), <https://www.cnn.com/2020/09/19/opinions/rbg-supreme-court-gop-hypocrisy-avlon/index.html> [<https://perma.cc/G995-QHA6>] (collecting statements made in 2016 by Republican senators).

2. Burgess Everett, *Romney Backs Vote on Supreme Court Nominee, Clearing Way for Trump*, POLITICO (Sep. 22, 2020), <https://www.politico.com/news/2020/09/22/romney-supports-holding-a-vote-on-next-supreme-court-nominee-419898> [<https://perma.cc/U339-PSEX>].

3. For instance, constitutional-law scholar Anthony Michael Kreis has called for Court expansion on the grounds that the Court has grown overly countermajoritarian. See @AnthonyMKreis, TWITTER (Sept. 20, 2020), <https://twitter.com/AnthonyMKreis/status/1307694312784908289> [<https://perma.cc/WB8D-BSL5>]. And constitutional-law scholar Erwin Chemerinsky has justified expansion on partisan-fairness grounds. See Erwin Chemerinsky, *Democrats Have a Secret Weapon to Thwart a Rapid Ginsburg Replacement. They Should Use It*, L.A. TIMES (Sept. 18, 2020), <https://www.latimes.com/opinion/story/2020-09-18/op-ed-democrats-have-a-secret-weapon-to-thwart-a-rapid-ginsburg-replacement-they-should-use-it> [<https://perma.cc/5XDA-5WNJ>].

4. Jordan Carney, *Schumer: 'Nothing is Off the Table' If GOP Moves Forward with Ginsburg Replacement*, THE HILL (Sept. 19, 2020), <https://thehill.com/homenews/senate/517235-schumer-nothing-is-off-the-table-if-gop-moves-forward-with-ginsburg> [<https://perma.cc/8VW6-Y768>] (collecting statements made by Senator Edward Markey and Representative Jerry Nadler).

and Senate Republicans move forward with this, then nothing is off the table for next year. Nothing is off the table.”⁵

In addition to Court expansion, scholars have suggested other reform options, such as term limits or structural reconfigurations, intended to effect a long-term depoliticization of the Court.⁶ We leave to others to consider normatively whether a new unified government *should* respond in kind to a pre-election or lame-duck confirmation. We also leave to others the long-term project of judicial reform, some versions of which will likely require constitutional amendment. (Indeed, the options we discuss in this Essay may be seen as temporary correctives rather than long-term reforms.) Instead, we address a simpler question: What can the 117th Congress do if it wants to respond in early 2021 to this vacancy being filled pre-election or in the lame-duck period?⁷

In answering this question, we identify straightforward legislative options, categorized roughly by whether Congress mistrusts Justices individually but retains trust in the Court itself, or whether Congress comes to mistrust the Court as an institution. In the former case, Congress can expand the Court or limit its certiorari discretion. In the latter event, it can restrict the Court’s jurisdiction or reroute that jurisdiction to another court. Should the 117th Congress choose to pursue these options, we explain how it could do so.⁸

I.

THE SUPREME COURT AND DISTRUST

Suppose that a new unified government is in place come January 20, 2021, and suppose that the previous government has already confirmed a successor to Justice Ginsburg. The 117th Congress would then face a few questions and decisions, all of which essentially boil down to *trust*.⁹ Does it trust the Supreme Court generally to reach decisions that are broadly consistent with its interpretations of the Constitution, federal statutes and treaties, and broader

5. *Id.*

6. *See, e.g.,* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 *YALE L.J.* 148 (2019).

7. The 117th Congress might also respond in areas that do not immediately bear on the judiciary. For example, it might admit new states to the Union.

8. This Essay relies on two big, but necessary, assumptions. First, when we refer to the 117th Congress, we assume that starting January 20, 2021, there is unified control by Democrats of the presidency and both chambers of Congress. Second, we assume that in the 117th Congress, cloture in the Senate may be achieved by majority vote, i.e., the filibuster has been abolished. *But see* Senate R. XXII(2). Abolishing the filibuster, of course, is a controversial prospect and there is no guarantee that such a move would garner sufficient support from Democratic senators.

9. Our trust framing largely lines up with Doerfler and Moyn’s framing of Court reform as being either personnel-based or institution-based, although we do not entirely align with them on which reforms go to which bucket. *See* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 *CALIF. L. REV.* __ (forthcoming 2021).

principles about proper judicial behavior and decision-making—in other words, to reach decisions that it generally regards as non-erroneous?¹⁰

If the answer is “yes,” then nothing need be done and this Essay is at an end. But if the answer is “no,” then some new questions arise:

- (1) Does Congress lack confidence in the *members* of the Court to reach non-erroneous decisions?
- (2) Or does it lack confidence in the Court as an institution to support decisional processes that yield non-erroneous decisions?
- (3) Or, perhaps, does Congress’s mistrust hit both the individual and institutional levels?

The answers to these questions will guide how Congress should respond. We assume that in the short-term, it will opt for responses that can be achieved through simple-majority legislation that does not require significant structural overhauls of the federal judiciary, even if it plans to take up longer-term reforms later. We identify four options that we believe satisfy those criteria: expand the Court, limit its certiorari discretion, or restrict or reroute its appellate jurisdiction. The first two options address mistrust of the Justices, whereas the second two options address mistrust of the institution. The following paths capture the 117th Congress’s decision space:

- (A) If the 117th Congress mistrusts the Justices, but not the institution itself, then it should impose individual-level constraints by adding seats, limiting discretion by increasing how many Justices (from the current four) are needed to grant certiorari, or both. Just how many seats would be added, or how many Justices would be required to grant certiorari, are second-order decisions.
- (B) If the 117th Congress mistrusts the Court as an institution, then it should impose institution-level constraints by restricting or rerouting the Court’s appellate jurisdiction, or both. How much jurisdictional or discretionary restriction Congress would impose are second-order decisions.
- (C) If both (A) and (B) are true, then the 117th Congress should follow the options outlined by (B), because if the institution itself is mistrusted, then that implies that changes in the Court’s membership will not mitigate Congress’s mistrust.

10. After all, the 117th Congress represents public sentiment about what the law is, or what it must or should be, that is not guaranteed to align with the idiosyncratic perspectives of individual Justices. Members of Congress have their own views about the law, too. These democratic inputs and personal views would be expected to guide how Congress regards, cooperates with, and counters the judiciary as one of its sister branches of government.

II.

MISTRUST OF THE JUSTICES

If Congress mistrusts the Justices but not the institution itself, then that suggests there are other compositions that Congress *would* trust, or at least mistrust less. Changing the composition of the Court would require changing its personnel (such as through adding seats) or changing the relative power of individual Justices (such as through requiring a majority or supermajority to grant certiorari).

A. Court Expansion

Given that the 117th Congress would have little control over sitting Justices' departures, its most straightforward lever to augment the Court's composition would be to add one or more seats. Doing so would dilute the individual power of sitting Justices. If the seats were filled by jurists who shared a congressional majority's approach to interpreting and applying the law, then in Congress's view, the new members would push the Court in the general direction of reaching non-erroneous decisions. For example, adding two seats would restore the one-vote conservative majority that existed prior to Justice Ginsburg's passing. Adding four seats would yield the one-seat liberal majority that would have existed had Judge Garland been confirmed to Justice Scalia's seat, at least up to the point of Justice Ginsburg's passing. Whatever the number, Congress could add seats by simply amending one word in 28 U.S.C. § 1,¹¹ as we show with the following legislative language:¹²

28 U.S.C. § 1 is amended by striking "eight" and inserting "[•]".

B. Discretion Restriction

Among federal courts, Congress has given the Supreme Court the luxury of almost total discretion over its caseload, discretion it exercises by granting or denying petitions for writs of certiorari.¹³ Congress has not regulated how writs of certiorari may be granted or how many Justices must support a petition before

11. "The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum." 28 U.S.C. § 1. This configuration, of course, is prescribed by statute, as the Constitution is silent on the matter. *See* U.S. Const. art. III § 1. Indeed, at various times, Congress has changed the size of the Court from as few as five to as many as ten Justices. FED. JUDICIAL CENTER, *Supreme Court of the United States: Succession Chart* (accessed Sept. 19, 2020), <https://www.fjc.gov/history/courts/supreme-court-united-states-succession-chart>.

12. Additional language might address fiscal considerations. New Justices would be entitled to a salary. 28 U.S.C. § 5. And they would need law clerks, legal secretaries, and so forth. The Court's current \$88 million appropriation might already be sufficient to cover these costs, but if not, Congress might want to appropriate incremental funds. *See* Judiciary Appropriations Act, 2020, Pub. L. 116-93, 133 Stat. 2451 (Dec. 20, 2019).

13. Pub. L. 100-352, 102 Stat. 662 (June 27, 1988). This act left in place the Court's mandatory appellate jurisdiction over appeals from three-judge district courts. *See* 28 U.S.C. § 1253.

the Court grants it. Instead, the Court follows an informal “Rule of Four”: it will grant certiorari when doing so is favored by at least four Justices (rather than a majority or supermajority).¹⁴ The Rule of Four is far from a formal judicial procedure. Indeed, although it likely emerged around 1891, the rule’s existence was not even publicly acknowledged until 1924.¹⁵

If the 117th Congress mistrusts some Justices but not others, then restricting the Court’s certiorari discretion would be one way to ensure that the cases the Court takes represent some consensus among the Justices, including those most trusted by Congress.¹⁶ For example, requiring a majority—or six, seven, eight, or even all nine—of the Justices to agree to grant certiorari would permit minority perspectives on the Court to block cases that are likely to be the most ideologically, socially, or politically divisive. For instance, if Congress were to impose a new Rule of Seven, the Court’s caseload would be expected to shift to those cases most likely to garner consensus among the Justices: technical, low-salience subjects—patents, tax, employee-benefit plans, government contracts, and the like—or routine resolutions of circuit splits. Whatever Rule of *N* the 117th Congress might choose, it can do so with the following legislation, which would apply to certiorari from federal, state, Puerto Rico, and Virgin Islands courts:

Chapter 81 of title 28, United States Code, is amended to add Section 1261, to read as follows:

“No writ of certiorari shall be granted, by petition or otherwise, except upon the recorded concurrence of [•] justices.”

III.

MISTRUST OF THE COURT

Mistrust of the Court as a countermajoritarian institution is as old as the Constitution itself.¹⁷ And almost since the Constitution was ratified, Congress has contemplated curbing the Court’s jurisdiction to limit the substantive reach

14. *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 521, 529 (1957) (Frankfurter, J., dissenting): The ‘rule of four’ is not a command of Congress. It is a working rule devised by the Court as a practical mode of determining that a case is deserving of review, the theory being that if four Justices find that a legal question of general importance is raised, that is ample proof that the question has such importance.

15. Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 981 (1957).

16. In the past, Congress has not regulated how the Court grants and denies petitions for certiorari. It would thus not surprise us if an enterprising petitioner were to try to get around a new Rule of *N* by arguing that the rule violates separation of powers. *But cf.* Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 29 YALE L.J.F. 97 (2019) (expressing openness to the view that Congress’s judicial regulatory authority empowers it to “displace the common-law majority-voting rule, requiring a supermajority to enter orders or to disturb judgments on appeal”).

17. *Antifederalist Nos. 78-79: The Power of the Judiciary (Part I)*, in THE ANTIFEDERALIST PAPERS 222, 223 (Morton Borden ed., 1965) (“[T]hey are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.”).

of its decisions.¹⁸ A natural corollary to limiting the Court's jurisdiction is to reroute excluded cases to better-trusted venues. These options are legislatively straightforward, and we explore each below.

A. Jurisdiction Restriction

Restricting the Supreme Court's jurisdiction is in some ways the converse of expanding its membership. Rather than augmenting it with more trusted judges, Congress could simply prevent the Court's current members from deciding cases with high political or ideological valence. This option manifests directly from constitutional text: Congress has the power to "regulat[e]" and create "exceptions" to the Supreme Court's appellate jurisdiction.¹⁹ And it has done so several times without controversy.²⁰

Some scholars argue that there are implicit limits on Congress's express power to restrict Supreme Court jurisdiction.²¹ But the Court has upheld congressionally created exceptions to jurisdiction in the past,²² and it has rejected them only in the context of the writ of habeas corpus, an express constitutional guarantee.²³ Indeed, discretionary certiorari might itself be a massive and unquestioned exercise of Congress's power to create exceptions to the Court's appellate jurisdiction.²⁴ We proceed on the assumption that unless a jurisdiction-restricting measure violates some "external" constitutional limitation,²⁵ it is valid.²⁶

18. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 896–97 (1984).

19. U.S. CONST. art. III § 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.”).

20. See, e.g., 8 U.S.C. § 1252(a)(2)(B) (providing that “no court shall have jurisdiction to review” certain immigration decisions made by the executive branch); 35 U.S.C. § 314(d) (providing that the U.S. Patent & Trademark Office’s decision to institute *inter partes* review of a patent “shall be final and nonappealable”); *Cuozzo Speed Techs. v. Lee*, 136 S. Ct. 2131, 2141 (2016) (enforcing § 314(d) according to its terms).

21. See, e.g., Steven Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007); Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364 (1953) (“You would treat the Constitution, then, as authorizing exceptions which engulf the rule, even to the point of eliminating the appellate jurisdiction altogether? How preposterous!”).

22. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869).

23. *Boumediene v. Bush*, 552 U.S. 723 (2008).

24. Charles L. Black, *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 845–46 (1975).

25. A statute that removed federal question jurisdiction over claims brought by plaintiffs who were Black, for example, would quite plainly violate provisions of the Constitution *external* to Article III. See *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (“So long as Congress does not violate other constitutional provisions, its ‘control over the jurisdiction of the federal courts’ is ‘plenary.’” (quoting *Trainmen v. Toledo, P. & W.R. Co.*, 321 U.S. 50, 63–64 (1944))) (plurality op.).

26. Indeed, some have argued that the power to withdraw jurisdiction is *essential* to the legitimacy of judicial review. Black, *supra* note 24, at 846.

We see three ways in which Congress might restrict the Court's appellate jurisdiction. First, Congress might restrict it wholesale, leaving the Court only with its constitutionally mandated original jurisdiction.²⁷ Second, it might create exceptions for politically salient subjects, like healthcare, immigration, or abortion. And finally, it might withdraw jurisdiction on an ad hoc basis, such as a jurisdictional provision in a new healthcare bill or a bill admitting the District of Columbia to the Union.

1. Wholesale Withdrawal

The only jurisdiction Article III mandates that the Supreme Court have is its original jurisdiction. "In all the other cases," the Court has only appellate jurisdiction, which is subject to "such exceptions, and under such regulations as the Congress shall make."²⁸ Unsurprisingly, there is vigorous debate as to whether the Constitution means what it says; many scholars argue that it does not,²⁹ and even the Court has suggested in dicta that eliminating judicial review of "colorable constitutional claims" would raise a "serious constitutional question."³⁰

But let us assume the Constitution *does* mean what it says.³¹ Withdrawing the Supreme Court's appellate jurisdiction wholesale would be thorny. In one sense, it would freeze precedent where it is today, perhaps giving the 117th Congress room to abrogate caselaw with new legislation. Pragmatically, it could also fracture the country's legal regime: imagine a world in which the right to abortion is protected by the Constitution in Montana, yet prohibited by the Constitution in neighboring North Dakota. Or, by removing all federal review of state-court decisions, state supreme courts would have the final word on questions of federal law that arose in those systems. For this reason alone, this option is probably unwise unless paired with one of the jurisdiction-rerouting options we discuss below.

Nevertheless, if Congress wanted to pursue this option, it would be legislatively straightforward to do:

Section 1251 of title 28, United States Code, is amended to add subsection (c), to read as follows:

"Any other provision of law notwithstanding, the sole jurisdiction of the Supreme Court is the original jurisdiction of the Supreme Court."

Sections 1253, 1254, 1257, 1258, 1259, and 1260 of title 28, United

27. U.S. CONST. art III § 2 (prescribing the Court's original jurisdiction as being "all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party.").

28. U.S. CONST. art III § 2.

29. See, e.g., Hart, *supra* note 21, at 1364; Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201-02 (1960).

30. *Webster v. Doe*, 486 U.S. 592, 593 (1988); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986).

31. See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869).

States Code, are repealed.

2. *Categorical and Ad Hoc Restriction*

Rather than withdraw the Supreme Court's appellate jurisdiction wholesale, Congress could simply restrict it as to certain subject matters, titles, or statutes. Efforts in this vein saw their peak in the latter half of the twentieth century, when some members of Congress sought to curb federal jurisdiction on topics ranging from subversive activities to school prayer.³² Again, the legislation would be straightforward. For example, to foreclose Supreme Court review of immigration decisions favorable to immigrants, Congress could enact:

Chapter 99 of title 28, United States Code, is amended to add section 1362, to read as follows:

“The Supreme Court shall have no appellate jurisdiction to review or reverse any final judgment or decree where is drawn in question the construction of any clause of any statute relating to immigration, and the decision is in favor of the title, right, privilege, or exemption claimed by an alien or naturalized citizen under such clause of the said statute.”³³

Much as with wholesale withdrawal, however, this type of targeted restriction could lead to the freezing and fracturing of federal law. Its most effective use, then, would not be retrospective but prospective, aimed at avoiding what the 117th Congress might view as erroneous decisions around *new* legislation. Thus, a new healthcare bill might include a provision like the one above, withdrawing jurisdiction from the Court to decide the constitutionality of the new statute.

B. *Jurisdiction Rerouting*

It is possible to avoid the freezing and fracturing effects raised by the prior options. Beyond restricting the Supreme Court's jurisdiction, the 117th Congress could reroute excluded cases to a more trusted venue.³⁴ Congress, without significant controversy, has already used jurisdictional routing to accomplish substantive ends. It did so most notably when it rerouted all patent cases to the Federal Circuit expressly for the purpose of strengthening the rights of patent

32. See, e.g., S. 2646, 85th Cong., 1st Sess. (1957); H.R. 326, 97th Cong., 1st Sess. (1981).

33. This language echoes that used in the original Judiciary Act of 1789. Act of Sept. 25, 1789, § 25, 1 Stat. 73, 85–87.

34. The 117th Congress might favor the Court of Appeals for the D.C. Circuit for this purpose, as it retains an ideological split likely to garner greater trust from Democratic elected officials. But nothing stops it from creating an entirely new “inferior court[]” to reroute jurisdiction to, if it pleases. See U.S. CONST., art. III § 1. Perhaps it could even call the new court the “High Court.”

holders.³⁵ Indeed, the Constitution gives Congress plenary power to “ordain and establish” inferior courts with whatever jurisdiction it pleases.³⁶

As before, the legislative text to accomplish rerouting would not be complicated. For example, suppose a new unified government decides to admit the District of Columbia as a state.³⁷ One view is that such an action would be unconstitutional.³⁸ Others disagree,³⁹ and in any event “Congress’ admission of new states is the paradigmatic political question.”⁴⁰ But why take the risk? To commit final review of legislation admitting the District of Columbia exclusively to the D.C. Circuit sitting *en banc*, Congress could add the following provision to the bill admitting the District to the Union:

“Any other provision of law notwithstanding, the United States Court of Appeals for the District of Columbia Circuit shall have exclusive and final jurisdiction to review, including by writ of certiorari granted upon the petition of any party, before or after rendition of judgment or decree, actions regarding the interpretation of, or the validity under the Constitution of, this Act.”

CONCLUSION

We wrote the first draft of this Essay on September 20, two days after Justice Ginsburg’s passing. We can only guess how her seat will be filled or what the outcome of the 2020 general election will be. We do know, though, that if something like our assumptions hold, the 117th Congress will have ample responsive options to a pre-election or lame-duck confirmation. And although we express no normative or pragmatic views whether that Congress should pursue those options, we believe it is helpful to think ahead about how such decisions might be made and what they might look like legislatively. In this Essay, we have predicted what that decision space will look like. Time will soon tell.

35. Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1453–58 (2012).

36. U.S. CONST. art. III § 1. *But see* James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433 (2000) (arguing that Congress may not undermine the premise that other courts must be “inferior” to the Supreme Court).

37. Joe Biden, the Democratic nominee for president, has expressed his support for D.C. statehood. Mike Murillo, *Joe Biden on D.C.: ‘You Should be a State’*, WTOP NEWS (Jan. 17, 2015), <https://wtop.com/dc/2015/01/joe-biden-d-c-state/> [<https://perma.cc/5DRQ-QWYA>].

38. *See, e.g.*, R. Hewitt, *D.C. Statehood: Not Without a Constitutional Amendment*, HERITAGE FOUNDATION (Aug. 27, 1993), <https://www.heritage.org/political-process/report/dc-statehood-not-without-constitutional-amendment> [<https://perma.cc/B9LH-FY33>].

39. *New Columbia Admission Act, Hearing on S.132 Before the S. Comm. on Homeland Security & Gov’t. Affairs*, 116th Cong. 2-3 (2019) (statement of Viet D. Dinh, Founding Partner, Bancroft PLLC), available at <https://norton.house.gov/sites/norton.house.gov/files/Dinh.pdf> [<https://perma.cc/82XS-MCZM>]; *ACLU Analysis of the Washington, D.C., Admission Act*, ACLU (Aug. 12, 2019), <https://www.aclu.org/archive-docs/aclu-legal-analysis-washington-dc-admission-act> [<https://perma.cc/VC4M-AFB3>].

40. Dinh, *supra* note 39, at 2.