United States House Committee on the Judiciary

Subcommittee on Courts, Intellectual Property,
Artificial Intelligence, and the Internet

Hearing on "Court Packing: A Threat to the Supreme Court's Legitimacy"

Thursday, May 21, 2026, 10:00 am

Testimony of Nikolas Bowie
Louis D. Brandeis Professor of Law, Harvard Law School

Chairman Issa, Ranking Member Johnson, Chairman Jordan, Ranking Member Raskin, and Distinguished Members of the Subcommittee:

Thank you for inviting me to testify. My name is Nikolas Bowie. I am the Louis D. Brandeis Professor of Law at Harvard Law School, where I teach and write about the U.S. Constitution, among other topics. With my colleague Daphna Renan, I have spent the last seven years researching a forthcoming book called *Supremacy: How Rule by the Court Replaced Government by the People* (W.W. Norton & Co. September 2026). Our book shows how the Supreme Court acquired the power it now wields, and what Congress can do about it.

I am also the author of a casebook, *Federal Constitutional Law* (West 2022), which is used to teach law school classes across the country.

You have asked whether "court packing" is "a threat to the Supreme Court's legitimacy." Before we can make sense of that issue, we first need to be on the same page about a more basic question: what is the legitimate role for the Court to play under our Constitution?

As Daphna Renan and I describe in our book, this question has been a critical one not only for our generation, but also for the generation that founded the Republican Party in the 1850s to fight against slavery. This was a generation familiar with the claims of some judges that the role of the Supreme Court was to declare federal laws unconstitutional, a claim the

Court asserted in an 1803 case called *Marbury v. Madison*. But it was also the generation that lived through 1857, when the Court actually disagreed with Congress for the first time. That decision, *Dred Scott v. Sandford*, defied a federal law by declaring it unconstitutional for Congress to limit the spread of slavery.

Rather than accept this new role for the Court, Republicans and their abolitionist allies responded that the Court's assertion of power to override Congress was unwarranted by the Constitution, "despotic," and would replace government by the people with a Court "inflated with supremacy." As Abraham Lincoln campaigned against *Dred Scott* in the 1860 presidential election, Republicans in Congress declared that "whenever a decision is, in the judgment of Congress, subversive of the rights and liberties of the people, or otherwise hurtfully erroneous, it is not only the right, but the solemn duty of Congress, persistently to disregard it." The next Congresses proceeded to enact statutes that rejected *Dred Scott* and created the beginning of a multiracial democracy in the defeated South.

Congress wanted the Court to enforce its legislation against defiant states and vigilantes. But to protect its legislation from the Court's own defiance, Congress changed the Court's size, stripped the Court of jurisdiction to review its most consequential laws, and proposed further legislation to prevent a "Second 'Dred Scott' Decision."

The early Republican Party offers an important lesson for our own generation. Drawing on their experience, the legitimate role for the Court is to *enforce* federal law against anyone who considers themselves above it, whether that anyone is a corporate executive, a state official, or a president. The role for the Court is not to *defy* federal law by placing themselves above you all—the national representatives of we the people—to whom our Constitution and elections give primary responsibility to determine what our Constitution means.

You all take oaths to support the Constitution. The legislation you enact on behalf of your constituents incorporates your collective understanding of how to interpret the document. The Constitution itself declares your laws the supreme law of the land.

But when the Court defies federal law by declaring it unconstitutional—by announcing that the views of five or six unelected lawyers are superior to and beyond the reach of every official 340 million Americans have the power to elect—the Court disrespects your oaths and undermines the possibility of republican governance itself. It fosters an undemocratic system in which none of us have the power to govern ourselves or attempt to resolve our most important political disagreements.

The Supreme Court's assertion of power to defy federal law has a name: *judicial supremacy*. Unfortunately, the idea was not fully buried by Congress in the 1860s. It reemerged in the 1870s after Congress drafted the 13th, 14th, and 15th amendments along with legislation to enforce the amendments' guarantees of freedom and equality. Rather than apply Congress's new legislation, the Court seized for itself the power to declare Congress constitutionally incapable of banning lynching, racial discrimination by businesses, or widespread disenfranchisement. A century-long era of Jim Crow followed.

But like those early Republicans, we do not need to accept judicial supremacy. In fact, since the beginning of U.S. history, judicial supremacy has been rejected by the leaders of Thomas Jefferson's party, abolitionists such as Frederick Douglass, and civil rights and labor icons. They have instead advocated for an alternative tradition that Daphna Renan and I call *democratic constitutionalism.* This is the idea that we the people have the power to interpret and define the meaning of the Constitution through the process of federal lawmaking. That the best interpretation of what the Constitution means is found not in any Supreme Court opinion but instead in the federal statutes you enact.

This was the position of the lawyers who argued *Brown v. Board of Education* in the 1950s. They urged the Court to stop defying Congress's civil rights laws and start enforcing them against racial discrimination in the South. As they understood, Congress during Reconstruction opposed the Court's review of federal legislation but supported judicial enforcement of its new federal statutes and constitutional amendments against states. One act in particular, the Ku Klux Klan Act of 1871, explicitly directed courts to prevent state officials from violating anyone's rights under the Constitution

or federal law. The Court finally applied this act of Congress to overturn harmful state laws in *Brown* and in many landmark cases since then.

Unfortunately, we have lost sight of democratic constitutionalism in our own time. The lesson of *Brown* for many people—especially lawyers—is that the Court's view of the Constitution must be supreme even over Congress, and that this supremacy has been accepted since *Marbury* in 1803. These lawyers incorrectly conflate the Court's defiance of Congress with its enforcement of federal authority against states, advancing the misleading conclusion that judicial supremacy is needed to protect a functional political process, powerless minorities, and the Constitution itself from tyrannical majorities.

But judicial supremacy has, in fact, had the opposite effect. In the years since *Dred Scott*, the Court has deployed its claimed supremacy over Congress to gut voting rights laws, undermine civil rights laws, and eliminate laws that prevented the wealthy from dominating our elections—and your daily call time.

Judicial supremacy has also unleashed presidential authoritarianism. By disabling many of the most important laws Congress and the president have enacted over the decades to regulate the executive branch, the Court has invited presidents to claim "conclusive and preclusive" authority to defy laws that protect the peaceful transition of power, that limit the use of military force, and that prevent the corruption of federal agencies.

It is difficult to imagine how any constitutional democracy could long survive this role the Court has asserted for itself. Ours may not be able to. Because the role is not established by our Constitution, we should not tolerate it any longer.

You have the power to replace judicial supremacy with democratic constitutionalism by statute. Where the Constitution says nothing about the Court's power to defy acts of Congress, it explicitly empowers Congress to regulate the Court and determine for yourselves which laws are necessary and proper to carry into execution the Constitution's guarantees. Your predecessors have handed down a playbook for how to enact your understanding of the Constitution and prohibit unelected judges from replacing it with their own:

- **Curb defiance of federal statutes.** You could follow the example of the authors of the 13th, 14th, and 15th amendments who proposed declaring by statute that the constitutionality of all federal laws or specific federal laws are political questions, and therefore the Supreme Court must enforce the laws instead of defying or second-guessing them.[1]

- **Introduce a consensus rule.** You could follow the example of their proposals to prohibit the judiciary from second-guessing any federal law absent a consensus rule among the justices that you specify, such as a unanimous or supermajority vote.[2]

- **Override harmful constitutional interpretations.** You could follow the examples of laws such as the Territorial Slavery Act of 1862, Civil Rights Act of 1866, and more recent laws such as the Voting Rights Act of 1965 and Indian Civil Rights Act Amendments of 1990 in overriding harmful Supreme Court interpretations of the Constitution.[3]

- **Regulate how the Supreme Court acts.** You could follow the examples of laws such as the Judiciary Act of 1789, Process Act of 1792, Habeas Corpus Act of 1868, Judiciary Act of 1925, and Rules Enabling Act of 1934 in specifying what procedures the Supreme Court must follow in reaching decisions, what kind of evidence or claims it may consider, what it has the power to do on its own initiative, what information must be publicized, and what kinds of questions, cases, or controversies it has jurisdiction to hear, including on its so-called shadow docket.[4]

- **Regulate where and when the Supreme Court sits.** You could follow the examples of laws such as the Judiciary Acts of 1789 and 1802 and Public Buildings Act of 1926 in regulating the Supreme Court's calendar, delaying when the justices are allowed to next meet, specifying where the Court is allowed to sit, or requiring the justices to ride circuit and spend time in local communities as trial judges.[5]

- **Regulate what anyone can ask any court to do.** You could follow the examples of laws such as the All Writs Act of 1789, Anti-Injunction Act of 1793, Tax Anti-Injunction Act of 1867, Norris–La Guardia Act of

---

[1] *See, e.g.*, S. 363, 40th Cong. (1868) (specific law); S. 274, 41st Cong. (1869) (all laws).
[2] *See, e.g.*, S. 163, 40th Cong. (1868) (supermajority); Cong. Globe, 40th Cong., 2d Sess. 479 (1868) (unanimous).
[3] 12 Stat. 432 (territories); 14 Stat. 27 (1866); 79 Stat. 437 (VRA); 104 Stat. 1892 (ICRA).
[4] 1 Stat. 73 (1789); 1 Stat. 275 (Process); 15 Stat. 44 (Habeas); 43 Stat. 936 (1925); 48 Stat. 1064 (Rules).
[5] 1 Stat. 73 (1789); 2 Stat. 132 (1802); 2 Stat. 156 (1802); 44 Stat. 630 (Buildings).

1932, Johnson Act of 1934, Portal to Portal Act of 1947, Immigration and Nationality Act of 1952, Antiterrorism and Effective Death Penalty Act of 1996, and Fiscal Responsibility Act of 2023 in regulating who can bring a particular case in any court, including the Supreme Court; what issues no court has jurisdiction to decide; and what kinds of writs, injunctions, or other orders a court has the power to issue.[6]

- **Allow new or specific courts to resolve certain issues.** You could follow the examples of laws such as the Judiciary Acts of 1801 and 1802, Evarts Act of 1891, Emergency Price Control Act of 1942, Voting Rights Act of 1965, Foreign Intelligence Surveillance Act of 1978, and Federal Courts Improvement Act of 1982 to create new courts, abolish existing courts, reassign judges, or allow only certain courts—including the courts you create—to exercise jurisdiction over specific questions.[7]

- **Specify when the United States or its officials may be sued.** You could follow the examples of laws such as the Tucker Act of 1887, Federal Tort Claims Act of 1946, and Westfall Act of 1988 in specifying when, if at all, the United States or its officials may be sued and whether they are entitled to sovereign, qualified, or other forms of immunity.[8]

- **Create administrative alternatives to Article III courts.** You could follow the examples of laws such as the Court of Claims Act of 1855, Freedmen's Bureau Act of 1866, Immigration Act of 1891, Federal Trade Commission Act of 1914, and Dodd–Frank Act of 2010 in channeling law enforcement through agencies rather than courts.[9]

- **Specify how to interpret federal law.** You could follow the examples of laws such as the Dictionary Act of 1871, Administrative Procedure Act of 1946, Religious Freedom Restoration Act of 1993, and Iran Threat Reduction and Syria Human Rights Act of 2012 in instructing courts how to interpret federal laws and whether or not to apply canons of interpretation such as the so-called major questions doctrine.[10]

---

[6] 1 Stat. 73, 81 (AWA); 1 Stat. 333, 334 (AIA); 14 Stat. 471, 475 (Tax); 47 Stat. 70 (Norris–La Guardia); 48 Stat. 775 (Johnson); 61 Stat. 84 (Portal to Portal); 66 Stat. 163 (INA); 110 Stat. 1214 (AEDPA); 137 Stat. 10, 47 (Fiscal Responsibility).

[7] 2 Stat. 89 (1801); 2 Stat. 132 (repeal); 2 Stat. 156 (1802); 26 Stat. 826 (Evarts); 56 Stat. 23 (EPCA); 79 Stat. 437 (VRA); 92 Stat. 1783 (FISA); 96 Stat. 25 (FCIA).

[8] 24 Stat. 505 (Tucker); 60 Stat. 842 (FTCA); 102 Stat. 4563 (Westfall).

[9] 10 Stat. 612 (Court of Claims); 14 Stat. 173 (Freedmen); 26 Stat. 1084, 1085 (Immigration); 38 Stat. 717 (FTC); 124 Stat. 1376, 1955 (CFPB).

[10] 16 Stat. 431 (dictionary); 60 Stat. 237 (APA); 107 Stat. 1488 (RFRA); 126 Stat. 1258 (Iran).

- **Define "good Behaviour."** You could expand federal ethics laws enacted since 1792 that define what counts as "good Behaviour" for a federal judge, that establish oversight institutions for the federal judiciary, and that require Supreme Court justices to disclose certain gifts, to abstain from receiving bribes or honoraria, and to recuse from cases in which their impartiality might reasonably be questioned.[11]

- **Regulate the Supreme Court's budget and discretionary benefits.** You could change how you appropriate funds to the Supreme Court, using this power to regulate how it hires clerks and other staff and when justices receive raises, vacation, retirement benefits, and other perks.[12]

- **Change the number of justices.** You could follow the examples of federal laws enacted in 1789, 1801, 1802, 1807, 1837, 1863, 1866, and 1869 that specify the number of justices who sit on the Supreme Court.[13]

This final example brings us back to the subject of this hearing: whether "court packing" is a "threat to the Court's legitimacy."

The answer to this question is that the number of justices, like nearly everything else about the Court, can be regulated by statute. Section 1 of title 28 of the U.S. Code currently sets the number of justices at nine. Congress can amend that number. And if the current majority of the Court is exercising an illegitimate supremacy over federal law, a supremacy that the Constitution does not give the Court, that the Court should not possess, and that is being used to undermine multiracial democracy while making the future of republican governance unviable, then regulating the Court is not just legitimate—it is Congress's responsibility.

---

[11] Process Act of 1792, 1 Stat. 275 (recusal); Judicial Disqualification Act of 1974, 88 Stat. 1609 (recusal); Ethics in Government Act of 1978, 92 Stat. 1824 (disclosure); Judicial Conduct and Disability Act of 1980, 94 Stat. 2035 (oversight); Ethics Reform Act of 1989, 103 Stat. 1716 (bribe and honoraria ban). *See also* S.J. Res. 193, 64th Cong. (1917) (proposing that the judicial defiance of federal law violates the "good behavior" standard).

[12] *See, e.g.*, 28 U.S.C. §§ 671–77 (Supreme Court staff); Judiciary Act of 1869, 16 Stat. 44 (pensions); Act of Mar. 1, 1929, ch. 419, 45 Stat. 1422 (senior status).

[13] Judiciary Act of 1789, 1 Stat. 73 (6 justices); Judiciary Act of 1801, 2 Stat. 89 (5); Act of Mar. 8, 1802, 2 Stat. 132 (6); Seventh Circuit Act of 1807, 2 Stat. 420 (7); Eighth and Ninth Circuits Act of 1837, 5 Stat. 176 (9); Tenth Circuit Act of 1863, 12 Stat. 794 (10); Judicial Circuits Act of 1866, 14 Stat. 209 (7); Judiciary Act of 1869, 16 Stat. 44 (9).