



A DCI Deliberation Guide

Reforming the Supreme Court:

How should we change America's

"least dangerous branch" of government, if at all?

Format for Deliberation

Before the Deliberation

- I. Read this document's Background, Expected Outcomes and Conversation Agreements section
- II. (Optional) Review the *New York Times* collection of op-eds discussing different ideas about [How to Fix the Supreme Court](#).
- III. (Optional) Read articles by our four panelists:
 - A. Ryan Doerfler and Samuel Moyn's article in *The Atlantic*, "[Reform the Court, but Don't Pack It.](#)"
 - B. Judith Resnik's article on CNN, "[The size of the Supreme Court is only part of the problem.](#)"
 - C. James Lindgren and Steven Calabresi's article in the *Harvard Journal of Law and Public Policy*, [Term Limits for the Supreme Court: Life Tenure Reconsidered](#).
 - D. Kent Greenfield's article on "[Create a New Court.](#)"
- IV. (Optional) Review any of the resources listed in the footnotes or conduct your own research on the topic for familiarity.

During the Deliberation

- I. Conversation Agreements - 5 min.
- II. Round 1: Getting to Know Each Other - 5 min.
- III. Round 2: Exploring the Topic - 30 min.
- IV. Round 3: Reflections - 15 min.
- V. Debrief - 5 min.

Background

What role do and should courts play in the United States? What does the Constitution say, and what options to change the current format are possible and which are wise?

In this country, these questions have been raised and deliberated on since America's founding, as reflected in **Alexander Hamilton's** need to argue that the Supreme Court would become America's least dangerous branch of government.¹ What makes any branch "dangerous," and why worry about danger coming from the Supreme Court?

These questions are front and center today in part because of **high profile recent nominations**, including last year's appointment of Amy Coney Barrett to the Supreme Court and the resulting shift in its ideological balance. Concerns about the power of the Supreme Court and calls for its reform thus need to be examined. Within the context of the partisan rancor that seems to increase with each successive judicial nomination, many Americans are growing more open to reform proposals that aim to repair perceptions of decreased legitimacy and reduce the politicization of our nation's highest court. A recent survey, for example, found that 75% of respondents favored enacting at least one of five proposals to reform the Supreme Court.²

The recent history of nominations has contributed to the polarization surrounding the Court. President Barack Obama nominated **Merrick Garland** in 2016 to fill the vacancy following Justice Antonin Scalia's death. The Senate's Republican majority refused to hold any hearings, claiming Scalia's successor should be left to the next President to nominate. Ultimately, President Donald Trump appointed **Neil Gorsuch** to the Supreme Court in 2017, with the Senate voting almost entirely along party lines to confirm him. It was only able to do so after the Republican majority eliminated the 60-vote requirement for Supreme Court confirmations.³ And after a highly contentious confirmation process that examined allegations of sexual assault by the nominee, **Brett Kavanaugh** joined the Court in 2018, with only one Democratic senator voting for him.⁴

Then Republicans confirmed **Amy Coney Barrett** only 30 days after being nominated by President Trump and only eight days before the 2020 election, the closest confirmation to an election in American history.⁵ It was also the first time in 156 years that a Supreme Court justice

¹ Hamilton, Alexander. [Federalist #78](#).

² Epstein, Lee, James L. Gibson, & Michael J. Nelson, "[Public Response to Proposals to Reform the Supreme Court](#)."

³ Kim, Seung, Burgess, Everett, and Elana Schor. "[Senate GOP goes 'nuclear' on Supreme Court filibuster](#)."

⁴ Stolberg, Sheryl. "[Kavanaugh Is Sworn In After Close Confirmation Vote in Senate](#)."

⁵ Congressional Research Service. "[Supreme Court Vacancies That Occurred During Presidential Election Years \(1789-2020\)](#)"; United States Senate. "[Supreme Court Nominations \(1789-Present\)](#)."

was confirmed without a single vote from the opposition party.⁶ With these appointments, justices appointed by Republican presidents now hold a 6–3 majority in the Court, which is celebrated by conservatives and is a deep concern for liberals.

These dynamics have contributed to increasing concern about the **perceived legitimacy and politicization of the Court**, particularly as it has made far-reaching decisions related to abortion, gay marriage, gun control, political contributions, and other controversial issues. Some of these decisions have upset Republicans while others have angered Democrats, leading to frustration in both parties. Public opinion as measured in polling data about the Supreme Court has indeed declined in recent years. Between 2000 and 2020, the percentage of the American public disapproving of the way the Supreme Court is handling its job increased from 29% to 43%. Likewise, the percentage of Americans who stated they have little or no trust and confidence in the Supreme Court increased from 24% in 2000 to 34% in 2020.⁷

The U.S. Supreme Court sits on top of the rest of **the federal judiciary** and has power over state court decisions if they rest on federal law. Some reform proposals (including FDR’s famous “court packing” effort) focus on more facets of this system, while others are centered on the Supreme Court itself. And all reform proposals run into headwinds because of concerns about whether they would help or hurt its “legitimacy,” a term itself needed to be explored. In order to systematically think through the wisdom of reform efforts, citizens and policymakers should consider different perspectives on three basic questions, which are outlined below.

Should the Supreme Court be reformed?

Why try to change the composition or rules of the Supreme Court? To what end? What is wrong that needs fixing? Is it only the Supreme Court or the entire judiciary that requires attention? Unpacking those questions is an important step towards understanding the differing views on pending proposals for reform.

For some, the need to alter the Supreme Court and realign some of its authority predates the last decade. They perceive the Court as having too much power in general, too much power over the wrong things, and/or the wrong people (or the wrong types of people) having too much power. These proponents of reform argue that their suggested changes will improve public perceptions and restore the Court’s legitimacy, which we can roughly understand as the public’s perception that it has the right to exercise power. They assert this legitimacy is at risk due to the Court’s low public approval and the increasing politicization of nominations that has

⁶ Fandos, Nicholas. “[Senate Confirms Barrett, Delivering for Trump and Reshaping the Court.](#)”

⁷ Gallup. “[Supreme Court.](#)”

“increased the sense that judges are on teams and courts [are] just another arena for partisan encounter.”⁸

For others, the urgency of reform has been increased by recent appointments to the Court and the nature of its decisions. Many progressives focused on the last few decades now hope that a Democratically controlled House, Senate, and Presidency will pass judicial reforms that will curtail the threat they fear a conservative-leaning Court poses to their agenda. Other reasons for reform are less focused on the Supreme Court itself but on saving the “American system of self-government.”⁹ Following this logic, some reformers argue the purpose of reform should be to reduce the power of the Supreme Court, which they view as not sufficiently accountable to the public.

Despite recent interest in reforming the Supreme Court, some commentators assert that many of the proposed reforms will not solve the problems they are designed to address. Opponents of reform also assert they will only further weaken its legitimacy and may do more harm than good. They also argue that changes to the composition of the Court by a Democratically controlled Congress designed to produce more liberal rulings will simply be met with a reversal or escalation of these changes by a future Republican controlled Congress.

Some scholars such as Judith Resnik have pointed out that reform efforts should take into account the fact that the federal judiciary is more than only the Supreme Court, and includes appellate, district, and bankruptcy courts as well.¹⁰ The selection processes, composition, and decisions of these courts also contribute to the public’s perceptions of the judiciary, the Supreme Court, and the federal government more generally.

What criteria should we use to evaluate various Supreme Court reform proposals?

Beyond arguments for and against reform in general, this question turns to how we should evaluate specific reform ideas. One criterion to consider when evaluating Supreme Court reforms is the **political feasibility** of it becoming law. How likely is the reform to be supported by both Houses of Congress and the President? The **constitutionality of the reform** might also be a consideration – any proposal that may require a constitutional amendment would face significant obstacles either in the form of legal challenges or the cumbersome amendment process. An additional criterion to consider is whether the reform proposal is made in **good**

⁸ Doerfler, Ryan and Samuel Moyn. [“Democratizing the Supreme Court.”](#)

⁹ Doerfler, Ryan and Samuel Moyn. [“Reform the Court, but Don’t Pack It.”](#)

¹⁰ Judith Resnik. [“The size of the Supreme Court is only part of the problem.”](#)

faith and with consistent reasoning that is not motivated by partisan interests.¹¹ Reforms meeting this standard may be less likely to be repealed by a future Congress.

Reform proposals might also be evaluated on their **potential long-term effects** on the independence of justices, the protection of minority rights, the functioning of the federal government, the relationships between the Court and the other branches, the states, and the lower courts, the perceived legitimacy of the Court by the public, and its ability to interpret the Constitution. Considering the impact of suggested changes requires us to think about the importance and dynamics of each of these variables.

What are the most prominent proposals for reforming the Supreme Court?

As work by Ryan Doerfler and Samuel Moyn has shown, the most prominent reform proposals can be grouped into two categories. The first category of Supreme Court reforms focuses on the question of who should sit on the Supreme Court.¹² These **“personnel-related” reforms** include proposals to **expand the size of the Court**. A related proposal opts to **balance the court**, with five Republican justices, five Democratic justices, and five justices from the appellate courts, confirmed by unanimous consensus of the ten partisan justices.¹³ Though critics argue adding justices would politicize the judiciary, proponents argue that it already is politicized. “Once cooperation breaks down, the only play to restore it is tit-for-tat.”¹⁴

If Democrats carry out the recently popularized idea of “court packing” to transform the Court into a progressive majority, opponents of this strategy argue that “Republicans will do the same when they have the power.”¹⁵ This could politicize and delegitimize the Court even more. Jamelle Bouie argues that such escalation may not necessarily be a negative outcome and may ultimately lead to both sides finding a “new equilibrium.”¹⁶ This may be the only way for everyone to learn that neither side wins without cooperation.¹⁷

Beyond proposals that change the number of justices serving on the Court, another reform idea that has been suggested by legal scholars Paul Carrington, Roger Crampton, Steven Calabresi, James Lindgren and others calls for a constitutional amendment to impose **18-year term limits** on the justices in which terms are staggered two years. This ensures one-term presidents have

¹¹ Turley, Jonathan. [“Here are the worst proposals to reform Supreme Court.”](#)

¹² Doerfler, Ryan and Samuel Moyn. [“Reform the Court, but Don’t Pack It.”](#)

¹³ Millhiser, Ian. [“9 ways to reform the Supreme Court besides court-packing.”](#)

¹⁴ Kramer, Larry. [“Pack the Courts.”](#)

¹⁵ Barnett, Randy. [“Keep the Courts the Same.”](#)

¹⁶ Bouie, Jamelle. [“Court Packing Can Be an Instrument of Justice.”](#)

¹⁷ Kramer, Larry. [“Pack the Courts.”](#)

two nominees to the Supreme Court, while two-term presidents nominate four justices. Vacancies due to death or retirements would be filled by replacements who would serve for the rest of the unexpired term with no possibility of reappointment.¹⁸

The second category of Supreme Court reform tackles the question of what power ought to be held by the Supreme Court. These reforms generally focus on stripping, or “**disempowering,**” **the Court of some of its power**, which requires us to tease out the different sources of its power. Kent Greenfield has focused on its power to rule on constitutional matters, and so he has proposed that Congress and the President accomplish this goal by creating a **new Constitutional Court** made up of judges from existing federal courts that would handle questions of constitutional interpretation. It would have an even number of judges to ensure that rulings were not made with a bare majority. The Supreme Court would focus on the interpretation of federal statutes and regulations and would only be able to hear an appeal of a decision from the Constitutional Court if seven of nine justices agreed to do so.¹⁹

Alternatively, in an effort to reduce the Supreme Court’s power as a “super-legislature,” another proposal calls for Congress to require a **supermajority** of the Court’s justices to agree on rulings. Requiring six or seven justices to agree on the constitutionality of federal law, as opposed to the current requirement of five, would shift power back to the legislative and executive branches of government.²⁰ One additional reform proposes to **end justices’ ability to grant certiorari**, which allows them to select cases that connect to their own priorities. Delegating this power to a randomly selected panel of appellate justices instead would limit this power and encourage litigants to develop sound legal arguments rather than wait for a sympathetic composition of justices to take up their case.²¹

¹⁸ Calabresi, Steven. “[End the Poisonous Process of Picking Supreme Court Justices.](#)” Calabresi, Steven and James Lindgren. [Term Limits for the Supreme Court: Life Tenure Reconsidered](#); Cramton, Roger, and Paul Carrington. [Reforming the Court: Term Limits for Supreme Court Justices.](#)

¹⁹ Greenfield, Kent. “[Create a New Court.](#)”

²⁰ Bokor-Lindell, Spencer. “[Three Paths for Reforming the Supreme Court.](#)”

²¹ Wang, Melody. “[Don’t Let the Court Choose Its Cases.](#)”

Expected Outcomes and Conversation Agreements (5 minutes)

Expected Outcomes of the Conversation

Given the complexity of this topic and our limited available time, we do not expect to come to any formal agreement or declaration in this conversation. Instead, our focus is on deepening our understanding of proposals to reform the Supreme Court. The DCI will follow up with resources for actions that you can take related to this important topic following the deliberation today.

Deliberative Dispositions

The DCI has identified several “deliberative dispositions” as critical to the success of deliberative enterprises. When participants adopt these dispositions, they are much more likely to feel their deliberations are meaningful, respectful, and productive. Several of the Conversation Agreements recommended below directly reflect and reinforce these dispositions, which include a commitment to egalitarianism, open mindedness, empathy, charity, attentiveness, and anticipation, among others. A full list and description of these dispositions is available at <https://deliberativecitizenship.org/deliberative-dispositions/>.

Conversation Agreements

In entering into this discussion, to the best of our ability we each agree to:

1. Be authentic and respectful
2. Be an attentive and active listener
3. Be a purposeful and concise speaker
4. Approach fellow deliberators’ stories, experiences, and arguments with curiosity, not hostility
5. Assume the best - and not the worst - about the intentions and values of others, and avoid snap judgements
6. Recognize that no one has all the answers, and demonstrate intellectual humility by asking questions and making space for others to do the same
7. Critique the idea we disagree with, not the person expressing it, and remember to practice empathy
8. Note areas of both agreement and disagreement
9. Respect the confidentiality of the discussion
10. Avoid speaking in absolutes (i.e. “All people think this,” or “No educated people hold that view”)

Getting to Know Each Other (5 minutes)

Each participant can take 1-2 minutes to share their name, where they live, and what drew them to this conversation, and then answer one of these questions:

1. What are your hopes and concerns for your family, community, and/or the country?
2. What would your best friend say about who you are?
3. What sense of purpose/mission/duty guides you in your life?

Exploring the Topic (30 minutes)

Take ~2 minutes each to answer one of the questions below without interruption or crosstalk. After everyone has answered, the group should spend the rest of their time on clarifying or follow up questions and responses. Continue exploring additional questions and ideas as time allows.

1. What do you think about America's various courts, and do you distinguish among them so that a focus on the Supreme Court makes sense to you?
2. Why is the Supreme Court important to you personally?
3. What is wrong, if anything, with the Supreme Court? Does it need to be reformed? Why or why not?
4. How should we evaluate different Supreme Court reform ideas?
5. Should the Supreme Court be reformed using a personnel or disempowering strategy?
6. Given the evaluation criteria discussed earlier, which personnel or disempowering strategy do you most prefer, if any? Why?

Reflections (15 minutes)

1. In one sentence, share what was most meaningful or valuable to you during this deliberation.
2. Was there anything that was said or not said that you think should be addressed with the group?
3. Are there any perspectives missing from this conversation that you feel would be important to hear?
4. What did you hear that gives you hope for the future of conversations about the Supreme Court reform?
5. Were there any moments of tension that highlight different values in this conversation?

6. Is there a next step you would like to take based upon the deliberation you just had?
What questions remain?

Debrief (5 minutes)

This marks the end of today's Deliberative Forum! Please use the closing minutes of your team meeting to discuss how it went with your facilitator. Was the meeting what you expected? Is there something that worked well, or something that didn't work well? What would you like to see in future Deliberative Forums you attend? We hope it has been an engaging and illuminating conversation, and we look forward to seeing you all next time!

About This Guide

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The Deliberative Citizenship Initiative

The Deliberative Citizenship Initiative (DCI) is dedicated to the creation of opportunities for Davidson students, faculty, staff, alumni, and members of the wider community to productively engage with one another on difficult and contentious issues facing our community and society. The DCI regularly hosts facilitated deliberations on a wide range of topics as well as organizes training workshops for deliberation facilitators. To learn more about these opportunities, visit www.deliberativecitizenship.org.

DCI Deliberation Guides

The DCI has launched this series of Deliberation Guides as a foundation for such conversations. They provide both important background information on the topics in question and a specific framework for engaging with these topics. The Guides are designed to be informative without being overwhelming and structured without being inflexible. They cover a range of topics and come in a variety of formats but share several common elements, including opportunities to commit to a shared set of Conversation Agreements, learn about diverse perspectives, and reflect together on the conversation and its yield. The DCI encourages conversations based on these guides to be moderated by a trained facilitator. After each conversation, the DCI also suggests that its associated Pathway Guide be distributed to the conversation's participants.

DCI Pathways Guides

For every Deliberation Guide, the DCI has also developed an associated Pathways Guide, which outline opportunities for action that participants can consider that are related to the covered topic. These Pathways Guides reinforce the DCI's commitment to an action orientation, a key deliberative disposition. While dialogue and deliberation are themselves important contributors to a healthy democracy, they become even more valuable when they lead to individual or collective action on the key issues facing society. Such action can come in a range of forms and should be broadly understood. It might involve developing a better understanding of a topic, connecting with relevant local or national organizations, generating new approaches to an issue. or deciding to support a particular policy.

If you make use of this guide in a deliberation, please provide attribution to the Deliberative Citizenship Initiative and email dcideliberativecitizenship.org to tell us about your event. To access more of our growing library of Deliberation Guides, Pathway Guides and other resources, visit www.deliberativecitizenship.org/readings-and-resources.