

Common Law S4 Ep 2: Tara Leigh Grove Transcript

[THEME MUSIC IN, THEN UNDER]

Risa Goluboff: Today on Common Law: court-packing, with professor Tara Leigh Grove of the University of Alabama School of Law.

Tara Grove: Anything that we suggest as a court reform today, we should imagine, how would we view this if our political opponents or people that we think are just dangerous to American democracy have the same power in their hands?

[THEME MUSIC UP, THEN UNDER, THEN OUT]

Risa Goluboff: Welcome back to Common Law, a podcast of the University of Virginia School of Law. I'm Risa Goluboff, the dean. This season, we are welcoming to the show four co-hosts who are also UVA law professors who will help guide us through topics in their fields. These stellar scholars include experts on everything from contracts to law and psychology. So we're calling this season Co-Counsel. Today, we're welcoming professor John Harrison. To be frank, John is an expert in just about everything. He came to Virginia after serving in the Justice Department and has taught an absolutely amazing array of topics over the years: constitutional law and history, federal courts, remedies, corporation, civil procedure, legislation – I'm not done –

[LAUGHTER]

Risa Goluboff: ...national security law, administrative law, federal income tax and property. I've probably missed something. When people ask how we make sure that everything in our curriculum gets covered, I usually answer, "John Harrison." He has also served as a counselor on international law in the State Department's Office of the Legal Advisor, and he is a prolific and prominent scholar. John, welcome.

John Harrison: Thank you, Risa. It's great to be here.

Risa Goluboff: I wonder if you could just give us a taste for the area of law that you're thinking about the most these days.

John Harrison: Right now, I'm thinking some more about some of the fundamental features of the American constitutional system. And in particular, the way judicial review works. You might think that after a couple hundred years, that's all been sorted out, but there are always new issues coming up.

Risa Goluboff: Well, I am excited to talk about those issues, and I think they really are in play today in a big way on the national landscape. So we have a terrific guest today. Do you want to tell us who she is and what she's going to talk to us about?

John Harrison: Yes, professor Tara Leigh Grove at the University of Alabama School of Law. There at Alabama, Tara is the director of the Program in Constitutional Studies. She was a lawyer with the appellate staff of the civil division of the Department of Justice, and of special interest to us, she just finished service on the Presidential Commission on the Supreme Court of the United States.

Risa Goluboff: Right, so that commission is the one that's been in the news quite a lot. Its members were convened to look at possible changes to the court, ranging from additional justices to term limits and many things in between. And the commission's members included other judges and scholars, including our own faculty member, Bertrall Ross, and alumnus and retired federal judge Thomas B. Griffith.

[THEME MUSIC IN]

John Harrison: The commission recently released its final report. So we'll have an opportunity to talk about that with professor Grove. We will be right back with the University of Alabama's Tara Leigh Grove.

[THEME MUSIC UP, THEN OUT]

Risa Goluboff: Tara, welcome to the show.

Tara Grove: Thank you so much.

John Harrison: So maybe you could tell us a little bit about the commission, about what your work has been like over the last several months.

Tara Grove: I'll do my best. So, during the presidential campaign, the president was asked about court reform and gave assorted answers and his final answer was to say, 'Hey, let me start a commission.'

CBSN: SUPREME COURT COMMISSION HOLDS FIRST MEETING TO CONSIDER POSSIBLE REFORMS

Joe Biden: I will, uh, ask them to over 180 days, come back to me with recommendations as to how to, uh, reform the court system, because it's getting out of whack, um, the way in which it's being handled. And it's not about court-packing. There's a number of other things that our constitutional scholars have debated and I'd look to see what recommendations that commission might make.

Tara Grove: So the president officially announced the Commission and issued the executive order in April of 2021. I was contacted and I think several other folks were contacted during the transition period. So I actually heard about this in December of 2020.

Risa Goluboff: When you were contacted by the transition team, how did you feel about it? Did you think, oh, that's a lot of work or did you think this is a perfect opportunity for me to, you know, engage in a public-serving way on the scholarship and my expertise or, you know, what was your attitude toward the project?

Tara Grove: You know, once I got over the, the surprise, my reaction was to be super excited. I've been studying court reform for over a decade, long before it was cool.

Risa Goluboff: Isn't it always cool? It's not always cool?

[LAUGHTER]

Tara Grove: I thought it was cool, but a few years before the commission was created a former colleague and, and a good friend of mine said to me, 'You know, Tara, your stuff on jurisdiction stripping and court-packing, it's good scholarship, but it's really not relevant to anything. I took some offense to that. I'm not really sure why he said that, but he did. And so when I was invited to be on the commission, I felt some, some level of vindication.'

Risa Goluboff: Absolutely. Yeah.

Tara Grove: I wasn't totally wasting my time, in, in studying these debates from 1789 to the present.

Risa Goluboff: What was the charge of the commission?

Tara Grove: The charge was to analyze various proposals for court reform and give a breakdown of the costs and benefits, but NOT give recommendations. And I think some people don't realize that. The charge of the commission was NOT to actually recommend anything, but to provide an analysis. And I think there's some discussion as to whether that's valuable. I actually think that's quite valuable to say, okay, here are the pros and cons of various court reforms. And then you, reader, you can make the choice yourself as to what you prefer. And so that is what the commission ultimately did in voting to submit the report to the president.

Risa Goluboff: The report is, you know, almost 300 pages. It's a really substantial document.

Tara Grove: There are a lot of end notes. You have a lot of law professors, so they're going to be a lot of footnotes in anything.

[LAUGHTER]

Risa Goluboff: Even without the law students requiring them, it turns out the law professors like them.

John Harrison: Yes.

Tara Grove: Commissioners from Yale blame those of us who went to Harvard and were on the Harvard Law Review for all of that.

John Harrison: For actually wanting you to support what you said with authority?

[LAUGHTER]

Tara Grove: I know, well, you know, it's ...

John Harrison: Typical Harvard thinking.

Tara Grove: Yeah, um, and not typical Yale thinking.

Risa Goluboff: You're talking to two Yalies, I think, so ...

Tara Grove: Sorry!

Risa Goluboff: I don't take any offense. So this commission was large — 36 members, right? What was it like working with that many other commissioners?

Tara Grove: At the beginning, I didn't anticipate the frustration and, and I should have anticipated some of the challenges and the difficulties of trying to get a lot of people to come to agreement. And it gave me some appreciation for what we might see if we had a much larger Supreme Court.

[LAUGHTER]

John Harrison: Tara, one of the questions that the report touches on that I think would be really interesting to discuss briefly is that of norms: the idea that there are practices that aren't legally required, but that are generally accepted, and that people normally go along with, even when following the norm isn't in their immediate interests, but that maybe in the last five, 10 years, there've been more departures from norms than sometimes in the past. Is this something we should be thinking about, the difference between norms and the law, strictly speaking?

Tara Grove: I think most legal scholars would have told you, at least until recently, that there is no legal prohibition on, for example, expanding the Supreme Court, but there is a very strong norm against that. I anticipate that after recent debates over court expansion and court-packing and our report, there will be as much legal scholarship on this topic as there has been on jurisdiction-stripping over the past 30 years.

John Harrison: Mm-hmmm.

Tara Grove: You have my prediction there.

John Harrison: Do you think that the same analysis may apply to whether the Senate holds hearings or otherwise considers presidential

nominees to the Supreme Court? Maybe that's something about which there is a norm, but not necessarily an actual legal rule.

Tara Grove: Yes, that is what I, I have always assumed that that is governed by norms and not legal rules. One of the questions I asked during the commissioners' hearings, Professor Randy Barnett was testifying and was actually arguing that partisan court-packing, he said was unconstitutional, because it would so undermine the structure of government. And in a question to him, I said, 'If we think that something is unconstitutional if it undermines the structure of government, what if you have a United States Senate that refuses to confirm a Supreme Court nominee ...

John Harrison: Mm-hmmm.

Tara Grove: And then another, and then another. And so the Supreme Court size doesn't expand. It goes from nine to eight to seven to six. Under the theory that Professor Barnett proposed one could say that partisan rejection of nominees is also potentially unconstitutional. And he said under his theory, that would be so.

John Harrison: Mm-hmmm.

Tara Grove: The theory that Professor Barnett proposed is not a theory that I personally accept as a legal scholar, but I think once we go down that road, we can say that there actually may be some legal constraints, constitutional constraints on the Senate as well. Even if they're not judicially enforceable, they may actually exist.

Risa Goluboff: There's a long and complicated history of norms and custom being part of how we determine what the law is, especially when it comes to the relationships between the branches, right? So it's not like there's been a hermetic seal between, norms or custom and law.

Tara Grove: Exactly. And I think, part of the challenge for American legal scholars is that so much of what we think of as law is equated with whatever the judiciary will enforce. Even in the discussions of the commission, I realized a lot of people simply say something is illegal BECAUSE the Supreme Court will strike it down. And if you have that assumption, a lot more stuff goes into the worlds of constitutional convention and constitutional norms. I personally do not agree with that. I think that there are lots of things that are illegal, but judicially

unenforceable. But if you have my view of things, then the line between what is a constitutional convention and constitutional norm and what is actually constitutional and unconstitutional becomes far harder to discern.

John Harrison: One of the classic examples of a principle that for a long time was thought to be a norm and maybe quasi-constitutional is that presidents don't serve more than two consecutive terms. And then that was abandoned and then the constitution was amended. I wonder whether that sort of is connected to the commission and the commission's work, whether talk about norms and norm violations might lead to constitutional amendments that would actually put a norm in place. Because one of the things you talk about briefly — one of the things the commission talks about briefly — is the possibility of an amendment to fix the size of the court. Do you think that's a possible outcome of the debate about expanding it by statute?

Tara Grove: Some members of Congress have actually proposed that in our own time.

John Harrison: Mm-hmm.

Tara Grove: But I think along with the proposals to expand the Supreme Court in Congress, there have been accompanying proposals to fix the size of the Supreme Court at nine members. And so that is under discussion. As we all know, getting a constitutional amendment through the House and the Senate, and then getting ratification by three quarters of the states is a challenge. But I think it's on the table, and I do think that's a reflection of how much some people in our society want to preserve the NORM of a fixed size of the Supreme Court to say, well, if you're going to start proposing court expansion, then I'm going to propose a constitutional amendment to stop that, not only now, but in the future.

Risa Goluboff: This moment is one moment in a long history of debates about reforming the Supreme Court in various ways. And in fact, the size of the court has changed at different times in the 19th century, for example. And the report talks about a lot of these historical moments. I'm curious, you know, which ones do you think are the most salient for the current conversations or the most important to your mind?

Tara Grove: Thinking through our current political moment, the 1930s and the 1950s are actually probably the most helpful.

[MUSIC IN AND UNDER]

Tara Grove: So in 1937, the country faced a constitutional crisis, right? We were in the middle of a great depression. President Roosevelt believed that the federal government had not only the power, but the responsibility to help people in this great socioeconomic catastrophe. And he believed the Supreme Court was standing in the way.

FDR FIRESIDE CHAT 9: ON “COURT-PACKING”

Franklin Delano Roosevelt: During the last half century, the balance of power between the three great branches of the federal government has been tipped out of balance by the courts.

Tara Grove: And Roosevelt DID propose court-packing.

Franklin Delano Roosevelt: This plan will save our national constitution from hardening of the judicial arteries.

Tara Grove: If there was ever a time when there was a true crisis, it was 1937. And yet his own political party fought back. And that was pretty extraordinary because the Democrats controlled over 70% of the House and the Senate at that time, and Roosevelt had won overwhelmingly in the 1936 presidential election. And there WAS a tremendous amount of support for court-packing, court expansion at that time, and yet still it didn't happen. And I think the fact that it DIDN'T happen, was crucially important for later developments.

[MUSIC OUT]

Tara Grove: It's not clear to me that some of the major Supreme Court decisions, including Brown vs the Board of Education would have occurred if political parties had been able to manipulate the Supreme Court, as much as I fear that they would have been able to had Roosevelt been successful in 1937.

John Harrison: I think one of the interesting aspects of the story of FDR and his court-packing plan connects to proposals to have term limits so that each president will regularly appoint a number of justices, which is that President Roosevelt went his entire first term without getting any

Supreme Court vacancies to which he could appoint somebody more in line with New Deal thinking.

Tara Grove: Yes.

John Harrison: For most of the first New Deal, it was entirely the old court, which often found the New Deal unconstitutional. Things would have been a little different if there were probably – certainly – if there had been two FDR appointees to the court in that first term.

Tara Grove: I think that's right. I have real mixed emotions about the idea of term limits and regularizing appointments.

John Harrison: Yeah, let's talk about that, because that's a key question for the commission.

Tara Grove: On the one hand, I see the argument for regularizing appointments, to the extent that we want a Supreme Court that is more reflective of the body politic and having each president get two nominations could potentially do that. You also avoid some of the randomness of judges potentially passing away, right before, say, a presidential election as we recently experienced. But I also worry a lot about having every single presidential election impacted by the prospect of two Supreme Court appointments. Eighteen years, which is the, the term that a lot of people have talked about, 18 years is a really long time. And that's actually a longer term than judges of other constitutional courts enjoy. And if one knows that a president is going to pick two people, each of whom will serve 18 years, I'm not sure that's actually going to reduce the level of friction surrounding Supreme Court nominations and confirmations. It's just going to make it happen ALL the time. I think there's also something to be said for randomness, not knowing whether a president is going to have a Supreme Court nomination. And there's something to be said for the period of quiet that we enjoyed in the, in the 1990s and 2000s when there just weren't that many Supreme Court changes.

John Harrison: Well on that score, I think there's been a lot more attention given to term limits than to a mandatory retirement age. Although as the commission's report mentions, mandatory retirement ages are VERY common in the states. So, independent of term limits, what do you think about the possibility of requiring retirement at 70, 75, something like that?

Tara Grove: I think there's some value in that. I think you still run the risk of somebody potentially serving on the U.S. Supreme Court for 30 or 40 years, right? As long as the president appointed them at a very young age, which is increasingly conceivable in our society.

John Harrison: Yes.

Tara Grove: One could couple it with mandatory minimums. One could do that and effectively create term limits that way. Around the world, we found that most countries that had mandatory retirement ages also had some kind of term limit. So they didn't just rely on mandatory retirement ages. If the goal is to avoid having someone serving on the Supreme Court for decades and decades, then I think mandatory retirement ages are not the ideal.

Risa Goluboff: Going back to expansion, do you think that people are really worried about the possibility that if expansion starts, there will be a cycle of retaliation and over the next several decades, there will be expansion after expansion after expansion?

Tara Grove: Oh, I think so. I think a lot of people worry about that. I have seen some scholarship that questions that. Obviously, you need the president and the House and the Senate to all be from the same political party for any expansion. And you need there to be enough political support, even within that political party to expand the Supreme Court.

John Harrison: Mm-hmmm.

Tara Grove: And as we've seen, even when there is unified government control, it can be difficult to pass legislation, and one would presume that expanding the size of the Supreme Court would be among the difficulties. But I still think one has to assume that if there is expansion today, for example, it could happen in the future.

Risa Goluboff: Yeah, I can imagine.

Tara Grove: A larger concern to my mind is even if one believes in expansion at a particular political moment because of who is in control, one should keep in mind that a very different political faction could well be in control in the future, and one that doesn't have tremendous respect

for American democracy and the American constitutional system. And to my mind, that is the greater fear.

Risa Goluboff: I've often thought about it in the free speech context, when you're talking to people about how to regulate free speech, you want to make sure people are thinking, this is regulating speech I like, and it's regulating speech I don't like, right? It's regulating courts I like, and regulating courts I don't like.

John Harrison: Yes! Is there any way to defuse all this by making the court maybe at least a little bit less powerful?

Tara Grove: A lot of people want to distinguish, and I think it's an important distinction between empowering reforms where a political party wants to kind of harness the Supreme Court as with court expansion, and DISEMPOWERING reforms that would allow the Supreme Court to do a lot less, whether it's a supermajority requirement for invalidating federal or state legislation or taking away Supreme Court jurisdiction. But I think the support for that type of disempowering reform has gone down dramatically in our society. I think one sees in our current politics, whether it's among progressives or conservatives and libertarians, an effort to basically harness the power of the Supreme Court. And the goal is to make sure that, you know, WE get OUR folks on the judiciary rather than let's keep the judiciary out of most contests. That is what I see as the biggest challenge for any disempowering reform. I don't see political support on either political side for it, rather just an effort on both sides to take over the courts.

Risa Goluboff: It's so striking when you read this 300-page report that even though it's obviously deeply embedded in particular political battles, over particular ideas and issues, it's also the case that as you read each type of potential court reform, you know, the same issues and the same tensions arise as the report goes through the pros and cons of each of them, right? And, you know, we have a democracy with elected legislators and an elected president who are meant to carry out the will of the people and in our constitutional scheme. But at the end of the day, the Court gets to review laws and deem them unconstitutional. The Court is not an elected body. Currently the court doesn't have term limits, so, you know, quite insulated from politics. And almost every major proposal is really, in some sense, navigating between a desire sometimes by some people for more political accountability, and a desire by other people at other times for less political accountability, more

insulation so that judges are NOT so subject to the political will. And obviously people go back and forth depending on their political ideas, but these are the kind of – we call it in constitutional law, "the counter-majoritarian difficulty," right? This is the central conflict, and it just keeps coming up again and again.

Tara Grove: Yes.

Risa Goluboff: Is that a fair way to think about the relationship between all of these kind of disparate proposals and what links them together as we evaluate them?

Tara Grove: Right, I think they are linked together in that people start proposing court reform when they're not happy with what the courts are doing. And often the goal is not to actually get court reform, it's rather to influence the way the Supreme Court does its job. And one can view that in one of two ways, right? Um, on the one hand, wow, that's a real infringement on judicial independence, you're trying to affect the way the Supreme Court is deciding cases. Or conversely one can say, well, this is part of our democratic system of government and these checks, even if used as threats, are still checks on the Supreme Court, and this is a way to keep the Supreme Court in line – not case by case, but over the long term – keep it more in line with what the democratic polity wants. And I think that is a unifying theme of all types of court reform. And I think it's an important one for us to keep in mind. But for me, the story of court reform is also a very cautionary tale.

[MUSIC IN AND UNDER]

Tara Grove: And I have seen – having read debates from 1789 to the present for over a decade – I have seen different political forces wanting court reform desperately at different political moments. And then the winds change on the Supreme Court and suddenly the very people who were arguing adamantly either for or against court reform switch sides. Politicians, you know, by necessity, have to be thinking about the next election, and they're thinking in the immediate term. But I think as legal scholars, we have an obligation to think in the longer term. And anything that we suggest as a court reform today, we should imagine, how would we view this if our political opponents or people that we think are just dangerous to American democracy have the same power in their hands? I worry sometimes that it's hard, even in our profession, for people to see the long term, as opposed to the immediate costs and benefits of whatever the judiciary is doing.

[MUSIC OUT]

John Harrison: You've written about the court's legitimacy. And we were just talking about both political responsiveness as an important part of the system, and of course, judicial independence, which to some extent is non-responsiveness as an important part of the system. How much does the court's legitimacy, do you think, depend on it being responsive and how much does it depend on it not being politically responsive and just being more independent?

Tara Grove: So that is a good question and I am not sure of the answer. So there are of course different types of legitimacy. There's the public reaction to the Supreme Court that's sometimes called "sociological legitimacy." And I think that that depends a lot on whether the Supreme Court is doing things that are popular in the particular moment. But I think in the long term, people respect the judiciary when they assume it is NOT responsive to the political branches. Whenever I teach *Brown vs the Board of Education* to my constitutional law class, we focus a lot on *Brown II* and "all deliberate speed."

Risa Goluboff: Right. So *Brown II* is the follow-on case to *Brown vs. Board of Education*, where the court addresses the question of remedies for the violation that they found in *Brown I*. And the arguments that had been made were arguments for remedying the situation fairly quickly, you know, by the next school year or the school year after that. And instead, the Supreme Court announces that it's going to require desegregation with, quote, "all deliberate speed." So not a very demanding requirement.

Tara Grove: I agree.

[MUSIC IN AND UNDER]

Tara Grove: And I am always struck by the reaction of many of my students that the Supreme Court LOST legitimacy by being so wimpy in *Brown II* and issuing the "all deliberate speed" formula, as opposed to what the NAACP actually asked for, which was a strict deadline of either September, 1955 or September, 1956. There's no question the Supreme Court in the moment issued the "all deliberate speed" formula, because it thought that was the only way to preserve its legitimacy, its public reputation at that time. They were afraid of attacks on the court, they were afraid people would not obey a firm deadline. But in the longer

term, when you look decades into the future, Brown II is one of the most deplorable decisions of the United States Supreme Court. And I think the Supreme Court actually might've improved itself – not only as a legal legitimacy matter by issuing a decision that was more in keeping with Brown I – but also improved its sociological legitimacy over time, if it had done the thing in 1955, that the NAACP asked it to do, to be brave and issue a strict deadline for desegregation. I also think we might have a very different country if that had happened.

[MUSIC OUT]

Tara Grove: So that's what makes legitimacy really hard. And I will say, and I've suggested this in my scholarship, these might be reasons for the Supreme Court NOT to think about this stuff at all when it issues decisions. I think it IS important to think of the long-term consequences for litigants and future litigants, whose constitutional rights are at issue.

John Harrison: Well, you might think so, but how well can they predict that?

Tara Grove: That's a fair point. I think it was NOT hard to predict in 1955 that the “all deliberate speed” formula would significantly slow down the process of desegregation. In fact, one of the attorneys – I think it was the attorney general for South Carolina – said in the Brown II oral argument, you know, “Supreme Court justices, I think you're going to have to wait until society is ready for desegregation.” He said, and I'm quoting here, “That might not happen until 2015 or 2045.” So there they had an attorney for the state saying, you know, “Guess what? We're not going to do anything if you don't make us.” And so, I don't think that was a tough thing to predict.

Risa Goluboff: Tara, just to come back to your service ...

Tara Grove: Yes.

Risa Goluboff: What did you learn as a scholar? As an American? Would you do it again? What are your final thoughts as you look at that 300 pages and reflect upon the process that it took to get there?

Tara Grove: So would I do it again? Um, it may be a little too soon to ask me.

[LAUGHTER]

Tara Grove: I'm suffering from a little bit of, uh, PTSD.

[MUSIC IN AND UNDER}

Tara Grove: I hope in the long run that it will be very useful. I think if one thinks the goal is to change the current debates entirely, I don't think that any report was likely to do that. To my mind, that was not the goal. My hope is that the long-term goal will be to help future researchers as they're considering these issues. For me, I think I came out of this a lot less optimistic than I was before. When you have even a group of folks like on this commission who have extraordinarily similar backgrounds in lots of ways and still disagree vehemently, that's not a good sign for the future. I think it is good that the commission ultimately came together and submitted a report to the president. But all we voted on was submitting the report. We didn't actually come to agreement on anything inside that report, and there's a tremendous amount that I personally disagree with and would not write, but went along with in the spirit of compromise.

[MUSIC OUT]

Tara Grove: Maybe I'll feel less cynical as I get further away from it, but it, it was, it was a real eye-opener for me how hard it is for people to, to see things from the other person's perspective.

[THEME MUSIC IN]

John Harrison: Tara, that was outstanding. Thanks for joining us.

Tara Grove: Thank you both so much.

[THEME MUSIC UP, THEN UNDER]

Risa Goluboff: Well, that was just a fascinating conversation, John. I'm so glad that we were able to talk with her about this report.

John Harrison: Yeah.

Risa Goluboff: It added so much to my understanding of it and how it was produced and what it could mean.

John Harrison: Yeah. One of the things that occurred to me is that all of the talk about the Supreme Court and Supreme Court reform is in the shadow of the difficulty of constitutional amendments.

Risa Goluboff: Yes.

John Harrison: One reason the Supreme Court is so important is because that other mode of constitutional change is, if not completely blocked, largely blocked.

Risa Goluboff: Yes. Amendment was meant to be one of the political accountability mechanisms, right?

John Harrison: Yes.

Risa Goluboff: One of the ways that the elected branches and the people could respond.

John Harrison: Yes. If the court got out of step with the people, the people could change the Constitution explicitly.

Risa Goluboff: So, John, do you have a favorite reform that you have thought, you know, would be salutary?

John Harrison: Well, yes I do, although our conversation with Tara to some extent shook my confidence in it.

[LAUGHTER]

John Harrison: I have long supported – and I think I still support – a constitutional amendment for term limits of the kind that would produce regular appointments, so that basically every two years there would be a vacancy and the current president and the Senate, or maybe the president of the Senate and the House, would appoint somebody. Random events like who dies when should not have major implications for how the country is governed. But interestingly, Tara made the argument for randomness, and that the costs of predictability can also be substantial. And one of the things we mentioned was there was a – what was it, 10-plus years – in which there were no vacancies on the court. There's no design in that, but maybe some randomness isn't a bad thing.

Risa Goluboff: Yeah, well, I, I clerked for Justice Breyer during that period when he was a very long-serving junior justice.

John Harrison: Yes, for year after year after year.

Risa Goluboff: Oh, the junior justice for a long, long time. But it does strike me, John, that if you were to adopt the system that you're describing, you might not have a constant state of heightened political anxiety and mobilization. You might create a regularity. It might become more mundane, right? I mean, if it really was happening on a regular basis, the process might respond and be somewhat different.

John Harrison: Yeah. The budget's adopted every year.

Risa Goluboff: Right.

John Harrison: The budget's a big deal, but the budget's adopted every year and it's just part of politics.

Risa Goluboff: Right, exactly.

John Harrison: One thing we never talked about, and I don't think anybody has proposed this, is including the House of Representatives in confirming justices. But a change like that, a structural kind of change, on one hand will more reliably have effects because everybody's going to be subject to them, and more importantly, there's no applying for the judges to do.

Risa Goluboff: Yes.

John Harrison: Predicting the effects of expanding the size of the court, predicting the effects of making it harder to confirm justices, predicting the effects of term limits, those are much more difficult.

Risa Goluboff: Yeah.

John Harrison: And so, in a sense, those are more powerful, but less reliable in that it's harder for a proponent to say, "and it will have this effect" as opposed to yes, some big effect, but what would it be?

Risa Goluboff: Right. So then it's harder to get support for it among any particular constituency.

John Harrison: Yes.

Risa Goluboff: Well, John, it seems clear to me that, um, YOU should have been on this commission and then maybe they would have considered that one too.

John Harrison: That's what they didn't need was one more law professor to make it 30 pages longer.

[LAUGHTER]

Risa Goluboff: Well this was a fabulous conversation and I'm so glad that you brought Tara to us and really enjoyed talking about it.

John Harrison: She's wonderful and has just come off some extremely important service.

[THEME MUSIC IN, THEN UNDER]

John Harrison: That does it for this episode of Common Law. If you'd like more information on Tara Leigh Grove's work on court-packing and the Supreme Court, please visit our website CommonLawpodcast.com. There you'll also find previous episodes, links to our Twitter feed, and more.

Risa Goluboff: And in two weeks, UVA law professor Kristen Eichensehr will join the podcast along with a new host, Professor Danielle Citron, to take a deep look into cybersecurity.

Kristen Eichensehr: Everybody who was in the cybersecurity field knew what was happening, knew who was responsible. The government began to look a little silly because they wouldn't actually name names.

Risa Goluboff: We can't wait to share that with you. I'm Risa Goluboff.

John Harrison: And I'm John Harrison. Thanks for listening.

[THEME MUSIC UP, THEN UNDER]

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[THEME MUSIC UP, THEN OUT]