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Protecting the Supreme Court: Why Safeguarding the Judiciary's Independence is Crucial to Maintaining its Legitimacy

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Protecting the Supreme Court: Why Safeguarding the Judiciary's Independence is Crucial to Maintaining its Legitimacy

Democracy and the Constitution Clinic
Fordham University School of Law

Isabella Abelite, Evelyn Michalos, & John Roque

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THE SCHOOL OF LAW

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This report was researched and written during the 2019-2020 academic year by students in Fordham Law School's Democracy and the Constitution Clinic, where students developed non-partisan recommendations to strengthen the nation's institutions and its democracy. The clinic was supervised by Professor and Dean Emeritus John D. Feerick and Visiting Clinical Professor John Rogan.

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Table of Contents

Executive Summary	1
Introduction	4
I. The American Judiciary: A History of Independence	5
A. The English Crown and Philosophical Roots of Judicial Independence	5
B. Development of the Judiciary in Colonial America.....	6
C. The Constitutional Convention’s Focus on an Independent Judiciary	8
D. Post-Constitutional Convention to the Present	11
II. The Court’s Threatened Legitimacy in The Public’s Perception	15
A. Inequity of Appointments	16
B. The Nomination Process.....	17
C. Allowing Strategic Considerations to Impact Retirement Decisions.....	19
D. Ideological Predictability	20
E. Set Majorities and Swing Justices.....	21
III. Analysis of Existing Proposals	22
A. Methods of Implementing Reform	22
B. Term Limits	23
C. Mandatory Retirement.....	25
D. Balanced Bench	26
E. Rotating Panels	28
F. Expanding the Court.....	31
IV. Our Recommendations	31
A. Securing a Senate Hearing.....	31
B. Implementing a Rotating Panel Framework	33
C. Retirement Stage	36
V. Conclusion	36

Executive Summary

The rarity of changes to the Supreme Court’s structure and procedures is undoubtedly a source of stability and legitimacy. We advance recommendations in this report for reforms to the Court as part of an ongoing dialogue about how reform might strengthen the institution. We recognize that maintaining the Court in substantially the same form may outweigh potential benefits of reform.

The Constitution’s framers created the Supreme Court with a core principle in mind: independence. Over its history, the Court has faced threats to its independence from politics, especially in the public’s eyes. An irregular appointment system has given some presidents more opportunities to nominate justices to the Court, and the Senate confirmation process has often been politicized. It has appeared to observers that some justices have timed their retirements to allow presidents of certain political parties appoint their replacements. Another perception is that ideological voting blocks have often decided politically charged cases. And “swing justices,” who frequently cast deciding votes, can appear to exert disproportionate influence over issues of great importance.

Sustaining the independence of the Court is crucial to effectuating conformity with the rule of law. This report deals with this sensitive subject by surveying the history of the Supreme Court, identifying issues that raise concerns about the Court’s independence, and analyzing reform proposals offered by scholars and experts. We conclude by advancing and discussing proposals that we believe are worthy of consideration, mindful at the same time that no changes might be the best option, especially in an era of extreme partisanship.

I. History

The Constitution’s framers did not invent the concept of judicial independence. They drew on the work of intellectuals who emphasized its importance. Montesquieu, for instance, argued that individual liberty and an independent judiciary were directly correlated. The development of judicial independence in England and the colonies provided examples for the framers to draw on. English kings appointed and removed judges at will until Parliament created protections to give judges at least some protection from the king’s control. The king’s ability to dismiss colonial judge was cited by the Declaration of Independence as a source of tyranny. After the colonies declared independence, some state constitutions granted judges lifetime tenure as a way to bolster independence.

At the Constitutional Convention of 1787, the framers conferred life tenure to Supreme Court justices, among several other measures to protect the judiciary. The Constitution also prevented justices' salaries from being decreased to reduce the risk of improper influence. To prevent Congress from having too much say over the Court, they gave the appointment power to the president—while still requiring the Senate's advice and consent to check the president. And they established standardized impeachment criteria: treason, bribery, or "other high crimes and misdemeanors." These criteria ensured some objectivity for potential proceedings and helped prevent arbitrary removals. This goal was also served by the requirement that judges be impeached by a majority of the House of Representative and removed by a two-thirds vote in the Senate. Finally, the framers declined to give the Supreme Court a role in the legislative process through "revisionary power," which could have allowed the Court to invalidate legislation before litigants filed suit to challenge it.

Aside from these measures, the framers placed very few conditions on the Supreme Court's operations and its justices, instead empowering Congress to fill the gaps, such as the number of justices on the Court and the procedural rules in the Senate for handling nominations.

In the centuries that have followed the Constitutional Convention, the Court's role has changed dramatically. This shift is the result of both Chief Justice John Marshall's legitimization of judicial review in *Marbury v. Madison* and numerous laws that altered the federal judiciary's form and functioning. But the Court's size has not changed since 1869.

II. Existing Reform Proposals

Before advancing our proposal, we survey existing proposals for reforming the Supreme Court. Some of those proposals touch on the lengths of justices' tenures on the Court, such as imposing term limits for justices or imposing a mandatory retirement age. Other proposals would expand the number of justices on the Court. The most straightforward of these proposals involve increasing the number of justices to a set number, with all justices deciding every case. A more complex approach is the "balanced bench" proposal, which would increase the number of justices to 15 and allow ten justices who identify with a political party—five from each major party—to choose five "non-partisan" justices to serve for year-long terms. At least two proposals involve rotating panels deciding cases. The "Supreme Court Lottery" proposal involves randomly choosing a panel of nine from all of the federal appeals court judges in the country. Another proposal would guarantee presidents the opportunity to appoint three justices to the Court for every four-year term that they serve, which would expand the Court to about 15 justices who would decide cases on panels of nine justices. Although we do not endorse the entirety of any of these proposals, we do draw on aspects of some of them for our proposal.

III. Our Proposal

Our three-part recommendation addresses issues facing the Court in three areas: the nomination process, the justices' time on the Court, and justices' retirement from the Court.

A. Securing a Senate Hearing and Vote

We propose changes to the nomination process that would essentially guarantee every Supreme Court nominee a Senate hearing. Senate rules should require the vice president, the Senate majority leader, and the Senate minority leader to vote on whether a presidential nominee should receive a hearing. In almost every scenario, the nominee would receive at least two of the three votes, given that the vice president and one of the two Senate leaders are members of the president's political party. With this triumvirate framework, we hope to expedite the nomination process and ensure that nominees can at least receive due consideration, even in times of divided government. This recommendation aims to reduce the escalating partisan influence that Congress has had on the Court.

B. Implementing a Rotating Panel

We recommend allowing every president to nominate two justices for each four-year term that he or she serves. Guaranteed appointments would expand the size of the Court beyond its current composition of nine justices. But, under our proposal, a rotating panel of nine justices drawn by lottery would decide each case. Allowing presidents to appoint at least two justices per presidential term would address the inequity of appointments among presidents. Although the president would still be required to exercise the appointment power with the Senate's advice and consent, we believe that regularizing appointments would decrease the gravity, and the related partisan struggle, of each appointment.

Each panel's decision would be entitled to *stare decisis* effect. To ensure stability in the law, if a panel sought to overturn precedent, an *en banc* review of the decision would take place. We also offer procedural recommendations pertaining to granting certiorari. Under our proposal, the Supreme Court would operate more like the federal appeals courts.

C. Retirement

Congress should enact a law creating senior-status for Supreme Court justices allowing them to advise sitting justices on cases before the Court. We believe that affording justices this opportunity, coupled with an increase in the Court's size by way of the rotating panel system, would rectify concerns about aging justices' health and reduce incentives for justices to time their retirements to allow presidents of certain parties to appoint their replacements. In addition, allowing justices to step down and assume an advisory role for the current Court would make the most of their accumulated experience and knowledge.

Introduction

For the Supreme Court to maintain its legitimacy in the eyes of the public, it must remain independent from the executive and legislative branches and the inevitable partisanship that is a feature of those branches. Indeed, judicial independence involves ensuring “justice will not be a servant of the political process or subject to the whims and prejudices of the moment.”¹ Although the Supreme Court interacts with the political branches of the government, it cannot answer to them. The Court’s legitimacy is harmed by even the perception that the Court is not above politics.

Some argue that the public’s confidence in the Court is at risk of declining,² coinciding with its expanding role in deciding hot-button issues along partisan lines.³ Other developments that might contribute to a drop in confidence include unequal opportunities for presidents to appoint justices, an increasingly antagonistic and divisive nomination process, and justices’ reluctance to retire until a president of the party that nominated them is in office.⁴ Each of these circumstances threatens the Court’s legitimacy.

This report addresses how to preserve the public’s perception of the Court’s legitimacy by suggesting reforms to safeguard the Court’s independence. Part I focuses on the Court’s history: it highlights the monarchical abuses in both England and the American colonies that illustrate the need for judicial independence, gives an overview of the Court’s development at the Constitutional Convention, and describes the Court today. Part II discusses threats to the Court’s legitimacy and the reasons why reform is necessary. Part III evaluates the strengths and weaknesses of various existing proposals to reform the Court. Finally, Part IV recommends an original solution that institutes: a new process in the Senate that would virtually guarantee Supreme Court nominees receive hearings; a rotating panel for the Supreme Court itself; and senior status for justices.

¹ John D. Feerick, *Judicial Independence and the Impartial Administration of Justice*, 51 REC. ASS’N B. CITY N.Y. 233, 236 (1996) [hereinafter Feerick, *Judicial Independence*].

² Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L. J. 148, 150-51 (2019).

³ See Carl Hulse, *Political Polarization Takes Hold of the Supreme Court*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/us/politics/political-polarization-supreme-court.html>.

⁴ See Frederick A.O. Schwarz Jr., *Saving the Supreme Court*, BRENNAN CTR. FOR JUST. (Sept. 13, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/saving-supreme-court>.

I. The American Judiciary: A History of Independence

An independent judiciary has been “one of the hallmarks of the American system of government” for over 200 years.⁵ However, this tenet of American government predates even the nation’s early days.⁶ Influential European intellectuals recognized its value during the 17th and 18th centuries, and England’s Parliament passed laws aimed at allowing judges more freedom in the face of the Crown’s overreach.⁷ Before the Constitutional Convention in 1787, different state constitutions incorporated provisions that emphasized judicial independence.⁸ At the Convention, the framers ultimately included similar language in the United States Constitution.⁹ Finally, the development of judicial review and the enactment of legislation that has defined the federal judiciary’s structure and functioning have further solidified judicial independence as a bedrock of American government.¹⁰

A. The English Crown and Philosophical Roots of Judicial Independence

Judicial independence, a vital aspect of representative government that safeguards individual rights and diminishes improper influence over the people, has roots dating back centuries. Montesquieu’s “Spirit of the Laws,” which appeared in 1748 and influenced the Constitution’s framers, emphasized distinct separation, declaring that “there is no liberty, if the judiciary power be not separate from the legislative and executive.”¹¹ In 1765, Sir William Blackstone too stressed independence and warned that a judiciary’s dependence on another branch would place a person’s “life, liberty, and property . . . in the hands of arbitrary judges whose decisions would be regulated only by their opinion, and not by any fundamental principles of law.”¹²

Despite these contemporary views, the monarch both appointed and removed judges at his pleasure.¹³ In 1701, Parliament passed the Act of Settlement, which gave the English judiciary more autonomy by creating set salaries and establishing that judges would serve for as long as they maintained “good behavior.”¹⁴ This prevented the king from removing judges at will and,

⁵ Feerick, *Judicial Independence*, *supra* note 1, at 236.

⁶ *Id.*

⁷ *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *268 (George Sharswood ed., 1753).

⁸ *See, e.g.*, MASS. CONST. of 1780; N.Y. CONST. of 1777.

⁹ *See generally* MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911).

¹⁰ *See infra* Part I.D.

¹¹ Sam J. Ervin, *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108, 108-09 (1970).

¹² 1 WILLIAM BLACKSTONE, COMMENTARIES 269 (George Sharswood ed., 1753).

¹³ John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 10 (1970) [hereinafter Feerick, *Impeaching Federal Judges*].

¹⁴ *Id.* at 11 (internal quotation marks omitted).

effectively, transferred the removal power to Parliament.¹⁵ However, the Act had no true force until 1787.¹⁶

When a “good behavior” standard dictates judicial tenure, retaining an impeachment mechanism bolsters judicial independence. In essence, it operates as a two-pronged tool that provides a check on the judiciary, while preventing judges from being removed simply because political actors disagree with their decisions.

Another English common law practice that influenced the framers’ desire for an independent judiciary was the use of bills of attainder, which allowed Parliament to pass legislative acts to punish named persons or groups without a trial.¹⁷ Attainder rendered individuals effectively “dead in law,” barring them from receiving an inheritance, requiring them to forfeit their property, and causing them to become “stained” in the eyes of society as if they “had never been born.”¹⁸ Used as early as the 14th century to take possession of estates of deceased rebels, bills of attainder allowed Parliament and the Crown to remove political enemies without the difficulty of providing enough proof of a crime to convict them in court.¹⁹ During the Revolutionary War, all 13 American colonies adopted bills of attainder to punish those who remained loyal to the Crown by banishing them, confiscating their property, or even sentencing them to death.²⁰ However, two clauses in the Constitution barred bills of attainder at the state and federal level.²¹ This prohibition suggests that the framers saw bills of attainder as a legislature’s improper exercise of a judicial function and, therefore, outlawed them to enhance the judiciary’s independent role and maintain separation of powers.²²

B. Development of the Judiciary in Colonial America

Judges in colonial America served at the pleasure of royal governors.²³ Before 1776, colonial judges received commissions directly from the Crown or through royal governors under authority from a document called the “instructions.”²⁴ To prevent arbitrary removal of judges, the instructions prohibited governors from expressing “any limitation of time” upon the

¹⁵ *Id.*

¹⁶ *Id.* at 12.

¹⁷ Charles H. Wilson, Jr., *The Supreme Court’s Bill of Attainder Doctrine: A Need for Clarification*, 54 CALIF. L. REV. 212, 213 (1966).

¹⁸ *Id.* at 213-14.

¹⁹ *Id.* at 214-15.

²⁰ *Id.* at 216.

²¹ U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder . . .”).

²² See Wilson, *supra* note 17, at 216-17.

²³ Ervin, *supra* note 11, at 112.

²⁴ Feerick, *Impeaching Federal Judges*, *supra* note 13, at 12 (internal quotation marks omitted).

commissioned judges.²⁵ Because it was unclear whether the duration of judges' tenures would be subject to the king's pleasure or during good behavior, governors construed the condition to be at the Crown's will.²⁶ In response, England issued a new order in 1752 clarifying that a judge's tenure was at "the pleasure of the Crown."²⁷ This led to strife between the Crown and the colonies that continued until the American Revolution. In fact, the Declaration of Independence asserted that the king bolstered judicial insecurity to instill tyranny over his subjects.²⁸

The colonists long sought to have judicial tenure based upon good behavior—not the executive's pleasure—to ensure judicial independence.²⁹ This desire is reflected in state constitutions written between 1776 and 1787, which provided for the impeachment of government officials, including judges.³⁰ These constitutions had different impeachment procedures,³¹ but maladministration and misdemeanors were standard grounds for impeachment.³² Moreover, early state constitutions specified judges' tenure and compensation to minimize the executive and legislative branches' ability to influence the judiciary, and, in turn, guarded the rule of law from becoming susceptible to the political process or prevailing attitudes at a given time.³³

For example, the Massachusetts Constitution of 1780 highlighted that impartially interpreting laws and administering justice were integral to protecting individual rights, declaring that every citizen had a right to be tried by "judges [who are] as free, impartial and independent as the lot of humanity will admit."³⁴ As a result, Massachusetts judges held office "as long as they behave[d] themselves well," and could not serve dual appointments.³⁵ The governor, with the advice and consent of the Council, appointed judicial officers.³⁶ Meanwhile, the Senate had the power to hear and determine all impeachments made by the House.³⁷

The New York Constitution of 1777 reiterated the Declaration of Independence's grievances regarding the Crown's influence on the judiciary. It protested that the king hindered justice "by refusing his assent to laws for establishing judiciary powers" and "made judges dependent on

²⁵ *Id.* at 13 (internal quotation marks omitted).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Ervin, *supra* note 11, at 112.

³⁰ Feerick, *Impeaching Federal Judges*, *supra* note 13, at 14.

³¹ For example, some states barred the executive from pardoning impeached officials. *Id.* at 15.

³² *Id.* at 14. *See, e.g.*, DEL. CONST. (1776); PA. CONST. (1776); VA. CONST. (1776).

³³ *See* Ervin, *supra* note 11, at 113; Feerick, *Impeaching Federal Judges*, *supra* note 13, at 14.

³⁴ Ervin, *supra* note 11, at 113 (quoting MASS. CONST. (1780)).

³⁵ *Id.* at 113-14.

³⁶ MASS. CONST. pt. II, ch. II, § 1 (1780).

³⁷ *Id.* at pt. 2, ch. I, § 2.

his will alone, for the tenure of their offices, and the amount and payment of their salaries.”³⁸ Accordingly, the New York Constitution declared such acts inconsistent with the public good.³⁹ Similar to the Massachusetts Constitution, the New York Constitution established judicial terms during good behavior.⁴⁰ Unlike the Massachusetts Constitution, it added a condition that required judges to retire at 60 years old, rather than allowing lifetime tenure.⁴¹ It prohibited judges from holding other positions in government except for special occasions, and allowed for impeachment of public officials through a process that gave the judiciary a relatively minor role.⁴²

C. The Constitutional Convention’s Focus on an Independent Judiciary

At the Constitutional Convention in the summer of 1787, the framers considered creating a national judiciary from the outset of their work.⁴³ On May 29, Edmund Randolph presented the Virginia Plan, which called for distinct legislative, judicial, and executive branches.⁴⁴ The framers focused more attention on the legislative and executive branches than the judicial branch, but they recognized the importance of an independent judiciary and undertook measures to ensure that the Constitution provided for it.⁴⁵ For example, the Virginia Plan proposed that the judiciary would “consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature.”⁴⁶ Judges would “hold their offices during good behaviour” and receive “fixed compensation for their services.”⁴⁷

Lifetime tenure⁴⁸ and fixed compensation⁴⁹ were ultimately included in the Constitution to protect judicial independence. The framers also granted the appointment power to the executive, barred the judiciary from exercising lawmaking powers, and protected judges from targeted impeachments.

³⁸ N.Y. CONST. of 1777. *See also* HERBERT FRIEDENWALD, DECLARATION OF INDEPENDENCE: AN INTERPRETATION AND AN ANALYSIS 230-33 (1904).

³⁹ N.Y. CONST. of 1777.

⁴⁰ *Id.* art. XXIV.

⁴¹ *Id.*

⁴² *Id.* art. XXV.

⁴³ 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20-21 (Max Farrand ed., 1911).

⁴⁴ *Id.*

⁴⁵ Feerick, *Judicial Independence*, *supra* note 1, at 237.

⁴⁶ 1 FARRAND, *supra* note 43, at 21.

⁴⁷ *Id.* at 21-22.

⁴⁸ U.S. CONST. art. III, § 1.

⁴⁹ *Id.*

1. Assigning the Appointment Power

On June 5, the Committee of the Whole discussed the process for appointing the judges of the national judiciary.⁵⁰ James Wilson of Pennsylvania opposed judicial appointments by the legislature, and instead argued that the executive, as a single individual, should have the power.⁵¹ He argued that allowing the legislature to appoint judges would result in “intrigue, partiality, and concealment.”⁵² James Madison of Virginia wanted the Senate to appoint judges, viewing it as a middle ground between granting the power to the full legislature and vesting it in the executive.⁵³

On June 15, New Jersey’s William Patterson proposed the New Jersey Plan, which, like the Virginia Plan, called for a national judiciary.⁵⁴ While it remained mostly consistent with the Virginia Plan’s impeachment provisions, the New Jersey Plan endowed the executive—not the legislature—with the power to appoint the “supreme tribunal” of judges.⁵⁵ Additionally, Patterson’s proposal explicitly provided that the members of the judiciary should be prohibited from “receiving or holding any other office or appointment” during their time as judges.⁵⁶

The Committee of Eleven, which convened on September 4, compiled a report that gave the president the power to nominate “Judges of the supreme Court” with “the advice and consent of the Senate.”⁵⁷ Pennsylvania’s Gouverneur Morris observed, “[A]s the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.”⁵⁸ The delegates adopted the Committee of Eleven’s language for inclusion in the Constitution, settling on a delicate balance where neither the president nor the Senate would exert too much influence on the judiciary.⁵⁹

2. Excluding the Judiciary from Lawmaking

On June 6, the delegates debated allowing the judiciary a revisionary role in the lawmaking process, which would allow the judiciary to potentially intrude on lawmakers’ powers and invalidate legislation without it first being challenged by a lawsuit.⁶⁰ After some consideration, the delegates rejected granting the judiciary this power.⁶¹ Madison cited two objections that

⁵⁰ 1 FARRAND, *supra* note 43, at 119.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 120.

⁵⁴ *Id.* at 241.

⁵⁵ *Id.* at 244.

⁵⁶ *Id.*

⁵⁷ 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 495 (Max Farrand ed., 1911).

⁵⁸ *Id.* at 539.

⁵⁹ *Id.* at 539-40.

⁶⁰ 1 FARRAND, *supra* note 43, at 138-40.

⁶¹ *Id.* at 140.

emphasized the importance of judicial independence: first, that judges “ought not to be subject to the bias” that could arise from both making the law and subsequently deciding questions of law⁶² and, second, that the judiciary “ought to be separate [and] distinct” from the other branches of government.⁶³

Responding to a renewed motion to grant the judiciary revisionary power, Maryland’s Luther Martin stated that linking the judiciary and executive in this manner constituted a “dangerous innovation,” and further stressed that the judiciary would lose “the confidence of the people” if allowed to participate in the executive’s revisionary duties.⁶⁴ Again, the delegates voted to restrict the power to the executive, upholding the independence of the judiciary.⁶⁵

3. Determining the Proper Removal Mechanism

Later in the Convention, the delegates debated the appropriate procedure for removing Supreme Court justices.⁶⁶ Delaware’s John Dickinson proposed that judges would serve during good behavior “provided that they may be removed by the Executive” following an application by both the Senate and House of Representatives.⁶⁷ His motion was met with strong opposition. Gouverneur Morris thought it was inappropriate for “so arbitrary an authority” to have an enormous impact on the judiciary. Wilson also voiced opposition, asserting that the judiciary “would be in a bad situation if made to depend on every gust of faction which might prevail” in the executive and the legislature.⁶⁸ By a vote of seven states to one, the delegates rejected Dickinson’s motion, instead favoring a more independent judiciary.⁶⁹

The convention passed a motion on September 8 setting the criteria for impeachment to include treason, bribery, and “other high crimes and misdemeanors.”⁷⁰ By standardizing the impeachment process for judges, the framers accentuated judicial independence in the Constitution.⁷¹

⁶² *Id.* at 138.

⁶³ *Id.*

⁶⁴ 2 FARRAND, *supra* note 57, at 76.

⁶⁵ *Id.* at 80.

⁶⁶ *Id.* at 428-29.

⁶⁷ *Id.* at 428.

⁶⁸ *Id.* at 428-29.

⁶⁹ *Id.* at 429.

⁷⁰ *Id.* at 545.

⁷¹ The framers also opted to keep the judiciary out of conducting impeachment proceedings, further protecting evenhandedness and independence. Gouverneur Morris asserted that if the executive appointed the judges to the national judiciary, it would be improper for those judges to conduct the executive’s impeachment trial, as “an impartial trial would be frustrated.” *Id.* at 42. They instead conferred this responsibility upon the Senate. *Id.* at 495.

4. Reinforcing an Independent Judiciary

On the heels of the Convention, the framers promoted the Constitution’s ratification in the states by explaining the document’s provisions. In Federalist No. 78, Alexander Hamilton described the standard of good behavior for federal judges as the “best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”⁷² Additionally, Hamilton dismissed talk of a provision dealing with the removal of judges for inability, arguing that it would more often than not “give scope to personal and party attachments and enmities than advance the interests of justice or the public good.”⁷³ With both assertions, Hamilton promoted judicial independence as one of the Constitution’s core principles.

D. Post-Constitutional Convention to the Present

In the Supreme Court’s nascent years, the judicial branch was not held in nearly the same level of high regard as it is today.⁷⁴ In fact, some of the justices appointed to the bench viewed their position with disdain and served short tenures, partly because the Court embraced its “feeble” design and because the pay did not entice practicing attorneys to leave their positions.⁷⁵ Nonetheless, as the federal government grew, so too did the Court’s role and power.⁷⁶

1. Development of Judicial Review

The development and implementation of judicial review⁷⁷ increased both the Court’s power and its independence from the political branches. Much of the Court’s increase in power can be traced back to Chief Justice John Marshall’s 34-year tenure on the Court, and, in particular, his efforts to legitimize judicial review.⁷⁸ Marshall’s impact is remarkable because he ascended to the bench at a time when many considered the judicial branch to be subordinate—rather than equal—to the executive and legislative branches.⁷⁹

⁷² THE FEDERALIST NO. 78 (Alexander Hamilton).

⁷³ THE FEDERALIST NO. 79 (Alexander Hamilton).

⁷⁴ See Schwarz, *supra* note 4.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ “Judicial review is the idea, fundamental to the US system of government, that the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judiciary. Judicial review allows the Supreme Court to take an active role in ensuring that the other branches of government abide by the constitution.” *Judicial Review*, LEGAL INFO. INST. (June 10, 2019), https://www.law.cornell.edu/wex/judicial_review.

⁷⁸ See Samuel R. Olken, *Chief Justice John Marshall and the Course of American Constitutional History*, 33 J. MARSHALL L. REV. 743, 744-45 (2000).

⁷⁹ See *id.* at 745.

Within Marshall's first years as chief justice, President Thomas Jefferson and the Democratic-Republicans took steps to reduce the judiciary's power by repealing the Judiciary Act of 1801.⁸⁰ This move prevented a decrease in the Court's size from six to five justices.⁸¹ The Democratic-Republicans also sought to use impeachment as a political tool to remove Federalist judges and replace them with Democratic-Republican judges.⁸²

In spite of these challenges, Marshall safeguarded the Court's independence by refusing to concede to the surrounding political pressure.⁸³ Marshall's most important assertion of the Court's independence and authority came in the decision in *Marbury v. Madison*.⁸⁴ Marshall's opinion affirmed the Court's power as the final arbiter in reviewing the constitutionality of federal laws.⁸⁵ Ultimately, the *Marbury* decision echoed—and perhaps answered—the rhetorical question that Marshall posited at the 1788 Virginia Convention on the Constitution's ratification: “To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the Judiciary?”⁸⁶

2. Fluctuations in the Size of the Supreme Court

Article III of the Constitution does not address the Court's composition, leaving it up to Congress to set the Court's size.⁸⁷ The Judiciary Act of 1789 established that the first Supreme Court would consist of six justices,⁸⁸ three fewer than the Court's current composition.⁸⁹ This difference is the result of various efforts throughout the past two centuries to alter the number of justices on the Court.⁹⁰ Political scientist J.R. Saylor argues these changes were largely political, in that Congress changed the Court's size to exclude “justices making decisions objectionable to an incumbent of the White House or to a dominant party majority in

⁸⁰ *Id.* at 755.

⁸¹ 2 Stat. 156 (1802). The 1802 Act repealed the Judiciary Act of 1801, which would have reduced the size of the Court from six to five justices. 2 Stat. 89 (1801) (repealed 1802); Olken, *supra* note 78, at 755. Additionally, the 1801 Act would have created judgeships for judicial circuits, which would have relieved Supreme Court justices from their “onerous” circuit court duties. Olken, *supra* note 78, at 755; *Landmark Legislation: Judiciary Act of 1801*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/legislation/landmark-legislation-judiciary-act-1801> (last visited Apr. 13, 2020).

⁸² Feerick, *Impeaching Federal Judges*, *supra* note 13, at 26.

⁸³ Olken, *supra* note 78, at 757.

⁸⁴ *Id.*; see also 5 U.S. (1 Cranch) 137 (1803).

⁸⁵ Olken, *supra* note 78, at 758.

⁸⁶ *Id.* at 760.

⁸⁷ U.S. CONST. art. III.

⁸⁸ 1 Stat. 73 (1789).

⁸⁹ See, e.g., Daniel Hemel, *What Happens if Ruth Bader Ginsburg Remains Too Sick to Work?*, POLITICO (Jan. 16, 2019), <https://www.politico.com/magazine/story/2019/01/16/ruth-bader-ginsburg-supreme-court-health-224014>.

⁹⁰ See Schwarz, *supra* note 4.

Congress” or to “‘pack’ the Court in order that the policies of the government in power would be upheld as constitutional.”⁹¹

The first change came through the Judiciary Act of 1801,⁹² which Congress enacted to limit President Jefferson’s ability to appoint justices upon taking office by reducing the size of the Court from six to five justices.⁹³ However, the Judiciary Act of 1802 restored the Court’s size to six justices.⁹⁴ Next, the Seventh Circuit Act of 1807 increased the Court’s size to seven justices and created the Seventh Circuit;⁹⁵ the Eighth and Ninth Circuit Acts of 1837 enlarged the Court to nine justices and produced the Eighth and Ninth Circuits;⁹⁶ and the Tenth Circuit Act of 1863 increased the number of justices to ten and established the Tenth Circuit.⁹⁷

Following President Abraham Lincoln’s assassination, Congress reignited politicization of the Court by enacting the Judicial Circuits Act of 1866, intending to limit President Andrew Johnson’s ability to appoint justices.⁹⁸ This law reduced the Supreme Court’s size to seven justices by prohibiting replacement appointments for the next three justices who retired.⁹⁹ However, the Circuit Judges Act of 1869 restored the Court’s composition to nine justices.¹⁰⁰

The Court’s size has not changed since 1869.¹⁰¹ Nonetheless, there have been attempts since 1869 to change its structure, with the most famous attempt being President Franklin Roosevelt’s proposed court-packing scheme of 1937.¹⁰² Citing litigation delays, Roosevelt asked Congress to grant him the authority to appoint an additional justice for each justice on the Court who was over 70 years of age.¹⁰³ Roosevelt actually sought to expand the size of the Court because the Court’s conservative majority appeared to stand in the way of his New Deal legislation.¹⁰⁴

⁹¹ J. R. Saylor, “Court Packing” Prior to FDR, 20 BAYLOR L. REV. 147, 149 (1968).

⁹² 2 Stat. 89 (1801).

⁹³ Schwarz, *supra* note 4.

⁹⁴ 2 Stat. 156 (1802).

⁹⁵ 2 Stat. 420 (1807).

⁹⁶ 5 Stat. 176 (1837).

⁹⁷ 12 Stat. 794 (1863).

⁹⁸ Ch. 210, 14 Stat. 209 (1866); Schwarz, *supra* note 4.

⁹⁹ Ch. 210, 14 Stat. 209 (1866).

¹⁰⁰ Ch. 22, 16 Stat. 44 (1869).

¹⁰¹ *The Supreme Court of the United States and the Federal Judiciary*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/courts/supreme-court-united-states-and-federal-judiciary> (last visited Nov. 27, 2019) [hereinafter *Supreme Court and the Federal Judiciary*].

¹⁰² See William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN MAG. (May 2005), <https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/>.

¹⁰³ *Id.*

¹⁰⁴ See *id.*

Critics of the court-packing legislation argued that: the Court did not need more justices to keep up with its caseload; the legislation would undermine the Court's independence by violating separation of powers principles; and the legislation would set a precedent that could one day suppress both individual rights and the protection of minority groups.¹⁰⁵ Further, the Senate Judiciary Committee emphatically rejected Roosevelt's Reorganization of the Federal Judiciary bill, stating that it would "make this Government one of men rather than one of law, and its practical operation would be to make the Constitution what the executive or legislative branches of the Government choose to say it is—an interpretation to be changed with each change of administration."¹⁰⁶ Despite the fervent opposition, many political observers expected it to pass with ease.¹⁰⁷

Ultimately, one of the conservative-leaning justices, Owen Roberts, began voting to uphold New Deal legislation.¹⁰⁸ Around the same time, another conservative-leaning justice, Willis Van Devanter, announced his retirement from the bench.¹⁰⁹ As a result, Roosevelt's court-packing legislation lost steam and failed to pass.¹¹⁰ Since the court-packing scheme, there have been no significant attempts to alter the size of the Court.¹¹¹

3. Proposed and Enacted Legislation Regarding the Federal Judiciary

Aside from legislation altering the Court's size, a litany of proposed and enacted laws have touched on other aspects of the Court's functioning. For example, several laws have defined the federal judiciary's jurisdiction. Originally, the Court decided most civil appeals and had very little control over managing its ever-increasing docket.¹¹² The Judiciary Act of 1891 created more jurisdictional organization among the federal courts by: creating nine new circuit courts; reassigning the appeals that district courts would hear to circuit courts; establishing the Supreme Court's ability to review cases through certiorari; and eliminating the requirement that Supreme Court justices engage in circuit riding.¹¹³ The Judiciary Act of 1925, which then-Chief Justice Taft strongly supported, increased the Court's discretion in selecting which cases it

¹⁰⁵ ROBERT J. KACZOROWSKI, *FORDHAM UNIVERSITY SCHOOL OF LAW: A HISTORY* 1, 147 (2012).

¹⁰⁶ S. Rep. No. 75-711, at 23 (1937).

¹⁰⁷ Leuchtenburg, *supra* note 102.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Supreme Court and the Federal Judiciary*, *supra* note 101.

¹¹³ 26 Stat. 826 (1891).

should hear with the underlying purpose of reducing the Court’s workload.¹¹⁴ In 1988, Congress essentially eliminated all forms of mandatory jurisdiction for the Court.¹¹⁵

There are also several statutes pertaining to federal judges’ terms of employment. The Circuit Judges Act of 1869 was the first law that instituted a pension-like provision, whereby Supreme Court justices would retain their salary throughout retirement.¹¹⁶ In 1948, Congress enacted an additional condition: a federal judge or Supreme Court justice must serve at least ten years continuously on the bench to continue receiving his or her salary for life.¹¹⁷ Moreover, the same 1948 statute provides for the removal of a judge, and, consequently, the appointment of an additional judge, if the president concurs with the Circuit Court’s Judicial Council:

that [the allegedly disabled] judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business, the President may make such appointment by and with the advice and consent of the Senate. Whenever any such additional judge is appointed, the vacancy subsequently caused by the death, resignation, or retirement of the disabled judge shall not be filled.¹¹⁸

The statute does not apply to Supreme Court justices.¹¹⁹ Although subsection (b) has never been invoked by the Circuit Court’s Judicial Council,¹²⁰ the language of the statute suggests that it should only be invoked in extreme circumstances.

II. The Court’s Threatened Legitimacy in The Public’s Perception

As the highest court in the United States, the Supreme Court represents much more than the nine justices who occupy its bench at any given time—it embodies the American public’s idea of a “citadel of justice.”¹²¹ However, public perception of procedures and actions surrounding the

¹¹⁴ 43 Stat. 936 (1925); *Landmark Legislation: The Judges’ Bill*, FED. JUDICIARY CTR., <https://www.fjc.gov/history/legislation/landmark-legislation-judges-bill-0> (last visited Apr. 19, 2020).

¹¹⁵ Supreme Court Case Selections Act, 28 U.S.C. § 1257 (2018); *Supreme Court of the United States: Jurisdiction*, FED. JUDICIARY CTR., <https://www.fjc.gov/history/courts/supreme-court-united-states-jurisdiction> (last visited Apr. 19, 2020).

¹¹⁶ Ch. 22, 16 Stat. 44 (1869).

¹¹⁷ 28 U.S.C. § 372(a) (2018).

¹¹⁸ 28 U.S.C. § 372(b). The composition of a Circuit Court’s Judicial Council is provided in a separate statute. 28 U.S.C. § 332.

¹¹⁹ See 28 U.S.C. § 372(b).

¹²⁰ Searches on both WestLaw and LexisNexis and a general Google search yielded no instance of § 372(b) ever being invoked.

¹²¹ Epps & Sitaraman, *supra* note 2, at 167-68.

Court can dim the public's confidence in the Court as an independent body.¹²² In this Part, we explore certain realities about the Court that may threaten its reputable standing.

A. Inequity of Appointments

Because presidents nominate justices for the Supreme Court only when death or retirement results in a vacancy, presidents have unequal opportunities to appoint justices.¹²³ Inequity of appointments by presidents may lead to uneven and unpredictable results, potentially allowing presidents of one political party to appoint more justices than presidents of the other political party.¹²⁴ Given the frequency of 5-4 decisions and the importance of the cases that are often decided by that margin, even one new appointment may be crucial to the Court's judgments.¹²⁵ When nominating justices, presidents tend to select a nominee with philosophical or ideological views that mirror the president's own.¹²⁶ As a result, many senators, especially members of the Judiciary Committee, emphasize the importance of closely evaluating the president's nominees before ultimately deciding who will serve on the bench.¹²⁷

Although the nomination process does not guarantee presidents the same number of appointments,¹²⁸ the justices on the Court still tend to represent a diverse array of ideological

¹²² See generally *id.*

¹²³ See BARRY J. McMILLION & DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL33225, SUPREME COURT NOMINATIONS, 1789 TO 2017: ACTIONS BY THE SENATE, THE JUDICIARY COMMITTEE, AND THE PRESIDENT 4 (2018); see also Adam H. Morse & Julian E. Yap, *A Panel-Based Supreme Court*, 37 OHIO N.U. L. REV. 23, 28 (2011).

¹²⁴ Morse & Yap, *supra* note 123, at 28.

¹²⁵ DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL31989, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 6 (2010). The Court has issued increasingly more 5-4 decisions. In October Term (OT) 2018, the Court issued 21 5-4 opinions, representing 29% of total decisions, and 81% of the 5-4 decisions were split on ideological lines. In OT 2012, the Court split 5-4 in 23 out of 78 cases, which was again 29% of total decisions, but 70% were split on ideological lines. Earlier terms saw fewer 5-4 decisions: OT 2011 had 15 of 76 cases (20%); OT 2010 had 16 of 80 cases (20%); OT 2007 had 12 of 69 cases (17%); and OT 2005 had 11 of 82 cases (13%). While 5-4 decisions increased, unanimous judgments decreased. In OT18 the Court released 28 unanimous judgments, representing 39% of its total decisions. Adam Feldman, *Final Stat Pack for October Term 2018*, SCOTUSBLOG (June 28, 2019, 5:59 PM), <https://www.scotusblog.com/2019/06/final-stat-pack-for-october-term-2018/>; Kedar Bhatia, *October Term 2012 Summary Memo*, SCOTUSBLOG (June 29, 2013, 10:25 AM), <https://www.scotusblog.com/2013/06/october-term-2012-summary-memo/>.

¹²⁶ RUTKUS, *supra* note 125, at 5.

¹²⁷ *Id.*

¹²⁸ President Franklin D. Roosevelt had the second-largest number of Supreme Court confirmations, with the Senate confirming all nine of his nominations. In contrast, the Senate confirmed only one of President John Tyler's nine nominations. Six presidents achieved only one confirmation, and three presidents did not make any nominations because no vacancies occurred during their presidencies. President Andrew Johnson made no successful appointments because Congress eliminated the associate justice position to which Johnson had nominated Henry Stanbery. McMILLION & RUTKUS, *supra* note 123, at 5; *Supreme Court Nominations (1789-Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> (last visited Apr. 24, 2020) [hereinafter *Supreme Court Nominations*].

and philosophical views.¹²⁹ Furthermore, legal precedent, accumulated wisdom, and methods of interpretation influence the Court's decision-making.¹³⁰

If presidents of one party can appoint more justices than presidents of the other party, the public might view the Court as an extension of the party that was able to make the most appointments. One scholar observes that Republicans and Democrats "shared the presidency fairly equally" from 1946 to 2001, with five Democrats controlling the White House for 26 years and four Republicans holding it for 29 years.¹³¹ Yet, the Republican presidents made 15 of the 24 appointments to the Court during that time period.¹³² The scholar's research further suggests that of nine presidents during that 55-year period, the appointments of four affected 25 percent or more of Court decisions for the majority of that period.¹³³ In addition to allowing presidents of one party to have more of an impact on the Court, the randomness of Supreme Court vacancies allows voters in one election to potentially have more influence over appointments to the Court than voters in another election.¹³⁴

B. The Nomination Process

Senate procedures can dilute the president's power to nominate justices to the Supreme Court. Although a nominee's qualifications are central to the nomination process, extreme partisanship has disfigured the Constitution's vision of the process.¹³⁵ One Congressional Research Service report noted that the political aspect of the nomination process becomes most visible when "a President submits a nominee with controversial views, there are sharp partisan or ideological differences between the President and the Senate, or the outcome of important constitutional issues before the Court is seen to be at stake."¹³⁶ The partisanship afflicting the nomination process is due, in part, to changes to once-standard Senate practices and rules.¹³⁷

Another significant issue in the nomination process is the Senate majority leader's power to schedule votes on Supreme Court nominees. The majority leader may consult with the minority

¹²⁹ The Court has often consisted of justices nominated by four or five different presidents and confirmed by six or seven different Senates. See E. Donald Elliott, *Fixing A Broken Process for Nominating US Supreme Court Justices*, THE CONVERSATION (Oct. 15, 2018, 6:29 AM), <https://theconversation.com/fixing-a-broken-process-for-nominating-us-supreme-court-justices-104629>.

¹³⁰ *Id.*; see also BENJAMIN N. CARDOZO, NATURE OF THE JUDICIAL PROCESS 20, 135-36 (1921).

¹³¹ Joseph M. Whitmeyer, *Presidential Power Over Supreme Court Decisions*, 127 PUB. CHOICE 97, 112-13 (2006).

¹³² *Id.* at 113.

¹³³ *Id.* at 111-12.

¹³⁴ Elliott, *supra* note 129.

¹³⁵ See RUTKUS, *supra* note 125, at 56; Epps & Sitaraman, *supra* note 2, at 169-70. While we recognize that a degree of partisanship is inevitable with our current two-party system of government, we find fault with partisanship when it prevents the government from functioning as it was intended.

¹³⁶ RUTKUS, *supra* note 125, at 56.

¹³⁷ See *id.*

leader and other interested Senators before scheduling consideration of a nominee,¹³⁸ however, Senate leadership ultimately has unilateral control over whether to allow a vote.¹³⁹

If Senate leadership chooses to not schedule a nominee and takes no action, the full Senate will be deprived of the opportunity to consider that particular nomination. For example, both the Senate majority leader and the chair of the Senate Judiciary Committee opted to take no action on President Obama's nomination of Judge Merrick B. Garland to fill the open seat created by Justice Antonin Scalia's death.¹⁴⁰ They declined to hold hearings and a floor vote because they asserted that a vacancy should not be filled in an election year, and that the next president should fill the vacancy.¹⁴¹ When President Trump nominated Judge Neil M. Gorsuch to fill the vacancy, the Judiciary Committee held confirmation hearings for four days, and "favorably reported the nomination to the Senate" by an 11-9 vote.¹⁴² The full Senate held floor debate for three days and confirmed Judge Gorsuch by a 54-45 vote.¹⁴³

One scholar asserts that the Senate rejects or does not act on a nomination because of: opposition to the president; opposition to the nominee's politics or likelihood to hold positions contrary to the party in power; pressure from interest groups; and fear that the nominee may significantly change the Court's ideological makeup.¹⁴⁴ Another scholar argues that the timing of the nomination, the Senate's understanding of the nominee's ideology, and how the president manages the nomination process affect the Senate's decision to reject or refuse to consider a Supreme Court nominee.¹⁴⁵

Senate voting records on Supreme Court nominees show how these phenomena have become more widespread in the Court's recent history.¹⁴⁶ Justices Antonin Scalia and Anthony Kennedy were confirmed unanimously in the late 1980s, and Justice Ruth Bader Ginsburg received 96 of 99 votes at her 1993 confirmation.¹⁴⁷ However, since 2006, no Supreme Court justice has received more affirmative votes than Justice Sonia Sotomayor's 68, a trend that shows how Senators have gravitated towards voting along party lines as the country's politics have become more polarized.¹⁴⁸

¹³⁸ *Id.* at 35.

¹³⁹ RICHARD S. BETH & BETSY PALMER, CONG. RESEARCH SERV., RL 33247, SUPREME COURT NOMINATIONS: SENATE FLOOR PROCEDURE AND PRACTICE, 1789-2011 12 (2011).

¹⁴⁰ McMILLION & RUTKUS, *supra* note 123, at 1.

¹⁴¹ DENISE CARDMAN, JUDICIAL VACANCIES: 114TH CONGRESS WRAP-UP, AM. BAR ASS'N (2017).

¹⁴² McMILLION & RUTKUS, *supra* note 123, at 1.

¹⁴³ *Id.*

¹⁴⁴ RUTKUS, *supra* note 125, at 49.

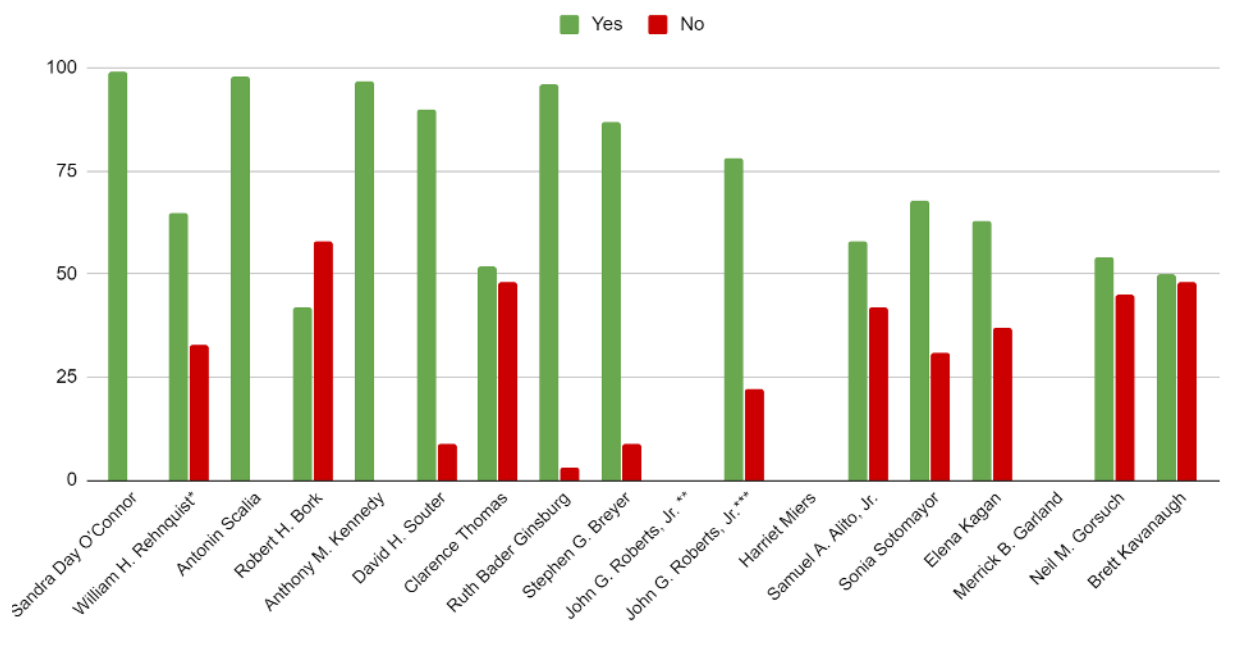
¹⁴⁵ *Id.* (internal quotation marks omitted).

¹⁴⁶ *See, e.g., Supreme Court Nominations, supra* note 128.

¹⁴⁷ *Id.*

¹⁴⁸ *See id.*

Senate Votes on Recent Supreme Court Nominees



Source: *Supreme Court Nominations (1789-Present)*, U.S. Senate, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm>

Notes:

- * This is Chief Justice Rehnquist's nomination to become chief justice. He was already a sitting associate justice.
- ** This was President Bush's initial nomination of John Roberts to replace Justice O'Connor as an associate justice. The nomination was later withdrawn to nominate Roberts to be chief justice.
- *** This is Chief Justice Roberts' nomination to be chief justice.

C. Allowing Strategic Considerations to Impact Retirement Decisions

While there are of course legitimate reasons justices retire, the Court's legitimacy is impacted when justices postpone their retirements strategically. Justice Nathan Clifford, who joined the Court in 1858, served ably until his mental capacity began to decline around 1877.¹⁴⁹ Clifford then suffered a stroke in 1880 and Justice Samuel F. Miller, assessing Clifford's mental incapacity, termed him "a babbling idiot."¹⁵⁰ However, Justice Clifford delayed retirement because he hoped that a Democrat would win reelection and appoint his successor.¹⁵¹

¹⁴⁹ David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1006 (2000).

¹⁵⁰ *Id.* at 1007.

¹⁵¹ *Id.* at 1008; see also Schwarz, *supra* note 4 (recognizing that "when justices themselves play a role in determining the ideology of their successor, it is not surprising that more people question the court's democratic legitimacy").

In 1929, at the age of 72, Chief Justice William Howard Taft acknowledged that his mental aptitude had declined, explaining that he was “older and slower and less acute and more confused.”¹⁵² However, Taft too allowed political concerns to influence his retirement decision.¹⁵³ He worried about the appointment of radical judges to the Court, and felt that he should postpone retirement “in order to prevent the Bolsheviki from getting control.”¹⁵⁴

D. Ideological Predictability

In recent years, many justices now arrive at the Court with already-established judicial-ideologies.¹⁵⁵ This is because presidents have been selecting their Supreme Court nominees almost exclusively from the Courts of Appeals.¹⁵⁶ The underlying strategy of selecting federal appellate judges as Supreme Court nominees is to ensure some semblance of ideological reliability.¹⁵⁷ By selecting justices with a clear ideology, certain views may disproportionately influence the Court and the greater legal community, even if those views represent a minority outlook when a justice comes to the Court.¹⁵⁸

Despite this strategy, several justices throughout history have appeared to depart from the ideologies they held when they were appointed. Justice James McReynolds, who was appointed by the Democratic President Woodrow Wilson, became one of the “four horsemen” who threatened to completely derail Democratic President Franklin Roosevelt’s New Deal legislation.¹⁵⁹ Justice Harry Blackmun, whom Republican President Richard Nixon nominated, became more liberal during his tenure and even authored the majority opinion in *Roe v. Wade*.¹⁶⁰ Justice Blackmun later defended the importance of the decision, which held that the Constitution protects a woman’s right to obtain an abortion, and continued to vote to preserve

¹⁵² 2 HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 967 (1939).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *See supra* Part II.A.

¹⁵⁶ Schwarz, *supra* note 4.

¹⁵⁷ *Id.*; *see also* Morse & Yap, *supra* note 123, at 29.

¹⁵⁸ *See* Morse & Yap, *supra* note 123, at 44. An example of this phenomenon can be seen in Justice Scalia’s belief in originalism and the frequency with which he incorporated it into opinions. *See, e.g., Originalism: A Primer On Scalia’s Constitutional Philosophy*, NPR (Feb. 14, 2016), <https://www.npr.org/2016/02/14/466744465/originalism-a-primer-on-scalias-constitutional-philosophy>.

¹⁵⁹ Epps & Sitaraman, *supra* note 2, at 153.

¹⁶⁰ Oliver Roeder, *Supreme Court Justices Get More Liberal As They Get Older*, FIVETHIRTYEIGHT (Oct. 5, 2015), <https://fivethirtyeight.com/features/supreme-court-justices-get-more-liberal-as-they-get-older/>; Linda Greenhouse, *Justice Blackmun, Author of Abortion Right, Dies*, N.Y. TIMES (Mar. 5, 1999), <https://www.nytimes.com/1999/03/05/us/justice-blackmun-author-of-abortion-right-dies.html>.

the right to choose.¹⁶¹ This phenomenon of unexpected, ideological aisle-crossing has become rarer.¹⁶²

More predictable rulings indicates that presidents are nominating individuals who are more ideologically consistent in their decision-making and less moderate in their ideology.¹⁶³ In fact, President George W. Bush's appointees, Chief Justice John Roberts and Justice Samuel Alito, have been described as "impeccably conservative."¹⁶⁴ Meanwhile, President Bill Clinton's and President Barack Obama's appointees, Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor, have maintained a liberal presence on the Court.¹⁶⁵ With the additions of Justices Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett, it seems to many that the Court has a solidified conservative majority, renewing concerns of partisan imbalance on hot-button issues for the foreseeable future.¹⁶⁶ Nonetheless, Chief Justice Roberts' institutionalist inclinations to shield the Court's independence from political capture may reduce the likelihood that a definitive conservative majority has unilateral decision-making authority on the Court.¹⁶⁷ And Justices Gorsuch and Kavanaugh have recently shown signs of independence on major issues before the Court.¹⁶⁸

E. Set Majorities and Swing Justices

A Supreme Court with an odd number of justices permits the possibility of a clear ideological majority.¹⁶⁹ When the Court has operated with an even number of justices and no ideological majority, compromise has been a necessity.¹⁷⁰ The problem of a definitive majority is

¹⁶¹ Greenhouse, *supra* note 160.

¹⁶² Lee Epstein & Eric A. Posner, *If the Supreme Court is Nakedly Political, Can it Be Just?*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html>; Epps & Sitaraman, *supra* note 2, at 153.

¹⁶³ Epstein & Posner, *supra* note 162; *see also* Epps & Sitaraman, *supra* note 2, at 203.

¹⁶⁴ Epstein & Posner, *supra* note 162.

¹⁶⁵ *Id.*

¹⁶⁶ Epps & Sitaraman, *supra* note 2, at 156-60; Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html>.

¹⁶⁷ *Id.* at 162-63. For example, in *National Federation of Independent Business v. Sebelius*, Chief Justice Roberts voted with the liberal wing of the Court to uphold the Affordable Care Act's individual mandate under Congress's taxing power. *Id.* at 162.

¹⁶⁸ Richard Wolf, *Supreme Court Justices Gorsuch and Kavanaugh Display Independent Streaks*, USA TODAY (July 17, 2020, 5:00 AM), <https://www.usatoday.com/story/news/politics/2020/07/17/brett-kavanaugh-neil-gorsuch-trumps-justices-show-independence/5437009002/>.

¹⁶⁹ *See, e.g., id.* at 153-56; Maya Rhodan, *This Is What Happens When the Supreme Court Is Tied*, TIME (Feb. 13, 2016), <https://time.com/4220760/%20supreme-court-tie-antonin-scalia/>.

¹⁷⁰ *Id.* at 197. During the time that Justice Scalia's seat on the Court remained vacant, the eight sitting justices strove to reach consensus and decided cases on narrow grounds. As a result, the October 2016 Term "displayed the most consensus among the Justices in more than seventy years." *Id.*; *see also* Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, N.Y. TIMES (June 27, 2017),

exacerbated by both the trend of justices serving longer tenures¹⁷¹ and the inherent inequities in appointments that the system permits.¹⁷² These factors increase the likelihood that a justice will remain on the Court long after the president with whom their views are likely aligned has left office. They also allow a majority created over the course of perhaps a mere decade to persist for generations.¹⁷³ Ideologies can become entrenched, leading many to “question the [C]ourt’s democratic legitimacy.”¹⁷⁴

Furthermore, when the majority exists by only a slight margin and there is a justice who occasionally decides with the minority, it might appear that the law is in the hands of one justice.¹⁷⁵ When a swing justice presides on the Court, litigators tend to tailor their legal strategy to appeal to that particular justice, rather than the whole panel.¹⁷⁶ To some, the existence of a swing justice amplifies the perception that the Court’s decisions are undemocratic and advances the view that the Court is more akin to the “rule of men,” rather than the “rule of law.”¹⁷⁷

Finally, there is a history of the Court overruling several major precedents following a justice’s retirement, especially when that justice was a swing-voter.¹⁷⁸ Commentators note that changes in the Court’s membership can so easily alter precedent “undercuts the appearance that the Court is doing law rather than enacting policy.”¹⁷⁹

III. Analysis of Existing Proposals

Before detailing our recommendations, we analyze a bevy of existing proposals for reform related to the Supreme Court that seek to protect the public’s perception of the Court’s legitimacy; decrease ideological partisanship; and maintain the Court’s independence.

A. Methods of Implementing Reform

The authors of the proposals discussed here recommend different legal mechanisms for implementing their proposals. Some advocate for a constitutional amendment,¹⁸⁰ while others

<https://www.nytimes.com/2017/06/27/us/politics/supreme-court-term-consensus.html>. If the Court decides a case in a tie, the decision has no precedential value and the lower court’s ruling stands. Rhodan, *supra* note 169.

¹⁷¹ Schwarz, *supra* note 4; Morse & Yap, *supra* note 123, at 24.

¹⁷² See *infra* Part III.A.

¹⁷³ See Schwarz, *supra* note 4.

¹⁷⁴ *Id.*

¹⁷⁵ Morse & Yap, *supra* note 123, at 35.

¹⁷⁶ *Id.* at 35-36.

¹⁷⁷ *Id.* at 34-36.

¹⁷⁸ *Id.* at 45. Soon after Justice O’Connor retired, Justice Alito, who took her seat, voted to overturn two major rulings. See *id.*

¹⁷⁹ *Id.* at 46 n.131.

¹⁸⁰ See, e.g., Schwarz, *supra* note 4.

see amending the constitution as impractical and focus on reform via statute.¹⁸¹ The judiciary possesses greater influence today than it did in its early days, leading some to argue that a constitutional amendment, rather than a statute, would be better suited to address problems affecting the judiciary.¹⁸² Conversely, because of the Court's power and the country's intense political polarization, the passage of a constitutional amendment changing the Court's operating procedures seems unlikely.¹⁸³

B. Term Limits

Term limits would confine justices' service to a nonrenewable, fixed number of years.¹⁸⁴ Many proponents of terms limits, such as Fix the Court,¹⁸⁵ have suggested 18-year terms,¹⁸⁶ which would enable each president to appoint a new justice every two years while keeping the Court's composition at nine.¹⁸⁷ If a justice does not complete the 18-year tenure, a new appointee would finish the remainder of the justice's term without receiving an additional 18-year term.¹⁸⁸

One benefit of imposing 18-year term limits on justices, rather than granting lifetime tenure, is that the president would appoint a new justice every two years. This regimented approach would eliminate the problems posed by inequity of appointments.¹⁸⁹ Term limits may inadvertently avoid some physical or mental incapacity issues because justices would only serve for a fixed term rather than for life.¹⁹⁰

¹⁸¹ Epps & Sitaraman, *supra* note 2, at 171.

¹⁸² See, e.g., Schwarz, *supra* note 4.

¹⁸³ Epps & Sitaraman, *supra* note 2, at 152.

¹⁸⁴ See generally James E. DiTullio & John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093 (2004); see also Schwarz, *supra* note 4.

¹⁸⁵ Fix the Court is a nonpartisan, national organization that advocates for non-ideological reforms to make the Supreme Court more accountable to the American people and has worked with various organizations, including the Federalist Society and the American Constitution Society. *About Us*, FIX THE COURT, <https://fixthecourt.com/about-us/> (last visited May 21, 2010).

¹⁸⁶ See, e.g., DiTullio & Schochet, *supra* note 184, at 1147. One term limits proposal envisions a constitutional amendment taking effect on the first odd-numbered year after its ratification. Each justice serving on the Court at the time of ratification would be assigned a fixed term. For example, the justice with the longest tenure would be given a term that expired on the first even-numbered year after ratification once that justice had served for at least 18 years. *Id.*

¹⁸⁷ Schwarz, *supra* note 4; *Letter to Congress on the Regularization of Supreme Court Appointments Act of 2017*, FIX THE COURT (June 29, 2017), <https://fixthecourt.com/2017/06/tlproposal/>.

¹⁸⁸ Schwarz, *supra* note 4.

¹⁸⁹ See *supra* Part II.A; see also Hemel, *supra* note 89 (noting that a regularized appointment system may "narrow the inequity across presidents who have disparate opportunities to influence the court based on the number of vacancies that arise during their terms"); FIX THE COURT, *supra* note 187.

¹⁹⁰ See generally Garrow, *supra* note 149.

However, others assert that term limits would weaken the Court’s independence. John D. Feerick, former dean of Fordham University School of Law, highlights that the framers understood lifetime tenure provided by the Constitution’s “good Behaviour” language as vital to judicial independence.¹⁹¹ Alexander Hamilton stated, “[P]ermanency in office . . . may therefore be justly regarded as an indispensable ingredient in [the judiciary’s] constitution, and, in a great measure, as the citadel of the public justice and the public security.”¹⁹² Accordingly, one disadvantage of term limits may be a weaker anchor for individual liberties, given that judicial independence is “the right that anchors all other rights.”¹⁹³

Moreover, Professors Daniel Epps and Ganesh Sitaraman contend that term limits would not depoliticize the Court, but may exacerbate the problem.¹⁹⁴ For one, they say the nomination process would occur with increased frequency and equal ferocity.¹⁹⁵ Such constant turnover could erode the Court’s prestige.¹⁹⁶ Additionally, shorter tenures may exacerbate what Professors Lee Epstein and Eric Posner call the “loyalty effect,” which refers to “justices voting in a way that favors the president who appointed them.”¹⁹⁷ With every president nominating a certain number of justices, presidents might be virtually guaranteed to have justices on the Court who are predisposed to rule in their favor.

Next, term limits may also reduce collegiality on the bench. Justices who know they are working together for the rest of their careers are more likely to cooperate with each other and may expect reciprocation for concessions made in certain cases.¹⁹⁸ Term limits, however, lead to the “last period problem” whereby a justice approaching the end of his or her term will have fewer incentives to collaborate with other justices and vice versa.¹⁹⁹ Furthermore, term limits

¹⁹¹ U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour”); Feerick, *Judicial Independence*, *supra* note 1, at 237-38.

¹⁹² THE FEDERALIST NO. 78 (Alexander Hamilton).

¹⁹³ Feerick, *Judicial Independence*, *supra* note 1, at 239; *see also* THE FEDERALIST NO. 51 (James Madison) (“In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle . . . because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.”).

¹⁹⁴ Epps & Sitaraman, *supra* note 2, at 173.

¹⁹⁵ *Id.*; *contra* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 835-36 (2006) (stating that more frequent nominations would depoliticize the process by making each nomination less politically important).

¹⁹⁶ *But see* Calabresi & Lindgren, *supra* note 195, at 851.

¹⁹⁷ Lee Epstein & Eric A. Posner, *Supreme Court Justices’ Loyalty to the President*, 45 J. LEGAL STUD. 401, 403 (2016).

¹⁹⁸ Hemel, *supra* note 89.

¹⁹⁹ *Id.* For some justices, the “prospect of seeking political support for re-nomination or re-designation at the end of their terms . . . can weigh in their minds when rendering a decision in a politically important or otherwise sensitive case.” Feerick, *Judicial Independence*, *supra* note 1, at 244.

would inhibit the Court’s ability to build upon and gain invaluable insight from the accumulated knowledge that lifetime tenure affords justices.²⁰⁰

Finally, limiting Supreme Court tenure to 18 years could require a constitutional amendment because Article III’s “during good Behaviour” language indicates that federal judges have lifetime appointments.²⁰¹ However, some scholars argue that an amendment might not be necessary if the term-limits reform moves justices to other courts after their terms expires.²⁰²

C. Mandatory Retirement

Some have called for a mandatory retirement age for Supreme Court justices.²⁰³ This suggestion has roots in historical precedent dating back to colonial America.²⁰⁴ More than 30 states have some form of a mandatory retirement age for judges serving on their highest courts.²⁰⁵ Setting a retirement age would likely help maintain the Court’s legitimacy by reducing the likelihood that justices with health issues would remain on the bench.²⁰⁶

However, this proposal does not come without weaknesses. While some justices’ energy for the job might wane as they age, history shows that several Supreme Court justices have served ably beyond their mid-70s.²⁰⁷ By mandating retirement at a certain age, the Court would be deprived of senior justices’ capabilities and wisdom developed over decades of service. Moreover, imposing a mandatory retirement age—and eliminating life tenure—would raise many of the same issues as setting a fixed term limit.²⁰⁸ Finally, because Supreme Court justices are authorized to hold their offices during “good behavior,” legislation forcing them to retire at a certain age would raise constitutional objections.²⁰⁹

²⁰⁰ Interview with Bruce A. Green, Professor, Fordham Univ. Sch. of Law, in New York, N.Y. (Oct. 1, 2019).

²⁰¹ Epps & Sitaraman, *supra* note 2, at 171.

²⁰² Calabresi & Lindgren, *supra* note 195, at 855-56.

²⁰³ See Garrow, *supra* note 149, at 1085.

²⁰⁴ See, e.g., N.Y. CONST. (1777).

²⁰⁵ Hemel, *supra* note 89; see, e.g., N.J. CONST. art. VI, § 6, ¶ 3 (requiring judges to retire at age 70); WASH. CONST. art. IV, § 3(a) (requiring judges to retire at age 75).

²⁰⁶ See generally Garrow, *supra* note 149.

²⁰⁷ David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute”*, 83 WASH. U. L. REV. 1397, 1437-38 (2005) (listing justices whose careers would have been cut short by a mandatory retirement age of 75).

²⁰⁸ *Supra* Part III.B; see also Hemel, *supra* note 89.

²⁰⁹ Hemel, *supra* note 89; U.S. CONST. art. III, § 1. Removing justices from the bench once they have reached a certain age would be inconsistent with the Constitution, which provides for much less stringent terms of service.

D. Balanced Bench

Under the balanced bench proposal, the Supreme Court would increase its membership to 15 justices.²¹⁰ Of the 15, ten justices would be explicitly partisan, with five identifying as Democrats and five identifying as Republicans.²¹¹ The remaining five justices would be non-partisans and serve non-renewable, one-year terms.²¹² The non-partisan justices would be selected by the ten partisan justices two years in advance of their appointment.²¹³ To be selected, the non-partisan justices would need to garner at least supermajority support from the partisan justices.²¹⁴ Ideally, the partisan justices would select “colleagues who have a reputation for fairness, independence, and centrism, and who have views that do not strictly track partisan affiliation.”²¹⁵ However, if the partisan justices fail to agree on a slate of non-partisans, the Supreme Court would lack the requisite quorum for that one-year term, preventing it from hearing any cases that year.²¹⁶ Formulated by Professors Epps and Sitaraman,²¹⁷ the “balanced bench” was touted by Pete Buttigieg during his campaign for the 2020 Democratic presidential nomination.²¹⁸

The original authors of the proposal highlight several advantages.²¹⁹ First, it would increase the likelihood that centrist candidates—who have almost no chance of being nominated in today’s political climate—serve on the Court.²²⁰ Next, by regularizing a portion of the appointments, the nomination process would be less partisan because the increase in appointments would lower the stakes of each individual nomination.²²¹ Furthermore, the authors contend that this proposal would increase the legitimacy of the Court in the eyes of the American public for three reasons: (1) it acknowledges the inherently political aspects of the Court and the justices; (2) the presence of non-partisan justices would eliminate predictable outcomes based on party affiliations; and (3) the presence of partisan justices would ensure that the best arguments from all sides are discussed thoroughly during deliberations.²²²

²¹⁰ Epps & Sitaraman, *supra* note 2, at 193.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *See generally id.*

²¹⁸ Josh Lederman, *Inside Pete Buttigieg’s Plan to Overhaul the Supreme Court*, NBC News (June 3, 2019, 6:03 AM), <https://www.nbcnews.com/politics/2020-election/inside-pete-buttigieg-s-plan-overhaul-supreme-court-n1012491>.

²¹⁹ *See* Epps & Sitaraman, *supra* note 2, at 193-96.

²²⁰ *Id.* at 193.

²²¹ *Id.* at 195-96.

²²² *Id.* at 195-98.

But partisanship could still have negative effects under the balanced bench proposal.²²³ For example, the partisan justices could make compromises when selecting the non-partisan justices that could lead to each side choosing justices who are at least amenable to their ideologies.²²⁴ Prospective candidates for the non-partisan justice positions could also self-declare and re-register as independents only for the purpose of being appointed.²²⁵ Additionally, the balanced bench system would assuredly increase partisanship in the nomination process for the lower federal courts, because those courts would be the source of non-partisan nominees.²²⁶

Further, it would be problematic for the Court to cease functioning for a full term if an agreement were not reached on whom to appoint as non-partisan justices. There are important issues for the Court to resolve every term; it would be very disruptive to the legal system for the Court to stop working for a year.

Aside from the practical concerns, there are also potential constitutional objections to the proposal. Specifically, the president's appointment power would be undermined because the process would involve Supreme Court justices, instead of the president, choosing justices.²²⁷ However, Professors Epps and Sitaraman argue that justices inviting judges to sit on the bench for a limited time is permissible within existing law and practice.²²⁸ For example, justices sit by the chief justice's designation on courts of appeals, and other lower court judges have flexibility to sit by designation of chief judges on different circuit and district courts.²²⁹ Such movement does not require additional presidential nominations and Senate confirmations.²³⁰

An additional constitutional concern with the proposal is that it could raise First Amendment associational rights issues if the process only recognizes the major parties for the ten partisan positions.²³¹

²²³ *Id.* at 196.

²²⁴ *Id.* at 194.

²²⁵ *Id.* at 203.

²²⁶ *Id.* at 196.

²²⁷ *See id.* at 200. The Appointment Clause provides that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court." U.S. CONST. art. II, § 2, cl. 2.

²²⁸ Epps & Sitaraman, *supra* note 2, at 201.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 204. The right of association is an incidental First Amendment right that protects different forms of association, including based on political beliefs. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). Thus, it is possible that a person who is not a member of either major party could raise a claim that the balanced bench's party requirement violates his or her First Amendment right to freely associate with a particular political group in conjunction with a Fourteenth Amendment Due Process claim.

E. Rotating Panels

There are two versions of a “rotating panel” reform for the Court. The first, proposed by Professors Daniel Epps and Ganesh Sitaraman, involves selecting Supreme Court justices from a pool comprised of every federal circuit court judge. Scholars Adam Morse and Julian Yap present a slightly different rotating panel framework that would provide for regularized appointments to the Court.

1. Version 1: “Supreme Court Lottery”

The “Supreme Court Lottery” proposal involves randomly choosing a panel of nine from every federal appellate judge across the country.²³² Those chosen would serve two-week terms on a panel as associate justices of the Supreme Court.²³³ A 6–3 supermajority would be required to strike down federal laws.²³⁴

One benefit of this proposal is that it likely would result in cases being decided by justices with a wider range of perspectives. Indeed, the Court would encompass a broader array of life experiences and backgrounds.²³⁵ Additionally, the Court might become less inclined to strike down federal laws.²³⁶ This increased deference could move the Court away from the center of contentious political battles. A rotating panel of federal appellate judges could also encourage narrower decision-making and more adherence to *stare decisis* because the justices would know that a future panel might reverse radical departures from settled precedents and because the circuit court judges sitting on the panel would be accustomed to following precedent from their experience on inferior courts where they “operate under the threat of reversal.”²³⁷

Epps and Sitaraman assert that a rotating panel of justices would de-politicize the Court.²³⁸ The frequency of appointments would reduce the stakes and impact of each nomination, and “contentious issues of public importance” would no longer be determined by the randomness of unexpected deaths or strategically timed retirements.²³⁹ The Court would randomly assign cases to panels and grant certiorari behind a “veil of ignorance,” where justices would be less likely to base decisions on the predicted outcomes of cases.²⁴⁰ As a result, litigators would be

²³² Epps & Sitaraman, *supra* note 2, at 181.

²³³ *Id.*

²³⁴ *Id.* at 182.

²³⁵ DANIELLE ROOT & SAM BERGER, STRUCTURAL REFORMS TO THE FEDERAL JUDICIARY: RESTORING INDEPENDENCE AND FAIRNESS TO THE COURTS, CTR. FOR AM. PROGRESS 12 (2019).

²³⁶ See Epps & Sitaraman, *supra* note 2, at 170.

²³⁷ *Id.* at 183 n.138 (internal quotation marks omitted).

²³⁸ *Id.* at 182.

²³⁹ *Id.*

²⁴⁰ *Id.* at 183-84; see also Morse & Yap, *supra* note 123, at 42.

less likely to bring ideologically motivated cases, and they would have difficulty catering their arguments to specific justices.²⁴¹

Another potential benefit of the rotating panel is that it would consist of relatively anonymous justices.²⁴² Reducing the celebrity of individual justices might lead the public to view the Court's administration of justice as impartial, rooted in legal principles, and less dependent on any one individual.

A potential weakness of this proposal is that the possibility of litigants having future cases held by panels that are more favorable to their arguments could encourage litigants to keep bringing cases to the Court, resulting in less stability and uniformity in the law.

A rotating panel of justices raises some constitutional questions. First, it would involve judges having dual appointments as federal circuit judges and as associate justices of the Supreme Court.²⁴³ Epps and Sitaraman respond that the Constitution's bans on dual appointments do not explicitly apply to judges.²⁴⁴ They also cite historical support for dual appointments without violating the Constitution, such as an order from the First Congress for justices to serve dual positions and Chief Justice Earl Warren's work chairing the commission that investigated President John F. Kennedy's assassination.²⁴⁵

Second, a rotating panel might run afoul of the Constitution's vision for "one Supreme Court."²⁴⁶ Epps and Sitaraman contend that the language was the result of a compromise at the Constitutional Convention in which the framers agreed to create a Supreme Court and let Congress decide whether to create any lower courts.²⁴⁷ They also cite Hamilton's insight in Federalist No. 22 that the core benefit of a single institution is its finality among the federal courts.²⁴⁸ A Court with a rotating membership would retain this benefit.

Third, Congress may not have the constitutional authority to require a supermajority vote for the Court to strike down federal laws.²⁴⁹ Epps and Sitaraman contend that there is no textual

²⁴¹ Epps & Sitaraman, *supra* note 2, at 183-84.

²⁴² *Id.* at 183.

²⁴³ *Id.* at 186.

²⁴⁴ *Id.* at 186.

²⁴⁵ Additionally, Chief Justice John Jay negotiated the Jay Treaty in 1794 and Chief Justice John Marshall simultaneously served as the secretary of state for some time. *Id.* at 187-88.

²⁴⁶ *Id.* at 188 (internal quotation marks omitted).

²⁴⁷ *Id.* at 189.

²⁴⁸ *Id.* at 189-90; THE FEDERALIST NO. 22 (Alexander Hamilton).

²⁴⁹ Epps & Sitaraman, *supra* note 2, at 190.

support for this objection, and that imposing a supermajority requirement is within Congress's authority to structure the federal courts.²⁵⁰

2. Version 2: Regularized Appointments

The other rotating panel proposal involves choosing members for a nine-person panel from an expanded Supreme Court.²⁵¹ Under Adam Morse and Julian Yap's proposal, every president would appoint three judges to the Supreme Court for each four-year presidential term they served; this rate of appointments would result in an average of 15 justices on the Court at any time.²⁵² A random lottery would select each panel, and "the composition of the panel considering each case would be announced shortly before oral argument."²⁵³

The proposal seeks to "ameliorat[e] the problems associated with increased tenures"—justices would no longer have to worry about retiring only when the president can appoint a like-minded successor because their retirements would not create vacancies.²⁵⁴ Additionally, the presence of more justices would mitigate each individual justice's impact, making it less likely that justices would consider the direction of the Court's jurisprudence in timing their retirements.²⁵⁵ The panel-based system would also reduce each justice's influence on litigants' strategies. Because the composition of each panel would be announced just before oral argument, "litigators would be unable to tailor their written arguments to specific justices."²⁵⁶

While Morse and Yap's panel-based system has significant merit, it encounters one major flaw with its treatment of *stare decisis*.²⁵⁷ The authors maintain that each panel's decisions would be binding precedent on lower courts and "very strong but not binding precedent" on future Supreme Court panels.²⁵⁸ While panel decisions would be entitled to *stare decisis* effect, "the Court could not eliminate from panels the power to overrule prior Court decisions."²⁵⁹ This may lead to a lack of stability in the law. Although panels may hesitate to strike down decisions issued by previous panels, the possibility remains that frequent decisions to overrule past holdings would render the law unpredictable.

²⁵⁰ *Id.* at 191.

²⁵¹ *See generally* Morse & Yap, *supra* note 123.

²⁵² *Id.* at 38.

²⁵³ *Id.*

²⁵⁴ *Id.* at 42-43.

²⁵⁵ *See id.* at 43.

²⁵⁶ *Id.* at 45.

²⁵⁷ *See id.* at 39.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

F. Expanding the Court

Proposals to increase the number of justices on the Court have returned in recent years, mainly from critics of Senate Republicans' handling of nominations to the Court.²⁶⁰ Congress could expand the Court by statute because the Constitution does not specify a number of justices.²⁶¹ Congress has changed the Court's size before.²⁶² However, the nine-justice Court has been the constitutional norm for over a century. President Franklin Roosevelt's failure to expand and reorganize the judiciary reinforced nine as the norm.²⁶³ Some scholars argue that adding justices to the Court today would constitute a short-term, partisan solution, exacerbating politicization of the Court.²⁶⁴

IV. Our Recommendations

We recommend three reforms to enhance the Court's legitimacy in the eyes of the American public: (1) a mechanism by which each president's Supreme Court nominees would essentially be guaranteed a Senate hearing; (2) a rotating panel framework that would regularize the appointment process; (3) a new "senior status" position to allow justices to serve the Court in an advisory capacity after they retire from deciding cases.

A. Securing a Senate Hearing

Our proposal mandates that the vice president, Senate majority leader, and Senate minority leader vote on whether a Supreme Court nominee should receive a hearing. This would practically guarantee the nominee a hearing and ensure serious consideration of the president's pick. The proposed process, which the Senate could implement through its rules, is preferable to mandating a hearing because it would encourage communication between both parties and prevent the unilateral imposition of the president's will on the Senate.

Since the Twelfth Amendment's enactment,²⁶⁵ the vice president has almost always been a member of the president's political party.²⁶⁶ And either the Senate majority leader and Senate

²⁶⁰ Epps & Sitaraman, *supra* note 2, at 175-76.

²⁶¹ See U.S. CONST. art. III.

²⁶² Epps & Sitaraman, *supra* note 2, at 175; *supra* Part I.D.

²⁶³ Epps & Sitaraman, *supra* note 2, at 176.

²⁶⁴ *Id.* at 176-77; Schwarz, *supra* note 4.

²⁶⁵ U.S. CONST. amend. XII; see also *12th Amendment: Election of President and Vice President*, NAT'L CONST. CTR. (Dec. 16, 2013), <https://constitutioncenter.org/blog/12th-amendment-election-of-president-and-vice-president>.

²⁶⁶ The intricacies of vice presidential succession could complicate our proposal. The Twenty-Fifth Amendment permits the president to nominate someone to fill "a vacancy in the office of the Vice President" with majority approval by both Houses of Congress. U.S. CONST. amend. XXV, § 2. Thus, in the rare situation where the vice president has either died or resigned, either the House or the Senate could block the president's nominee to fill

minority leader belongs to the president's party. Therefore, at least two of the triumvirate's three members would always be from the president's party, virtually guaranteeing a president's Supreme Court nominee a hearing.

This guarantee is important. In modern times, the Senate has either moved nominees through the appointment process quickly or not at all, depending on whether the majority leader and president are from the same party.²⁶⁷ The proposed triumvirate framework would alter this dynamic because presidential nominees would receive a hearing regardless of the Senate's composition. The triumvirate framework would promote both efficiency and inter-party communication at the initial stages of the appointment process. Furthermore, it would embody the framers' vision for the appointment process. While the Senate would not be able to completely restrain the president's judicial appointment powers, it would still provide the constitutionally-mandated advice and consent during the hearing and subsequent vote.

By ensuring that each nominee undergoes a Senate hearing, the proposed framework would repair some of the partisan divisions currently crippling the federal government. A Senate majority would no longer be able to stifle the presidential prerogative of filling vacancies on federal courts—a tactic that has only increased the perception of the Supreme Court as partisan.²⁶⁸ This would result in a more harmonious nomination and appointment process. If it becomes conventional that, regardless of the Senate's composition, every nominee receives a hearing and a vote,²⁶⁹ the entire process will become less partisan. And the Senate might be more likely to evaluate presidential nominees based on their merit rather than their political values.²⁷⁰ Ultimately, by assuring presidential nominees a Senate hearing and then still giving the Senate the opportunity to provide its advice and consent, the framework would allow the executive and legislative branches to perform their roles as the framers contemplated.²⁷¹

the vacancy, thereby hampering the triumvirate framework and, by extension, the entire judicial confirmation process.

²⁶⁷ See John C. Eastman, *The Limited Nature of the Senate's Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 657-60 (2003) (noting the troubling "growing tendency of the Senate to refuse even to hold hearings for nominees" (emphasis original)).

²⁶⁸ See, e.g., Ron Elving, *What Happened With Merrick Garland In 2016 And Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now>.

²⁶⁹ While we think it is appropriate that, in the majority of circumstances, the nominee receive a timely vote as well, we wish to respect the president's discretion to withdraw a nominee.

²⁷⁰ For example, President George Washington's original criteria were: (1) "fitness, including [the nominee's] character, health, training, experience, and public recognition"; (2) geographic balance; (3) sacrifice in the Revolutionary War; and (4) support of the new government established under the Constitution. James R. Perry, *Supreme Court Appointments, 1789-1801: Criteria, Presidential Style, and the Press of Events*, 6 J. EARLY REPUBLIC 371, 372 (1986).

²⁷¹ See *supra* Part II.C.

B. Implementing a Rotating Panel Framework

We recommend that the Supreme Court adopt a panel-based system for hearing cases.²⁷² Under this proposal, each president would appoint two justices to the Supreme Court for each four-year presidential term that they serve. Appointments would no longer be tied to justices retiring or passing. The Court's membership would almost always consist of more than nine justices, alleviating the need to quickly nominate and appoint justices in order to fill a seat.

Nine justices would still hear each case. Justices would receive their panel assignments via lottery, and the composition of each panel would be revealed shortly before oral arguments.²⁷³ The lottery system for choosing which justices hear a given case would be similar to the lottery systems that the federal circuit courts use. A panel's ruling would be considered binding precedent—with one caveat: to promote stability in the law, if a panel sought to overturn Supreme Court precedent, or a majority of the non-sitting justices voted for further evaluation, an *en banc* review of the decision would take place.

Although the president would be allowed two appointments per term, our plan would not require that the president make any appointments. If the president did not make both appointments during his or her term, these vacancies would remain unfilled—the president in the following term (incumbent or not) would not be able to fill them, thereby barring any president from appointing more than two justices to the Court during his or her four-year term. Additionally, the president could not nominate justices until he or she has served six months in office. This waiting period would encourage the president to seriously deliberate before making any nominations for lifetime appointments. It would also maintain the Senate's advisory role and offer some regularity to the appointment process.

The Senate could still block the president's nominees from ascending to the bench. However, both the guarantee of every president having up to two appointments and the lack of rollover vacancies would reduce the incentives to block a nominee. Further, our recommendation would not limit how many nominees the president may put forth. If the Senate rejected one nominee, the president could nominate someone new. Additionally, there would be no limits on the president's ability to withdraw a nominee. This system would strengthen the president's nominating power without detracting from the Senate's crucial advisory role.²⁷⁴

Under our proposal, the chief justice would not hear every case—he or she would be subject to the lottery system like the other justices. Requiring the chief justice to sit on every panel would likely make the position unduly burdensome, especially in light of the chief justice's

²⁷² We were inspired by Adam Morse and Julian Yap's rotating panel proposal. See generally Morse & Yap, *supra* note 123.

²⁷³ Circuit courts employ this approach. *Id.* at 38 n.104.

²⁷⁴ See *supra* Part I.C.

administrative duties. We believe this proposal is constitutional because the Constitution is largely silent on the details of the chief justice’s responsibilities.²⁷⁵ The senior most justice on each panel would preside.

We also recommend changes to some of the Court’s procedural rules. First, we recommend changing the method of granting certiorari. Currently, the Court requires that four justices vote to accept a case for it to receive certiorari.²⁷⁶ However, with the larger, uncapped pool of justices, settling on a particular number of justices to grant certiorari would be arbitrary. Accordingly, the Court should grant certiorari when 45 percent of the entire pool of justices vote to accept a case.²⁷⁷

Second, as mentioned, the Court should undertake *en banc* reviews of cases where a panel sought to overturn legislation or Supreme Court precedent. In those case, the entire pool of justices would hear the case. *En banc* review would help prevent the instability in the law that could result from one panel easily overturning the holding of a previous panel without any sort of review.

The final recommendation we offer in tandem to the rotating panel is a minimum-age requirement for justices. A minimum-age requirement would make it less likely that the pool of justices would become too large due to younger justices receiving lifetime appointments.

The panel-based system would strengthen the Court’s legitimacy. Equalizing appointment opportunity would mean voters would effectively cast their ballots in presidential elections for up to two Supreme Court nominees. Currently, appointment opportunities occur due to chance, randomly awarding some presidents multiple seats to fill while giving other presidents no opportunities to exercise their appointment power. Under the rotating panel framework, the public would have more involvement and no president would disproportionately influence the Court’s configuration.

Because a random lottery would determine the panels and presidents would be given two nominations per term, the high and often contentious stakes of the nomination process would be greatly diminished. Every time a seat opens up or the prospect of an open seat presents itself under the current system, the president’s party clamors to fill it, mindful that it must seize the rare opportunity to place a justice on the Court. Our proposal would not allow a justice’s

²⁷⁵ Neither Article II nor Article III of the Constitution mention the chief justice. See U.S. CONST. arts. II, III. Meanwhile, Article I only explicitly references the chief justice in the context of impeaching public officials. U.S. CONST. art. I, § 3.

²⁷⁶ *Supreme Court Procedures*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited Nov. 27, 2019).

²⁷⁷ The current policy requires 44 percent approval to grant certiorari (four of nine justices). We selected 45 percent because it is close to the current rule.

passing or retirement to automatically trigger appointment procedures, which would make justices feel less pressure to retire only when a like-minded president holds office.²⁷⁸

Senators who were not members of the president's party would be less likely to stand firm against the president's nominees because they would know that a president from their party would have opportunities to nominate justices. This could lead the Senate toward evaluating nominees based on merit rather than political ideology.

Our proposed lottery system would likely change the way advocates presented their arguments to the Court. During the Court's recent history, certain justices became known as "swing justices," meaning they might vote with liberal or conservative justices, depending on the case.²⁷⁹ As a result, litigators tailored their arguments with those justices in mind, knowing that their chances of a favorable ruling were high if they could attain the pivotal swing vote(s). Using the lottery system and revealing each panel's configuration only shortly before oral arguments would neutralize this advocacy tactic. Because advocates would not know the panel's exact composition far in advance, they would have to prepare their best arguments without modifying them for any particular justice. The lottery, as a part of the panel-based system, would protect the Court's legitimacy by compelling advocates to make the most meritorious arguments.

Our proposals are not without some potential weaknesses. Admittedly, rotating panels for each case could potentially lead to instability in the law. For example, the panel system would not further the judiciary's legitimacy if, on the heels of a panel's close decision regarding a polarizing issue, the next panel to confront the issue reached the opposite conclusion in a close decision. However, the potential for *en banc* review would dissuade panels from warring over hotly contested issues. Further, the Court is unlikely to grant certiorari simply to alter precedent. The Court is judicious and exacting during the process of evaluating petitions of certiorari,²⁸⁰ and we would not expect this to change under the panel-based system. Last, lifetime tenure has traditionally cultivated collegiality among the justices, and our framework will continue to embrace this tradition by maintaining lifetime tenure. Accordingly, we believe it is unlikely that our framework would cause the law to become any less stable.

The Constitution's mandate that "the judicial Power of the United States, shall be vested in *one* supreme Court" could present a constitutional hurdle to implementing our proposed framework.²⁸¹ Commentators have argued both sides of this issue, but have not reached a

²⁷⁸ See *supra* Part II.C.

²⁷⁹ See, e.g., Ben Zimmer, *Tracing the Meaning of 'Swing Vote' as Justice Kennedy Retires*, WALL ST. J. (July 6, 2018), <https://www.wsj.com/articles/tracing-the-meaning-of-swing-vote-as-justice-kennedy-retires-1530883844>.

²⁸⁰ See, e.g., Adam Feldman, *Pace of Grants*, SCOTUSBLOG 28 (June 28, 2019), https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19.pdf.

²⁸¹ *Id.* (emphasis added).

consensus on whether Supreme Court justices hearing cases in panels would still be considered “one Supreme Court.”²⁸² An ultimate construal of the language’s meaning would determine whether our proposal could be accomplished via statute or whether it would require an amendment to the Constitution.

C. Retirement Stage

We recommend that Congress pass a law creating senior-status for Supreme Court justices. Such a law would expand on an existing statute that permits retired justices to receive assignments and designations from the chief justice to perform judicial duties in any federal district or circuit court.²⁸³ Our recommendation would expand the role of senior-status justices to include an advisory function where they could advise sitting justices on current matters before the Court. This advisory system would allow the Court to retain the benefits that come with the accumulated knowledge of experienced justices, while mitigating the likelihood that a justice’s poor health or age could hinder their performance as an active justice.

Further, senior-status justices would maintain lifetime tenure, which would prevent certain constitutional challenges and result in two incidental benefits. First, upholding lifetime tenure safeguards the Court’s independence,²⁸⁴ as it eliminates the likelihood of justices re-entering political life or working for private interests.²⁸⁵ Second, it will likely foster continued collegiality amongst the pool of judges who would work together for life.

V. Conclusion

Maintaining the Supreme Court’s legitimacy in the eyes of the American public is critical. It is possible that the best course for achieving that goal involves less dramatic changes to the Court than the reforms we suggest here. Nevertheless, we submit our recommendations with the hope that they contribute to the ongoing dialogue around strengthening the nation’s institutions.

²⁸² See, e.g., Tracey E. George & Chris Guthrie, *The Threes: Re-Imagining Supreme Court Decisionmaking*, 61 VAND. L. REV. 1825, 1853 (2009) (asserting that “there is nothing sacrosanct about the high court sitting as a group of nine”); *but see id.* at 1853 n.100 (citing William Brennan’s opinion that the Constitution “does not permit Supreme Court action by committees, panels, or sections”).

²⁸³ 28 U.S.C. § 294 (1978) (“Assignment of retired Justices or judges to active duty”).

²⁸⁴ See THE FEDERALIST NO. 78 (Alexander Hamilton).

²⁸⁵ See, e.g., *supra* Part III.B; III.C.