

**Beyond “Good Behaviour”: A Plan to Restructure the Supreme Court of the United States**

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**Abstract:**

The Supreme Court of the United States truly decides what the law is. It is the final say in any legal battle, and as a result, it is in many ways more powerful than either the legislative or executive branches of the United States government. It performs an important check on both of those branches and serves a vital function in the democracy of the United States. But its current structure leaves something to be desired. There are too few justices, and life tenure is a mistake. Plus those justices represent a very geographically narrow selection of the country's judiciary branch. In this paper, I discuss the Supreme Court's history as well as a selection of its most important cases, and I offer a potential new structure for America's highest court that contains more justices, term limits, and a geographically representative selection of Justices. After comparing this proposed structure with that of three other countries, I ultimately find that the implementation of this new structure could be accomplished in one of three possible ways: through Constitutional amendment, through statute, or through the creation of an entirely new Court of Appeals subordinate to the current Supreme Court.

**Important Background Information:**

In order to understand this subject matter, a basic understanding of the United States judicial system is necessary. What follows is a brief summary of the structure of that system from state district courts all the way to the United States Supreme Court. I have also appended a glossary of some important terms that will be used during the course of this paper.

How does a case make it to the Supreme Court?

The United States judicial system is composed of the Supreme Court as well as many inferior courts. There are two systems of courts: federal and state. The federal court system is composed of district courts, in which trials are conducted, Circuit Courts of Appeals in which decisions of district courts can be appealed, and the United States Supreme Court, which can hear cases from all other courts. All of these aforementioned courts hear cases pertaining to federal laws. So if a person commits a crime that violates federal law, they will be tried in federal court. The state court system is similar in structure to the federal court system. It is composed of state district courts, state appeals courts, and the state's highest court, the State Supreme Court

(e.g. the Supreme Court of Colorado). The vast majority of crimes are dealt with in state courts because each state has different laws pertaining to those crimes. State crimes are those such as murder, assault, and arson.

Here is an example of how a case could potentially make its way to the Supreme Court. I have purposely used a rather silly example so as to make it easier to understand as well as to avoid any tangential discussions of legal procedure or actual statutes.

Let's say that Sally is sued by her neighbor Jeff because Jeff thinks her house is too purple and it hurts his eyes. The state of Colorado's circuit court conducts a trial by jury which pits Sally against Jeff. The jury rules in Jeff's favor, citing the Colorado statute that prohibits houses that are too purple, and the judge orders that Sally paint her house a different color. Sally decides to contest this decision, so she appeals it to the State's Court of Appeals, where that court decides to uphold the lower court's decision to make Sally paint her house. Sally really likes her purple house, so she then decides to appeal that Appeals Court's decision to the Supreme Court of Colorado. This court upholds the decision of the Colorado Court of Appeals, meaning that the original circuit court's decision stands, and Sally will be forced to paint her house a different color, barring extraordinary circumstances.

But Sally refuses to budge. She appeals the decision of the Colorado Supreme Court to the Supreme Court of the United States. Extraordinary circumstances occur, as the Supreme Court grants a writ of certiorari<sup>1</sup> and decides to hear the case. The Supreme Court hears arguments from Sally's lawyer as well as the Colorado attorney general, and decides to rule in Sally's favor and overturn the decision. They rule that Sally's house is not too purple and that the state law against purple houses is invalid.

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<sup>1</sup> See glossary.

This is definitely a ridiculous example, but it shows the process by which a state's law can become a national matter by making its way through the court system. In addition to hearing cases from any state court, the Supreme Court can also choose to hear cases on appeal from any lower federal court. It is quite rare that the Supreme Court hears a case that was not appealed from a lower court. It has original jurisdiction only in a narrow range of cases: those cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."<sup>2</sup> So this would include cases involving ambassadors and other public officials such as a president or congressperson as well as cases in which one of the parties is a state (for example, a case in which the US attorney general sues a state over the constitutionality of a state law). With this discussion out of the way, I now turn my attention to the United States Supreme Court.

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<sup>2</sup> U.S. Const. Art. III Section I.

## **I - Introduction**

In the Federalist Papers, which were published in newspapers in the late 1780's to advocate adoption of the Constitution, Alexander Hamilton famously stated that the judiciary branch would be the "beyond comparison the weakest of the three departments of power."<sup>3</sup> He reasoned that, because the judiciary controls neither money nor the military, it depends on the other two branches more so than they depend on it.<sup>4</sup> And while it is true that, as Hamilton says the judiciary has "neither force nor will, but merely judgment,"<sup>5</sup> this is an oversimplification. It is the judiciary that decides what the law is. Both the legislative and executive branches of the United States government have powerful incentives to follow the law, lest they lose the support of the other branches, or worse: the people.

Hamilton further states that "no legislative act... contrary to the Constitution can be valid."<sup>6</sup> This seems reasonable. It would be a simple and noncontroversial statement if it were true that every judge had the same interpretation of the Constitution. This is clearly not the case. One merely has to look at some of the most recent Supreme Court nominations to see this. While the most recent Supreme Court Justice Brett Kavanaugh's confirmation battle was bitterly divisive, there were extenuating circumstances that contributed to this,<sup>7</sup> so let us look to the next most recent confirmation battle – that of Neil Gorsuch – for evidence.

After the death of Justice Antonin Scalia in February 2016,<sup>8</sup> a vacancy on the Supreme Court was created, leaving eight justices rather than the usual nine. President Barack Obama attempted to fill this vacancy with Judge Merrick Garland, the chief judge on the D.C. Circuit

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<sup>3</sup> Kesler, "The Federalist Papers," 464.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid. at 466.

<sup>7</sup> Brown, Emma. "California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks out about Her Allegation of Sexual Assault." The Washington Post. September 16, 2018.

<sup>8</sup> Liptak, Adam. "Antonin Scalia, Justice on the Supreme Court, Dies at 79." The New York Times. February 13, 2016.

Court of Appeals.<sup>9</sup> Yet Senate Majority Leader Mitch McConnell vowed that the Senate would not vote on Garland's confirmation until after the upcoming November 2016 presidential election had concluded.<sup>10</sup> That election put Donald Trump in office, and in 2017, when Trump began his first term as president, he immediately got to work on nominating Judge Neil Gorsuch of the 10<sup>th</sup> Circuit Court of Appeals for the vacant position.<sup>11</sup> But many Democrats subsequently refused to vote on Gorsuch's nomination, denying Republicans the 60 votes necessary to confirm a Supreme Court nominee.<sup>12</sup> As a result, McConnell employed the so-called "nuclear option" and changed the threshold from 60 votes to 50.<sup>13</sup> Gorsuch was confirmed the following day.<sup>14</sup>

It is clear from this confirmation battle that it is no simple matter whether or not something is constitutional, contrary to the predictions of Alexander Hamilton. If it were really that simple, then this fight would not have happened at all. It seems, then, that whether or not something is Constitutional depends at least somewhat on the person interpreting that Constitution. Because of this, the office of any given Supreme Court Justice carries a vast amount of power. This power is amplified by the current structure of the Supreme Court: one Chief Justice and eight associate justices, all of whom are appointed for life, and serve until they either (1) retire or (2) die.

This structure serves to insulate those Justices to an unacceptable degree. As a result of their life tenure, some justices have been serving for far longer than the Founders would have expected them to, and are out of touch with the will of the public as a result. To quote the late

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<sup>9</sup> Reilly, Katie, and Maya Rhodan. "Merrick Garland Nominated for Supreme Court Justice." *Time*. March 16, 2016.

<sup>10</sup> White, Daniel. "McConnell: Senate Will Not Act on Garland SCOTUS Nomination." *Time*. March 16, 2016.

<sup>11</sup> Davis, Julie Hirschfeld, and Mark Landler. "Trump Nominates Neil Gorsuch to the Supreme Court." *The New York Times*. January 31, 2017.

<sup>12</sup> Levy, Gabrielle. "Duckworth, Cortez Masto Bring Filibuster Effort on Gorsuch to 36." *U.S. News & World Report*. March 31, 2017.

<sup>13</sup> Kim, Seung Min, Burgess, Elana Schor, Seung Min Kim, Burgess, and Shane Goldmacher. "Senate GOP Goes 'nuclear' on Supreme Court Filibuster." *POLITICO*. April 06, 2017.

<sup>14</sup> Vogue, Ariane De, and Dan Berman. "Neil Gorsuch Confirmed to the Supreme Court." *CNN*. April 07, 2017.

Roger C. Cramton, a prominent legal scholar, “decisions having great moment for the nation's future are made by Justices whose appointments came many years before and who may not be influenced by, or even knowledgeable about, the views of voters who are members of generations other than that of the most elderly.”<sup>15</sup> Since the size of the Supreme Court is fixed at nine, the only way to address this problem under current laws is to wait for some of these out-of-touch Justices to leave the Court by one means or another. This takes a long time and the cycle will only keep repeating itself if Supreme Court Justices continue to serve long past the point that they should.

To fix these structural issues, a reform of the Supreme Court is needed. In this paper, I propose one. I start by examining the history of the Supreme Court from its creation in the United States Constitution through its first (and arguably most consequential) major case, *Marbury v. Madison* in 1803. This case established the principle of judicial review, which allows for the Court to declare acts of government unconstitutional if those acts conflict with the constitutional interpretation of a majority of the sitting justices on the Court. I then provide examples in the form of specific cases of the power of judicial review, following up with why the Court's structure makes this power problematic. Then, I propose to restructure the Supreme Court to fix these problems while acknowledging the difficulty that this implementing this new structure may bring. I propose alternate plans if these difficulties prove too much, and conclude that any of these alternate plans would be better than the current structure of the Supreme Court.

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<sup>15</sup> Cramton, “Reforming the Supreme Court,” 1321.

## **II – The History of the Supreme Court**

In order to propose any potential improvement to the current structure of the Supreme Court, it is important to see how and why that structure came to be. In order to do this, we have to go back to the country's original governing document: the Articles of Confederation. Before the Constitution was implemented, the United States was governed by the Articles of Confederation: an agreement between the thirteen original American colonies to establish a central government and to help legitimize the United States as a nation in the wake of the signing of the Declaration of Independence. The Declaration was signed in 1776, though the Articles were not officially adopted until ratified by Maryland in 1781.<sup>16</sup> These Articles of Confederation gave each of the individual states in the union vast latitude in making their decisions. The second provision of the Articles reads "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."<sup>17</sup> Among these powers not expressly delegated were the powers to coin money, appoint state legislators, or to establish justice systems, meaning that individual states had to face these challenges on their own.

The Articles of Confederation proved to be problematic for the early United States. The fact that all of the states were largely autonomous meant that it was extremely difficult to coordinate the payment of debts taken out to service the American Revolution.<sup>18</sup> It was difficult, in fact to achieve coordination on any issue at all, as "by the end of 1786, the Confederation had reached stalemate on every major issue that had confronted it since 1783."<sup>19</sup> In 1787, a Constitutional Convention was called to amend the Articles of Confederation. But rather than merely amendments to the existing Articles of Confederation, this convention ended

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<sup>16</sup> Elliot, "The Debates in the Several States..." 98.

<sup>17</sup> U.S. Articles of Confederation, Article II.

<sup>18</sup> Van Cleve, "We Have Not a Government," 245.

<sup>19</sup> Van Cleve, 248.



in an entirely new governing document: the Constitution of the United States of America. The Constitution was far more comprehensive than were the Articles of Confederation. The Constitution provided for a bicameral legislature made up of a House of Representatives and a Senate rather than a single Continental Congress. It provided for an executive to head the federal government. And most importantly for our purposes, it created the United States Supreme Court.

Article III of the Constitution is the portion dealing with the judiciary. Its section 1 reads, “The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.”<sup>20</sup> This piece of text established the Supreme Court and gave Congress the power to establish the Appeals Courts that exist today. It notably does not say anything relating to what the structure of this Supreme Court should be. That was specified in the Judiciary Act of 1789, which provided for 6 Supreme Court Justices – one chief justice and five associate justices.<sup>21</sup> The Supreme Court decided its first case, *West v. Barnes* in 1791.<sup>22</sup>

The Supreme Court’s early history was, by most accounts, uneventful. One of the only notable cases is *Chisholm v. Georgia* (1793), in which a man from South Carolina attempted to sue the state of Georgia. The State of Georgia refused to send a representative to appear in Court as it was a sovereign state, and therefore, it reasoned, not subject to lawsuits unless it consented to them. The Supreme Court disagreed, and ruled that federal courts had the power to hear lawsuits brought against states even at the expense of limiting those states’ sovereign immunity.<sup>23</sup> But less than two years after this decision, Congress passed the 11<sup>th</sup> amendment, the

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<sup>20</sup> U.S. Const. Art. III Section 1.

<sup>21</sup> Federal Judicial Center, “History of the Federal Judiciary.”

<sup>22</sup> *West v. Barnes*, 2 U.S. 401 (1791).

<sup>23</sup> *Chisholm v. Georgia*, 2 U.S. 419 (1793).

text of which reads, in part, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State.”<sup>24</sup> This invalidated the Court’s decision in *Chisholm v. Georgia* because that case was brought by a South Carolina man against the state of Georgia.

While the Supreme Court seemed to have little to do during this early cases other than to interpret law by rote, at the background, the concept of judicial review was developing. *Hylton v. United States* marked the first time that the Supreme Court invalidated a law of congress on the grounds that it was unconstitutional. Associate Justice James Iredell remarked in his seriatim opinion that, if the Supreme Court does, in fact, have the power of judicial review, “I am free to declare, that I will never exercise it, but in a very clear case.”<sup>25</sup> While early cases like this experimented with the usage of judicial review, it was not until the landmark case of *Marbury v. Madison* that the principle was firmly and finally articulated, making it a permanent fixture of the judiciary of the United States.

### **Marbury v. Madison (1803)**

The presidential election of 1800 pitted John Adams, a federalist who believed in a strong central government, against Thomas Jefferson, an anti-federalist who believed in decentralization.<sup>26</sup> As Adams was the incumbent president at the time, he decided to appoint as many federalist judges as possible after it became clear that he had lost the election. Adams appointed 16 federalist-friendly judges to circuit court positions,<sup>27</sup> one of whom was William Marbury. Adams then ordered that commissions<sup>28</sup> be delivered to all of these judges so as to

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<sup>24</sup> U.S. Const. Amend. 11.

<sup>25</sup> *Hylton v. United States*, 3 Dall 175 (1796).

<sup>26</sup> "The Most Consequential Elections in History: Thomas Jefferson and the Election of 1800." U.S. News & World Report.

<sup>27</sup> Urofsky, Melvin I. "Marbury v. Madison." Encyclopædia Britannica. February 17, 2019.

<sup>28</sup> See glossary.

quickly establish them. But some, including Marbury's, could not be delivered in time.<sup>29</sup> When Jefferson officially took office in 1801, he ordered his secretary of state, James Madison, to withhold all of the undelivered commissions, ensuring that the judges who had not received them could not take office. William Marbury then asked the United States Supreme Court for a writ of mandamus<sup>30</sup> in the hopes that the Court would decide in his favor and order the government to deliver his commission. While Chief Justice of the Supreme Court John Marshall could have merely ordered that Marbury's commission be delivered, he instead ruled that it was not the Supreme Court's place to do so. His decision rested on an issue dealing with original vs. appellate jurisdiction.<sup>31</sup>

According to Article III of the United States Constitution, the Supreme Court has original jurisdiction in cases pertaining to "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party,"<sup>32</sup> and appellate jurisdiction in all other cases. Marbury's case fits none of the criteria for original jurisdiction, meaning that the Supreme Court had only appellate jurisdiction in the case. Yet Marbury took his case directly to the Supreme Court. Section 13 of the 1789 Judiciary Act read, in part, that the Supreme Court "shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue... writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."<sup>33</sup>

The majority decision in *Marbury v. Madison* asserts that Section 13 of the Judiciary Act of 1789 is itself void because it gives the Supreme Court the power to issue writs of mandamus

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<sup>29</sup> Urofsky, Melvin I. "Marbury v. Madison."

<sup>30</sup> See glossary.

<sup>31</sup> See glossary.

<sup>32</sup> U.S. Const. Art. III Section 1.

<sup>33</sup> 1 Stat. 73.

in matters unrelated to appeals, and thus conflicts with Article III of the United States Constitution. This declaration that the Supreme Court can declare any act of Congress unconstitutional if it so desires represents the first instance of judicial review, a practice that has allowed the Supreme Court extreme power in a wide variety of subsequent cases.

While some argue that the practice of judicial review was used before *Marbury*,<sup>34</sup> the decision in *Marbury v. Madison* firmly enshrined the practice within the powers of the Supreme Court. The decision in *Marbury* allowed for the Supreme Court to definitively have the final say in the determination of the Constitution's meaning. As Chief Justice John Marshall asserted in that case's majority decision, "It is emphatically the province and duty of the judicial department to say what the law is."<sup>35</sup> This ability has allowed the Court to make some of the most hugely substantive decisions in American history. Some have been terrible decisions that have brought shame upon the country while others have been triumphs of civil rights and liberties over those who would seek to limit them. What follows is a discussion of some of the most monumental decisions in the history of the Supreme Court. This evaluation will demonstrate the substantial power that the Court wields over America. It will also demonstrate why vesting this substantial power in the hands of nine (or fewer) life-tenured justices should be cause for concern in many instances.

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<sup>34</sup> See e.g. Treanor, "Against Textualism," *Northwestern University Law Review* 103, no. 2 (2009) 987.

<sup>35</sup> *Marbury*, 5 U.S. at 177.

### **III – Cases**

#### **Dred Scott v. Sandford (1857)**

The decision in *Dred Scott v. Sanford* was inarguably one of, if not the, worst decision in the history of the Supreme Court. The case revolved around a slave, Dred Scott, who attempted to purchase his freedom from his owner, John Emerson. In 1833, Scott had been sold to Emerson in Missouri, in which slavery was legal, but Emerson subsequently relocated to Illinois, a free state.<sup>36</sup> Interestingly, at this time, under either Illinois law or Missouri law, Scott would have been entitled to freedom, as he had spent a sufficient amount of time in a free state.<sup>37</sup> Yet Scott did not pursue this, perhaps because he didn't know about these laws. It has been argued that even if Scott had known, it would have been difficult to find a lawyer who would have taken the case anyway.<sup>38</sup> For whatever reason, Scott did not attempt to claim his freedom until 1846. John Emerson had died in 1843 and as Scott was considered Emerson's property, Emerson had passed Dred Scott (as well Scott's wife and two children) to his wife, Irene. Scott had attempted to purchase his and his family's freedom from Irene Emerson, but she refused, and later that year, Dred Scott sued for his freedom.

The case worked its way up through the judicial system and was eventually appealed to the Supreme Court of the United States, where arguments were held in 1856.<sup>39</sup> In a stunning and sweeping decision, the Supreme Court held not only that Dred Scott would remain a slave, but that black people were not even entitled to sue in federal court in the first place because they were not citizens. Chief Justice Roger Taney issued the Court's majority opinion, and reasoned that black people, "are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which the

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<sup>36</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>37</sup> Finkelman, "Scott v. Sandford: The Court's Most Dreadful Decision and How It Changed History," 14.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

instrument provides for and secures to citizens of the United States,”<sup>40</sup> adding, “On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”<sup>41</sup>

This decision was decided 7-2. As legal historian Paul Finkelman points out, only one justice, John McLean, definitively opposed slavery.<sup>42</sup> While this case could have easily been decided on narrow grounds (for instance by ruling that states are allowed to set their own laws with regard to citizenship), the Court took it upon itself to make a ruling against the entire Missouri Compromise,<sup>43</sup> which admitted Missouri to the Union as a slave state. The Missouri Compromise also prohibited slavery north of a certain line, and by invalidating it, Chief Justice Roger Taney was in effect saying that slavery was permissible nationwide. The power of judicial review allowed the Supreme Court to invalidate one of the foundations of the United States.

### **Brown v. Board of Education (1954/1955)**

The case of Brown v. Board of Education is perhaps the Supreme Court’s most famous case. In it, the Court struck down the “separate but equal” doctrine, which allowed for the segregation of American public schools based on racial grounds. In a unanimous decision, the Supreme Court ruled that the “separate but equal” doctrine resulted in education that was inherently unequal. As Justice William Brennan, Jr. said in his majority opinion, “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”<sup>44</sup> In

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<sup>40</sup> Dred Scott v. Sandford, 60 U.S. 404.

<sup>41</sup> Ibid at 404-405.

<sup>42</sup> Finkelman, 33.

<sup>43</sup> Dred Scott v. Sandford, 60 U.S. 455.

<sup>44</sup> Brown v. Board of Education of Topeka 347 U.S. 495 (1954).

allowing “separate but equal” facilities, the Board of Education of Topeka was depriving the plaintiffs of the equal protection guaranteed by the Fourteenth Amendment. Interestingly, this was not the end of the case of *Brown v. Board of Education*. While the Court ruled that “separate but equal” facilities were unconstitutional, it did not provide any sort of remedy for students who were wronged because of that doctrine. Because of this, the Supreme Court heard further arguments in a case usually called “Brown II.”

In *Brown II*, Chief Justice Earl Warren delivered the opinion of the Court. He ordered that the schools and districts in question comply with the previous *Brown I* ruling with “all deliberate speed.”<sup>45</sup> This order does not really say anything specific. Perhaps the Court wanted to leave the enforcement of this action up to the executive branch of government. Certain localities did not comply with this new guideline at all until forced. Governor George Wallace of Alabama physically blocked the door to the University of Alabama registrar’s office so that two black students could not enroll.<sup>46</sup> Eventually, President Johnson ordered the national guard to enforce the ruling.

This case provides an interesting instance in which the Supreme Court overruled itself. This new ruling directly conflicts with *Plessy v. Ferguson*,<sup>47</sup> which confirmed the constitutionality of the separate but equal doctrine. The constitution did not change in this fifty year period. Nor did the practice in question. The only thing that changed was the judges. This implies that constitutionality is really a matter of individual views rather than set in stone. This demonstrates the extraordinary power of the *individual* members of the United States Supreme Court.

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<sup>45</sup> *Brown v. Board of Education of Topeka* 349 U.S. 301 (1955).

<sup>46</sup> Raines, Howell. "George Wallace, Segregation Symbol, Dies at 79." *The New York Times*. September 14, 1998.

<sup>47</sup> *Plessy v. Ferguson*, 16 U.S. 587, (1896).

**United States v. Nixon (1974)**

Any time the Supreme Court overturns a law, it is in effect exercising its power over congress. But the Supreme Court can also overrule a president if that president makes some decision that the current members of court perceive as inconsistent with the Constitution. The Watergate scandal provides a great example of this.

In 1972, five men broke into the Democratic National Convention's headquarters at the Watergate Hotel in Washington, D.C. While the White House initially released a statement calling the break in a "third-rate burglary,"<sup>48</sup> it became clear over time that the White House was connected to the incident. As a result, a special prosecutor, Archibald Cox, was hired by the Department of Justice to investigate the connection between the break-in and then-president Nixon's reelection campaign. Nixon was known for recording his conversations in the Oval Office, so Cox requested these recordings in connection with the investigation. When Nixon refused, Cox and members of the Senate issued a subpoena to force Nixon to hand over the recordings.

In a unanimous decision, (save for William Rehnquist, who recused himself),<sup>49</sup> the Supreme Court rejected Nixon's claim that the president is immune from criminal proceedings while in office, saying that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, [alone], can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."<sup>50</sup> Here, the Supreme Court overruled the person traditionally seen as one of the most powerful people in the world.

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<sup>48</sup>The Associated Press. "Ziegler, Baker, Others on 'Third-Rate Burglary Attempt'." AP NEWS. April 23, 1994.

<sup>49</sup> U.S. v. Nixon, 418 U.S. 685.

<sup>50</sup> Ibid at 706.



## **Bush v. Gore (2000)**

In November of 2000, the presidential election pitted George W. Bush against Al Gore. Bush appeared to have won the election by a narrow margin after winning the state of Florida. The Florida Supreme Court ordered a recount of so-called “undervotes,” those ballots on which no vote had been recorded during machine counting.<sup>51</sup> Some votes may not have been counted because of the way the machines were designed. The ballots were perforated with a stylus, but some had not been perforated well enough, leaving hanging pieces of paper (chads) that were not counted by the voting machines.<sup>52</sup>

In a per curiam<sup>53</sup> decision, the Court stated that the Florida Supreme Court’s decision was ill-formed because it did not prescribe that every county record its recounted votes in the same way.<sup>54</sup> Justice Stephen Breyer in his dissent stated, “no preeminent legal concern, or practical concern related to legal questions, required this Court to hear this case, let alone to issue a stay that stopped Florida’s recount process in its tracks.”<sup>55</sup>

This decision created a great degree of controversy, much of it centered around the justices’ alleged partisanship. Walter Sinnott-Armstrong has argued that Justice Antonin Scalia and Justice Clarence Thomas should have recused themselves from the case, as Scalia had two sons that worked in law firms representing Bush, and Thomas’ wife was involved in recommending candidates to the Bush administration.<sup>56</sup> Law professor Jack Balkin has said that the case, “was troubling because the five conservatives appeared to use the power of judicial review to secure control of another branch of government that would, in turn, help keep their

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<sup>51</sup> Britannica, The Editors of Encyclopædia. "Bush v. Gore." Encyclopædia Britannica. December 05, 2018.

<sup>52</sup> Ibid.

<sup>53</sup> See glossary.

<sup>54</sup> Bush v. Gore, 531 U.S. 105 (2000).

<sup>55</sup> Ibid at 152.

<sup>56</sup> Sinnott-Armstrong, Walter. "Recusal and Bush v. Gore." *Law and Philosophy* 21, no. 2 (2002): 221.

constitutional revolution going.”<sup>57</sup> Prominent legal analyst Jeffrey Toobin suggests that the judicial conservatives’ decision in this case was in fact hypocritical because it goes against the typical conservative platform that emphasizes states’ rights.<sup>58</sup> Journalist Jeffery Rosen of the New Republic took it a step further, calling the Supreme Court’s decision a “national disgrace.”<sup>59</sup> Regardless of one’s political leanings, it seems odd that the Supreme Court would decide this issue at all. The per curiam opinion asserts that “the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work.”<sup>60</sup> But it is unclear why the need for substantial additional work is justification enough to stop a recount that is already in progress, and one that was judged by the Florida Supreme Court as permissible at that.

Whatever the reason, the recount was stopped, and Bush was declared to have won the election. Perhaps if the recount were allowed to continue, the result would have been different, or perhaps it would have been the same. But the Supreme Court in this decision effectively decided a presidential election when it does not appear to have been necessary. I will stop short of calling this a “bad” decision, but it is certainly one that is cause for concern. The Supreme Court did not need to be involved at all and should have let the Supreme Court of Florida’s ruling stand. This is further complicated by the issues with Scalia and Thomas outlined above.

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<sup>57</sup> Balkin, Jack. "Bush v. Gore and the Boundary Between Law and Politics." *The Yale Law Journal* 110, no. 8 (June 2001): 1409.

<sup>58</sup> Toobin, Jeffrey. "Precedent And Prologue." *The New Yorker*. June 19, 2017.

<sup>59</sup> Rosen, Jeffrey. "Disgrace." *The New Republic*. December 24, 2000.

<sup>60</sup> *Bush v. Gore*, 531 U.S. 100 (2000).

#### **IV – The Problem**

All of this information demonstrates the power of the justices of the United States Supreme Court. They have made socially responsible decisions, as in *Brown*, and terribly misguided ones, as in *Dred Scott*. They have overruled presidents, the House of Representatives, the Senate, and themselves. They have changed the social fabric of the country for the better and for the worse. The judiciary holds a crucial responsibility. Their separation from the public ensures the freedom to make unpopular but necessary decisions such as *Brown v. Board of Education*.

But it seems rather odd for a country that claims to be a democratic republic to place this responsibility in the hands of nine unelected officials who serve for life. Monumental decisions such as these should not be left up to nine people regardless of their term length. In many cases, the Supreme Court has returned 5-4 decisions, meaning that it was effectively one single person who decided the outcome. And while this has the potential to happen on a Supreme Court of any size, the fact that the Court's current size is only nine justices amplifies the decision of that one judge. There is really no special reason that the Supreme Court should be composed of nine justices. In fact, the Supreme Court has had nine justices only since 1869 when a new Judiciary Act was passed.<sup>61</sup> The Supreme Court originally had six justices after the passage of the 1789 Judiciary Act<sup>62</sup> and as many as ten under the Tenth Circuit Act of 1863.<sup>63</sup> If we were to increase this number, it would lessen the impact of any one justice

Notably, Article III of the United States Constitution does not at all specify lifetime tenure. In fact, there is reason to believe that the Founders would not have wanted or expected lifetime tenure for Supreme Court Justices. Some believe that the Founders did not hold the view

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<sup>61</sup> Judiciary Act of 1869 Section 1.

<sup>62</sup> 1 Stat. 73.

<sup>63</sup> 12 Stat. 794.

that any form of governmental service should be a lifetime job.<sup>64</sup> Lifetime tenure simply does not cohere with any of the other branches of government, all of which are dependent on regular elections to remain in power. I am not saying that Supreme Court Justices should be subject to elections. In fact, I think the system in place, in which nominees to the Court are selected by the president and confirmed by the Senate, is a good one. In fact, this nomination process needs to happen more often to ensure that the Justices of the Supreme Court reflect the views of the President and the Senators, and by extension, the people who elect them. Term limits would ensure that this crucial nomination process happens more frequently.

Additionally, I believe that each elected United States president should get the chance to choose at least one nominee to the Supreme Court. The current system relies on the luck of the draw. Some presidents, such as Ronald Reagan and Donald Trump have been able to appoint multiple Supreme Court Justices, while others such as Jimmy Carter were not able to appoint any.<sup>65</sup> If staggered correctly, the terms of each Justice could be made to coincide such that each president will receive a set number of nominations per term (plus any additional nominations that may come from either retirement or death).

But the president should also be somewhat constrained in choosing his or her nominees. Looking at the current makeup of the Supreme Court, four justices have previously served on the District of Columbia Circuit Court of Appeals: Chief Justice John Roberts,<sup>66</sup> Clarence Thomas,<sup>67</sup> Ruth Bader Ginsburg,<sup>68</sup> and Brett Kavanaugh.<sup>69</sup> And all of the current Justices have attended Ivy League law schools.<sup>70</sup> This makeup does not effectively represent the United States as a whole,

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<sup>64</sup> Cramton, 1315.

<sup>65</sup> "Supreme Court Nominations: Present-1789." U.S. Senate: Supreme Court Nominations: Present-1789. October 06, 2018.

<sup>66</sup> "John G. Roberts, Jr." Oyez.

<sup>67</sup> "Clarence Thomas." Oyez.

<sup>68</sup> "Ruth Bader Ginsburg." Oyez.

<sup>69</sup> "Brett M. Kavanaugh." Oyez.

<sup>70</sup> Strauss, Valerie. "The 'cloistered' Harvard-Yale Law Monopoly on the Supreme Court." The Washington Post. July 10, 2018.

and I believe that it should. A Supreme Court made up of a variety of individuals from different walks of life will enhance the judiciary process. Because the Court rules on such important matters, I think it is essential that the makeup be geographically diverse in order to represent a wide variety of different viewpoints. A judge born and raised in Huntsville, Alabama who attended the University of Alabama Law School will probably have had a very different set of life experiences than one from Boston, Massachusetts, who attended Harvard Law School, for example. This mandated geographic diversity would also help to combat the Court's perceived elitism, which experts say is problematic.<sup>71</sup>

In the next section, I propose a plan to address all of these problems. Its implementation would be slightly complicated, but also well worth it.

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<sup>71</sup> Wan, William. "Every Current Supreme Court Justice Attended Harvard or Yale. That's a Problem, Say Decision-making Experts." The Washington Post. July 11, 2018.

## **V – The Plan**

I propose a plan to reform the structure of the Supreme Court which I will call the Supreme Court Enhancement Plan (SCEP). Under this plan, the Supreme Court would consist of twenty-four Justices each chosen from among the ranks of current Circuit Court of Appeals judges; two from each of the eleven federal Court of appeals circuits plus two from the D.C. circuit.<sup>72</sup> Each Justice shall serve one and only one twelve-year term, after which that justice shall return to the circuit from which they were selected. The terms shall be staggered such that one Justice shall be appointed every two years (in even-numbered years) in order from the First Circuit to the DC Circuit. This will ensure that every presidential term carries with it two opportunities to appoint Justices. If a Justice retires or dies before his or her term ends, then the president will be permitted to appoint a replacement from the same Appeals Court to serve out the remainder of the term. In the event that the Justices tie in voting, there would be two tiebreaker rounds. In the first round, all of the sitting justices would vote again, and if there is a second tie, then the law or decision in question shall be upheld as it is under current Supreme Court guidelines when a tie is reached.<sup>73</sup>

This raises two potential issues for presidential nominees to the Supreme Court. (1) It would give two-term presidents more power than single-term presidents. (2) It may also give certain presidents the opportunity to appoint justices with an established track record of decisions relevant to those made on the Supreme Court. The DC circuit, for example, typically handles matters of more complexity and consequence than say, the 6<sup>th</sup> circuit, and as a result, judges from

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<sup>72</sup> For a list of which Circuits represent which states, see "About U.S. Federal Courts." Federal Bar Association. 2018 at [http://www.fedbar.org/Public-Messaging/About-US-Federal-Courts\\_1.aspx](http://www.fedbar.org/Public-Messaging/About-US-Federal-Courts_1.aspx).

<sup>73</sup> LoGiurato, Brett. "A Huge Upcoming Supreme Court Case Could Lead to an Incredibly Rare Phenomenon." Business Insider. June 29, 2015.

the DC circuit may be more experienced with some of the matters that they will deal with on the Supreme Court.<sup>74</sup>

The first issue would be no more a concern under the Supreme Court Enhancement Plan than it is now. Certain presidents *already* have more power than others in appointing Justices to the Court. President Ronald Reagan was able to appoint four justices to the Court: Sandra Day O'Connor, William H Rehnquist (who was moved from associate justice to Chief Justice), Antonin Scalia, and Anthony M. Kennedy<sup>75</sup> while President Jimmy Carter wasn't able to appoint any justices at all.<sup>76</sup> And four justices is equivalent to 44% of the Court at present, which seems far too high given that the appointments are for life. It should not be that a President has this degree of influence on the country's future merely because he or she was in the right place at the right time. My plan would make this selection process more equitable. If my plan had been in place during both the Carter and Reagan administrations, then Jimmy Carter would have been able to appoint two justices and Reagan still would have been able to appoint four. The difference is that, under this plan, those four justices would represent only 17% of the Court – a far more reasonable number.

The second issue is actually not an issue at all. Once on the Court, all of the Justices would have the same power as any other, and would handle similar matters. It may be true that Justices who have dealt with matters related to the federal government may have more experience with their roles on the Supreme Court, but this experience provides no leg up unless they are able to convince other Justices to side with them. And given that all the other Justices

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<sup>74</sup> Roberts, John G., Jr. "What Makes the DC Circuit Different? A Historical View." *Virginia Law Review* 92, no. 3 (May 2006): 377.

<sup>75</sup> President Reagan also nominated Judge Robert Bork, who was not confirmed.

<sup>76</sup> "Supreme Court Nominations: Present-1789." U.S. Senate: Supreme Court Nominations: Present-1789. October 06, 2018.

will have this same power, the difference between those Justices who have served on the DC Circuit Court of Appeals and all other Justices would be negligible.

Under the SCEP, any nominees picked by the president will be currently sitting Appeals Court judges. This would be an improvement over the current rules, under which, people can be appointed to the Supreme Court without ever having been a judge on any court at all. In some cases, senators, law professors, and even one former president<sup>77</sup> have been appointed to the Supreme Court without ever having previously served as judges. Nowhere in the text of the Constitution or that of the most recent judicial act of 1869 does it say that justices are even required to have law degrees. And while this is certainly due to the fact that the existing network of law schools was not in place until more recent history, it would now make sense to formalize the requirement that all Supreme Court Justices should have previously served as judges on Appeals Courts. Just as the CEO of an oil drilling company should have some experience in the oil business, a Supreme Court Justice should have some experience judging cases. And while most Justices appointed today do fit this criteria, the SCEP would make it obligatory rather than merely a matter of convention, ensuring that what has been done in practice for a long time will be legally binding.

Twenty-four is obviously an even number. One of the perceived benefits of having an odd number of Justices is in the ability to break ties. Under the current Court, if four justices vote one way and the other four vote the opposite way, then the ninth justice is able to decide one way or the other between them. This would be less likely under the Supreme Court Enhancement Plan. Under the SCEP, a tie would result in a revote of the decision in question. This would give the Justices time to discuss the matter and to change their votes. A second tie would result in the law or decision in question being upheld, just as a tie does now.<sup>78</sup> This is the proper method

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<sup>77</sup> Former President William Howard Taft was appointed to the Supreme Court in 1921.

<sup>78</sup> LoGiurato, Brett. "A Huge Upcoming Supreme Court Case Could Lead to an Incredibly Rare Phenomenon."



because, in the event of a tie, it would take the decision out of the hands of the Supreme Court and into those of an elected official in most cases. If an issue is truly so divisive that the Supreme Court is tied, then a precedent should not be set, and the lower court ruling, whatever it is, should stand until more of a consensus can be built. This also gives the Court an incentive not to reach a tie. And since there would be twenty four rather than nine justices, ties would most likely be less common anyway.

Under a system of twenty-four Justices, a president's choice of judges that he or she could nominate to the Supreme Court would be limited. Rather than having the ability to pick any judge who matches their ideology, the president would be forced into choosing the judge that most closely matches their ideology within a particular judicial circuit. For example, a president cannot simply choose the most conservative or liberal judge possible and nominate them to the Supreme Court. The president would instead be forced to choose the judge that most meets their specifications within the particular vacancy on the Supreme Court that is being filled. I believe that this will probably lead to quicker and less divisive nomination processes as there will be a smaller possibility of nominating the most extreme judge possible. And even if a judicial extremist is nominated, their impact will be lessened as there will be twenty-three rather than eight other justices to balance the extremist out.

## **VI – How to Make It Work**

This plan raises an obvious question: what should be done with the current Justices of the Supreme Court? If we were to keep all of the existing justices and merely add 15 more in order to reach the 24 prescribed by the SCEP, we would still face the problem of having more than the allotted number of justices for each slot. We would have to remove two of the following: John Roberts, Clarence Thomas, Ruth Bader Ginsburg, and Brett Kavanaugh, since all four previously served on the DC Circuit Court of Appeals. But removing any combination of two of these people would create difficulties. It would be hard to justify for the sheer reason that removing any combination of the two would anger one group or another.

We would also have to remove Justice Elena Kagan entirely since she never served as a Federal Appeals Judge, and instead served as the United States Solicitor General prior to her appointment to the Court.<sup>79</sup> This would leave us with 6 justices: the two we were left with above, as well as Breyer, Alito, Sotomayor, and Gorsuch. But we must keep in mind the proposed twelve-year term limit, which would eliminate both Alito, who was appointed in 2006,<sup>80</sup> and Breyer, who was appointed in 1994.<sup>81</sup>

This means that only four justices would remain. Even still, the math would not check out. Because the Supreme Court Enhancement Plan is formulated so as to give each president two supreme court nominations per term, this means that only current justices who were appointed in even-numbered years would be allowed to remain on the court. This eliminates Sotomayor, who was appointed in 2009,<sup>82</sup> and Gorsuch, who was appointed in 2017<sup>83</sup>. It would also eliminate three from the list of the four DC Circuit Judges: Roberts (appointed 2005),<sup>84</sup>

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<sup>79</sup> Elena Kagan, Oyez.

<sup>80</sup> Samuel A. Alito Jr., Oyez.

<sup>81</sup> Stephen G. Breyer, Oyez.

<sup>82</sup> Sonia Sotomayor, Oyez.

<sup>83</sup> Neil Gorsuch, Oyez.

<sup>84</sup> John G. Roberts, Jr., Oyez.

Thomas (appointed 1991),<sup>85</sup> and Ginsburg (appointed 1993).<sup>86</sup> So if we were to implement the Supreme Court Enhancement Plan today and apply it to the Supreme Court going forward, only Brett Kavanaugh would be allowed to remain on the Court. This obviously does not make any sense at all.

The best option on how to proceed with the Supreme Court Enhancement Plan given that we already have a Supreme Court with nine members would be to keep the current sitting justices but to slowly phase them out. Even though most of them violate at least one tenet of the SCEP, removing them would be unfair and would create a host of new problems. After the passage of the SCEP, and after eight new justices have been appointed (meaning after 16 years) the current nine justices would have the choice to either retire or to be returned down to the circuit from which he or she came similar to what would happen when Justices finish their twelve-year terms under the Supreme Court Enhancement Plan. This would give each of the current sitting Justices a term of at least twelve years. And since it is fairly likely that at least one currently sitting justice will retire or die within the next sixteen years, they should not be replaced. The President and the Senate should instead conform to the Supreme Court Enhancement Plan and appoint and confirm a new Justice every two years.

The plan to return the current justices to the circuits from whence they came is not as radical as might sound. At present, each current supreme Court justice is assigned to one or more circuits for various administrative duties.<sup>87</sup> And in the past, the Supreme Court Justices would all “ride circuit.” This was a practice early on in the history of the judiciary when justices of the Supreme Court would be required to travel to circuit courts to preside over them.<sup>88</sup> The

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<sup>85</sup> Clarence Thomas, Oyez.

<sup>86</sup> Ruth Bader Ginsburg, Oyez.

<sup>87</sup> "Circuit Assignments." Supreme Court of the United States.

<sup>88</sup> See Stras, David R. "Why Supreme Court Justices Should Ride Circuit Again," 1714-1715.

constitutionality of a plan involving circuit riding after the end of service on the Supreme Court is endorsed by the late Roger C. Cramton.<sup>89</sup>

The Supreme Court Enhancement Plan would most likely require a constitutional amendment to Article III since it would alter the “good behaviour” clause to specify that Justices serve a term of twelve years. A constitutional amendment can be proposed in one of two ways: (1) two-thirds of both houses of Congress can propose the amendment or (2) two-thirds of state legislatures can do so.<sup>90</sup> Once the amendment has been proposed, there are one of two ways to ratify it: (1) the amendment is ratified by three-quarters of the state legislatures or (2) the amendment is ratified by constitutional convention with three-quarters of states voting to ratify.<sup>91</sup> This is a very high bar, but there may be a way to implement this reform without having to rely on a constitutional amendment. Because all of the newly minted Supreme Court Justices under the Supreme Court Enhancement Plan would already have served as Judges on a Federal Circuit Court of Appeals, the good behaviour clause might be unaffected. The Judges will still hold their offices during good behaviour, as they will still remain federal judges after their Supreme Court term is over. The difference is that a Supreme Court position would not be permanent. So a judge who finishes their twelve-year term on the Supreme Court will still hold their office so long as they are not impeached.

Alternatively, imagine that the Constitutional Amendment prevents the Supreme Court Enhancement Plan from being implemented. Under Article III, we know that “the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>92</sup> So Congress could potentially create a new court that, while still subordinate to the existing Supreme Court, would hear appeals from

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<sup>89</sup> Cramton, 1326

<sup>90</sup> U.S. Const. Article V.

<sup>91</sup> Ibid.

<sup>92</sup> Art. III Section 1.

all Courts below it. Let's call it the Supreme Court of Appeals. Article III also states, "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."<sup>93</sup> So long as the current Supreme Court retains original jurisdiction over that narrow band of cases specified by Article III, the newly created Supreme Court of Appeals could hear all other cases, and could, in effect, supplant the Supreme Court without necessitating any modifications to the text of Article III whatsoever.

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<sup>93</sup> Art. III Section 2

## **VII – Comparison to Other Countries**

This plan may be a departure from the current structure of America’s Supreme Court, but when we look to other countries’ Supreme Courts, the Supreme Court Enhancement Plan does not look so radical.

The highest German court, the Federal Court of Justice, is composed of two so-called “senates” consisting of eight members each.<sup>94</sup> One senate is elected by the Bundestag, the lower of house of German congress, while the other senate is elected by the Bundesrat, the upper house.<sup>95</sup> Similar to the SCEP’s provision concerning prior judicial service, at least three members of each senate must be elected from lower courts.<sup>96</sup> And also similar to the SCEP, these judicial officers have term limits – the minimum age for appointment is forty and the age of mandatory retirement is sixty-eight,<sup>97</sup> bringing the maximum possible term to twenty-eight years.

The Supreme Court of Ireland has a structure quite similar to that of the current Supreme Court of the United States. It is composed of twelve members total: one chief justice, nine associate justices, as well as the heads of the Court of Appeal and the High Court – two of the lower Irish courts.<sup>98</sup> But unlike the current United States Supreme court, the judges are term limited, and can serve only until they reach the age of seventy.<sup>99</sup> Additionally, the chief justice has a maximum term length of seven years.<sup>100</sup>

The Supreme Court of India is quite similar to the one I have proposed for the United States with the SCEP. India’s Supreme Court consists of a single chief justice as well as a maximum of thirty other justices.<sup>101</sup> These justices are permitted to serve until they reach the age

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<sup>94</sup> "Structure." Bundesverfassungsgericht.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> "Composition of the Court." Supreme Court of Ireland.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Indian Constitution. Section 124.

of sixty-eight, much like Germany's Court.<sup>102</sup> The nomination criteria for these justices requires that any potential judge will have served on a lower court for at least five years, that the judge will have been an advocate for that lower court for at least ten, or that the judge is distinguished according to the president.<sup>103</sup>

All three of these example countries have Supreme Courts with more than nine justices. Some have an even number, and all have some form of term limits for their justices. It is clear to see, then, that implementing the SCEP would be new for America, but it would not be some bold experiment. When we look at these countries, we see that the Supreme Court of the United States, with its lifetime appointments, is in fact the exception rather than the rule.

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<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

## **VIII – Concluding Remarks**

The Supreme Court of the United States is the most powerful body in the American government. Using the power of judicial review, it can overrule both of the legislative and executive branches, both of which have little choice but to comply or risk losing legitimacy. Judicial review has been used to make wide variety of decisions ranging from good to terrible depending on the makeup of the Court. But the power of judicial review is too great to vest in nine judges who serve for life. A reform to the structure of the Supreme Court could alleviate many of the ongoing issues surrounding the Court. The one that I have proposed has a lot of moving parts, to be sure. But if implemented, I believe that it would go a long way toward ensuring a Supreme Court that more accurately reflects public opinion while at the same time ensuring a necessary degree of insulation.



## **Glossary**

### Appeal:

the process of requesting review from a higher court of a decision from a lower court

### Appellate jurisdiction:

A court is said to have appellate jurisdiction when it has jurisdiction to review the decisions of a lower court

### Commission:

A formal written warrant granting the power to perform specific duties. In the context of *Marbury v. Madison*, the judges in question could not perform their duties of office until they received their commissions.

### Discretionary jurisdiction:

A court has discretionary jurisdiction when it can choose whether or not to hear a particular case. It can coexist with either original or appellate jurisdiction as it does with both in the United States Supreme Court. The Supreme Court was originally required to hear every case appealed to it, but this was changed by Congress in 1925.<sup>104</sup>

### Judicial review:

The process by which the Supreme Court can declare a governmental action illegal if that action conflicts with the Constitution of the United States.

### Original jurisdiction:

a court has original jurisdiction if it is the first court to hear the case in question

### Per curiam:

A per curiam opinion is one that is issued by the Supreme Court collectively rather than by any of its individual members.

### Seriatim:

A seriatim opinion was used early in the Supreme Court's history. In cases that did not have a majority opinion, seriatim opinions would be issued by each of the Court's members.

### Writ of certiorari:

A writ of certiorari is granted when the Supreme Court agrees to hear a particular case. It is an order for a lower court to deliver its case record to a higher court for review.

### Writ of mandamus:

A rarely issued command for a governmental body to perform a specific action.

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<sup>104</sup> Cramton, 1317

## Bibliography

- "About U.S. Federal Courts." Federal Bar Association. 2018. Accessed April 08, 2019. [http://www.fedbar.org/Public-Messaging/About-US-Federal-Courts\\_1.aspx](http://www.fedbar.org/Public-Messaging/About-US-Federal-Courts_1.aspx).
- The Associated Press. "Ziegler, Baker, Others on 'Third-Rate Burglary Attempt'." AP NEWS. April 23, 1994. Accessed April 08, 2019. <https://www.apnews.com/5669edd4488063c863dd5ba72bb29746>.
- Balkin, Jack. "Bush v. Gore and the Boundary Between Law and Politics." *The Yale Law Journal* 110, no. 8 (June 2001): 1407-458.
- "Brett M. Kavanaugh." Oyez. Accessed April 08, 2019. [https://www.oyez.org/justices/brett\\_m\\_kavanaugh](https://www.oyez.org/justices/brett_m_kavanaugh).
- Brown, Emma. "California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks out about Her Allegation of Sexual Assault." The Washington Post. September 16, 2018.
- "Circuit Assignments." Supreme Court of the United States. Accessed April 08, 2019. <https://www.supremecourt.gov/about/circuitassignments.aspx>.
- "Clarence Thomas." Oyez. Accessed April 08, 2019. [https://www.oyez.org/justices/clarence\\_thomas](https://www.oyez.org/justices/clarence_thomas).
- "Composition of the Court." Supreme Court of Ireland. Accessed April 12, 2019. <http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/pagecurrent/36C4492DCD6C52E780257315005A419C?opendocument&l=en>.
- Cramton, Roger C. "Reforming the Supreme Court." *California Law Review* 95 (Fall 2007): 1313-334. Accessed April 8, 2019.
- Davis, Julie Hirschfeld, and Mark Landler. "Trump Nominates Neil Gorsuch to the Supreme Court." The New York Times. January 31, 2017. Accessed April 08, 2019. <https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html>.
- The Editors of Encyclopaedia Britannica. "Bush v. Gore." Encyclopædia Britannica. December 05, 2018. Accessed April 08, 2019. <https://www.britannica.com/event/Bush-v-Gore>.
- "Elena Kagan." Oyez. Accessed April 08, 2019. [https://www.oyez.org/justices/elena\\_kagan](https://www.oyez.org/justices/elena_kagan).
- Elliot, Jonathan, and James Madison. "The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787. Together with the Journal of the Federal Convention, Luther Martins Letter, Yates Minutes, Congressional Opinions, Virginia and Kentucky Resolutions of 98-99, and Other Illustrations of the Constitution. 2d Ed., with Considerable Additions.' Collected and Rev. from Contemporary Publications by Jonathan Elliot. Pub. under the Sanction of Congress. Philadelphia, J.B. Lippincott & Co. Charlottesville, VA: Michie, 1941.

"Federal Judicial Center." History of the Federal Judiciary | Federal Judicial Center. Accessed April 08, 2019. <https://www.fjc.gov/history/legislation/landmark-legislation-judiciary-act-1789>.

Finkelman, Paul. "Scott v. Sandford: The Court's Most Dreadful Case and How It Changed History." *Chicago-Kent Law Review* 82, no. 1 (December 2006): 3-48.

"John G. Roberts, Jr." Oyez. Accessed April 08, 2019. [https://www.oyez.org/justices/john\\_g\\_roberts\\_jr](https://www.oyez.org/justices/john_g_roberts_jr).

Kesler, Charles R.. The Federalist Papers: Alexander Hamilton, James Madison, John Jay. Edited by Clinton Lawrence Rossiter. New York: Signet Classic, 2003.

Kim, Seung Min, Burgess, Elana Schor, Seung Min Kim, Burgess, and Shane Goldmacher. "Senate GOP Goes 'nuclear' on Supreme Court Filibuster." POLITICO. April 06, 2017. Accessed April 08, 2019. <https://www.politico.com/story/2017/04/senate-neil-gorsuch-nuclear-option-236937>.

Levy, Gabrielle. "Duckworth, Cortez Masto Bring Filibuster Effort on Gorsuch to 36." U.S. News & World Report. March 31, 2017. Accessed April 08, 2019. <https://www.usnews.com/news/politics/articles/2017-03-31/democratic-senators-supreme-court-nominee-neil-gorsuch-refused-to-meet-with-us>.

Liptak, Adam. "Antonin Scalia, Justice on the Supreme Court, Dies at 79." The New York Times. February 13, 2016.

LoGiurato, Brett. "A Huge Upcoming Supreme Court Case Could Lead to an Incredibly Rare Phenomenon." Business Insider. June 29, 2015. Accessed April 08, 2019. <https://www.businessinsider.com/what-happens-if-theres-a-4-4-tie-at-supreme-court-2015-6>.

"The Most Consequential Elections in History: Thomas Jefferson and the Election of 1800." U.S. News & World Report. Accessed April 08, 2019. <https://www.usnews.com/news/articles/2008/08/13/the-most-consequential-elections-in-history-thomas-jefferson-and-the-election-of-1800>.

"Neil Gorsuch." Oyez. Accessed April 08, 2019. [https://www.oyez.org/justices/neil\\_gorsuch](https://www.oyez.org/justices/neil_gorsuch).

Reilly, Katie, and Maya Rhodan. "Merrick Garland Nominated for Supreme Court Justice." Time. March 16, 2016. Accessed April 08, 2019.

Raines, Howell. "George Wallace, Segregation Symbol, Dies at 79." The New York Times. September 14, 1998. Accessed April 08, 2019. <https://www.nytimes.com/1998/09/14/us/george-wallace-segregation-symbol-dies-at-79.html>.

Roberts, John G., Jr. "What Makes the DC Circuit Different? A Historical View." *Virginia Law Review* 92, no. 3 (May 2006): 375-89.

Rosen, Jeffrey. "Disgrace." *The New Republic*. December 24, 2000. Accessed April 08, 2019. <https://newrepublic.com/article/70674/disgrace>.

"Ruth Bader Ginsburg." Oyez. Accessed April 08, 2019. [https://www.oyez.org/justices/ruth\\_bader\\_ginsburg](https://www.oyez.org/justices/ruth_bader_ginsburg)

"Samuel A. Alito, Jr." Oyez. Accessed April 08, 2019. [https://www.oyez.org/justices/samuel\\_a\\_alito\\_jr](https://www.oyez.org/justices/samuel_a_alito_jr).

Sinnott-Armstrong, Walter. "Recusal and Bush v. Gore." *Law and Philosophy* 21, no. 2 (2002): 221-48. doi:10.2307/3505131.

"Sonia Sotomayor." Oyez. Accessed April 08, 2019. [https://www.oyez.org/justices/sonia\\_sotomayor](https://www.oyez.org/justices/sonia_sotomayor).

"Stephen G. Breyer." Accessed April 08, 2019. [https://www.oyez.org/justices/stephen\\_g\\_breyer](https://www.oyez.org/justices/stephen_g_breyer).

Stras, David R. "Why Supreme Court Justices Should Ride Circuit Again." *Minnesota Law Review* 91 (June 15, 2007): 1710-751.

Strauss, Valerie. "The 'cloistered' Harvard-Yale Law Monopoly on the Supreme Court." *The Washington Post*. July 10, 2018. Accessed April 08, 2019. [https://www.washingtonpost.com/news/answer-sheet/wp/2018/07/10/the-cloistered-harvard-yale-law-monopoly-on-the-supreme-court/?utm\\_term=.75eb166d8c68](https://www.washingtonpost.com/news/answer-sheet/wp/2018/07/10/the-cloistered-harvard-yale-law-monopoly-on-the-supreme-court/?utm_term=.75eb166d8c68).

"Structure." Bundesverfassungsgericht. Accessed April 12, 2019. [https://www.bundesverfassungsgericht.de/EN/Das-Gericht/Organisation/organisation\\_node.html](https://www.bundesverfassungsgericht.de/EN/Das-Gericht/Organisation/organisation_node.html).

"Supreme Court Nominations: Present-1789." U.S. Senate: Supreme Court Nominations: Present-1789. October 06, 2018. Accessed April 08, 2019. <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm>.

Toobin, Jeffrey. "Precedent And Prologue." *The New Yorker*. June 19, 2017. Accessed April 08, 2019. <https://www.newyorker.com/magazine/2010/12/06/precedent-and-prologue>.

Treanor, William. "Against Textualism." *Northwestern University Law Review* 103, no. 2 (2009): 983-1006.

Urofsky, Melvin I. "Marbury v. Madison." *Encyclopædia Britannica*. February 17, 2019. Accessed April 08, 2019. <https://www.britannica.com/event/Marbury-v-Madison>.

Van Cleve, George William. *WE HAVE NOT A GOVERNMENT: The Articles of Confederation and the Road to the Constitution*. Place of Publication Not Identified: UNIV OF CHICAGO Press, 2019.

Vogue, Ariane De, and Dan Berman. "Neil Gorsuch Confirmed to the Supreme Court." *CNN*. April 07, 2017. Accessed April 08, 2019. <https://www.cnn.com/2017/04/07/politics/neil-gorsuch-senate-vote/index.html>.

Wan, William. "Every Current Supreme Court Justice Attended Harvard or Yale. That's a Problem, Say Decision-making Experts." The Washington Post. July 11, 2018. Accessed April 08, 2019. [https://www.washingtonpost.com/news/speaking-of-science/wp/2018/07/11/every-supreme-court-justice-attended-harvard-or-yale-thats-a-problem-say-decision-making-experts/?utm\\_term=.b6619d577b3b](https://www.washingtonpost.com/news/speaking-of-science/wp/2018/07/11/every-supreme-court-justice-attended-harvard-or-yale-thats-a-problem-say-decision-making-experts/?utm_term=.b6619d577b3b).

Walsh, Kenneth T. "The Most Consequential Elections in History: Thomas Jefferson and the Election of 1800." U.S. News & World Report. August 13, 2008. Accessed April 08, 2019. <https://www.usnews.com/news/articles/2008/08/13/the-most-consequential-elections-in-history-thomas-jefferson-and-the-election-of-1800>.

White, Daniel. "McConnell: Senate Will Not Act on Garland SCOTUS Nomination." Time. March 16, 2016. Accessed April 08, 2019. <http://time.com/4261973/mcconnell-senate-gop-merrick-garland-supreme-court/>.