Depoliticizing the Supreme Court: How to Rein in Those Answerable to No One?

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"[T]hey are independent of the people, of the legislature, and of every power under heaven."[1]

The framers of the Constitution of the United States envisioned a carefully balanced document that would allow for a strong yet limited national government; a government that would protect the guaranteed rights of citizens and permit a balance between order and individual rights to freedom.[2] To achieve these goals, the framers created three independent and coequal branches of government: the Executive Branch, the Legislative Branch, and the Judicial Branch.[3] But are these branches equal?

Alexander Hamilton once labeled the judiciary our government's "least dangerous" branch.[4] Hamilton described the executive branch as "hold[ing] the sword of the community" and the legislature as the branch that "commands the purse" and makes the rules that regulate "the duties and rights of every citizen."[5] But Hamilton believed that the judiciary "has no influence over either the sword or the purse" and has "neither FORCE nor WILL, but merely judgment."[6] However, judgment can be dangerous when you have the final say.[7] In truth,

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[1] Brutus, *Essay No. XV*, TEACHING AM. HIST., https://teachingamericanhistory.org/document/brutus-xv (last visited Dec. 7, 2022).

[2] *The Court and Constitutional Interpretation*, SUP. CT., https://www.supremecourt.gov/about/constitutional.aspx (last visited Dec. 7, 2022).

[3] *Id.*

[4] Alexander Hamilton, *The Federalist No. 78*, LIBR. OF CONG., https://guides.loc.gov/federalist-papers/text-71-80#s-lg-box-wrapper-25493470.

[5] *Id.*

[6] *Id.*

[7] *See generally* Casey C. Sullivan, *13 Worst Supreme Court Decisions of All Time*, FINDLAW (Oct. 14, 2015) https://www.findlaw.com/legalblogs/supreme-court/13-

Supreme Court decisions are essentially final, with the only means of change coming from a constitutional amendment or a new ruling by the Court.[8]

The vast power of the Supreme Court is exactly what the Anti-federalist writer Brutus was worried about.[9] His essays examining the nature and extent of judicial powers granted by the Constitution questioned the idea of an all-powerful Court.[10] Brutus believed the strength of the federal judiciary would diminish the importance of state courts, thereby causing discourse between the state and the federal government.[11] When speaking about Supreme Court justices in Essay No. 15, Brutus proclaimed there was "no power above them . . . no authority that can remove them," and the laws of the legislature cannot control them.[12] Although the framers of the Constitution purported judicial independence for the Supreme Court, Brutus believed those "placed in this situation will generally soon feel themselves independent of heaven itself."[13] Brutus feared an all-powerful Supreme Court, and that is what we seem to have today!

So, is it possible to curtail an all-powerful Court? That is the question President Biden hoped to answer when issuing an Executive Order forming the Presidential Commission on the Supreme Court ("Commission").[14] This bipartisan collection of experts was tasked with examining the role of the Supreme Court in our constitutional system and was responsible for analyzing arguments for and against

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worst-supreme-court-decisions-of-all-time (discussing some of the Supreme Court's worst decisions and their ramifications) (last updated Mar. 21, 2019).

[8] *Id.*

[9] *See* Brutus, *Essay No. I*, TEACHING AM. HIST., https://teachingamericanhistory.org/document/brutus-i (last visited Nov. 15, 2022).

[10] *See* Brutus, *Essays No. XI-XV*, TEACHING AM. HIST., https://teachingamericanhistory.org/document/brutus-xi (last visited Dec. 7, 2022).

[11] *See* Brutus, *Essay No. XV*, *supra* note 1.

[12] *Id.*

[13] *Id.*

[14] *Presidential Commission on the Supreme Court of the United States*, THE WHITE HOUSE https://www.whitehouse.gov/pcscotus/ (last visited Nov. 15, 2022).

court reform.[15] The Commission produced an extensive report they delivered to the President in December 2021.[16]

This Note will discuss some of the Commission's findings and other interesting suggestions to determine whether it is possible to rein in the modern-day Court. Part I will explain the inherently political nature of the Supreme Court. Part II will briefly present how the Supreme Court acquired its power. Part III will discuss several prominent proposals for Supreme Court reform. Finally, Part IV will examine whether any recommendations may depoliticize the Court.

Part I - The Supreme Court is Inherently Political

Since history has a fascinating way of repeating itself, discussing the Supreme Courts of the past is crucial. The current calls for Court reform are based on hopes that a less political Court will result in renewed public confidence. However, this is not the first time the Court has been political, nor is this the first instance where Americans have lost faith in the Court.[17] So why does public opinion matter, and what can be done?

Until recently, many Americans felt the Supreme Court operated in the people's best interest, but they also agreed that the Court "gets too mixed up in politics."[18] This is an interesting assertion since,

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[15] *Presidential Commission on the Supreme Court of the United States*, THE WHITE HOUSE https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf (last visited Nov. 15, 2022).

[16] *Id.*

[17] *Constitutional Issues – Separation of Powers*, NAT'L ARCHIVES, https://www.archives.gov/education/lessons/separation-powers (last visited Dec. 7, 2022) (explaining how the Court was regarded as an "enemy of working people."). *See also Statement by Frank E. Gannett, of Gannett Newspapers Regarding President Franklin D. Roosevelt's Attempt to Pack the Supreme Court*, DOCSTEACH, https://www.docsteach.org/documents/document/statement-by-frank-gannett (last visited Nov. 9, 2023) (showing a newspaper publisher's reaction to President Roosevelt's court-packing proposal).

[18] *Most Americans Trust the Supreme Court, But Think It Is 'Too Mixed Up in Politics,'* ANNENBERG PUB. POL'Y CTR. (Oct. 16, 2019) https://www.annenbergpublicpolicycenter.org/most-americans-trust-the-supreme-court-but-think-it-is-too-mixed-up-in-politics ("Two-thirds (68%) of those surveyed trust the Supreme Court to operate in the best interests of the American people . . . [m]ore than half of Americans (57%) agree with the statement that the court 'gets too mixed up in politics'").

according to historians, the Court used to be openly political, and it was expected.[19]

Rachel Shelden, an associate professor of history at Penn State, noted that "partisan fidelity – not legal ability – was the primary consideration in presidents' Supreme Court appointments."[20] During the nineteenth century, most nominees served in state or federal political positions instead of rising through the federal circuit court ranks.[21] John Jay, the first Chief Justice of the Supreme Court, was initially elected to the first Continental Congress in 1774 as a representative of New York.[22] Chief Justice Jay remained a close political ally and advisor to President Washington,[23] so much so that Chief Justice Jay also served as a special envoy to Great Britain, where he negotiated an immensely unpopular treaty.[24]

The political entanglements and aspirations of justices remained prominent through the mid-twentieth century. One example was Associate Justice John McLean.[25] A former member of Congress, Justice McLean was also one of the most tireless seekers of the presidency.[26] Although never nominated, Justice McClean continually aspired to be someone's pick during the next presidential election.[27] Likewise, Salmon P. Chase, while serving on the Court, sought the

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[19] *See generally* Rachel Shelden, *The Supreme Court used to be openly political. It traded partisanship for power*, WASH. POST (Sept. 25, 2020, 11:04 AM) https://www.washingtonpost.com/outlook/supreme-court-politics-history/2020/09/25/b9fefcee-fe7f-11ea-9ceb-061d646d9c67_story.html (arguing that the Supreme Court used to be openly political but less powerful).

[20] *Id.* (explaining that party loyalty was important in choosing Supreme Court justices).

[21] Sheldon, *supra* note 19.

[22] *John Jay*, HIST., https://www.history.com/topics/us-government-and-politics/john-jay (updated Mar. 22, 2022).

[23] *John Jay*, GEORGE WASHINGTON'S MOUNT VERNON, https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/john-jay (last visited Sept. 9, 2022).

[24] *John Jay's Treaty, 1794–95*, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1784-1800/jay-treaty (last visited Nov. 19, 2023).

[25] *See John McLean*, BRITANNICA, https://www.britannica.com/biography/John-McLean (last visited Sept. 9, 2023).

[26] *Id.*

[27] MICHAEL NELSON, VAULTING AMBITION: FDR'S CAMPAIGN TO PACK THE SUPREME COURT 33 (2023).

Republican presidential nomination in 1864 and then the Democratic nomination in 1868.[28] Even as late as the 1940s, Justice William O. Douglas was an advisor to President Franklin D. Roosevelt and President Lyndon B. Johnson.[29] Justice Douglas was even considered for the presidency or vice presidency while serving on the Court.[30]
The Court's insistence that it is apolitical is a relatively new concept that has increased over the last seventy-five years.[31] Now, potential justices often downplay their political ideologies to secure their place on the Court.[32] Most notably, Chief Justice John Roberts insisted justices were like umpires calling "balls and strikes," with no involvement in making the rules, only applying them.[33]

This notion of a Court working outside politics is often shattered during election season.[34] Presidential candidates have actively politicized the Court by choosing nominees to fulfill campaign promises.[35] For example, while campaigning, Joe Biden promised to

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[28] *Salmon P. Chase*, BRITANNICA, https://www.britannica.com/biography/Salmon-P-Chase (last visited Sept. 9, 2023).
[29] James L. Moses, *William O. Douglas's 'Political Ambitions' and the 1944 Vice-Presidential Nomination: A Reinterpretation*, THE HISTORIAN, vol. 62, no. 2, 2000, pp. 325–41. JSTOR, http://www.jstor.org/stable/24452092 (last visited Aug. 10, 2023).
[30] *Id.* (explaining the political ambitions of Justice William O. Douglas).
[31] *See generally* Rachel Shelden, *The Supreme Court used to be openly political. It traded partisanship for power*, WASH. POST (Sept. 25, 2020, 11:04 AM) https://www.washingtonpost.com/outlook/supreme-court-politics-history/2020/09/25/b9fefcee-fe7f-11ea-9ceb-061d646d9c67_story.html.
[32] *Id. See also* Carolyn Shapiro, *Putting Supreme Court confirmation hearings in context* (Aug. 28, 2018, 11:13 AM) https://www.scotusblog.com/2018/08/putting-supreme-court-confirmation-hearings-in-context (discussing the rate at which Supreme Court nominees refuse to answer questions).
[33] *See Chief Justice Roberts Statement – Nomination Process*, U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process (last visited Aug. 10, 2023).
[34] *See* Mark X. Barabak, *Column: The architect of Regan's pledge to put a woman on the Supreme Court says it was all political*, L.A. TIMES (Feb. 1, 2022, 5:00 AM) https://www.latimes.com/politics/story/2022-02-01/biden-reagan-supreme-court-politics.
[35] *Id. See also* Tara Subramaniam, *Fact Check: Biden is not the first president to limit SCOTUS search to specific demographics*, CNN (Feb. 1, 2022, 3:32 PM) https://www.cnn.com/2022/02/01/politics/fact-check-presidents-supreme-court-picks-demographics/index.html (discussing the campaign promises of President Biden, President Reagan, President Bush, and President Trump).

appoint the first black woman to the Supreme Court if elected president.[36] Biden was not the first presidential hopeful to use this tactic, nor was he the last.[37] Most recently, Ron DeSantis vowed to choose more conservative justices if given the chance.[38]

Politics are also intricately involved with the nomination and confirmation process.[39] Potential Supreme Court justices are nominated by the President and confirmed by the approval of the Senate.[40] Initially, a three-fifths majority, or sixty votes, were needed to confirm a nominee.[41] This changed in 2017 when Senator Mitch McConnell used his political power to reduce the threshold for Supreme Court nominees.[42] Today, only a simple majority, or fifty-one votes, are needed for confirmation.[43]

Appointments to the Court have become so coveted because the Court has amassed immense power. This notion was made glaringly apparent when Senator Mitch McConnel blocked Judge Garland from filling the Supreme Court vacancy after Justice Antonin Scalia

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[36] *See* Sahil Kapur, *Biden pledged to put a black woman on the Supreme Court. Here's what he might have to do*, NBC NEWS (May 6, 2020, 9:12 AM) https://www.nbcnews.com/politics/2020-election/problem-biden-s-pledge-black-woman-justice-n1200826.

[37] *See* Subramaniam, *supra* note 35 (noting the backlash from President Biden's campaign promise and discussing similar actions of President Reagan, President Bush, and President Trump).

[38] Gabe Gutierrez & Ali Vitali, *Ron DeSantis vows to pick more conservative judges than Trump: 'We'll do better*,' NBC NEWS (June 23, 2023, 1:04 PM) https://www.nbcnews.com/politics/2024-election/ron-desantis-vows-pick-conservative-judges-trump-rcna89849.

[39] *See* Ilya Shapiro, *The Politics of Supreme Court Confirmations and Recommendations for Reform,* CATO INST. (July 20, 2021) https://www.cato.org/testimony/perspectives-supreme-court-practitioners-views-confirmation-process (describing how politics have always been involved in the selection of judicial nominees).

[40] *The Court as an Institution*, SUP. CT. OF THE U.S. https://www.supremecourt.gov/about/institution.aspx (last visited Nov. 15, 2022).

[41] Meghan Keneally & Emily Shapiro, *Breaking down the Supreme Court nomination, confirmation process*, ABC NEWS (Sept. 26, 2020, 4:54 AM) https://abcnews.go.com/US/supreme-court-justice-makes-court/story?id=58204712.

[42] Susan Davis, *Senate Pulls 'Nuclear' Trigger To Ease Gorsuch Confirmation*, NPR (Apr. 6, 2017, 12:33 PM).

[43] *About the Court*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/faq_general.aspx (last visited Nov. 15, 2022).

died.[44] Senator McConnel defied tradition by holding the opening on the grounds that a Supreme Court seat should not be filled during a presidential election year, only to rush through the nomination of Justice Barrett four years later.[45]

The Supreme Court aims to ensure "equal justice under law" by guarding and interpreting the Constitution.[46] This becomes difficult when the public loses confidence in the Court's legitimacy.[47] A lack of faith in the Court can lead to vulnerabilities, opening the door for institutional reforms and oversight. Court reform is precisely what the Presidential Commission was tasked with investigating.[48] The rule of law becomes fragile when the public does not trust those empowered to make decisions.[49] So, how did the Court become so powerful?

Part II - The Power of the Supreme Court

To understand the current Court, a brief discussion is required to explain how the Supreme Court obtained its vast power. Article III, Section 1 of the Constitution provides that "[t]he 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."[50] This section also provides that judges and justices "shall hold their Offices during good Behaviour, and . . . receive for their Services,

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[44] *See* Priyanka Boghani, *How McConnell's Bid to Reshape the Federal Judiciary Extends Beyond the Supreme Court*, PBS (Oct. 16, 2020) https://www.pbs.org/wgbh/frontline/article/how-mcconnell-and-the-senate-helped-trump-set-records-in-appointing-judges, Carl Hulse, *Mitch McConnell's Court Delivers*, N.Y. TIMES (June 27, 2022) https://www.nytimes.com/2022/06/27/us/politics/mitch-mcconnell-supreme-court.html.

[45] Hulse, *supra* note 44.

[46] *The Court and Constitutional Interpretation*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/constitutional.aspx (last visited Dec. 7, 2022).

[47] Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022) https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx (noting that confidence in the Supreme Court has dropped by eleven points).

[48] *See* Presidential Commission, *supra* note 15.

[49] *See Demonstrators converge outside Supreme Court after* Dobbs *decision*, SCOTUS BLOG (June 24, 2022, 6:33 PM) https://www.scotusblog.com/2022/06/demonstrators-converge-outside-supreme-court-after-dobbs-decision; *Supreme Court Rules on Abortion: Thousands Protest End of Constitutional Right to Abortion*, N.Y. TIMES (Jun. 24, 2022) https://www.nytimes.com/live/2022/06/24/us/roe-wade-abortion-supreme-court.

[50] U.S. CONST. art. III § 1.

a Compensation, which shall not be diminished."[51] Article III, Section 2 of the Constitution established original jurisdiction for the Court over certain cases.[52] The Constitution was purposely vague regarding the judiciary, leaving the organizational details of the Court up to Congress.[53]

Congress first exercised this power in The Judiciary Act of 1789, which created a six-justice Supreme Court.[54] The Act also established lower federal courts, dividing the nation into thirteen judicial districts organized into the Eastern, Middle, and Southern circuits.[55] The Act stipulated that the justices would "ride circuit," holding circuit court twice yearly in each district.[56] Additionally, the Act accorded the Supreme Court appellate jurisdiction from the circuit courts.[57] The Judiciary Act of 1789 and the subsequent versions "represented a set of choices about how the judicial power of the nation would be shaped."[58] The Act placed the Court as an overseer of the decisions originating from state court judges, beginning the Court's rise to power.[59]

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[51] *Id.* Article III, Section 2 of the Constitution established original jurisdiction for the Court over certain cases, such as lawsuits between different states and cases involving public ministers and ambassadors. Additionally, the Court was provided with appellate jurisdiction regarding cases that involve constitutional and/or federal law.

[52] U.S. CONST. art. III § 2 (establishing original jurisdiction for the Court over lawsuits between different states and cases involving public ministers and ambassadors. Additionally, the Court was provided with appellate jurisdiction regarding cases that involve constitutional and/or federal law).

[53] Richard W. Garnett & David A. Strauss, *Article III, Section One*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/article-iii/clauses/45 (last visited Dec. 7, 2022).

[54] Judiciary Act of 1789, Pub. L. No. 1-20, §13, 1 Stat. 73, 81. *See also, A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875,* THE LIBR. OF CONGRESS https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=002/llac002.db&recNum=481 (last visited Nov. 15, 2022) [hereinafter *A Century of Lawmaking*] (granting the Court the power to review certain decisions of the highest state courts).

[55] *A Century of Lawmaking*, *supra* note 54.

[56] *The Court as an Institution*, SUP. CT OF THE U.S., https://www.supremecourt.gov/about/institution.aspx (last visited Nov. 15, 2022).

[57] Judiciary Act of 1789, Pub. L. No. 1-20, §13, 1 Stat. 73, 81.

[58] *See* Presidential Commission, *supra* note 15 at p. 37.

[59] *Id.* (discussing the ramifications of the Judiciary Act of 1789).

The Judiciary Act of 1801 introduced the first revisions to the federal courts.[60] This Act expanded the Court's jurisdiction, added sixteen circuit court judgeships, and ended circuit riding.[61] Ultimately, the Act was repealed the following year.[62] Amid criticism, the Judiciary Act of 1802 was passed, retaining the expansion of the circuits from three to six and reinstating circuit riding for the justices.[63]
In 1803, the Court issued one of the most critical decisions regarding the Constitution in *Marbury v Madison*.[64] In this case, the Court refused to issue a writ of mandamus to Marbury because it lacked the authority under the Constitution.[65]

Although the Court was given the authority to issue the writ under the Judiciary Act of 1789, the Court held the Act "appears not to be warranted by the constitution" and questioned "whether an act, repugnant to the constitution, can become the law of the land."[66] So, even though a unanimous Court held that Marbury's commission was wrongfully withheld,[67] the jurisdiction provided in the Judiciary Act of 1789 conflicted with Article III of the Constitution.[68] Chief Justice Marshall then established the principle of judicial review holding:

> So if a law be opposition to the constitution, if both the law and the constitution apply to a particular case, so that the court must either decide that case comfortably to the law, disregarding the constitution; or comfortably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[69]

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[60] An Act to Provide for the More Convenient Organization of the Courts of the United States, 2 Stat 89 (1801) (Judiciary Act of 1801) (repealed by Judiciary Act of 1802, 2 Stat 132 (1802)).
[61] *Id. See also Judiciary Act of 1801*, U.S. Capitol Visitor Ctr., https://www.visitthecapitol.gov/artifact/judiciary-act-1801 (last visited Nov. 15, 2022).
[62] Judiciary Act of 1801, *supra* note 60 (repealed by Judiciary Act of 1802, 2 Stat 132 (1802)).
[63] *Judiciary Act of 1801*, BRITANNICA, https://www.britannica.com/topic/Judiciary-Act-of-1801 (last visited Nov. 15, 2022).
[64] Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60 (1803)
[65] *Id.* at 176.
[66] *Id. See also* Judiciary Act of 1789, Pub. L. No. 1-20, §13, 1 Stat. 73, 81.
[67] Marbury, 5 U.S. (1 Cranch) at 168.
[68] *Id.* at 174-76.
[69] *Id.* at 178.

The *Marbury* decision has been lauded as an essential tool for the government's checks and balances system, but it was much more.[70] Through *Marbury*, Chief Justice Marshall seized enormous power for the Court as an interpreter of the Constitution. The decision established an enduring precedent enabling the Court to invalidate federal and state laws violating the Constitution.[71] Although the Federalist and Antifederalist papers acknowledged judicial review, Brutus was weary of this inevitable supremacy.[72]

The Supreme Court continued to grow throughout the next few decades with the authorization of the Seventh Circuit in 1807 and the addition of the Eighth and Ninth Circuits under the Act of 1837.[73] This Act also increased the number of Supreme Court justices to nine for the first time.[74]

Twenty years later, the Supreme Court used its power of judicial review to decide *Dred Scott v. Sandford*.[75] Dred Scott was born into slavery around 1800.[76] After his original owner died, Scott was purchased by an army surgeon, Dr. John Emerson, who eventually brought Scott to the free state of Illinois.[77] As an army surgeon, Dr. Emerson traveled and resided at several military posts in the free state of Illinois and the Wisconsin Territory, where the Missouri Compromise had outlawed slavery.[78]

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[70] *See* Marbury v. Madison (1803), NAT'L ARCHIVES https://www.archives.gov/milestone-documents/marbury-v-madison (last visited Apr. 16, 2023).
[71] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).
[72] Brutus *supra* note 11.
[73] Eighth and Ninth Circuits Act of 1837, ch. 34, § 1, 5 Stat. 176, 176-77.
[74] *United States court reorganization legislation*, BALLOTPEDIA, https://ballotpedia.org/United_States_court_reorganization_legislation (last visited Nov. 16, 2022).
[75] 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.
[76] *Dred Scott's fight for freedom*, PBS, https://www.pbs.org/wgbh/aia/part4/4p2932.html (last visited Dec. 7, 2022) [hereinafter *Fight for freedom*].
[77] *Id.* (describing Dred Scott's life).
[78] *See Missouri State Archives: Missouri's Dred Scott Case*, 1846-1857, MO. DIGIT. HERITAGE, https://www.sos.mo.gov/archives/resources/africanamerican/scott/scott.asp (last visited Dec. 7, 2022); *see also Missouri Compromise*, HIST., https://www.history.com/topics/slavery/missouri-compromise (last visited

Missouri was the first territory west of the Mississippi River to petition Congress for statehood.[79] This caused a contentious debate because the twenty-two states were equally divided between slave and free states at the time.[80] To keep the balance, the Missouri Compromise admitted Maine as a free state and Missouri as a slave state.[81] This compromise also outlawed slavery in the rest of the northwest territories above the 36th parallel, which included Wisconsin and Illinois.[82]

Dred Scott could have petitioned for his freedom in Illinois or Wisconsin, but it was not until April 1846 that Scott finally filed a lawsuit in St. Louis.[83] Scott went to trial in 1847 but lost on a technicality.[84] A retrial was granted, and in 1850, Scott won his freedom.[85] The decision was appealed, and the Missouri Supreme Court reversed the decision, making Scott and his family enslaved once again.[86] In 1853, Scott filed a federal lawsuit with the United States Circuit Court for the District of Missouri.[87] The Court ruled against Scott again, prompting an appeal to the Supreme Court.[88]

In one of the Supreme Court's most controversial decisions, Justice Taney held that Scott did not have standing to sue because he

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Dec. 7, 2022) (explaining the Missouri Compromise and its relation to tensions over slavery).

[79] Andrew Glass, *Missouri enters the Union, Aug. 10, 1821*, POLITICO (Aug. 9, 2016, 11:57 PM) https://www.politico.com/story/2016/08/missouri-enters-the-union-aug-10-1821-226775.

[80] *Missouri Compromise Ushers in New Era for the Senate*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Missouri_Compromise.htm (last visited Dec. 7, 2022).

[81] *Id. See also* Missouri Compromise Act of 1820, ch. 22, 3 Stat. 545.

[82] *The Missouri Compromise*, NAT'L GEOGRAPHIC, https://education.nationalgeographic.org/resource/missouri-compromise (last visited Dec. 7, 2022); *see also The Missouri Compromise*, AM. BATTLEFIELD TR., https://www.battlefields.org/learn/articles/missouri-compromise (last visited Dec. 7, 2022) (noting that slavery was prohibited in the northwest territories now known as Ohio, Indiana, Michigan, Illinois, Wisconsin, and parts of Minnesota).

[83] *Dred Scott Case*, HIST. (Oct. 27, 2009) https://www.history.com/topics/black-history/dred-scott-case (updated Apr. 25, 2023).

[84] Laura Temme, Dred Scott v. Sandford: *History, Decision, and Impact*, FIND LAW, https://supreme.findlaw.com/supreme-court-insights/dred-scott-v--sandford--history--decision--and-impact.html (last visited Dec. 7, 2022).

[85] *Id*.

[86] *Dred Scott Case*, *supra* note 83.

[87] *Id.*

[88] *Fight for freedom*, *supra* note 76.

was not a citizen "within the meaning of the Constitution."[89] The Court insisted the Fifth Amendment protected slave owner rights because slaves were deemed to be property.[90] Additionally, the Missouri Compromise, passed to "balance the power between slave and non-slave states,"[91] was deemed unconstitutional by the Court.[92]

The enormous power of the Supreme Court was evident after the *Dred Scott* case. In one ruling, the Court declared that slaves were not entitled to protection under the Constitution and that Congress did not have the authority to ban slavery from a federal territory.[93] Although the Court's pro-slavery decision was not a surprise, many people were outraged, including Abraham Lincoln.[94] Newspapers from the northern states published editorials denouncing the Court's decision as "wicked, detestable, and cowardly."[95] The Court's decision "gave momentum to the anti-slavery movement and served as a stepping stone to the Civil War."[96]

In consideration of criticism and recommendations by President Lincoln, Congress enacted reforms in 1862 and 1863 to overhaul the federal courts and limit Southern influence.[97] In President Lincoln's inaugural address of 1861, he stated that if government policy is to be "irrevocably fixed by decisions of the Supreme Court," then "people will have ceased to be their own rulers, having to that extent

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[89] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 406 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV.
[90] *Id.* at 450.
[91] *Dred Scott Case*, *supra* note 83.
[92] Dred Scott, 60 U.S. at 455.
[93] Dred Scott v. Sanford (1857), NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/dred-scott-v-sandford?_ga=2.257131851.198176284.1699455526-1622137132.1699455526 (last visited Dec. 7, 2022).
[94] *See Dred Scott Case*, *supra* note 83; *see also Dred Scott decision still resonates today*, NAT'L CONST. CTR. (Mar. 6, 2021) https://constitutioncenter.org/blog/dred-scott-decision-still-resonates-today-2.
[95] *See Missouri State Archives supra* note 78.
[96] *Id.*
[97] Calvin Schermerhorn, *Packing the Court: Amid national crises, Lincoln and his Republicans remade the Supreme Court to fit their agenda*, THE CONVERSATION (Oct. 12, 2020, 11:23 AM) https://theconversation.com/packing-the-court-amid-national-crises-lincoln-and-his-republicans-remade-the-supreme-court-to-fit-their-agenda-147139.

practically resigned their government into the hands of that eminent tribunal."[98] Shortly after, the Judiciary Act of 1862 was passed, reducing the number of "federal circuits in the South from five to three while expanding circuits in the North from four to six."[99] Then, in 1863, Congress created a Tenth Circuit and added a tenth justice to the Supreme Court.[100] During this time, President Lincoln limited Southern influence by appointing new justices loyal to the North.[101] These reforms were authorized in the hopes of changing the ideological landscape of the Court.[102]

In 1865, President Lincoln's successor, Andrew Johnson, clashed with Congress and threatened to appoint justices who would favor the South.[103] In light of President Johnson's threats, Congress reorganized the federal circuits again in 1866 by reducing the number of circuits back to nine and requiring a reduction of justices from ten to seven.[104] This maneuver guaranteed President Johnson would not have the opportunity to fill a vacancy.[105] The next nine years saw a significant expansion of the Court's power through the Habeas Corpus Act of 1867[106] and the Jurisdiction and Removal Act of 1875.[107] The Habeas Corpus Act granted habeas relief to prisoners held by the state violating federal law.[108] The Jurisdiction and Removal Act made it easier for plaintiffs or defendants to move cases from state to federal court and provided for federal question or "arising under" jurisdiction.[109] Arising under cases are those that require an interpretation of the Constitution for their correct decision.[110] All of these reforms also

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[98] *First Inaugural Address of Abraham Lincoln,* THE AVALON PROJECT, https://avalon.law.yale.edu/19th_century/lincoln1.asp (last visited Dec. 7, 2022).
[99] *See* Schermerhorn, *supra* note 97.
[100] *Id.*
[101] *Id.* (noting that when Lincoln became president, half of the Supreme Court justices were Southerners. With one death, one vacancy, and one resignation, President Lincoln filled the Court with three loyal Republicans.).
[102] *See* Dave Roos, *Why Do 9 Justices Serve on the Supreme Court?*, HISTORY (Sept. 23, 2020) https://www.history.com/news/supreme-court-justices-number-constitution. (stating that President Lincoln wanted to "cement an anti-slavery majority on the Court").
[103] *See* Schermerhorn, *supra* note 97.
[104] Act of July 23, 1866, ch. 210, 14 Stat. 209.
[105] Roos, *supra* note 102.
[106] Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.
[107] Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.
[108] Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.
[109] Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.
[110] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821).

caused the dockets of the federal courts to become overcrowded.[111] The federal district and circuit court's pending cases increased from 29,013 in 1873 to 54,194 in 1890.[112] This significant increase flooded the Court's caseload since there was no other exclusive appellate court, and there was an automatic right of appeal to the Supreme Court.[113] In response, Congress established the Evarts Act of 1891, which created nine courts of appeals and the framework for the contemporary federal judicial system.[114] The U.S. Court of Appeals was designed to exclusively hear appeals from trial courts.[115] Further, the Act liberated justices from riding the circuit.[116] The Act also limited the types of cases that could be appealed directly to the Supreme Court.[117] Most importantly, the Evarts Act introduced the statutory principle of Supreme Court review by writ of certiorari.[118]

In 1925, Congress passed the Judiciary Act of 1925, commonly known as the Judge's Bill, providing the Supreme Court with discretion over its caseload.[119] This Bill severely reduced the Court's mandatory review of state decisions.[120] Additionally, in federal cases, the Bill only required the Court to review cases where the court of appeals struck down a state statute[121] and a few other specific issues that came directly from the district courts.[122]

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[111] FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 86 (1928).
[112] *See* Presidential Commission, *supra* note 15.
[113] JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 174 (2012).
[114] Act of March 3, 1891, ch. 517, 26 Stat. 826.
[115] *The Evarts Act: Creating the Modern Appellate Courts*, U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/evarts-act-creating-modern-appellate-courts (last visited Dec. 14, 2022).
[116] *See* Presidential Commission, *supra* note 15.
[117] *See* Judiciary Act of 1891, Pub. L. No. 51-517, § 6, 26 Stat. 826, 828.
[118] *See* Judiciary Act of 1891, Pub. L. No. 51-517, § 6, 26 Stat. 826, 828.
[119] *See* Judiciary Act of 1925 (Judges' Bill of 1925), Pub. L. No. 68-415, 43. Stat. 936.
[120] *Id.* sec. 1, § 237, 43 Stat. at 937–38 (requiring mandatory review when a state statute was upheld against a challenge based on constitutional or federal law or when a federal statute, treaty, or authority was struck down as unconstitutional).
[121] Id. sec. 1, § 240(b), 43 Stat. at 939.
[122] Id. sec. 1, § 238, 43 Stat. at 938.

Using language nearly identical to the Evarts Act, This Act empowered the Supreme Court to "require by certiorari . . . that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."[123]
Congress further expanded the Supreme Court's discretionary power in 1988.[124] This Act virtually eliminates all of the Court's "mandatory or obligatory appeal jurisdiction."[125]

Today, the Court answers questions outlined in the party's petition for a writ of certiorari, "or fairly included therein."[126] As codified in the U.S. Code, the Supreme Court may review cases from the courts of appeals in two ways:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.[127]

As discussed, Congress and the Court were instrumental in supplying justices with substantial power. The original Court justices progressed from hearing a multitude of cases and riding the circuit twice per year to choosing their docket. As the Court's power expanded, the number of cases before the Court significantly decreased. Justices hear fewer than 150 cases yearly, and those decisions cannot be appealed.[128]

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[123] Judiciary Act of 1925 (Judges' Bill of 1925), Pub. L. No. 68-415, § 240(a), 43 Stat.
936, 938–39.
[124] *See* Act of June 27, 1988, Pub L. No. 100-352, 102 State. 662.
[125] *See* Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 81 (1988).
[126] Supreme Court Rules: Rule 14. Content of a Petition for a Writ of Certiorari, LEGAL INFO. INST., https://www.law.cornell.edu/rules/supct/rule_14 (last visited Dec. 7, 2022).
[127] 28 U.S. Code § 1254.
[128] *The Judicial Branch*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch (last visited Apr. 16, 2023).

In describing the Court, Justice Jackson once wrote, "[w]e are not final because we are infallible, but we are infallible only because we are final."[129] This is why the White House aptly refers to the Supreme Court as the "final judicial arbiter" on matters of federal law since their decisions are virtually irreversible.[130] The immense power of the Court is precisely what Brutus feared when he wrote the Court would become independent of "every power under heaven."[131] So, what can be done about the current Court?

Part III – Prominent Proposals for Supreme Court Reform

Recently, the Court has been under fire from critics who believe that depoliticization is the answer.[132] To further that agenda, calls for proposals were made in the hopes that reforms were possible.[133] Discussing the prominent recommendations is warranted to determine whether today's Court can be restrained.

Court-Packing

Some believe that court-packing merely adds more judges to the court, but that oversimplifies the idea.[134] Court-packing is defined as the "practice of packing a court . . . in an attempt to change the ideological makeup of the court."[135] Article III, section 1 of the Constitution provides that "[t]he judicial power of the United States, shall be vested in one Supreme Court," but the text does not detail the number of justices.[136] Expanding the number of justices on the Supreme

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[129] Brown v Allen, 344 U.S. 443, 540 (1953). (noting that "if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed.").
[130] The Judicial Branch, *supra* note 128.
[131] *See* Brutus, *supra* note 1.
[132] *See* Presidential Commission, *supra* note 15.
[133] *Id.*
[134] Amber Phillips, *What is court packing, and why are some Democrats seriously considering it?* WASH. POST https://www.washingtonpost.com/politics/2020/09/22/packing-supreme-court/ (Oct. 8, 2020, 12:13 AM).
[135] *Court Packing*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/court-packing (last visited Dec. 7, 2022).
[136] U.S. CONST. art. III § 1.

Court has developed some traction recently, but it is not the first time this has been attempted in history.[137]

The Judiciary Act of 1789 established that the Supreme Court "shall consist of a chief justice and five associate justices."[138] Since then, Congress changed the number of justices several times. A clever political cartoon by Herbert Block presents the following rhyme to demonstrate the changes in the number of Supreme Court justices:

> 1789: Congress decided at first to fix the number of justices at six;
> 1801: Congress planned on a change to five, but the six remained very much alive;
> 1807: Six high judges, supreme as heaven – and Jefferson added number seven;
> 1837: Seven high judges, all in a line -- two more added, and that made nine;
> 1863: Nine high judges were sitting when Lincoln made them an even ten;
> 1866: Ten high judges, very sedate; when Congress got through there were only eight;
> 1869: Eight high judges who wouldn't resign: Grant brought the figure back to nine;
> 1937: Would a justice feel like a packed sardine if the number was raised to -- say --fifteen?[139]

The "packed sardine" line refers to President Franklin D. Roosevelt's proposal to expand the Supreme Court.[140] The bill presented a plan to add "one justice to the Court for each justice over the age of 70, with a maximum of six additional justices."[141] Roosevelt was attempting to reorganize the political landscape of the Court to pass his New Deal legislation.[142] The bill was criticized, and the law never gained any

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[137] *See* Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By, 353-55 (2012).
[138] 1 Stat. 73, 1 Cong. Ch. 20, 1 Stat. 73, 1 Cong. Ch. 20.
[139] Herbert Block, *Historical figures* (photograph), LIBR. OF CONGRESS (Feb. 19, 1937) https://www.loc.gov/item/2009632460.
[140] *FDR's "Court-Packing" Plan*, FED. JUD. CTR., https://www.fjc.gov/history/timeline/fdrs-court-packing-plan.
[141] *Id.*
[142] *Id.*

traction.[143] Ultimately, the size of the Supreme Court has stayed at nine members since 1870.[144] However, in the past few years, Democrats have adamantly discussed increasing the number of justices again.[145] Sen. Elizabeth Warren said, "It's not just about expansion, it's about depoliticizing the Supreme Court."[146]

Although depoliticizing the Supreme Court may be the Democrats' goal, court packing is not a sustainable way to achieve this. Even before taking office, President Biden stated that he was "not prepared to go on and try to pack the court, because we'll live to rue that day."[147] During a 2019 interview, Justice Ruth Bader Ginsburg insisted that nine seemed to be a good number of justices.[148] Justice Ginsburg disliked President Franklin D. Roosevelt's attempt to pack the court.[149] Justice Ginsburg believed that enlarging the court when one side was in power "would make the court look partisan" and impair the idea of an "independent judiciary."[150]

Swinging the pendulum from one side to the other based on which political party currently has power will not end well for the public. As previously discussed, President Lincoln expanded the Court to ten justices to further his agenda.[151] As soon as Andrew Johnson took office, he threatened to undo Lincoln's Court.[152] This led to Congress reducing the size of the Court to prevent President Johnson's plans.[153] If each political party decides to engage in court-packing, the result would likely be a more significant lack of confidence in the Court.

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[143] *Id.*
[144] Amar, *supra* note 137.
[145] Amber, *supra* note 134.
[146] *Id.*
[147] Pat Rynard, *Joe Biden Interview: "Talk About The Future" In Dem Primary*, IOWA STARTING LINE https://iowastartingline.com/2019/07/05/joe-biden-interview-talk-about-the-future-in-dem-primary (July 5, 2019, 12:06 PM).
[148] Nina Totenberg, *Justice Ginsburg: 'I Am Very Much Alive,'* NPR https://www.npr.org/2019/07/24/744633713/justice-ginsburg-i-am-very-much-alive (July 24, 2019, 5:00 AM).
[149] *Id.*
[150] *Id.*
[151] *See* notes 97-102 and accompanying text.
[152] *See* notes 103-05 and accompanying text.
[153] *Id.*

Term Limits

Article III states, "[j]udges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour."[154] Thus, justices have been given a lifelong tenure once appointed to the Supreme Court. This is notable since "life tenure for Supreme Court Justices has been rejected by all other major democratic nations in setting up their highest constitutional courts."[155] Instead, these nations have opted for a limited tenure for their judges.[156] This makes the United States Supreme Court an outlier among other democratic countries. During the last few years, talk of term limits has become a front-runner among ways to depoliticize the Supreme Court.[157] In September 2020, the Supreme Court Term Limits Act was introduced in Congress.[158] This bill promotes capping the terms of new justices to eighteen years of "active service" and limiting the Senate's "advice and consent authority."[159] This bill does not impose the term limits on justices currently serving on the Court.[160]

Similar and updated versions of this bill have been introduced in both the House and Senate.[161] These bills also set a regular appointment of two new justices during the first and third year of each presidential term.[162] Unlike the 2020 bill, the more recent bills contain a provision requiring justices to retire from regular active service after

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[154] U.S. CONST. art. III § 1.
[155] Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L. & PUB. POL'Y 769, 819 (2006).
[156] *Id.*
[157] Kermit Roosevelt & Ruth-Helen Vassilas, *Supreme Court justices should have term limits*, CNN (Sept. 30, 2019, 5:23 PM) https://www.cnn.com/2019/09/30/opinions/supreme-court-term-limits-law-roosevelt-vassilas.
[158] *See* Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Cong. (2020).
[159] *Id.*
[160] *Id.* at §8(b).
[161] *See* Supreme Court Term Limits and Regular Appointments Act of 2021, H.R. 5140, 117th Cong. (2021); Supreme Court Tenure Establishment and Retirement Modernization Act of 2022, H.R. 8500, 117th Cong. (2021); Supreme Court Tenure Establishment and Retirement Modernization Act of 2022, S. 4706, 117th Cong. (2021); *see also* Supreme Court Term Limits and Regular Appointments Act of 2023. H.R. 4423, 118th Cong. (2023).
[162] H.R. 4423, 118th Cong. §7 (2023).

an eighteen-year term.[163] The retirement provision may technically preserve the Article III requirement that justices "shall hold their Offices during good Behaviour."[164] If so, a constitutional amendment may not be necessary to establish term limits.

Although term limits for justices seem to enjoy bipartisan support, there are downsides.[165] For instance, appointing justices every two years may cause more political unrest. The Commission stated, "Presidential candidates might have even greater incentives to make promises about whom they will appoint."[166] Justices may view these appointments as the "spoils of politics," which could change their decisions and behavior on the bench.[167] Additionally, the imposition of an eighteen-year term may cause justices to decide cases along party lines with the aim of a post-retirement political career.[168]

Professor Cynthia Nicoletti believes that Chief Justice Salmon P. Chase likely had his political career in mind while handing down decisions.[169] In *Texas v. White*,[170] Chief Justice Salmon famously wrote that the "Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States."[171] Justice Chase's opinion rejecting state secession was a shift from his decision in *United States v. Jefferson Davis*, where he explained to Davis's attorney that Davis's best defense would be to forfeit his U.S. Citizenship upon secession.[172] Nicoletti suggests that Justice Chase's shift on

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[163] H.R. 4423, 118th Cong. §8(b) (2023) (clarifying that if the Senate does not exercise its advice and consent authority regarding a President's nominee within 120 days, it would be waived under §9, and the nominee shall be seated on the Court).
[164] U.S. CONST. art. III § 1.
[165] Presidential Commission *supra* note 15 at 111.
[166] *Id.* at 118.
[167] *Id.*
[168] *See* Will Baude, *One Cheer for Supreme Court Term Limits*, VOLOKH CONSPIRACY (Oct. 26, 2020, 6:30 AM), https://reason.com/volokh/2020/10/26/one-cheer-for-supreme-court-term-limits (arguing that if justices are subjected to term limits, they may "start auditioning" for their next job).
[169] *See* Andrew Hamm, *Chief Justice Salmon Chase on the permanency of the Union, and Cynthia Nicoletti on Chase's political ambitions*, SCOTUS BLOG (Oct. 20, 2017, 3:56 PM).
[170] 74 U.S. 700 (1868).
[171] *Id.* at 725.
[172] *See* Hamm, *supra* note 167 (explaining that Justice Chase invited Davis's lawyer to a private meeting to express his views on Davis's best defense).

state sovereignty was due to his political aspirations.[173] Once Davis's attorney repeated the forfeiture of citizenship defense, Justice Chase could rule in favor of Davis without endorsing state secession.[174] During the Davis trial in 1868, Justice Chase was actively seeking the Democratic nomination for President, and he feared that convicting Davis would alienate Democratic Southerners.[175] However, a year after his failed presidential bid, Nicolleti propounds that Justice Chase was able to insert a significant ruling into *Texas v. White,* which was an inconsequential case at the time.[176]

Despite bipartisan support, the institution of term limits would face significant hurdles.[177] Forced retirement after eighteen years would likely require a Constitutional Amendment.[178] Additionally, term limits could become another form of court packing. For example, a president serving two terms would have the ability to appoint four justices. If the same political party wins the presidency several times, that party may substantially influence the Court. This could perpetuate continual political shifts in the Court, leading to more significant ideological inconsistencies and tension. Therefore, term limits are unlikely to bring about the depoliticization supporters anticipate.

Supreme Court Lottery

Another interesting proposal is to create a lottery system to depoliticize the Supreme Court.[179] This would require every federal court of appeals judge to be appointed as an Associate Justice.[180] Panels of nine justices would be randomly selected to hear cases for a term

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[173] *Id.* (noting that Justice Chase was concerned about alienating Southern supporters).
[174] *Id.* (claiming that Justice Chase's opinion was likely politically motivated).
[175] *Id.* (arguing that Justice Chase attempted to avoid deciding the Davis case).
[176] *Id.* ("Unlike the Davis trial, Texas v. White attracted little attention or publicity. Most newspapers focused on another case handed down the same day and ignored this one.")
[177] *Supra* Term Limits.
[178] Jeffrey L. Fisher, *Opinion: The Supreme Court Reform that Could Actually Win Bipartisan Support*, POLITICO (July 21, 2022, 4:30 AM).
[179] Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 181 (2019).
[180] *Id.*

of two weeks to twelve months.[181] The panels would be prohibited from containing "more than five Justices nominated by a President of a single political party."[182] Additionally, a supermajority would be required to hold a federal statute unconstitutional.[183]

Opponents of this proposal may raise constitutional objections, arguing that rotating membership in the Supreme Court would not adhere to the textual interpretation of the Constitution.[184] Since Article III "vests the judicial power in 'one supreme Court,'" a shifting Court membership "would not be 'one' Supreme Court, but several different Courts."[185] Additionally, each set of new justices may vote differently on recurring issues.[186] This could seriously undermine the stability of the law and finality of Supreme Court decisions.[187]

Conversely, proponents of the proposal would emphasize its potential benefits. First, this undertaking would help decrease the power of individual justices since they would be chosen randomly and only serve for a shorter period.[188] Second, this approach could potentially depoliticize the appointment process by making numerous, less consequential confirmations while also making federal court of appeals appointments more significant.[189] Lastly, the proposed changes may decrease the occurrences of justices pushing an ideological

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[181] *Id. See also* John O. McGinnis, *Justice Without Justices*, 16 Const. Comment. 541, 541 (1999) (proposing elimination of "the position of Supreme Court Justice" and reverting to a time where the justices "rode [the] circuit.").
[182] Epps & Sitaraman, *supra* note 179, at 181.
[183] *Id.* at 182.
[184] Lisa T. McElroy & Michael C. Dory, *Coming off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 Duke L.J. 81, 107 (2011).
[185] *Id. See also* Ross E. Davies, *A Certain Mongrel Court: Congress's Past Power and Present Potential to Reinforce the Supreme Court*, 90 Minn. L. Rev. 678, 678-87 (2006) (asserting that "one supreme Court" should be understood as "one [indivisible] supreme Court.").
[186] Amanda Frost, *Academic highlight: Epps and Sitaraman on how to save the Supreme Court*, SCOTUS BLOG (Dec. 18, 2018, 4:15 PM) https://www.scotusblog.com/2018/12/academic-highlight-epps-and-sitaraman-on-how-to-save-the-supreme-court.
[187] *Id.*
[188] Epps & Sitaraman, *supra* note 179, at 183.
[189] *Id.* at 182.

agenda.[190] With justices only serving two weeks at a time, those selecting cases would not necessarily be the same justices deciding cases, allowing less room for agenda-pushing.[191]

Whether for or against the proposal, the Supreme Court lottery would likely run afoul of Article III, requiring a constitutional amendment for implementation.

Creating a Binding Code of Ethics

The Court has dealt with many appearances of impropriety over the years.[192] Most recently, there have been calls for Justice Clarence Thomas to recuse himself from the January 6th insurrection cases where his wife was part of the narrative.[193] This has reignited a debate surrounding the need for a binding code of conduct. In response to the call for judicial reform, legislation has been introduced by members of Congress that would require the Judicial Conference "to issue a judicial code of conduct for judges and justices of U.S. courts, including Justices of the Supreme Court."[194]

Established in 1922, the Judicial Conference of the United States "serves as the policymaking body for the federal courts."[195] Composed of the Chief Justice of the United States and a select number of other federal judges, the Judicial Conference considers administrative and policy issues affecting the federal courts and provides

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[190] *Id.* at 183 (limiting the time serving as a justice would deter the selection of cases to push a specific agenda).

[191] Frost, *supra* note 186.

[192] *See* David G. Savage & Richard A. Serrano, *Scalia Was Cheney Hunt Trip Guest; Ethics Concern Grows*, L.A. TIMES (Feb. 5, 2004, 12:00 AM) https://www.latimes.com/archives/la-xpm-2004-feb-05-na-ducks5-story.html (noting ethical concerns about Justice Scalia attending a hunting trip with Vice President Dick Cheney); *see also* Opinion, *The Justices' Junkets*, WASH. POST (Feb. 20, 2011), https://www.washingtonpost.com/opinions/the-justices-junkets/2011/02/20/ABCJb7H_story.html (discussing foreign trips for liberal justices).

[193] Nina Totenberg, *Legal ethics experts agree: Justice Thomas must recuse in insurrection cases*, NPR (Mar. 30, 2022, 5:00 AM).

[194] *See* Supreme Court Ethics Act, H.R. 4766, 117th Cong. (2021) (standalone legislation)*;* For the People Act of 2021, S.1, 117th Cong. §964 (2021); *see also* Supreme Court Ethics Act, S325, 118th Cong. §964 (2023).

[195] *Governance & the Judicial Conference*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/governance-judicial-conference (last visited Oct. 16, 2022).

recommendations to Congress regarding legislation involving the judicial branch.[196]

On April 5, 1973, the Judicial Conference adopted a "Code of Judicial Conduct" for United States judges.[197] This Code "includes the ethical canons that apply to federal judges and provides guidance of their performance of official duties and engagement in a variety of outside activities."[198] The current Code of Conduct[199] requires federal judges to adhere to the following:

> Cannon 1: A judge should uphold the integrity and independence of the Judiciary;
> Cannon 2: A judge should avoid impropriety and the appearance of impropriety in all activities;
> Cannon 3: A judge should perform the duties of the office fairly, impartially and diligently;
> Cannon 4: A judge may engage in extrajudicial activities that are consistent with the obligations of judicial office;
> Cannon 5: A judge should refrain from political activity.[200]

The Supreme Court justices are the only federal judiciary members to whom this Code of Conduct does not bind.[201]

Even though a code does not bind Supreme Court justices, they must take two oaths before they begin their duties. As per Article VI, Supreme Court justices, like other federal officials, must "take an oath in support of the Constitution."[202] The wording of this oath is not outlined in the Constitution but was established by Congress during the

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[196] *Id.*
[197] JCUS-APR 73.
[198] *Code of Conduct for United States Judges*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges (last visited Oct. 16, 2022).
[199] *Id.* (effective Mar. 12, 2019).
[200] *Id.*
[201] *Id.*
[202] U.S. CONST. art. IV.

1860s.[203] An additional judicial oath was set forth by the Judiciary Act of 1789.[204] This oath was revised under the Judicial Improvements Act of 1990.[205] The combined version of the preceding oaths may be used and reads as follows:

> I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States; and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.[206]

Besides the oath, other statutes impose various ethical requirements upon Supreme Court justices.[207] For example, one statute requires justices to comply with the same financial disclosure requirements as other federal officials.[208] Another law mandates justices to disqualify themselves from any proceeding where a justice "has a personal bias or prejudice concerning a party" or "a financial interest in the subject matter in controversy."[209] Additionally, the Supreme Court has voluntarily complied with specific regulations outlined by the Judicial Conference about gifts received by judicial officers.[210]

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[203] 5 U.S.C. 3331.
[204] Judiciary Act 1789 *supra* note 54.
[205] 28 U.S.C. § 453.
[206] Oaths of Office: The Combined Oath, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/oath/oathsofoffice.aspx (last visited Sept. 23, 2022).
[207] *See* 28 U.S.C. §455 (requiring federal judges to recuse themselves from cases under certain circumstances). *See also* 5 U.S.C. App. §101 (subjecting Supreme Court justices to financial disclosure requirements).
[208] *See* 5 U.S.C. App. §101 (outlining persons required to file financial disclosures).
[209] *See* 28 U.S.C. §455 (outlining the many reasons for disqualifying a justice).
[210] *See Guide to Judiciary Policy*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/vol02c-ch06.pdf (last visited Oct. 16, 2022). *See also* 1991 *Supreme Court Internal Ethics Resolution*,

Although justices adhere to some voluntary and statutory constraints, it does not seem to be enough. Lately, a string of ethical issues have heightened calls for a binding code of ethics and additional oversight.[211] For example, Justice Thomas has been accused of accepting gifts and luxury travel without disclosing them as per federal law.[212] Justice Sonia Sotomayor has been accused of using court staff to boost book sales by nudging public institutions to buy hundreds of books she has written when they have hosted her as a speaker.[213] Justice Elena Kagan, Justice Sotomayor, and Justice Thomas have all been accused of participating in events that are technically not fundraising, but would likely be prohibited if a lower federal court judge participated.[214] The lack of binding constraints has allowed for too many appearances of impropriety.[215]

Adopting a code of conduct would require Supreme Court justices to be ethically bound, like every other state and federal judge. However, some justices believe that a formal code of conduct is unnecessary.[216] In his 2011 year-end report, Chief Justice Roberts explained that while "justices view the code as the 'starting point and a key source of guidance' for themselves, . . . the court has 'no reason to

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https://www.documentcloud.org/documents/296686-1991-supreme-court-internal-ethics-resolution.html (last visited Oct. 16, 2022).

[211] *See* Alison Durkee, *Recent Controversies Supreme Court Justices Have Been Caught Up In – As Senate Committee Votes on Ethics Bill*, FORBES (Jul. 17, 2023, 11:22 AM); *see also* Supreme Court Ethics Act, S325, 118th Cong. §964 (2023) (attempting to establish an ethics investigations counsel and a binding ethics code for justices).

[212] *See* Alison Durkee, *Clarence Thomas: Here Are All The Ethics Scandals Involving The Supreme Court Justice Amid Latest ProPublica Revelations*, FORBES (Aug. 10. 2023, 11:46 AM).

[213] *See* Brian Slodysko and Eric Tucker, *Supreme Court Justice Sotomayor's staff prodded colleges and libraries to buy her books*, ASSOCIATED PRESS (Jul 11, 2023, 5:14 AM).

[214] *See* Brian Slodysko and Eric Tucker, *Supreme Court justices and donors mingle at campus visits. These documents show the ethical dilemmas*, ASSOCIATED PRESS (Jul 11, 2023, 5:05 AM).

[215] *See generally* Durkee, *supra* note 211.

[216] *See* Robert Barnes, *Chief Justice Roberts rejects request for code of conduct,* THE WASH. POST (Feb. 21, 2012), https://www.washingtonpost.com/politics/chief-justice-roberts-rejects-request-for-code-of-conduct/2012/02/21/gIQAliawRR_story.html.

adopt the Code of Conduct as its definitive source of ethical guidance.'"[217] Additionally, during a 2020 hearing before the House of Representatives, Justice Samuel Alito and Justice Kagan emphasized that although they "follow the code" and take their ethical obligations "seriously," they do not regard themselves as "being legally bound to it."[218]

A binding code of conduct would likely strengthen the public's opinion of the Court and would avoid the appearance of impropriety. Many Americans, including most judges and attorneys, support the creation of a code of ethics for the Supreme Court.[219] Instituting a code is one effort that could receive bipartisan support.[220] Any reform that both parties agree on will have the best chance of reining in the Court.

Certiorari Reform

As defined today, certiorari is an order issued allowing a higher court to review a decision by a lower court.[221] This definition is an oversimplification of the term and procedure. A brief history lesson and additional clarifications are warranted to explain the certiorari reform proposal adequately.

As mentioned earlier, the Judiciary Act of 1789 granted the Supreme Court "appellate jurisdiction from the circuit courts of the

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[217] *Id.*

[218] *Hearings Before a Subcommittee of the Committee on Appropriations*, https://www.govinfo.gov/content/pkg/CHRG-116hhrg38124/html/CHRG-116hhrg38124.htm (last visited Oct. 16, 2022).

[219] *See* Allison Durkee, *Most Americans Don't Think Supreme Court Acts In A 'Serious And Constitutional Manner' And Wants Reforms, Poll Finds*, FORBES (Mar. 15, 2022, 3:26 PM) (finding that 72% of Americans want a code of ethics for the Supreme Court). https://www.forbes.com/sites/alisondurkee/2022/03/15/most-americans-dont-think-supreme-court-acts-in-a-serious-and-constitutional-manner-and-want-reforms-poll-finds/?sh=37c53ab65a8b; *See* Nate Raymond, *Most judges in survey support U.S. Supreme Court having ethics code*, REUTERS (June 22, 2022, 4:37 PM) (noting that 97% of 859 judges who responded to a national survey agreed that a code of ethics should bind justices). *See also Supreme Court Justices Should Follow Binding Code of Ethics, ABA House Says*, AM. BAR ASS'N (Feb 27, 2023) (urging all other bar associations to pass resolutions calling for the Supreme Court to adopt a binding code of judicial ethics).

[220] *Republicans and Democrats Agree on the Need for a Supreme Court Ethics Code*, FIX THE CT. (Jan. 30, 2019) https://fixthecourt.com/2019/01/republicans-democrats-agree.

[221] *Certiorari*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/certiorari (last visited Nov. 18, 2022).

several states."[222] The Act also accorded Supreme Court review in civil cases through writs of error and appeals.[223] Both the writ of error and appeal were issued as a matter of right.[224] Although a writ of error limited review to legal questions, appeals allowed the Court the power to review law and fact; examination under either was mandatory and inclusive of the record.[225]

The Judiciary Act of 1789 also included the beginning of the Court's certiorari powers through section fourteen, now known as the All Writs Act.[226] Section fourteen bestowed "power to issue writs . . . not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[227]

In 1889, the Supreme Court recognized three uses of certiorari.[228] "A writ of certiorari, when its object is not to remove a case before trial, or to supply defects in a record, but to bring up after judgment the proceedings of an inferior court . . . is in the nature of a writ of error."[229] Interestingly, for over a century, the Supreme Court never used certiorari to assert jurisdiction of a case on appeal.[230] Certiorari was used to complete an imperfect record of a case, but not, "like a writ of error, to review the judgment of an inferior court."[231] So, how did we get to our current understanding of certiorari?

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[222] Judiciary Act of 1789, Pub. L. No. 1-20, §13, 1 Stat. 73, 81.
[223] *Id.* at 84.
[224] *Id.*
[225] Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 Colum. L. Rev. 793, 814 (2022).
[226] This section is codified at 28 U.S.C. §1651 (2018).
[227] Judiciary Act of 1789 §14, 1 Stat. at 81-82.
[228] Harris v Barber, 129 U.S. 366, 369 (1889) (recognizing that certiorari is used to transfer missing records to a superior court, remove a criminal case, or as an appellate device to determine an error).
[229] Harris v Barber, 129 U.S. 366, 369 (1889).
[230] *See* Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co., 148 U.S. 372, 380 (1893) ("the writ of certiorari has not been issued . . .to bring up from an inferior court of the United States for trial a case within the exclusive jurisdiction of a higher court.").
[231] *Id.*

The Evarts Act of 1891 granted the Supreme Court statutory power of certiorari, transforming the Court's appellate jurisdiction.[232] The Act identified two ways to bring cases to the Supreme Court.[233] The first set of cases bypassed the circuit courts of appeals and went straight to the Supreme Court for mandatory review.[234] This included constitutional construction, capital conviction cases, cases involving a federal statute or treaty questions, and cases that questioned the constitutionality of a state law or constitution.[235] The second method required the circuit courts of appeals to certify questions to the Supreme Court.[236]

Congress believed the procedure of certifying questions would allow important issues to come before and be resolved by the Supreme Court.[237] Congress created an independent statutory writ of certiorari to ensure necessary matters were brought before the justices.[238]

In 1925, the Judges Bill was passed.[239] This Bill severely reduced the Court's mandatory jurisdiction, allowing for a largely discretionary docket.[240] During this time, the Supreme Court continued to assert that a review after granting certiorari was analogous to a case appearing as if from a writ of error.[241] However, this did not last long. The Court began to place limitations on writs of certiorari to review specific questions.[242] This allowed the Court to decide parts of the case

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[232] *See* Act of March 3, 1891, ch. 517, 26 Stat. 826.
[233] Judiciary Act of 1891, Pub. L. No. 51-517, § 5, 26 Stat. at 827–28.
[234] *Id.*
[235] *Id.*
[236] Judiciary Act of 1891 § 6, 26 Stat. at 826, 828.
[237] Johnson, *supra* note 225, at 826.
[238] Judiciary Act of 1891 § 6, 26 Stat. at 826, 828.
[239] *See* Judiciary Act of 1925 (Judges' Bill of 1925), Pub. L. No. 68-415, 43 Stat. 936.
[240] *Id.*
[241] Fed. Trade Comm'n v. Pac. States Paper Trade Ass'n, 273 U.S. 52, 66 (1927) ("This court has the same power and authority as if the case had been carried here by appeal or writ of error.").
[242] *See* Md. Cas. Co. v. Jones, 278 U.S. 596, 596 (1928) (mem.) (limiting the question to "whether the Circuit Court of Appeals erred in failing to review the rulings of the District Court."); Pueblo of Santa Rosa v. Fall, 273 U.S. 678, 678 (1926) (mem.) (limiting the issue to "the existence of authority of counsel who filed the bill to represent complainant."); Olmstead v. U. S., 276 U.S. 609, 609 (1928) (mem.) (limiting the question to "whether the use of evidence of private telephone conversations . . . intercepted by means of wiretapping, is a violation of the fourth and fifth amendments.").

instead of all the questions presented, disregarding the traditional understanding of certiorari procedures.

Nonetheless, in *Olmstead v. United States*,[243] Chief Justice Taft's opinion noted that certiorari was "granted with the distinct limitation that the hearing should be confined to the single question whether the use of evidence . . . amounted to a violation of the Fourth and Fifth Amendments."[244] The certiorari petition for this case included additional evidentiary issues which were not to be considered.[245] This deviation from the historical understanding that certiorari required a complete review of the record led to the Court's increase in discretionary power.[246]

During the next few years, the Court continued to secure additional powers.[247] In the 1931 case of *Langnes v. Green*,[248] the court noted that even if a petition for certiorari did not request a review of a specific objection, the court had the power to review objections "not applied for [in] certiorari, if the court deems there is good reason to do so."[249] The Court envisioned the possibility of reviewing more than the questions presented.

The power of certiorari has allowed the Court to avoid cases it did not want to decide, answer only some of the questions presented, and proffer additional issues it believed needed to be addressed.[250] As explained above, the Court was never meant to handpick questions it

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[243] 277 U.S. 438 (1928).
[244] *Id.* at 455.
[245] Ben Johnson, *The Supreme Court's Olmstead Power Grab*, REASON, (May 12, 2022, 8:01 AM) https://reason.com/volokh/2022/05/12/the-supreme-courts-olmstead-power-grab.
[246] *Id.*
[247] *Id.*
[248] 282 U.S. 531 (1931).
[249] *Id.* at 538.
[250] John Fritze, S*upreme Court dodges cases on police liability, declining to hear excessive force claims*, USA TODAY (May 24, 2021) https://www.yahoo.com/lifestyle/supreme-court-dodges-cases-police-200936408.html (discussing the Court's refusal to hear two cases without explanation); *See also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 396 (2010) (Stevens, J., concurring in part) (stating that the Court was not asked to reconsider Austin v. Michigan Chamber of Commerce and thereby McConnell v. Federal Election Commission, but more accurately the court asked themselves this question).

wanted to decide. The Judges Bill of 1925, which all but abolished mandatory appellate jurisdiction, granted the Courts more discretion through writs of certiorari.[251] In the view of William Howard Taft, the biggest proponent of the Bill, the Supreme Court was made to work for the "public at large," not the "particular litigants before it."[252] Taft believed the Court's purpose was to "lay down important principles of law and thus to help the public at large to a knowledge of their rights and duties and to make the law clearer."[253] This was a departure from the Court, which was initially "the vindicator of all federal rights."[254] Since neither the power granted to the Court through statutory nor common law certiorari allows review based on questions preselected by justices, this self-appointed power could be reined in by Congress. Perhaps if the justices only answered the questions before them instead of interjecting their agenda, the public would have more faith in the Court.[255]

Conclusion – Can Any of These Suggestions Depoliticize the Court?

Although the current goal of the nation is to depoliticize the Supreme Court, this is easier said than done. While several of the reforms discussed seem plausible, some proposals, such as court packing, would likely cause increased politicization of the Court and the country. Even though President Biden's Supreme Court Commission delivered a 280-page report in December of 2021, there still has been no response from the White House.[256] Despite continued public outcry, sweeping reforms are highly unlikely without legislative intervention.

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[251] *See* Judiciary Act of 1925 (Judges' Bill of 1925), Pub. L. No. 68-415, 43 Stat. 936.
[252] William Howard Taft, Address to the New York County Bar Association 5 (Feb. 18, 1922) (Taft Papers, Reel 590).
[253] *Id.*
[254] FRANKFURTER & LANDIS, *supra* note 111 at 260-61.
[255] *Supra* note 250 and accompanying text. *See also* Douglas Keith, *A Legitimacy Crisis of the Supreme Court's Own Making*, BRENNAN CTR FOR JUST. (Sept. 15, 2022) https://www.brennancenter.org/our-work/analysis-opinion/legitimacy-crisis-supreme-courts-own-making (discussing the Court's habit of answering questions that were not asked).
[256] Madison Alder, *Biden's Supreme Court Commission Members Still Await Response*, BLOOMBERG LAW (Aug. 15, 2022, 4:45 AM).

Nevertheless, amidst continued pressure from the media regarding ethics violations, the Supreme Court voluntarily adopted a Code of Conduct.[257] The justices maintained that "[f]or the most part these rules and principles are not new."[258] However, the absence of a Code has led to the "misunderstanding that the Justices of this Court, unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules."[259] The Court laid out five canons of conduct on issues of recusal, outside activities, politics, judicial independence, and appearances of impropriety.[260] Noticeably absent was any direction on how the rules would be enforced and who would have the final say when the inevitable disputes arose. Whether this or any reform can rein in the Court remains to be seen.

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[257] *Statement of the Court Regarding the Code of Conduct*, SUP. CT. (Nov. 13, 2023) https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.
[258] *Id.*
[259] *Id.*
[260] *Id.*