A Case for Changing Congressional Process, not the Supreme Court

Question: *Should the United States Supreme Court be changed, perhaps by expanding the number of seats on the Court, imposing term limits, or in some other way? Or should the Court remain the same?*

The importance of an objective judicial branch of government to our functioning democracy cannot be overstated. While the day-to-day lives of the American people are primarily influenced by the actions of their respective state legislatures, in addition to Congress and their law-making, and to a lesser degree the Executive Branch and its executive orders power, the Supreme Court renders all of these branches accountable back to the American people through the Constitution, in a way that the average American citizen has no hope of achieving otherwise. In effect, the Supreme Court is to the Executive and Legislative Branches as the centered-pivot-point-beam is to the double-pan balance scale that the blindfolded Lady Justice carries – that is, there is no balance without the foundational beam. It is imperative that the beam is capable of withstanding the weight of push-and-pull, yet able to provide a stabilizing leverage for flexibility and growth. As Benjamin Franklin said, "An equal dispensation of protection, rights, privileges, and advantages, is what every part is entitled to …"; while Richard Henry Lee stated "It must never be forgotten…that the liberties of the people are not so safe under the gracious manner of government as by the limitation of power."[1]

The very fabric of our current society has been woven with the fibers of the rulings of the Supreme Court. A country that began ruled by wealthy, land-owning European white males as the only eligible voters and decision-makers has become a land where women, minorities and the otherwise-disenfranchised have gained the same rights as the historical "ruling class," even if practice differs somewhat from the reality of those rights. Through its establishment of precedent and judicial supremacy, the federal government sets the tone for the state level. In many cases the federal courts have spurred social change which might not have reached the legislative houses otherwise – or, if so, would

have been long-delayed. The Supreme Court has ensured that the very humanity of our country prevails, with logic and reason as its guideposts.[2]

In order to understand how our society has reached its current existence, we must understand how we originated, and how the Court's rulings have affected our growth. After achieving independence from England, the new, unified federal government prioritized creating a stronger, centralized, independent court system, after the failures of the Articles of Confederation. When establishing the Court, the independence of the Court was of paramount importance to the Founding Fathers – so much so that they dictated that "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."[3] By giving the justices an (interpreted) lifetime appointment, and denying Congress any opportunity to interfere financially, the Founders insulated the judicial branch from not only the other two branches, but also from the changing attitudes and whims of the voting public, whom most of the Founders regarded as uneducated and easily manipulated. Thus, the Judicial branch was created to be non-political. Once Justices are confirmed and take their seats, it becomes exceedingly difficult to remove them from their position, by design.

Despite the forethought and planning put into an independent judicial branch, the Supreme Court had a somewhat inauspicious start. Formed in 1789 by Congress,[4] and subsequently beginning to meet in 1790, it did not render its first decision until 1791. Initially meeting only two months a year, they did not have their own building, or even chambers. The Justices also "rode the circuit" – traveling through their assigned districts the majority of the year, hearing cases that were on appeal from federal district courts. They performed their duties without clerks or assistance with reviewing case law; only receiving oral arguments, they were provided with no written documentation beforehand. First established with six total justices (one Chief, five Associates), the number of total justices changed six times – decreasing to five, increasing to ten, and finally settling on current count of nine (one Chief, eight Associates) in 1869 – unchanged in number, or any other significant manner since then, with the exception of the societal changes leading to the additions of Justices of color,[5] and later, women.[6]

Between 1790 and 1801, only eighty-six cases appeared before the court; in contrast, the Supreme Court is expected to hear approximately seventy cases in the 2018-2019 session, which represents about ten percent of the petitions for review that court receives each year.[7] The Court was poorly regarded in its first decade of existence; this came to a head when the state of Georgia refused to appear during the case of *Chisholm v Georgia* (1795),[8] claiming that the federal Court had no jurisdiction over its state's affairs. While this case led to the adoption of the Eleventh Amendment,[9] it also signaled the Court's intentions to rule in cases of State disputes; their main obstacle was getting the states to recognize the federal court's authority.

It was not until the John Marshall Court, and its *Marbury v Madison* (1803)[10] decision, that the Supreme Court's most significant power was established: judicial review over the Legislative and Executive branches. Chief Justice John Marshall, who led the Court for thirty-five years, was well-regarded and considered an influencer, only having one case in his Supreme Court career in which his ideas were rebuffed by the majority of the court.[11] While the Democratic-Republicans feared that the Federalist-heavy judicial branch would be a polarized institution bent on obstructionism, Chief John Marshall defied expectations and demonstrated "judicial jujitsu"[12] by threading the needle: his Court affirmed the first two questions at the center of *Marbury v Madison*, which was the assumed decisional outcome from the Federalist appointee, but ruled against the third component, by declaring the "original jurisdiction" provision of the Judiciary Act of 1789 unconstitutional. This was a significant and elegant decision because the third part of the ruling went against the Federalist party, favoring the Democratic-Republican party's inaction in completing all of President Adams' judicial appointments. This judicial and political prowess led not only to the establishment of judicial review power, but also to Chief John Marshall's reputation for fairness and impartiality.

It is interesting that this ruling, and the subsequent establishment of judicial review power, may not have been made at all if Federalist President John Adams hadn't attempted to stack the judicial deck against the incoming Democratic-Republicans, appointing a bounty of judges two days before the newly-

elected president took office in 1801. Democratic-Republican Thomas Jefferson was not a fan of the judicial expansion through the "midnight appointments," lamenting that "{the Federalists} retired into the judiciary as a stronghold . . . and from that battery all the works of Republicanism are to be beaten down and destroyed."[13] Adding to the indignation of the Democratic-Republicans was the fact that John Marshall certified the appointments as Secretary of State.[14] President Adams's blatant, political power grab in the final moments before his party's loss of executive power ended up proving a greater good than anyone at the time anticipated: The Court became a powerful counterbalance to legislative and executive overreach.

After *Marbury v Madison* (1803), the Supreme Court issued a number of significant rulings that increased and clarified the federal government's role in lawmaking. *McCulloch v Maryland* (1819) established the federal government's implied powers and federal supremacy over the states, a blow to states in the battle between state's rights versus federal rights. However, *Shelby County v Holder* (2013) established some limitations to federal oversight, when it held that states and localities do not need federal approval to change voting laws. *Gitlow v New York* (1925) was one of the first significant cases that established that parts of the Bill of Rights extends to the states, and therefore, the citizens of those states. *Cooper v Aaron* (1958) established that states could not nullify decisions of the federal courts. These rulings were paramount for the subsequent rulings that expanded social justice to the masses, although progress has not always been achieved in a linear fashion.

Racial equality has been achieved largely through court rulings, or legislation in response to court rulings. Though the Court has been back and forth on racial rights and prohibitions, it eventually sided with non-discrimination. *Dred Scott v Sandford* (1857) denied citizenship to African American slaves – which was reversed through the legislation of the Civil Rights Act of 1866, closely followed by the Fifteenth Amendment in 1868. In 1870 the right to vote was extended to African American males, a continuation of post-Civil War legislation aimed at dismantling the slave-state mindset of the South. *Plessy v Ferguson* (1896)[15] upheld "separate but equal" segregation laws in states, but the Court reversed

course with *Brown v Board of Education* (1954). *Loving v Virginia* (1967) invalidated state laws that prohibited interracial marriage. *Regents of the University of California v Bakke* (1978)[16] was an interesting case of threading the needle, as the Supreme Court has shown its aptitude in doing: while the case for affirmative action was upheld, the specific racial quotas of the University of California were ruled unconstitutional, and Bakke was ordered admitted to its medical school. The long-term effect of the ruling was minimal, as most affirmative action programs continued on without change or disturbance.

Korematsu v United States (1944)[17] was a controversial ruling that found that the U.S. Government met the strict scrutiny standard[18] of review – one of only a handful of cases in which the Court ruled in favor of the U.S. Government in this way. The dissenting justices criticized the internment as racially discriminatory, with Justice Frank Murphy stating the internment "falls into the ugly abyss of racism {and resembled} the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy." This decision was not reversed by legislation or a Court decision, although Korematsu's conviction was overturned in 1983 on the grounds that the Solicitor General had withheld a naval report that indicated there were no known instances of Japanese-American involvement in espionage, and the Japanese-Americans who had been held were granted reparations through the Civil Liberties Act of 1988.

Women have also reaped the benefit of Civil Rights rulings from the Court. *Union Pacific Railway Co. v Botsford* (1891)[19] established the right of bodily autonomy, although it upheld the right to criminalize abortion unless it was necessary for the preservation of the mother's life or health – although interpreting the term "health" to include psychological factors, as well as physical. *Griswold v Connecticut* (1965) established the right to privacy, and a married couple's right to use contraceptives – *Eisenstadt v Baird* (1972) extended those protections to the unmarried. *Roe v Wade* and *Doe v Bolton* (1973) was a joint decision that acknowledged that women have a constitutional right to privacy, of which an abortion during the first two trimesters of pregnancy is a part; that any restrictions have to be narrowly tailored to

serve compelling state interest – additionally deciding that before a fetus is viable there is no compelling state interest, and after viability the mother's life and well-being continue to be the primary factor; and that a fetus is not a person under the Fourteenth Amendment, nor may the State justify restrictions on abortion based on one theory of when life begins. This conglomeration of rulings established a broad independence for women who wanted control over their own lives, outside of the biological function of reproduction.

The Supreme Court has also played a large part in establishing the rights of LGBTQ+ individuals. *One, Inc. v Olesen* (1958)[20] was the first case to establish some LGBTQ+ rights – specifically that the First Amendment protected homosexual magazine content, and clarifying that homosexuality was not obscene. *Mapp v Ohio* (1961) established the right against unlawful search and seizure, which furthered the cause of privacy for those individuals who would otherwise run the risk of having their privacy invaded, and then being prosecuted for what they may be doing behind closed door. However, the Supreme Court declined to hear *Baker v Nelson* (1970) on appeal from the Minnesota Supreme Court due to a "want of a federal question", which allowed for the continuance of laws to maintain that marriage was only for opposite-sex couple, a blow for those same-sex individuals who sought matrimonial legal protections. As well, later, *Bowers v Hardwick* (1986) upheld the Georgia law that criminalized oral and anal sex between consenting adults.

Romer v Evans (1996) found a progressive change in the Court's thinking, striking down a Colorado voter initiative that would remove LGBTQ+ individuals as a protected class, with Justice Anthony Kennedy insisting that "these protections constitute ordinary civil life in a free society." This was furthered by *Oncale v Sundowner Offshore Services, Inc.* (1998) which decided that same-sex harassment was covered under the protections of Title VII of 1964. *Lawrence v Texas* (2003) struck down state laws that prohibited sodomy between consenting adults. *United States v Windsor* (2013) was a

decision that mandated that the federal government must provide benefits to legally married same-sex couples, and *Obergefell v Hodges* (2015) legalized same-sex marriage across all states in the Union.

Another class of citizen that received the protection of furtherance of rights: people accused of crime. In addition to the Fifth Amendment right against self-incrimination, *Gideon v Wainwright* (1963) gave criminal defendants the right to an attorney, even if they cannot afford one. *Miranda v Arizona* (1966) specified that prisoners must be advised of their rights before being questioned by police, which most people now know as the Miranda Warning.

Even politics has felt the effects of Supreme Court rulings. *United States v Nixon* (1974) established that the President cannot use executive privilege to withhold evidence from a criminal trial, which came up again during the Mueller investigations into President Trump's alleged election activities. *Bush v Gore* (2000) decided that no recount of the 2000 presidential election was feasible in a reasonable time period, effectively deciding the election in favor of President Bush, to the consternation of Vice-President Gore, his supporters and the Democratic Party in general. *Citizens United v Federal Election Commission* (2010) changed election fundraising law, allowing corporations and unions to spend unlimited amounts of silent money supporting their candidate-of-choice in elections, markedly changing the election fundraising landscape.

Throughout the years, the average citizen has reaped the benefits of the workings of the Court. Its current make-up, which has been in place for over 150 years, has a long-term, proven track record for fairness and functionality. I do not agree with making any changes to the Supreme Court; particularly, I do not favor increasing the number of seats on the bench, nor do I agree with term-limits.

Increasing the number of seats is inadvisable, because it would give whomever may be in office the chance to "pack the Court". This was attempted by one of our greatest presidents, Franklin D. Roosevelt. In his second term, after three "Black Monday" rulings against his New Deal policies, he sought to add six Justices – one Justice to compensate for each current Justice over the age of 70. While he was generally wildly popular, he lost a lot of political capital in his attempt to change the makeup of

the Court to benefit his policies, and the general public did not favor his plan any more than did the political leaders of the day[21]. While there has been some research that says the general public may favor an increase in federal justices in general[22], particularly if the goal is to decrease the backlog of cases and help the federal court system run more smoothly, there is scant evidence that this sentiment would hold over to changing the makeup of the Supreme Court. While the party in power may get the short-term advantage of a majority of sitting Justices, the voting public may very well reward them with a place in the unemployment line, in effect giving their political rivals the political capital that they had hoped to gain.[23]

Aside from the political implications of the fallout of an ill-accepted plan to alter the court, there is also the problem of precedent: if the Court is not ruling the way in which the party in power wants, a future president could very easily justify "packing of the Court" in their own favor. "Packing the Court" may have short-term benefits to the party in political power, but the long-term effect would be that the Court would be made into a political creature, exactly what it was designed not to be, and what it should not be.

The suggestion of term-limits is also short-sighted. The average Justice's life-term-appointments equate to an average of sixteen years each,[24] although recent Justices have had terms longer than sixteen years. A set, solid term-limit would exclude those who have a lifetime of experience and knowledge, in the prime of their legal careers. Not only would this not be the best use of the best legal minds in our union, it would possibly encourage corruption. If terms are well-defined, political players may begin to plan around a justice that they like, or don't like, based on a term-limit schedule. Even if the Justices were rotated in and out of Supreme Court positions but kept on a Federal bench,[25] there would still be no guarantee that this would be a significant enough distinction to circumvent term-limit scheduling. This plan may well serve to fundamentally destabilize the Court.

My only recommendation for change for the Supreme Court is a Constitutional Amendment that prohibits Congress from declining to hold hearings on a Supreme Court nominee. Of concern, the case of Merrick Garland[26] cannot be repeated. Judge Garland was nominated by President Obama in March

2016, after the death of Justice Scalia. Congress, and in particular Senate Majority Leader Mitch McConnell (R-KY), effectively nullified his appointment without even the benefit of a hearing. The justification was that it was an election year, and that the (new) incoming President should have the benefit of nominating a Supreme Court justice – never mind the fact that the new President would not even be elected for another seven months, or be installed for another ten months, leaving the Court with a missing seat, and without a "tie-breaker" (one of the benefits of an odd number of justices).

This act of Congressional interference forever changed the make-up of the Supreme Court, and will have an effect on Supreme Court rulings for decades. It was, in effect, Congress' way of "packing the Court"[27]. Congress must not be allowed to obstruct in this manner again. Refusal to do their duty is tantamount to sedition, and any member of Congress who obstructs the workings of the Court in the future should be removed from office, and prosecuted.

The importance of the continued independence of the Judicial Branch cannot be overstated. The very fabric of our society and freedoms depends upon each branch of our government being equal. If the Legislative or Executive branches are allowed to interfere with the integrity of the Supreme Court, the very integrity of our democratic society is in jeopardy. Limiting or changing the Court in any way at this point can only be viewed as an attempt to limit the power of the independent branch, which is the very example of unconstitutional.

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