Our Collective Misunderstanding: The True Purpose of the Supreme Court

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Introduction

They had a laudable goal: a nation designed so strategically that too much centralized power could never come to be. On parchment paper, the federal structure the Framers proceeded to build seemed like the perfect mechanism for achieving that objective. Even so, the system itself relied upon concepts that exist fundamentally in conflict.

The Framers chose the checks and balances system as the primary means of preventing the actualization of centralized power. The idealistic federal structure ultimately created was comprised of three branches—legislative, executive, and judicial. Each branch was given a checking capability over the other two branches, principally to ensure that none of the three garnered too much strength and to guarantee that each maintained enough authority to operate effectively. A brief United States history lesson reminds us of the overarching features within the system: the legislative and executive branches would be sustained through the democratic political process, while the judiciary would be constructed by the other branches in an effort to remain insulated from political influence. This focus for the judiciary has become known as judicial independence. It flows rather naturally, though, to notice that no one branch can ever actually stand apart from the others in such a system. Specifically, the Supreme Court cannot possibly be independent if its composition—its very existence—is determined by the appointment and approval of two political branches. This Note argues that, although the Court is not formed through the democratic process, the political aspects that have manifested within the institution were inevitable—and perhaps, when viewed in light of the *true* purpose of the Court, this is not as inherently problematic as we may think.

While many remain committed to finding a way to save the Court's independence from politics, this Note argues that we must acknowledge that the structure of government that the Framers created made judicial independence an unattainable aspiration, and thus the commitment to salvaging it is irrational. With this reality confronted, this Note questions if we have incorrectly understood the reason for the institution all along. The real purpose of the Supreme Court is not judicial independence, but instead a body dedicated to a much grander end:

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safeguarding the Constitution. From this perspective, that end can be achieved even when the means of judicial independence proves unfeasible.

Part I of this Note provides an overview of the American three-branch government structure and the system of checks and balances, with specific focus on the goals that our founders had for the judicial branch. Part II identifies and examines the intrinsic conflict between the motivations of the Framers in creating the three-branch system, including the ideals they had for the judicial branch, and the subsequent structure of the Court. This Part then analyzes the system of checks and balances in practice throughout American history to further underscore the impossibility of judicial independence. Part III acknowledges that the impact of a polarized modern America has led to many debates about reforming the Court but suggests an alternative perspective for the discussion: the true purpose of the Court is to safeguard the Constitution, and judicial independence is merely a means—one means—of trying to realize this goal. Subsequently, this Part underscores that most proposals for Court reform are destined to fail if judicial independence is the focus, and instead offers possible reforms that would (1) address the institution's grander responsibility of protecting the charter and (2) ensure that the inherently political aspects imbedded in the Court's structure—unproblematic on their own—do not become a concern in practice.

I. THE FOUNDING: MOTIVATIONS FOR A NEW NATION

The Founders dreamed of creating a country safeguarded from the many "causes which impel[ed] them to the separation"[1] from Great Britain. Their focus for the country, in large part, was relatively simple: a sovereign nation grounded in inalienable rights such as life, liberty, and the pursuit of happiness. The execution of this vision was an arduous task, particularly in regard to the logistical formation of this new republic. Who was in charge? What were the rules that all members must follow? Was it possible to prepare for the future? The need for a unified framework—a Constitution—became evident.

The official founding document followed, demarcating the national frame of government. It would become "the supreme law of the land."[2] The original Constitution was comprised of seven articles, each concentrated on an aspect of this proposed governmental system.[3] Although every article is of profound importance in understanding the birth of the United States, the relationship among

1. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

2. U.S. CONST. art. VI, § 2. It is worth noting that the Articles of Confederation represented a false start. Although the document created the basic functions of a national government for the new nation, the Articles of Confederation failed to establish the relationship between that national government and the subsequent state governments for which the framers hoped. *See* ARTICLES OF CONFEDERATION of 1781.

3. *See* U.S. CONST. art. I–VII.

the directives set forth in Articles I, II, and III—often referred to as the separation of powers model—are of particular relevance to this Note.[4]

To be clear, those involved in drafting and shaping of the Constitution did not invent the concept of separation of powers. In fact, the Framers adopted the principle from a French political philosopher who lived and died before the Declaration of Independence was even penned.[5] Charles de Montesquieu is regarded as one of the most influential political philosophers to ever exist. To many, Montesquieu's greatest contribution to political thought came through his book *The Spirit of the Laws*, published in 1748.[6] There, he was arguably the first person to give force to the idea that "the enjoyment of liberty depends on the separation of the powers of government."[7] It is thus no coincidence that liberty was a key aspect of the Declaration of Independence[8] and became one of the inalienable rights that the Constitution protects. Thus, it cannot be a surprise that the separation of powers arrangement—and the checks and balances system within it—was at the core of the new government's framework.

Article I of the Constitution created the Legislative Branch; Article II created the Executive Branch; and Article III created the Judicial Branch.[9] Within each article is a comprehensive explanation of the ways in which the respective branch will function, the powers it will hold, and the limits of its reach. The point, surely, was to ensure each branch had dominion over its respective arena while clearly demarcating the limitations of each branch's powers. All of this was to prevent one branch from amassing centralized power, an effort done in the name of liberty and in avoidance of tyranny.[10]

Notably, the separation of powers system also includes a defense mechanism—the checks and balances system—whereby the three branches remain balanced in their powers through their oversight capabilities of one another. Proclaiming that "[a]mbition must be made to counteract ambition," James Madison referred to this

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4. This Note analyzes only the horizontal separation of powers between the coequal branches of the federal government; it does not explore the vertical separation of powers between federal and state governments. When discussing the judicial branch, this paper focuses strictly on the Supreme Court of the United States.

5. Robert G. Hazo, *Montesquieu and the Separation of Powers*, 54 A.B.A. J. 655, 667 (1968) ("It is largely through Montesquieu's influence that the idea of the separation of the powers of government became one of the pillars of the Constitution of the United States.").

6. Charles de Montesquieu, The Spirit of the Laws (1748).

7. *Id.* at 665; *see also, id.* at 667 ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty . . . . Again, there is no liberty if the judiciary power be not separated from the legislative and executive.").

8. *See generally* THE DECLARATION OF INDEPENDENCE, *supra* note 1 (discussing liberty as a motivating force for the new nation as well as a vital requirement for the new government).

9. *See* U.S. CONST. art. I–III (The Framers decided that the members of the legislative and executive branches would be determined by the democratic process, thus making these branches political in nature. The Supreme Court, on the other hand, was not to be a part of the democratic process or to be involved in politics.).

10. *See* N. Pipeline Const. Co. v. Marathon Pipeline Co., 458 U.S. 50, 57–58 (1982) ("To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct.").

process in the Federalist papers as a series of "auxiliary precautions."[11] Such checks include, among others, the President's ability to veto bills approved by Congress and nominate individuals to the Federal judiciary; the Supreme Court's ability to declare a law enacted by Congress or an action by the President unconstitutional;[12] and Congress's ability to impeach and remove the President and federal court justices and judges.[13] Like the general separation of powers, the designated checks and balances were put in place to protect liberty and defend against tyranny; they were seen as "self-executing safeguard[s] against the encroachment or aggrandizement of one branch at the expense of the other."[14] Curiously, these protections were to occur in concert with the enumerated distinct powers held by each branch that were intended to keep them separated.

One feature of this robust form of government—interpreted by many as the foundation of the Court—is the principle of judicial independence: all three branches were to remain separate from one another, but the judiciary should stand as detached as possible from the legislative and executive branches in order to best protect the rights guaranteed by the Constitution.[15] This notion was explicitly identified, for the Framers discussed it multiple times in early, explanatory documents. In Federalist 78, Alexander Hamilton explained that "the complete independence of the courts is peculiarly essential."[16] Judicial independence has been interpreted by many as an essential element of America's success.[17] This idea is a noble one, but the broader system in which it was supposed to exist prevented its actualization.

II. THE IMPOSSIBILITY OF INDEPENDENCE WITHIN THE STRUCTURE

Before we can analyze modern America, we must understand the initial vision that our Framers held, and the contradictions within it. When designing the structure of government we know today, the Framers' commitment to a nation

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11. THE FEDERALIST NO. 51 (James Madison).

12. It should be noted that this power was not enumerated in the Constitution but rather invented by Chief Justice Marshall because such a check was deemed necessary for the broader system to function. *See* Marbury v. Madison, 5 U.S. 137, 178 (1803).

13. *See* U.S. CONST. art. 1, § 2–3.

14. Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam).

15. Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 686 (1980). We see here an indication that judicial independence was meant to serve merely as a means of effectuating a broader goal. *Id.*, *see also N. Pipeline Const. Co.*, 458 U.S. at 58 ("The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial.").

16. THE FEDERALIST NO. 78 (Alexander Hamilton).

17. *See, e.g.,* Judith S. Kaye, Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts, 25 HOFSTRA L. REV. 703, 708–09 (1997) ("[O]n the floor of the House of Representatives nearly 200 years ago, John Rutledge, Jr. admonished his colleagues: '. . . so long as we may have an independent Judiciary, the great interests of the people will be safe . . . Leave to the people an independent Judiciary, and they will prove that man is capable of governing himself.'").

free from tyranny was evidently at the heart of their ambitions.[18] The system most commonly referred to as separation of powers is accomplished by the checks and balances process. This process provides the necessary procedures to promote democracy, as it establishes the "means of keeping [the branches] in their proper places."[19] Accordingly, it is difficult to maintain that judicial independence can really exist when such checking and balancing occurs—checking and balancing that proves essential for the very existence of the judicial branch.

A. THE CONTRADICTIONS BETWEEN THE PRINCIPLE AND THE SYSTEM

The Federalist Papers first presents the conflict between judicial independence within a checks and balances system of government.[20] The series of essays continue to serve as an extraordinary means of understanding the motivations behind the Constitution, but they leave ample room for interpretation.[21] The contradictions revealed in the Federalist Papers, published just months before the Constitution was ratified, make it apparent that the Framers were focused on achieving lofty goals for this new country. Particularly, they sought a democratic government made up of three branches, each with a "will of its own"[22] and each with "as little agency as possible"[23] over the other branches.[24] Unfortunately, when put into practice, this multi-faceted vision is incompatible with the goal of simultaneously guaranteeing judicial independence.

1. "A WILL OF ITS OWN"

In Federalist 51, James Madison discussed the necessity for separation amongst the branches.[25] "In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which . . . is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own."[26] This assertion was then directly countered in Federalist 78, when Alexander Hamilton wrote that the federal judiciary would be the "least dangerous to the political rights of the Constitution"

18. The Declaration of Independence, *supra* note 1.

19. THE FEDERALIST NO. 51, *supra* note 11.

20. *Id.*; THE FEDERALIST NO. 78, *supra* note 16.

21. It should be noted that the papers were written by Alexander Hamilton, James Madison, and John Jay to promote the ratification of the Constitution. In other words, it can be said that The Federalist Papers were a key part of a political campaign to garner support from New Yorkers. *See* Irving R. Kaufman, *What Did The Founding Fathers Intend?*, N.Y. TIMES MAG., Feb. 23, 1986, at 42, https://www.nytimes.com/1986/02/23/magazine/what-did-the-founding-fathers-intend.html [https://perma.cc/474F-SEMX].

22. THE FEDERALIST NO. 51, *supra* note 11.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

because it would have "neither force nor will . . . and must ultimately depend on the aid of the executive arm even for the efficacy of its judgements."[27]

When Hamilton's statement is read in the context of the ideals Madison put forward, we can see that the Framers desired two concepts—judicial independence and an unthreatening judiciary dependent on the executive branch—in a such way that made them operationally incompatible.[28] An independent Court cannot exist when it stands powerless to enforce its own decisions and instead must rely on another branch for such duties.

The problems that can result from this incongruity were exemplified in *Worcester v. Georgia*. President Andrew Jackson, displeased with the holding Chief Justice John Marshall announced on behalf of the Court in the case, infamously declared, "Well: John Marshall made his decision: *now let him enforce it!*"[29] The conflict is apparent: on the one hand, the Framers sought an independent Court that was to obey the separation of powers configuration in the name of liberty; on the other hand, the Court was to depend on the other branches for its formation and for the enforcement of its decisions, making it almost powerless.[30] The latter prevented the former from the start.[31]

2. "AS LITTLE AGENCY AS POSSIBLE"

James Madison also stressed that "the members of each [branch] should have as little agency as possible in the appointment of the members of the others."[32] He caveated this sentiment when he noted that, in an ideal world, "rigorous adherence" to this principle would mean the people, whom he called the "fountain of authority," would appoint all members of the three branches.[33] But he then, almost ironically, asserted that this would not be possible for the judicial branch since ordinary people are not aware of the "peculiar qualifications" members

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27. THE FEDERALIST NO. 78, *supra* note 16.

28. Hamilton was a likewise zealous advocate for judicial independence, which makes his vision for a dependent Court especially confusing. *See* Kaye, *supra* note 17 ("Alexander Hamilton, in persuading New York to ratify the Constitution, explained that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers . . . The complete independence of the courts of justice is . . . essential . . .'").

29. Edwin A. Miles, *After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J.S. HIST. 519, 519 (1973) (emphasis in original).

30. Looking at the state of the Supreme Court today would have many arguing that it has become concerningly powerful. While those perspectives are important, they are outside the scope and focus of this Note, which analyzes the paradoxes in the Court's foundation.

31. A modern version of *Worcester v. Georgia* can be seen in *Brown v. Board of Education*, when the Court's decision to overrule the "separate but equal" holding of *Plessy v. Ferguson* was met with profound resistance from political leaders in the South. President Eisenhower was likewise against integration. *See The Southern Manifesto and "Massive Resistance" to Brown*, NAACP LEGAL DEF. FUND, https://www.naacpldf.org/ldf-celebrates-60th-anniversary-brown-v-board-education/southern-manifesto-massive-resistance-brown/ [https://perma.cc/3DFY-PNBW] (last visited Nov. 9, 2021).

32. THE FEDERALIST NO. 51, *supra* note 11.

33. *Id.*

of the judiciary must possess.[34] This interesting rationale contributed to the approach that Framers undertook to comprise the Court—since the common man was not qualified to select the members of the Court, the President and the Senate would have to do it—and the approach also produced the most significant checks placed upon the Supreme Court. (1) Upon the death or retirement of a member of the Court, the current president would nominate a replacement justice; (2) the Senate would provide its advice and consent on the nominee, amounting to either a confirmation or denial; (3) the Senate could vote to remove siting justices from the Court for impeachable offenses; and (4) the full Congressional body would hold the authority to dictate the number of justices on the Court.[35]

Despite his initial proclamation, Madison only provided a surface level excuse to justify why the executive and legislative branches, both themselves generally removed from the election process of one another other, would maintain such agency over the appointment of the Supreme Court justices. These controls appeared to solve the problem of ensuring the justices on the Court were selected by "qualified" persons and, like the broader system, looked like logical means of keeping the Court from garnering too much power. Despite comments suggesting the benefits of an independent judiciary, the Framers solidified the branch's role in the broader system—a system that operationally cannot operate if each component does not engage in its checking and balancing duties.

B. THE STRUCTURE IN PRACTICE

If there were any outstanding questions about whether the Supreme Court could attain true judicial independence, notwithstanding its paradoxical structure, the answer showed itself when the structure was put into practice. The outcome of a Court dependent on two political branches for its existence is simple: it is a Court imbedded with political undertones.[36] Independence and dependence are, of course, antonyms of one another; judicial independence was compromised the second the President and the Senate had a hand in staffing the Supreme Court. Even considering instances in which Court has managed to stay out of the political fray, the concerning traces of politics in its foundation have always been present. With the roles of the executive and legislative branches so vital in maintaining the Court's existence, judicial independence was as impossible as the presence of politics within the institution was inevitable.

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34. *Id.* This begs the question of why Madison thought the ordinary citizens was capable of electing the Executive, who serves a variety of roles as Chief of the country, and the Legislature, who dictates the legal realm of the country.

35. *Separation of Powers*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/separation_of_powers_0#:~:text=Separation%20of%20Powers%20in%20the,branch%20from%20becoming%20too%20powerful [https://perma.cc/W9GF-WU5K].

36. *See generally* CHRISTOPHER E. SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS (1999) (discussing the political influences on the structure and procedures of the judiciary and the consequences of this reality).

1. THE EFFECT OF THE PRESIDENT

In our reality, it was unrealistic to ever expect a president to actually make Supreme Court appointments in a "vacuum," considering only the "integrity and ability of the would-be judges" and not the "[nominee's] political views."[37] Presidents are the products of a democratic institution; they are representatives of certain political parties and are elected by the people as a result of the beliefs, values, and aspirations they hold. Because the Supreme Court has the authority to declare an executive order in violation of the Constitution, the president would be foolish to appoint someone whose principles are likely to stand in the way of the President's own political agenda for the country.[38] Notably, this is one way that the Court performs its own series of checks, further highlighting the impossibility of the branch remaining independent. Despite the continued belief that the Court can somehow be independent, the executive's motivations in staffing the Court have never been a secret. In 1936, Ernest S. Bates put forth the grim truth:

> It is pleasant theory still held by the naive that the president of the United States in making his appointments to the Supreme Court is governed primarily by considerations of merit. That unfortunately has never been the case in the past and is not likely to be the case in future. The president can hardly be expected to appoint men, however outstanding they may be, whose views on matters of public policy are known to be radically different from his own. He has personal and political obligations, which, being human, he will be tempted to fulfill through appointments to the Court. Besides being president, he is the leader of a political party, and partisan considerations will be borne in mind.[39]

Bates' pragmatic analysis can be seen in some of the earliest and most notable relationships between presidents and the Court.

When appointing justices to the very first Supreme Court, President Washington "deemed it to be his duty to appoint only Federalists on the Court."[40] Because of the Federalist composition of the Court at the end of the eighteenth century and the start of the nineteenth century, Washington's successor, President Jefferson, repeatedly "defied and flaunted" the Court—a sentiment that was said to have led to the conduct at issue in *Marbury v. Madison*.[41] Similarly, in making appointments to the Court, President Lincoln was "guided by the principle that the appointee should reflect the opinions of the appointing officer."[42]

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37. J.R. Saylor, *"Court Packing" Prior to FDR*, 20 BAYLOR L. REV 147, 147–48 (1968).

38. *Id.* at 147 ("We have a government of laws interpreted and applied by men."). The Framers also failed to consider the basic fact that by having a Supreme Court made up of human beings, it meant each justice would carry with them a lifetime of experience and, as such, views on how the world functions.

39. ERNEST S. BATES, THE STORY OF THE SUPREME COURT 42 (1936).

40. Saylor, *supra* note 37, at 149.

41. *Id.* at 155.

42. *Id.*

Through the appointment process, the President intends to impact the Court's jurisprudence with the hope that it will support the President's policies and carry forward those ideals long after their term has ended.[43] As such, presidents are not presidents considering, protecting, or prioritizing judicial independence. Instead, they are focused on creating a Court engrained with the values of the political parties they represent. Consequentially, the members of the Court must pass an implicit political investigation by the executive before they ever adjudicate a matter from the bench—and the Court's existence as a sincerely independent body becomes even more unattainable.[44]

2. THE POWER OF THE LEGISLATURE

The presence of party affiliation in structuring the Supreme Court extends beyond the President. The Framers also delegated tremendous power to Congress in influencing the composition and configuration of the Supreme Court. The credulousness behind the idea that the president would make nominations in a vacuum is mirrored by Congress's role in the process. The members of the two branches of Congress—the House and the Senate—are both elected by the people as well, and too serve as representatives of their respective political parties. The Court's ability to strike down legislation impacts the extent to which Congress can drive forward various policies. In other words, the Supreme Court is a potential threat to the Congressional political agenda.

a. The Power to Set the Size

The Constitution conferred on Congress the power to determine the number of justices on the Supreme Court.[45] In doing so, the Framers—either knowingly, and presuming it to be unproblematic, or unknowingly, and thus unaware of its

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43. GEORGE L. WATSON & JOHN A. STOOKY, SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENT 58–59 (1997) ("Presidents are, for the most part, results-oriented. This means that they want Justices on the Court who will vote to decide cases consistent with the president's policy preferences.").

44. This reality was particularly evident in the divisive Supreme Court decisions preceding the Civil War:

> *Dred Scott* provides lessons about what can happen when the country sees the Supreme Court as beholden to one side in a contentious public debate. In the run-up to the Civil War, the country was bitterly divided over the issue of slavery along regional lines. In *Dred Scott*, Americans perceived the Court as handing one side total victory in that highly divisive conflict. Political rhetoric around the decision was fiery; Abraham Lincoln famously charged that the decision was the result of "a conspiracy to make slavery national."

Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 155 (2019).

45. *About the Supreme Court*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about [https://perma.cc/DF5V-7V62] (last visited Nov. 9. 2021) (Reinforced by the directives of the Constitution, Congress also sets the outer limit of the Court's jurisdiction. It was not until the Certiorari Act of 1925 that the Court was given discretion to decide which cases it would hear, but the Court is still constrained by the limits Congress set forward in the Constitution and the Judiciary Act of 1789).

significance—also awarded to Congress an inherent ability to rule over the Court with an iron fist.

By holding the authority to set the size, Congress could in theory reframe the Court if it ever acted counter to Congress's vision.[46] Although the size of the Supreme Court has been unchanged for well over a century, the threat to judicial independence that comes from Congress's ability to modify the number of justices has been seen before: Congress initially decided the Court would have six justices but changed the number to five in 1801 to stop incoming President Jefferson from weakening the Federalist control of the Court.[47] In 1863, Congress expanded the Court to ten justices during the Civil War, a move to help President Lincoln in his anti-slavery efforts and "shore up support for Republican, pro-Union interests on the Court."[48] Shortly thereafter, Congress then cut that number back to seven justices in order to prevent President Johnson from appointing any justices, before setting the number at nine once he left office.[49] These actions show once again that any notion of judicial independence is regrettably unrealistic when Congress can, at any time, swing its iron fist at the Supreme Court and attempt to influence its jurisprudence by altering the Court's configuration. Moreover, the adjustments to the Court during President Jefferson's first term and President Jackson's second term reinforce the fact that qualms between the legislative and executive branch bring politics directly into the Court—once again blockading judicial independence.

b. The Power to Confirm

The Senate holds the power to block any nomination, as the Constitution grants it the authority to offer the president "advice and consent" regarding a nominee's fitness to serve on the Court and requires the Senate's confirmation before any nominee can take the bench.[50] Because of the vagueness of this statement, there are no constraints in place for the kinds of advice it should offer the president or the considerations the Senate should contemplate before consenting to a nominee.[51] It should not be a surprise, then, that senators have determined that their

46. Article III of the Constitution delegated to Congress the power to decide how to organize the Supreme Court. *See Why does the Supreme Court have nine justices?*, NAT'L CONST. CTR., https://constitutioncenter.org/blog/why-does-the-supreme-court-have-nine-justices [https://perma.cc/PUV3-45QW] (last visited Mar. 13, 2022). Congress exercised this power for the first time one year later in the Judiciary Act of 1789, setting the number of justices at six. *Id*. Congress changed that number to five through the Judiciary Act of 1801, to ten through the Judiciary Act of 1863, and to nine through the Judiciary Act of 1869. *Id*.

47. Digital History, *War on the Judiciary*, http://www.digitalhistory.uh.edu/disp_textbook.cfm?psid=2982&smtID=2 [https://perma.cc/AWH3-B2F8] (last visited Nov. 9, 2021).

48. Epps & Sitaraman, *supra* note 44, at 164.

49. *Id*.

50. U.S. CONST. art. II, § 2, cl. 2.

51. Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1205 (1988); *see also* CONG. RESEARCH SERV., R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote* 5 (2021).

advice can include matters of political concern and that the inverse of consent can somehow mean outright political opposition.[52] We can once again see that, in a governmental system of people, by people, over people, it is nearly impossible to leave politics outside the judicial chamber—even in the pursuit of judicial independence.[53]

Although their job responsibilities and the details of their electoral process differ from the president, the members of the Senate are still also representatives of political parties. As such, like the president senators would prefer to have a Court made up of justices who will interpret the law in a way that furthers certain ideals; senator's decision to object, or vote to block, a president's nominee is seen as "a traditional and effective way of challenging and focusing attention upon the policies which that nominee is presumed to represent."[54] By inquiring into the nominee's values and predicting their opinions on certain issues, instead of assessing the nominee's intelligence and ability to fairly adjudicate, the senators make the confirmation process even more political than it already is with the president's involvement. Political attacks on judicial nominees have been prevalent since the Supreme Court's inception. In fact, during the nineteenth century, "the Senate rejected one out of every four nominees for the Supreme Court, often on strictly partisan grounds."[55]

It must again be asked: how can a Court really achieve independence if a senator's political concerns and endorsements are imprinted on a nominee, even if such a pursuit does not defeat the nomination? The answer, it seems, is it cannot. This riposte is a stark reminder that, despite the fact that the Senate has confirmed more nominees than it has blocked overall,[56] the degree of its power in this process and the implicit political nature of its role as a political body contributes to a Court imbedded with politics.[57]

C. THE IMPACT OF MODERN AMERICA

The political embers with the Supreme Court, created by executive and legislative involvement in the institution's governance, have erupted from sparks into

52. CONG. RESEARCH SERV. ("During the George W. Bush presidency, a Senate Judiciary subcommittee examined the question of what role ideology should play in the selection and confirmation of federal judges. In his opening remarks, the chair of the subcommittee, Senator Charles E. Schumer (D-NY), stated that it was clear that 'the ideology of particular nominees often plays a significant role in the confirmation process.' The current era, he said, 'certainly justifies Senate opposition to judicial nominees whose views fall outside the mainstream and who have been selected in an attempt to further tilt the courts in an ideological direction.'").

53. *See* Monaghan, *supra* note 51, at 1206.

54. Joel B. Grossman & Stephen L. Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, 1972 DUKE L.J. 557, 557 (1972).

55. James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 337 (1989).

56. *Supreme Court Nominations (1789Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm [https://perma.cc/QA2C-SF55] (last visited Dec. 11, 2021).

57. *See* Monaghan, *supra* note 51, at 1207.

flames. The blaze exists outside of the Court, with the concerning aspects of the executive and legislative roles becoming more pronounced, and within the Court, with the justices more profoundly demonstrating the harmful effects of these political actors on jurisprudence. When taken in combination, the modern realities and surrounding the Court have made it clear—if it was not already so—that it is considerably impacted by the democratic institution and judicial independence cannot exist.

1. THE SCOURGE OF A POLARIZED SOCIETY

Legal scholars Daniel Epps and Ganesh Sitaraman properly characterized the impact of America's current political state on the already problematic process of formulating the Supreme Court. "[T]hese flaws were less apparent in an age when the leading political parties were less polarized. But now, given extreme ideological sorting, politicians of both parties realize the stakes of Supreme Court appointments and are firmly committed to staffing the Court with ideological comrades."[58] Epps and Sitaraman attribute this "ideological sorting" and subsequent rise in candor to a troubling mixture of "several factors—such as increased polarization in society, the development of polarized schools of legal interpretation aligned with political affiliations, and greater interest-group attention to the Supreme Court nomination process."[59]

Because of the importance of party affiliation today, politicians are unreserved in admitting the great lengths to which they will go to control the Court; "raw power is the name of the game."[60] Structuring the Supreme Court can be seen as a "political football,"[61] with Democrats and Republicans going head-to-head to gain possession of the Court's majority. The efforts of these politicians are not without success. In recent years, "justices have hardly ever voted against the ideology of the president who appointed them. Only Justice Kennedy, named to the Court by Ronald Reagan, did so with any regularity."[62] The general loyalty of justices to the president who appointed them has made it "impossible to regard the [C]ourt as anything but a partisan institution."[63]

Epps and Sitaraman were correct in their analysis, but they forgot to underscore the bleak fact that the amplified partisanship in this courty only has such a detrimental effect on the Court because the defining parameters of the judiciary allowed the branch to become intertwined with politics.[64] The most notorious

58. Epps & Sitaraman, *supra* note 44, at 168.

59. *Id*. at 152.

60. *Id*. at 157.

61. *Id*. at 152.

62. Lee Epstein & Eric Posner, *Opinion, If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html [https://perma.cc/8F3J-A24N].

63. *Id*.

64. *See generally* STEPHEN L. CARTER, THE CONFIRMATION MESS (1994) (discussing the improper politization of the confirmation process and the harmful impacts of contentious Senate hearings).

example of this was seen in the events that led to the appointments of Justice Gorsuch and Justice Coney Barrett. In 2016, Senator McConnell, the majority leader of the Republican-controlled Senate, refused to consider President Obama's nominee, now Attorney General Garland, to fill the vacant seat that resulted from Justice Scalia's death.[65] Senator McConnell declared "any [nomination] by the sitting president to be null and void" because "the next Supreme Court justice should be chosen by the next president—to be elected later that year."[66] Justice Scalia was considered an "icon of conservative jurisprudence"[67] and anyone nominated by Democratic President Obama would be the very opposite. Subsequently, President Obama's successor, President Trump, faced no resistance from the Republican-controlled Senate when he nominated Justice Scalia's replacement.[68] Justice Gorsuch was sworn into the Court 422 days after Justice Scalia's death—the longest vacancy on the Court since it had become a nine-justice body.[69]

Four years later, Senator McConnell changed course in convenient moment for the Republican party. When liberal Justice Ginsburg died months before the 2020 presidential election, Senator McConnell allowed President Trump to nominate a replacement and permitted the necessary Senate hearing before election day.[70] This time, Senator McConnell deemed his move to be permissible, since the American people had elected the Republican-majority to "work with President Trump and support his agenda."[71] The result was Justice Coney Barrett's appointment, strengthening the conservative majority on the Court.

Despite Senator McConnell's questionable ethics, he did not cross any official legal lines—the Constitution requires the Senate's "advice and consent" for Supreme Court appointments and provides *no* direction as to what this process must entail.[72] Senator McConnell's conduct reinforces a series of truths, all of

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65. Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2242 (2019).

66. Ron Elving, *What Happened With Merrick Garland in 2016 and Why It Matters Now*, NPR, https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now [https://perma.cc/Z68B-JHFM].

67. *Id.*

68. *See* Epps & Sitaraman, *supra* note 44, at 156 ("The inescapable conclusion from these events [i.e., how Justice Gorsuch joined the Court] is that party affiliation of Supreme Court Justices matters.").

69. Alana Abramson, *Neil Gorsuch Confirmation Sets Record For Longest Vacancy on 9-Member Supreme Court*, TIME (April 7, 2017), https://time.com/4731066/neil-gorsuch-confirmation-record-vacancy/ [https://perma.cc/9QYM-EDET].

70. Kelsey Snell, *McConnell: Trump's Nominee to Replace Ginsburg Will Receive a Vote in the Senate*, NPR (Sep. 18, 2020), https://www.npr.org/sections/death-of-ruth-bader-ginsburg/2020/09/18/914650878/mcconnell-trumps-nominee-to-replace-ginsburg-will-receive-a-vote-in-the-senate [https://perma.cc/2X9J-XQXK].

71. *Id.*

72. This calls into question once again the alarming fact that the Framers provided virtually no direction for what the Senate's "advice and consent" role actually means. *See generally* Cong. Research Serv., *supra* note 52; James E. Gauch, *supra* note 55. Because Senator McConnell appeared to face no repercussions for his actions, and the Senate as a body did not immediately work to prevent this from happening in the future, it also makes clear that the degree of the Senate's power over the Court in this regard can go virtually unchecked, highlighting in a different way that the system of checks and balances is inherently faulty.

which coincide to reflect the inevitable political nature of the Court and the impossibility of judicial independence: that the partisan battles between the legislative and executive branch over the Court so often carry into the Court; that two political branches tasked with determining the Court's composition will lead to an inherently political Court; and that the confirmed justices are implicitly expected to serve as representatives of the political parties that fought tooth and nail for their appointments.[73] The justices themselves are not helping combat this narrative.

2. THE REALITY OF STRATEGIC JUSTICES

Whether they have decided to be more explicit with their involvement in the American political game or because of the tacit expectation that appointed justices remain loyal to the political figures responsible for their appointments, the members of the Supreme Court contribute to the surging national partisan divide.[74] Although the nation's polarization has become more pronounced in recent years, the Court's engagement in appeasing political demands and making decisions based on political strategy, rather than solely the law, can be traced back much further.

a. Changing Votes

When President Roosevelt, frustrated by the Court's interference with his New Deal legislation, sought to drastically readjust the Court in 1937, it is said that Justice Owen J. Roberts changed his jurisprudence to uphold President Roosevelt's legislation and save the Court from any structural changes—a move that has been widely regarded as "the switch in time that saved nine."[75] This

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73. *See* Epps & Sitaraman, *supra* note 44, at 169 ("As we see it, a key problem with how the Supreme Court works today is that its design makes it possible for political parties to capture control over the institution using bare-knuckle tactics, leading to the apocalyptic confirmation battles we have seen in recent years. Such conflicts were not foreseen at the Founding.").

74. This Note focuses on the behavior of the justices as it relates to the cases before the Court, but an equally illustrative example of their engagement with politics can be found in the tactical timing decisions for retirement:

> Breyer acknowledged the possibility that by delaying his retirement further, he increased the risk that his successor would be ideologically opposed to everything he's done on the bench. Nearly 20 years ago, then-Chief Justice William Rehnquist was asked whether it was "inappropriate for a justice to take into account the party or politics of the sitting president when deciding whether to step down from the court." The conservative jurist replied at the time, "No, it's not inappropriate. Deciding when to step down from the court is not a judicial act."

Steven Benen, *Justice Breyer raises eyebrows with new comments about his plans*, MSNBC (Aug. 27, 2021), https://www.msnbc.com/rachel-maddow-show/maddowblog/justice-breyer-raises-eyebrows-new-comments-about-his-plans-n1277786 [https://perma.cc/6RN9-DGWX].

75. DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT 51–52 (5th ed. 2011).

intentional jurisprudential shift occurred again in the historic 2012 case *National Federation of Independent Business v. Sebelius*.[76] There, Chief Justice John Roberts reportedly "switched his vote on the [constitutionality of the] individual mandate [within the Affordable Care Act] in order to safeguard the Supreme Court's reputation" in the eyes of both the other branches and the country as a whole.[77] Regardless of whether it is done in an effort to thwart off the efforts of another branch, as seen by Justice Owen J. Roberts in 1937, or as a deliberate move in a game of political chess, as seen by Chief Justice Roberts in 2012, intentionally changing votes is a strategic effort by the Court—one that undermines the integrity of the judiciary as an institution and is the direct opposite of judicial independence.

Further, justices' willingness to vote a particular way because of political ideology was also seen in the landmark presidential election case *Bush v. Gore*.[78] In reversing a Florida Supreme Court decision ordering the recount of the state's presidential ballots in the 2000 election, leading to a victory for George W. Bush, the five conservative justices on the Court "seemed to adopt whatever legal arguments would further the election of the Republican candidate" and further solidify "partisan political advantage."[79] At this stage, despite the starkness of the behavior exhibited, the conservative majority still tried to claim righteousness—an effort that fooled few:

> Associate Justice Clarence Thomas addressed a group of students in the Washington, D.C., area. He told them that he believed that the work of the Court was not in any way influenced by politics or partisan considerations. . . Afterwards the question on many legal scholars' minds was not whether Justice Thomas had in fact made these statements. The question was whether he also told the students that he believed in Santa Claus, the Easter Bunny, and the Tooth Fairy.[80]

The conservative justices' stance in *Bush v. Gore* demonstrated that, in moments of political furor, independence and principled jurisprudence have given way to preservation of the political power of the justices' affiliated party. In recent years, members of the Court have shifted from such attempts to disguise their efforts and have instead been outright in voicing their affiliations and personal motivations.

b. Taking Sides

During a contentious confirmation process, which included a hearing conducted by the Senate Judiciary committee into sexual assault allegations against

76. 567 U.S. 519 (2012).
77. Grove, *supra* note 66.
78. 531 U.S. 98 (2000).
79. Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics,* 110 YALE L.J. 1407 (2001).
80. *Id.*

him, then Judge, now Associate Justice, Kavanaugh gave testimony that was widely viewed as "nakedly partisan."[81] Kavanaugh, on the defense, proclaimed that they were a "calculated and orchestrated political hit" put on by the Democratic party in an effort to take him down.[82] He even went so far as to allege that the hit was "revenge on behalf of the Clintons" and that left-wing opposition groups were funding such an attack against his character.[83] The partisanship of Kavanaugh's commentary was subsequently an accusation that the entire confirmation process was being manipulated by politics[84]—this just weeks after his formal confirmation hearings in front of the committee during which he presented himself as the "model of neutrality" and reiterated his belief that an independent Court is the crown jewel of our Constitution.[85] If it had not been made clear before, Justice Kavanagh's confirmation process exposed the troubling extent to which politics had infiltrated the Court's staffing process—a process that the Framers thought would help foster the notion of independence within the judiciary.[86]

As I was about to finalize this Note, we learned of additional concerning conduct by the Court. In March of 2022, news broke that Ginni Thomas, wife of Justice Clarence Thomas, had asked Mark Meadows, Chief of Staff to former President Trump, to "push claims of voter fraud and work to prevent the [2020] election from being certified" in text messages spanning from November 2020 to January 2021.[87] In January 2022, shortly before the news broke, Justice Thomas was the lone dissenter in the Court's decision to reject President Trump's efforts to conceal presidential records relating to the issues of January 6, 2021.[88] The possibility that the Court will hear additional cases concerning January 6 has provided a concrete example of justices' personal and political conflicts of interest."

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81. Epps & Sitaraman, *supra* note 44, at 150; *see also* Grove, *supra* note 66 ("The 2018 confirmation process for Justice Kavanaugh was said to be problematic in several respects: Republicans withheld information about the nominee's service in the White House and failed to adequately investigate charges of sexual assault; and the nominee himself offered what many saw as openly partisan testimony in responding to the latter allegations.").

82. Michael Kranish, Emma Brown & Tom Hamburger, *Kavanaugh takes partisan turn as he lashes out at 'search and destroy' Democrats*, WASH. POST (Sep. 27, 2018), https://www.washingtonpost.com/politics/kavanaugh-takes-partisan-turn-as-he-lashes-out-at-search-and-destroy-democrats/2018/09/27/99bcd386-c293-11e8-b338-a3289f6cb742_story.html [https://perma.cc/2Z24-C52R].

83. *Id.*

84. *Id.*

85. *Id.*

86. THE FEDERALIST NO. 51, *supra* note 11.

87. Ryan Nobles, et al., *First on CNN: January 6 committee has text messages between Ginni Thomas and Mark Meadows*, CNN POLITICS (Mar. 25, 2022), https://www.cnn.com/2022/03/24/politics/ginni-thomas-mark-meadows-text-messages/index.html [https://perma.cc/6JRK-2HZG].

88. Dan Mangan, *Senate Democrat Wyden says Supreme Court Justice Thomas should recuse in cases involving Trump, Jan. 6 Capitol riot*, CNBC (Mar. 25, 2022), https://www.cnbc.com/2022/03/25/clarence-thomas-should-recuse-in-trump-january-6-cases-ron-wyden-says.html [https://perma.cc/X5TT-82YZ].

Additionally, in May of 2022, an unknown source leaked a draft decision in the pending case *Dobbs v. Jackson Women's Health Organization*.[89] The draft majority opinion, written by Justice Alito and seemingly joined by the other four conservative justices, would overturn *Roe v. Wade* and allow states to determine whether to protect, restrict, or ban access to abortion.[90] An unprecedented occurrence, the leaked draft contained commentary proclaiming that the right to an abortion was erroneously declared a constitutional guarantee and promising an end to the long-standing protection created by *Roe*.[91] In the aftermath, the country has been left wondering who was responsible for the leak. One leading theory is that a clerk for one of the conservative justices did it in an effort to lock in the majority necessary to take the opinion from an nonbinding draft to a final holding from the Court, an outcome that has long been sought by the Republican party that gave the conservative justices their seats on the Court.[92] Conversely, others believe that one of the liberal justices leaked the opinion in an effort to create enough public outrage to pressure the Court to change course.[93] Neither theory has been proven, and we may never know the source of the leak, but these theories underscore the fact that the Court is not an independent arbiter, but rather a player in the political game.

The reality of a leak within the Court and the conspiracy theories that followed were not the only issues created by the leak; there are additional concerns about the allegedly hypocritical behavior demonstrated by Justices Gorsuch, Kavanaugh, and Coney Barrett, the three Trump-appointed justices presumed to be a part of the five-justice majority in *Dobbs*.[94] Each stated in their confirmation hearings that they believed *Roe v. Wade* was settled law of the land and precedent deserving of adherence under *stare decisis*,[95] yet each seems to be taking the first opportunity available to overturn it. While we are left waiting to learn more about the leak, as well as any repercussions from Justice Thomas's decision to vote on President Trump's records, both instances serve as stark examples of the glaring presence of politics, in some shape or form, within the Court.

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89. Josh Gerstein & Alexander Ward, *Supreme Court has voted to overturn abortion rights, opinion shows*, POLITICO (May 2, 2022), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/8MQD-Q3KJ].

90. *Id.*

91. *Id.*

92. Brad Dress, *NPR reporter says 'leading theory on SCOTUS leak is conservative clerk*, HILL (May 8, 2022), https://thehill.com/policy/healthcare/3481235-npr-reporter-says-leading-theory-on-scotus-leak-is-conservative-clerk/ [https://perma.cc/LJ6L-Y454].

93. Yael Halon, *Cruz unleashes on 'woke little leftwing twit' who leaked Supreme Court draft opinion: '12 likely suspects*,' (May 4, 2022), https://www.foxnews.com/media/cruz-supreme-court-abortion-leak-suspect-woke-little-left-wing-twit [https://perma.cc/X29E-39BS].

94. Gerstein & Ward, *supra* note 90.

95. Meredith Deliso, *What the Trump-appointed Supreme Court justices previously said about Roe's precedent*, ABC NEWS (May 3, 2022), https://abcnews.go.com/Politics/trump-appointed-supreme-court-justices-previously-roes-precedent/story?id=84470384 [https://perma.cc/GAM8-KMU3].

The past conduct of many of the justices has created an understanding in the public that, despite their attempts to convince otherwise, the members of the Court can be expected to vote generally along partisan lines in issues that come before the judiciary and do not leave politics at the chamber door.[96] Whether the justices show their cards outright or choose to pursue their political leanings in secret, the reality of such behavior on the Court further contradicts the notion of judicial independence that has been steadfastly regarded as the foundation of the Court.

III. MODERN DISCUSSIONS SURROUNDING THE COURT

As a result of the ongoing debate about the Court's legitimacy, reform has become a trending topic, with advocates expressing concern about the direction in which the Court is progressing and opponents declaring that any reform would go against the original intent of the Framers.[97] The dialogue surrounding Court reform has become so pervasive that President Joe Biden even established the Presidential Commission on the Supreme Court of the United States to analyze "the principal arguments on both sides of this debate and appraise the merits and legality of recognized reform proposals."[98] There are many irons in the reform fire, but most are grounded in the idea of saving judicial independence—a principle that has been shown to be impossible in our current system of government. Even the justices have joined the conversation, speaking publicly in defense of judicial independence and pleading with the country to believe in the concept.[99] A more effective approach would be to accept its unattainability, reconsider what we have defined as the intended core of the Court, and develop suitable reformatory measures accordingly.

A. SOME OF THE POPULAR VIEWS: REFORMS THAT MISS THE POINT

While numerous ideas have been shared, the most popular proposals put forward to reform the Court are focused on addressing the same issue: that the institution is unable to remain independent due to the prevalence and impact of

96. Joan Biskupic, *Dissension at the Supreme Court as justices take their anger public*, CNN POLITICS, https://www.cnn.com/2021/10/01/politics/supreme-court-unhappy-justices/index.html (Oct. 1, 2021) ("[W]hen Justice Breyer decides to write a book and Justice Barrett decides to go to the McConnell Center in Louisville, Kentucky, and argue that 'no politics, we're just playing them straight, calling them as we see them,' and then you look at this (Texas abortion case), well, it defies description.") [https://perma.cc/528S-AHB9].

97. *See* Kaye, *supra* note 17, at 728 ("Whatever precisely ignited current interest, the subject of criticism of courts—politicizing the judiciary—has earned its spot among high-profile issues of the day.").

98. *Presidential Commission on the Supreme Court of the United States*, THE WHITE HOUSE, https://www.whitehouse.gov/pcscotus/ [https://perma.cc/B6M3-749N] (last visited Nov. 9, 2021).

99. *See e.g.*, Adam Liptak, *Chief Justice Roberts Reflects on Conflicts, Harassment and Judicial Independence*, N.Y. TIMES (Dec. 31, 2021), https://www.nytimes.com/2021/12/31/us/politics/john-roberts-supreme-court.html?auth=login-email&login=email [https://perma.cc/U9DP-7VJE].

politics.[100] Unfortunately, these proposals are destined for failure because they are motivated by the pursuit of a concept—judicial independence—that has been shown to be both impossible and unnecessary to achieve the Court's more significant responsibility.

1. EXPANDING THE COURT

One common proposition is to expand the number of justices on the Court. As established, changing the size has occurred on multiple occasions since the Court's inception; although historically in the name of "constitutional hardball,"[101] rather than reform. Some advocates believe the Court should be expanded by four to include thirteen justices;[102] others think that fifteen justices are necessary.[103] Regardless of the number recommended, and efforts to frame the rationale as "restor[ing] balance to the [C]ourt" and achieving some semblance of judicial independence,[104] these proposals are politically motivated in practice. Democrats are generally leading the current efforts for Court reform, in large part due to a growing frustration with both the Republican party and the conservative justices they appointed.[105] Democrats seem to believe that expanding the Court while they maintain control of the executive and the legislature will rectify the damage caused by Senator McConnell's hypocrisy between 2016 and 2020. Such political motivations, while ethically troubling, are natural consequences of the checks and balances system of government—a system which, again, cannot be reconciled with judicial independence. Whether we add one or one hundred justices, the politics that motivate any sort of expansion preclude the measure, as repeatedly presented, from creating an independent judiciary; the executive and legislative branches would still be subjecting the Court to their partisan preferences.

2. INSTITUTING TERM LIMITS

Another idea suggested to reform the Court involves term limits. Regardless of the length of the term put forward, this proposal would require an amendment to

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100. Given the number of arguments presented on all sides, the following proposals are only presented and critiqued at a high level.

101. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004).

102. Press Release, H. Comm. on the Judiciary, Expand the Supreme Court: Reps. Nadler, Johnson, and Jones and Senator Markey Introduce Legislation to Restore Justice and Democracy to Judicial System (Apr. 15, 2021), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4508 [https://perma.cc/JCW6-V3SB].

103. Russell Wheeler, *Should we restructure the Supreme Court?*, POLICY 2020 (Mar. 2, 2020), https://www.brookings.edu/policy2020/votervital/should-we-restructure-the-supreme-court/ [https://perma.cc/3AHC-LAUB].

104. Press Release, H. Comm. on the Judiciary, *supra* note 103.

105. Wheeler, *supra* note 104.

the Constitution,[106] which provides that justices will serve lifetime appointments so long as they maintain "good behavior."[107] The main justifications for term limits are that they would arguably address the "gamesmanship by justices in choosing their replacements," create "more predictability in turnover and appointment," and lead to "less of an incentive to appoint younger justices to ensure a longer foothold on the bench."[108] There are strong arguments in favor of instituting term limits, but like expanding the Court, the basic structure of the Court would still remain intact—and so would the problems it created.

There is an expected originalist argument against term limits. The Framers believed that, without lifetime appointments, the Court would be subject to the pressures of those who put them in office—whether through the appointment process or some sort of recurring election following appointment.[109] These pressures would, the Framers worried, cause the members of the Court to engage in bad faith politics and prevent them from acting independently.[110] Even if originalists were persuaded by this means of reform, notwithstanding their usual commitment to the Federalist Papers,[111] term limits would still fail to create judicial independence, since the checks and balances system would seemingly still govern the appointment process for each term.

3. GUARANTEEING APPOINTMENTS FOR EVERY PRESIDENT

Other proponents of Court reform think the best tactic is to stabilize the playing field within the executive branch. Under this solution, Congress would pass a law that guarantees every president would get two appointments per four-year term.[112] Should the nominee be rejected by the Senate, the president would be able to keep presenting nominees until one was confirmed.[113] Further, the death or resignation of sitting justice would not entitle a president to name additional

106. Some advocates believe it could be achieved through a statute, but there are a number of counterarguments that would likely be presented against this specific approach. *See* Mitch Jagodinski, *Term limits emerge as popular proposal at latest meeting of court-reform commission*, SCOTUS BLOG (Jul. 21, 2021 at 1:48 PM), https://www.scotusblog.com/2021/07/term-limits-emerge-as-popular-proposal-at-latest-meeting-of-court-reform-commission/ [https://perma.cc/D73X-QLZR].

107. U.S. CONST. art. III. Such an amendment could include language regarding mental fitness. It is improbable that those who oppose reformatory measures would allow this sort of change to the charter.

108. Jagodinski, *supra* note 107.

109. THE FEDERALIST NO. 78, *supra* note 16. This belief is interesting, as the justices seem to have been subjected plenty to these pressures despite the existence of lifetime appointments.

110. *Id.*

111. *Id.* ("If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.").

112. E. Donald Elliot, *Fixing a Broken Process for Nominating US Supreme Court Justices*, THE CONVERSATION (Oct. 15, 2018), https://theconversation.com/fixing-a-broken-process-for-nominating-us-supreme-court-justices-104629 [https://perma.cc/T5W2-JZ4M].

113. *Id.*

justices and the Senate would be required by statute to confirm two nominees each presidential term.[114] This promised appointment method would certainly prevent a reoccurrence of Senator McConnell's conduct in 2016 and would also address the political imbalance that can occur when some presidents get fewer appointments than others. On the other hand, this proposal does no more to ensure judicial independence than the current practice, for the politics behind the presidents' decision-making process would still persist.

B. A BETTER APPROACH TO THE ISSUE: LOOKING BEYOND JUDICIAL INDEPENDENCE

Ultimately, a structure of checks and balances and a truly independent judiciary are mutually exclusive concepts. Many of the current concerns about the Court fail to recognize this truth and are stuck trying to force harmony between two contradicting ideas. It is unsurprising that this results in a polarity of views about the judiciary as an institution. What if we have mistakenly clung to judicial independence as the intended bedrock for the Court? Could all of our debates and disagreements about the Court actually be due to our incorrect interpretation of its true purpose? The Framers certainly believed judicial independence was of significant importance to the success of the judicial branch. Although noteworthy, perhaps we have erred in presuming that this principle was meant to be *the* ultimate goal, instead of simply a proposed means of achieving a greater one: a branch that would steadfastly serve as the "bulwark" of the Constitution.[115] Consequently, measures like expansion, term limits, and guaranteed appointments are misfocused these reforms are motivated by, and focused on, the unachievable objective of judicial independence—an objective that also is not the only avenue for achieving the Court's intended function of safeguarding the charter. Viewed in this light, the structure of checks and balances remains compatible with the actual purpose of the judiciary.

Like the members of the legislative and executive branches, the justices are only human: each comes to the bench carrying with them their lived experiences; each likely participates in our democratic process through voting; each holds their own opinions and perspectives on the state of the world and the issues in it. I contend that the politics which have manifested in the Court, as a result of the structure, do not *alone* prevent its members from fulfilling the role of the Constitution's fiercest protectors; the presence of politics is only problematic when it acts as an interference to the execution of that responsibility.

The Federalist Papers emphasized the significance of judicial independence on multiple occasions, but this principle was discussed as a part of a broader theme.[116] While asserting the necessity of the proposed multi-faceted government

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114. *Id.*

115. THE FEDERALIST NO. 78, *supra* note 16.

116. *See e.g.*, THE FEDERALIST NO. 51, *supra* note 11; THE FEDERALIST NO. 78, *supra* note 16.

for the new nation in Federalist 51, James Madison explained, "[j]ustice is the end" and it should be forever pursued until obtained.[117] When the Framers discussed the role of the judiciary in the quest of justice, they tasked it with the responsibility of being the "bulwark" of the Constitution.[118] This meant standing as a protective force between the other branches and the people to ensure that the rights guaranteed to the people by the charter were never threatened.[119] The Framers then introduced the concept of judicial independence as a means of executing this duty because they believed the members of the judiciary would be better able to perform the role if uninfluenced by the political branches of the government. But judicial independence was not the *only* means set forward under this logic; the Framers also deemed permanent tenure[120] and judicial review[121] to be just as important to the pursuit of upholding the Constitution. While the principle of judicial independence was both laudable and sensible in theory, the Framers precluded it from the start through the checks and balances system of government. Nonetheless, the grander end of the Court—serving as the designated protector of the Constitution in the tireless pursuit of justice—is entirely possible within such a structure. An unsuccessful or impracticable means does not in and of itself defeat the end.

By more fully understanding what the Framers imagined as the role of the Court, the political undertones that have developed within it are less startling. Being a "bulwark" of the Constitution, like most things, is a subjective term, and thus the justices' varying interpretations of how they should fulfill this role are understandable. From this perspective, the modern concerns about the state of the Court shift. The issues are not whether the judiciary is wholly independent from the two political branches, but rather whether the members of the Court are acting fervently to safeguard the democratic structure created and the rights guaranteed to the people by the Constitution. When we analyze the Court through this lens, we see that the politics present within the institution are a detriment if, and only if, they obstruct the constitutional duty of being a "bulwark." Reform then becomes more realistic.

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117. THE FEDERALIST NO. 51, *supra* note 11.

118. *See generally* Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 456 (1986) (discussing how the intended role of the judiciary, and of the Supreme Court in particular, was to serve as the bulwark of a limited constitution).

119. THE FEDERALIST NO. 78, *supra* note 16.

120. *Id.* ("That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.").

121. *Id.* ("A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.").

1. IMPLEMENTING A DETAILED CODE OF ETHICS

The political aspects within the Court do not singlehandedly preclude it from standing as the "bulwark" of the Constitution. Rather, such elements are expected results of the governmental structure the Framers purposefully put into place. Politics become problematic when they interfere with the Court's ability to protect the rights guaranteed by the Constitution, whether through influence or dishonorable motivations. Because "bulwark" is not explicitly defined in early documents like the Federalist Papers,[122] it has consequently become a subjective term; justices interpret it differently and each believes they are accomplishing the duty through their personal definition. Justice Scalia deemed his originalist style—adhering strictly to the meaning of the words in the Constitution at the time the charter was written—as the epitome of protecting the people's rights;[123] Justice Breyer opposes the originalist approach and instead proclaims that discerning the Framers' intent is best.[124] Subsequently, a potential solution to ensuring that the Court is fulfilling its responsibilities could be the creation of a formal code of ethics to which every justice must adhere and in which the bounds of interpretation are not limitless. This is not to say that the justices would be prohibited from using their various interpretive methods when analyzing and applying laws to the specific cases before the bench.[125] Instead, such a code would seek to provide some objectivity to the role of being a "bulwark", clearly delineating both the expectations *and* the limitations. The justices would be required to answer to the code in moments of questionable conduct, and there would be a measure of accountability that is currently missing from the Court.[126]

This concept of a code of ethics been put forward before by a number of interest groups in response to the noteworthy fact that the "nine justices of the Supreme Court are the only federal judges not bound by the Code of Conduct for U.S. Judges, which goes beyond the basic ethics laws enacted after Watergate and creates uniformity around thorny issues like recusals and participation in political activities."[127] Many versions of proposed codes of ethics for the justices are based on the Code of Conduct for United States Judges and the American Bar

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122. *See id.*; THE FEDERALIST NO. 51, *supra* note 11.

123. *Antonin Scalia*, OYEZ, https://www.oyez.org/justices/antonin_scalia [https://perma.cc/HX59-FWB2] (last visited Mar. 31, 2022).

124. *Stephen G. Breyer*, OYEZ, (https://www.oyez.org/justices/stephen_g_breyer [https://perma.cc/K34V-FU5E] (last visited Dec. 11, 2021).

125. *See* RICHARD FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT 129–32, 142–48. In his book, Fallon notes that such interpretive methods are a natural reality of our legal system, but also importantly recognizes that such methods are only legitimate if a justice adopts a reliable approach, applies that desired approach consistently as well as in good faith across a range of cases, and makes sensible moral judgments.

126. If this sort of code is proven successful, it could be expanded or altered to cover the roles of the legislative and executive branches in the appointment process. This might prevent a reoccurrence of Senator McConnell's conduct and provide some parameters for the president's behavior in selecting appointees as well.

127. Fix The Court, *Code of Ethics*, https://fixthecourt.com/fix/code-of-ethics/ [https://perma.cc/Y6PP-D4QY] (last visited Nov. 9, 2021).

Association's *Model Code of Judicial Conduct*.[128] In most cases, advocates suggest starting with these codes but do not offer any further provisions. While these examples provide a strong direction, the descriptions within them are fairly vague and—like much of American law—can be construed in a number of ways.[129] For example, what does it really mean for a judge to "maintain and enforce high standards of conduct and personally observe those standards, so that the integrity and independence of the judiciary may be preserved"?[130]

A code of ethics would be more useful if it included and addressed specific types of conduct that hinders the ability to be a "bulwark" of the Constitution based on tangible past actions by justices. A concrete definition of what it means to satisfy this role would remove much of the subjectivity that has led to the modern problems of the Court today. For instance, Justice Kavanaugh's behavior during his confirmation hearing could have been subject to the ethics code; while political opinions do not in and of themselves prevent a justice from satisfying their duties as a "bulwark" of the Constitution, there is a sound argument that Justice Kavanaugh's combative political commentary could prevent him from protecting the rights of the American people who identify with the groups his statements intended to attack. By the same logic, justices who give speeches to interest groups[131] or go on book tours[132] could be subject to the code if it defined specific forms of engagement with the public that compromise the justices' ability to impartially defend the Constitution.

It would also be beneficial if the responsibility of drafting the code was not left to the justices,[133] but was instead done by a neutral committee like the American Bar Association. The Association could also propose an independent response to addressing violations of the code, rather than leaving enforcement to the justices.[134] Such a response might be a formal review process by the Association, an automatic suspension, or a strike system. The more detailed the code of conduct,

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128. Alicia Bannon & Johanna Kalb, *Why We Need a Code of Ethics for the Supreme Court*, TIME (Oct. 1, 2019), https://time.com/5690513/code-ethics-supreme-court/ [https://perma.cc/YY9F-ZVCP].

129. *Code of Conduct for United States Judges*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#b [https://perma.cc/WM6D-4H6R] (last visited Nov. 9, 2021).

130. *Id.*, at Canon 1.

131. *See e.g.,* Adam Liptak, *In Unusually Political Speech, Alito Says Liberals Pose Threat to Liberties*, N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/2020/11/13/us/samuel-alito-religious-liberty-free-speech.html [https://perma.cc/8ZZ9-K6MT]; Richard Wolf, *'The People's Justice': After decade on Supreme Court, Sonia Sotomayor is most outspoken on bench and off*, USA TODAY (Aug. 12, 2019), https://www.usatoday.com/story/news/politics/2019/08/08/justice-sonia-sotomayor-supreme-court-liberal-hispanic-decade-bench/1882245001/ [https://perma.cc/82RW-Y8R5].

132. Ian Millhiser, *Justice Breyer's new warning for Democrats couldn't have come at a worse time*, VOX (May 29, 2021), https://www.vox.com/22454648/justice-stephen-breyer-supreme-court-retirement-book-harvard-court-packing-voting-democracy [https://perma.cc/7YYH-C8UD].

133. It seems common to propose that the justices write their own code of conduct. *See* Bannon & Kalb, *supra* note 129.

134. Johanna Kalb & Alicia Bannon, *Supreme Court Ethics Reform: The Need for an Ethics Code and Additional Transparency*, BRENNAN CTR. FOR JUST. (Sep. 24, 2019), https://www.brennancenter.org/sites/default/files/201909/Report_2019_09_SCOTUS_Ethics_FINAL.pdf [https://perma.cc/C4AA-WCU6].

the easier it would be to attribute punishments for violating. Furthermore, if based on past conduct by justices from both the progressive *and* conservative sides of the bench, the code would be less disputable by those who oppose reforms because they see the measures as targeting a specific jurisprudence or ideology.

Without a statute or a change to the Constitution, the Court would not be obliged to follow a code of ethics.[135] Because the code as suggested would be a nonpartisan solution, since it would not change the composition of the Court or dictate the career decisions of the justices and would cover the whole gambit of conduct, advocates may have an easier time convincing opponents of reform in Congress to pass the necessary statute. Additionally, if the American people were made aware of the existence of and expected adherence to such comprehensive proposal, the public pressure could encourage the justices to support the idea as well. Unlike most other suggestions, this sort of ethical code would be built upon the understanding that politics within the Court are inevitable. Thus, it would take a forward-looking approach of establishing uniform constraints on the justices to prevent the political aspects from becoming detrimental to the institution's purpose. The implementation of a code of ethics would remind the Court, the other branches, and the public that the judicial branch is meant to be a "bulwark" of the rights guaranteed to the people, and any conduct running counter to that responsibility is as unethical as it is unconstitutional.

2. REQUIRING RECUSAL

As a feature of the code of ethics, or a separate measure of its own, justices should also be required to recuse themselves from any issue before the Court if they had previously made conclusive commentary beyond the bench about the topic of that case.[136] Whether the justices intend it or not, these public statements indicate that they see no need to hear certain cases on their merits because they already have firm views on such matters. Similarly, the justices' personal circumstances should be grounds for required recusal when such circumstances are apt to create a conflict between the justices and their ability to judge. The justices are incapable of fairly safeguarding the Constitution when they cannot put the law before their personal beliefs in every single issue that reaches the Court.

Under 28 U.S.C. § 455, justices are expected to disqualify themselves from any case in which their "impartiality might reasonably be questioned."[137] The list of situations that would call for a disqualification includes when a justice has a

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135. Since all eyes are on the Court at this time, public pressure could be a strong enough enforcement mechanism, but we cannot know for sure.

136. This would not include the legal reasoning and jurisprudential commentary made in the Court's majority, concurring, or dissenting opinions, as this would be impracticable given the importance of precedent in the institution's processes.

137. 28 U.S.C. § 455(a) (2020).

"personal bias or prejudice concerning a party."[138] As it stands today, though, 28 U.S.C. § 455 is ultimately powerless when applied to the members of the Supreme Court—the justices are the ones who ultimately decide whether they may have a conflict significant enough to into question their impartiality.[139] In other words, since the Court regulates itself, there is no disciplinary mechanism established for instances in which a justice should recuse but fails to do so.[140]

In this Term and the next, the Court is expected to hear cases on matters of significant public interest, including abortion, gun rights, vaccine mandates, and voting.[141] There is valid concern that the Court's current composition of five conservative justices means that these cases will be adjudicated in line with conservative values,[142] a concern that was only reinforced after the draft opinion for *Dobbs v. Jackson Women's Health* Organization, set to overturn *Roe v. Wade*, was leaked to the public.[143] Furthermore, the anticipation that the events surrounding the 2020 presidential election and January 6, 2021 will appear before the Court has become a point of discomfort for many Americans—especially after learning about Ginni Thomas's texts to President Trump's chief of staff[144] and Justice Thomas's now ironic lone dissent in the Court's decision to reject President Trump's efforts to conceal records relating to the insurrection on January 6.[145]

To address these issues, and others, Congress should strengthen or more strictly enforce 28 U.S.C. § 455 to ensure the justices are realistic in acknowledging and accepting their own conflicts. This would not eliminate any actual bias or prejudice held by the justices, but it could create some necessary pressure. Justices might be swayed to avoid making commentary in the public sphere on hot topics and to make sure they approach cases in which their personal values are implicated with a clearer sense of impartiality—or recuse themselves if they cannot. Similarly, justices might take extra effort to separate their personal lives

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138. 28 U.S.C. § 455(b)(1) (2020).

139. Nina Totenberg, *Legal Experts Agree: Justice Thomas must recuse in insurrection cases*, NPR (Mar. 30, 2022), https://www.npr.org/2022/03/30/1089595933/legal-ethics-experts-agree-justice-thomas-must-recuse-in-insurrection-cases [https://perma.cc/9GAY-VWTS].

140. *Id.*

141. *Supreme Court Cases, October term 2021-2022*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_cases,_October_term_2021-2022 (last visited Nov. 9, 2021) [https://perma.cc/HTJ5-XPCM].

142. Epps & Sitaraman, *supra* note 44, at 159–61 ("There is good reason to expect the new conservative majority to assert its power in high-profile, controversial cases. Most obvious is the possibility— though not the certainty—that the Court will overturn *Roe v. Wade*. . . Even if the Court declines to revisit Roe, there is little doubt that the Justices will wade into many other divisive areas over the coming years: the intersection of gay rights and religious liberty, the rights of corporations, the constitutionality of affirmative-action programs, the scope of presidential power, challenges to federal legislation under the Commerce Clause, thorny issues of free speech, and more. There is good reason to expect that, at least in some instances, the Court will. . . aggressively impose its will.").

143. Gerstein & Ward, *supra* note 90.

144. Nobles, et al., *supra* note 88.

145. Mangan, *supra* note 89.

from their professional duties to avoid tension between the two to the extent possible.

Like any solution, required recusal is imperfect. Chiefly, this reformatory measure would require compliance from the Court. Considering the longstanding practice that each justice decides for themselves when and whether to recuse and the Court's view that it is not bound by the Code of Conduct for U.S. Judges,[146] the justices' might be reluctant to change course. Additionally, I assert in this Note that Congress views the Court as a political pawn, so expecting its help in this way—especially ahead of matters that are of great political, as well as social, importance—might be unlikely. To address both considerations, the tool of public pressure could once more be helpful.

Firstly, if required recusal was framed as merely a way of assuring that the justices satisfy their obligations as bulwarks of the Constitution, it would be difficult for both the Court and Congress to rationalize not enforcing it without appearing unethical themselves. Furthermore, the members of the Senate Judiciary Committee would know they are under watch during the public confirmation hearings, where senators historically ask aggressive questions with the hope of enticing nominees to make decisive public remarks.[147] With required recusal controlling the hearings, senators would risk presenting as unprincipled if they tried to back the nominee into a corner and, even if they did, the nominee would be able to cite the require recusal statute to avoid engaging. Required recusal may compel additional considerations, but it would at least implement an initial measure of accountability that is crucial for the branch in charge of guarding this country's most fundamental rights.

CONCLUSION

The dream of judicial independence and the logistics of the checks and balance system exist fundamentally in conflict, and a Court imbedded with politics and partisan divides was a predictable outcome of this dichotomy. We have seen this reality at a number of stages since the Court's inception and, while the existence of political undertones within the institution is not inherently problematic, the "rise of a Court polarized on party lines makes the present moment particularly dangerous."[148] The debates about combating the moment and reforming the Court are far from over, but they remain destined for failure if we continue to view judicial independence as the institution's primary duty. Judicial independence was but one of multiple means presented to achieve the Court's greater end of being a "bulwark" of the Constitution. Given the established impossibility of

146. Totenberg, *supra* note 140.

147. *See generally* Scott Basinger & Maxwell Mak, *The Changing Politics of Supreme Court Confirmations*, 40 AM. POL. RSCH. 737 (2012) (discussing the increasing normality of clashes during modern nomination hearings).

148. Epps & Sitaraman, *supra* note 44, at 205.

that particular means, we must reframe our focus and remember that the end can still be achieved notwithstanding the fruitlessness of a chosen means.

It is worth also noting that, although frustrations about the state of our governmental system are on the rise and all three branches need improvements, we would be wise to remember the inescapable consequences of relying on leadership through a structure comprised of human beings. Two hundred and thirty-three years ago, in Federalist 51, James Madison shared a poetic reminder about this very truth:

> But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[149]

Like this country, the Court has stood the test of time for a reason. As we continue to fault both the institution and those in charge of its composition for failing to achieve judicial independence and for allowing the political undertones within the Court to turn harmful, we should remember that it was assigned a far grander mission. Our expectations for the highest court in the land are rightly high, but safeguarding the "longest surviving written charter of government"[150] is no small task.

149. THE FEDERALIST NO. 51, *supra* note 11.

150. *Constitution of the United States*, U.S. SENATE, https://www.senate.gov/civics/constitution_item/constitution.htm [https://perma.cc/GV2M-AVY8] (last visited Dec. 11, 2021).