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Correcting A Corrupt Court: How Unethical Legislative and Judicial Decisions Have Led to the Disintegration of Basic Human Rights, Civil Liberties, and Personal Freedoms in the Name of Scoring Points for Political Parties— and How We Can Fix It Without Expansion

Jenelle Carlin

I. INTRODUCTION

The unchecked nature of the Supreme Court of the United States and the unethical behaviors of Congressmembers and Supreme Court Justices alike have culminated in the recent overturning of important historical case precedent, the diminution of the Court's reputation, and the erosion of America's founding democratic principles. To avoid further loss of fundamental human rights, faith in the judiciary, and belief in American democracy, the federal government must act. Specifically, election year restrictions and qualification requirements for appointing Supreme Court Justices must be implemented along with a better means of impeachment and removal should a Justice be found to have violated the Constitution or their oath of office. In doing so, these procedures will place a stronger check on the Supreme Court, inhibit the continued pattern of unethical behaviors, and preserve both the Court's reputation and the Nation's democratic principles of personal freedom, civil liberties, and human rights without expanding the number of Justices.

This article is composed of four larger sections, each of which contains three subsections. The first section serves as the background and is designed to provide the reader with a foundational knowledge of 1) the Supreme Court's origins, 2) the Justice selection process, and 3) the Justice

impeachment process. The second section acts as the argument and will showcase 1) how the Court is overstepping its constitutionally-established bounds, 2) the improper selection and appointment of certain Justices, and 3) the impact this overreach has on American democracy. The third section provides the solution to issues outlined in the argument section and will suggest 1) means of altering the Justice appointment process, 2) methods of modifying the Justice impeachment process, and 3) the three current Justices who should be impeached, with each Justice being discussed in their own respective subsection. Lastly, the fourth section consists of the rebuttal and will respond to the primary anticipated criticisms for the three solutions proposed in the prior section. The article will then conclude with an emphasis on this topic's importance, the implications associated with inaction, and the effectiveness of the proposed solutions in resolving the problems discussed.

II. BACKGROUND

When the Constitution became operational in 1789,[1] the Framers created a governmental framework with three main branches: the Executive, the Legislative, and the Judicial.[2] While the Supreme Court initially represented the sole entity of the Judicial Branch, Congress quickly applied its constitutional powers to create a more comprehensive federal judiciary.[3] Later that same year, Congress passed the Judiciary Act,[4] which established

[1] *The Constitution*, THE WHITE HOUSE (2021), https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/ [https://perma.cc/662P-KB3F].
[2] *Our Government*, THE WHITE HOUSE (2022), https://www.whitehouse.gov/about-the-white-house/our-government/ [https://perma.cc/M4XD-RDFD].
[3] *The Court as an Institution*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/institution.aspx [https://perma.cc/ZW5M-EQPE].
[4] *Judiciary Act of 1789: Primary Documents of American History*, THE LIBRARY OF CONGRESS (2022), https://www.loc.gov/rr/program//bib/ourdocs/judiciary.html [https://perma.cc/JWF3-FU23].

a three-part judiciary composed of district courts, circuit courts,[5] and the constitutionally-established Supreme Court[6]—which served as the highest court.[7] The Judiciary Act also delineated the structure and jurisdiction of each of these three branches.[8] It was this Act, in tandem with the Constitution, which led the Supreme Court to act as the pinnacle of the American court system.

In addition to establishing the Supreme Court's existence, Article III of the Constitution granted the Court its power to exercise judicial authority over cases and controversies arising under select original[9] or appellate[10] jurisdiction.[11] Thus, it became the Supreme Court's responsibility to oversee, review, and decide upon controversies petitioned for a writ of certiorari (judicial review)[12] from the congressionally-established lower courts as well as cases regarding government officials.[13] Specifically, the Supreme Court is tasked with interpreting state and federal law to determine its meaning, relevance, and, perhaps most importantly, Constitutionality.[14]

Although the Constitution does not specify a required number of Justices for the Court,[15] there were six Justices when the Supreme Court first assembled in 1790: one Chief Justice and five Associate Justices.[16] While

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[5] The Editors of Encyclopedia Britannica, JUDICIARY ACT OF 1789 ENCYCLOPÆDIA BRITANNICA (2021), https://www.britannica.com/topic/Judiciary-Act-of-1789 [https://perma.cc/QRF6-TBE2].

[6] U.S. CONST. art. III, § I.

[7] *The Judicial Branch*, THE WHITE HOUSE (2022), https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch [https://perma.cc/BD3K-ZMYR].

[8] JUDICIARY ACT OF 1789, *supra* note 4.

[9] *Original Jurisdiction*, BLACK'S LAW DICTIONARY (Bryan A Garner ed., 11th ed. 2019) ("The court's power to hear and decide a matter before any other court can review the matter").

[10] *Appellate Jurisdiction*, BLACK'S LAW DICTIONARY (Bryan A Garner ed., 11th ed. 2019) ("The power of a court to review and revise a lower court's decision").

[11] U.S. CONST. art. III, § II.

[12] *Certiorari*, BLACK'S LAW DICTIONARY (Bryan A Garner ed., 11th ed. 2019).

[13] *The Judicial Branch*, *supra* note 7.

[14] *Id*.

[15] U.S. CONST. art. III.

[16] *The Court as an Institution*, *supra* note 3.

the Court's size has varied throughout history for political reasons,[17] there have consistently been nine Justices, still with one Chief Justice, since 1869.[18] Since its origins—and especially today, perhaps because of the Court's static size—the historical use of the appointment process for Supreme Court Justices has been almost entirely political.[19]

Similar to the lack of rules surrounding the Court's size, the Constitution does not provide any indication of what qualifies a Supreme Court Justice for appointment to the Bench.[20] Thus, the burden of determining whether a candidate is duly qualified for the position rests with both the Executive and Legislative Branches. It is the President's job to select a Justice for appointment,[21] and the Senate's job to confirm the presidentially nominated Justice's appointment.[22] Historically, Presidents have oftentimes relied upon traditional and political criteria as well as professional qualifications as predictive indications of a candidate's judicial performance.[23] This criterion usually includes political and ideological compatibility (e.g., acceptable philosophies, membership in the same political party), representativeness (e.g., geographical balance, being the right age, religious representation), personal friendship (e.g., direct political benefits,

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[17] Kurt Walters, *The Supreme Court Has Been Expanded Many Times Before. Here Are Four Ways To Do It Today.*, HARVARD L. & POL'Y REV. (May 6, 2019), https://harvardlpr.com/2019/05/06/the-supreme-court-has-been-expanded-many-times-before-here-are-four-ways-to-do-it-today/ [https://perma.cc/6C86-VWMU].

[18] *The Judicial Branch*, *supra* note 7.

[19] Amy McKeever, *Why The Supreme Court Ended Up With Nine Justices— And How That Could Change History & Culture*: NATIONAL GEOGRAPHIC (2021), https://www.nationalgeographic.com/history/article/why-us-supreme-court-nine-justices [https://perma.cc/2EV8-UGAW] (last visited Sep 10, 2022).

[20] *Frequently Asked Questions–General Information*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/ABOUT/faq_general.aspx [https://perma.cc/9U9Z-FZH3].

[21] *The Judicial Branch*, *supra* note 7.

[22] *Id*.

[23] William E. Hulbary & Thomas G. Walker, *The Supreme Court Selection Process: Presidential Motivations and Judicial Performance*, 33 THE WESTERN POL. Q. 185–196 (1980).

cronyism), and objective merit (e.g., distinguished credentials as lawyers or legal scholars, excellent records of public service, prior judicial experience).[24]

Additionally, during a candidate's confirmation hearings, the Senate frequently utilizes a myriad of methods, including questionnaires, hearings, and written follow-ups, to determine the candidate's fitness for the Bench before voting.[25] These methods allow the Senate to review criteria such as the candidate's biographical, financial, and employment information in addition to their legal writings, previous judicial opinions, sworn testimony, and other responses to specific questioning (such as during nomination hearings).[26] According to political scientists, Presidents and Senators generally consider eight qualities when determining fitness: party neutrality in litigation, fair-mindedness, being well-versed in the law, the ability to think and write logically and lucidly, personal integrity, good physical and mental health, judicial temperament, and the ability to handle judicial power sensibly.[27]

The State Supreme Court Justice evaluation process, however, can look quite different. In California, for example, appellate and Supreme Court Justices are reviewed by a nonpartisan office known as the California State Bar's Commission on Judicial Nominees Evaluation.[28] This office comprises both lawyers and members of the public who represent the population's diversity with their different backgrounds, abilities, interests, and opinions.[29] In evaluating a candidate, the Commission reviews

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[24] *Id.*
[25] Robert Longley, *Who Appoints and Approves Supreme Court Justices?,* THOUGHTCO (Jan. 3, 2021), https://www.thoughtco.com/supreme-court-justices-senate-confirmation-process-3321989 [https://perma.cc/J2JE-ULD7].
[26] *Id.*
[27] Sheldon Goldman, *Judicial Selection and the Qualities that Make a "Good" Judge*, 462 ANNALS AM. ACAD. POL. AND SOC. SCI. 112–124 (1982).
[28] *How Appellate and Supreme Court Justices are Selected*, CAL. CTS. (2022), https://www.courts.ca.gov/7434.htm [https://perma.cc/MH8M-WGE4].
[29] *Id.*

character, reputation, common sense, knowledge, legal skills, professional experience, objectivity, ethics, ability to make difficult decisions, work ethic, temperament, and integrity.[30] All candidates are required to have practiced law for a minimum of ten years to be eligible for consideration.[31] In contrast, the United States Supreme Court has openly admitted that a Justice's age, education (including being a law school graduate), citizenship status, or profession (including being a lawyer or judge) does not matter.[32] The only limitations for Supreme Court Justices expressly provided by the Constitution are that they serve under "good Behaviour" and that their salaries cannot be diminished whilst they are on the Bench.[33] Although "good Behaviour" is not elaborated on or defined in the Constitution, Justices considered to have fallen outside of this qualification are eligible for impeachment by the House of Representatives[34] and conviction by the Senate.[35]

While the Constitution does not explicitly grant power to Congress to remove Justices for misconduct, it has been assumed that the House has impeachment powers over the Supreme Court because of the Justices' status as civil officers.[36] Civil officers, along with Presidents and Vice Presidents, are subject to charges under the articles of impeachment by a simple majority vote in the House of Representatives.[37] If this House majority is attained, the articles of impeachment are then sent to the Senate, which acts as a High Court of Impeachment, for consideration of the

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30 *Id.*
31 *Id.*
32 *Frequently Asked Questions–General Information*, *supra* note 20.
33 U.S. CONST. art. III, § I.
34 U.S. CONST. art. I, § II.
35 *The Judicial Branch*, *supra* note 7.
36 *Persons Subject to Impeachment*, JUSTIA LAW, https://law.justia.com/constitution/us/article-2/48-persons-subject-to-impeachment.html [https://perma.cc/5C46-3275].
37 *About Impeachment*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment.htm [https://perma.cc/3NXY-YMH9].

evidence and a two-thirds vote to either acquit or convict.[38] If convicted, the official is removed from their office[39] and, in some instances, can also be disqualified from holding public office again in the future.[40]

In the Supreme Court's two-hundred-thirty-year history, only one Justice has ever been impeached,[41] and no Justice has ever been removed from the Bench.[42] In 1804, Justice Samuel Chase, who had served on the Court since 1796, was impeached for allowing his political ideologies to impact his decisions.[43] Specifically, he was accused of refusing to dismiss biased jurors, excluding or limiting defense witnesses in politically sensitive cases, and otherwise behaving arbitrarily, oppressively, and unjustly by continually promoting his political agenda on the Bench.[44] Although a Senate committee was appointed to review the House's articles of impeachment, Justice Chase argued that he was being tried for his beliefs rather than for the impeachable offenses[45] of treason, bribery, or other high crimes and misdemeanors.[46] When none of the House's impeachment articles received the votes required for conviction,[47] the Senate acquitted Justice Chase and he was permitted to remain on the Bench.[48] Justice Chase's trial, and other impeachment trials throughout American history, sparked debate over the impeachability of Supreme Court Justices[49] as well

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38 *Id*.
39 U.S. CONST. art. II, § IV.
40 *About Impeachment*, *supra* note 37.
41 *Frequently Asked Questions–General Information*, *supra* note 20.
42 *Impeachment Trial of Justice Samuel Chase, 1804–05*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-chase.htm [https://perma.cc/VAT3-PXLX].
43 *Id*.
44 *Id*.
45 U.S. CONST. art. II, § IV.
46 *Impeachment Trial of Justice Samuel Chase, 1804–05*, *supra* note 42.
47 U.S. Const. art. I, § III.
48 *Impeachment Trial of Justice Samuel Chase, 1804–05*, *supra* note 42.
49 *Persons Subject to Impeachment*, *supra* note 36.

as the definition of "high crimes and misdemeanors"[50] given that neither are expressly defined within the Constitution.

Collectively, many of the dictional and syntactical aspects of the Constitution were intentional decisions by the Framers to maintain the system of checks and balances so essential to American democracy. Specifically, the imposition of the "good Behaviour" clause[51] allows Justices who have been appointed to the Court to serve, unless impeached, until they die or otherwise decide to retire.[52] These lifetime appointments were purposefully designed to promote both objectivity and justice in legal analysis and application by insulating the Court and its Justices from the partisan pressures of temporary public passion as well as both electoral and political concerns.[53]

In a similar vein, the vagueness[54] of both Articles I and II about what constitutes an impeachable offense and who is eligible for impeachment left Congress with tremendous discretion regarding whether to impeach, convict, or remove an official from office. Additionally, Article III's vagueness concerning the Supreme Court's authority and the qualifications required for Justices to be appointed to and remain on the Bench left the Court itself[55] as well as both the President and the Senate to fill in those gaps. It is this very same vagueness which has also proved to be problematic in the face of addressing difficult legal questions pertaining to the appointment, confirmation, bench practices, and potential impeachment

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[50] *About Impeachment*, *supra* note 37.

[51] U.S. CONST. art. III, § I.

[52] *The Court as an Institution*, *supra* note 3.

[53] *The Judicial Branch*, *supra* note 7.

[54] *See* Neil J. Kinkopf & Keith E. Whittington, ARTICLE II, SECTION 4: COMMON INTERPRETATION NATIONAL CONSTITUTION CENTER – CONSTITUTIONCENTER.ORG (2016), https://constitutioncenter.org/the-constitution/articles/article-ii/clauses/349 [https://perma.cc/8CBY-NE3Z].

[55] *See Marbury v. Madison,* 5 U.S. 137 (1803) (holding that, although not explicitly set forth in Article III of the Constitution, the Supreme Court has the power of judicial review which thus permits it to review and strike down laws or statutes that it finds to be in violation of the Constitution).

as well as removal of Supreme Court Justices. Despite these legal questions all posing important political implications for the Nation, the Court, and democracy itself, no clear answers can be found within the text of the Constitution.

III. ARGUMENT

Politicians and Supreme Court Justices alike often look to the Constitution as a guide for how to resolve difficult legal questions.[56] In instances where neither the Constitution's explicit text nor the Framers' intent is clearly discernable, two main options for resolution exist. On one hand, those wishing to strictly abide by the text may propose the matter be resolved through congressional, rather than judicial, means (e.g., passing a federal statute or proposing an amendment to the Constitution as opposed to issuing a binding Supreme Court decision).[57] On the other hand, those who believe the intent can be inferred through examining its "penumbras [and] emanations"[58] may argue that the solution can be found within the interplay between the Constitution's articles, sections, and amendments. Regardless of which side of this issue one may fall on, the overall concern remains clear: when the answer is not readily apparent within the Constitution, there is a great risk of corruption.

This portion of the article serves as the argument for how the Supreme Court, fueled in part by Congress' political motivations, has become increasingly corrupt in recent years. Specifically, it will first delve into the

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[56] *The Court and Constitutional Interpretation*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/constitutional.aspx [https://perma.cc/W4GC-SU6U].

[57] *Congress & Courts: Keeping the Balance*, HARRY S. TRUMAN LIBRARY MUSEUM, https://www.trumanlibrary.gov/education/three-branches/congress-and-courts-keeping-balance [https://perma.cc/F67G-QVXC].

[58] *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (Justice Douglas' majority opinion) (with "penumbra" referring to the periphery, and "emanation" referring to the act of flowing from—both terms pertain to the Bill of Rights and an interpretation of which considers the implied rights contained therein).

role that congressional misconduct has played in judicial selection, and how this has contributed to the overall degradation of the Court's reputation. It will next explore how recent case law and constitutional interpretations, paired with a lack of accountability for otherwise unjust actions, have permitted the Court to overstep its constitutionally-established bounds. It will then conclude with a discussion of how such congressional interference and judicial overreach have manipulated and subverted the American ideals of justice and democracy for political gain.

A. Congressional Misconduct and Interference

Throughout American history, an open position on the Supreme Court has often been perceived as a political opportunity for Presidents and Congressmembers to appoint someone who will further their party's objectives.[59] An open seat can also represent the chance for an opposing party to reject someone who will not serve as a means to their particular party's ends.[60] For example, in February of 2016, there was an opening on the Court after Justice Antonin Scalia's death.[61] Not wanting to leave the seat vacant for almost a year, then-President Barack Obama appointed Merrick Garland for the position.[62] Congressional Republicans, however, did not want President Obama to fill another seat on the Court.[63] Thus,

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[59] *The Supreme Court Selection Process: Presidential Motivations and Judicial Performance*, *supra* note 23.

[60] Bryon J Moraski & Charles R Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices* 43 AMER. J. OF POL. SCI. NO. 4, 1069 (1999).

[61] Terri Langford & Jordan Rudner, *Supreme Court Justice Antonin Scalia Found Dead in West Texas,* THE TEXAS TRIBUNE (Feb. 13, 2016), https://www.texastribune.org/2016/02/13/us-supreme-court-justice-antonin-scalia-found-dead/ [https://perma.cc/J4VM-4P4A].

[62] *Supreme Court Nominations (1789–present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm [https://perma.cc/P75K-7MWW].

[63] Karoun Demirjian, *Republicans Refuse to Budge Following Garland Nomination to Supreme Court,* THE WASH. POST (Mar. 16, 2016),

Senate Republicans, led by Mitch McConnell, conjured up the so-called "Thurmond Rule"[64] which, they argued, prohibited the confirmation of Supreme Court candidates nominated during Presidential election cycles.[65] It was not until April of 2017 that Justice Scalia's seat was filled by Neil Gorsuch, who was appointed by then-President Donald Trump.[66]

Ironically, four years later, in September of 2020, another seat opened on the Court following the passing of Justice Ruth Bader Ginsburg.[67] Fearing he would lose the chance to confirm another Justice if he failed to win re-election, then-President Trump quickly nominated Amy Coney Barrett for the position.[68] Sharing in President Trump's desire to further thwart the Court's composition, Senate Republicans, again led by Mitch McConnell, pushed through and hurriedly confirmed Barrett in October of 2020,[69] making Barrett the first Justice since 1870 to be confirmed without a single vote from the minority.[70] Interestingly, despite the Presidential election being only eight days away,[71] the previously prohibitive "Thurmond Rule"

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https://www.washingtonpost.com/news/powerpost/wp/2016/03/16/republicans-refuse-to-budge-following-garland-nomination-to-supreme-court/ [https://perma.cc/95CA-4JST].

[64] Jonathan Chait, *McConnell Admits the 'Rule' That Blocked Merrick Garland Is Not Actually a Rule,* INTELLIGENCER (Apr. 3, 2017), https://nymag.com/intelligencer/2017/04/mcconnell-rule-that-blocked-garland-not-actually-a-rule.html [https://perma.cc/C5VC-3ZBQ].

[65] Daniel Victor, *What is the Thurmond Rule?,* N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/live/supreme-court-justice-antonin-scalia-dies-at-79/what-is-the-thurmond-rule/ [https://perma.cc/9J88-JNMP].

[66] *Supreme Court Nominations (1789–present)*, *supra* note 62.

[67] Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [https://perma.cc/5T8F-DNZ8].

[68] *Supreme Court Nominations (1789–present)*, *supra* note 62.

[69] *Id*.

[70] *Id*.

[71] Tessa Berenson, *Amy Coney Barrett Confirmed to Supreme Court Before Election*, TIME (Oct. 26, 2020), https://time.com/5902166/amy-coney-barrett-confirmed-supreme-court/ [https://perma.cc/U9EZ-86G3].

was completely disregarded in this appointment process.[72] Regardless of where one might fall on the political spectrum, it is almost impossible to construe this about-face in such a short period of time as being anything other than politically motivated.[73]

However, fabricated rules—which are then abandoned as needed—are not the only way to appoint or reject Justices favoring a particular party's political aims. Historically, Justices reflecting a certain party's ideals have also been withdrawn because of, or confirmed despite, alleged indiscretions. For example, Douglas Ginsburg was suggested as a potential Supreme Court nominee by President Ronald Reagan, but Ginsburg withdrew himself from consideration prior to official nomination after the revelation that he had smoked marijuana with some of his students while he was a professor at Harvard Law School led to heavy public criticism.[74] Similarly, Harriet Miers was nominated for appointment to the Court by President George W. Bush but requested to be withdrawn from consideration following widespread attacks for previously allowing her law license to lapse and for being largely unqualified.[75]

Despite the torrent of public backlash[76] that emerged when Clarence Thomas, who was accused of sexual harassment,[77] was nominated for the

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[72] *See* Katie Wadington, *Then and Now: What McConnell, Others Said About Merrick Garland In 2016 vs. After Ginsburg's Death*, USA TODAY (Sept. 19, 2020), https://www.usatoday.com/story/news/politics/2020/09/19/what-mcconnell-said-merrick-garland-vs-after-ginsburgs-death/5837543002/ [https://perma.cc/2WAQ-YLYY].

[73] Russell Wheeler, *McConnell's Fabricated History to Justify a 2020 Supreme Court Vote*, FIXGOV (2020), https://www.brookings.edu/blog/fixgov/2020/09/24/mcconnells-fabricated-history-to-justify-a-2020-supreme-court-vote/ [https://perma.cc/269V-W6SQ].

[74] MARTIN A. LEE, SMOKE SIGNALS: A SOCIAL HISTORY OF MARIJUANA – MEDICAL, RECREATIONAL, AND SCIENTIFIC, SIMON AND Schuster 192 (2013).

[75] Paul Krugman, *All the President's Friends*, N.Y. TIMES (Sept. 12, 2005), https://www.nytimes.com/2005/09/12/opinion/12krugman.html [https://perma.cc/H76V-P6RR].

[76] Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas,* 60 GEORGE WASHINGTON L. REV. 969, 982–83 (1992).

Bench, he was not withdrawn. In fact, his appointment was confirmed.[78] A similar pattern of public protest[79] and congressional disregard occurred when Brett Kavanaugh, who was also accused of sexual misconduct,[80] was nominated. He, too, did not withdraw from consideration and was ultimately confirmed.[81] Even Amy Coney Barrett, who was met with fierce public disapproval[82] upon being nominated due to her lack of qualifications, was confirmed.[83] It is hard to imagine how the recreational use of marijuana or a temporary lapse in licensing could be met with stronger repercussions than allegations of sexual harassment and misconduct. The common difference in the latter, compared to the former, is that there was sufficient congressional support from the nominees' party to force their confirmations. This political support, and willingness to overlook the nominee's significant misconduct for the sake of furthering the party's political goals, prevented pressure to withdraw their nominations despite the public backlash.

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[77] *Sexual Harassment - Clarence Thomas and Anita Hill Hearings*, AM. L. AND LEGAL INFO., https://law.jrank.org/pages/10222/Sexual-Harassment-CLARENCE-THOMAS-ANITA-HILL-HEARINGS.html [https://perma.cc/F7CE-P4DQ] (hereinafter "*Sexual Harassment Hearings*").
[78] *Supreme Court Nominations (1789–present)*, *supra* note 62.
[79] Jeffrey M Jones, *Opposition to Kavanaugh Had Been Rising Before Accusation,* GALLUP (Sept. 18, 2018), https://news.gallup.com/poll/242300/opposition-kavanaugh-rising-accusation.aspx [https://perma.cc/9PCQ-NNCR].
[80] Megan Sheets & Clark Mindock, *Brett Kavanaugh: What Was He Accused Of and What Happened At His Supreme Court Confirmation Hearing?*, THE INDEPENDENT (Mar. 21, 2022), https://www.independent.co.uk/news/world/americas/us-politics/brett-kavanaugh-accusations-supreme-court-b2040678.html [https://perma.cc/H3XT-DA5Y].
[81] *Supreme Court Nominations (1789–present)*, *supra* note 62.
[82] Andrew Chung & Daniel Wallis, *Instant View: Reaction to Trump Plan to Pick Amy Coney Barrett for Supreme Court,* REUTERS (Sept. 25, 2020), https://www.reuters.com/article/usa-court-ginsburg-barrett-instantview/instant-view-reaction-to-trump-plan-to-pick-amy-coney-barrett-for-supreme-court-idUSKCN26G395/ [https://perma.cc/ENM6-AC26].
[83] *Supreme Court Nominations (1789–present)*, *supra* note 62.

B. Judicial Overreach and Lack of Accountability

Congressional interference has dire consequences for the Supreme Court. When one body of government interferes with another in a way that affects its composition, the role of the latter body is compromised by the former. Specifically, when Justices are appointed to the Court for the express purpose of overturning well-established case precedent, consideration for compliance with the Constitution becomes merely an afterthought. Congress' interference in the Supreme Court not only results in, but actively encourages, judicial overreach for partisan political purposes.

As a result of the aforementioned acts by Congress, the Supreme Court currently has a conservative supermajority.[84] The Court, which is traditionally split 5–4,[85] is presently made up of six conservative Justices[86] (only one of whom[87] is considered a "swing justice"[88]) and three liberal Justices.[89] Because it is virtually impossible for the liberal Justices to have a majority on any given issue, the important cases coming through the Court's docket no longer serve as means to solidify the civil rights and

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[84] Ben Olinsky & Grace Oyenubi, *The Supreme Court's Extreme Majority Risks Turning Back the Clock on Decades of Progress and Undermining Our Democracy Center for American Progress*, CTR. FOR AM. PROGRESS (Jun. 13, 2022), https://www.americanprogress.org/article/the-supreme-courts-extreme-majority-risks-turning-back-the-clock-on-decades-of-progress/ [https://perma.cc/A6SE-K95R].
[85] Amelia Thomson-DeVeaux & Laura Bronner, *The Supreme Court's Partisan Divide Hasn't Been This Sharp In Generations,* FIVETHIRTYEIGHT (Jul. 5, 2022), https://fivethirtyeight.com/features/the-supreme-courts-partisan-divide-hasnt-been-this-sharp-in-generations/ [https://perma.cc/X3X5-XUKR].
[86] *Current Members*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/A9Y6-K7C6].
[87] Danielle Alberti & Oriana Gonzalez, *The Political Leanings of the Supreme Court Justices,* AXIOS (Jul. 3, 2022), https://www.axios.com/2019/06/01/supreme-court-justices-ideology [https://perma.cc/X6BS-HAWV].
[88] Dmitry Kovalenko, *Swing Justice,* SCOTUSBLOG (2020), https://www.scotusblog.com/election-law-explainers/swing-justice/ [https://perma.cc/9ZL8-CKAL] ("The justice in the center of the Supreme Court, who may align with either [their] more conservative or more liberal colleagues to provide the key vote in closely divided cases").
[89] *Current Members*, *supra* note 86.

liberties established by case precedent. Instead, they are opportunities to rescind protections that do not serve the conservative agenda.[90] This shift in purpose is perhaps best demonstrated by the numerous consequential rulings delivered in the Court's 2021–2022 session.

In June alone, the Supreme Court rendered six major decisions pertaining to important topics like abortion,[91] guns,[92] climate change,[93] separation of church and state,[94] school prayer,[95] and Indigenous law.[96] The most discussed, but perhaps least surprising, decision from this session was undoubtedly *Dobbs*, which overturned *Roe*.[97] Specifically, the Court's majority opinion articulated that, before *Roe*, abortion was unprotected at both the federal and state levels due to it historically being considered a criminal act.[98] The majority also claimed that the so-called right to privacy and choice is a slippery slope that will inevitably lead to drug use, prostitution, and other "unfavorable" acts.[99] The majority further expressed the necessity of overturning *Roe* on five grounds: (1) the *Roe* Court short-circuited the democratic process of state officials being elected because of

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[90] *See* Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2300 (2022) (Thomas, J., concurring) (stating the Court's need to now revisit cases like *Griswold*, *Lawrence*, and *Obergefell*).

[91] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

[92] New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1 (2022).

[93] *See* West Virginia v. Environmental Protection Agency, 597 U.S. 697, 728 (2022) (holding that the EPA lacks the authority to regulate greenhouse gas emissions).

[94] *See* Carson v. Makin, 596 U.S. 767, 785 (2022) (holding that states cannot prevent religious schools from receiving public grant money which is extended to other private schools).

[95] *See* Kennedy v. Bremerton School District, 597 U.S. 507, 526 (2022) (holding a public high school football coach's postgame prayers were protected by the First Amendment's Free Speech and Free Exercise Clauses and did not violate the First Amendment's prohibition on government endorsement of religion).

[96] *See* Oklahoma v. Castro-Huerta, 597 U.S. 629, 654 (2022) (holding state officials have the power to prosecute non-Indigenous people for crimes against Native Americans within tribal reservations).

[97] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

[98] *Id.*

[99] *Id.*

their views and the ability of those elected officials to pass legislation reflecting such views; (2) the right to an abortion is not founded in the Constitution's text, history, or precedent; (3) the right to an abortion cannot be understood and applied consistently and predictably; (4) the right to an abortion would lead to the distortion of important, unrelated, legal doctrine; and (5) there is no reliance interest in the right to an abortion because the Court, unlike the legislature, is not dictated by social or economic beliefs.[100]

In their poignant dissent, the three liberal Justices asserted that the majority is throwing stare decisis[101] out in favor of individual partisan ideologies.[102] The dissent further contends that claiming a certain right or liberty is not grounded in the Constitution's history opens a floodgate for revoking all liberties not existing in the 18th century, when women were not full, equal citizens.[103] Moreover, they stress that this perspective is a deep-seated hypocritical misunderstanding of the Court's role to objectively interpret the Constitution and case precedent, the implications of which extend far beyond abortion.[104] In countering the majority's reliance on common law, the dissent articulates that early common law did not, in fact, criminalize abortions prior to the quickening[105] stage.[106] Thus, not only is this decision not based on the Framers' intentions as the majority claims, but it entirely undermines the essence of both the Constitution itself and the later added Fourteenth Amendment.[107] Specifically, the dissent emphasizes that the majority's holding strips people of their agency, forces them to

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100 *Id.*
101 *Stare Decisis*, BLACK'S LAW DICTIONARY (Bryan A Garner ed., 11th ed. 2019) ("The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation").
102 *Dobbs*, 597 U.S. at 215.
103 *Id.*
104 *Id.*
105 *Quickening*, BLACK'S LAW DICTIONARY (Bryan A Garner ed., 11th ed. 2019) ("The first motion felt in the womb by the mother of the fetus, usually occurring near the middle of the pregnancy").
106 *Dobbs*, 597 U.S. at 215.
107 *Id.*

carry out the State's will, and deprives them of their liberty by curtailing women's rights and status as free and equal citizens with no regard for the economic and social ramifications of doing so.[108]

However, the Supreme Court's controversial decision-making extended beyond abortion. As *The Washington Post* put it, "[t]he emboldened 6–3 conservative majority…wasted little time expanding the rights of gun owners to carry firearms in public, strengthening the role of religion in public life[,] and sharply curtailing the Biden administration's power to combat climate change."[109] Just one week prior to *Dobbs*, in *Bruen*, the Court concluded that states do not have the authority to regulate their citizens' gun ownership.[110] The majority in *Bruen* held that public understanding of the Second Amendment does not permit states to impose licensing requirements or invoke restrictions on public carry.[111] Dissenting, the three liberal Justices again asserted that the majority blatantly disregarded historical evidence, case precedent, and the text of the Second Amendment itself.[112] Specifically, Justice Breyer traced the history of gun ownership regulations throughout England, early America, and modern times[113] to demonstrate how that evolution is connected to both the Amendment's language[114]—a "well regulated" militia—and important stare decisis like *Heller*.[115] One cannot help but wonder why the majority is comfortable strictly relying on the Constitution's language in allowing citizens to play geographical bingo when it comes to preserving their bodily

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[108] *Id.*
[109] Ann E. Marimow, Aadit Tambe, & Adrian Blanco, *How the Supreme Court Ruled in the Major Decisions of 2022,* THE WASH. POST (Jun. 30, 2022), https://www.washingtonpost.com/politics/interactive/2022/significant-supreme-court-decisions-2022/ [https://perma.cc/JJJ6-GAR7].
[110] New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1 (2022).
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] U.S. CONST. amend. II.
[115] *See* District of Columbia v. Heller, 544 U.S. 570 (2008) (finding a District of Columbia law which strictly regulated personal gun ownership to be unconstitutional).

autonomy, yet willingly disregards the Constitution's text in imposing sweeping nationwide protections for inanimate objects like guns.

In that same June session, the Supreme Court's conservative supermajority also took aim at other, previously-established and constitutionally-protected rights, as codified by *Miranda*,[116] *Mapp*,[117] and *Bivens*.[118] Specifically, in *Egbert*, the majority effectively overruled *Bivens* in deciding that plaintiffs need damages to bring Fourth Amendment violation claims.[119] By imposing such a high burden of proof, the Court has significantly undermined police accountability[120] while simultaneously insulating the judicial system by making it increasingly inaccessible to plaintiffs seeking judicial review for constitutional violations.[121] Similarly, in *Vega*, the majority held that, although the Court has the authority to create prophylactic rules, the pre-existing requirement that a police officer is obligated to inform criminal defendants of their rights is not actually a binding duty.[122] The majority concluded that a police officer's failure to inform a criminal defendant of their rights upon being seized, alone, does not constitute a sufficient basis for a civil liability claim by the defendant.[123]

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[116] *See* Miranda v. Arizona, 384 U.S. 436 (1966) (holding that the Fifth Amendment prohibits law enforcement officers from using testimony given by anyone during interrogation while in police custody without that person having first been warned of their right to an attorney and right to remain silent because anything said could be used against them in court).

[117] *See* Mapp v. Ohio, 367 U.S. 643 (1961) (holding the Fourth Amendment's Exclusionary Rule prohibits all evidence illegally obtained by an unconstitutional search or seizure from being used by prosecutors in a court of law).

[118] *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (holding that an implied cause of action exists for any individual whose Fourth Amendment protection from unreasonable searches and seizures has been violated).

[119] Egbert v. Boule, 596 U.S. 482 (2022).

[120] *Id.*

[121] *Id.*

[122] *See* Vega v. Tekoh, 597 U.S. 134, 149–50 (2022).

[123] *Id.* at 136.

Collectively, these decisions and the majority's clear disregard for historical context and case precedent indicate the Court's ongoing effort to weaken constitutional rights. The current majority's dedication to chipping away at critical case precedent which permitted the Constitution to enforce and ensure its therein-contained civil rights and liberties casts an eerie shadow for the future.

C. *The Undermining of Democracy and Decency*

While overturning vital case precedent is problematic, there is an even bigger issue occurring: the loss of the Nation's core understandings, values, and principles. The Supreme Court is meant to step in when democracy is not working, not participate in democracy's demise.[124] Yet, the Court has been compromised. As a result of the bifurcation of the modern political state,[125] Congressional Republicans have—through selective confirmation hearings—monopolized the Court's majority to fulfill their political agenda.[126] In doing so, the conservative Justices have been given the green light to—without consequence or risk of impeachment—decide cases as they see fit, irrespective of case precedent or the Constitution. When unfit Justices are being appointed and subsequently remain in their positions despite committing impeachable offenses, the corruption of the Court is clear.

But the Court's corruption extends beyond just appointing and keeping unqualified Justices. The Supreme Court is already composed of unelected officials serving lifetime appointments.[127] While some critics have argued that lifetime appointments alone prevent the Court from ever being a truly democratic institution,[128] there are other aspects of the Court's structure

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[124] Eric J. Segall & Hannah Mullen, Panel Discussion at the Seattle University School of Law, *What Was That? Thoughts on the 2021–22 U.S. Supreme Court* (Sept. 15, 2022).
[125] *Id*.
[126] *Id*.
[127] *See The Court as an Institution*, *supra* note 3.
[128] Segall & Mullen, *supra* note 124.

which inhibit the free flow of democratic principles as well. When the fate of a judicial nominee lies almost entirely in the hands of a few Congressional Republicans holding onto office despite being opposed by much of the country,[129] the role of partisan politics in the Court is undeniable. The Supreme Court, though, was not designed to be a political entity; rather, it is intended to be an objective body tasked with interpreting laws and the Constitution.[130] However, when a nominee's politics on critical topics, rather than their abilities and experience, become the focus of confirmation hearings, the agenda becomes clear. Congress' intentions lie not with appointing qualified Justices capable of fulfilling the expected role, but with selecting candidates who will comply with their political aims.[131] Once the Court's reputation as an objective, apolitical body is lost to monopolistic politicization, the Nation loses faith in the Court.

When the Justices of the Nation's highest court become political chess pieces in the eyes of the public, people also lose faith in the Court's ability to be objective and fair when hearing cases and analyzing the law. Once the public considers the Court to be compromised and lacking in objectivity, confidence ceases regarding any opportunity for due process[132] or justice in cases where political issues are at stake.[133] But due process is not the only constitutional right in jeopardy. The political monopolization of the

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[129] Dan Balz & Clara Ence Morse, AMERICAN DEMOCRACY IS CRACKING. THESE FORCES HELP EXPLAIN WHY, THE WASH. POST (Aug. 18, 2023), https://www.washingtonpost.com/politics/2023/08/18/american-democracy-political-system-failures [https://perma.cc/C5V6-8QRC].

[130] *See generally About the Supreme Court*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/about.aspx [https://perma.cc/UWY9-7Z4E].

[131] *See* William C Duncan, *When Did Supreme Court Nominations Become So Politicized?,* SUTHERLAND INST. (Mar. 24, 2022), https://sutherlandinstitute.org/when-did-supreme-court-nominations-become-so-politicized/ [https://perma.cc/CWF4-NV4J].

[132] *Due Process*, BLACK'S LAW DICTIONARY (Bryan A Garner ed., 11th ed. 2019) ("The conduct of legal proceedings according to established rules and principles for the prosecution and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case").

[133] Segall & Mullen, *supra* note 124.

Nation's judiciary has exemplified the societal fear of the suppression of justice and democracy at the hands of the few—the very issue the Constitution and the Supreme Court were designed to prevent.[134] With the dismantling of the Nation's democratic principles and notions of justice, there is also a tremendous deprivation of human rights and civil liberties.

As seen in the 2021–2022 term alone, the Supreme Court's quest for partisan political gain is eradicating constitutionally-protected rights once considered sacred and inherent. In *Bruen*, the Court determined that states do not have the authority to control the gun ownership of their own citizens, despite the phrase "well regulated" being written in the text of the Second Amendment.[135] Yet, in *Dobbs*, the Court concluded that states do have the authority to regulate and, in some cases, even criminalize[136] their citizens' fertility statuses, medical procedures, and travels.[137] Similarly, in *West Virginia*, the Court held that the Environmental Protection Agency does not have the authority to order the reduction of existing power plants' carbon production.[138] Further, in *Egbert* and *Vega*, the Court established that legitimate[139] or additional[140] damages, respectively, are a prerequisite for seeking remedies based on Fourth Amendment violations, thus limiting the authority courts have to hear such cases. Even in isolation, these few cases demonstrate the impact that congressional interference and judicial overreach have on individual rights and liberties. For example, the loss of bodily autonomy and personal decision-making in *Dobbs*, the loss of the Nation's ability to reach its carbon neutrality and clean energy goal by

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[134] Zephyr Teachout, *Constitutional Purpose and the Anti-Corruption Principle*, NW. L. REV. 200 (2014).
[135] *See* New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1 (2022).
[136] Carey Hickox, *Abortion Is Now Illegal in 11 U.S. States*, CTR. FOR REPRODUCTIVE RTS. (Aug. 30, 2022), https://reproductiverights.org/abortion-illegal-11-states/ [https://perma.cc/8Q3H-S2K6].
[137] *See* Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).
[138] *See* West Virginia v. Environmental Protection Agency, 597 U.S. 697 (2022).
[139] *See* Egbert v. Boule, 596 U.S. 482 (2022).
[140] *See* Vega v. Tekoh, 597 U.S. 134 (2022).

2035[141] in *West Virginia*, and the loss of constitutional protections and knowledge of personal rights in *Egbert* and *Vega* can all be starkly contrasted to the Court's expansion of gun ownership rights in *Bruen*. It is evident that the majority is choosing politics over people, against the will of the Framers upon which they claim to rely.

While the bifurcation of the modern political state as a whole seems impossible to remedy, there are ways in which the Supreme Court, which has fallen victim to such a political scheme, can be revived. In recent years a wide array of critics from both sides of the aisle have called for reforms. These proposals range from expanding the number of Justices on the Court,[142] to removing lifetime appointments,[143] and even to requiring that the Justices be democratically elected rather than appointed.[144] However, none of these proposals serve as the best method of restoring the Court to its original purpose in accordance with the Framers' intentions; rather, there are other, more effective means of resolving the political monopolization of the Court and its currently compromised state.

IV. SOLUTIONS

The diminution of the Supreme Court's reputation and the erosion of democratic principles cannot be solved by expanding the Court, removing lifetime appointments, or even electing Justices. All these suggestions, while well-intentioned, merely place a Band-Aid on a bullet hole; they do not address the injury's cause. The unchecked nature of the Court and its presiding Justices requires a deeper level of intervention, one which

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[141] *See generally DOE Launches New Initiative From President Biden's Bipartisan Infrastructure Law to Modernize National Grid*, OFFICE OF ELECTRICITY (Jan. 12, 2022), https://www.energy.gov/oe/articles/doe-launches-new-initiative-president -bidens-bipartisan-infrastructure-law-modernize [https://perma.cc/CB4D-LPQN].

[142] *See* Kurt Walters, *supra* note 17.

[143] Olinsky & Oyenubi, *supra* note 84.

[144] *See* William Watkins, *Op-Ed: Supreme Court Justices Should Be Elected*, NPR (Jun. 28, 2010), https://www.npr.org/2010/06/28/128168260/op-ed-supreme-court-justices-should-be-elected [https://perma.cc/CA3S-FBD2].

improves upon the framework created by the Constitution's drafters. If the Court has any hope for revival, the federal government must implement election-year restrictions and qualification requirements for the appointment of Justices. Additionally, the federal government must also amend the means of impeachment and removal should a Justice violate the Constitution or their oath of office. In doing so, such procedures will place a stronger, much-needed check on the Supreme Court, inhibit the continued pattern of unethical behaviors, and preserve both the Court's reputation and the nation's democratic principles of personal freedom, civil liberties, and human rights.

This section of the article serves as the solution for how best to resolve the biggest issues now plaguing the Supreme Court. Specifically, it will first articulate three means of improving the appointment process to insulate the Court, as much as possible, from partisan political influences. It will next assert three ways of amending the impeachment process to better ensure fair trials and proper judicial conduct. Finally, it will emphasize the importance of impeaching currently presiding Justices known to have violated the Constitution, their oath of office, or the law. Such a solution seeks to hold these Justices accountable for their actions, and to right the Court's wrongs.

A. Improving the Appointment Process

The lack of specificity in the Constitution regarding requirements for appointment to the Supreme Court has resulted in both executive and legislative officials selecting and confirming Justices based on their politics rather than their qualifications and experience.[145] Currently, politicians are permitted, if not encouraged, to utilize the judicial nomination process as a slow-burn chess game for scoring personal points for their political party. There are three means through which this process can be altered to better serve both the Court's and the country's best interests: establishing the

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[145] Moraski & Shipan, *supra* note 60, at 1090.

"election year law", creating a balanced court, and implementing qualification requirements.

1. The Election Year Law

The Thurmond Rule resurfaced in 2016 in the wake of President Obama's bid to appoint Merrick Garland but was then quickly buried again in 2020 with President Trump's rushed appointment of Amy Coney Barrett.[146] While both sides have significantly debated whether this "election year law" is a legitimate rule, no official has ever tried to formally establish it beyond its convenient, timely use in 2016. Although the Thurmond Rule is divisive because of its past use, or lack thereof, by Mitch McConnell regarding judicial appointments in recent years, the law itself is not fundamentally flawed and would serve as an effective means of checking partisan political influence on the Court.

In essence, the Thurmond Rule prohibits the nomination, confirmation, and appointment of Justices at any point during an election year.[147] In doing so, the Court is insulated from the influence of politicians who are leaving office due to having been voted out or, in a President's case, having exhausted their re-election opportunities. Regardless of whether it is a midterm Congressional election year or a Presidential election year, the rule's mission remains steadfast in preventing last-ditch efforts by losing politicians to influence the Court for decades to come. The most salient example of this is Amy Coney Barrett's rushed confirmation in 2020. Not only was she confirmed just days before the Presidential election concluded,[148] but Barrett became the third Justice to be appointed by Donald Trump.[149] Had the Thurmond Rule been properly followed, a twice-

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[146] Wadington, *supra* note 72.
[147] Victor, *supra* note 65.
[148] Berenson, *supra* note 71.
[149] *Supreme Court Nominations (1789–present)*, *supra* note 62.

impeached, one-term President would not have had the opportunity to appoint one-third of the Court's currently seated Justices.

But beyond the political antics of Donald Trump and Mitch McConnell, the Thurmond Rule is beneficial to everyone regardless of their political leanings. During an election cycle, Congressional or Presidential, the composition of the federal government can change dramatically. The party that is in power could shift in the Executive Branch, the Legislative Branch, or both branches. In the same way that one would not want a President who is ineligible for re-election and about to leave office to select a new Justice, one would not want Congressmembers at risk of being unseated to vote on a new Justice. Even if a President were eligible for a second term (as in Trump's case), there will always be an undeniable degree of uncertainty as to whether they will be re-elected. When the fate of the Court hangs in the balance, it is prudent to wait and ensure that the politicians with critical roles in deciding who is nominated, confirmed, and ultimately appointed to the High Court are those who have been democratically chosen to do so. This solution is one of the best means of limiting political influence on the Court without requiring the election of Justices, as some scholars have suggested.[150] Additionally, it requires only a Senate rule change for implementation, rather than the amendment to the Constitution that would be required if Justices were to be elected, thus making it a more expedient option.

2. A More Balanced Court

A second way to better insulate the Supreme Court from partisan politics centers on the establishment of a more balanced bench. Modeled after the Federal Election Commission[151] and a code in Delaware's Constitution,[152]

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[150] Watkins, *supra* note 144.
[151] *Leadership and Structure*, FEDERAL ELECTION COMM'N, https://www.fec.gov/about/leadership-and-structure/ [https://perma.cc/M6JL-GFT2].
[152] DEL. CONST. art. IV, § 3.

both of which seek to maintain an ideological balance of Justices, so, too, does this proposal. In addition to the abundant evidence that both the Federal Election Commission[153] and Delaware system[154] have been successful within the agency and the courts, respectively, this solution is a beneficial check regardless of one's political leanings.

The Constitution does not specify a required number of Justices for the Supreme Court, nor does it stipulate what those Justices should represent in terms of their ideologies or qualifications.[155] Although several scholars have argued for the Court's expansion to improve its ideological balance, such a suggestion does not solve the problem, and may actually worsen it. If politicians were allowed to expand the Court to ensure an ideological balance, the Bench would be constantly growing. This would reinforce the Court's functioning as a mere extension of the political branches, and further hinder its decision rendering. Conversely, if the number of Justices remained static at nine seats, but their ideological balance shifted, the Court's current means of deciding cases would have to change.

Currently, the Supreme Court has a conservative supermajority,[156] which means cases are often decided based on politics rather than on merit. However, if the Court were to be truly ideologically balanced, there would be three liberal, three conservative, and three independent, or "swing," Justices. This composition would prevent supermajorities from tipping the scales of justice and would instead require well-rounded legal analysis for all cases before the Court—something that does not always happen when there is a clear majority—to effectively establish a true majority opinion.

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[153] The Federal Election Commission: Overview and Selected Issues for Congress, EVERYCRSREPORT.COM (2015), https://www.everycrsreport.com/reports/R44318.html [https://perma.cc/RK7D-MBKF].
[154] Douglas Keith, *Supreme Court Considers Partisan Balance Requirements for State Courts*, BRENNAN CTR. FOR JUST. (Oct. 1, 2020), https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-considers-partisan-balance-requirements-state-courts [https://perma.cc/QQ2B-PDMB].
[155] U.S. CONST. art. III.
[156] Olinsky & Oyenubi, *supra* note 84.

When there is no majority of Justices sharing the same political beliefs, a proper legal analysis requiring reasoned interpretation of both the Constitution and case precedent is needed to reach a verdict. Establishing this ideological split would grant a fighting chance to both parties of a case coming before the Court, as the matter must now be decided on the merits and not the politics of the issue presented. Further, this solution is more representative of the body politic as it gives equal weight to mainstream (liberal or conservative) and more marginalized (independent) political ideologies. Finally, because the Constitution does not provide any specific guidance on this topic, this solution also does not require an amendment, which makes it easier to implement.

3. Qualification Requirements for Justices

A third means of altering the Supreme Court appointment process to better insulate it from partisan politics is to establish certain requirements for judicial nomination. In no way do these qualifications seek to gatekeep or otherwise prevent those without the same opportunities or privileges as previously selected Justices from being appointed to the Court. Rather, these prerequisites aim to prevent unqualified candidates from occupying critical legal decision-making positions. Specifically, there are five criteria which are instrumental in determining who is qualified to serve on the Court.

The first qualification criterion for the Court is that the nominee has a legal education from an American Bar Association-accredited institution. Although some past Justices were not attorneys or judges,[157] the nation has strayed from this for several decades. Thus, it makes sense that those tasked with interpreting the Constitution and complex legal arguments have received a legal education. The second measure similarly follows: that the candidate has extensive and diverse legal and judicial experience. Taking

[157] *Frequently Asked Questions–General Information*, *supra* note 20.

from California's State Supreme Court nomination requirements,[158] a minimum of ten years practicing law (in this instance, as both an attorney and a judge) should suffice as an evaluative threshold for federal Supreme Court nominees. Similarly, a third condition is the ability to execute the required duties as demonstrated by litigating and deciding complex cases, drafting eloquent motions and decisions, and showing objectivity in politically charged cases. A fourth standard is the exhibition of a strong moral character. To again borrow from aspects of California's requirements,[159] a candidate's character, reputation, temperament, integrity, common sense, and work ethic would all be evaluative. Finally, a fifth basis is a non-violent, non-crimen falsi,[160] and non-repetitive criminal background because, if a nominee is to be tasked with interpreting and upholding the law, they ought not to demonstrate a disregard for it.

Collectively, these five elements for analysis by both Presidents seeking to nominate a candidate and Congressmembers determining whether a nominee should be confirmed will ensure that Justices appointed to the Court are the most qualified entrants to task with protecting and interpreting the law. This solution also prevents Justices from being appointed solely because of their political beliefs or their willingness to overturn important case precedent. And, like the other two proposals previously presented, it also does not require an amendment to the Constitution, as the suggestion to remove lifetime appointments would require. If a Justice is wholly qualified for the position and has effectively demonstrated their ability to be fair, reasoned, and objective, the duration for which they are on the Supreme Court should have no impact on its role or principles.

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[158] *How Appellate and Supreme Court Justices are Selected*, *supra* note 28.
[159] *Id*.
[160] *Crimen*, BLACK'S LAW DICTIONARY (Bryan A Garner ed., 11th ed. 2019) ("The crime of falsifying…a crime in the nature of perjury…any other offense that involves some element of dishonesty or false statement").

B. Amending the Impeachment Process

The Constitution's vague qualifications for impeachable offenses have contributed to an overwhelming unwillingness by politicians to hold the Court's Justices accountable when they have violated the Constitution or their oaths of office.[161] However, the Constitution's textual ambiguities are not the only culprit. Congress' overinvolvement in the Court's composition has also significantly impacted the willingness to impeach, remove from office, or otherwise hold Justices accountable for their indiscretions.[162] To best ensure that the Justices are not given free rein to violate their positional duties, there are three methods of improving the impeachment process that should be effectuated: implementing alternative judges, omitting co-conspirators, and establishing parameters.

1. Implementing Alternative Judges

Under the Constitution's framework, the Senate has the sole power of trying impeachments, including those of Supreme Court Justices.[163] However, like any other governmental body in this bifurcated political state, the Senate is rather partisan. How can it be ensured that an impeachment trial is fair and proper if the officials voting to remove the Justice from office previously voted to appoint the Justice to that office? Although this system was devised by the Framers within the meaning of checks and balances, it fails to account for the associated inherent political biases.

To preserve the Court's integrity and ensure that unfit Justices are properly removed, federal judges, not Congressmembers, should conduct judicial impeachment hearings. Like Supreme Court Justices, federal judges

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161 Douglas Keith, *Impeachment and Removal of Judges: An Explainer,* BRENNAN CTR. FOR JUST. (May 6, 2018), https://www.brennancenter.org/our-work/analysis-opinion/impeachment-and-removal-judges-explainer [https://perma.cc/XJ5W-CE78].
162 Segall & Mullen, *supra* note 124.
163 U.S. CONST. art. I, § III.

are skilled in objective legal analysis while Senators are not. Thus, federal judges are able to review the facts without their perception being influenced by personal political interests, which might otherwise influence a Senator's decision on whether a Justice is impeached. Similarly, federal judges have significantly less, if any, personal stake in the outcome of judicial impeachment trials because the results have no impact on them. With Senators, however, the Justices being placed on trial for impeachment can represent one of two things: (1) an opportunity to replace a Justice from an adverse party with one from a favorable party, or (2) a risk of losing political control over another seat on the Bench. In either instance, there is an underlying agenda surrounding any Senate hearing pertaining to Supreme Court Justices; appointment or impeachment.

Unlike Senators, federal judges have no skin in the game and are more likely to be fair when deciding whether a Justice has violated the law and should be removed from office. Together, these factors demonstrate that federal judges are better qualified to conduct these important judicial impeachment proceedings. Specifically, Congressmembers are more likely to be concerned with their own partisan interests than either the well-being of the Court as an institution of justice or the importance of abiding by due process in a democratic system. Although this proposal would require an amendment to the Constitution, it is still feasible if one is to think long-term about the Court's vitality.

2. Omitting All Co-Conspirators

To maintain the original impeachment framework of the Constitution,[164] another option for improvement is to keep the Senate as the sole trier of impeachment but to exclude members known to have been involved with or knowledgeable of, in any incriminating capacity, the impeachable offense. Like the prior example, this proposal requires an amendment but will

[164] U.S. CONST. art. I, §§ II, III.

significantly diminish the role of partisan political interference by holding government officials accountable to both their oaths of office and the Nation's Constitution. Such accountability is a crucial aspect of democracy.

This proposal parallels the Supreme Court's requirement that Justices recuse themselves from cases where they are too intertwined with the issue for review.[165] Federal law requires Supreme Court Justices to recuse themselves if their "impartiality might reasonably be questioned;" if they have "a personal bias or prejudice concerning a party;" if they previously served in governmental employment and, in that capacity, "participated as counsel, advisor, or material witness concerning the proceeding;" or if they, or their spouse, have "a financial interest in the subject matter…or in a party to the proceeding."[166] For example, Justice Jackson recently recused herself from an affirmative action case before the Court due to her membership on the Harvard Board of Overseers since 2016.[167] The rationale behind the Court's recusal requirement is the maintenance of an honest and fair trial, free of biases and other prejudices as stipulated in the concept of due process. Similarly, when an official has a personal stake in the outcome of an impeachment trial, it is fair to suspect that they might attempt to avoid accountability themselves by disrupting the fact-finding process. Because there is a substantial risk of violating due process, it is essential that those involved with the impeachable offense do not partake in such decisions.

By preventing congressional co-conspirators from partaking in the judicial impeachment process, the risk of tainting the proceedings with a

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[165] *Code of Conduct for United States Judges*, U.S. CTS. (Mar. 12, 2019), https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges [https://perma.cc/XJ27-FNGU].
[166] 28 U.S.C. §455(a)–(b) (2006).
[167] James Romoser, *Jackson Says She'll Recuse Herself From Case Challenging Affirmative Action at Harvard,* SCOTUSBLOG (Mar. 23, 2022), https://www.scotusblog.com/2022/03/jackson-says-shell-recuse-herself-from-case-challenging-affirmative-action-at-harvard/ [https://perma.cc/7R86-8DD2].

Senator's personal or political bias is considerably lessened. For example, suppose a Justice was involved in a political bribery scheme that also included Congressmembers. If the Justice was caught and impeachment claims were raised, the House would vote on whether to submit impeachment articles. The Senate would then conduct an impeachment hearing; first, to determine the validity of the claims, and second, to vote on whether to remove the Justice from office. If the involved Congressmembers participate in the Justice's impeachment trial, they could vote against impeaching and removing the Justice. If the other Congressmembers were unaware of this involvement, such blatant interference with the fairness of the Justice's impeachment would simply go unnoticed until the opportunity for removal had passed.

3. Establishing Impeachment Parameters

The Constitution's vague language[168] for what an "impeachable offense" is leaves much to be desired when deciphering what actions warrant a Justice's removal. Implementing a non-exhaustive list of impeachable offenses, which also does not require an amendment to the Constitution, would give Congress and the Justices a clear standard for what defines unconstitutional behavior.

Justices are unlikely to commit impeachable offenses when they know the parameters of their duties as government officials. This knowledge also avoids significant controversies for the Justices and the Court itself. Although treason and bribery are fairly straightforward, the phrase "high crimes and misdemeanors" is too vague for impeachment criteria. A non-exhaustive list of impeachable acts based on this notion would include violent crimes (e.g., rape, murder, assault, kidnapping), weapons charges (e.g., possession of unlicensed firearm, felon in possession), disorderly conduct (e.g., driving under the influence, drug possession, larceny, other

[168] U.S. CONST. art. II, § IV.

misdemeanor acts), property crimes (e.g., grand theft auto, arson, breaking and entering, vandalism), and fraud.

Because Justices can avoid engaging in impeachable offenses when they have a standard for what behaviors fall outside of the Constitution's "good Behaviour" requirement,[169] both the Justices and the Nation are provided with a better sense of what constitutes an impeachable act. Such knowledge also shields Justices from being removed for minor, non-impeachable acts that might have previously been considered impeachable due to the vagueness of the Constitution's language.

C. Impugning the Accountable Parties

A Supreme Court Justice has not been impeached since 1805.[170] Some may attribute this two-hundred-nineteen-year hiatus to the Justices abiding by their constitutional obligations and positional duties; however, the current impeachment parameters have also contributed to this lapse. When the definition of impeachment is both narrowly tailored, e.g., treason, bribery,[171] and incredibly vague, e.g., high crimes and misdemeanors,[172] Congress' ability to successfully convict a Justice for an offense becomes quite challenging. It is particularly difficult if a Justice did not specifically commit an act of either treason or bribery, as Congress is unlikely to vote to impeach and remove the Justice. However, if any of the previous solutions are effectuated, then the Court's composition could change. Specifically, three of the current Justices—Clarence Thomas, Amy Coney Barrett, and Brett Kavanaugh—could be removed from the Bench because of both their improper appointments and impeachable actions.

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[169] U.S. CONST. art. III, § I.
[170] *Impeachment Trial of Justice Samuel Chase, 1804–05*, *supra* note 42.
[171] U.S. CONST. art. II, § IV.
[172] U.S. CONST. art. II, § IV.

1. Clarence Thomas

The most obvious case for impeachment is Justice Clarence Thomas. From the immense public backlash regarding his nomination, confirmation, and appointment to the Court,[173] to current criticisms and scandals around his unwillingness to abide by the Constitution or his oath of office,[174] Justice Thomas should no longer be on the Supreme Court.

If the qualification requirements are implemented, Clarence Thomas is automatically disqualified from the Bench because he does not have a clear character background. Three months into Thomas' confirmation, Anita Hill testified before the Senate that he did not meet the character and fitness criteria needed to serve on the Court because of his history of sexual harassment.[175] Hill spoke of her own experiences with Thomas exhibiting inappropriate behavior at work, including unwelcome sexual comments and unsolicited sexual advances.[176] This testimony was corroborated by statements to the Senate made by Angela Wright and Rose Jourdain who supported Hill's assertion that Thomas had sexually harassed at least one woman in the past.[177] Although she did not join in the accusations, Sukari Hardnett did attest to Thomas' inappropriate workplace behaviors.[178] Despite this glaring indication of a lack of moral character and blatant violation of the law, both of which alone are grounds for his nomination's

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173 Gerhardt, *supra* note 76.

174 Avalon Zoppo, '*Arguably Unprecedented': Ethics Experts Say Clarence Thomas Crossed a Line With Jan. 6 Ruling*, THE NAT'L. L. J. (Mar. 5, 2022).

175 *Sexual Harassment Hearings*, *supra* note 77.

176 Reuters, EXCERPTS FROM SENATE'S HEARINGS ON THE THOMAS NOMINATION, N.Y. TIMES (Oct. 12, 1991), https://www.nytimes.com/1991/10/12/us/the-thomas-nomination-excerpts-from-senate-s-hearings-on-the-thomas-nomination.html [https://perma.cc/GXL4-NFKS].

177 *Excerpts From An Interview With Another Thomas Accuser*, N.Y. TIMES (Oct. 15, 1991), https://www.nytimes.com/1991/10/15/us/the-thomas-nomination-excerpts-from-an-interview-with-another-thomas-accuser.html [https://perma.cc/NQH3-JYC4].

178 Ruth Marcus, *One Angry Man,* THE WASH. POST (2007), https://www.washingtonpost.com/wp-dyn/content/article/2007/10/02/AR2007100201822.html [https://perma.cc/6FDL-25G7].

revocation, Thomas, who received the second-highest percentage of votes against confirmation in history,[179] ultimately ascended to the Bench.[180]

In the years since Hill's testimony, Thomas' looming presence on the Court has been difficult to ignore. From angry dissents to deeply unsettling majority or concurring opinions, Justice Thomas does not hold back his true feelings.[181] Aside from his qualifications and strong opinions, though, Justice Thomas' position on the Bench has also been compromised. In 2000, Justice Thomas was hundreds of thousands of dollars in debt and complained about his salary to Republican Congressmember Cliff Stearns, suggesting that he and other conservative Justices would leave the Court if lawmakers did not act.[182] During that conversation, Thomas and Stearns agreed that "it [was] worth a lot to Americans to have the Constitution properly interpreted," but that they "must have the proper incentives…, too."[183] What followed from this fear-inducing conversation was an unprecedented slew of lavish gifts—including thirty-eight destination vacations, twenty-six private jet flights, twelve VIP passes to pro and college sporting events, two stays at luxury resorts, and one standing invite to an uber-exclusive golf club—that Justice Thomas received from

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[179] Barry J. McMillion, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, CONG. RSCH. SERV. (2018), https://sgp.fas.org/crs/misc/R44234.pdf [https://perma.cc/9UJT-QT5K].
[180] *Supreme Court Nominations (1789–present)*, *supra* note 62.
[181] *See e.g.,* New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1(2022), Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022), Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 591 U.S. 657 (2020), Whole Woman's Health v. Hellerstedt. 579 U.S. 582 (2016), Obergefell v. Hodges, 576 U.S. 644 (2015), King v. Burwell, 576 U.S. 473 (2015), Citizens United v. the Federal Election Commission, 558 U.S. 310 (2010), Kansas v. Marsh, 548 U.S. 163 (2006), U.S. v. Patane, 542 U.S. 630 (2004), Lawrence v. Texas, 539 U.S. 558 (2003), etc.
[182] Justin Elliott et al., *Clarence Thomas' Money Complaints Sparked Resignation Fears*, PROPUBLICA (2023), https://www.propublica.org/article/clarence-thomas-money-complaints-sparked-resignation-fears-scotus [https://perma.cc/L6QA-JC6S].
[183] *Id*.

billionaires who are associated with cases before the Court.[184] One billionaire in particular, Harlan Crow, a Republican donor who has financial stakes in several Supreme Court cases,[185] took his generosity even further by purchasing Justice Thomas' mother's house[186] and paying for Justice Thomas' grandnephew's private boarding school tuition.[187]

These billionaires' gifts, though, were never disclosed by Justice Thomas[188] as required by federal disclosure laws.[189] Specifically, the 1978 Ethics in Government Act and the 1989 Ethics Reform Act both seek to prevent corruption and conflicts of interest by requiring judges to annually report any valuable gifts that might affect the performance of their official duties.[190] Although Justice Thomas has argued that these non-disclosures are not grounds for impeachment because they constitute social hospitality based on personal relationships (an exception to the aforementioned rules),[191] his failure to recuse himself from the cases that these billionaires were involved in is not only a major conflict of interest, but also a clear violation of his oath of office, and thus an impeachable offense.

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[184] Brett Murphy & Alex Mierjeski, *The Other Billionaires Who Helped Clarence Thomas Live A Luxe Life*, PROPUBLICA (2023), https://www.propublica.org/article/clarence-thomas-other-billionaires-sokol-huizenga-novelly-supreme-court [https://perma.cc/328S-ZM3V].

[185] Zoe Tillman, *Clarence Thomas Friend Harlan Crow had Supreme Court "Conflict of Interest"*, BLOOMBERG (2023), https://www.bloomberg.com/news/articles/2023-04-24/clarence-thomas-friend-harlan-crow-had-business-before-the-supreme-court [https://perma.cc/6Q5N-GQS2].

[186] Murphy & Mierjeski, *supra* note 184.

[187] Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas Raised Him. Harlan Crow Paid His Tuition*., PROPUBLICA (2023), https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus [https://perma.cc/XB6C-YGKY].

[188] Murphy & Mierjeski, *supra* note 184.

[189] Russell Wheeler et al., *Justice Thomas, Gift Reporting Rules, and What A Supreme Court Code of Conduct Would and Wouldn't Accomplish*, BROOKINGS (May 1, 2023), https://www.brookings.edu/articles/justice-thomas-gift-reporting-rules-and-what-a-supreme-court-code-of-conduct-would-and-wouldnt-accomplish/ [https://perma.cc/6SYE-NP6D].

[190] *Id*.

[191] *Id*.

Similarly, Justice Thomas' eligibility for impeachment for violating his oath is further illustrated by his failure to recuse himself for ethical reasons in relation to the January 6th cases.[192] Joined by Justice Alito, Justice Thomas dissented from the Court's decision to not block the January 6th Committee's subpoena for records relating to Republican Chair Kelli Ward's role in the 2020 election dispute.[193] Previously, Justice Thomas served as the lone dissent when the Court refused to greenlight President Trump's attempt to prevent the release of his presidential records to the January 6th Committee.[194] Justice Thomas should not have heard any cases related to the events on January 6th because his wife, Ginni Thomas, was directly involved in the insurrection and has testified before the January 6th Committee.[195] Recusal is designed to shield litigants from biased judges and protect the judiciary's integrity. Justice Thomas is no stranger to recusals due to familial conflicts, as he removed himself from the Virginia Military Institute case due to his son's contemporaneous enrollment at the university.[196]

Here, by again openly violating his duty to recuse himself—for a treason-related case, no less—Justice Thomas continues to impede the Court's role as an impartial and independent judiciary. His misconduct diminishes the public's confidence in both the Court as a judicial institution and its Justices as well as positions him as directly aiding and abetting his wife's as well as the rest of the insurrectionists' behavior. Justice Thomas must be impeached.

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[192] Zoppo, *supra* note 174.
[193] Ward v. Thompson, 143 S.Ct. 439 (2022) (mem.).
[194] Trump v. Thompson, 142 S.Ct. 680 (2022) (mem.).
[195] Summer Concepcion et al., *Ginni Thomas Told Jan. 6 Committee She Still Believes the Election Was Stolen, Chair Says*, NBC NEWS (Sept. 29, 2022), https://www.nbcnews.com/politics/congress/ginni-thomas-meeting-house-committee-investigating-jan-6-riot-rcna49967 [https://perma.cc/R62Z-KC5V].
[196] United States v. Virginia, 518 U.S. 515 (1996).

2. Amy Coney Barrett

Justice Amy Coney Barrett is another member of the Supreme Court who should be removed. She, too, faced tremendous public criticism upon being nominated, confirmed, and appointed to the Bench.[197] Her appointment and confirmation during an election year,[198] combined with her lack of experience[199] and failure to recognize the impact of both her personal opinions and political ideologies[200] on her judicial decisions, stresses the need for her removal. Justice Barrett has also committed perjury in direct opposition to both her oath during her confirmation hearings and her oath of office.[201]

Paralleling Harriet Miers,[202] Amy Coney Barrett faced tremendous backlash upon being nominated because of her lack of qualifications.[203] Barrett's short resumé details only two years clerking for federal judges, only three years of legal practice, fifteen years as a full-time law professor, and less than three years as an appellate judge for the Seventh Circuit.[204] Although she was ultimately deemed qualified by the New York City Bar Association, it, too, expressed reservations about her premature

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[197] Chung & Wallis, *supra* note 82.
[198] Wheeler, *supra* note 73.
[199] Andrew Villeneuve, *Republicans Install the Unqualified Amy Coney Barrett on the United States Supreme Court*, CASCADIA ADVOC. (Oct. 25, 2020), https://www.nwprogressive.org/weblog/2020/10/republicans-install-the-unqualified-amy-coney-barrett-on-the-united-states-supreme-court.html [https://perma.cc/SH79-N2NN].
[200] Amy Howe, *Profile of a Potential Nominee: Amy Coney Barrett*, SCOTUSBLOG (Sept. 21, 2020), https://www.scotusblog.com/2020/09/profile-of-a-potential-nominee-amy-coney-barrett/ [https://perma.cc/65Z8-8HL7].
[201] Tanner Stening, *Did the Conservative Justices Commit Perjury? Here's What They Said Under Oath About Roe v. Wade*, NEWS AT NORTHEASTERN (Jun. 26, 2022), https://news.northeastern.edu/2022/06/26/roe-v-wade-conservative-justice-perjury/ [https://perma.cc/KCH7-24YS].
[202] Krugman, *supra* note 75.
[203] Villeneuve, *supra* note 199.
[204] Howe, *supra* note 200.

ascension.[205] Specifically, the Bar expressed hesitancy regarding Barrett's maturity of judgement, integrity, and independence, willingness to seek fair resolutions, understanding of the Court's constitutional role of protecting individual rights, and appreciation of the Court's role in interpreting the Constitution as well as sensitivity to the other branches' powers.[206] If the previously discussed qualification requirements are effectuated, Justice Barrett would no longer meet the necessary criteria to serve on the Court. For one, her confirmation clearly violated the Thurmond Rule and directly contradicted prior statements by both Mitch McConnell and Lindsey Graham.[207] A Justice who was improperly appointed during an election year cannot serve on the Court. Her less than six years of professional experience working as an attorney and then as a judge[208] is also noticeably insufficient.

In addition to her limited qualifications, Justice Barrett has also committed an impeachable offense. During her confirmation hearings, Barrett was repeatedly asked about her position on upholding case precedent under stare decisis, specifically, as it pertains to *Roe* and *Casey*.[209] Although she declined to answer directly about her views regarding either case,[210] Barrett conveyed that she was not coming to the Bench with an agenda or predetermined view on a particular future case.

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[205] N.Y. City Bar Ass'n., *New York City Bar Association Finds Judge Amy Coney Barrett "Qualified to Serve as a Supreme Court Justice, with Reservations",* N.Y. CITY BAR (Oct. 23, 2020), https://www.nycbar.org/media-listing/media/detail/reservations-on-judge-amy-coney-barretts-qualifications-for-supreme-court [https://perma.cc/YHU7-NF7U].
[206] *Id*.
[207] Louis J Virelli, *Supreme Court Recusal*, AM. CONST. SOC. (Oct. 28, 2020), https://www.acslaw.org/expertforum/supreme-court-recusal/ [https://perma.cc/4U72-EPPJ].
[208] Howe, *supra* note 200.
[209] D'Angelo Gore, et al., *What Gorsuch, Kavanaugh and Barrett Said About Roe at Confirmation Hearings*, FACTCHECK.ORG (May 9, 2022), https://www.factcheck.org/2022/05/what-gorsuch-kavanaugh-and-barrett-said-about-roe-at-confirmation-hearings/ [https://perma.cc/Z8NA-88S5].
[210] *Id*.

This portrayal, though, was a thinly-veiled smokescreen in an attempt to avoid perjury.[211] Barrett's lengthy academic scholarship indicates not only her personal political opinions, but also a clear lack of respect for the separation of church and state, as her deep Catholic faith significantly permeates her decision-making.[212] In lying about her feelings regarding case precedent and whether she was joining the Court to help overturn *Roe*,[213] to then unapologetically partaking in the majority opinion to overturn *Roe* in *Dobbs*,[214] it is evident that Justice Barrett has committed perjury. Between her noticeable lack of qualifications, being improperly appointed during an election year, and committing perjury during her confirmation hearings, Justice Barrett must be impeached.

3. Brett Kavanaugh

Borrowing from both Justice Thomas and Justice Barrett, Justice Brett Kavanaugh has committed a trifecta of disqualifying and impeachable offenses. In his whirlwind nomination and confirmation hearings, Justice Kavanaugh was thrice accused of inappropriate, criminal behavior;[215] displayed a blatant lack of emotional regulation;[216] and made perjurious statements regarding important case precedent he would later overturn.[217] Collectively, one fact remains: Brett Kavanaugh should never have been confirmed to the Court and he should not be seated there now.

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[211] Ariane de Vogue, *Amy Coney Barrett's Record of Advocating for Limits to Abortion Rights*, CNN (Oct. 6, 2020), https://www.cnn.com/2020/10/06/politics/amy-coney-barrett-abortion-record/index.html [https://perma.cc/AG2J-H9F4].
[212] Howe, *supra* note 200.
[213] Gore, et al., *supra* note 209.
[214] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 231 (2022).
[215] Sheets & Mindock, *supra* note 80.
[216] Marilisa Racco, *What Does Brett Kavanaugh's Angry Testimony Say About Gender and Emotion?*, GLOBAL NEWS (Sept. 28, 2018), https://globalnews.ca/news/4497396/brett-kavanaughs-anger/ [https://perma.cc/4V7H-Q6V6].
[217] Gore, et al., *supra* note 209.

Similar to Douglas Ginsburg,[218] Brett Kavanaugh faced accusations of past criminal activity. Specifically, Christine Blasey Ford came forward during Kavanaugh's confirmation hearings and accused him of sexually assaulting and attempting to rape her at a house party as a teenager.[219] Julie Swetnick corroborated these statements in a sworn declaration of her experiences witnessing Kavanaugh, in high school, drink excessively, engage in inappropriate sexual contact, and even spike girls' drinks so that it would be easier for them to be gang raped at parties.[220] Deborah Ramirez also came forward and stated Kavanaugh had sexually harassed her at a college party.[221] These criminal acts not only meet the criteria for impeachment as outlined in the non-exhaustive list from the second proposal, but they also violate the qualification requirements outlined in the first solution. Provided these proposals are implemented, the first solution has thus been twice violated by Kavanaugh's inability to also maintain any semblance of professionalism or emotional regulation while attempting to refute the accusations levied against him.[222] His emotional outburst was in direct contradiction to a Justice's need to be rational, objective, and professional, and was an explicit demonstration of his inability to properly serve on the Court.

Justice Kavanaugh also committed a separate impeachable offense during his confirmation hearings: perjury. While he avoided directly stating whether he believed *Roe* or *Casey* were decided correctly, or how he would

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218 Lee, *supra* note 74.

219 Sheets & Mindock, *supra* note 80.

220 Kevin Breuninger, *Read the Full Sworn Statement From Julie Swetnick, The Third Woman to Accuse Supreme Court Nominee Brett Kavanaugh of Sexual Misconduct*, CNBC (Sept. 26, 2018), https://www.cnbc.com/2018/09/26/read-full-sworn-statement-from-brett-kavanaugh-accuser-julie-swetnick.html [https://perma.cc/78JD-V3SZ].

221 Terry Gross, *Reporters Dig Into Justice Kavanaugh's Past, Allegations of Misconduct Against Him*, NPR (Sept. 16, 2019), https://www.npr.org/2019/09/16/761191576/reporters-dig-into-justice-kavanaughs-past-allegations-of-misconduct-against-him [https://perma.cc/9HRK-FLUW].

222 Racco, *supra* note 216.

rule in a future case challenging either,[223] he did continuously state that *Roe* was important and settled precedent under stare decisis, as evidenced by *Casey* reaffirming its holding.[224] Although Justice Kavanaugh attempted to backpedal by saying he was open to hearing arguments for cases that need to be revisited,[225] he also reasserted the importance of case precedent and its status as the foundation of the judicial system.[226] Nevertheless, Justice Kavanaugh joined the Court in *Dobbs* to overturn *Roe*,[227] writing a separate concurrence[228] in a failed attempt to mitigate the damage the majority had just done—an effort that underscores the contradictions in his earlier testimony.[229] The combined effect of his lack of professionalism, numerous criminal accusations, and willingness to lie under oath while attempting to avoid the consequences of doing so all evidence his lack of fitness for the Court. Justice Kavanaugh must be impeached.

V. CRITICISMS & REBUTTALS

Trying to solve the problems plaguing the Supreme Court is nothing new to legal academia. Thus, such proposals are expected to be met with extensive discussion, both supportive and skeptical. Given the stakes, these solutions will likely receive substantial reaction from both the legal realm and the general public. Specifically, it can be anticipated that criticisms will focus on three main arguments: (1) the inability to trust future government officials to comply with these procedures, (2) the Constitution's text obstructing such proposals and the slippery slope created by circumventing it, and (3) the ex post facto limitation on retroactive policy application.

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[223] Gore, et al., *supra* note 209.
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).
[228] *Id.* at 336 (Kavanaugh, J., concurring).
[229] Lisa Needham, *Who is Brett Kavanaugh Kidding?*, BALLS AND STRIKES (Jun. 28, 2022), https://ballsandstrikes.org/scotus/kavanaugh-dobbs-concurrence/ [https://perma.cc/RLL2-5DR8].

A. A Matter of Trust

Requiring a President to comply with election-year appointment parameters, ensure an ideological balance, and consider a candidate's qualifications for Supreme Court nominations involves both public and governmental trust that the executive will respect these rules. Based on past experiences with non-cooperative executives,[230] it would be easy to argue that this level of trust could never be achieved. However, such an argument fails to consider the bipartisan benefits arising from enacting such proposals.

For instance, the appointment law prohibiting any Justice from being nominated and confirmed during an election year is advantageous to all parties. It prevents a President who might not be re-elected from further influencing and impacting the Court. In doing so, the voting public also has a greater voice in the Court's composition because nominations and confirmations can only be made by elected officials; outgoing officials are no longer permitted to participate in the process. Because this proposal allows for greater public input, Congressmembers (who are subject to election by the voting public) are also more likely to agree to such a law.

Although the cynical fear that a President may disregard this constraint exists based on past experience,[231] this fear is irrelevant when there are impediments and consequences in place to prevent such occurrences. Even if a President attempted to ignore this rule, Congress is still an obstacle to the success of the President's nomination, as it, too, would have to collectively agree to ignore the restriction. The probability of both actions occurring without significant consequences is virtually nonexistent. All government officials are required to take an oath to abide by the law.[232]

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[230] Ilya Shapiro, *An Exit Survey of Trump's Constitutional Misdeeds*, CATO INSTITUTE (Jan. 24, 2021), https://www.cato.org/commentary/exit-survey-trumps-constitutional-misdeeds [https://perma.cc/L2RT-APSZ].
[231] *Id*.
[232] *Oaths*, CONST. ANNOTATED, CONGRESS,

When officials violate the law, there are consequences which serve to discourage such behavior.[233] Although the public may harbor reservations about a President's trustworthiness, such skepticism should not preclude the enactment of this law. Given the significant incentives for Congressmembers and political parties alike to comply with the rule, it is also fair to assume that a President would be amenable given that their position in office would otherwise be jeopardized.

Similarly, the proposed ideological split to ensure the Court's balance is likely to also be supported by the President and Congressmembers alike. Throughout history, whenever one party has had the majority on the Supreme Court, the other party has been fiercely dissatisfied.[234] To avoid this continued partisan pendulum swing and all the complications arising from it, the "three of each" rule will inhibit supermajorities. The Justices, who would not necessarily form an immediate majority on an issue for review because of their differing ideologies, will need to focus on the law and the art of persuasion to create a majority opinion. Thus, all Court decisions will be rooted in constitutional values rather than partisan opinions—a result that any party and the public alike can support.

As with the appointment law, if a President disregarded this requirement when nominating a Justice for the Court, they would be subject to accountability by both Congress and the public. Additionally, ignoring such a law would not only jeopardize the President's position in office with the

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https://constitution.congress.gov/browse/essay/artVI-C3-1/ALDE_00000387/ [https://perma.cc/T2CS-E4FK].

[233] *Violation of Oath of Office and Walker v Members of Congress*, FRIENDS OF THE ARTICLE V CONVENTION, http://foavc.org/01page/Articles/Violation%20of%20Oath%20of%20Office%20and%20Walker%20v%20Members%20of%20Congress.htm [https://perma.cc/75TY-9CFM].

[234] Jeff Nilsson & Ben Railton, *The Supreme Concern: The History of Bias and Power in the Supreme Court*, THE SATURDAY EVENING POST (Feb. 7, 2022), https://www.saturdayeveningpost.com/2022/02/the-supreme-concern-the-history-of-bias-and-power-in-the-supreme-court/ [https://perma.cc/62L2-RF5R].

risk of impeachment and removal,[235] but also could not be overlooked or justified. While it might be hard for today's legal community or the general public to envision a President from one party nominating a Justice from another party willingly, given the currently bifurcated political state, it has been done before. In 1990, President H.W. Bush, a Republican, nominated Justice Souter, a liberal, to the Court.[236] This example indicates the ability of leaders to reach across the aisle when doing so is in the Nation's and democracy's best interest. This proposal similarly necessitates nonpartisan engagement. In requiring officials to engage in bipartisan efforts, both the Nation and the principles of democracy benefit from the non-supermajority, constitutionally justified Court decisions that result.

Finally, the qualification parameters also require the President's compliance for success and effectiveness. It could be argued that a President already constrained by the previous proposals might try to nominate an underqualified Justice to still "win" in the Court. However, this is unlikely given that the candidate would not pass congressional review. Another criticism arises with people doubting that a President would take the time to ensure a candidate truly meets all the criteria before nominating them. However, this is part of the role of executive assistants and Congress, as any candidate under consideration who does not meet the criteria will be removed and thus will not be nominated.

The most likely criticism, though, is that these prerequisites are too restrictive and will omit worthy candidates from consideration. In addition to these qualifications being based on existing State Supreme Court

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[235] *Overview of Impeachment Clause*, CONST. ANNOTATED, CONGRESS, https://constitution.congress.gov/browse/essay/artII-S4-1/ALDE_00000282/ [https://perma.cc/GGB6-9CTX].

[236] Richard Wolf, *George H.W. Bush Left Both A Liberal and Conservative Legacy at the Supreme Court*, USA TODAY (Dec. 2, 2018), https://www.usatoday.com/story/news/politics/2018/12/02/george-bush-liberal-and-conservative-legacy-supreme-court/2183452002/ [https://perma.cc/7M4N-LCAP].

requirements,[237] they are also rooted in the need to establish a baseline criterion. Every job has criteria or qualifications listed for prospective candidates.[238] This is not a coincidence; people are selected for jobs they are qualified for, and people who are not qualified are not selected as they cannot perform the job as its description requires. The same is true of the Supreme Court: a candidate lacking sufficient and diverse legal experience cannot rise to the occasion necessitated by the Nation's highest court, and permitting them to try jeopardizes both the Court's reputation and founding principle of fairness, justice, and due process. Requiring Justices to enter with a baseline of experience and knowledge ensures thorough constitutional understanding, legal reasoning, and case analysis. This requirement also fosters greater objectivity because the Justices are less dependent upon their own political perspectives due to their extensive experience with law and legal precedent. Having qualified, fair, and capable Justices on the Supreme Court is an end goal that everyone can and should support.

B. Constitutional Limits and Court Control

Suggesting alterations to the Supreme Court impeachment process that undermine the antecedent procedure in the Constitution[239] understandably causes concern. The impeachment method, though, has not changed since its creation during the Constitutional Convention.[240] Proposing a system requiring constitutional modifications naturally results in confusion and panic for both the legal community and the general public. However, amendments to the Constitution, though uncommon in recent decades, have been made in the past. Although it has been over thirty years since the last

[237] *How Appellate and Supreme Court Justices are Selected*, *supra* note 28.
[238] Alison Doyle, *What Are Job Requirements?*, THE BALANCE (Oct. 22, 2021), https://www.thebalancemoney.com/what-are-job-requirements-3928054 [https://perma.cc/P7ED-5PC4].
[239] U.S. CONST. art. II, § IV.
[240] *About Impeachment*, *supra* note 37.

amendment was ratified,[241] legal scholars predict that the Nation is due for a "big one,"[242] and this set of proposals is it.

The Constitution has an engrained amendment process[243] because the Framers never intended it to be a static document.[244] Thus, amendments to the Constitution are a legitimate mechanism for effectuating the changes proposed above. The judiciary's role is to objectively interpret the law, so why are partisan politicians with personal stakes in particular outcomes permitted to conduct judicial impeachments? Permitting such partisan participation subjects the Court to politicization by permitting Justices of the same party as the congressional majority to commit impeachable offenses without consequence. Conversely, federal judges are experts in the analysis of character, behavior, and redemptive value. They are thus better suited to conduct Supreme Court impeachment trials and determine whether to remove a Justice from office. When the trier of fact understands the applicable rules, the outcome of the case is better. Having federal judges, rather than Congressmembers, conduct impeachment hearings better protects and preserves the Court's integrity, the public's trust in the judiciary, and the sanctity of the Nation's democratic principles. Although some may argue impeachment proceedings should continue as the Framers intended, the Nation's historical inability[245] to impeach ill-equipped Justices indicates a need to improve upon the process for the sake of the Nation as a whole.

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[241] *The Twenty-Seventh Amendment*, HIST., ART & ARCHIVES, https://history.house.gov/Historical-Highlights/1700s/The-27th-Amendment/ [https://perma.cc/JFG9-B39J].

[242] Erin Carr, Constitutional Law I Classroom Lecture at Seattle University School of Law (Fall Semester 2022).

[243] U.S. CONST. art. V.

[244] Erwin Chemerinsky, *Even the Founders Didn't Believe in Originalism*, THE ATLANTIC (Sept. 6, 2022), https://www.theatlantic.com/ideas/archive/2022/09/supreme-court-originalism-constitution-framers-judicial-review/671334/ [https://perma.cc/U94K-YTNM].

[245] *Frequently Asked Questions–General Information*, *supra* note 20.

A common criticism is that, even if this amendment to the Constitution were suggested, it would fail. Given the currently polarized nature of the Nation, this is a very plausible result, and thus a “backup” plan is required. As previously mentioned, another option is to require legislators involved with the impeachable offense to be recused from the proceedings. Just as Justices recuse themselves from cases where they cannot be objective,[246] Congressmembers should similarly be prohibited from participating in impeachment proceedings for Justices and offenses with which they have also been involved. In doing so, the proceedings maintain the original design of the Constitution but still prevent political control and manipulation by partisan officials who are unable to be objective and fair.

This proposal, however, will be met with pushback. Critics will likely argue that requiring Congressmembers to recuse themselves for involvement or association with the impeachable act would consume too much time, require too much trust in Congressmembers’ honesty and willingness to admit their own biases, and ultimately interfere with the impeachment itself. Ensuring Congressmembers are not biased on the topic they are presiding over might be time-consuming but could easily be determined by congressional aides and available evidence. For example, the Congressmembers involved with the January 6th insurrection on the Capitol provided the media with their views on the matter.[247] Thus, if an impeachment trial were held regarding a Justice’s association or involvement with January 6th, the Congressmembers needing to be recused are already known. While not every impeachable issue is guaranteed the same congressional transparency, the combined efforts of congressional aides and the media at large to demonstrate Congressmembers’ involvement

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[246] *Code of Conduct for United States Judges*, *supra* note 165.

[247] Yamiche Alcindor & Alex D’Elia, *GOP Lawmakers Were ‘Intimately Involved’ in Jan. 6 Protest Planning*, NEW REPORT SHOWS, PBS (Oct. 25, 2021), https://www.pbs.org/newshour/show/gop-lawmakers-were-intimately-involved-in-jan-6-protest-planning-new-report-show [perma.cc/R23B-SPX8].

and biases will suffice in determining who needs to be removed from a proceeding. Thus, no time-consuming "side trials" would be required.

Another anticipated criticism is the fear that implementing impeachment parameters will create a "slippery slope" leading to more Justices being impeached and making it easier for the other governmental branches to control or otherwise manipulate the Court. This fear, however, is an extreme interpretation of the proposal. Given the Constitution's vagueness on impeachable offenses,[248] it is useful to establish what acts are impeachment offenses. These parameters help to prevent the outlined offenses from occurring by providing the Justices with knowledge and advanced notice of what acts are "off-limits" for them. As a result, Justices violating these limits will be held accountable via impeachment procedures rather than allowing Congress to, on a per se basis, decide if a particular offense warrants impeachment. By stating what actions are impeachable, the determination is removed from Congress, which protects both the Justices and the proceedings from congressional influence and over-politicization.

While the counterargument to this proposal might be that more Justices will be impeached because there is now a non-exhaustive list of impeachable offenses, this is not the case. Conversely, fewer Justices will be subject to impeachment as they will have clear notice about what acts are impermissible and Congress would be limited by the constraints outlined in the proposal's non-exhaustive list. Because the impeachability of an act would no longer be Congress' decision, the risk of trivial litigation for non-impeachable actions is avoided. Additionally, the parameters of a non-exhaustive list help to ensure that Justices found to be violating their oaths or the Constitution are properly identified, tried, and removed from their positions. This measure does not seek to arbitrarily impeach Justices or

[248] U.S. CONST. art. II, § IV.

make the process easier for political advantage, but rather to hold Justices accountable for their misdeeds.

C. Avoiding Ex Post Facto

While the aforementioned objections are worthy of discussion, most criticism will likely aim at the suggestion to impeach one-third of the current Supreme Court's Justices. This disapproval can be viewed in two ways: either that the wrong Justices (or not enough of the Justices) are being targeted, or that impeaching Justices for rules not existing at the time violates the prohibition of ex post facto.[249]

For the first view, it could be argued that the other three conservative Justices should also be impeached as they have committed the same or similar offenses as those of the three aforementioned Justices. For the sake of reasonableness, the remaining conservative Justices were excluded from in-depth impeachment discussions, however, it is worth taking a moment to acknowledge the merit of such an argument.

In a similar vein to both Justice Barrett and Justice Kavanaugh, Justice Gorsuch also lied about *Roe* during his confirmation hearings.[250] And, like Justice Thomas, Justice Gorsuch not only failed to report the identity of the purchaser of his property (a CEO whose law firm has since had at least twenty-two cases before the Court), but he did not recuse himself despite the conflict of interest created.[251] Also resembling Justice Thomas, Justice Alito similarly failed to disclose a luxury vacation that was paid for by a billionaire Republican megadonor who has subsequently had at least ten cases before the Court, none from which Justice Alito recused himself.[252]

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[249] U.S. CONST. art. I, § IX.
[250] Gore, et al., *supra* note 209.
[251] Heidi Pryzybyla, *Law Firm Head Bought Gorsuch-Owned Property*, POLITICO (Apr. 25, 2023), https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579 [https://perma.cc/HDF5-HZ5F].
[252] Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Alito Took Unreported Luxury Trip With GOP Donor Paul Singer*,

Even Chief Justice Roberts has failed to recuse himself from cases with flagrant conflicts of interest.[253] Like some of Justice Thomas' failed recusals, Chief Justice Roberts' non-recusals also relate to his wife.[254] Jane Roberts was paid over ten million dollars as a legal recruiter for elite corporate law firms that then had cases before the Supreme Court and Chief Justice Roberts.[255] Therefore, there is merit in arguing that these Justices should also be impeached as they, too, demonstrate a lack of fitness for their positions on the Bench.

For the second view, ex post facto laws seek to retroactively make criminal conduct that was not criminal when it was performed, increase the punishment for previously committed crimes, or change the procedural rules in place at the time of the crime's commission in a way that substantially disadvantages the accused.[256] While some may argue that the Constitution protects the Justices from impeachment because their actions were not known to be impeachable offenses at the time of their commission, this argument is deficient. The solutions proposed in this article do not implicate ex post facto laws. Even if they did, ex post facto refers specifically to criminal activity and does not apply to civil actions[257] such as perjury, behavioral choices, appointment laws, recusal, or lack of qualification.

PROPUBLICA (Jun. 20, 2023), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/9A2P-NPBN].

[253] Mattathias Schwartz, *Jane Roberts, Who Is Married to Chief Justice John Roberts, Made $10.3 Million in Commissions From Elite Law Firms, Whistleblower Documents Show*, BUSINESS INSIDER (Apr. 28, 2023), https://www.businessinsider.com/jane-roberts-chief-justice-wife-10-million-commissions-2023-4 [https://perma.cc/PK7J-RDCV].

[254] *Id.*

[255] *Id.*

[256] *Ex Post Facto*, BLACK'S LAW DICTIONARY (Bryan A Garner ed., 11th ed. 2019) ("Done or made after the fact; having retroactive force or effect").

[257] The Editors of the Encyclopedia Britannica, *Ex Post Facto Law*, ENCYCLOPÆDIA BRITANNICA, https://www.britannica.com/topic/ex-post-facto-law [https://perma.cc/TQ6L-YRBY].

First, a Justice who lies under oath during their confirmation hearings about whether they believed certain caselaw to be a well-established precedent, or even super-precedent, has committed perjury.[258] Perjury is the act of intentionally falsifying an affirmation, to tell the truth concerning matters material to an official proceeding.[259] A Justice who commits perjury will be impeached and removed from office under the Constitution.[260] Ex post facto arguments are thus inapt, as the law existed at the time.

Second, a Justice accused of sexual harassment, sexual misconduct, sexual assault, or rape has not only violated the background check required both within the legal field itself and by this article's first proposal, but they have also potentially violated criminal law. When law students apply for admission to the Bar, they must undergo a comprehensive background check to ensure their moral character is fit to enter the legal profession.[261] Thereafter, there is little opportunity for acknowledgment of and accountability for indiscretions. When allegations of a nominee's improper, and possibly criminal, conduct come to light and Congress does not fully investigate the accusations,[262] the Justice's background is not properly considered. Hence, background checks are needed to ensure that the "good Behaviour" and moral conscience qualifications are met. While critics will

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[258] Stening, *supra* note 201.

[259] *Perjury*, BLACK'S LAW DICTIONARY (Bryan A Garner ed., 11th ed. 2019) ("The act or an instance of a person's deliberately making material false or misleading statements while under oath; esp., the willful utterance of untruthful testimony under oath or affirmation, before a competent tribunal, on a point material to the adjudication").

[260] Brad Dress, *Could Congress Impeach Supreme Court Justices for Perjury?*, THE HILL (Jul. 19, 2022), https://thehill.com/regulation/court-battles/3566007-could-congress-impeach-supreme-court-justices-for-perjury/ [https://perma.cc/8CQE-D53L].

[261] Timothy Dinan, *Bar Application Character and Fitness Background Check - Part 1*, NAT'L. JURIST (Mar. 22, 2018), https://nationaljurist.com/national-jurist-magazine/bar-application-character-and-fitness-background-check-part-1/ [https://perma.cc/5C8K-TVXA].

[262] Avi Selk, *How the FBI's Flawed Investigation of Clarence Thomas Became A Model For Kavanaugh's*, THE WASH. POST (2018), https://www.washingtonpost.com/politics/2018/10/02/fbis-anita-hill-investigation-quick-professional-flawed/ [https://perma.cc/3XCR-MD3L].

argue that impeaching Justices for Congress' failure to properly investigate (or properly consider) such allegations is both unjust and a violation of ex post facto, this is not necessarily the case. A Justice would not be impeached unless and until the allegations were proven to be factually and evidentiarily supported. And even if a Justice were to be impeached, such would not be the result of the criminal act they committed, but because they no longer satisfy the qualification requirements. While it may be tempting to say so, this article's proposed prerequisites and their application to currently seated Justices would not violate ex post facto as such proposals are civil, not criminal. Thus, the principles of ex post facto do not apply.

Third, a Justice demonstrating unprofessional behavior during their confirmation hearings would similarly violate the proposed qualification requirements. Given that Supreme Court Justices are supposed to be rational, composed, and professional members of the national judiciary, pre-appointment behavior indicating their inability to maintain this role-required composure is grounds for disqualification. While this alone may be insufficient for impeachment, the argument is that the Justice would not have been confirmed if such prerequisites were in place at the time, and therefore they should be unseated. Critics are likely to interpret this position as extreme and argue that a Justice cannot be held to standards that did not exist when they ascended the Bench as doing so violates the law prohibiting ex post facto application. Like the previous example, though, the principles of ex post facto do not apply here because the qualifications and behavioral focus in this matter relate to civil, not criminal, law.

Fourth, a Justice appointed to the Bench against a previously-established rule prohibiting such an appointment during election cycles would also violate the election year law proposed earlier in this article. Recall that this law was once cited to deny a qualified Justice a seat on the Bench and then ignored to permit an unqualified Justice to be seated.[263] This contradiction

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[263] Wadington, *supra* note 72.

indicates the need for consistency in the Court's appointment process and to hold improperly confirmed Justices accountable. Although critics could again argue that it was not the Justice's fault that Congress ignored a law they once relied upon, this fact directly pertains to the Justice themself. When Congress or the President uses a judicial candidate as a political pawn for personal or party advantage, the Justice is also partially responsible for not refusing the nomination given the appointment's lack of integrity. In addition to the Justice's role, Congress, the involved political party, and potentially even the President are not allowed to continue to benefit from this unjust behavior. Therefore, a Justice could be impeached for being improperly appointed and confirmed against the election year law without violating ex post facto because the rule previously existed, so the law against ex post facto does not apply.

Fifth, a Justice appointed without demonstrating they are qualified for the position is also eligible for impeachment given the previously proposed prerequisites. While this is like the third point above, it warrants repetition for its broader impact. A Justice who does not meet the qualifications required for the position and who demonstrates an inability to be effective, objective, and fair is unable to fulfill the role's necessitated duties. While critics might quickly say that even if a Justice was appointed when they were not "qualified," the fact that they have maintained their position (seemingly without issue) is indicative of their ability regardless of whether such a proposal goes into effect. It is possible for a Justice who was not qualified at the time of their confirmation to now be considered sufficiently qualified due to their record while in the position. However, such an argument fails to consider that someone who should never have been considered should not remain in the position to which they were wrongly appointed. Again, the ex post facto law does not apply as this is a civil matter. Thus, ex post facto is not a legitimate legal basis for arguing that a Justice otherwise qualified for impeachment for failing to meet such appointment terms should not be impeached after all.

Sixth, a Justice involved with or assisting in high crimes, during occurrence or thereafter, is also eligible for impeachment. Under the Constitution's impeachment clause,[264] bribery, treason, and other high crimes and misdemeanors are specifically indicated as means for removal, thus preventing ex post facto from applying as the law is pre-existing. In this instance, assisting in the execution and subsequent cover of such high crimes and misdemeanors is a form of aiding and abetting.[265] Thus, a Justice aiding and abetting high crimes and misdemeanors would be removed for blatantly violating the Constitution. Critics may argue that knowing of or being indirectly associated with such high crimes and misdemeanors is an insufficient basis to impeach someone who did not directly participate in the act, but that position is unsupported in the legal realm. Any level of knowledge or involvement, whether direct or indirect, in illegal activity without immediate and direct notification to authorities results in a person being labeled a co-conspirator or an aider and abettor.[266] In both civil and criminal law, a co-conspirator or an aider and abettor is equally as liable for the act in question.[267] Thus, a Justice involved in such impeachable offenses in any way is directly eligible for impeachment and removal from office.

Finally, a Justice refusing to recuse themselves from cases where they cannot be an objective and unbiased trier of fact has violated the fundamental requirements of judicature and is eligible for impeachment. Supreme Court Justices, like all judges, are required to take an oath to

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[264] U.S. CONST. art. II, § IV.

[265] *Aid and Abet*, BLACK'S LAW DICTIONARY (Bryan A Garner ed., 11th ed. 2019). ("To assist or facilitate the commission of a crime, or to promote its accomplishment").

[266] *Id*.

[267] *Aiding-and-Abetting Liability*, BLACK'S LAW DICTIONARY (Bryan A Garner ed., 11th ed. 2019) ("Civil or, more typically, criminal liability imposed on one who assists in or facilitates the commission of an act that results in harm or loss, or who otherwise promotes the act's accomplishment").

affirm that they will be just and impartial in all matters they oversee.[268] By failing to abide by the recusal requirement when they cannot be impartial and just—particularly when their opinion has been bought by someone with a vested interest in the case's ruling, a Justice has explicitly violated their oath of office and is subject to impeachment and removal. While some critics argue that it is a Justice's decision, based on the perception of their ability to be impartial, whether to recuse themselves, this argument ignores the inherent bias involved in such a decision. The recusal requirement's purpose is to prevent judicial overreach and over-politicization while ensuring just outcomes in all matters.[269] When a case comes before the Supreme Court, the parties have only one opportunity to succeed as the Court is the "final voice" on judicial matters.[270] Even if a Justice thinks they are capable of being impartial, people are oftentimes unaware of their own biases and the extent to which such biases permeate and impact their perspectives and decisions on matters. Thus, when a Justice fails to recuse themselves, they are deliberately tampering with the objectivity of the Court's evaluation of as well as decision on the case and should be held accountable.

VI. CONCLUSION

The Supreme Court is digging its own grave. As one of the most important, albeit, often underappreciated, pillars of the Nation's democracy, it is imperative that the other two governmental branches intervene to prevent further corruption of both the Court and democracy. The unchecked nature of the Supreme Court and the associated unethical behaviors by both Congressmembers and Justices alike have resulted in the overturning of

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[268] *Oaths of Office*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/oath/oathsofoffice.aspx [https://perma.cc/R4KS-B7U6].

[269] *Code of Conduct for United States Judges*, *supra* note 165.

[270] *The Judicial Branch*, *supra* note 7.

important historical case precedents, the denigration of the Court's reputation, and the erosion of the Nation's founding principles of democracy.

The only way the Nation can avoid further loss of such fundamental human rights and the public's collective trust in both the judiciary and democracy is for the federal government to implement several changes to the process of nominating, appointing, and confirming Supreme Court Justices. Similarly, changes must also be made to the process of impeaching and removing Justices. Specifically, implementing election-year restrictions and qualification requirements for the appointment of Supreme Court Justices will ensure that only the most qualified candidates are appointed, and that Justices are not simply appointed for personal or political gain. Additionally, an improved process for impeaching and removing Justices that violate either the Constitution or their oath of office will place a stronger check on the Justices' behaviors and will better preserve the Court's reputation. Collectively, these solutions aim to protect and ensure the Nation's most revered democratic principles of personal freedom, civil liberties, and human rights without expanding the size of the Supreme Court.

At a time when such principles are being attacked daily, the importance of these measures cannot be overstated. American democracy was founded on the concept of checks and balances, yet the Supreme Court—one of the three major governmental branches—has gone almost entirely unchecked in recent years. Between Congressmembers fabricating rules and then later refusing to abide by them to blatant violators of the Constitution, accused predators, and inexperienced Justices ascending the Bench, both the Court's reputation and ability to abide by its founding purpose have been called into question by government officials, legal scholars, and even the general public. Maintaining the Nation's fundamental democratic values and preserving both the reputation and purpose of one of its three main branches

of government is critical. The solutions proposed within this article[271] seek to curtail and ultimately eradicate the corruption that has led to the Supreme Court's current composition and the dire consequences of its recent judicial decisions.

[271] The election year law, three-three-three ideological split, qualification requirements, impeachment hearings conducted by federal judges, recusal of involved Congressmembers from impeachment proceedings, non-exhaustive list of impeachable offenses, and impeachment of Justices known to be violating the Constitution or their oaths of office.