WHERE DO WE GO FROM HERE: OBSOLESCENCE OR RESURGENCE: AN ANALYSIS OF THE CONTINUED VIABILITY OF THE U.S. SUPREME COURT IN CONTEMPORARY AMERICA

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I. INTRODUCTION

This article owes part of its genesis to a conversation that I had with a legal colleague within the last year. My colleague remarked that he did not believe that the U.S. Supreme Court was still relevant today. Given my fascination with the Court and its history, my initial instinct was to protest; however, the more I began to ponder the Court, particularly its recent jurisprudence, my level of certainty about my position regarding the Court's place in society began to wane. This conversation pre-dated the Court's recent term, where it decided that political gerrymandering was a political question.[1] The net effect of this ruling, of course, is that the Court has taken itself out of probably the greatest legal fight of the decade. This was not only a rather surprising ruling, but it perhaps signals the focus of this article: whether the Court will rise to be the constitutional tribunal that it has been in its past, or whether it will withdraw from the fights of our age.

With certain exceptions, the U.S. Supreme Court has been the lesser known co-equal branch of the U.S. government. These exceptions, however, have swallowed the rules, nonetheless as a handful of cases have shaped this country for generations. From *Dred Scott v. Sanford*[2] in 1857 to *Plessy v. Ferguson*[3] in 1896 on one end of the spectrum, to *Brown v. Board of Education*[4] in 1954 and *Obergefell v. Hodges*[5] in 2015 on the other end of the spectrum, and some cases in between, the Court has at times determined the fate of various social issues of the day.[6] In recent times, however, where there is a greater emphasis on the power of the Executive branch and a divided Congressional branch, it is debatable whether the Court continues to occupy its previous role. Another more subtle, but similar point which may impact this issue, is that Justice Clarence Thomas, now the longest serving member of the current Roberts Court, has also been one of the most silent justices in terms of oral arguments in the

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[1] Rucho v. Common Cause, 139 S. Ct. 2491, 2506 (2019).

[2] 60 U.S. (19 How.) 393 (1857).

[3] 163 U.S. 537 (1896).

[4] 347 U.S. 483 (1954).

[5] 135 S. Ct. 2584 (2015).

[6] *See generally Obergefell*, 135 S. Ct. 2584; *Brown*, 347 U.S. 483; *Plessy*, 163 U.S. 537; *Dred Scott*, 60 U.S. (19 How.) 393.

Court's history.[7] Moreover, his position on many issues, particularly civil rights, have been all but certain in many cases; which lends the question of whether this will be the model of younger and future Supreme Court justices and whether this will affect the view of the Court in the minds of many. In addition, despite Chief Justice Roberts's well-stated disdain for 5-4 split decisions of the Court,[8] the partisan and sensitive judicial nomination fights over the last two vacancies make clear that the Court may become even more divided as time goes on. As such, the Court could become just one more line in the chorus of a political song that has disillusioned many in this country. Indeed, it is possible that for many, the Court has just become an elite body, disconnected from the demands and pressures of the day. All of these factors raise the possibility that there may never be another landmark case which impacts citizens of this country to the same level of those mentioned above. This could place the court in danger of soon disappearing into legal obscurity, destined to only issue opinions of significance in bankruptcy or intellectual property contexts. Notwithstanding the foregoing, the Court still occupies a unique place in the constitutional scheme of the country. As cases from its most recent term indicate, the Court can overturn legislative and executive action and may be a criminal defendant's last hope if they have been denied a fair trial. Thus, there is still much promise in the Court's potential for relevancy and legitimacy.

Part II of this article will begin by exploring the Court's early period in which it was relatively inactive as a third branch of government. This will include a look at the earliest justices on the Court, and early decisions of the Court prior to Chief Justice John Marshall's seminal decision in *Marbury v. Madison*.[9] Part III will then use *Marbury* as a starting point, during what could be described as the Court's Gilded Age. This will include a review of the major decisions during this period as the Court, in Chief Justice Marshall's

[7] Emma Green, *The Justice Thomas Effect*, ATLANTIC (July 10, 2019), https://www.theatlantic.com/politics/archive/2019/07/clarence-thomas-trump/593596/.

[8] *Roberts: 'My Job Is to Call Balls and Strikes and Not to Pitch or Bat'*, CNN: POL. (Sept. 12, 2005, 4:58 PM), https://www.cnn.com/2005/POLITICS/09/12/roberts.statement/ (publishing Chief justice Roberts's opening statement during nomination hearings before the Senate Judiciary Committee).

[9] 5 U.S. (1 Cranch) 137 (1803).

estimation, embraced its role as the "sole expositor of the Constitution."[10] Part IV of this paper will trace the post-*Madison* period of the Court, including the Civil War period, Reconstruction, and early 20th Century, which could be described as the Court's Dark Ages. This part will highlight the Court's role in perhaps leading to the Civil War, ending Reconstruction, and ushering in Jim Crow. Part V will examine what some could describe as its Reformation, or at least where some observers might describe its most active period during the Civil Rights movement and desegregation, as well as its role in curtailing the Executive and Legislative branches during the 1960s and 1970s. Part VI will explore the Court's recent history, specifically the primary cases in the Rehnquist and Roberts Courts. Part VII will examine the Court's most recent judicial nomination fights, as well as the most recent term for the Court, as attitudes of the general public continue to form in relation to the Court. Part VIII will attempt to use the Court's history, and current events to project what the view of the Court could be for the future. Part IX will conclude this paper and provide proposed ways in which the Court could avoid disappearing into obscurity in the minds of the American people. It will also provide a summary and forecasting the potential avenues that the Court can take for the next 50 years or so, and the attendant challenges that it faces to avoid obsolescence.

II. PRE-*MARBURY V. MADISON*

Numerous articles and books have been written on the judicial branch of the federal government. However, the majority of discussions of the judiciary have focused on the period beginning with the appointment of Chief Justice John Marshall, who has largely been credited with the Court's role in judicial review.[11] However, it appears that there are some scholars and researchers who disagree with this notion and instead argue that the U.S. Supreme Court exercised judicial review before Chief Justice Marshall's appointment to the Court.[12] Nevertheless, it is clear that this alternate argument to the contrary, the Supreme Court did not enjoy the same level of public

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[10] Letter from Walter Jones, John Nicholas, Carter H. Harrison, Joseph Eggleston, Abraham B. Venable, and Richard Brent to James Madison (Feb. 7, 1799), *in* JAMES MADISON, THE WRITINGS OF JAMES MADISON 1, 351 (Gaillard Hunt ed. 1906).

[11] SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 11 (Scott Douglas Gerber ed. 1998) [hereinafter SERIATIM].

[12] *Id.*

prominence during the Court's early years as it did at the time the seminal case, *Marbury v. Madison*,[13] was decided. The Court's apparent insignificance during its early period could be associated with the fact that the Court was the newest part of the new federal government. As such, the Court did not have the profile of the other two branches with President Washington having been a strong military leader and Revolutionary War hero. Moreover, Congress had been established as the very first branch to have more powers than the British Parliament, its predecessor, across the ocean.

A. Constitutional Obsolescence: Article III of the U.S. Constitution

An early observation of the Court's perceived value lies in the document creating the court itself: the Constitution. Specifically, Article III vested the judiciary power of the United States in "one supreme Court, and in such inferior Courts as the Congress may from time to time . . . establish."[14] However, in the structure of the Constitution, the Framers listed the Supreme Court last, with Congress and the President being listed first and second, respectively.[15] It is the third of three branches of the federal government and the last one listed, which may suggest the Framers' possible order of importance for the branches of government.[16] This is not to ascribe to the Framers the intent that their sequence is indicative of their order of importance in the overall Constitutional scheme, however, it does suggest that the Framers were perhaps more concerned about creating a government with a strong legislative branch and a limited executive branch, than they were concerned about establishing its federal tribunal.

Another important distinction between the Supreme Court and the judicial branch as a whole, and the other two branches of the federal government, is that Article III, as compared with Articles I and II, was virtually silent as to the qualifications for members of this branch.[17] This distinction is crucial as it underscores the deliberate decision by the Framers to put in place sophisticated and detailed

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[13] *Marbury*, 5 U.S. 137 (1803).

[14] U.S. CONST. art. III, § 1.

[15] *See* U.S. CONST. art. I–III.

[16] *Id.* art. III.

[17] *Compare* U.S. CONST. art. I–II, *with* U.S. CONST. art. III; *and* James F. Ianelli, *The Sound of Silence: Eligibility Qualifications and Article III*, 6 SETON HALL CIR. REV. 55, 55 (2009).

qualifications for members of Congress and for the President.[18] Nevertheless, the plain text of the Constitution is very clear in expressing that the Framers believed the Judiciary was not as dangerous–and the potential for abuse of power was not as great–as it was with the other two branches.[19] In addition, the fact that the Constitution is thin on qualifications in Article III begs the question of whether the Supreme Court and the Judiciary were obsolete in their conception. Given that the members of the Judiciary and the early Supreme Court were involved in obtaining independence from Great Britain and establishing this new government, any perceived initial obsolescence may be premature.

Some scholars have argued that Article III's lack of qualifications for judges has to do with both the Framers and the American public's impression of an important, yet sometimes overlooked, part of the judicial branch: the jury.[20] The importance of juries is apparent in the notable mention of them in the federal Constitution as well as in many state constitutions.[21] In fact, people in early America believed that juries helped to limit the power of judges.[22] Furthermore, the Framers believed that any potential bias or other conflicts in the judiciary could be overcome by the heavy involvement of the other two branches, the President and the Senate (but not the House), in appointment and confirmation of justices to the U.S. Supreme Court.[23] This does nothing, however, with regard to any personal or racial bias that a Supreme Court Justice may have toward a particular people or group of people, as history would later dictate.

Additionally, perhaps an even greater indication of the status of the Court prior to Chief Justice Marshall's appointment, is the interest, or lack thereof, of prominent statesmen in serving on the Court.[24] There were several early appointees to the Court who declined or

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[18] Ianelli, *supra* note 17, at 60 ("The absence of eligibility qualifications in the judiciary is striking because the concerns underlying the qualifications in the legislative and executive organs apply as forcefully in the judicial context.").

[19] *Id.* at 64–65. *But see* Parts IV & V of this article.

[20] *Id.* at 65–70.

[21] U.S. CONST. art. III, § 2, cl. 3; *see, e.g.*, N.C. CONST. art. I, § 25 ("In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.").

[22] Ianelli, *supra* note 17, at 66.

[23] *Id.* at 72.

[24] SERIATIM, *supra* note 11, at 5–6.

never served after they were appointed by the President.[25] For instance, President Washington attempted to appoint Patrick Henry to fill the seat of Chief Justice, after the first Chief Justice, John Jay, resigned to serve as governor of New York, and his replacement, John Rutledge, who had been an associate Justice on the Court, failed to obtain Senate confirmation.[26]

B. Legislative Limitations: Judiciary Act of 1789

In addition to Article III of the U.S. Constitution, the Judiciary Act of 1789, adopted by Congress, helped authorize the practical nature of the Supreme Court and create lower federal courts across the country.[27] Two early Supreme Court Justices, Ellsworth and Paterson, were both principal drafters of the Judiciary Act of 1789, when they both served in the U.S. Senate.[28] The Judiciary Act of 1789 specifically permitted the U.S. Supreme Court to review decisions from the highest courts of states involving federal questions.[29] This was a significant limitation on the Supreme Court's appellate jurisdiction, as state courts had few occasions to decide issues of federal law that would need to be appealed to the U.S. Supreme Court. For a number of reasons, principally to ensure passage of the Act, Senator (later Justice) Ellsworth deliberately limited the Supreme Court's jurisdiction to these cases.[30] In fact, at that time, most issues that were decided by federal courts were legal issues surrounding criminal codes, revenue, admiralty, and treaties.[31] Then as today, these issues, outside of maybe criminal law, are not the subject of great public attention for the Court. As such, the Judiciary Act of 1789 did its part through Ellsworth and Paterson to keep the Supreme Court fairly obscure in its early days.

On the other hand, Senators Ellsworth and Paterson, along with the others on the committee, attempted to bring the Supreme Court closer to the people. They accomplished this through the 1789 Act by creating a comprehensive system of federal courts, divided into circuits, with the members of the early Supreme Court riding the circuits,

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[25] *Id.*

[26] *Id.* at 6.

[27] WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 27 (Herbert A. Johnson ed., 1995).

[28] *Id.* at 28; SERIATIM, *supra* note 11, at 4–5.

[29] CASTO, *supra* note 27, at 36.

[30] *Id.*

[31] *Id.* at 185.

making them more accessible to litigants.[32] Senator (and later Justice) Paterson remarked that, by riding the circuits, the early Supreme Court would "carry Law to [the People's] Homes, Courts to their Doors."[33] However, even with this characteristic, it does not appear that the early Supreme Court was able to gain any additional notoriety prior to John Marshall's Chief Justiceship.

C. Silent Majority: The First Supreme Court Justices

As indicated earlier, the original members of the U.S. Supreme Court do not get a great deal of attention. However, it is important to recognize not only the fact that these were the original members of the Court, but also the characteristics that the first President, George Washington, used in selecting and appointing them.[34] The six original justices on the U.S. Supreme Court were Chief Justice John Jay from New York, Justice John Rutledge from South Carolina, Justice William Cushing from Massachusetts, Justice James Wilson from Pennsylvania, Justice John Blair from Virginia, and Justice Robert Harrison from Maryland.[35] In addition, prior to the appointment of Chief Justice Marshall, the other members of the Court, who were appointed to replace the original six Justices, were Oliver Ellsworth, (from Connecticut) to replace Chief Justice Jay, James Iredell (from North Carolina) to replace Justice Harrison (who resigned without ever taking the bench due to declining health), Thomas Johnson, (from Maryland) to replace Justice Rutledge (who resigned to become Chief Justice of the South Carolina Court of Common Pleas), and Justice William Paterson (from New Jersey) to replace Justice Thomas Johnson.[36] It is of particular note that the original members of the Supreme Court never met as a group.[37] Each of these Justices, while prominent in their own right, did not rise to the level of Chief Justice Marshall in the eyes of the nation or even other lawmakers. It is not because they were not worthy of the attention, but rather that the relative inactivity of the Court in the early days, due to a light caseload as well as likely the conditions of the fledgling country

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[32] *Id.* at 45.

[33] *Id.* (quoting William Paterson, Notes for Remarks on Judiciary Bill (June 23, 1789), *reprinted in* 4 DHSC 416).

[34] SERIATIM, *supra* note 11, at 5.

[35] *Id.*

[36] *Id.* at 5–6.

[37] *Id.* at 5.

and federal government at the time.[38] The members of the Supreme Court prior to Chief Justice Marshall that had been selected by President Washington varied in geographical terms, hailing from New England, the Mid-Atlantic, and the South, as well as in age, from thirty-eight (Iredell) to fifty-seven (Cushing).[39] In order to preserve the geographic balance on the Supreme Court, President Washington also tried to appoint a Justice's replacement with another person from the same state.[40] President Washington also emphasized his appointees having either civilian or Revolutionary War military service, although judicial experience was not a major requirement.[41]

D. Judicial Review: The Beginning?

Although the early Supreme Court cannot be said to have had many cases of national interest, there were a few that should be noted in terms of the Court's stature during this period. For instance, in *Chisholm v. Georgia*,[42] the Supreme Court decided that states can be sued in federal court, despite the existence of traditional sovereign immunity of the state.[43] In addition, contrary to popular belief concerning the Court's pronouncement of its power of judicial review beginning with Chief Justice Marshall, in *Ware v. Hylton*,[44] the Supreme Court held that a Virginia sequestration statute was overridden by a U.S. treaty.[45] This case also illustrated the impact of the Supremacy Clause of the Constitution by finding the state law in Virginia was subservient to the federal treaty.[46] Thus, although not stated in as glaring terms as Chief Justice Marshall did later in *Marbury v. Madison*, this case appears to confirm that the pre-Marshall Supreme Court believed it had the power to review state laws and decide on their compatibility with the laws of the U.S., or in this case, a U.S. treaty.[47] The fact that these cases did not get much

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[38] *Id.* at 5–6.

[39] *Id.* at 6.

[40] *See* CASTO, *supra* note 27, at 66–68.

[41] *See id.* at 65.

[42] 2 U.S. 419 (1793).

[43] *See id.* at 479; *see also* CASTO, *supra* note 27, at 63–64.

[44] 3 U.S. (1 Dall.) 199 (1796).

[45] *See id.* at 285; *see also* CASTO, *supra* note 27, at 98–101.

[46] *See Ware*, 3 U.S. at 285; *see also* CASTO, *supra* note 27, at 100–01.

[47] *Compare Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 153 (1803), *with Ware*, 3 U.S. at 285.

attention publicly is evidence of the degree to which the early Supreme Court operated without much significance during this period.

III. THE GILDED AGE: THE MARSHALL COURT

The year 1801 was an important year in the life of the U.S. Supreme Court, and not only because of the passage of the Judiciary Act of 1801, which transformed the Court and the federal judiciary in enormous ways.[48] But, perhaps the most significant event in the life of the Supreme Court was the appointment of Chief Justice John Marshall by President John Adams in 1801.[49] For all of the things that Chief Justice Marshall did for the Supreme Court and the nation, probably the greatest accomplishment of his nearly thirty-four years on the Court was to place the Court in a prominent position within the federal government, as well as in the minds of the American public. Chief Justice Marshall's Court not only allowed the lower federal courts to become more active, but the Supreme Court became the primary route for resolving questions of federalism between the federal government and the several states.[50]

A. Removing the Court from the People: The Judiciary Act of 1801

Having the Supreme Court Justices riding the circuits, hearing litigants' cases, was short lived, as the Judiciary Act of 1801 removed this duty from the Justices, and instead required them to sit on the Supreme Court bench.[51] This ensured that Supreme Court Justices would no longer hear appeals of cases they presided over as Circuit Judges.[52] In addition, the federal circuits were divided into sixteen circuits, with a Circuit Judge for each, providing for more efficient and regular sessions of federal circuit court.[53] While the Judiciary Act of 1801 made the federal courts and the Supreme Court more efficient and easier for the justices, it had the practical effect of removing

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[48] Act of Feb. 13, 1801, ch. 4, 2 Stat. 89.

[49] Herbert A. Johnson, *The Chief Justiceship of John Marshall, 1801-1835*, *in* CHIEF JUSTICESHIPS OF THE UNITED STATES SUPREME COURT 1, 9 (Herbert A. Johnson, ed., 1997).

[50] *Id.* at 161.

[51] Act of Feb. 13, 1801, ch. 4, 2 Stat. 89.

[52] RONALD D. ROTUNDA, JOHN MARSHALL AND THE CASES THAT UNITED THE STATES: BEVERIDGE'S ABRIDGED LIFE OF JOHN MARSHALL 159 (2018).

[53] *Id.*

the Court from litigants. 'This began the detachment between the Court and the American people, which the Court may not have overcome to this day.

B. The Real Judicial Review: Marbury v. Madison

As already discussed, Chief Justice Marshall likely continued the practice of judicial review that had already begun by the Supreme Court before him. However, the new Chief Justice in 1801, to use a common vernacular, began the Court's judicial review on steroids. The case that gets the most credit for his time is *Marbury v. Madison*.[54] In *Marbury*, Chief Justice Marshall began a process of textual constitutional analysis, which continued throughout his tenure on the Court, and is evident in other notable cases such as *Fletcher v. Peck*,[55] *Gibbons v. Ogden*,[56] and *McCulloch v. Maryland*,[57] some of which will be discussed later. This method, as well as the practice of issuing majority opinions rather than *seriatim* opinions from the Court, transformed the Supreme Court from its previous form into the Court as it is primarily known today.[58] For this reason, *Marbury* is commonly referred to as beginning the modern practice of judicial review, thereby making it one of the more notable early cases of the U.S. Supreme Court. In keeping with *Marbury*, six days later, the Court decided *Stuart v. Laird*, holding that the Judiciary Act of 1802 was constitutional,[59] thereby avoiding a direct confrontation with the Legislative and Executive Branches.[60]

C. Uniting the States

The 1819 term of the Supreme Court used several cases to establish federal uniformity in various areas of law.[61] Specifically, the

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[54] 5 U.S. 137 (1803).

[55] 10 U.S. 87 (1810).

[56] 22 U.S. 1 (1824).

[57] 17 U.S. (4 Wheat.) 316 (1819).

[58] *See* CASTO, *supra* note 27, at 111. (Prior to Chief Justice Ellsworth, the Supreme Court vacillated between either issuing *seriatim* (point-by-point) or majority opinions, without really any clear standard for issuing one or the other).

[59] 5 U.S 299 (1803).

[60] *See id*; *see also* Johnson, *supra* note 49, at 57.

[61] Johnson, *supra* note 49, at 73 (citing *McCulloch*, 17 U.S. (4 Wheat.) 316; Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819)).

Court rejected the arguments that the federal government was formed by the conflagration of the several states.[62] Under this analysis, then, state power could be curtailed to the extent it was in conflict with the federal Constitution. The most prominent case during this term was *McCulloch v. Maryland*, where the Court held that federal supremacy overrides conflicting state laws and also provided an early interpretation of the Necessary and Proper Clause of the U.S. Constitution.[63] Not only was this case legally significant, but it became a very important political issue as well. The case involved the constitutionality of the Second Bank of the United States and whether it was subject to state taxation.[64] The Court ultimately held that it was constitutional and was not subject to state taxation.[65] This case helped the Court establish consistent federal principles for the administration of the Constitution and its applicability across the country. In addition, in *Cohens v. Virginia*,[66] Marshall defended the ability of the Supreme Court to review decisions of a state's highest court involving federal questions.[67] He believed it important for the federal Constitution to be capable of adaptation to changing times and circumstances.[68] Moreover, Marshall believed that both federal and state laws should protect the country's fundamental legal principles from legislative actions threatening it.[69] Furthermore, in *Gibbons v. Ogden*, Chief Justice Marshall, writing for the Court, addressed federal supremacy and sovereignty which, under the Constitution, gave federal law precedence over state law.[70] In fact, by 1825, almost a quarter of a century into Marshall's tenure as Chief Justice, the Court had invalidated at least one state law in each of the ten states which existed at the time, some of which involved cases of significant interest to these states.[71]

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[62] *Id.*

[63] *Id.* at 40; *see also McCulloch*, 17 U.S. at 406.

[64] *McCulloch*, 17 U.S. at 406.

[65] *Id.* at 400.

[66] 19 U.S. (6 Wheat.) 264 (1821).

[67] *Id.* at 392–94.

[68] *Id.* at 387–88.

[69] *Id.* at 407 ("[N]o interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its Courts, the constitution and laws from active violation.").

[70] 22 U.S. (9 Wheat.) 1 (1824).

[71] *See* Johnson, *supra* note 49, at 78.

D. The Overall Impact of the Court's Role as the "Sole Expositor of the Constitution."

Chief Justice Marshall's and the Marshall Court's jurisprudence is responsible for a large body of the law developed in this country, regardless of whether it involved federal law. This is largely due to the fact that, at the time, Supreme Court decisions were more widely reported and circulated across the country than the decisions of state courts.[72] Thus, the Marshall Court provided great service to the larger population of the country by providing certainty and stability in the law. In doing so, the Supreme Court was responsible for "shaping American jurisprudence" in both commercial law and private litigation, as well as having greatly influenced constitutional and international law.[73] The Marshall Court truly embraced its role and tried to remain relevant by attempting to speak with a unified voice, affirming its place as a co-equal branch, and faithfully representing both lawyers and the American people as a whole. The Marshall Court's influence can also be seen through its impact on international law as the Court began the practice of deferring to the more political branches of the federal government.[74]

E. Enduring Legacy of the Marshall Court and the End of the Court's Gilded Age

The period of the Marshall Court from 1801–1835 is clearly a highlight of the Court's history and relevance to the country overall. Chief Justice Marshall is a large reason for this fact. There are many lessons which form part of the legacy of the Marshall Court, many of which still influence the Court and American law to this day. For instance, Justice Marshall wrote in *Gibbons* that strict construction is not acceptable when it renders the federal government ineffectual.[75] In addition, Justice Marshall and the Court helped cement the Supreme Court's jurisdiction and preserved the future constitutional structure of the United States. Moreover, the Marshall Court helped establish practices and procedures for the Court itself to increase its practical

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[72] *See, e.g.*, *id.* at 77 (explaining that the Supreme Court has jurisdiction over federal questions, which allows for uniformity among the states concerning the interpretation of the Constitution). This suggests that state cases were reported less frequently to avoid a wide range of interpretations of the Constitution.

[73] *See* Johnson, *supra* note 49, at 223.

[74] *Id.* at 235.

[75] *Id.* at 166.

ability to serve the country. However, all reactions to the Marshall Court were not popular publicly or politically. For instance, toward the end of Chief Justice Marshall's tenure, and with the rise of President Jackson–a staunch critic of the Court–there was some opposition to the Court's opinions. For instance, President Jackson remarked publicly that the Marshall Court's decisions upholding the Banks of the United States were not settled law, but instead, that the Court's decisions in these cases should not impact the activities of the other branches of the federal government.[76] In fact, based on these, and other, comments President Jackson appeared to question the central notion of the Marshall Court, and posited instead that rather than the Supreme Court being the sole expositor of the Constitution, each federal branch of government was responsible for their own interpretation of the federal constitution.[77] At the end of the Marshall Court, there began a rise in sectionalism, and the chorus for states' rights began to get louder and louder. Marshall had tried consistently to provide for a strong national government, and to quiet the voices of states' rights to the extent that it threatened the legitimacy of the national government.[78] As such, unsurprisingly, the rise in sectionalism bothered Marshall.[79]

However, all in all, Chief Justice Marshall is still regarded as the gold standard by which Supreme Court Justices and Chief Justices would be measured. Even some of his harshest critics, such as the Richmond Enquirer, heaped much praise on him and his service on the Court.[80] There were commemorations all over the country in his honor.[81] Chief Justice Marshall transformed the Court from the one that he received in 1801, which was not very well known or regarded, to likely the most powerful court in the world, when he left the Court in 1835.[82]

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[76] *See* ROTUNDA, *supra* note 52, at 531–32.

[77] *Id.* at 532.

[78] *Id.* at 877.

[79] *See* R. Kent Newmyer, *John Marshall,* McCulloch v. Maryland*, and the Southern States' Rights Tradition*, 33 J. MARSHALL L. REV. 875, 875–76 (2000).

[80] ROTUNDA, *supra* note 52, at 519.

[81] *Id.* at 519–20.

[82] *Id.*

IV. DARK AGES: JACKSONIAN PERIOD, CIVIL WAR, AND RECONSTRUCTION

In the shadow of the highlights of the Marshall Court, came the rise of the Jacksonian period of the Court, characterized by President Jackson's appointments to the Supreme Court.[83] President Jackson spoke publicly about his preference for states' rights over those of the federal government.[84] To that end, he appointed justices with similar perspectives, including his choice to replace Chief Justice Marshall with Roger B. Taney.[85] Through these judicial appointments, President Jackson sought to reverse what he believed were erroneous decisions and the unnecessary expansion of authority of the federal government generally, and the Supreme Court specifically. Of course, it is not clear if Chief Justice Taney or President Jackson could have predicted that nearly three decades later, the Supreme Court would begin its plunge into perhaps one of its darkest times for the country.

A. Prelude to A Civil War

Toward the end of Chief Justice Marshall's tenure on the Court and his life, he worried about the dangers of sectionalism and giving too much power to the states on issues of national concern.[86] As with most things concerning the strength of the national government, the great former Chief Justice Marshall was correct. Although Chief Justice Marshall had built the Court to new heights, it could not survive the populist wave ushered in by the President Jackson's election, or Chief Justice Story's appointment to the Court. Chief Justice Story's attempt to undo or restrict many of the areas on the Court that Chief Justice Marshall had expanded was undermined by a case that put the Court, and the country, on the collision course to civil war. Former Chief Justice Marshall's warnings of sectional conflict manifested iteslf most prominently when slavery began dividing the country geographically. Congress codified this georgraphic split through the passage of the Missouri Compromise in 1820, and later the Compromise of 1850.[87] These laws attempted to regulate the expansion of slavery as new states were

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[83] *See* Johnson, *supra* note 49, at 47–50.

[84] *See* ROTUNDA, *supra* note 52, at 530–36.

[85] *See* Johnson, *supra* note 49, at 43.

[86] JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 67 (2007).

[87] JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 192–93 (7th ed. 1994).

admitted to the Union. However, neither of these legislative efforts proved immediately successful. Furthermore, by 1856, the Supreme Court was comprised of several justices from the South, who had no appetite to end slavery any time soon.[88] Thus, Justice Taney and the U.S. Supreme Court weighed in on this issue.

In 1842, in *Prigg v. Pennsylvania*, the U.S. Supreme Court held that state officials in Pennsylvania (a free state) were not required to assist a slaveholder from Maryland (a slave state) in returning an enslaved person to the slaveholder.[89] In addition, in *Strader v. Graham*, the U.S. Supreme Court recognized the Northwest Ordinance's control of the territories governed by it at its inception, but did not extend its application to states subsequently added to the United States.[90] But, these cases were only a prelude to the case that would soon become the darkest spot in the U.S. Supreme Court's more than 230 year history: *Dred Scott v. Sanford*.[91]

In *Dred Scott*, Chief Justice Taney did his best John Marshall impression in an attempt to settle the slavery question and to triumph on this issue where Congress and the President had failed.[92] However, unlike former Chief Justice Marshall's work, the *Dred Scott* decision did not settle the slavery question.[93] Instead, the *Dred Scott* decision became a rallying cry for Republicans, who eventually took control of Congress and the White House, in the election of 1860.[94] President Lincoln and the Republican Congress's position on slavery contrasted with the Southern states' opposition.[95] The result was seccession by the Confederate States and subsequetly the bloodiest war this country has ever seen. Thus, in stark contrast to the certainty that its predecessor, the Marshall Court, provided through its decisions, the Taney Court actually became a lightning rod, sparking greater division, and eventually Civil War, in the nation. This was only the beginning of the Court's dark ages.

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[88] *See id.* at 193, 195.

[89] *See id.* at 192 (citing Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842)).

[90] 51 U.S. (18 How.) 82, 97 (1856).

[91] 60 U.S. (19 How.) 393 (1857).

[92] *Id.*

[93] *Id.*

[94] TIMOTHY S. GOOD, LINCOLN FOR PRESIDENT: AN UNDERDOG'S PATH TO THE 1860 REPUBLICAN NOMINATION 10 (2009).

[95] *Id.* at 11.

B. Reconstruction of the Union

The country had survived the Civil War and the assassination of the President, abolished slavery, begun to rebuild itself, and began the process for including the formerly enslaved African people as citizens of the country. Then, once again, the U.S. Supreme Court crashed the party. At this time, the Court was headed by Chief Justice Waite. In decision after decision during the post-Civil War era, the Supreme Court began to erode what little legal protections had been afforded to African Americans. First, in 1873, in the *Slaughter House Cases*, the U.S. Supreme Court limited civil rights protections under the U.S. Constitution by holding that states did not have to respect fundamental economic and civil rights and only prohibited the federal government from abridging such rights.[96] Furthermore, in 1888, the U.S. Supreme Court held that the Civil Rights Act of 1875, which prohibited discrimination against African Americans in public accommodations, was unconstitutional.[97] In addition, Associate Justice Bradley argued that African Americans should no longer be treated as a "special favorite" of the laws, and therefore should not need the benefit of the laws to enjoy full citizenship.[98] Thus, at a time when the country truly needed a unifying voice and a firm grasp on the union, the Court continued to foster division and disunity, attempting to perpetuate a system of white supremacy and segregation. The Court continued its sectionalist slant and its states' rights bent to the detriment of African Americans and, consequently, the nation.

C. Closing the Door on Reconstruction

If it was not enough that the Supreme Court did not assist the country in healing from the scars of slavery and the Civil War, it effectively closed the door on Reconstruction in the U.S. For the second time in a generation, the Supreme Court issued a decision that would haunt the Court for the rest of its history: *Plessy v. Ferguson*.[99] Ultimately, on May 18, 1896, by a 7-1 vote, the U.S. Supreme Court ruled that it could not conclude that the Louisiana separate car law's

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[96] ROSEN, *supra* note 86, at 94–95.

[97] *Id.* at 95.

[98] *Id.* at 96.

[99] 163 U.S. 537 (1896).

requirement, or permission to separate the races, was per se unreasonable.[100] Associate Justice Henry Billings Brown, writing for the majority, despite the fact that Chief Justice Melville Miller was also in the majority, indicated that Plessy's argument that separate but equal labels African Americans with a badge of inferiority was simply a fallacy that was only believed or evident to them.[101] In support of its ruling, Justice Brown, citing *Roberts v. City of Boston*, indicated that the Fourteenth Amendment, "could not have been" enacted to get rid of color/race distinctions in social, rather than political, equality.[102] The only ray of sunlight for the Court in *Plessy* was Justice John Marshall Harlan, Sr.'s lone dissenting opinion in the case. Justice Harlan argued that the majority's conclusion that Louisiana's separate car law was about anything other than excluding African Americans based on race was clearly erroneous.[103] Along with the other line of rulings prior to *Plessy*, the Supreme Court effectively foreclosed any further attempts at Reconstruction or restoration of civil rights for African Americans, and with one decision ushered in Jim Crow Segregation for the next half-century.

V. THE REFORMATION: SUPREME COURT AND CIVIL RIGHTS

Like any institution, the Supreme Court had its period of reformation and restoration; the time in which it attempted to atone for the wrong that had been done either by it or because of it. This reformation was closely tied to its relationship to Civil Rights and African Americans. Having been responsible for the preservation of slavery in *Dred Scott* and for ending Reconstruction and ushering in Jim Crow with *Plessy*, its reformation then would begin with desegregation cases. From *Sweatt v. Painter*,[104] and culminating with *Brown v. Board of Education*,[105] the Supreme Court began issuing rulings similar to those of the Marshall Court, speaking with uniformity and

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[100] *Id.* at 550–51, *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

[101] *Id.* at 551.

[102] *Id.* at 544 (citing Roberts v. Boston, 59 Mass. 198 (1849)).

[103] Melvin I. Urofsky, *"Among the Most Humane Moments in All Our History": Brown v. Board of Education in Historical Perspective*, *in* BLACK, WHITE, AND *BROWN* 5–6 (Clare Cushman & Melvin I. Urofsky eds., 2004).

[104] 339 U.S. 629 (1950).

[105] 347 U.S. 483 (1954).

federal supremacy as it relates to the issue of segregation.[106] With these rulings and others, like *Miranda v. Arizona*[107] and *Gideon v. Wainwright*,[108] the Supreme Court continued to expand federal constitutional protections, rather than restrict them.[109] In doing so, the Court once again began to connect to the people, and establish a strong, prominent role throughout the country.

VI. A NEW AGE: POST CIVIL RIGHTS MOVEMENT

After the heights of the Civil Rights Movement, the Supreme Court once again began to go through a transformation. This change to the Court was due in part to its changing dynamics, with older justices retiring, and the appointment of a new form of justices. This time saw the appointment of the first female Supreme Court Justice, Sandra Day O'Connor.[110] But it also saw the appointment of justices by Presidents with the express desire to reign in the Court from its recent rulings. Much like the Jacksonian period, this time in the Court's history appeared to focus once again on limiting the role of the Court within the national government, as well as limiting the federal government's role. Eventually, during this period, Chief Justice William H. Rehnquist was appointed, first as an associate justice and later as Chief, upon the retirement of Chief Justice Burger.[111] Chief Justice Rehnquist would eventually preside over the longest serving Supreme Court in its history.[112] This period also brought a somewhat unprecedented event in the Court's history, the resolution of a Presidential election in 2000, in *Bush v. Gore*.[113] Because of the partisan volatility involved in the case, and the closeness, or perceived closeness, of the victorious candidate with the ideological majority of the Court,

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[106] David Sloss & Wayne Sandholtz, *Universal Human Rights and Constitutional Change*, 27 WM. & MARY BILL RTS. J. 1183, 1243 (2019).

[107] 384 U.S. 436 (1966).

[108] 372 U.S. 335 (1963).

[109] Sloss & Sandholtz, *supra* note 106, at 1205.

[110] Andrew Glass, *Senate Confirms First Female Supreme Court Justice: Sept. 21, 1981*, POLITICO (Sept. 21, 2007, 5:47 AM), https://www.politico.com/story/2007/09/senate-confirms-first-female-supreme-court-justice-sept-21-1981-005943.

[111] Andrew Glass, *William Rehnquist Sworn in as Chief Justice, Sept. 26, 1986*, POLITICO (Sept. 26, 2018, 12:20 AM), https://www.politico.com/story/2018/09/26/william-rehnquist-sworn-in-as-chief-justice-sept-26-1986-834960.

[112] *Id.*

[113] 531 U.S. 98 (2000).

it likely undermined the Court's image in the minds of many Americans. Moreover, Chief Justice Rehnquist's stated goal had been to roll back, or even eliminate, many of the decisions of the previous Courts with which he vehemently disagreed.[114] While he was not completely successful in doing so, in areas such as affirmative action and criminal defendant rights, the Court was successful in limiting the breadth of these protections. These decisions also began to move the Court further away from the people and the Court's influence on the everyday lives of Americans.

Following the death of Chief Justice Rehnquist, his former law clerk, John Roberts, was elevated to replace him.[115] In addition, with the retirement of Associate Justice Sandra Day O'Conner, the Court continued to maintain its status and influence, not really moving in one direction or another one in terms of its influence and relevancy in the nation.

VII. THE FIRE NEXT TIME: FADE IN ITS UTILITY FOR THE LIVES OF AMERICANS

Today's Supreme Court is hard to be thought of without the most recent, fierce nomination fights in the Court's recent history. This began with the political maneuvering in the Senate, refusing to consider the nomination of Merrick Garland by President Obama, to replace the late Associate Justice Antonin Scalia.[116] Following this fight, after a bitter and close election, the Senate confirmed Justice Neil Gorsuch, appointed by the next President.[117] Thereafter, and very recently, the unexpected retirement of Associate Justice Anthony Kennedy, and the appointment of Brett Kavanaugh continued this controversial nomination and confirmation process.[118] In particular, Justice

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[114] *See* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 459 (2002).

[115] Adam Liptak & Todd S. Purdum, *As Clerk for Rehnquist, Nominee Stood Out for Conservative Rigor*, N.Y. TIMES (July 31, 2005), https://www.nytimes.com/2005/07/31/politics/politicsspecial1/as-clerk-for-rehnquist-nominee-stood-out-for.html.

[116] Lee Ann Caldwell, *Neil Gorsuch Confirmed to Supreme Court After Senate Uses 'Nuclear Option'*, NBC NEWS (Apr. 7, 2017, 11:57 AM), https://www.nbcnews.com/politics/congress/neil-gorsuch-confirmed-supreme-court-after-senate-uses-nuclear-option-n743766.

[117] *Id.*

[118] Sherryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html.

Kavanaugh's confirmation hearings were dominated by allegations of sexual misconduct, which had not occurred for a generation, followed by a very close vote of the Senate to confirm him to the Court.[119] In addition, the severe partisan confirmation fights are the model for Supreme Court Justices, as evidenced by Associate Justice Clarence Thomas.[120] Justice Thomas is now the longest serving member of the Court, whose service has been recognized as much for his lack of comment during oral argument as for anything else.[121] Thus, it appears that a trend has developed with Justices being appointed and serving in almost obscurity, a development that does nothing to ease an already limited docket, where the Court's oral arguments are few and far between, and still remain un-televised, all of which contribute to the declining relevancy of the Court today.

VIII. ON THE EDGE OF OBSCURITY: PROJECTING WHAT THE COURT'S POTENTIAL FUTURE COULD BE, AND SUGGESTING WAYS THAT THE COURT MAY REGAIN AND MAINTAIN ITS RELEVANCE CURRENTLY AND FOR YEARS TO COME

There are many things that could contribute to the Court either disappearing into obscurity or rising to its previous prominence. One is the extent to which Justices are appointed to the Court. For instance, no matter which party is in control of the White House or the Congress, the persons appointed to the Court are a very small and select few. They generally have attended only a handful of undergraduate and law schools, specifically Ivy League schools. They have generally only had a very specific career path. The basic career path for a Supreme Court Justice today includes a federal clerkship, including at the Supreme Court, as well as service as a U.S. Attorney, and more than likely a 'Big Law' career. These attributes are shared by an exclusive group of select individuals. As such, it creates even more of a chasm between the Court and the American people, as the average Americans do not share in these credentials, nor are their life experiences similar to those of the average Supreme Court Justices.

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[119] *Id.*

[120] Green, *supra* note 7.

[121] *Id.*

IX. CONCLUSION

The U.S. Supreme Court is one of the most austere bodies in this country's, and indeed the world's, history. Like any institution that has lasted for over two centuries, it has had its glory days and its dark days. Nevertheless, the current and future Supreme Courts will face new challenges to their relevancy for the future. In order to avoid being lost in obscurity, the Court will have to adapt to changing technologies, as well as deal with new internal and external threats to the safety and security of our people and our republic. The extent to which the current and future Supreme Courts will be flexible enough to respond to these changes, but sturdy enough to withstand the constant political and social whirlwinds, will go a long way toward preserving its existence for generations to come.