
STRUCTURE MATTERS

**Structure Matters:
The Impact of Court Structure
on the Indian and U.S. Supreme Courts**

*Nick Robinson**

ABSTRACT

The United States Supreme Court sits as a unified bench of nine justices. The Indian Supreme Court sits in panels, and can have up to thirty-one justices. This article uses the divergent structures of the U.S. and Indian Supreme Courts to explore how specific court structures are adopted to promote different values or understandings of what a supreme court should be. It analyzes how structure impacts: (1) access to these courts; (2) the cohesiveness of the doctrine they produce; (3) inter-judge relations; and (4) perceptions about these courts, including perceived politicization. It argues a comparative analysis of court structure can challenge common assumptions about the ideal role of a court, as well as aid in judicial institutional design and reform. Such an analysis helps make explicit how law is permeated by the structure of the courts that interpret it.

INTRODUCTION

How many judges there are on a highest court, whether these judges sit in panels or on one bench. These structural characteristics are amongst the most noticeable variations in highest courts around the world. They are also amongst the least studied.¹

* Nick Robinson is a Visiting Fellow at the Centre for Policy Research, New Delhi. I would like to thank Marc Galanter, Vikram Khanna, Judith Resnik, Pratap Bhanu Mehta, Talha Syed, Rohit De, Rajeev Dhavan, Johanna Kalb, Kamala Sankaran, Sital Kalantry, Priya Gupta, Vik Kanwar, Jonathan Burton Mac-Leod, Alex Fischer, Madhav Khosla, and Avi Singh for feedback on this article. I would like to especially thank Jeff Redding, with whom a conversation initially inspired this article, and whose advice and encouragement strengthened it greatly. Different versions of this article were presented at the annual Law and Society meeting in Denver, the International University College of Law in Turin, Italy, and the faculty workshop at Jindal Global Law School, New Delhi, India.

¹ New interest in court structure has emerged recently. See, for example, Benjamin R.D. Aldarie, Andrew J. Green, and Edward M. Iacobucci, *Is Bigger Always Better? On Optimal Panel Size, with Evidence from the Supreme Court of Canada*, U TORONTO, LEGAL STUDIES

The paucity of research about the size and structure of highest courts sits in contrast to the relatively large volume of work on other aspects of institutional design and competency. For example, researchers have studied the impact of both the size and structure of legislatures on legislative outcomes² and proposed models to determine an ideal number of legislators.³ Meanwhile, legal scholars have debated the respective merits of parliamentary, presidential, and semi-presidential systems, along with the role of courts in each.⁴ And the legal process school has extensively compared the competencies of courts versus other government institutions, particularly the legislature and executive.⁵

Perhaps the reason so little comparative research or broader theorizing has historically been done on court structure is that the role of a nation's highest court seems to vary so dramatically across countries. Some countries have separate supreme and constitutional courts, and others have separate highest courts for administrative law matters or cases concerning religious

RESEARCH PAPER NO. 08-15 (May 2011) (arguing panel size should vary on the Canadian Supreme Court, and other similar courts, with larger panels for cases that involve more social benefit); F. Andrew Hessick and Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZONA ST. L. J. 645 (2009) (discussing how different sized U.S. Supreme Courts would effect the Court's varying goals, specifically impartiality and independence; diversity and representation; and participation, efficiency, cohesion, and accuracy); Tracey E. George and Christopher Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439 (2009) (proposing a larger, paneled U.S. Supreme Court to increase clarity and consistency amongst federal jurisprudence, and strengthen the Court's ability to act as an adequate check on the other branches of government). However, these studies are not comparative, generally focus on discrete concerns about the impact of court structure in a specific context, and are frequently tied to proposals to change a court's structure.

² Barry R. Weingast, Kenneth A. Shepsle, and Christopher Johnsen, *The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics*, 89(4) J. OF POLITICAL ECON. 642 (1981) (arguing that as the number of districts increase so does inefficiency and the logrolling of projects). Jowei Chen and Neil Mohatra, *The Law of k/n : The Effect of Chamber Size on Government Spending in Bicameral Legislatures*, 101(4) AM. POL. SCI. REV. (2007) (describing literature on the effect of legislative size and the number of chambers on legislative spending)

³ Rein Taagepera, *The Size of National Assemblies*, 1(4) SOC. SCI. RESEARCH 385 (1972)

⁴ See, Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000); Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51 (2001); Cindy Skach, *The "Newest" Separation of Powers: Semipresidentialism*, 5 I CON 93 (2007)

⁵ See, for example, Lon Fuller, *The Forms and Limits of Adjudication*, 92(2) HARV. L. REV. 353 (1978) (arguing polycentric disputes, where the resolution of the dispute for one party may effect others' claims, are not well suited to be resolved by adjudication); ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (claiming that legislatures are not as well equipped as the judiciary to create "a coherent body of principled rules" *id.* at 25).

law. There are countries that have constitutions that give courts a prominent role in their enforcement, while others do not. The degree of actual judicial independence courts enjoy varies widely, just as various judicial philosophies motivate judges differently across countries.⁶ These marked variations between highest courts seem to overshadow any impact differences in the structure of a highest court might cause.

But shouldn't structure still matter? Intuitively it seems it would, and this article argues that it in fact does. Different structures to highest courts are advocated to promote different conceptions of what a highest court should do and the values it should embody. At the same time, court structures frequently have consequences largely unforeseen by their proponents.

The effects of court structure should not be exaggerated. Importantly, courts' structural characteristics are rarely determinative in their impact: shaping possible outcomes, rather than guaranteeing them. Given this contextual specificity, a comparative analysis of court structure should not try to create a new science, but rather a better literacy to read structure's impact.

Keeping these qualifications in mind, this article focuses on two case studies—that of the Indian and U.S. Supreme Courts. These courts are the highest court of appeal in their respective countries, share British historical roots, and at one time even broadly resembled each other.⁷ However, they have evolved so that today they represent extreme ends of the type of structural characteristics found in supreme courts. The U.S. Supreme Court sits as a unified bench of nine judges, while the Indian Supreme Court, which can have up to thirty-one judges, traditionally sits in panels.⁸ The article focuses first on examining how their structures impact: (1) access to these courts; (2) the cohesiveness of the doctrine they produce; (3) inter-judge relations; and (4) perceptions about these courts, including perceived politicization. It then uses some illustrative aspects from these case studies to show how a comparative analysis of court structure can challenge common assumptions about the ideal role of a court, as well as aid judicial institutional design and reform. Whether one is examining the world's many

⁶ See generally, TOM GINSBURG AND TAMIR MOUSTAFA, *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (2008)

⁷ The U.S. Supreme Court began sitting with just six justices. When the Indian Supreme Court began sitting in 1950 it had eight judges and the US Supreme Court by that time had nine. *Infra* Section I.A and Section II.A

⁸ Since its inception the full Indian Supreme Court has never sat together with its total sanctioned strength at any time during its history. However, in the 1950's all judges that were sitting on the bench have sat together at the same time even though there were vacancies. See, for example, *Srimathi Champakam Dorairajan vs. C.R. Sr 09/04/1951*

multi-panel courts—like the European Court of Justice or France’s Cour de Cassation—or those with unified benches—like South Africa’s Constitutional Court or Brazil’s Supreme Federal Court—case studies, such as these of India and the U.S., can help give one a new fluency with which to articulate the frequently underappreciated effects of court structure.

I. THE SUPREME COURT OF INDIA

The Indian Supreme Court is crowded. The parapeted open-air hallways that ring the side of its building buzz with lawyers making business and small talk while waiting for their cases. Exasperated litigants rush to find their hearings amongst the building’s fifteen courtrooms, while lawyers’ clerks jostle to their seats carrying armfuls of disheveled briefs. Monday and Friday is admission day, also known by court insiders as the “fish market” for its fast moving and frequently raucous exchanges. On these days, benches of two judges listen to dozens of admission matters from a deep line of black-jacketed lawyers, each arguing why their case should be accepted for regular hearing. Leaning down from their bench a judge will question advocates skeptically, frequently cutting them off abruptly, while the lawyers beseech their “lordships” to just hear them out.⁹

Generally the advocates’ pleas will prove futile. In 2010 only about 17.5% of cases were accepted for regular hearings, which are on Tuesday, Wednesday, and Thursday.¹⁰ During these longer hearings panels of typically two or three judges will hear drawn out arguments as lawyers painstakingly lead them through a case, sometimes for hours, and even days, at a time.

Given its reputation for being so central to Indian political life, outsiders are often struck that the Supreme Court hears so many seemingly routine matters. Stepping into a courtroom one might find an Indian administrative officer from Tamil Nadu arguing he should have been ranked in a higher seniority grade, two neighbors from Nagpur disputing ownership over land from a deal gone bad in the 1980’s, or a Delhi businessman pleading he has been taxed at the wrong rate.

Despite this range of matters before it, or perhaps partly because of this diverse and heavy workload, the Indian Supreme Court has become well known for both its interventionism and creativity. This combination of activism and accessibility has caused it to alternatively be dubbed a “people’s

⁹ Observations of the scene at Supreme Court are based on the author’s experience as a judicial clerk to Chief Justice Sabharwal in 2006-07 and in repeated visits thereafter; INDIAN CONST. Art. 145 (4) (Stipulating, “No judgment shall be delivered by the Supreme Court save in open Court. . .”).

¹⁰ 2010 SUPREME COURT ANNUAL STATEMENT (on file with author)

court”,¹¹ the “last resort for the oppressed and bewildered”,¹² and the “most powerful court in the world.”¹³

A full synopsis of the Court’s major judgments or role in Indian political life is not possible here.¹⁴ Still, it is worth noting that the Court has frequently asserted itself in public policy, arguably because the government is often seen to have abdicated or mismanaged many of its governance functions. For example, after complaints of graft and environmental degradation the Court now manages all of India’s national forests. In a case on the right to food, its continuing orders direct the implementation of many of India’s core social welfare schemes. The Court has ordered smoking be banned from public spaces, penned sexual harassment guidelines for the workplace, and directed taxis, buses, and auto rickshaws to convert to natural gas in the country’s capital to help curtail spiraling pollution.¹⁵

The Indian Supreme Court has also extended this guardianship role from beyond public policy, or promoting good governance, to supervise Parliament’s constituent powers. After standoffs with Parliament during the Court’s early years, it pioneered the “basic structure” doctrine. Under this judge-made doctrine the Court has struck down constitutional amendments that violate the Constitution’s “basic structure”, which it has found includes commitments to democracy, secularism, federalism, and judicial review.¹⁶

Major political controversies of the day routinely come through the Court’s doors, whether it is permissible levels of reservations based on caste, high profile corruption cases, or determining whether a chain of shoals between India and Sri Lanka are part of a mythical bridge that Rama crossed

¹¹ Paari Vendhan, *What Lady Justice Can’t See*, TEHELKA, May 23, 2011 (one of many popular media references to the court as being perceived as a “people’s” court)

¹² *State of Rajasthan v. Union of India* (1979) 3 SCC 634 at 670 (per Goswami J.); Rajeev Dhavan, *Justice on Trial: The Supreme Court Today* (1980)

¹³ Alexander Fischer, *Higher Lawmaking as a Political Resource*, in SOVEREIGNTY AND DIVERSITY 186 (Miodrag Jovanović & Kristin Henrard ed.’s 2008) (noting both Upendra Baxi and S. P. Sathe refer to the Indian Supreme Court as the “most powerful in the world”).

¹⁴ For a useful overview see SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA (B.N. Kirpal et al ed.’s, 2001); Lavanya Rajamani and Arghya Sengupta, *The Supreme Court of India: Power, Promise, and Overreach* in THE OXFORD COMPANION TO POLITICS IN INDIA (2010); Pratap Bhanu Manu Mehta, *India’s Judiciary: The Promise of Uncertainty* in PUBLIC INSTITUTIONS IN INDIA (Devesh Kapur and Pratap Bhanu Mehta Ed.’s, 2005)

¹⁵ For more details on these cases, see, Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. UNIV. GLOBAL STUDIES L. REV. 1 (2009)

¹⁶ *Id.*

in the days when gods walked the country.¹⁷ Indeed, the Supreme Court arguably receives more media attention in India than either the Prime Minister or Parliament.¹⁸

A. HISTORY

Yet, the Court wasn't always so central to Indian political life, or overloaded with cases. Today's teeming hallways of the Supreme Court were not part of the original vision for the Court, but rather an unintended consequence of it. The Supreme Court first sat in 1950 with just eight sanctioned judges, who typically presided in panels of five and three. Looking back on the Supreme Court's early years Justice B.P. Singh recounts, "Only five to six lawyers would be present in the Court Hall and one could only hear the Counsel addressing the Court. Interruption from the Bench was rare, and if at all, only to clarify their thinking without getting into an argument with the Counsel. The proceedings were consequently solemn, virtually dull, when compared to what is witnessed in the Court Halls nowadays."¹⁹

What then accounts for this transformation not only in the Court's workload, but also its very structure? In short: access. The Indian Supreme Court is one of the most accessible highest courts in the world, and as a result, has become one of the most sprawling.

i. The Court's Founding

History played a key role in this story. For most of the British Raj, High Court decisions could only be appealed to the Privy Council in London as there was no highest court in India.²⁰ Litigants complained such appeals to the Privy Council were costly, took too much time, and that the judges in England were not well versed in India's laws.²¹

The 1935 Government of India Act, which would later significantly influence the design of the Indian Constitution, created a new Federal Court

¹⁷ Dhananjay Mahapatra, *Adam's Bridge was NDA Decision: Govt*, TIMES OF INDIA, Sept. 11, 2007

¹⁸ Robinson, *supra* note 15 at 22 (showing that on an annual basis more articles in a prominent Indian newspaper, THE HINDU, mention the Supreme Court than either the Prime Minister or Parliament)

¹⁹ Justice BP Singh, *Supreme Court – As I saw it then*, in THE ANNUAL REPORT OF THE SUPREME COURT OF INDIA 2006-07

²⁰ M. V. PYLEE, THE FEDERAL COURT OF INDIA 68 (1996)

²¹ *Id.* at 73-74

in New Delhi. It had original jurisdiction in disputes between states, provinces, or the Federation²² and took appeals from high courts if a high court certified the matter involved a substantial question of law under the 1935 Act.²³ The Privy Council though continued to take certified and special leave petitions from the Federal Court, meaning judges in London retained ultimate control.²⁴

Many of India's leading politicians had unsuccessfully lobbied for a Federal Court with broader jurisdiction, including allowing appeal even if a High Court did not grant a certificate.²⁵ With this narrower jurisdiction, the Federal Court decided only 100 cases in its entire 11 year existence.²⁶ Although the 1935 Act allowed the Court up to seven judges, with such a small docket it began with just three and ended with only six.²⁷

When independence came in 1947, India's constituent assembly members finally had the moment to create the national court with wide access for all Indians that they had long advocated. The new Supreme Court was seen as transferring the powers of the Privy Council to the Federal Court, and since the Privy Council had allowed appeals at its discretion through special leave, the new Supreme Court would too.²⁸ The Supreme Court would also have original jurisdiction for fundamental rights cases, meaning litigants could directly approach the Court to enforce these rights without first going to the lower courts (the 1935 Government of India Act hadn't granted any fundamental rights). Finally, litigants could still bring cases to the Supreme Court if they were certified from a High Court.

Pandit Thakur Das Bhargava embodied much of the assembly's spirit of promoting wide access when he argued that "we should liberalise the jurisdiction, we should see that in all cases, in all fit and proper cases, the ordinary man gets full justice."²⁹ Dr. Ambedkar, the lower caste leader

²² Government of India Act, 1935, Section 204

²³ *Id.* at Section 205.

²⁴ *Id.* at Section 207; See also, RAJ KUMAR, *ESSAYS ON LEGAL SYSTEMS IN INDIA* 110 (2003)

²⁵ RAJEEV DHAVAN, *THE SUPREME COURT UNDER STRAIN – THE CHALLENGE OF ARREARS* 5 (1978)

²⁶ Pylee, *supra* note 20 at 132

²⁷ *Id.* at 83

²⁸ Dhavan, *supra* note 25 at 10

²⁹ Pandit Thakur Das Bhargava, *CONSTITUENT ASSEMBLY DEBATES* (Hereafter "CAD"), June 3, 1949 (Bhargava made this statement during a debate over whether certified criminal cases should be able to be appealed to the Supreme Court. Bhargava, a noted criminal lawyer, charged that resistance to allowing certified criminal cases arose because the assembly was "full of civil lawyers. . .")

considered by many the father of the Indian Constitution, called the ability of citizens to directly petition the Supreme Court for violation of their fundamental rights “. . . the very soul of the Constitution and the very heart of it. . .” without which the Constitution “would be a nullity.”³⁰

A handful of dissenting constituent assembly members did express concern that lawyers, and their biases, were unduly influencing the process. Biswanath Das labeled lawyers a “parasite on the people” and argued that the Constitution’s provisions for “interminable and intermingling appeals from court to court” would only serve to profit lawyers at the expense of everyone else.³¹ He concluded, “If there is justice based on truth it must be had in the first court or in the next appellate court.”³² His voice though was ultimately drowned out in the broader call for access. The Supreme Court, with its wide jurisdiction, was to be the final protector of all Indians’ rights. A Court whose decisions would help unite an exceedingly diverse, and often politically splintered country.

Despite this ambitious vision, little concerted debate went into how many judges would be required to staff the Court.³³ Ultimately, it was decided there would be eight, with the judges of the old Federal Court becoming the Supreme Court’s first judges. The constitution requires that a constitution bench of at least five justices sit to hear substantial questions of constitutional law, this presumably left three judges to hear other matters.³⁴

ii. The Court’s Expansion

³⁰ Dr. Ambedkar, CAD, Dec. 9, 1948 (Vol. VII p. 953) (Note Dr. Ambedkar did not imagine that the Supreme Court would fully hear cases involving fundamental rights under its original jurisdiction, but rather that it could grant interim relief in appropriate cases.)

³¹ Biswanath Das, CAD, June 6, 1949 (Vol. VIII) (Das, who gave up a lucrative law practice to join the non-cooperation movement in a response to a call by Mahatma Gandhi, was perhaps influenced by Gandhi’s antipathy towards litigious conflict, *see* MAHATMA GANDHI, HIND SWARAJ AND OTHER WRITINGS 58-61 (1997))

³² Das, *supra* note 31

³³ One early draft of the Constitution provided for ten judges, who would sit in two equal divisions, while another proposed to continue with the Federal Court’s allocated strength of seven. Committee appointed in pursuance of the Resolution of the Assembly of the 30th April, 1947, REPORT ON THE PRINCIPLES OF THE UNION CONSTITUTION reported in the Constituent Assembly Debates July 21, 1947; Dhavan, *supra* note 25 at 13

³⁴ CONSTIT. OF INDIA ART. 145(3). Although not as common as today, in the Court’s early years some matters were heard by just two judges. However, it was felt by many then that two judges were a “weak bench” (P. N. Saprú speaking during the Rajya Sabha Debate of Supreme Court (number of judges) bill, 1956 p. 3315 – 4 Sept. 1956) and that benches should have “at least three judges as a rule” (K.K. Basu speaking in Lok Sabha Debate, p. 3809 Supreme Court (number of judges) bill 20 Aug. 1956.

In crafting its jurisdiction, few of the constituent assembly members seemed to have foreseen the dominant role the standard leave petition would take on in the Court's caseload, believing the Court would only exercise this discretionary jurisdiction if there was a "serious breach" of justice.³⁵ This oversight would seem glaring in hindsight. An original member of the Court, and its third Chief Justice, Mehr Chand Mahajan, recounts "We were soon flooded with applications for special leave to appeal wherever a litigant could afford the high cost of such a proceeding in the Supreme Court."³⁶

The Court's liberal interpretation of its jurisdiction led to an ever-ballooning increase in work. In its first year of operation in 1950 over a 1,000 cases were filed with the Supreme Court, by 1960 almost 2,000, by 1970 over 4,000, and by 1980 this had jumped to over 20,000. The number of regular hearing matters it disposed of tracked a similar curve rising from 227 in 1951 to 2,433 in 1980.³⁷ In 2010, almost 70,000 admission matters were filed with the Court, while it disposed of 7,642 regular hearing matters.³⁸

This increase in work was not only driven by the wide jurisdiction originally given to the Court, but how the Court was perceived by the public, Parliament, and the judges themselves. During the constituent assembly debates, members repeatedly expressed concern that the Court could block economic reforms much like its counterpart in the United States had during the New Deal.³⁹ Indeed, during its first twenty-five years, the Supreme Court was often painted as protecting elite interests and playing spoiler to the government's nationalization and property redistribution policies.⁴⁰ Although wary of the Court's interventions in economic affairs, Parliament steadily increased the Court's jurisdiction as part of its efforts to address the perceived needs of ordinary Indians. For example, Parliament eased and

³⁵ Prof. Shibban Lal Saksena, Constituent Assembly Debates, June 6, 1949 (Vol. VIII)

³⁶ MEHR CHAND MAHAJAN, LOOKING BACK: THE AUTOBIOGRAPHY OF MEHR CHAND MAHAJAN, FORMER CHIEF JUSTICE OF INDIA 196 (1963); For a discussion of Court's initial and later interpretation of SLP jurisdiction see 14th ILI COMMISSION REPORT 47; Dhavan, *supra* note 25, at 21-24

³⁷ It was 1,271 matters in 1960 and 2,569 in 1970. SUPREME COURT OF INDIA ANNUAL REPORT 2007-2008 p. 63

³⁸ *Supra* note 10

³⁹ See Dhavan *supra* note 25

⁴⁰ Gregory Alexander provides a nuanced account of this showdown over property in GREGORY ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE (2006)

eventually eliminated monetary restrictions on civil appeals and minimum sentences for criminal appeals.⁴¹

When Indira Gandhi's government declared an emergency in 1975-77, the Supreme Court was widely seen as being unable to stand up to the government's worst abuses, damaging its reputation. In the exuberance of the revitalization of democratic institutions in post-Emergency India the Supreme Court recast itself as a people's court, responsive to the people's needs through such tools like public interest litigation.⁴² In this more populist role, few judges questioned whether the Court should limit its docket. Instead, it made it even easier to bring a case by expanding locus standi⁴³ and instituting a policy of treating letters to the Court by citizens complaining of fundamental rights violations as petitions.⁴⁴

The Court and Parliament's response to the Supreme Court's ever-increasing docket has generally been to simply add more judges. Parliament increased the size of the Court from its original 8 judges to 11 in 1956, 14 in 1960, 17 in 1977, 26 in 1986, and finally to 31 judges in 2008.⁴⁵ During debates over these increases, Members of Parliament rarely, if ever, recommend the Court's jurisdiction should be restricted or that the Court should accept significantly fewer cases for regular hearing.

B. THE IMPACT OF SIZE AND STRUCTURE

i. Access

⁴¹ In 1970 Parliament removed the monetary limit for appeals to the Supreme Court in certified civil cases and reduced the limits for appeal in criminal cases to any sentence over ten years (eventually even this restriction would be dropped). Dhavan, *supra* note 25 at 39

⁴² For a brief synopsis of some important Public Interest Litigation cases see I.P. MASSEY, ADMINISTRATIVE LAW 453-457 (2008)

⁴³ See, for example, Fertilizer Corp'n. Kamgar Union v. Union of India 1 SCC 568 (1981) (Justice Iyer discussing how locus standi for petitioners must be liberalized because when "corruption permeates the entire fabric of government" public spirited individuals must not be barred from bringing cases to correct the use of public power).

⁴⁴ S. Ct. Annual Report, *supra* note 37. This is not to suggest that the Supreme Court never took steps to limit its jurisdiction. The Supreme Court has suggested curtailing its SLP jurisdiction and in P.N. Kumar v. Municipal Corp'n of Delhi 4 SCC 609 (1987) the Court directed that where writ petitions (cases invoking its fundamental rights jurisdiction) could be filed before a High Court the parties should not approach the Supreme Court first.

⁴⁵ Supreme Court (Number of Judges) Act 1956, Supreme Court (Number of Judges) Amendment Bill 1960, Supreme Court (Number of Judges) Amendment Bill 1977, Supreme Court (Number of Judges) Amendment Bill 1986, Supreme Court (Number of Judges) Amendment Bill 2008. The original increases in judges were in increments of three judges so as to add more three judge benches, but as two judge benches became more frequently used this arithmetic made less sense. INDIA LAW COMMISSION 14TH REPORT 54-55 (1958)

Wide access to the Court has conventionally been accepted as a largely unquestioned good, and as a result the Court has added additional judges and panels to accommodate this value. As has already been hinted, the roots of this tradition are both idealistic and pragmatic. The idea that anyone who has had their constitutional right violated—from the poorest villager in the tribal areas of Jharkhand to the wealthiest business man in a high rise in Bombay—can appear before a panel of the Supreme Court to have their case heard has deep democratic resonance. It is a legitimizing idea infused with a populist spirit that carries added weight in a country wracked by sharp class, religious, caste, and ethnic divisions. An often distant and rigid government is suddenly made personal and (potentially) responsive at the pinnacle of judicial power. The Court's interpretation of the law will be shaped not just by the privileged few, but by the petitions of a wide cross section of the Indian population.

India's constitution was meant to be transformative. The Constitution, and by extension the judiciary, was charged with changing a country rooted in hierarchy into one that internalized the liberal values of equality and freedom of expression for all its citizens. Arguably, a Supreme Court active in many cases has more opportunities to act as this sort of democratic school master, working to instill these values in a society still frequently resistant.

Wide access also has clear practical benefits. Take the practice of open admission day, where all cases filed before the Court are briefly heard. It is a product of the strong oral tradition in India and the general weakness of written briefs. Judges find that they can often determine more efficiently whether a case should have a regular hearing through a short verbal exchange with a lawyer than by reading an often wandering brief that may not adequately represent the issues at stake. Further, many judges do not employ clerks, and those that do only have one, meaning there is no system in place to help them filter admission petitions.

More importantly, accepting more cases for regular hearing allows the Indian Supreme Court to actively police the high courts and lower judiciary. Both the Supreme Court and many members of the public seem to distrust these lower courts, fearing that they might be incompetent, corrupt, or that local parochial interests such as caste biases unduly influence decisions.⁴⁶

It also strengthens the Supreme Court's check on the executive and legislature; allowing it to make its presence known on a wide range of matters that might escape the attention of a less active court. This is particularly

⁴⁶ Nick Robinson, *Too Many Cases*, FRONTLINE, Jan. 3-16, 2009

relevant in India where many perceive that the legislature has abdicated some of its governing responsibilities and the executive frequently abuses some of its powers. Access then seems a more desirable feature where a Supreme Court is building legitimacy with a large, poor population, still distant from the values in its constitution, and there is distrust of the lower courts' ability and integrity, as well as the executive's and legislature's.

Still, there are clear costs to this approach. By accepting so many cases, delay has become a serious problem. It currently would take the Supreme Court about three years to clear its existing docket if it accepted no more cases. This backlog also means judges are generally overworked and the quality of their opinions suffers. Important constitution bench matters, which require at least five judges and lengthy arguments, are difficult to schedule amongst the mass of other matters, and have declined in number.⁴⁷

Litigation in such a system is not only longer, but more expensive. As Biswanath Das had feared, despite the populist rhetoric it is mostly those with means who actually use the Supreme Court. Those with money, the government (whose officers don't bare the cost of appeal), and appellants geographically situated closer to New Delhi are all far more likely to appeal a case to the Supreme Court.⁴⁸ A group of leading lawyers have emerged whose perceived high "face value" with judges and success in getting orders, especially for admission of cases, allows them to charge around \$10,000 an appearance. Several of these lawyers make between \$2 to 10 million a year.⁴⁹

With no real opinion survey data, it is unclear how much the general public actually values wide access to the Supreme Court. Both the bar and bench reiterate this value, often claiming it to be a public one, but they arguably have a vested interest in perpetuating this view.⁵⁰

Yet, there is reason to believe that wide access does tap into a larger societal value. In 2009, a report by the Indian Law Commission

⁴⁷ In the 2000's there were on average only nine five-judge or larger benches a year compared to about a hundred such benches a year in the 1960's. Nick Robinson et al., *Interpreting the Constitution: Supreme Court Constitution Benches Since Independence*, XLVI(9) EC. & POL. WEEKLY 27 (2011)

⁴⁸ Nick Robinson, *Hard to Reach*, FRONTLINE Jan. 30-Feb. 12, 2010 (Finding that parties in Delhi are four times more likely to appeal their case to the Supreme Court than the national average, and the farther one is from Delhi the less likely a case will be appealed.)

⁴⁹ Marc Galanter and Nick Robinson, *The Grand Advocates* (work in progress) The Court's many panels empowers these lawyers, who were often former solicitor or attorney generals, as smaller benches are arguably easier for them to impress and sway.

⁵⁰ Although Supreme Court judges may have a bias towards believing that the answer to the Supreme Court's backlog is more judges like themselves they do not have a material interest in expanding the Court. However, the more matters heard before more benches the more business is created for lawyers since they typically charge by appearance.

recommended setting up panels of the Supreme Court in four parts of the country to decrease costs for litigants and increase access (a model of geographic dispersion the Pakistani Supreme Court follows).⁵¹ Over the years, Members of Parliament, particularly those from the south, have made similar pleas for having benches of the Court sit across the country. In effect, these MPs argue having wider, more equitable access to the Court by continuing to open up its structure is more important than limiting access to keep its structure in tact.⁵²

ii. Cohesiveness and Polyvocality

Speaking of *the* Indian Supreme Court is in many ways a misnomer. There is no one Court that speaks with a single voice in the way one might think of the U.S. Supreme Court. Instead, the separate panels of the court usually number no more than two or three judges. It is a polyvocal court. Any given bench has a slightly different interpretation of the law than another bench, and sometimes a starkly different interpretation.

The Court's polyvocality is present from admission day. Some judges are well-known for accepting certain types of cases for regular hearing or denying others. Some simply accept far more cases for regular hearing than others, believing the Court should leave its doors more widely open.

During regular hearing differences between benches can also become stark. In public interest litigation certain judges are known for intervening aggressively when they see lapses in governance, while others rarely sanction intervention.⁵³ Cases involving the death penalty are another clear example. In the first decade of the 2000's Justice Pasayat was well known for supporting the death penalty for serious and heinous crimes like rape and

⁵¹ LAW COMMISSION OF INDIA, REPORT NO. 229 (Aug. 2009). This report does not mention that the Pakistani Supreme Court today uses a similar model, having benches that sit in the capitals of each of Pakistan's four provinces and a bench in Islamabad. This practice started under the 1956 Constitution where the Supreme Court's permanent seat was in Karachi, but it was required to sit in Dacca (contemporary Bangladesh) at least twice per year, which was both symbolically and practically important in a country which at that time was not geographically contiguous. See Art. 156, CONST. OF PAKISTAN (1956)

⁵² Resisting such a move, a full meeting of the judges unanimously rejected the 2009 Law Commission recommendations, claiming such a change would adversely affect the Court's institutional cohesiveness. J. Venkatesan, *Supreme Court Again Says 'No' to Regional Benches*, THE HINDU, February 21, 2010

⁵³ See, for example, Katju, *infra* note 75

murder, and his bench frequently upheld death sentences.⁵⁴ On the other hand, Justice Sinha stressed the death penalty's arbitrariness and his bench interpreted India's death penalty jurisprudence so that it almost never applied.⁵⁵ Meanwhile, Marc Galanter and Alex Fischer have recorded how the Court's ever-controversial caste-based reservation decisions have become increasingly conflicting with each other as the Court has increased in size.⁵⁶

Differences in opinion between benches are usually more subtle than these examples, but they still exist. As a result, lawyers frequently try to hunt for the most favorable bench. When a matter is before a judge they think will give an unfavorable ruling they may try to delay the hearing until either the case is transferred to another bench or the judge retires. Other times they will try to bring the case before the Chief Justice to be re-listed as an urgent matter to have different judges reassigned to it.

These differences between benches confuse doctrine. The resulting uncertainty arguably motivates more cases to be brought to the Supreme Court.⁵⁷ Litigants realize even if their appeal is not strong that with a sympathetic bench they could get a better ruling. Meanwhile, lower court judges, let alone Indian citizens, sometimes can not distinguish which Supreme Court judgments represent settled law adding uncertainty into a wide array of social and economic relations.

The entire system may seem like a calamity to an outsider (and even some insiders). Yet, it should not be taken as incoherence as the opinions of the judges are unified by a set of rules governing precedent and judicial discipline. The Court's polyvocal nature also arguably has benefits that could not be achieved otherwise.

iii. Inter-Judge Relations: Chief Justice Dominance, Judicial Entrepreneurs, and Judge Clusters

The Supreme Court's rules governing precedent reign in the most extreme and explicit outlier decisions. Under current case law benches are

⁵⁴ *Supreme Court Judge Pasayat Retires*, THE HINDU, May 10, 2009; *Child Rapist Deserves Death Penalty: Retd Justice*, TIMES OF INDIA, Dec. 6, 2009

⁵⁵ Tarunabh Khaitan, *Justice Sinha's Legacy: Strict Scrutiny, Death Penalty, Counter-majoritarianism*, LAW AND OTHER THINGS, Aug. 6, 2009. Justice Sinha's stance against the death penalty ironically strengthened his claim that it was arbitrarily applied.

⁵⁶ Marc Galanter and Alex Fischer, *New Introduction to COMPETING INEQUALITIES* (forthcoming 2012)

⁵⁷ Richard Posner makes a similar argument about how the increase in the size of the U.S. Courts of Appeal increased appeals to them since there was more uncertainty in the law. RICHARD POSNER, *THE FEDERAL COURTS: CHALLENGES AND REFORM* 120-122 (1999).

bound to follow the precedent of benches of the same or greater size.⁵⁸ In theory, a bench can not question the decision of a larger bench, but only ask the Chief Justice to place the matter before an even larger bench.⁵⁹

Seniority plays a unifying role as well. Most benches are composed of only two judges, but despite this even number there rarely is a split decision because tradition dictates that the junior judge generally defers to the opinion of the senior.⁶⁰ This means fewer judges routinely express their individual opinion decreasing the number of voices, and chances for conflict, on the Court. A junior judge will generally dissent though if they believe that the senior judge is expressing an opinion that is clearly against past precedent, a check which results in a one-one split and a referral to another bench.

The senior-most judge on the Court has traditionally been the Chief Justice. He plays a strong role not only in deciding which cases are heard by larger benches, but also which cases are heard by which judges. These powers have led to the development of a Chief Justice dominant Supreme Court, where the Chief Justice polices the system and helps unify doctrine.

The Chief Justice can override the automated system of assigning cases and explicitly assign cases to his own or another's bench. He can speed up the hearing of cases or holdup a politically sensitive case for years (given that backlog provides an ample excuse for delaying the hearing of a matter). He also creates the composition of benches, meaning he can effectively punish judges for outlier decisions. For example, he can place a non-conforming judge on a two judge bench where he or she is the junior judge (meaning they will rarely be speaking for the bench) or not include them on the larger and more powerful constitution benches of five or more judges.

Since independence the Chief Justice has been 6.5 times less likely to be in dissent than another judge on constitution benches.⁶¹ In research on the Court's earlier history, George Gadbois found that K. Subba Rao, Chief

⁵⁸ *See*, Central Board of Dawoodi Bohra Community v. State of Maharashtra 2 SCC 673 (2005) (also noting that Chief Justice Pathak thought there would be greater consistency and certainty in the law if the entire court sat together, but that workload prohibited this.)

⁵⁹ *Id.* The Chief Justice can also independently place a matter before any size bench.

⁶⁰ In the U.S. a number of scholars have shown the effect of ideological dampening and amplification on panels of the federal courts of appeal. A judge's voting becomes more liberal or conservative depending on how many democratic or republican appointed judges are on the same panel with them. CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006); FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS (2007) In India, Supreme Court judges do not have clear political party affiliations. A culture of dissent aversion, spurred on by high workloads, may instead result in an ideologically dampening of Indian judges opinions.

⁶¹ Robinson et al, *supra* note 48 at 31

Justice from 1966-1967, with his stark anti-government bias, was in dissent 48 times when he was a Supreme Court judge (more than any other judge to that point). However, he was never in dissent after he became Chief Justice. Perhaps more tellingly, during his tenure the entire Supreme Court gave more anti-government decisions than at any other point to that time, suggesting the Chief Justice used his bench-setting power to affect cases he didn't even hear.⁶²

Justices also typically come from very similar backgrounds leading to more uniformity in their decisions. Currently a collegium of the Chief Justice and the four most senior judges selects who will be appointed to the Supreme Court, although the President still formally makes the appointment. Judges are traditionally all former High Court judges, who come from backgrounds of relative privilege, including fluency in the English language.⁶³ Unlike in the U.S., these judges are rarely seen as overtly favoring the political philosophy of one political party over another. This internal selection method and their relative homogeneity adds to a sense of "brotherhood" that encourages judges to reach consensus when possible, although vocal dissents still frequently do occur on the larger and rarer constitution benches.⁶⁴

Therefore, what initially appears as a haphazard system of almost anarchic polyvocality has clear controls, such as theoretically strong precedent rules and a dominant Chief Justice. From this perspective, the typical Indian Supreme Court bench of two judges frequently does not even look like the highest court of a country. It more closely resembles a High Court, unable to overrule Supreme Court benches of even the same size.⁶⁵

Despite these constraints that push the Court's jurisprudence towards uniformity, individual judges or small groupings of like-minded judges have significant space to innovate. After all, a two judge judgment is still a Supreme Court ruling and binding on the parties unless it is overruled by a larger bench (which relatively rarely occurs). The Supreme Court's polyvocality may be limited and regulated, but it has consequences that make it different than if it sat as a unified bench.

⁶² George H Gadbois Jr, *Indian Judicial Behaviour*, 3(5) EC. & POL. WEEKLY 149 (1970)

⁶³ Supreme Court Advocates on Record Ass'n vs. Union of India (AIR 1994 SC 258); For an overview of Supreme Court judges' backgrounds, see GEORGE H. GADBOIS JR., JUDGES OF THE SUPREME COURT OF INDIA: 1950-1989 (2011); Abhinav Chandrachud, *An Empirical Study of the Supreme Court's Composition*, 46(1) EC. & POL. WEEKLY (2011)

⁶⁴ Robinson et al, *supra* note 48 at 28 (finding that dissent rates have climbed above 20% on constitution benches in recent years)

⁶⁵ Dhavan, *supra* note 25 at 36 (finding that by the end of the 1950's "In dealing with many appellate matters the Supreme Court was acting just like the High Courts. It was manned by judges who came from the High Courts. It decided cases in fragmented bench structures. It did not sit and think as a court. It was merely a collection of judges.")

For example, the development of public interest litigation would have been far less likely without the Court's panel structure. Judicial entrepreneurs such as Justices Bhagwati, Iyer, and Verma played a leading role in developing public interest litigation in the 1980's and 1990's frequently issuing decisions from smaller benches on which they were the senior judge. The detailed orders and long hearings in public interest litigation cases were made possible on a widespread basis at the Supreme Court level by having a large number of smaller benches with the capacity to commit the time necessary to hear these cases. For example, there are now two separate "green" benches that sit once a week to hear matters related to the environment, often making highly detailed directions to the government and other parties, which require frequent follow up by the Court.⁶⁶ In the right to food case the Supreme Court has issued over forty orders in a case that has gone on for over ten years. Through this case the Court manages many of the country's primary social welfare programs on the basis of pleadings from the parties and recommendations by right to food commissioners who were appointed by the Court to help oversee its orders.⁶⁷

When judges on smaller benches create new innovations like public interest litigation it enters a feedback loop. The press, public, and bar react with favorable or unfavorable views. Based on these inputs the rest of the judges can then reflect on the merits of this turn in the Court's jurisprudence. If there is a largely favorable reception an expectation is created that other judges should follow a similar line of reasoning. Allowing smaller benches to first experiment with new paths in jurisprudence also allows other benches of the court to better understand the feasibility and real world implications of its judgments. Similarly to the "laboratories of experimentation" argument for American federalism,⁶⁸ the whole is not necessarily committed to the innovations of one bench, but other benches or the entire Court can adapt them if they seem preferable or become the norm.

Judge clusters can also push precedent in a new direction. Here a small group of judges proactively shape jurisprudence having an out-sized impact on precedent creation. An illustration helps show how this works. Under the Industrial Disputes Act an employee has to have worked for 240 continuous days in order for provisions of the Act to apply. Previous precedent had made clear employers had to produce wage and muster roles

⁶⁶ *Supreme Court set up additional Forest Bench*, JOSH JAGRAN, July 18, 2010; *Government Wants Apex Court's Green Bench disbanded*, TIMES OF INDIA, July 2007

⁶⁷ For the orders and more information on the case, see Right to Food Campaign: Legal Action website, available at <http://www.righttofoodindia.org/case/case.html>

⁶⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932)

for any disputed period.⁶⁹ In a 2002 case, citing to no precedent a bench of Justices Kirpal and Pasayat decided that the burden of proof would be almost entirely on the employee.⁷⁰ In 2004, Justice Pasayat cited to his own 2002 decision in confirming this outcome.⁷¹ A series of similar judgments followed, involving a relatively small group of judges, and citing to the same precedent.⁷² Capping this period, in 2008 the Court declared there had been a “paradigm shift” accepting this new view.⁷³ Essentially, a cluster of Supreme Court judges tactically using precedent shifted the jurisprudence so that the evidentiary burden fell more squarely against the employee.

Supreme Court judges use their judgments not only to create new precedent, but to speak to each other and the public about the direction they think the overall Court should take. For example, in January 2010 Justice Singhvi lamented from the bench in a labor retrenchment case:

Of late, there has been a visible shift in the court’s approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalization and liberalisation are fast becoming the *raison d’etre* of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganized workers.⁷⁴

Justice Katju, a leading proponent of reigning in the Court’s expansionist view of its powers, declared in a 2007 judgment:

Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like Emperors. . . . [I]t is not the business of this Court to pronounce policy. [The Court] must observe a fastidious regard for limitations

⁶⁹ *Food Corporation of India v. Presiding Officer* (2001) Gau 959; Gayatri Singh, *Judiciary Jettisons Working Class*, 24, 29 COMBAT LAW (Nov.-Dec. 2008)

⁷⁰ *Range Forest Officer v. Hadimani*, 3 SCC 25 (2002)

⁷¹ *Rajasthan State Ganganagar S Mills Ltd v. State of Rajasthan and another* (2004)

⁷² *Municipal Corporation, Faridabad Vs. Siri Niwas* (2004); *M.P. Electricity Board Vs. Hariram etc.* (2004); *Batala Coop Sugar Mills v. Sowaran Singh* (2005); *Manager, R.B.I., Bangalore Vs. S. Mani and Ors.* (2005); *Kendriya Vidyalaya Sangathan and Anr. vs. S.C. Sharma* (2005); *RM Yellatti v. Assistant Executive Engineer* (2006); *U.P. State Brassware Corpn. Ltd. vs. Udai Narain Pandey* (2006); *Municipal Council, Sujanpur Vs. Surinder Kumar* (2006)

⁷³ *Talwara Coop. Credit and Service Society Ltd. Vs. Sushil Kumar* (2008)

⁷⁴ Krishnadas Rajagopal, *Globalization blinds us to aam aadmi plight: SC*, INDIAN EXPRESS, Jan. 28, 2010

on its own power, and this precludes the Court giving effect to its own notions of what is wise or politic.⁷⁵

Finally, having precedent more regularly reinterpreted through different Supreme Court benches may be a strength in a country where there is less national consensus on many political issues from caste-based reservations to economic liberalization. The judge can use their discretion to navigate the particularities of a specific case rather than try to impose a more cohesive jurisprudence. In this way, the Court's controlled pluralism can be seen as a tool, conscious or not, to keep the law and the Court as an open recourse to different social forces with divergent views.

iv. Image and Expertise

Given their virtual self-selection, judges on the Indian Supreme Court are viewed as less politicized than in the United States. The panel structure of the Court also prevents clear ideological blocks from being perceived (even if there are more "activist" or "conservative" judges). There is not the sense that all the judges have to assemble together for a decision to be legitimate or fair in the eyes of the public. Quite the opposite, judges are viewed as bringing different skills or backgrounds that should be selectively utilized.

The large size of the Court and the authority of the Chief Justice to assign judges to panels are frequently defended on the ground that judges have different expertise. As Pandit Sharma pointed out in Parliament when he advocated expanding the Court in 1960 "It is not possible for a Judge to know everything" and so more judges would ensure "the final law for the land is to be laid down by Judges specialized in a particular branch of law."⁷⁶ If judges gain legitimacy from expertise in interpreting the law⁷⁷ having specialized judges arguably produces stronger, more legitimate judgments. The more judges and panels on the Supreme Court the more expertise it can draw upon. For example, the de facto tax and environmental benches of the Indian Supreme Court have judges who have a specialty in these areas.

⁷⁵ Divisional Manager, Aravali Golf Club & Anr. Vs. Chander Hass (2007)

⁷⁶ Pandit Sharma, Lok Sabha debate April 27, 1960 over Number of Judges Bill, 14150; interview with former Chief Justice Verma (on file with author) (commenting that the Chief Justice can place judges with special expertise on different benches)

⁷⁷ ROSCOE POUND, *The Courts and the Crown* in THE SPIRIT OF THE COMMON LAW (1921) (arguing judicial independence was originally founded in part upon the idea that judges had a certain expertise in understanding the law that the sovereign did not).

Indian identity politics may also play a role when creating benches. There seems to be an unwritten rule that at any given point there should be geographic diversity on the Court with a judge from each major state. Similarly, there is almost always a Muslim on the Court, and recently lower caste judges seem to be represented more frequently and purposively.⁷⁸ Such selection is done not only to give the overall Court more legitimacy, but also for specific benches for certain cases. For example, in a constitution bench case concerning religious discrimination against Muslims in the state of Assam, the Chief Justice might decide to assign a judge from Assam, another who is Muslim, one who is an expert in religious discrimination jurisprudence, a judge well-known for his opinion writing skills, and himself.

Larger benches do carry more weight both in precedent value and in the authority of the judgment in the eyes of the public. As such, it is perhaps not surprising that the largest bench of the Indian Supreme Court (thirteen) sat for *Kesavananda Bharati*. This case laid down the foundational principles of the basic structure doctrine, which allows the Court to strike down constitutional amendments. So many judges heard it not just to be able to overturn past precedent on this issue, but the sheer number of judges added extra legitimacy to a judgment directly challenging a core power of parliament.

The overall image of the Court as a guardian institution is fostered by its structure. The Court is widely perceived as a group of periodically revolving mostly apolitical judicial experts that provides a backstop for governance failures committed by the other branches of government. Its large size gives the Court an almost impersonal nature that helps foster this sense of expertise, even while its ability to take on many cases creates a more populist image at the same time. All of these characteristics are affected by the panel structure of the Court to varying extents. Its US counterpart, to which this article now turns, evolved out of a different cluster of historical tensions and demands. As a result, its structure, and the impact it has had, is markedly different.

II. THE SUPREME COURT OF THE UNITED STATES

The marble steps leading up to the U.S. Supreme Court are wide and grand. They are also largely bare. A few out-of-towners may pose on them to take a quick picture, and on the forty or so days a year when the Court hears oral arguments a line neatly forms behind metal barriers for those

⁷⁸ Chandrachud, *supra* note 63 (noting that there is a tradition of having at least four non-Hindu vacancies on the Court in recent years)

waiting to get in through a side entrance.⁷⁹ Inside, the justices sit in a stately courtroom with Roman pillars to their backs. Visitors lucky enough to have secured a seat listen attentively, as tourists quietly shuffle through the back of the room for a three minute viewing as if being ushered through a living museum.

Unlike the Indian Supreme Court's often raucous "fish market", the U.S. Supreme Court's decision whether to hear full arguments for cases happens behind closed, deafeningly quiet doors. In the 2010 term 7,857 cases were filed in the Supreme Court, out of which only 86 were argued.⁸⁰ The rest were denied hearing, usually with no explanation. For those cases accepted, oral arguments are tightly regimented, with exactly half an hour generally allocated to each side. The justices throw out pointed questions to well-rehearsed counsel. A white light signals an arguing attorney has five minutes remaining. When the light turns red their time is up.

Like its Indian counterpart, the United States Supreme Court has also been called the "most powerful court in the world." It's impossible to detail its place in American history and society, as well as its contributions to global jurisprudence, here.⁸¹ It helped pioneer the concept of judicial review through judgments like *Marbury v. Madison*, 5 U.S. 137 (1803); arguably hastened the U.S. civil war with its decision in *Dredd Scott v. Sanford*, 60 U.S. 393 (1857); worked to desegregate the country in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); has decided upon a range of controversial social issues ranging from a woman's decision to have an abortion in *Roe v. Wade*, 410 U.S. 113 (1973) to the constitutionality of bans on sodomy in *Lawrence v Texas*, 539 U.S. 558 (2003); and even had the last word in the outcome of a presidential election in *Bush v. Gore*, 531 U.S. 98 (2000).

Although its judges and some of its decisions have been seen as highly political it has largely played a more limited role in overseeing government policy or intervening in political issues of the day when compared to its Indian counterpart.⁸² Nor has it ever curtailed the ability of Congress and the

⁷⁹ Judith Resnik, *Open the Door and Turn on the Lights*, SLATE, May 21, 2010

⁸⁰ SUPREME COURT OF THE UNITED STATES, 2011 YEAR-END REPORT OF THE FEDERAL JUDICIARY 13 (2011)

⁸¹ For more information *see*, LAURENCE H. TRIBE, *TRIBE'S AMERICAN CONSTITUTIONAL LAW* (2000); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (2006)

⁸² Frederick Schauer, *The Supreme Court Term 2005 Term, Foreword: The Court's Agenda and the Nation's* 120 HARV. L. REV. 4 (2006) (arguing using press and polling data that the U.S. Supreme Court, with rare exception, has not played as dominant a role in U.S. political life as traditionally portrayed.)

states to amend the Constitution, like the Indian Supreme Court has through the basic structure doctrine. The Court's jurisdiction is also limited to federal matters, leaving the interpretation of state law to state courts.

A. HISTORY

i. The Court's Early Years

During the Constitutional Convention in Philadelphia the delegates decided to create a centralized Supreme Court to interpret the Constitution. However, similar to their counterparts in New Delhi some 160 years later, they seemed to give little critical reflection to the judiciary's operational needs.⁸³ The exact size and structure of the Supreme Court engendered little debate, and were delegated to the first Congress.

When Congress did meet it passed the Judiciary Act of 1789, creating the basic architecture for the federal judiciary. The new Republic was to be divided into three circuits, but no circuit court judges were provided for in the Judiciary Act. Instead, these circuit courts would be manned by two Supreme Court judges, who rode the circuit for part of the year, and a local district court judge.⁸⁴ This plan's logic meant that there needed to be six Supreme Court justices.

Yet, different bench sizes for the Supreme Court were also given limited consideration. Senator William Maclay of Pennsylvania kept the most detailed notes on the Senate debate of the 1789 Judiciary Act. He describes Senator Oliver Ellsworth, one of the chief architects of the Act, as having "made a most elaborate harangue on the necessity of a numerous bench of judges," pointing to the dignity that comes with the twelve judges of the Exchequer chamber in England.⁸⁵ Senator Grayson also promoted a larger bench, arguing that more judges were necessary to ensure enough critical minds to produce respectable decisions. Senator Maclay rebutted these arguments for a larger Court, noting that England was a more populous country and that most litigation in the United States would be dealt with by

⁸³ JULIUS GOEBEL JR. *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME I: ANTECEDENTS AND BEGINNINGS TO 1801* 206 (1973)

⁸⁴ Judiciary Act of 1789 (ch. 20, 1 Stat. 73)

⁸⁵ WILLIAM MACLAY, *JOURNAL OF WILLIAM MACLAY, UNITED STATES SENATOR FROM PENNSYLVANIA 1789-1791* 87 (June 23, 1789), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llmj&fileName=001/llmj001.db&recNum=98> Senator Maclay argued that he thought six Supreme Court justices would be too many if there were to be no circuit courts, while too few if the judges had to ride circuit frequently.

state courts. He advised that what was important for achieving praiseworthy decisions was not numerous, but quality judges, and that more judges could be added later if necessary.⁸⁶

Like in India, some criticized the disproportionate influence representatives who were lawyers had in shaping the judiciary. Senator Maclay, who ultimately voted against the 1789 Judiciary Act feeling it would swallow states' powers, lamented "I really dislike the whole of this [judiciary] bill . . . it was fabricated by a knot of lawyers, who joined hue and cry to run down any person who will venture to say one word about it."⁸⁷ He observed that in England that by the time two parties reached the House of Lords they had spent so much money "one or both are completely ruined. . . . For never was so admirable a machine contrived by the art of man to use men's passions for the picking of their pockets . . ."⁸⁸

When the United States Supreme Court opened its doors in 1789 it had only a handful of cases. Even ten years later from 1801 to 1806 the Court averaged hearing just 24 cases a year. Few cases arose in a relatively unpopulated country where the federal government did not yet have deep reach.⁸⁹ As such, unlike in India, increases in the U.S. Supreme Court's size were less motivated by its caseload, which remained manageable until the 1850's. Rather the legislated strength of the Court fluctuated during its first seventy-five years from as few as five judges to as many as ten because of the calculations of politicians attempting to influence the Court's decisions and the need for more justices to ride new circuits in an expanding country.⁹⁰

⁸⁶ *Id.* The House of Representatives adopted the Judiciary Act of 1789 with less debate than the Senate although one representative seemingly off-handedly suggested that if the required quorum for the Supreme Court was diminished from four out of six justices, the Court could then potentially sit in two panels. *Annals of Congress, House of Representatives, 1st Congress, 1st Session Aug. 24, 1789 at 812.*

⁸⁷ Maclay, *supra* note 85 at 97 (July 2, 1789)

⁸⁸ *Id.* at 108 and 128

⁸⁹ William Strong, *The Needs of the Supreme Court*, 132(294) N. AM. REV. 437 (1881)

⁹⁰ After losing the election of 1800, John Adams and the Federalist controlled Congress reduced the number of justices on the Supreme Court from six to five in the Judiciary Act of 1801, presumably to deny incoming President Thomas Jefferson an appointment. Jefferson and the new Congress, however, quickly repealed the Act in 1802 returning the Court to six judges, while also dividing the country into six circuits (one for each justice). In 1807, President Jefferson and Congress added a 7th circuit, increasing the Court to seven justices. The Court's size remained stable until Andrew Jackson signed the Judiciary Act of 1837 which added two more circuits and Supreme Court justices, bringing the number of each to nine. During the Civil War, Congress passed the Judiciary Act of 1863, adding a 10th circuit for newly admitted California and increasing the size of the court to ten justices. This would be the last time the Supreme Court's size was expanded with the

ii. A Backlogged Court and Tightening Access

Even as the Supreme Court's size stabilized at nine justices shortly after the Civil War, the Court entered a period of chronic backlog, fueled by a surging population, an increasingly expansive and assertive post-Reconstruction federal government, and legislation enlarging the Court's jurisdiction.⁹¹ By 1890, 623 cases were filed with the Court and it had a backlog of 1,816 cases that it was estimated would take three to four years to clear if no new cases were filed.⁹² Retired Justice William Strong pleaded with Congress to "provide some remedy for the embarrassed condition of the Supreme Court . . ."⁹³

But why was the Court so behind in its docket? After all, if today the Court routinely deals with over 7,000 cases a year, 623 cases in 1890 should not have been overwhelming. The answer is that before the end of the 19th century the Court heard arguments for virtually every case that was brought before it for which it had jurisdiction, unlike today where only about 1% of petitions are argued and decided.

Under the 1789 Judiciary Act the Court's appellate jurisdiction was through "writ of error".⁹⁴ The early Court interpreted this to mean it was bound to decide all these appeals, with Chief Justice Marshall declaring in *Cobens v. Virginia*, 19 U.S. 264 (1821) that the Supreme Court had "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." So although the Court during these early days carefully

addition of new circuits. The unpopular Presidency of Andrew Johnson led to Congress passing the Judiciary Act of 1866, under which the Court was to be reduced by three justices upon their retirement to seven in order to prevent Johnson from having any Supreme Court appointments. However, the Court's size was increased to eight in 1867 and finally returned to nine in 1869, giving newly elected President Ulysses S Grant two appointees, which effectively allowed him to reverse the first *Legal Tender* case, where the Court had ruled paper money unconstitutional. See John V. Orth, *How Many Judges Does it Take to Make a Supreme Court*, 19 CONST. COMMENTARY 681, 684-85 (2002)

⁹¹ Strong, *supra* note 89 at 437 (1881). Only in 1860 was the Court unable to clear all its cases in a relatively short period of time. Justice William Strong, *Relief for the Supreme Court*, 151(408) N. AM. REV. 567 (1890); GERHARD CASPER AND RICHARD POSNER, *THE WORKLOAD OF THE SUPREME COURT* 17-19 (1976) (describing how legislation enlarged the Supreme Court's jurisdiction to include federal questions involving more than \$500 in 1875, capital crimes in 1889, and "infamous crimes" in 1891.)

⁹² Strong, *supra* note 91 at 151 (1890); RUSSELL WHEELER AND CYNTHIA HARRISON, *CREATING THE FEDERAL JUDICIAL SYSTEM* 16 (1994)

⁹³ Strong, *supra* note 91 at 570

⁹⁴ Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33(1) J. OF S. CT. HIST. 1, 3 (2008)

refused to expand its jurisdiction by declining to give President George Washington advisory opinions in 1793⁹⁵ and declaring Congress could not add to the Court's original jurisdiction in *Marbury v. Madison*,⁹⁶ it also made clear the jurisdiction it did have was mandatory.

Three primary proposals were commonly explored by Congress to relieve the Court's workload during the mid- and late-19th century. These options were reducing the justices' circuit riding duty, restructuring or expanding the Supreme Court to increase its capacity, and limiting the Court's mandatory jurisdiction.

Since the Court's inception justices had frequently complained about their circuit riding duties, which took a large amount of their time, and several had even left the Court in part due to this burden.⁹⁷ Yet, Congress continued to have the justices ride circuit, to some extent to save money on personnel costs in the earlier years, but later more because many in Congress saw justices as "republican schoolmasters"⁹⁸ who acted as an important conduit to bring federal values and authority to the states. Some in Congress also feared that if the Court was confined to D.C. it would become a "fossilized institution"⁹⁹ separated from "that practical knowledge, that practical experience, that knowledge of men and things, which is just as essential to the decision of causes in the last resort as it is to the trial of causes at *nisi prius*."¹⁰⁰

However, as the Supreme Court fell behind on its docket in the mid-19th century, pressure increased to relieve the justices of their circuit duties. Many in Congress continued to resist, considering adding more judges to provide

⁹⁵ In 1793 in a letter to President George Washington the justices declined to give advice the President had requested concerning the new Republic's obligations under a treaty with the French after hostilities broke out there. Ene Sirvet and R.B. Bernstein, *John Jay, Judicial Independence and Advising Coordinate Branches*, 21(2) J. OF S. CT. HIST. 25-27 (1996)

⁹⁶ In *Marbury v. Madison*, 5 U.S. 137 (1803) the Court declared that it had the power of judicial review by ruling unconstitutional any expansion of its original jurisdiction. As a result, the US Supreme Court's original jurisdiction never became a significant part of its docket, unlike in India where this is a substantial portion of the Court's work.

⁹⁷ Joshua Glick, *On The Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZA L. REV. 1753 (2003)

⁹⁸ Ralph Lerner, *The Supreme Court as Republican Schoolmasters*, 1967 SUP. CT. REV. 127 (1967)

⁹⁹ Felix Frankfurter, *The Business of the Supreme Court of the United States – A Study in the Federal Judiciary II. From the Civil War to the Circuit Courts of Appeals Act*, 39(1) HARV. L. REV. 35, 54 (1925) (quoting Senator Williams CONG. GLOBE 41st Cong., 1st Sess. 209).

¹⁰⁰ CONG. GLOBE 41st Cong., 1st Sess. 214 (Sen. Edmunds); for a fuller discussion of these debates see Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Constitutional Regulation of the Courts*, 78 IND. L.J. 153, 182-188 (2003)

relief instead.¹⁰¹ In the end, Congress passed the Judiciary Act of 1869 which appointed a circuit judge in each circuit to sit with district judges to hear these appeals. Under this Act, the Supreme Court justices were only required to ride circuit once every two years.¹⁰²

Despite providing some relief, the Court's workload kept expanding after the 1869 Act and soon its "docket became a record of arrears."¹⁰³ Again Congress considered restructuring the Court. In 1881 Senator Manning proposed increasing the Court's capacity by dividing it into three panels of three judges each, or alternatively having twenty-one judges divided into three panels of seven.¹⁰⁴ Along similar lines, in 1890 the Senate Judiciary committee considered increasing the number of justices to eleven or eighteen, and authorizing the Supreme Court to sit in panels for non-constitutional questions.¹⁰⁵ Critics, such as Justice William Strong, pointed out such proposals would lead to conflicts between benches, more delay, and might be unconstitutional.¹⁰⁶

Ultimately, instead of expanding the Court, Congress passed the Judiciary Act of 1891, which had two principal effects. First, it created a court of appeals in each circuit, effectively ending justices' circuit riding duties. Second, the Act gave the Supreme Court its first discretionary jurisdiction for many cases, including those that invoked diversity jurisdiction.¹⁰⁷ The replacement of writ of error jurisdiction for this writ of certiorari had an almost immediate impact. By 1892 the number of petitions to the Supreme Court had been reduced by over half the previous year's total to just 275.¹⁰⁸

¹⁰¹ For example, Senator Wilson proposed in 1867 that there should be fifteen Supreme Court judges, seven (to be drawn by lot) to sit in DC and the rest to ride circuit, thereby giving the Court the manpower to cope with both its circuit and appellate duties. Glick, *supra* note 97 at 1816; or CONG. GLOBE, 40TH CONG., 3D SESS. 1484 (1869) (recording motion to amend a judiciary bill by increasing the number of Associate Justices from eight to fourteen); or CONG. GLOBE, 41st Cong., 3d Sess. 214 (1870) (statement of Sen. Trumbull) (noting Edmunds' proposal that the number of Justices be doubled, as an alternative to adding circuit judgeships)

¹⁰² Judiciary Act of 1869, Sec. 4 (16 Stat. 44)

¹⁰³ Frankfurter, *supra* note 99 at 48

¹⁰⁴ *Id.* at 61-62; In this proposal if the bench was unanimous or six out of seven judges concurred their decision would be final. Otherwise, the case would be reheard by another panel of seven judges, and if there was a conflict then the case would be heard again by either the third panel or all the judges sitting en banc. Strong, *supra* note 91 (1881) at 443

¹⁰⁵ Sternberg, *supra* note 94 at 5

¹⁰⁶ Strong, *supra* note 91 (1890) at 574

¹⁰⁷ Judiciary Act of 1891 (26 Stat. 826) The new court of appeals in each circuit was staffed by three circuit and district judges and took appeals from the district and circuit courts (circuit courts were not formally abolished until 1911). Posner, *supra* note 57 at 4-5

¹⁰⁸ Frankfurter, *supra* note 99 at 81

Still the Court continued to have a wide writ of error jurisdiction and so cases began to mount up again.¹⁰⁹ Congress provided additional relief. The 1916 Judiciary Act authorized the Supreme Court to decline to review cases where a state court had refused a federal claim or defense.¹¹⁰ Nine years later, after zealous lobbying by then Chief Justice William Howard Taft, the 1925 Judiciary Act was passed. It marked the culmination of the movement for the Court to gain control over its own docket, making virtually all appeals to the Supreme Court writ of certiorari or based on a certificate by the courts of appeals.¹¹¹ The modern court was born. With practically full control over its docket the Court's workload declined, even as petitions to it increased,¹¹² and by the 2000's it decided on average only about 80 cases a year.¹¹³

B. THE IMPACT OF SIZE AND STRUCTURE

i. Access

The early U.S. Supreme Court with its limited federal jurisdiction was generally accessible if one could afford to appeal. Further, Supreme Court justices regularly rode circuit, sitting on circuit courts across the country. This structural feature of the federal judiciary allowed ordinary Americans to see the justices first hand relatively near their homes, while giving justices an intimate understanding of everyday life around the country. In this circuit court role, the Supreme Court justices could also play a much more active role in ensuring Supreme Court jurisprudence was followed by the subordinate federal courts. As such, circuit riding in some ways shares similarities to the many panels of the Indian Supreme Court. Both are used to perform a democratic school master role; bring the Court closer to everyday citizens' problems increasing its populist image; and actively monitor the judgments of lower courts

¹⁰⁹ By 1909 its docket was 503 cases. Felix Frankfurter, *The Business of the Supreme Court of the United States – A Study in the Federal Judiciary III. From the Circuit Court of Appeals Act to the Judicial Code* 39(3) HARV. L. REV. 325, 343 (1926)

¹¹⁰ Sternberg, *supra* note 94 at 7

¹¹¹ *Id.* at 12

¹¹² Posner, *supra* note 57 at 54-59.

¹¹³ SCOTUSblog Final Stats 7/7/10 available at <http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Stats-OT09-0707101.pdf>

In continuously restricting access to its courtroom¹¹⁴ and eventually eliminating circuit riding, the Court became increasingly removed from ordinary Americans, an outcome often resisted by legislators. In turn, advocates for such restrictions, like William Howard Taft, argued that limiting access to the Court actually helped the less wealthy. Years before becoming either President or Chief Justice, Taft wrote “How many legislative halls have rung with the eloquence of defenders of the oppressed and the poor, in opposing laws which were designed to limit the appeals to the Supreme Court . . . Shall the poor man be denied the opportunity to have his case re-examined in the highest tribunal of the land? Never! And generally the argument has been successful.” Taft retorted, “In truth, there is nothing which is so detrimental to the interests of the poor man as the right which, if given to him, must also be given to the other and wealthier party.” He concluded that, “one appeal is all that any litigant should be entitled to.”¹¹⁵

In justifying the 1925 Act to Congress Taft made clear that he thought “The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.”¹¹⁶ A much more cohesive view of Supreme Court jurisprudence won out over a more accessible vision that imperfectly synthesized the diverse cases in the country.

Taft, who equated the right to property with “civilization” itself,¹¹⁷ also had other reasons for wanting to reduce the Supreme Court's mandatory

¹¹⁴ “Perhaps the decisive factor in the history of the Supreme Court is its progressive contraction of jurisdiction.” Felix Frankfurter, *The Business of the Supreme Court of the United States – A Study in the Federal Judiciary V. From the Judicial Code to the Post-War Judiciary Acts* 39(8) HARV. L. REV. 1046 (1926); Even if the dominant trend was to restrict access, the Court though did gain some additional jurisdiction during its history. For example, by the end of the 19th century federal criminal cases were made appealable to the U.S. Supreme Court. Posner, *supra* note 57 at 48.

¹¹⁵ William Howard Taft, *Delays and Defects in the Enforcement of Law in this Country*, 187(631) THE N. AM. REV. 851, 851 and 855 (1908)

¹¹⁶ Hearings before the Committee on the Judiciary of the House of Representatives on H. R. 10479, 67th Cong., 2d Sess. 2; H. R. Rep. No. 1075, 68th Cong., 2d Sess. 2. (The House Report, recommending the House of Representatives pass the bill, also stated “The problem is whether the time and attention and energy of the court shall be devoted to matters of large public concern, or whether they shall be consumed by matters of less concern, without especial general interest, and only because the litigant wants to have the court of last resort pass upon his right.”) (both quoted in *Dick v. New York Life Ins. Co.* 359 U.S. 437, 452-53 (1959))

¹¹⁷ Peter Fish, *William Howard Taft and Charles Evan Hughes: Conservative Politicians as Judicial Reformers*, THE S. CT. REV. 123, 127 (1975)

docket, most notably a fear of socialism. As Alpheus Thomas Mason wrote describing Taft's motivations in his biography of the Chief Justice, "Judicial reform would remove a major source of popular dissatisfaction, thereby dissipating the Populist drive to abolish property. Bereft of a clogged docket, freed from its obligatory jurisdiction over 'minor' litigation, the Court would be in a stronger position to perform its 'higher function' – constitutional interpretation in general, the defense of property in particular."¹¹⁸ It was a position that seemed all the more desirable during the battles over how the Court should interpret the Constitution in light of the growing number of regulations on the economy during the *Lochner* era.¹¹⁹

In the 1950's Supreme Court justices like Felix Frankfurter and academics like Professor Hart, a leader of the legal process school, would extend this argument to claim the Court needed to further limit its docket to fulfill its role of laying out durable principles of law in a reflective manner.¹²⁰ The Court seemed to take heed, hearing fewer and fewer cases even as an increase in population and rights exponentially grew the size of the workload of district and circuit courts.¹²¹

Restricting access to the Supreme Court though changed how the Court managed its docket. After the judicial reforms of the early 20th century the Supreme Court justices not only stopped hearing most petitions for certiorari, but no longer even directly read many of them.¹²² While in India

¹¹⁸ ALPHEUS THOMAS MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* 64 (1965); See similarly, Fish, *supra* note 117 at 144 (1975).

¹¹⁹ During the *Lochner* era, the Court struck down numerous laws that regulated the economy on the grounds that they violated economic liberty or private contract rights. When the Court declared unconstitutional several pieces of New Deal legislation, President Franklin D. Roosevelt threatened to pass the Judicial Procedures Reform Bill of 1937, which could have expanded the Court to fifteen justices by allowing the President to appoint up to six new justices for every justice over seventy years and six months. For an overview of the showdown between Roosevelt and the Supreme Court, see William E. Leuchtenburg, *FDR's Court Packing Plan: A Second Life, A Second Death* 1985 DUKE L.J. 673 (1985)

¹²⁰ Henry M. Hart Jr., *The Supreme Court, 1958 Term*, 73(1) HARV. L. REV. 84, 99 (1959) ("[T] he Court is . . . charged with . . . developing impersonal and durable principles of constitutional law . . . If what has just been said is accepted, the conclusion emerges inexorably that the number of cases which the Supreme Court tries to decide by full opinion . . . ought to be materially decreased."); Or see, *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 458-59 (1959) (Justice Frankfurter concurring) ("It is . . . imperative that the docket of the Court be kept down so that its volume does not preclude wise adjudication.").

¹²¹ Posner, *supra* note 57 at 98.

¹²² See generally, ARTEMUS WARD AND DAVID WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2007); TODD C.

admission matters are heard by two judge benches, in the United States the justices' law clerks, who typically graduated from law school just one or two years before, have played a critical role in the admission process since the 1940's.¹²³ A pool of clerks sort through the thousands of petitions the Court receives each year, making recommendations to the justices on which cases should be accepted.¹²⁴ A vote of four out of nine justices is required to hear a case. The inclusion of all the judges in the U.S. selection process makes the admission process more stable and internally consistent than in India. Yet, it comes at the cost of delegating some authority to law clerks, creating what some say constitutes a type of "junior court" over certiorari petitions. This argument helped convince the Indian law commission to reject recommending a similar system for India in the late 1950's.¹²⁵

Further to help judges with the cases they do hear, since at least the 1970's clerks have had a prominent role in drafting opinions.¹²⁶ Although the impact of the clerks' role in drafting opinions is debated, the clerks' growing role has increasingly made justices more like bureaucratic managers, than solitary, reflective writers. Commentators like Richard Posner argue this has affected opinions' style, increasing their length and reducing their candor, credibility, and "greatness".¹²⁷

ii. Cohesiveness

The U.S. Supreme Court arguably has a more cohesive jurisprudence than its Indian counterpart. All nine justices vote together on whether to accept certiorari petitions for hearing and then listen to and decide those cases as a unified bench. They also decide relatively few cases and have rules

PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK (2006)

¹²³ Ward and Weiden, *supra* note 122 at 23

¹²⁴ Although not all judges have always participated. *Id.* at 118.

¹²⁵ India Law Commission 1958, *supra* note 45 at 469, (quoting disparagingly U.S. Justice Robert Jackson's claim that "In fact, a suspicion has grown at the Bar that the law clerks already constitute a kind of junior court which decides the fate of certiorari petitions. This idea of the law clerk's influence gave rise to a lawyer's waggish statement that the Senate need no longer bother about confirmation of Justices but ought to confirm the appointment of law clerks.")

¹²⁶ Ward and Weiden *supra* note 122 at 45; Jeffrey Rosenthal and Albert Yoon, *Judicial Ghostwriting: Authorship on the U.S. Supreme Court*, 96 CORNELL LAW REV. 1307 (2011) (showing how variations in judges writing styles may indicate reliance on clerks for drafting.)

¹²⁷ Posner, *supra* note 57 at 150; Ward and Weiden, *supra* note 122 at 231-36 also note commentators have said that law clerk drafted opinions are longer, cite more, and have likely contributed to more concurring and dissenting opinions being written by judges.

of precedent that strongly discourage them from overturning past decisions.¹²⁸ There is more continuity in personnel on the Court itself as well. Of the sixteen U.S. Supreme Court justices who joined the Court after 1950 and have either retired or died before 2011 their average tenure was 21 years (in India the average tenure of the 127 judges who served the Supreme Court between 1985 and 2010 was seven years).¹²⁹

Still, in recent years, plurality decisions have increased, opinions have gotten longer, and the Court has been criticized for giving less clear decisions that are more difficult for the lower courts to interpret.¹³⁰ Further, some have argued that many cases where there is a conflict between the circuits are not being decided by the Court.¹³¹ In other words, the Court is hearing too few cases to keep the overall federal jurisprudence cohesive.¹³²

The American judicial system on the whole also contains a remarkable degree of plurality because of its federal structure. As Frank Upham argues, this polyvocality in the U.S. federal system on its face seems to even undermine formalistic understandings of the rule of law.¹³³ The U.S. has one Supreme Court for federal law, but a highest court in each of the fifty states for state law. Sometimes legal issues that are decided by one set of courts may switch to the other. For example, the constitutionality of sodomy laws was decided on a state by state basis in relation to state constitutions until the U.S. Supreme Court decided the criminalization of consensual sodomy violated the U.S. constitution. Meanwhile, the state constitutionality of bans on gay marriage is still decided by the highest court of each state.

Judicial polyvocality that is derived from a federal structure is not the same as polyvocality within a centralized judiciary that has a paneled Supreme

¹²⁸ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)

¹²⁹ Chandrachud, *supra* note 63 at 72

¹³⁰ Adam Liptak, *Justices are Long on Words and Short on Guidance*, NY TIMES Nov. 18, 2010; For example, plurality opinions are increasing. Pamela C. Corley et al. *Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court*, 31(2) THE JUSTICE SYSTEM JOURNAL (2010)

¹³¹ George and Guthrie, *supra* note 1 at 1449 (citing to data that the Roberts Court “is unable to address even half” of the circuit splits “identified by litigants.”)

¹³² David Stras, *The Supreme Court’s Declining Plenary Docket: A Membership Based Explanation*, 27 CONSTIT. COMMENTARY 151 (2010) (arguing that the decline in the Court’s plenary docket can be explained, at least in part, by a change in personnel to judges who are much less likely to vote to grant plenary review.)

¹³³ Frank Upham, *Myth Making in the Rule of Law Orthodoxy*, DEMOCRACY AND RULE OF LAW PROJECT 17 (2002) (arguing that “federalism guarantees, indeed celebrates, national inconsistencies in legal rules and results” which contradicts the World Bank’s Rule of Law model.)

Court. When Brandeis called the states “laboratories of experimentation” he emphasized “that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹³⁴ This is not true of a Supreme Court panel. It is the Court speaking in a new direction not for just one geographic region, but for the entire country. There is clearly far less room for some types of experimentation. The point is that both systems retain polyvocal elements despite advocates of the rule of law frequently promoting the idea that a legal system should speak with one uniform voice.

iii. Inter-Judge Relations: The Swing Justice

The structure of the Indian Supreme Court empowers the Chief Justice given his ability to pick benches and move cases, as well as entrepreneurial judges and judge clusters since they can use smaller panels to innovate jurisprudence. In the U.S. the Chief Justice assigns who will write the court’s opinion (when they are in the majority) and has considerable administrative powers over the Supreme Court and lower courts.¹³⁵ Yet, especially in recent decades, the power center of the U.S. Court has typically resided with the swing justice, who is decisive to either the liberal or conservative wing of the Court prevailing in close votes.¹³⁶

Until the 1940’s dissents were comparatively rare on the Court and there was a norm towards consensus. In this climate, the Chief Justice exerted substantial power as a mediator. After Harlan Fisk Stone became Chief Justice in 1941 the Court saw many more dissents and concurrences reducing this role of the Chief Justice.¹³⁷ Theories on why dissents increased range from the Court’s docket becoming smaller, and so more contentious, to Chief Justice Stone not attempting to enforce a consensus norm on his colleagues.¹³⁸ Regardless, today the Court is a swing justice dominant court

¹³⁴ *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932)

¹³⁵ For an overview of the Chief Justice’s powers see, Judith Resnik, *Democratic Responses to the Breadth of Power of the Chief Justice*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger Cramton & Paul Carrington eds. 2006)

¹³⁶ To see this swing justice phenomenon tracked from 1995 to 2009 see, SCOTUS blog, *supra* note 113 at 17-18. For definition of swing justice see Janet Blasecki, *Justice Lewis F. Powell: Swing Voter or Staunch Conservative* 52:2 THE J. OF POLITICS 530 (1990).

¹³⁷ Thomas Walker, Lee Epstein, and William Dixon, *On the Mysterious Demise of the Consensual Norms in the United States Supreme Court* 50:2, THE J. OF POLITICS 361 (1988); Stacia Haynie, *Leadership and Consensus on the U.S. Supreme Court*, 54:4 THE J. OF POLITICS 1158 (1992).

¹³⁸ *Id.*; BRADLEY BEST, LAW CLERKS, SUPPORT PERSONNEL, AND THE DECLINE OF CONSENSUAL NORMS ON THE UNITED STATES SUPREME COURT, 1935-1995 (2003) (arguing

with the swing justice being the target of counsels' most pointed arguments and the lobbying efforts of the other justices.

The U.S. Supreme Court may be univocal in that it can give one clear majority opinion on an issue without the fear of an immediate conflicting opinion from another bench. However, in recent years the jurisprudence of the Court seems to fluctuate as its liberal and conservative ends alternatively trade victories depending on which side can claim the swing justice.

in. Image and Politicization

The U.S. appointment process by the President and Senate is the primary reason the Court is perceived as politicized, but the Court's unified bench has arguably exasperated this perception. It is easy for the public and others to see the Court's decisions split again and again on political lines in a way that would be present, but more obscured on a paneled court. As a result, in many ways the public sees the Court as an extension of the political process and one of the major stakes in Presidential elections is who will have the power to appoint the next vacancy on the Court. The idea of splitting up the Court into smaller benches to decide cases unsettles many because it seems to disrupt its political balance.¹³⁹

Because justices are frequently understood to be surrogates for political parties they are not regarded as impartial experts in the same way they are in India. Instead, Supreme Court judges, with their life tenure, are seen by many as a way for Presidents to entrench their preferences about the interpretation of law long after they may have left power.

III. RECASTING ASSUMPTIONS AND PRESCRIPTIVE POWER

The Indian and United States Supreme Courts represent only a sub-set of the different types of court structures there are. Yet, an analysis of just these two courts already begins to develop a clearer language – such as swing justice dominance, judge clusters, or polyvocality – with which to more easily identify the impact of different court structures around the world. The behavior of other supreme courts in South Asia may be seen in a new light

that law clerks and other support personnel mean justices do not interact as frequently with each other and are able to more easily write separate opinions on their own)

¹³⁹ Tracey E. George and Chris Guthrie, *"The Threes": Re-Imagining Supreme Court Decision-Making*, 16(6) VANDERBILT LAW REV. 1825 (2008) (arguing that the use of a panel system by the U.S. Supreme Court would not be "radical" because it would not change the outcomes of most cases, especially politically sensitive ones).

when one understands that like India they too are chief justice dominant.¹⁴⁰ Examples of judicial entrepreneurs in other countries can be freshly examined through the prism of court structure.¹⁴¹ As can its effects on perceived politicization¹⁴² or any number of other court characteristics.

A. UNEQUAL JUDGES AND INSTITUTIONAL "INTEGRITY"

An analysis of court structure can also help us question our assumptions about the ideal role of a court. Take inter-judge relations. All supreme court judges are not equal. The ideal of the judge, and the judicial process, is still often of the solitary thinker, who comes to judicial decisions after isolated reflection on the law.¹⁴³ Yet, the law is almost never created this way by highest courts. It is instead a story of alliances and discussions between judges to create a majority opinion.¹⁴⁴ As we have seen, in both the U.S. and India, certain judges may have more power than others in this process.

¹⁴⁰ For example, the showdown between President Pervez Musharaff and Chief Justice Chaudhary between 2005 and 2008 can be better understood when one notes the Pakistani Supreme Court is also Chief Justice dominant, and so Chaudhry was the lynchpin to controlling it. *Iftikhar Mubammad Chaudhry*, NY TIMES, March 16, 2009. Similarly, in Bangladesh, which has a Chief Justice dominant Supreme Court, judges who issued orders that questioned the validity of the military-backed caretaker government's rule in 2008 were moved to another bench by the Chief Justice. See Nawreen Sattar and Nick Robinson, *When Corruption is an Emergency: The Anti-Corruption Paradox and Bangladesh*, FORDHAM JOURNAL OF INTERNATIONAL LAW (forthcoming 2012).

¹⁴¹ In Nepal, the Supreme Court's decision to make gay marriage an "inherent right", which seems surprising in a developing country that is not necessarily a leader in gay rights, can be better understood when one sees that it was issued by a two-judge bench of the larger fifteen judge body. In this case, it might be best seen as an example of judicial entrepreneur behavior. *Sunil Babu Pant vs. Nepal Gov't*, Writ No. 917 of the year 2064 (BS) (2007 AD).

¹⁴² Scholars like David Robertson note that the House of Lords, which was replaced by the Supreme Court of the United Kingdom in 2009, generally sat in panels, which made it difficult for alliances to emerge, which in turn reduced the public perception of bias. DAVID ROBERTSON, *JUDICIAL DISCRETION IN THE HOUSE OF LORDS* 24 (1998) Law Lords were reportedly selected for panels on the basis of expertise and sometimes the need for a Scott on a case. When setting up the UK Supreme Court having all the judges sit together was considered so as to add transparency. This though would mean they would hear fewer cases and need more administrative staff. Alternatively, in a random selection process judges with the most appropriate expertise might not hear the case. A REPORT OF SIX SEMINARS ABOUT THE UK SUPREME COURT COMPILED BY LE SEUER ANDREW USING CHATHAM HOUSE RULES 24-26 (Nov. 2008)

¹⁴³ Posner, *supra* note 57 at 185 (arguing that today's judges no longer fit the academic lawyer's ideal court of judges like legal academics in leisured and learned deliberation.)

¹⁴⁴ Adrian Vermeule, *The Judiciary Is A They, Not An It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005)

Given that we encounter forms of judge dominance in many courts around the world it is not obvious that we should simply strive for equal relations between judges. For example, in a country with young democratic institutions perhaps having a strong Chief Justice provides a clear leader for a fledgling court.¹⁴⁵ Alternatively, a dominant swing justice may be beneficial if we want the public to more clearly perceive the ideological balance on a court. A court structure that promotes judicial entrepreneurs may create needed experimentation in a legal system like India's trying to adapt Anglo-American legal principles to a new socio-economic context.

In legislatures committee chairmen or party whips have more power than other legislators, even if all legislators have just one vote. This unequal distribution of power is often perceived to benefit the democratic process. A similar unequal distribution of power amongst judges could have analogous advantages, helping provide clearer leadership to today's sprawling bureaucratic judicial systems or allowing for greater specialization.

Similarly, just as it is unclear whether we should strive for absolute equality amongst judges it is not obvious how much cohesiveness we should aim for in a court's doctrine. The polyvocal nature of the Indian Supreme Court that arises out of its panel structure indicates finality and coherence may be overvalued, and a degree of limited plurality may have undervalued benefits. These may include experimentation, encouraging disputing parties to keep returning to the judicial system for redress, and an ability to allow for more situational justice. Or to counter Ronald Dworkin in his own language, perhaps a judicial system can have too much "integrity" and there are reasons to desire a less philosophically coherent or consistent jurisprudence.¹⁴⁶ Drawing on a much larger array of litigants for cases may increase problems in coordinating precedent, but also might increase legitimacy and shape a different understanding of the law—An interpretations that focuses less on laying down clear rules for lower courts, and instead attempts to remedy tangible problems in the here and now.¹⁴⁷

¹⁴⁵ Of course, a strong Chief Justice might also make it easy for the Court to be captured if those outside the Court were able to control the Chief Justice. Alternatively, the Chief Justice could become too controlling of the court itself. For example, Sajjad Ali Shah of the Pakistan Supreme Court was accused of becoming so autocratic that the Court eventually tried him. OSAMA SIDDIQUE, *THE JURISPRUDENCE OF DISSOLUTIONS* 107 (2008)

¹⁴⁶ RONALD DWORKIN, *LAW'S EMPIRE* (1986)

¹⁴⁷ This may even echo older Hindu traditions that valued situational justice, and actively deemphasized pursuing an ideal of a coherent body of principled rules. WERNER MENSKI, *HINDU LAW: BEYOND TRADITION AND MODERNITY* 547-569 (2009) (discussing Hindu law's continuance in contemporary Indian law, including the tradition of situational justice as represented by public interest litigation). Alternatively, *see* AMARTYA SEN, *THE*

More broadly, the presence of competing visions for a supreme court should make us wary of claims about an ideal structure applicable to all countries. The U.S. and Indian experiences indicate court structures are not converging, but rather adapting to separate contexts in which different challenges are faced and values emphasized.¹⁴⁸

B. REFORMING COURTS: PRESCRIPTIVE CLAIMS

Court reformers need to be sensitive to how their proposed interventions will interact with these different contexts. In the United States Tracey E. George and Chris Guthrie have recently proposed increasing the size of the Supreme Court and having it sit in panels (at least for some cases), as has Jonathan Turley.¹⁴⁹ George and Guthrie argue doing so will allow it to decide more cases, increasing clarity and consistency in a federal jurisprudence that they claim has suffered at the hands of a Supreme Court that too rarely hears cases. They also argue a larger workload is necessary so as to create enough judicial interpretation to provide an adequate check on the power of the legislative and executive branches.¹⁵⁰ Meanwhile, Turley primarily focuses on how a reform of the U.S. Supreme Court's structure would reduce the power of the swing justice and the Court's perceived politicization.¹⁵¹

A comparative analysis helps support some of these prescriptive claims. As the Indian example demonstrates, a larger, paneled court likely could help reduce the image of politicization, although it certainly would not eliminate it. Further, a larger court would have more opportunities to harmonize circuit court splits and provide a steadying hand on the overall judiciary's jurisprudence, including being a more robust check on the other branches.

IDEA OF JUSTICE 20 (2009) (arguing that the Hindu tradition has long seen a tradeoff between Niti and Nyaya (or behavioral/procedural correctness vs. realized justice))

¹⁴⁸ This divergence in the U.S. and Indian Supreme Courts indirectly questions Mark Tushnet's claim that there is an inevitable convergence in constitutional law around the world. Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49(4) VIRGINIA J. OF INT'L LAW 985 (2009)

¹⁴⁹ George and Guthrie, *supra* note 1 at 1438; Jonathan Turley, *Unpacking the Court: The Case for the Expansion of the United States Supreme Court in the Twenty-First Century*, 33(3) PERSPECTIVES ON POLITICAL SCIENCE 155 (2004); There have been several other proposals in recent years to change the structure of the Court. For example, Philip Oliver proposed having each President be able to appoint two new Supreme Court judges thus meaning that the Court would fluctuate in size. Philip Oliver, *Increasing the Size of the Court as a Partial But Clearly Constitutional Alternative*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger Cramton & Paul Carrington eds. 2006)

¹⁵⁰ George and Guthrie, *supra* note 1

¹⁵¹ Turley, *supra* note 149

That said, the Indian experience indicates that these proposals are likely underestimating consistency and clarity challenges amongst Supreme Court benches and how a larger docket would encourage appeal, perhaps inadvertently lengthening litigation.¹⁵² More importantly, these proposals do not seem to adequately account for how the structure of the Court relates to the larger character of the institution.¹⁵³ For example, they do not address how greater access might foster a more populist public perception of the court or affect its broader jurisprudence, and the merit of these potential changes. Neither do they address how panels might create a space for new tools for justices—like public interest litigation in India—or a new politics between them.

In India, reformers have often called for a dedicated constitutional bench since the Court mostly sits in smaller benches that cannot decide substantial questions of constitutional law.¹⁵⁴ The U.S. experience indicates a dedicated constitutional bench would likely produce more constitutional jurisprudence with greater overall cohesiveness and forward looking rules.¹⁵⁵ Yet, proponents have rarely questioned how such a reform may make the new constitutional bench appear more political and require the addition of more clerks or staff. Nor have they generally asked how it might change the larger nature of the Court, potentially weakening the prestige of the smaller benches or the ability of the overall Court to innovate.

CONCLUSION

There is no “neutral” court structure. A thirty-one judge paneled court is no more or no less valid for a supreme court than a nine judge unified bench. Both interpret law, and yet, as this article has argued, they were shaped to promote different values, such as access or cohesiveness, and will almost invariably interpret law differently. The impact of these varied structures is seen not just in individual cases, but the court’s overall character as an institution. If you are a lawyer or a litigant, the structure of the court will change how you approach it. If you are a member of the public, it will

¹⁵² George and Guthrie do mention briefly at the end of their argument that their proposal might increase appeals. George and Guthrie, *supra* note 1

¹⁵³ As Richard Posner has written the “Judicial decision-making is collective in a profound sense. The importance of institutional values in such a setting should therefore be, but apparently is not, self-evident.” Posner, *supra* note 57 at 382

¹⁵⁴ Nick Robinson et al., *Interpreting the Constitution: Supreme Court Constitution Benches Since Independence*, XLVI(9) EC. & POL. WEEKLY 27 (2011)

¹⁵⁵ Posner, *supra* note 57 at 178.

change how you perceive it. If you are a judge, it will change how you adjudicate in it. If the United States had a paneled fifteen judge Supreme Court it would resolve a judicial issue in one manner, but because it has a nine judge unified bench it resolves it another way.

The impact of court structure is always present in law. The decision-making process – including its appeals to reason, as well as its explicit or implicit invocation of political values – is channeled through it. The law is not only embedded with considerations of politics, identity, and class,¹⁵⁶ but also court structure. If the interpretation of law by courts is best thought of as restructured politics, with its own processes, language, and criteria for validity, then court structure is a very tangible part of that restructuring.¹⁵⁷ Whether it is the number of judges or whether they sit in panels or a unified bench, these features of institutional design permeate and shape the course of the law. Structure matters.

¹⁵⁶ These insights have been advanced from groups as diverse as the critical legal studies theorists to the new legal realists. See Karl Klare, *Critical Legal Politics: Levf vs. MPM: The Politics of Duncan Kennedy's Critique*, 22 CARDOZO L. REV. 1073, 1081 (2001) or DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIECLE* 19 (1997) for an overview of critical legal studies. For a description of the new legal realists see Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008) or Victoria Nourse and Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?* 95, CORNELL L. REV. 61 (2008)

¹⁵⁷ This vision follows calls such as Edward Rubin's to engage in a "microanalysis of social institutions", comparing how law's different institutions effect how political disputes are resolved. Edward Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109(6) HARVARD L. REV. 1396, 1403 (1996)