

# IT'S NOT HEADS OR TAILS: SHOULD SCOTUS HAVE AN EVEN OR ODD NUMBER OF JUSTICES?

MICHAEL MILLER\* & SAMUEL A. THUMMA\*\*

## I. INTRODUCTION

There is increasing interest, both in academic circles and in the public discourse, about measures to fix the United States Supreme Court.<sup>1</sup> Political commentators and scholars alike perceive many problems with the Court, typically based on disagreement with its decisions, which

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\* Retired Arizona appellate judge and psychologist in Tucson, Arizona who continues to study and to teach. J.D. 1984 University of Arizona College of Law; Ph.D. 1980 University of Michigan.

\*\* Judge, Arizona Court of Appeals, Division One, Phoenix, Arizona. M.J.S. 2020 Duke University School of Law; J.D. 1988 University of Iowa College of Law; B.S. 1984 Iowa State University. The authors wish to express their sincere thanks to Professor Barbara A. Atwood, Professor Edward A. Hartnett, and Retired Arizona Chief Justice W. Scott Bales for their comments and suggestions on a prior version of the Article. The analysis and conclusions herein are ours alone, and their kindness in reviewing our work should not be regarded as a reflection of their views. The substance of, and errors in, this Article are solely those of the authors.

<sup>1</sup> “Fix” is an admittedly colloquial term but captures both perceptions of social value and the need for moderate repair. The term is popular in non-technical discussions about SCOTUS. *See e.g.*, Sahil Kapur, *How to Fix the Supreme Court: Lessons from a Disenchanted Legal Scholar*, TALKING POINTS MEMO (OCT. 13, 2014), <https://talkingpointsmemo.com/dc/erwin-chemerinsky-how-to-fix-the-supreme-court> [<https://perma.cc/7EL8-62UL>] (containing an interview with Erwin Chemerinsky in which he says, “I don’t believe we should eliminate the Supreme Court. I believe that the Supreme Court is essential to enforce the Constitution.”). Another noteworthy example of the term in use is by Fix the Court, a nonpartisan 501(c)(3) organization that advocates non-ideological changes to make SCOTUS “more open and more accountable to the American people.” *See About Us*, FIX THE COURT, <https://fixthecourt.com/about-us> [<https://perma.cc/NJD8-Q3MG>] (last visited Dec. 5, 2021). Scholarly discussions of SCOTUS are frequent and occasionally express more dramatic concerns. *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L. J. 148 (2019), ideas from which were used by 2020 presidential candidate Pete Buttigieg. Neil Schoenherr, *WashU Expert: How to Save the Supreme Court*, THE SOURCE (July 31, 2019), <https://source.wustl.edu/2019/07/washu-expert-how-to-save-the-supreme-court> [<https://perma.cc/2XYJ-2M82>]. Whether SCOTUS proposals are far-ranging or incremental, we suggest the proponents should consider the analysis presented here.

Months after we began writing this article, President Joseph Biden created a thirty-six-member Presidential Commission on the Supreme Court of the United States for the purpose of producing a report about current and past reform debates, closing with an “analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals.” Executive Order on the Establishment of the Presidential Commission on the Supreme Court of the United States, 86 Fed. Reg. 19569 (Apr. 9, 2021). In December 2021, the Commission submitted its Report to the President. *See generally* Presidential Comm’n on the Sup. Ct. of the U.S., Final Report (2021) [hereinafter Final Report] <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/982J-JBBJ>]. The substance of this article was finalized long before that Report issued, meaning the focus here is not on that Report. The Report does, however, mention the even-odd issue, albeit briefly in the context of 1869 legislation establishing a nine justice SCOTUS, *see infra* note 20, and in noting that other countries “have not necessarily maintained an odd number of seats on their high bench.” *Id.* at 69, 79 (footnote omitted) (citing examples). In discussing the 1869 legislation, the Report adds that some experts viewed those changes as being “‘motivated by practical and mundane performance goals,’ including returning the Court to a workable (and odd) number of Justices.” *Id.* at 69 (footnote omitted) (citations omitted).

are usually attributed to partisan politics affecting the selection of justices and concomitant politicization of judicial decision-making. The proposed fixes vary in complexity, impact, and practicality, from constitutional amendment to legislation to court rule changes. These proposals often address the size of the Court, the nomination process, judicial review, or the tenure of justices. Few proposals, however, address a particular question that has been present throughout the history of the Court: Should there be an odd number of justices, or an even number? For many, this question (what we call “The Question”) is nonsensical given a belief that the only possible answer is an odd number of justices. Some may point to the occasional even number on the Court—because of death or retirement—as leading to paralysis, anarchy, and a condition to be remedied, quickly, before the Court can operate as it was designed to. The rare commentator suggests an even number, but without detailed analysis. We submit that The Question probes fundamental and sometimes unexplored beliefs about the purpose and function of the United States Supreme Court and therefore merits detailed analysis and consideration.

Because The Question is deceptively simple, and the possible answers limited to two, this Article explores the ramifications of both answers.<sup>2</sup> We posit that The Question should be separately and independently addressed for any proposed change to the United States Supreme Court. When discussing changes to the structure of the Supreme Court, it should not be unthinkingly assumed that the Court should have an odd number of justices. Although the Court

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<sup>2</sup> Although this Article is oriented toward a legal audience or those interested in the Supreme Court as an institution, we rely more on interdisciplinary sources compared to decisional authority. The reasons are that most of the issues posed in this Article are outside the authority of the Court itself and that the factors we discuss are not part of the traditional legal analysis in its decisions. Additionally, the views we express should not be attributed to our respective institutions, nor should the reader assume they affected how we made judicial decisions. As we later explain, the Supreme Court and other apex courts confront constitutional issues with different objectives and tools from those available to trial and error-correcting courts.

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has had an odd number of justices for most of its history, and an odd-numbered Court can promote efficiency, any decisions to change to the Court should more carefully consider the impact—and potential benefits—of an even-numbered Court. In doing so, we do not recommend an even number as much as suggest that any effort for change must consider an even-numbered Court. And although our analysis targets the United States Supreme Court, it applies to apex<sup>3</sup> courts in any jurisdiction. In illustrating contrast, however, the relevant factors are quite different for, and would not apply to, trial nor error-correcting or intermediate appellate courts.

A. “THE QUESTION” PLACED IN CONTEXT WITH CURRENT CONTROVERSIES

Before examining how a specific answer to The Question defines preferences for how the United States Supreme Court should function, it is necessary to describe three critical debates about what the Court does. These debates often prompt and frame proposals to change the Court.

The first debate is whether the Court determines or creates constitutional law. The debate is a proxy that broadly describes two opposing interpretative theories. Conservative theorists promote an analytical method based on original meaning and textual analysis. In contrast, liberal or progressive theorists stress that the little-changed text of the Constitution that was created to guide rather than direct. Although the debate turns on non-political concepts, adherents to its respective positions are often identified with either the Republican or Democratic parties, respectively.<sup>4</sup>

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<sup>3</sup> “Apex” is used here to refer to a court of last resort in a specific jurisdiction, such as the United States Supreme Court or a state supreme court. In most jurisdictions, there is an intermediate appellate court for appeals of right from trial courts and administrative agencies. A typical distinctive characteristic of an apex court is its great discretion to decide which cases it will review.

<sup>4</sup> See Dawn E. Johnsen, *Lessons from the Right: Progressive Constitutionalism for the Twenty-first Century*, 1 HARV. L. & POL’Y REV. 239, 239 (2007), for the progressive perspective. Attorney General Edwin Meese is credited with starting the larger debate about the conservative perspective of constitutional interpretation in a series of talks.

The second debate arises from the categorization of constitutional<sup>5</sup> decisions as a partisan victory by one (or the other) of the political parties.<sup>6</sup> Because it is increasingly possible to pigeon-hole Supreme Court justices based on their<sup>7</sup> interpretative theories and outcomes that correlate closely with political party identification, Court watchers focus on whether a particular configuration of justices favors one party over another. Stated more coarsely, does the Court—by majority decision of its justices acting consistently with their interpretive theory (and, often, political affiliation)—advance political and policy goals? The answer serves as a foundation to attack or bolster positions about court structure, and legal doctrines such as standard of review, separation of powers, and the rule of law and the legitimacy of the court.

The subject of the third debate is an amalgamation and consequence of the first and second debates: the process and criteria for vetting, nominating, scrutinizing, and confirming justices.

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His address at Tulane University is an early, important speech. *See generally* Edwin Meese II., *Law of the Constitution*, 61 TUL. L. REV. 979 (1986–1987). It was preceded by influential articles by well-known jurists questioning the validity of progressive constitutionalism. *See, e.g.*, William H. Rehnquist, *Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693–97 (1976); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 (1971).

<sup>5</sup> Statutory construction is different from constitutional interpretation, and the former is not addressed in the Constitution. *See* John C. Yoo, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607, 1608 (1992). The distinction between cases involving statutory construction and those involving constitutional interpretation is important in understanding the types of cases on which the Court is more likely to be closely divided. *See infra* Section II.G.

<sup>6</sup> Many SCOTUS cases, especially election cases, provoke commentary that a particular decision is a victory for one of the political parties. *See e.g.*, David G. Savage, *Analysis: How the Supreme Court has tilted election law to favor the Republican Party*, L.A. TIMES (June 4, 2021), <https://www.latimes.com/politics/story/2021-06-04/how-supreme-court-tilted-election-law-favor-gop>.

<sup>7</sup> *See, e.g.*, Amy Coney Barrett's Senate Confirmation Hearing Day 2 Transcript, REV (Oct. 13, 2020) <https://www.rev.com/blog/transcripts/amy-coney-barrett-senate-confirmation-hearing-day-2-transcript> [<https://perma.cc/A45L-YNTL>].

Chairman Lindsey Graham: (06:45) You said you're an originalist. Is that true? Amy Coney Barrett: (06:47) Yes. Chairman Lindsey Graham: (06:48) What does that mean, in English? . . . Amy Coney Barrett: (07:00) In English. Okay. So in English that means that I interpret the Constitution as a law, that I interpret its text as text, and I understand it to have the meaning that it had at the time people ratified it. So that meaning doesn't change over time and it's not up to me to update it or infuse my own policy views into it.

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Advocates and partisans engage in all manner of activities to favor candidates with the strongest adherence to their constitutional theory (and, typically, political party views), while also working to discredit their opponents.<sup>8</sup> Strictly speaking, this third debate involves the political process<sup>9</sup> rather than the Court's function. Because the results so clearly affect perceptions of the Court, it is an inexorable part of both.

Broadly speaking, these three debates capture much of modern news reporting about the Court's functioning.<sup>10</sup> Some topics, such as the role of politics in Court decisions, are as old as the Court itself. Furthermore, as is the case today, politics has been an important consideration in proposed changes to the Court's structure for more than two hundred years. For instance, Congress changed the Court's structure multiple times in the first century of its operation to obtain or thwart political goals.<sup>11</sup>

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<sup>8</sup> There are organizations on both sides of the political spectrum whose perceived goal is to identify law students and young lawyers with shared views regarding constitutional law with the eventual goal of influencing litigation and judicial nominations. See Emma Green, *How Democrats Lost the Courts*, THE ATLANTIC (July 8, 2021), <https://www.theatlantic.com/politics/archive/2021/07/liberal-judges-supreme-court-breyer/619333> [<https://perma.cc/2NFD-EA3L>]. Advocates for particular candidates may use membership in these organizations as an indicia of a candidate's judicial philosophy.

<sup>9</sup> The president, with the "Advice and Consent" of the Senate, appoints justices to the Court. U.S. CONST. art. II, § 2. This is a democratic, but not strictly majoritarian, process. Because the president is elected through the Electoral College, and two senators are elected from each state, the nomination and confirmation of the justices can easily be done by a president and senate majority who were not elected by a majority of the population.

<sup>10</sup> News reporting is important because it serves as a marker reflecting perceptions about SCOTUS among the public and in other branches of government. It is particularly important because, unlike the executive and legislative branches, the public has limited access to the justices. Moreover, the Court's reliance on the other branches of government for fundamental support, such as budget and enforcement of their decisions, is an additional constraint and complicating factor in assessing perceptions about the Court. Gibson and Caldeira have explored how public support for SCOTUS, as an institution and as it pertains to policy-affecting decisions, are attuned to news coverage and commentary by opinion leaders. See, e.g., Gregory A. Caldeira and James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 659-660 (1992) (public support for SCOTUS, mediated by the public opinions of leaders, changes over time); Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1223-1224 (1986) (individual citizens show relatively little knowledge about SCOTUS, but in the aggregate their views of the Court are affected by larger political events). We later discuss the Question as it impacts public perceptions and political leaders.

<sup>11</sup> The first attempt occurred as part of the Judiciary Act of 1801 when the Federalists attempted to deny incoming Republican President Thomas Jefferson the opportunity to nominate a justice to the Supreme Court until there were two vacancies. John Copeland Nagle, *The Lame Ducks of Marbury*, 20 CONST. COMMENT. 317, 324-25 (2003-04).

Modern popular recognition of the importance of the judiciary traces back to the principle of judicial review of legislative and executive action and, more generally, to the authority of the Court to declare what is and is not constitutional through its written decisions.<sup>12</sup> That review is one of a few unchanging principles in the last 200 years.<sup>13</sup> Equally important, written amendments to the Constitution, at least after the Bill of Rights, have been a “sidelight . . . [because most] of the great revolutions in American constitutionalism have taken place without any authorizing or triggering constitutional amendment.”<sup>14</sup> Theories of constitutional interpretation<sup>15</sup> underlying many of these changes did not become a frequent public topic until relatively recently.<sup>16</sup> Whether popular attention to constitutional interpretation may be attributed to the difficulty of securing a written amendment or some other reason is beyond the scope of this Article. For our purposes, the importance rests in public acknowledgment that the decisions of the Supreme Court of the United States (“SCOTUS”) are the predominant way to establish and clarify—and even modify and reverse—constitutional law.

This extremely broad overview hides many important topics and details on which debates, articles, books, and entire careers have been built. The tripartite division of these debates is made

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<sup>12</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“[I]t is emphatically the province and duty of the judicial department to say what the law is.”).

<sup>13</sup> *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) (“[I]t is necessary only to recall some basic constitutional propositions” to reject the assertion of “no duty” by “state officials to obey federal court orders resting on this Court’s considered interpretation of the United States Constitution.”) *Cooper* is not without its critics and is only cited for its full-throated affirmation of *Marbury v. Madison*. See, e.g., Christopher W. Schmidt, *Cooper v. Aaron and Judicial Supremacy*, 41 U. ARK. LITTLE ROCK L. REV. 255, 274–75 (2019).

<sup>14</sup> David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884 (1996).

<sup>15</sup> Harvard law professor—and later SCOTUS justice—Felix Frankfurter opined that Justice Oliver Wendell Holmes offered a “coherent body of constitutional law,” in part responding to his property law colleague, John Chipman Gray, who despaired that “constitutional law was not law at all, but politics.” Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683, 683–84 (1916).

<sup>16</sup> J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY* 3 (2012) (“Constitutional theory has been with us in some form since the Federalist Papers, but its explosion is a relatively recent phenomenon.”)

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only to highlight how The Question is implicit within many substantive issues without being a primary component of any of them. We will use the corraling to show how the answer makes a substantive difference and is not preordained by the terms of a particular debate. We also draw upon some of the more recent contributions to these debates to illustrate the importance of The Question. Omission of a particular topic, whether intentional or by oversight, should not imply judgment about its importance in constitutional debates.

## B. A BRIEF HISTORICAL AND CONCEPTUAL OVERVIEW OF THE QUESTION

Although the Constitution established the Supreme Court in 1789, the modern Supreme Court has existed for less than a hundred years. Before 1925, Congress had put in place statutes that exercised much more control over the types of cases the Court was required to decide. This affected the Court's workload and ability to set the agenda of constitutional issues.<sup>17</sup> All that changed, however, with the Judges' Bill of 1925, which stated that, with few exceptions, cases would reach the Supreme Court by the discretionary grant of a writ of certiorari, not by mandatory appeal, thereby limiting the Court's caseload.<sup>18</sup> In addition, both before and after passage of the Judges' Bill, Congress controlled the number of justices.<sup>19</sup>

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<sup>17</sup> As then-professor Felix Frankfurter and his student James M. Landis stated, legislative changes in early 1925 "mark[ed] a new chapter in the history of the federal judiciary." Felix Frankfurter & James M. Landis, *The Business of the Supreme Court of the United States – A Study in the Federal Judicial System*, 38 HARV. L. REV. 1005, 1005 (1925). For a detailed examination of how the Judges' Bill of 1925 was passed and its practical effects, see Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1718 (2000) ("Judges' Bill gave the Supreme Court an important tool with which to exercise will: The ability to set one's own agenda is at the heart of exercising will."). We return to this concept as it affects judicial decision-making and possible constitutional challenges to structural changes to the Court.

<sup>18</sup> FED. JUD. CTR., *Judge's Bill*, <https://www.fjc.gov/history/timeline/judges-bill> [<https://perma.cc/4BM7-DEKH>].

<sup>19</sup> "The Constitution places the power to determine the number of Justices in the hands of Congress." SUP. CT. OF THE U.S., *FAQs - General Information*, [https://www.supremecourt.gov/about/faq\\_general.aspx](https://www.supremecourt.gov/about/faq_general.aspx) [<https://perma.cc/V65L-YH7B>]. See also Judiciary Act of 1789, ch. 20, 1 Stat 73; Judiciary Act of 1869, ch. 22, § 1, 16 Stat. 44.

SCOTUS has had an odd number of justices since 1869; currently nine justices sit on the court.<sup>20</sup> That number, however, and the fact that it is odd and not even, is neither mandated by the Constitution nor required for the Court to function. Congress sets the number of justices on the Court for a variety of reasons; sometimes its decision is based on perceptions of the Court's workload but more often it reflects an attempt by Congress to thwart or support Presidential efforts to bend decisions toward certain policy goals.<sup>21</sup> Initially, the number of justices was tied to the number of federal judicial circuits because the justices had duties in each circuit.<sup>22</sup> For this reason, there were six justices during the early years of the Court.<sup>23</sup> Those years saw momentous decisions, such as *Chisholm v. Georgia*,<sup>24</sup> *Case of Hayburn*,<sup>25</sup> and *Marbury v. Madison*.<sup>26</sup> After a long period of an odd number of justices starting in the early 1800s, the number increased to ten in 1863 when

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<sup>20</sup> Act of April 10, 1869, ch. 22, 16 Stat. 44; accord 28 U.S.C. § 1 (“The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.”); Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—And Disservice—1789–1992*, 142 U. PA. L. Rev. 333, 341–42, n.32 (1993) (starting in 1789, “[o]ver the next seventy years the number of Supreme Court Justices grew to nine, where, with the exception of five years in the 1860s, it has remained ever since . . . Congress increased the size of the Supreme Court for the first time in 1807 with the addition of an Associate Justice, creating a seven-person court. In 1837, the number of Justices was increased from seven to nine. In 1863, Congress brought the number of Justices to 10. The death of [Justice] Catron in 1865 reduced the number of justices to nine; Congress then passed the Act of July 23, 1866, . . . , denying the President any further appointments to the court until after the next vacancy, which occurred when Justice Wayne died in July of 1867. The court was finally set at its current size by the Act of April 10, 1869.”) (citations omitted).

<sup>21</sup> John V. Orth, *How Many Judges Does It Take to Make a Supreme Court?*, 19 CONST. COMMENT. 681, 685–86 (2002).

<sup>22</sup> *Id.* at 683.

<sup>23</sup> Institutional history of the Court is available on its website. *About the Court*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/institution.aspx> [<https://perma.cc/4336-N5MQ>] (last visited Apr. 13, 2021) (noting that the United States Supreme Court was “initially composed of a Chief Justice and five Associate Justices”).

<sup>24</sup> *Chisholm v. Georgia*, 2 U.S. 419 (1793) (holding the federal judiciary had jurisdiction over lawsuits against states). One Justice started his opinion in *Chisholm* by stating “[t]his is a case of uncommon magnitude.” *Id.* at 453 (Wilson, J.). As later observed by the Court, *Chisholm* “‘created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted.’” *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 97 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 325 (1934)).

<sup>25</sup> *Case of Hayburn*, 2 U.S. 408, 410 (1792) (although denying the substantive relief requested, noting in response to an inquiry by an advocate, “THE COURT considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary.”).

<sup>26</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).



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California became a state which resulted in the creation of another circuit. Continuously since enacting the Judiciary Act of 1869, Congress has authorized nine seats on the Court. We have found no evidence suggesting that, in considering the various changes to the Court over the past two plus centuries, Congress debated whether an odd or even number of justices was more conducive to the operation of the Court. Although Thomas Jefferson railed against the possibility of a “majority of one”—which might be viewed as a criticism of an odd number of justices resulting in cases decided by a single vote—the comment arose in the context of general complaints about Federalist judges, especially any he considered too lazy or timid to assert their individual positions.<sup>27</sup>

Notwithstanding this absence of debate in the legislative or executive branches, scholars, lawyers, and parties do not dispute the authority or validity of Court decisions when the number of justices is even. This is true even when the decision of an even-numbered Court is a tie vote (which leaves the lower court decision as the law of the case). Nonetheless, the lack of proposals for an even number of justices removed the incentive to develop arguments in favor of an odd number. The likely positions of those favoring an odd-number of justices would appear straightforward.

The first and most obvious is the expectation that parties come to the Court for a decision declaring one of the contestants the winner. Despite many procedural barriers to even getting the Court to hear a particular case,<sup>28</sup> the assumption is that, once the Court agrees to consider a case

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<sup>27</sup> Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), in FOUNDERS ONLINE (NAT’L ARCHIVES), <https://founders.archives.gov/documents/Jefferson/98-01-02-1702> [<https://perma.cc/AW4M-HZPP>]; see also Donald Morgan, *The Origin of Supreme Court Dissent*, 10 WM. & MARY QUAR. 353, 355–56 (1953).

<sup>28</sup> The acceptance rate can be less than 1%. See, e.g., David Thompson & Melanie Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures*, 16 GEO. MASON U. L. REV. 237, 241 (2009).

on the merits, the Court will make some kind of ruling that resolves the case. The expectation is visceral. Having an equally divided court resolve a case does provide a ruling, although the precise nature of it depends on the decision the Court is asked to review.<sup>29</sup> A decision by an evenly divided court is akin to a tie at an apex (i.e., playoff) sporting event: unsatisfying (and mostly forbidden). But Court decisions are not sporting events. And Court scholars and practitioners regard this expectation as unrealistic and naïve because the Court no longer exists to adjudicate specific constitutional cases as an error-correcting court. Rather, it announces constitutional law after first deciding the cases it chooses to hear.

At a conceptual level, however, the expectation that the Court will direct constitutional law is important for various reasons, mainly the Court's case or controversy requirement.<sup>30</sup> Constitutional law is delineated only within the context of individual cases. New constitutional

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<sup>29</sup> A tie vote in the United States Supreme Court results in affirmation of the lower court decision. *See, e.g.*, *Washington v. U.S.*, 138 S. Ct. 1832, 1833 (2018) (per curiam) (“The judgment is affirmed by an equally divided Court.”); *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam) (“The judgment is affirmed by an equally divided Court.”); *Friedrichs v. Cal. Tchrs. Ass’n*, 578 U.S. 1, 1 (2016) (per curiam) (“The judgment is affirmed by an equally divided Court.”); *cf.* 28 U.S.C. § 2109 (“Quorum of Supreme Court justices absent”) (providing, in part, that for a case “brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.”); Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 652 (2002) (“[T]he rule of affirmance by an equally divided Court . . . is not some idiosyncratic practice of the Supreme Court of the United States, but an application of a broader principle that applies generally in multimember bodies governed by majority rule: the body cannot take any affirmative action based on a tie.”).

<sup>30</sup> U.S. CONST., art. III, § 2.

[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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principles generally arise from recent cases in which some issues were left unresolved<sup>31</sup> or areas in which federal circuit courts or state courts confront new applications of constitutional law but reach conflicting results.<sup>32</sup> In these kinds of cases, there is likely to be a large contingent of practitioners, justices, and judges who believe that clarity in the law would be helpful in their job. Despite popular opinion<sup>33</sup> that lawyers and judges advocate a particular constitutional principle, our experience is that, typically, both groups want clear direction to guide them in advising clients and to rule on contested facts. As they might say, “I don’t care what the law is so long as the answer to the question before me is clear.”

When an area of constitutional law is unsettled, either because it is a novel issue or because precedent no longer appears authoritative, participants and interested observers reasonably assume

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<sup>31</sup> This is not necessarily a passive process. See Vanessa A. Baird, *ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA* (2007); Tonja Jacobi, *The Judicial Signaling Game: How Judges Shape Their Dockets*, 16 SUP. CT. ECON. REV. 1, 2 (2008) (discussing the idea that “judges signal the outcome of future cases in order to actively shape their dockets”). See also Vanessa Baird & Tonja Jacobi, *How The Dissent Becomes The Majority: Using Federalism To Transform Coalitions In the U.S. Supreme Court*, 59 DUKE L.J. 183, 186 (2009) (“[S]ome dissents may be explained as signals from judges to litigants about how to frame future similar cases to increase the chance of success for the argument the dissenting judge supports”). Signaling can also occur during oral argument. See examples by University of California Davis law professor and former Supreme Court clerk Aaron Tang, *Op-Ed: The new Supreme Court is sending surprisingly centrist signals*, L.A. TIMES (Nov. 25, 2020), <https://www.latimes.com/opinion/story/2020-11-25/supreme-court-amy-coney-barrett-conservative-supermajority-affordable-care-act-lgbtq> [] (last visited Apr. 14, 2021).

<sup>32</sup> See, e.g., *Byrd v. U.S.*, 138 S.Ct. 1518, 1526 (2018) (“This Court granted Byrd’s petition for a writ of certiorari, to address the conflict among the Courts of Appeals over whether an unauthorized driver has a reasonable expectation of privacy in a rental car.”) (citations omitted); *Hartman v. Moore*, 547 U.S. 250, 255 (2006) (“The Courts of Appeals have divided on the issue of requiring evidence of a lack of probable cause in 42 U.S.C. § 1983 and *Bivens* retaliatory-prosecution suits. Some Circuits burden plaintiffs with the obligation to show its absence. Others, including the District of Columbia Circuit, impose no such requirement. We granted certiorari, to resolve the Circuit split and now reverse.”) (citations omitted).

<sup>33</sup> Popular opinion about judicial decision-making shows a nuanced understanding of the legal principles that judges should apply and a realistic assumption that judges’ ideology influences their decisions, sometimes within acceptable parameters and sometimes outside of those boundaries. See James L. Gibson and Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC’Y REV. 195, 206–09 (2011) (“[T]he American people seem to accept that judicial decision-making can be discretionary and grounded in ideologies, but also principled and sincere.”); John M. Scheb, II & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors that Influence Supreme Court Decisions*, 23 POL. BEHAV. 181, 186 (2001) (“[The] public believes that the intentions of the framers are accorded much less influence than they should have, while considerations of ideology and partisanship have much greater influence on the Court than they ought to.”).

that the Court will provide clarity.<sup>34</sup> Interested observers include the other branches of federal government, state officials, and affected stakeholders. Even if it reaches a 5-4 decision, an odd-numbered Court avoids several problems that an evenly divided, deadlocked decision might engender.

First, repeated trips to SCOTUS, by attorneys and parties facing the same issue, in multiple cases is inefficient to the extent that it does not resolve unsettled law and fails to provide guidance to those tasked with applying the Constitution. Whether the Court is evenly divided because the justices are split into equally balanced positions or some justices cannot yet agree with the proposed direction of their colleagues, the time period during which the law is unsettled could be lengthy. The longer it takes to resolve an unsettled issue, the greater the chance (and greater the number) of inconsistent applications of constitutional law in various jurisdictions. This inconsistent application occurs not only in the federal court system but also in the state courts and agency decisions.

Second, as a matter of public perception, deadlocked decisions can be perceived as making the Court appear weak or unfocused. To avoid public disclosure of a badly or equally divided Court, it could hear only those cases in which deadlock is unlikely. Of course, many Court observers will notice obvious gaps and may publicly opine the Court is unwilling to accept certain hard or controversial cases. Regardless of whether decisions are deadlocked, or the Court avoids those cases in the petition process, a negative perception could attach.

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<sup>34</sup> Clarity is aspirational, not mandatory. The Court's decision that resolves the petition effectively reverses or affirms the judgment from which review was sought or remands it for further action. The justices' individual opinions explaining their votes on the judgment, however, can be confusing and counterintuitive. See Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 136–45 (1999) (providing a detailed description of cases in which the justices' individual opinions arguably resulted in collective reasoning inconsistent with the judgment).

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Finally, some academics posit that judicial majoritarianism, which typically involves an odd number of justices, increases “epistemic worth.”<sup>35</sup> Epistemic worth generally refers to a correct answer as measured against external criteria, whether moral or utilitarian; it is independent of legal correctness. Unsurprisingly, the assumptions and theoretical foundations underlying application of this concept to a constitutional court are controversial, mainly because it is unclear if it fits within any established method of interpretation or follows the concept of the rule of law. We will address this more in later sections.

Arguments in favor of an even number of justices, which have been offered by a small number of proponents,<sup>36</sup> fall into two categories. The first category mainly involves lessening political partisanship, either in the justice selection process or as perceived in the Court’s decisions. The concern starts from a foundational assumption that justices should not be partisan advocates<sup>37</sup> or allow their political beliefs to influence judicial decision-making. At least on the surface, this assumption is almost universally accepted; advocating a direct role for politics in the Court would be anathema to any observer or participant.<sup>38</sup> Still, many politicians assume that justices act like them, but without the need to seek re-election. Congressional concern that justices are legislators

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<sup>35</sup> See Guha Krishnamurthi, *For Judicial Majoritarianism*, 22 U. PA. J. CONST. L. 1201, 1213 (2020). *But see* Jeremy Waldron, *Five to Four: Why do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692, 1712–18 (2014) (arguing that majoritarianism does little legitimize judicial decisions, particularly in close cases).

<sup>36</sup> *E.g.*, Eric J. Segall, *Eight Justices Are Enough: A Proposal To Improve The United States Supreme Court*, 45 PEPP. L. REV. 547 (2018); Josh Divine, *Keep the Supreme Court Bench Even-Numbered*, THE FEDERALIST (July 7, 2016), <https://thefederalist.com/2016/07/07/keep-the-supreme-court-bench-even-numbered> [<https://perma.cc/NK7U-MENQ>];

Ron Dolin, *Eight is Great?*, THINK OUTSIDE THE BAR (Nov. 25, 2016), <http://radicalconcepts.com/537/supreme-court-number>; David Orentlicher, *Politics And The Supreme Court: The Need For Ideological Balance*, 79 U. PITT. L. REV. 411, 422 (2018); John V. Orth, *How Many Judges Does It Take To Make A Supreme Court?*, 19 CONST. COMMENT. 681, 687–88 (2002).

<sup>37</sup> Chief Justice John Roberts pointedly stated, “We don’t work as Democrats or Republicans.” Adam Liptak, *Supreme Court Says Judges Are Above Politics. It May Hear a Case Testing That View*, N.Y. TIMES (Sept. 16, 2019), <https://www.nytimes.com/2019/09/16/us/politics/supreme-court-judges-partisanship.html>.

<sup>38</sup> *See, e.g., id.*

in black robes has existed, and ebbed and flowed, for more than two centuries.<sup>39</sup> Whatever the historical reality, there is recent evidence supporting the thought that justices do not abandon their political preferences and policies upon appointment to the Court.<sup>40</sup> This has led to increasingly partisan Senate confirmation hearings and an ongoing Court effort to refute the perception of political influence.<sup>41</sup> Commentators in this first category propose to alter the selection process by creating a presumption that Court members are evenly divided along political lines.

Professor Eric J. Segall offers the most comprehensive and complex proposed revision by suggesting Court membership be restricted to four Republicans and four Democrats.<sup>42</sup> Other commentators advocate various changes designed to achieve political stasis, such as adding justices,<sup>43</sup> leaving the number at eight when a justice leaves the Court,<sup>44</sup> or creating a special constitutional court with an even number of justices.<sup>45</sup> Although the proposals are varied in their

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<sup>39</sup> See Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 592 (2009).

<sup>40</sup> In political science, this is generally referred to as the attitudinal model as compared to the legal model. For the former, Professors Harold J. Spaeth and Jeffrey A. Segal are prominent proponents of attitudinal model. See, e.g., DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 150 (1976) (“justices are usually true unto themselves”); Jeffrey A. Segal and Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971, 985 (1996). Others contend the legal model cannot be ignored. See, e.g., Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices’ Values on Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1049, 1051–54 (1996).

<sup>41</sup> The partisan nature of the nomination and confirmation process often follows a judge onto the bench. For instance, President Trump referred to “Democrat” or “Obama” judges, and news stories routinely mention whether a judge was appointed by a Republican or Democratic president. Chief Justice John Roberts has attempted to correct the misperception: “We do not have Obama judges or Trump judges, Bush judges or Clinton judges.”

Kate Reilly, *President Trump Escalates Attacks on ‘Obama Judges’ After Rare Rebuke from Chief Justice*, TIME (Nov. 21, 2018), <https://time.com/5461827/donald-trump-judiciary-chief-justice-john-roberts>.

<sup>42</sup> Segall, *supra* note 36, at 533–55.

<sup>43</sup> Sometimes called court-packing. See Larry Kramer, *Pack the Courts*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion/pack-supreme-court.html>; Aaron Tang, *(Threaten) to Pack the Courts*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-packing.html>.

<sup>44</sup> Ron Dolin, *Eight is Great? Think Outside the Bar*, RADICAL CONCEPTS (Nov. 25, 2016), <http://radicalconcepts.com/537/supreme-court-number> [https://perma.cc/RDP4-MQK6].

<sup>45</sup> Kent Greenfield, *Create a New Court*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion/constitutional-supreme-court.html>.

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approach, the architects of a modified Court agree that a deadlocked Court is preferable to a polarized selection process or to the public perception of partisan factors in judicial decisions.

The second category of arguments for an even number of justices arises from the decision-making process itself. Although it might appear that there is nothing more to the process beyond nine individual votes, reflected in majority, concurring and dissenting opinions, the Court is fervently private about what occurs among justices to arrive at those opinions. The willingness of modern justices to offer general expositions in books and speeches<sup>46</sup> about Court procedures is insufficient to allay suspicions that the justices advance partisan and ideological policies behind densely worded decisions. Assuming that justices do not consciously intend to reach political decisions using subterfuge,<sup>47</sup> the question is whether the justices' prior partisan positions or ideological leanings unconsciously influence their judgment. Although this issue could be present in every case, it is particularly significant when partisan or ideological disputes cause justices to arrive at opposite conclusions. It is most important if the Court is roughly balanced along partisan lines and is most obvious in 5-4 decisions.<sup>48</sup> Based on the assumption of multiple high-controversy

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<sup>46</sup>See, e.g., WILLIAM H. REHNQUIST, *THE SUPREME COURT* (1987); ANTONIN SCALIA, *SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* (2017); Ruth Bader Ginsburg, *Thomas Jefferson Lecture: Workways of the Supreme Court*, 25 T. JEFFERSON L. REV. 517, 517 (2003).

<sup>47</sup>E.g., Dan T. Coenen, *Structural Review, Pseudo-Second-Look Decision Making, and the Risk of Diluting Constitutional Liberty*, 42 WM. & MARY L. REV. 1881, 1882 (2001) ("Clever judges . . . invoke structural review when they predict that the legislature will be unable to enact legislation that contravenes the judges' personal preferences.") (referencing MARK V. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 201 (1988)); Stephen Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 89, 89 (2005) (describing overtly political decision-making, and comparing it to more traditional legal analysis).

<sup>48</sup>The percentage of 5-4 decisions in the twentieth century rose from 2% to 30%. Robert E. Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-90*, 21 HOFSTRA L. REV. 667, 668-69 (1993). The importance of such decisions has long been noted. See, e.g., Albert H. Putney, *Five to Four Constitutional Law Decisions*, 24 YALE L.J. 460, 461 (1915) ("It is a startling statement, but nevertheless an absolutely correct one, that the large majority of the most important constitutional law questions which have come before the United States supreme court since the beginning of the Civil War have been decided by a majority of one in the vote of the justices of the United States supreme court.").

5-4 decisions, an even number of justices becomes a means to discuss how to encourage decision-making based on a common purpose and compromise.

Advocates for consensus-driven decisions can point to the beneficial impact of group compromise because there will be a much-reduced need for a swing justice who serves as an occasional bridge-maker, but mostly as a tiebreaker.<sup>49</sup> The inability to reach a consensus means the issue is unripe and politically fraught, and that the justices should allow time, deliberation, and, at times, societal change, to favor a lasting constitutional rule. Recognizing that efficiency and clarity often trump patience, they suggest an even number of justices as a structural solution that would lead to lasting constitutional rules. Although this perspective has less relevance if a partisan division is 6-3 rather than 5-4, we later address the significance of an even number of justices on internal proceedings regardless of the number of justices who are in opposing ideological camps.

## II. HOW ANSWERS TO THE QUESTION AFFECT QUALITATIVE FACTORS

Our brief overview of an odd versus even number of justices serves as an introduction to how The Question might be addressed within the context of a specific change proposal, but it is not conducive to an analysis of the factors which lead to different conclusions in the question of even versus odd. In this Section, we identify and discuss ten qualitative factors, some of which innately favor a specific answer to The Question and others for which the answer requires detailed discussion (and even then, the answer is not obvious). By focusing on these factors, we hope to

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<sup>49</sup> See generally, Jeffrey Rosen, *A Majority of One*, New York Times, N.Y. TIMES (June 3, 2001), <https://www.nytimes.com/2001/06/03/magazine/a-majority-of-one.html> (discussing Justice Sandra Day O'Connor) (justices “should have enough of an appreciation of their own fallibility to give elected representatives broad discretion to interpret and enforce the Constitution without interference from the courts”). Although “swing justice” is a popular term, it can be distinguished conceptually and etymologically from “swing voter,” “median justice,” and “swingman.” Kristin M. McGaver, Note, *Getting Back to Basics: Recognizing and Understanding the Swing Voter on the Supreme Court of the United States*, 101 MINN. L. REV. 1147, 1250 (2017).



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mitigate the possibility that our analysis will be conflated with the merits of a particular change proposal or issue.

#### A. TRADITION

Tradition underlies many judicial practices, including regalia, forms of dress and address, decorum, and stability in the law. The most significant is stare decisis, which is tradition as a fundamental legal principle: respect of a matter previously decided.<sup>50</sup> That respect, in general, is enhanced by the passage of time, meaning a matter that has been decided, for decades or even centuries, often is given the most respect.

Age-old tradition favors an odd number of justices on an apex court; indeed, it currently is the near-undisputed configuration.<sup>51</sup> But as noted earlier,<sup>52</sup> the Constitution does not mandate this arrangement, nor has it always been the Court's practice. Thus, the history of an odd number of justices is not binding in, or on par with, the manner of stare decisis on a lower court. Instead, we must ask whether this tradition<sup>53</sup> is part of the mortar upon which the foundation and authority of the Court is based.

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<sup>50</sup> *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) (“Stare decisis—in English, the idea that today's Court should stand by yesterday's decisions—is ‘a foundation stone of the rule of law.’”) (citation omitted); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part) (“The legal doctrine of stare decisis derives from the Latin maxim “stare decisis et non quieta movere,” which means to stand by the thing decided and not disturb the calm. The doctrine reflects respect for the accumulated wisdom of judges who have previously tried to solve the same problem. In 1765, Blackstone, “the preeminent authority on English law for the founding generation,” wrote that “it is an established rule to abide by former precedents,” to “keep the scale of justice even and steady, and not liable to waver with every new judge's opinion.” 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1765).”) (citation omitted).

<sup>51</sup> See *State Supreme Court*, WIKIPEDIA, [https://en.wikipedia.org/wiki/State\\_supreme\\_court#List\\_of\\_state\\_and\\_territorial\\_supreme\\_courts](https://en.wikipedia.org/wiki/State_supreme_court#List_of_state_and_territorial_supreme_courts) [https://perma.cc/DMB2-R7DX] using data from *Methods of Judicial Selection*, NAT'L CTR. FOR STATE CTS., [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state). It appears that only High Court of American Samoa has an even (eight) number of justices.

<sup>52</sup> See *supra* note 20 and accompanying text.

<sup>53</sup> We recognize that this use of “tradition” in a legal analysis, even when coupled with stare decisis, is unusual. We use it in the manner advocated by Karl Popper: “[T]raditions have the important double function of not only creating

The primary purpose of any court in Western legal proceedings is to rule on a case brought by parties who cannot resolve a legal conflict on their own. This is particularly true for trial courts, where typically a single judge presides. These courts act in an adjudicative capacity and have no general authority to initiate investigations about the application of the law. They also have no unique authority to propose the enactment of any law. In contrast, the main activity of the legislative and executive branches is focused on creating and implementing legal codes.<sup>54</sup> This critical limit on courts is ingrained among its participants but sits comfortably with sentiments that courts exist to maintain the rule of law, do justice, protect individual rights, provide predictability, and explain what the law is. Courts seek to meet these goals in the context of deciding a specific legal dispute between opposing parties. In this respect, the primary tradition of the judiciary is decision-making by resolving disputes others formally bring to the courts based on facts the parties present.

Multi-member courts (often called collegial courts) have a second tradition: decision-making by majoritarianism. There is no innate reason why a multi-member court could not require that its decisions use unanimity, supermajority, seniority, or ranked-choice rules. These alternative systems exist in other contexts, including in elections, enacting legislation, law, and politics.<sup>55</sup> With

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a certain order or something like a social structure, but also giving us something upon which we can operate; something that we can criticize and change.” KARL POPPER, *TOWARDS A RATIONAL THEORY OF TRADITION, CONJECTURES AND REFUTATIONS* 176 (2d ed. 2002).

<sup>54</sup> Legal codes are statutes and administrative regulations. The Executive branch is also considered to be responsible for criminal prosecution and regulatory enforcement. In practice, however, the political actors have a much more limited role in determining whether and how to conduct individual cases. This is even truer in state government, where the heads of enforcement do not directly answer to the Executive. In federal civil enforcement, semi-autonomous regulatory bodies shield them from direct executive control. In criminal matters, the wall between the president and the attorney general is much less clear, although custom dictates some separation. See William P. Marshall, *Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *YALE L.J.* 2446, 2446 (2006) for an excellent overview of the issues, as well as the federal and state differences.

<sup>55</sup> *Ramos*, 140 S. Ct. at 1390 (holding that the Constitution requires unanimous jury verdicts in state criminal trials). The filibuster in the United States Senate can only be stopped under Senate Rule IXX(2) (cloture rule), which

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rare exceptions,<sup>56</sup> no apex court has operated (or chosen to operate) under anything but a system of simple majoritarianism.<sup>57</sup> Collectively, these traditions make a compelling argument for the proposition that a multi-member court must have an odd number of justices to fulfill its primary duty to adjudicate individual cases using majoritarian voting. A deadlocked court with an even number of justices on each side thwarts this adjudicatory tradition.

Two subsidiary traditions, exclusive to apex courts, mediate what might otherwise be a very short debate about using an even number of justices. Apex courts, especially the Supreme Court, do not resolve every dispute between parties in every case in which review is sought.<sup>58</sup> They simply do not have the capacity to oversee and correct every court decision a party wishes to challenge.<sup>59</sup> To a lesser extent, and with some variation, the capacity problem also applies as a limitation for state supreme courts with discretionary review. This means that the primary tradition

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requires “three-fifths of the Senators duly chosen and sworn” to agree; Maine voters enacted as IB 2015, c. 3, “An Act to Establish Ranked-choice Voting” to become the first state to enact ranked-choice voting for statewide elections for governor, state legislature, and Congress. The Maine Ranked-Choice Voting enactment is discussed in *Senate v. Sec’y of State*, 183 A.3d 749 (Me. 2018) and *In Re Op. of the Supreme Jud. Ct. Given Under the Provisions of Article VI, Section 3 of the Me. Constitution*, 162 A.3d 188 (Me. 2017).

<sup>56</sup> *E.g.*, Ohio’s 1912 supermajority requirement to declare a statute unconstitutional. *See generally* Jonathan L. Entin, *Judicial Supermajorities and the Validity of Statutes: How Mapp Became a Fourth Amendment Landmark Instead of a First Amendment Footnote*, 52 CASE W. RES. L. REV. 441 (2001). *See also* N.D. CONST. art. 6, § 4 (“[T]he supreme court shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide”); NEB. CONST. art. 5, § 2. (“No legislative act shall be held unconstitutional except by the concurrence of five judges.”).

<sup>57</sup> “Simple” majoritarianism only connotes a numerical majority of voting justices (i.e., more than 50%). Unitarian and supermajority voting rules typically range from 66 to 100% for groups more than 6. As the size of the court expands or contracts, the specific percentage of votes to reach a decision will change, but it will always be more than 50% and less than supermajority (e.g., an 8-justice court requires 63%, 10 requires 60%, and 12 requires 58%; in contrast, 9 requires 56%, 11 requires 55% and 13 requires 54%).

<sup>58</sup> The Court enters a dispositional order for every petition that essentially affirms, reverses, or modifies a lower court judgment, but the great majority do not address the substance of the parties’ arguments.

<sup>59</sup> The Supreme Court reached this point more than 100 years ago, resulting in the Judiciary Act of 1925. 28 U.S.C. §§ 1251–94 (corresponds to Judiciary Act of 1925, ch. 229, 43 Stat. 936). Former Justice William Strong detailed how the Court’s appellate responsibilities increased and the proposed solution of an intermediate appellate court. *See* William Strong, *The Needs of the Supreme Court*, 132 N. AM. REV. 437, 437 (1881). *See generally* Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1 (1928).

of deciding all cases brought by parties applies to the judiciary in general but is mostly inapplicable to apex courts.

The next apex court tradition is overtly consistent with what the public wants from courts: to maintain the rule of law, do justice, protect individual rights, provide predictability, and explain what the law is. Apex courts meet these goals by issuing written decisions based on legal reasoning to guide both the behavior of persons beyond the parties and the resolution of future legal disputes. The decisions also inform federal and state legislators and executives about prohibited, questionable, and constitutionally permissible statutes and approaches. Although the process and methods used to explain the law are enormously complex, this tradition is so important that it supplants the duty to render majoritarian decisions on specific issues. This Article will later discuss the case-by-case process of delineating constitutional law in the context of other factors bearing on The Question.

We conclude the discussion of this factor with the observation that historical tradition, as shown in most apex courts, quantitatively favors an odd number of justices. This history, however, improperly favors judicial traditions while not considering the separate, important, and unique traditions of apex courts when compared to all other courts. Tradition does not dictate whether the Court should have an odd or even number of justices. Instead, we contend that a commitment to explicating the law requires consideration of other qualitative factors for ensuring the best judicial decision-making process when answering The Question.

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## B. EFFICIENCY

A primary duty of an apex court, especially SCOTUS,<sup>60</sup> is to explicate constitutional law. Because the law develops in response to external events and individual lower court judgments, constitutional law cases are delayed and likely arise out of geographically (and at times temporally) dispersed clusters of cases. The Court infrequently addresses constitutional issues of minor importance or which have not led to conflicting lower court decisions.<sup>61</sup> The Court rules instruct that it will only grant review for “compelling reasons,” which usually arise from conflicting decisions on significant, substantially similar issues.<sup>62</sup> The Court can reverse a decision to grant review of a case by dismissing the writ of certiorari as improvidently granted; however, this rarely occurs, and when it does, a reason is seldom given.<sup>63</sup> In other words, a constitutional issue ripe for decision typically is a matter of national concern that has been percolating in lower courts for several years or longer, almost always with conflicting outcomes.

Efficiency favors an odd number of justices, mostly because a deadlocked decision requires multiple returns to the Court. The arguments for and against resolution of a specific constitutional issue have been explored in the lower courts, and the opposing opinions usually make it clear why a majority decision is not currently possible. Only infrequently will the justices express a need for further development of arguments in the lower courts after the Court has granted review.

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<sup>60</sup> The Supreme Court’s website states that its “ultimate responsibility” is to provide “equal justice under law” as the Constitution’s guardian, interpreter, and “final arbiter.” *About the Court*, THE SUP. CT OF THE U.S., <https://www.supremecourt.gov/about/about.aspx> [<https://perma.cc/MT43-54A3>] (last visited Apr. 13, 2021).

<sup>61</sup> Ginsburg, *supra* note 46.

<sup>62</sup> *Id.*

<sup>63</sup> Michael E. Solimine & Rafael Gely, *The Supreme Court and the Sophisticated Use of DIGs*, 18 S. CT. ECON. REV. 155, 156 (2010).

Additionally, a deadlocked Court places more pressure on strategic considerations in certiorari (“cert”) review. Although simultaneous cert petitions may cite identical constitutional text and precedent, there are differences in cases where such review is sought based on important factors, such as procedural status, case facts, error preservation, amici involvement, and quality of argument. When voting whether to grant a cert petition, justices will consider various strategies and various factors, including the practical effect of granting review, because a deadlocked decision by the Court maintains the status quo of the cases under review and, generally, whatever constitutional analysis was adopted by the appellate court in a particular jurisdiction. Finally, even if an issue is sufficiently discrete that most cases on that specific issue are essentially the same in approach and resolution, a deadlock encourages parties and their attorneys to petition for review by the Court. The desire to be the attorney or party in a standard-setting case is compelling.

An even number of justices can be seen as not directly contributing to efficiency. For a particular issue in a specific term, an odd number of justices typically would eliminate the possibility of a deadlocked decision and would make the Court more efficient in processing that case and, more broadly, its cases. However, the analysis does not end there; instead, it begs the question whether efficiency in deciding unresolved issues by an apex court should be the goal.

Trial and error-correcting appellate courts serve the public by resolving legal conflicts. The need for such court services arises and dissipates, sometimes, based on the courts’ rulings, but typically independent of the courts’ rulings. For instance, economic, health, and natural conditions encourage pressing some kinds of cases while discouraging the prevalence of others.<sup>64</sup> Dockets for

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<sup>64</sup> That the economy affects court caseloads is clear, although the precise direction and area of impact are more difficult to measure. *See, e.g.*, William Glaberson, *The Recession Begins Flooding into the Courts*, N.Y. TIMES (Dec. 27, 2009), <https://www.nytimes.com/2009/12/28/nyregion/28caseload.html>; Carlisle E. Moody Jr. & Thomas

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family, bankruptcy, immigration, criminal, and civil cases do not expand and contract in lockstep. Where possible, courts with those dockets respond to the changing number of filings by re-allocating judges and judicial resources to wherever the need is greatest. Unlike the private sector or individual companies, and unlike apex courts, these lower courts cannot respond to increased demand by deciding not to adjudicate those cases. They must decide cases and, to serve the public, must be efficient in doing so.

Efficiency in the lower courts, however, does not depend on efficiency in apex courts. The lack of controlling precedent is not a bar to judgment in lower courts. Every court has the authority and duty to adjudicate constitutional issues, either in accordance with precedent or, if none exists, by its own interpretation of constitutional law.<sup>65</sup> Although they may have conflicting views on the merits, lower courts will not stop adjudicating cases in the absence of a SCOTUS decision providing the answer.

If the Supreme Court need not immediately provide guidance on constitutional issues for lower courts to resolve cases, how important is efficiency? Constitutional interpretation, much like democracy, is a process rather than an aspiration and a journey rather than a destination. Even if the constitutional text never changes, the Court will not arrive at a final interpretation in the same way that a translator finishes the translation of a book from one language to another. Therefore, the efficiency of apex courts is secondary to other qualitative factors.

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B. Marvell, *Appellate and Trial Court Caseload Growth: A Pooled Time-Series-Cross-Section Analysis*, 3 J. QUANTITATIVE CRIMINOLOGY 143, 160, 165 (1987).

<sup>65</sup> See, e.g., *Carter v. Kemna*, 225 F.3d 589, 592 (8th Cir. 2001) (“In the absence of controlling Supreme Court precedent, lower courts disagree about whether *Batson* requires reversal of a conviction when an alternate juror is improperly excluded, but no alternate joins the deliberating jury.”) (citations omitted); *State v. Williams*, 346 P.3d 455, 464 (Or. 2015) (“In the absence of controlling Supreme Court precedent, we must determine, as best we can, how that Court would rule if presented with the question before us.”).

## C. ACCURACY

All judges want to get the law right. Because judges are not infallible, almost<sup>66</sup> every judgment issued by a (trial) judge is reviewable and can be reversed (or affirmed) by a reviewing court.<sup>67</sup> The more serious the judgment<sup>68</sup>, the more likely there will be multiple levels of direct and collateral<sup>69</sup> review. Yet the goal remains the same in each court: apply the law as written to the facts presented to arrive at the right result.

This goal has been the subject of increasing academic interest.<sup>70</sup> It is frequently called “accuracy,” and it is defined as the ability of the majority to reach a “correct” result. Often, the study of accuracy and correctness relies on the Condorcet Jury Theorem (“CJT”),<sup>71</sup> which is a mathematical proof in which increasing the number of equally competent, independent voters increases the probability the group (i.e., jury) will reach the best decision.<sup>72</sup> This formal proof is

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<sup>66</sup> Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1222 (2013) (stating there is not an explicit constitutional right to appeal but “appellate remedies are nearly universal”).

<sup>67</sup> Although decisions requiring fact-finding are not under the exclusive authority of a trial judge, there are opportunities to correct errors in later stages of the trial court proceedings. *See, e.g.*, FED. R. CIV. P. 50 (judgment as a matter of law in a jury trial); FED. R. CIV. P. 52 (findings and conclusions by the court); FED. R. CIV. P. 59 (new trial; alter or amending a judgment) and FED. R. CIV. P. 60 (relief from a judgment or order).

<sup>68</sup> Judgments are generally important to the parties, but they vary in impact and ripple-effect. For instance, a capital sentence where the death penalty is imposed generates years of post-conviction litigation, but a state court drug case imposing probation that has a Fourth Amendment issue identical to the capital case might only involve a single appeal. The same constitutional claims will likely reach SCOTUS years or even decades apart.

<sup>69</sup> “[C]ollateral review” refers to a party’s right to apply for relief from judgment of a co-equal court, typically after remedies have been exhausted in the first court’s jurisdiction. The principal form is the federal writ of habeas corpus. *See* 28 U.S.C. §§ 2241–56.

<sup>70</sup> *See, e.g.*, Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking The Court*, 96 YALE L.J. 82, 91 (1986) (“principal measure of performance is accuracy . . . to reach ‘correct’ results”); *see also* Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2362 (1999).

<sup>71</sup> *But see* Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327 (2002), (discussing the difficulties of using CJT to support an optimal model of legal decision-making, whether by judges or juries).

<sup>72</sup> Lloyd Shapley & Bernard Grofman, *Optimizing Group Judgmental Accuracy in the Presence of Interdependencies*, 43 PUB. CHOICE, 329, 330 (1984). This proof was originally made by Nicolas de Condorcet in 1785. Kornhauser & Sager, *supra* note 70, at 98 n.20. Condorcet, a French philosopher, applied mathematical analysis to judicial processes to ascertain the probability a group made the correct decision. Charles Coulston Gillispie, *Probability and Politics: Laplace, Condorcet, and Turgot*, 116 PROC. AMER. PHIL. SOC’Y 1, 15 (1972).



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not particularly controversial because it reflects a modern belief that a diverse group is more likely to reach a correct result than a single person.<sup>73</sup> Application of CJT to the appellate process usually begins with the assumption of an odd number of judges to simplify the mathematical proof and to avoid classification problems that arise when an even number leads to a tie vote. And CJT is based on the assumption that judges on an appellate court vote independently, which is problematic<sup>74</sup> but has not deterred its use.<sup>75</sup>

By itself, CJT is of questionable value in evaluating whether to have an odd or even number of justices. As Professor Paul H. Edelman observed, CJT's technical assumptions are nuanced and often overlooked when trying to address legal questions that lack binary answers, probability estimates, or even definitions about what constitutes a correct result.<sup>76</sup> Additionally, Condorcet's mathematical proofs were undertaken to support his philosophical writings and political activities in the late eighteenth century. Unsurprisingly, those writings and activities may have paralleled the Constitutional Convention and the framers' activities, which were approximately contemporary. While historically fascinating, the intellectual and personal overlap between Condorcet and the framers further complicates the problems of assumptions and definitions, especially regarding constitutional law in the present day.<sup>77</sup> Finally, CJT proof is not premised on an even or odd number

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<sup>73</sup> It is modern in the sense that democracy is a dramatic departure from religious, philosophical, or societal reliance on singular figures or small groups for the guidance and direction for all people. *See also* DANIEL KAHNEMAN, OLIVER SIBONY & CASS R. SUNSTEIN, NOISE A FLAW IN HUMAN JUDGMENT 83 (2021) (discussing the “wisdom-of-crowds effect” that “averaging the independent judgments of different people generally improves accuracy”).

<sup>74</sup> David Austen-Smith and Jeffrey S. Banks, *Information aggregation, rationality, and the Condorcet Jury Theorem*, 90 AMER. POL. SCI. REV. 34, 35, 44 (1996).

<sup>75</sup> *See, e.g.*, Caminker, *supra* note 70, at 2297, 2319 n.53, 2363 n.176.

<sup>76</sup> Edelman, *supra* note 71, 330.

<sup>77</sup> *Cf.* Eric Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 136–40 (2006); Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to the Law of Other States*, 59 STAN. L. REV. 1281, 1283 (2006); Eric Posner & Cass R. Sunstein, *On Learning from Others*, 59 STAN. L. REV. 1309, 1310–12 (2007).

of decision-makers or voters; simply increasing the number of voters provides the beneficial effect over a smaller number.

Although CJT is not quantitatively informative on The Question, debates about CJT assumptions can inform consideration of qualitative factors. The most important is defining what it means for an apex court to get a correct result on the law. For most courts, whether a decision is correct may generally depend on whether the judgment is affirmed on appeal. By contrast, the judgment is incorrect if it is reversed on appeal. SCOTUS differs from all other courts because the majority has the final say on the constitutional law in a specific case.<sup>78</sup> In that sense, the Court has perfect accuracy about constitutional law on the day it decides any particular case. Of course, the Court regularly modifies and overrules its own constitutional precedent.<sup>79</sup> Moreover, the rate at which the Court has overruled constitutional precedent has greatly increased in the last century.<sup>80</sup> Whether this increase is because of more rapidly changing facts and understandings,<sup>81</sup> negative

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<sup>78</sup> *About the Court*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/constitutional.aspx> [<https://perma.cc/HC5P-BK63>] (last visited April 19, 2021) (“When the Supreme Court rules on a constitutional issue, that judgment is virtually final; its decisions can be altered only by the rarely used procedure of constitutional amendment or by a new ruling of the Court.”).

<sup>79</sup> To assist the Senate in evaluating the judicial philosophy of a nominee to the federal courts, the Congressional Research Service prepared a report examining “how the Supreme Court determines whether to overrule its prior decisions on questions of constitutional law.” BRANDON MUIRRILL, CONG. RSCH. SERV., R45319, *THE SUPREME COURT’S OVERRULING OF CONSTITUTIONAL PRECEDENT* (2018). This report included a table of 141 cases in which a majority of the Court explicitly stated that one or more cases had been overruled, and Congress maintains an updated list of almost 300 overruled cases. *Table of Supreme Court Decisions Overruled by Subsequent Decisions*, CONG. RSCH. SERV., <https://constitution.congress.gov/resources/decisions-overruled> [<https://perma.cc/HS7U-AZDE>] (last visited Mar. 2, 2021). The difference in numbers is due to one case overruling multiple cases.

<sup>80</sup> Although the average reversal rate since 1791 is roughly 1.3 cases each year, this number masks the great increase in the number of reversals in the second half of the Court’s existence, which account for 89% of all such cases. *See id.*

<sup>81</sup> *E.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (rejecting the previously approved practice of “separate but equal” school segregation based on new psychological and social studies).

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encroachment by related cases,<sup>82</sup> bad reasoning,<sup>83</sup> the explosion of federal statutory and regulatory law, greater attention to its mistakes, or other reasons is beyond the scope of this Article. The important point is that accuracy is a critical factor for SCOTUS, although it is blindfolded looking forward because its errors can only be seen looking backwards and, even then, in different cases that will be presented for resolution in the future.

Accuracy for other apex courts<sup>84</sup> is equally complicated, but in a different way. The appellate adjudication model employed by individual judges, or even by an entire court if there is unanimity, may define accuracy. In general, the approaches used by a judge in a lower court when apex court precedent does not provide a clear answer to the legal issue in a case being decided by that lower court can be described by two main models.

In the first model, the judge considers what the Supreme Court would do if presented with the pending case. The model is based on an exogenous reference point<sup>85</sup> to determine the correct answer. Because the Supreme Court always reaches the correct answer, if it reviews and affirms

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<sup>82</sup> *United States v. Gaudin*, 515 U.S. 506, 521 (1995).

<sup>83</sup> *E.g.*, the overruling of *Korematsu v. United States*, 323 U.S. 214 (1944) in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in law under the Constitution.’”) (citation omitted).

<sup>84</sup> In this context, we focus only on published decisions by state supreme courts or en banc circuit courts. Both types of decisions are binding on lower state courts, and district courts in their circuits, respectively. *See, e.g.*, *United States v. Broussard*, 611 F.3d 1069, 1072 (9th Cir. 2010) (“We are required to follow circuit precedent, but in the face of intervening Supreme Court and en banc opinions, ‘a three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled.’”) (citation omitted); *Doe v. Roman Catholic Archdiocese of St. Louis*, 311 S.W.3d 818, 821, 823 n.4 (Mo. Ct. App. 2010) (“Thus, a Missouri Supreme Court interpretation of federal constitutional law constitutes the controlling law within our state until either the Missouri Supreme Court or the United States Supreme Court declares otherwise;”); *State v. Ward*, 604 N.W.2d 517, 525 (Wis. 2000) (“Our decisions interpreting the United States Constitution are binding law in Wisconsin until this court or the United States Supreme Court declares a different opinion or rule.”). Although constitutional law decisions by other appellate courts are frequently binding in certain circumstances, the limited nature of stare decisis in those cases makes generalizations less robust and useful.

<sup>85</sup> Edelman, *supra* note 71, at 338.

the result<sup>86</sup> adopted by a lower court judge, that result is correct if it accurately predicts the Court's decision.<sup>87</sup>

In the second model, a judge perceives their role to require independent determination of constitutional law. It is an endogenous reference point,<sup>88</sup> although based on legal reasoning and analysis, regardless of personal, subjective preferences. Whether the Supreme Court affirms or reverses the result is irrelevant. Judicial adherents to this model do not view Supreme Court precedent as having greater intrinsic validity or reliability than their own decisions. Instead, a Supreme Court decision is seen as the final authority, but not necessarily the best decision.<sup>89</sup> The practical application of this view can be heard in court hallway discussions about recent, contrary higher court decisions, "They do their job and we do ours."

The endogenous model also has theoretical support in two respects. First, the Supreme Court often relies on competing and conflicting interpretations of the Constitution to reveal the best arguments and majority positions.<sup>90</sup> To assist the Court, it is incumbent on judges to advance what they determine to be the best approach even if they conclude there is unlikely to be majority support for that position with the current configuration of justices. Second, the Court's record of reversing its own precedent shows that its justices do not have a monopoly on good reasoning or

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<sup>86</sup> We speak of a "result" rather than decision because a judge's dissenting opinion is not the judgment in her case but would be "correct" if adopted by the Supreme Court.

<sup>87</sup> To keep the decisional model manageable, we only consider whether the judge got the binary result correct, i.e., affirmation or reversal. Differences arising out of rationales, justices' individual opinions, etc., induce logarithmically increasing complexity to determining correctness.

<sup>88</sup> Edelman, *supra* note 71, at 339.

<sup>89</sup> "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

<sup>90</sup> See generally Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137 (2012).

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superior analysis.<sup>91</sup> Indeed, federal judges and state court justices and judges can plausibly assert that their training and experiences make them as qualified to interpret the Constitution as sitting SCOTUS justices. In their view, an independent judiciary also means independent thinking if there is no controlling precedent.

The legal methods and analysis employed by judges under either model overlap more than they differ. Both require, among other things, attention to constitutional text and precedent, historical research, and consideration of the practical effects of a particular legal rule within the framework of traditional legal analysis. Nonetheless, the differing approaches illustrate important policy differences that can impact the answer to The Question.

As with our earlier discussion about SCOTUS deadlocks, an odd number of justices makes it easier for other courts to get a correct answer. If their singular goal is to predict what the Supreme Court would do if presented with the same case, having more cases with a clear result is the preferred route. It does not matter whether a case is decided 9-0, 5-4, or (1+4)-4 as long as the result and its application are clear for other cases.

An even number of justices and the increased likelihood of deadlocked decisions show a preference—or at least an acknowledgment—that constitutional decisions represent only the best explication of the law the moment they are issued. When the Court deadlocks, it demonstrates the inability of constitutional law to immediately resolve a legal issue. Similarly, it accepts the probability that equally competent jurists will disagree on some of the most important

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<sup>91</sup> See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (abrogating *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972)); *Ring v. Arizona*, 536 U.S. 584, 584 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)); *Crawford v. Washington*, 541 U.S. 36 (2004) (abrogating *Ohio v. Roberts*, 448 U.S. 56 (1980)); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (overruling *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976)).

constitutional law issues facing the country. It also encourages judges to make their own judgments on novel applications of or approaches to constitutional law. By explicitly excluding a method to “break a tie vote,” an even number of justices essentially recognizes accuracy as a transitional state rather than an end goal. This structural device has major implications that can be seen in greater detail in the remaining qualitative factors.

#### D. CONSISTENCY

SCOTUS decisions typically may be expected to have a shelf-life somewhere between that of the age of the constitutional text and the term of a chief justice. The former is an extreme outlier because few cases are as enduring and relevant as the framers’ text or the Bill of Rights. In contrast, the majority of Supreme Court cases overruling prior precedent were issued fewer than twenty years after the case being overruled was decided.<sup>92</sup> This is important for estimating how long it takes to recognize and reverse erroneous decisions but is not a proper measure of the significance and vitality of the great majority of cases that are never overruled. Our measure of consistency, however, focuses on cases that are overruled within the working life of an attorney (around two generations or fifty years). It is a perspective much like what the citizens likely perceived in the temperance movement leading up to the “Great Experiment” of Prohibition under the Eighteenth Amendment and its repeal under the Twenty-First Amendment. Most adults in the first part of the twentieth century could remember what was legal but endangered, then illegal but often available, then legal again, all in less than a generation. SCOTUS decisions with a head-snapping quality are

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<sup>92</sup> AJ Willingham, *The Supreme Court Has Overturned More Than 200 of its Own Decisions. Here’s What it Could Mean for Roe v. Wade*, CNN POLITICS (May 29, 2019, 7:31 AM) <https://www.cnn.com/2019/05/29/politics/supreme-court-cases-overturned-history-constitution-trnd/index.html> [<https://perma.cc/LYB3-ZSZS>] (showing data compiled by the Congressional Research Service).

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significant and memorable despite their relative rarity because it is likely that many people view either the overruled decision or the new constitutional rule (or perhaps both) in a negative light. The “bad” quality of one or the other decision makes people think about it more intensely, the formed thoughts are more resistant to disconfirmation, and the emotional response lasts much longer.<sup>93</sup>

There are three areas of particular note in which the Court managed in a single decision both to reverse decades of settled law and to establish a new constitutional rule. Each decision touched controversial aspects of American life involving race and education, reproductive rights, and rights of same-sex couples. They are *Brown v. Board of Education*, *Roe v. Wade*, and *Obergefell v. Hodges*.<sup>94</sup> *Brown* reversed *Plessy v. Ferguson*, decided nearly fifty-eight years earlier; *Roe* adopted the trimester framework regarding abortion rights, which itself was replaced nineteen years later with pre- and post-viability tests in *Planned Parenthood v. Casey*; and *Obergefell* overruled *Baker v. Nelson*, decided 43 years earlier.<sup>95</sup> Most importantly here, each decision definitively reversed on constitutional grounds multiple laws that had prohibited conduct the Court had previously ruled (directly or indirectly) passed constitutional muster. Particularly in hindsight, many scholars saw indications the Court was moving toward each result, and the Court tended to

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<sup>93</sup> The psychology of bad versus good events has long been observed and studied. The seminal paper organizing research on many aspects of this phenomenon is Roy F. Baumeister, Ellen Bratslavsky, Catrin Finkenauer and Kathleen D. Vohs, *Bad Is Stronger than Good*, 5 REV. OF GEN. PSYCH. 323 (2001).

<sup>94</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Roe v. Wade*, 410 U.S. 113 (1973); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>95</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Planned Parenthood v. Casey*, 505 U.S. 833; *Baker v. Nelson*, 460 U.S. 810 (1972). The overruling of *Bowers v. Hardwick*, 478 U.S. 186 (1986), by *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), was a quicker change for the Court and presaged *Obergefell*. Nonetheless, *Obergefell* has been described as a more dramatic shift in scope, immediate effects, and perception than declaring unconstitutional rarely-enforced state sodomy laws. 576 U.S. 644, 687 (Roberts, J., dissenting) (“Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage.”).

present the new rules as evolutionary rather than as abrupt changes in direction.<sup>96</sup> We use these counterexamples in our discussion of consistency for their dramatic qualities.

Consistency is the measure of how a case gradually develops, modifies, and clarifies constitutional law. It exists on a continuum from highly consistent to highly inconsistent. Highly consistent cases make incremental changes that may, in isolation, seem minor and, when faced with a novel issue or circumstance, carefully limit the scope of the ruling. Overruling cases, especially those significantly impacting other laws and societal behavior, are anchors at the highly inconsistent end. Although many people will always cheer for an overruling case, it will be a negative event for a different group of people. For most people, inconsistent decisions will be memorable and widely discussed in the community no matter if the decisions are lauded or lamented.

Courts generally strive for consistency as a matter of jurisprudential caution. Frequent or dramatic changes in the interpretation of the same constitutional text classically undercut originalists' argument that the Court applies unchanged constitutional text as written or intended by the framers. It also may damage the position of progressives by associating too closely with policy swings and reversals common in the legislative and executive branches. The answer to The Question arguably affects consistency on SCOTUS.

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<sup>96</sup> See, e.g., Charles W. "Rocky" Rhodes, *Loving Retroactivity*, 45 FLA. ST. U. L. REV. 383, 425–26 (2018).

*Obergefell v. Hodges* then completed the transition, overruling the summary disposition in *Baker v. Nelson* and declaring marital equality a nationwide constitutional mandate. Yet despite *Obergefell's* landmark status, the institutional development of the transition had extended over a dozen years. *Lawrence*, at least in hindsight, represented a significant initial marker, with its stated rationales encompassing principles also supporting marriage equality, as the *Lawrence* dissent and some state high courts recognized. After ten years of state legislative and judicial percolation, the Supreme Court entered the fray again with *Windsor*, which foreshadowed the likelihood of nationwide marriage equality. The final process took another two years, an interim transition to the new legal framework that disquieted the existing legal order. (footnotes omitted).



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An odd number of justices makes the path trending away from the consistent end of the continuum somewhat more likely to occur because it is mathematically easier to get a majority of one or, put differently, five votes. In this limited sense, a Court with an even number of justices should have more consistent decisions. But is this true in practice? It might be possible to survey the Court's decisions for a select period, create a quantitative measure of consistency based on observance of precedent, control for changes in consistency over time, and then examine the voting patterns to determine whether an odd number of justices increased or decreased consistency. Without such research, which also would need to account for significant confounding factors, we look to a limited post-hoc analysis of patterns of the identified cases.

The cases we chose to illustrate the opposite of consistency are rare.<sup>97</sup> In the empirical research we hypothesize above, the cases<sup>98</sup> will have a negligible effect on the final result. The tendency of an even number of justices to create more consistency will not be discernible except in a statistical analysis of a large number of cases. Additionally, of the three cases described here, only *Obergefell v. Hodges*, was decided by a 5-4 vote. *Brown v Board of Education* was unanimous, and *Roe v Wade* was 7-2. In other words, an even number of justices could have altered the outcome of only one of these three cases.<sup>99</sup>

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<sup>97</sup> For additional examples, *compare* *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (5-4 decision) (narrowly holding government generally will need a warrant to access cell-site location information), *with* *Riley v. California*, 573 U.S. 373 (2014) (9-0 decision) (holding that a warrantless search exception following an arrest exists for the purposes of protecting officer safety and preserving evidence, neither of which is at issue in the search of digital data in cellphones).

<sup>98</sup> The influence of our selected cases, while difficult to quantify, is measured more by their societal importance. What citizen does not have knowledge of the law and an opinion about segregated schools, abortion, or same sex marriage? We address public perception later.

<sup>99</sup> It is not clear whether the subject matter or a decreasing emphasis on consensus was more influential in the ideological divide in voting. This is discussed in the next factor: effect on judicial decision-making.

In sum, an even number of justices favors consistency on a theoretical basis, but we do not know whether it is true in practice and, if it is true, the magnitude of the effect.

#### E. EFFECT ON JUDICIAL DECISION-MAKING

Most scholarship and practitioner focus on the Supreme Court is devoted to the questions of how and why the justices do what they do in individual cases. In one sense, the Court is more transparent than any other governmental branch. Using legal reasoning shown in often expansive written opinions easily found in the same place, it explains in great detail how justices arrived at particular conclusions. Attribution is precise because, absent recusal, each justice either writes their own opinion or joins another justice's opinion. Unstated secondary considerations are prohibited or discouraged as violating Court mores<sup>100</sup> against political and ideological partisanship or personal benefit. These written opinions reflect a long and distinguished tradition.

The practice of developing law by written opinion predates the Constitution, having been brought to the colonies and then the United States based on British common law.<sup>101</sup> As explained a century ago by the noted American jurist, Judge (later Supreme Court Justice) Benjamin Cardozo, it is the duty of the judge, when text and precedent are insufficient, to “fashion law for the litigants” so the “sentence of today will become the right and wrong of tomorrow.”<sup>102</sup>

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<sup>100</sup> The Supreme Court is not bound by the Code of Conduct for United States Judges. *See Introduction, Code of Conduct for United States Judges*, U.S. COURTS (Mar. 12, 2019) <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> [<https://perma.cc/4V8N-JL8C>] (last updated Mar. 12, 2019). The justices consult the Code and must comply with federal statutes about certain matters that overlap with ethics directives. *See* Kevin M. Lewis, *A Code of Conduct for the Supreme Court? Legal Questions and Considerations*, CONG. RSCH. SERV.1 (Feb. 6, 2019) <https://fas.org/sgp/crs/misc/LSB10255.pdf> [<https://perma.cc/6JV2-96PW>].

<sup>101</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1:69 (1871) (“[J]udicial decisions are the principal and most authoritative evidence” of common law rules.). This reference does not encompass the more technical term “constitutional common law,” which is both more expansive and more controversial. *See, e.g.*, Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1482–85 (2007); Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1, 3, 10 (1975).

<sup>102</sup> BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 21 (1<sup>st</sup> prt. 1921).

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Nonetheless, scholarship and practice show that SCOTUS decision-making is not solely based on legal reasoning, at least as traditionally defined<sup>103</sup> and that the method by which cases are selected for a merits decision is a hidden, yet significant, type of decision-making. Individual and group dynamics affect which cases are accepted for decision on the merits and which arguments are found to be the most persuasive. The answer to The Question applies more to these latter topics than it does to traditional legal reasoning<sup>104</sup> stated in individual decisions. For that reason, we focus on the process by which review is granted<sup>105</sup> and decisional arguments are accepted, rejected, or created.

### 1. The Process of Determining When Review Will Be Granted

SCOTUS has almost unlimited discretion as to whether to accept a case for review.<sup>106</sup> It accepts cases for review under “The Rule of Four,” an accepted tradition allowing the votes of four justices to result in the grant of a petition for certiorari.<sup>107</sup> Although the other five justices could vote to dismiss the writ of certiorari as improvidently granted, it rarely occurs, most likely because of a collegiality concern that it could be seen as disrespectful to the justices who voted for the writ.<sup>108</sup> The greater problem is review of the more than seven thousand petitions filed annually in

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<sup>103</sup> Cardozo also recognized subconscious forces such as “inherited instincts, traditional beliefs, [and] acquired convictions” probably influence judicial decisions. *Id.* at 11–12.

<sup>104</sup> Even traditional legal reasoning principles recognize the role of individual preferences. For instance, the justices occasionally refer to jurisprudential limitations that arise from a subset of the justices turning personal preference into a constitutional rule. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2245 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (“And now consider how the dispute ends—with five unelected judges rejecting the result of that democratic process.”).

<sup>105</sup> Although largely missing from public discussion and frequently misinterpreted as a decision on the merits, whether to grant cert is “[o]ne of the most critical aspects” of the Court’s work. Margaret Meriwether Cordray & Richard Cordray, *Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits*, 69 OHIO ST. L.J. 1, 1 (2008).

<sup>106</sup> Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PENN. L.R. 1, 3 (2011).

<sup>107</sup> Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 975 (1957).

<sup>108</sup> At least one justice has viewed such dismissals as a privilege limited to those justices who voted to grant the writ. *United States v. Shannon*, 342 U.S. 288, 298 (1952) (Douglas, J., dissenting).

recent years.<sup>109</sup> The administrative burden is ameliorated by use of law clerks and streamlined discussion agendas to limit the number of substantive votes to about a thousand petitions per year. Only six to ten percent of those garnered support from four justices necessary to place the case on the Court's docket.<sup>110</sup> Because the discussion list is not published and the conference itself is subject to extreme privacy protections,<sup>111</sup> little is known about how justices in the current term decide whether to vote for or against certiorari.<sup>112</sup>

We assume the justices work like trial attorneys: plan from Day One the result you wish to achieve at the end. The chief justice is reported to start the strategic process by creating a list of petitions the chief believes should be discussed.<sup>113</sup> Any justice can ask that cases be added to the list for conference discussion. No matter how a case got on the list, the conference vote encourages a justice to predict their colleagues' opinions on the legal merits of the petition. This assessment is important in several ways. First, a justice who is leaning toward petitioner's argument will be inclined to grant it, but the inverse is also true. The former is sometimes called an "aggressive grant" and the latter, a "defensive denial."<sup>114</sup> Second, the procedural posture and the identified

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<sup>109</sup> *The Supreme Court at Work*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/courtatwork.aspx> [<https://perma.cc/Y9RB-WSPG>] (last visited Mar. 16, 2021). See also Carrington & Cramton, *supra* note 39, at 591, n.269.

<sup>110</sup> This range is an estimate based on Justice Ruth Bader Ginsburg's report that eighty-five percent of all petitions are "denied automatically" because no justice asks for them to be placed on the discussion list, and seventy-five to one hundred cases proceed to written decision after oral argument in a typical year when the number of petitions ranges from seven to eight thousand. Ginsburg, *supra* note 46, at 518–520.

<sup>111</sup> Only justices are permitted to enter the room and the junior justice must answer the phone or a knock on the door. *Id.* at 518.

<sup>112</sup> Political scientists use docket records from retired justices to ascertain how they made past decisions. Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 390–91 (2004). Justices occasionally reveal the process in public discussions. For a review of the process for the last sixty years, see David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779, 787–795 (1997).

<sup>113</sup> WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY, 82–84 (reprt. ed., 2016) (1964); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 13 (1983).

<sup>114</sup> H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 198–215 (1991).

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issues may affect case resolution and signal how the Court may handle related issues in the future. These nuanced considerations sit atop a tendency to deny petitions based on the belief that it is better to wait for a clean case on the particular constitutional issue than to make muddled law in a case with awkward facts or a confounded procedural status.<sup>115</sup>

Whether and how justices use their cert votes to shape policy is a major scholarly topic.<sup>116</sup> The empirical results show statistically significant patterns, but their strength and direction is uneven. The lack of definitive trends is probably the result of limited data and the possibility that strategic voting is limited to a subset of cases in areas of high visibility or conflict. Nonetheless, we can conclude that, to the extent justices consider the votes of their colleagues on a given petition, and the view of their colleagues on the merits, they will be influenced by whether the Court consists of an even or odd number of justices.

An odd number makes it easier for individual justices to estimate the likelihood that the Court will grant a petitioner relief because it avoids the problem of considering the implications of a deadlock. The justices also have the best information to predict individual votes based on their interactions with each other over many years. Better predictions make for higher success rates if they choose to engage in strategic voting, as compared with simply voting their position without

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<sup>115</sup> The general authority for this position applies to law clerks in the cert pool, but it can be generalized to the Court itself. See, e.g., Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1235 (2012); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1376–77 (2006). In Benjamin Johnson, *The Supreme Court's Political Docket: How Ideology and the Chief Justice Control the Court's Agenda and Shape Law*, 50 CONN. L. REV. 581, 590–93 (2018), the author describes compelling examples of both types of strategies in specific cases.

<sup>116</sup> Studies by Margaret Meriwether Cordray and Richard Cordray's are among the most comprehensive. See, e.g., *Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits*, 69 OHIO ST. L.J. 1 (2008); *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 397 (2004).

regard for the other eight votes. For these reasons, an odd number encourages justices to engage in strategic voting on petitions in order to shape or preserve their legal and policy choices.

By contrast, an even-numbered Court would likely suppress strategic voting on cert decisions. The first consideration is the relationship between the number of justices required to grant cert and the total number of justices. For instance, if SCOTUS preserved its Rule of Four after an increase to ten justices, then it would become harder for the justices to predict if a petition will succeed on the merits. The additional justice would increase the mathematical and qualitative complexity, decisions on issues may multiply, and petition decisions which garner only four “yes” votes would say less about the “no” votes from the other six justices. Conversely, a rule requiring assent by at least half of the justices might force greater transparency at an early stage.<sup>117</sup> If the Court size were increased to ten justices, who implemented a Rule of Five, the justices would be informed in a highly contested case with a 5-5 vote to grant review that a deadlocked vote on the merits was likely. A tie vote on the cert petition could, in the end, have the same effect as a deadlocked vote on the merits: the judgment of the lower court remains in effect.

Second, and likely more important, an even number of Justices would decrease the strategic power of the chief justice to influence the types of cases selected by the Court. When voting on any aspect of a case, the chief justice’s vote counts the same as the other votes, but the chief’s administrative duties can alter the nature of the cases before the Court. For instance, by tradition, the chief creates list of cert petitions to be discussed. This power is not absolute because any justice can add a petition to the list. Nonetheless, as anyone who has worked on a committee of more than

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<sup>117</sup> The Court also created a shadow rule to allow tentative interest in cases. Since the early 1970s, justices may cast a “Join-3” vote that is counted as a “no” vote unless three other justices join in the vote to grant cert. PERRY, JR., *supra* note 114, at 48–49.

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three people knows, the authority (and responsibility) of one person to create an agenda of topics to be discussed delegates a fractional amount of power to that person. Here, the consequences are real and immediate. If a petition does not make it to the discussion list, it is automatically denied. In the course of many thousands of petitions over many years, the incremental consequences of denial can influence the overall tenor, if not direction, of the Court.<sup>118</sup>

Another advantage that the chief possesses is the privilege of the first vote.<sup>119</sup> The justices conference for about four hours, about twice a month, for nine months, which requires them to consider fifty or more petitions each meeting for an average of four minutes apiece.<sup>120</sup> Even with significant pre-conference preparation aided by law clerk memoranda, justices must rely on internal and external cues, such other justices' ideology or background or expertise, to make a relatively quick decision to finish the discussion list in one meeting. As a point of comparison, in a study of magistrate judges making bail decisions, the average duration of the proceedings was six minutes.<sup>121</sup> The judges made the bail decisions using a "fast and frugal" model that relied on a single cue, despite the legal standard requiring consideration of multiple factors.<sup>122</sup> Apart from pre-conference conversations, Supreme Court justices, on average, only have thirty seconds each to ask questions or to make an observation before voting on a given petition at conference. In other words, there is virtually no time for substantive discussion at conference, and it would be just as efficient for the justices to forgo meetings and submit votes electronically. Most chiefs would be

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<sup>118</sup> Chief Justice Rehnquist is reported to have been able to influence the docket in ways that paralleled his ideology. Johnson, *supra* note 115, at 618–22.

<sup>119</sup> Johnson, *supra* note 115 at 618–619 ("first-mover advantage" allows the Chief to influence the other justices before they vote a petition).

<sup>120</sup> This time estimate has persisted for at least eighty years. *Id.* at 595 n. 98.

<sup>121</sup> Mandeep K. Dhimi & Peter Ayton, *Bailing and Jailing the Fast and Frugal Way*, 14 J. BEHAV. DECISION MAKING 141, 144 (2001).

<sup>122</sup> *Id.* at 156.

reluctant to adopt such a procedure because they would lose the first-mover advantage, which is based on a herding effect arising from differing expertise, signaling, and shared ideology.<sup>123</sup> That is, blocs of justices (whether delineated by seniority, ideology, or politics) respond similarly to the chief's vote, perhaps assuming greater expertise in administrative matters, or that their position on the merits would be the same or opposing. In any event, justices under time pressure are as likely as other judges to use a fast and frugal model with one cue, and the chief's vote easily supplies that cue. A vote to deny cert is not as helpful to justices who do not share the chief's ideology because pressures to keep the plenary docket under one hundred cases (and more recently, a far smaller number) may discourage them from voting "yes" whenever the chief votes "no."

Although an even number of justices would not eliminate the chief's advantages, increasing the difficulty of predicting the decision on the merits makes it more likely the justices will be equally empowered during cert votes. In other words, strategic voting might decrease while votes based on factors identified by rule<sup>124</sup> might increase.

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<sup>123</sup> Herding effects caused by the order of speaking can be complex to untangle. See Marco Ottaviani & Peter Sørensen, *Information Aggregation in Debate: Who Should Speak First?*, 81 J. PUB. ECON. 393, 395–96 (2001); Its existence in SCOTUS decisions has been empirically debated. Johnson, *supra* note 115, at 619–622.

<sup>124</sup> This portion of SUP. CT. R. 10. sets forth the relevant rule:

A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.



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## 2. The Process of Deciding on the Merits

The processes that individual justices use to reach and express their decisions on the merits are unique, although they generally abide by traditional legal analysis. Still, justices' approaches vary greatly. The longest-serving justice, William O. Douglas, often eschewed traditional analysis of text and precedent and would instead employ novel concepts in quickly written opinions.<sup>125</sup> Oliver Wendell Holmes noted that he wrote so quickly that he would request that additional cases be assigned to him.<sup>126</sup> More typically, a justice labors hard and long on a majority opinion, welcomes vigorous dissents as a means "to sharpen her presentation," and incorporates most changes from allied justices.<sup>127</sup> No matter the style, however, the author of a majority opinion must persuade four justices to join some portion of it (or at least the conclusion) to prevail.<sup>128</sup> We focus on this voting process in deciding the merits as it affects The Question.

The Court conducts two votes on the merits. The initial vote occurs within days after oral argument at a private conference governed by traditional, but informal, rules of procedure. This is

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<sup>125</sup> *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). Various guarantees within the Bill of Rights create penumbras, or zones, that establish a right to privacy: "[T]he foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

<sup>126</sup> See OLIVER WENDELL HOLMES, *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* 42 (Richard A. Posner ed. 1992) (June 10, 1923 letter to Frederick Pollock, with Holmes noting at age eighty that he was "pleased to think that I have done my full share of work—the doctor thinks it remarkable that I was able to—but as I don't know how narrow the margin may be I have not volunteered as I generally do to take some extra cases and relieve those who are hard pressed."); see also G. Edward White, *Holmes as Correspondent*, 43 *VAND. L. REV.* 1707, 1757 (1990) (noting that Holmes's "correspondence creates an overwhelming impression of judicial work as a job to be disposed of as quickly and efficiently as possible.").

<sup>127</sup> Ginsburg, *supra* note 46, at 526.

<sup>128</sup> The Court can also use summary adjudications and emergency relief orders in ways that approximate its "merits" decisions, but that do not include written opinions or the votes of the justices. This has been described as the Court's "shadow docket." William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 *N.Y.U. J. L. & LIBERTY* 1, 3–5 (2015). Its use has been reported as growing. See, e.g., *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 117<sup>th</sup> Cong. (2021) (testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law).

an oral vote.<sup>129</sup> The second vote is the final, official vote. It is made in writing during the course of finalizing the majority, concurring, and dissenting opinions. The justices vote by writing or joining the various opinions.

As with conference certiorari votes, the chief justice is reported as having the right to speak and to vote first at the private merits conference. It is reported that the remaining justices vote in order of seniority.<sup>130</sup> The right to vote in a particular place in the lineup does not carry the obligation to vote immediately. According to notes taken by Justice Lewis Powell, Jr., justices might pass until the end of the discussion or even later if they need to do further research.<sup>131</sup> Generally, however, enough justices vote to determine who is in the majority and minority blocs. Determining these groups is important because the chief has authority to assign the writer of the majority opinion if the chief is in the majority group (or the dissent if in the minority). This creates two significant procedural advantages for the chief.

First, the chief can signal a preferred position to the other justices and, by persuasion or group identification, shape the discussion.<sup>132</sup> Second, the chief may strategically exercise the administrative right to assign writing responsibility by joining the majority bloc even when the

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<sup>129</sup> The records of these votes appear to have only been kept by individual Justices and are not typically released until after the Justice leaves the Court. For a description of the materials available to determine this process, see Timothy R. Johnson, James F. Spriggs II & Paul J. Wahlbeck, *Passing and Strategic Voting on the U.S. Supreme Court*, 39 *LAW & SOC'Y REV.* 349, 350–52 (2005).

<sup>130</sup> The privileges of a Chief Justice derive from the position rather than experience or seniority. For instance, although John Roberts was the most junior member of the Court when appointed Chief Justice in 2005 from the U.S. Court of Appeals for the D.C. Circuit, he immediately acquired the privileges of that office.

<sup>131</sup> Johnson, *supra* note 129, at 360.

<sup>132</sup> Justice Ginsburg related a humorous story regarding William Rehnquist, who served as an associate justice for fourteen years before appointed to the chief justice position in which he served for nineteen years. As the junior justice, he believed “his ‘significant contributions’ at conference were not heeded, because ‘votes [already] had been cast [higher] up the line.’” He advocated more roundtable discussion. But when viewed from the Chief Justice’s position, he “reported ‘with newfound clarity’” that such egalitarian practices were “unlikely to ‘contribute much in practice.’” Ginsburg, *supra* note 46, at 525.

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chief leans toward the result proposed by the minority. This strategy does not impair the chief's final vote, nor preclude the option of joining the dissent.<sup>133</sup> Depending on whether the chief exercises writing-assignment authority for the majority or minority position, the most senior justice in the other bloc assigns an author for the counter opinion. Authority to assign opinion writing may not always be exercised strategically, but its significance has been empirically documented for the chief and the most senior associate justices.<sup>134</sup> The details of this process are important here because they show multi-stage procedures that allow sophisticated voting to obtain immediate and extended benefits. Assessment of strategic, sophisticated voting is an important variable trying to answer The Question.

While an odd number is conducive to strategic certiorari voting, it is even more important in merits voting. In a specific case, the justices all have access to the same substantive information, such as the trial record, legal research resources, and the opportunity to question counsel. They undoubtedly differ somewhat in their relative standing, ability, and willingness to marshal arguments, and in their detailed knowledge about each other's positions on legal issues. These similarities and differences are important in both the reasoning used to reach the result and the final result on the merits. The ability to predict or create a majority used in strategic voting in many cases depends on an odd number. A recent example is illustrative.

The most complex example in a high-profile case of contrasting reasoning and decisions on the merits is the 5-4 affirmance in *National Federation of Independent Business* (“*NFIB*”) v. *Sebelius*, which upheld most provisions of Affordable Care Act (often called Obamacare).<sup>135</sup>

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<sup>133</sup> Johnson, *supra* note 129, at 351.

<sup>134</sup> *Id.* at 372; *see also* MURPHY, *supra* note 113, at 78–83.

<sup>135</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 589 (2012).

Although Chief Justice Roberts wrote the majority opinion which relied on the congressional taxing power, that ground was a distant secondary rationale for the justices who joined Roberts's opinion, and other parts of his opinion were more in line with the position of the dissent.<sup>136</sup> Yet it was Roberts's positions on various legal issues and the final result that show how an odd number can be decisive.

*NFIB v. Sebelius* also shows that the importance of having an odd number does not depend on negotiated compromise. Popular contemporaneous reporting suggested that Roberts switched sides despite campaigning by the dissent,<sup>137</sup> but close examination of his reasoning displays analytical conclusions rather than compromised political and policy choices.<sup>138</sup> Without Roberts being able to cast the tie-breaking vote, the opinions on legal issues and the final result might have been quite different.

That justices sometimes refuse to compromise their individual positions in the final result or supporting rationales may not describe the majority of their interactions. They may be more likely to compromise by accepting modified positions to maintain the votes of allied justices and to persuade dissenting or undecided justices to join them.<sup>139</sup> It is reported that up to fifty percent of all cases involve changes in votes and opinions.<sup>140</sup> As Professor Walter A. Murphy observed in

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<sup>136</sup> From the beginning, the case involved a complex set of issues, but the resulting opinions require a table to keep straight the legal reasoning. *See, e.g.,* Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 7 (2013) (counting seven opinions on five issues).

<sup>137</sup> *E.g.,* Avik Roy, *The Inside Story on How Roberts Changed His Supreme Court Vote on Obamacare*, FORBES (July 1, 2012) <https://www.forbes.com/sites/theapothecary/2012/07/01/the-supreme-courts-john-roberts-changed-his-obamacare-vote-in-may> [<https://perma.cc/5VJZ-LQUK>].

<sup>138</sup> Martha Minow, *Affordable Convergence: 'Reasonable Interpretation' and the Affordable Care Act*, 126 HARV. L. REV. 117, 118 (2012).

<sup>139</sup> *See* LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE*, 10–18 (1998) (exploring strategic decisions by Supreme Court Justices).

<sup>140</sup> *Id.* at 8.

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his groundbreaking book on judicial strategy, “To make the most of having to share decision-making authority . . . a justice would have to be willing generally to compromise.”<sup>141</sup>

An odd-numbered Court also contributes to the phenomenon of a single justice casting (and typically writing) the tie-breaking vote in multiple cases and creates the perception of a “swing justice”<sup>142</sup> whose influence exceeds that of the other justices and even of the chief.<sup>143</sup> The reasons for the emergence of an especially influential justice are sometimes posited as a change in the ideological mix among the justices, but empirical investigation suggests that swing votes are influenced more by strategic considerations and tactics not used by the other justices.<sup>144</sup>

An even number of justices would not eliminate strategic considerations and tactics; rather, it would increase their complexity. Instead of orienting toward a single justice, a small bloc of justices would typically need to appeal to several justices in evenly divided, highly contested matters. This has the effect of diminishing the influence of individual justices, such as the chief or the current swing justice, thus dispersing influence among a greater number of justices. Whether increased complexity and a dispersion of influence would affect the prevalence of strategic voting is difficult to predict because there have been few opportunities to observe even-numbered courts.

#### F. EFFECT ON OTHER BRANCHES OF GOVERNMENT

The United States Constitution is often described as the founding document protecting citizens’ rights. The Court follows this theme with the engraving on the Supreme Court Building that proclaims the Court’s goal is “Equal Justice Under Law,” which generally refers to the

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<sup>141</sup> MURPHY, *supra* note 113 at 90.

<sup>142</sup> Peter K. Enns & Patrick C. Wohlfarth, *The Swing Justice*, 75 J. POL. 1089, 1089 (2013).

<sup>143</sup> See, e.g., Rosen, *supra* note 49.

<sup>144</sup> Enns & Wohlfarth, *supra* note 142, at 1103–04.

expectation that everyone be treated the same under the law.<sup>145</sup> While individual rights are a fundamental component of the Constitution, when it was originally presented to the states in 1787, the Constitution primarily concerned the strengthening of a central government among affiliated states and mostly focused on the authority and relationships among the three branches of the federal government.<sup>146</sup> The overlapping power and limitations among the federal branches (as well as their relationships with the states) continue to be critically important in constitutional law. There also are limits on and grey areas surrounding the Court's authority over the legislative and executive branches. For instance, as observed in *Marbury v. Madison*, the Court itself recognizes limitations on its authority and ability to resolve political questions.<sup>147</sup> We consider whether the answer to The Question affects three important aspects of the federal governmental: (1) the checks and balances between the federal branches; (2) the relationship between federal and state governments; and (3) SCOTUS supervision of state judiciaries.

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<sup>145</sup> See, e.g., *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 26–27 (1987) (Marshall, J., concurring in judgment) (discussing application of the law equally, regardless of status or money). The precise source of the quotation is not known, although the Court states that the words express its “ultimate responsibility” to ensure “the American people the promise of equal justice under law.” *About the Court*, SUP. CT. U.S., <https://www.supremecourt.gov/about/about.aspx> [<https://perma.cc/3E2A-8DZ8>] (last visited May 11, 2021).

<sup>146</sup> A specific, enumerated list of individual rights was briefly debated during the constitutional convention and became the subject of many ratification debates. Nonetheless, what became the Bill of Rights was written after the constitution was ratified. Law and history Professor William Nelson argues the sequence of events reflected a disagreement between the Federalists and Antifederalists about the means of achieving common goals but was undergirded by a shared goal of “a new central government exercising essentially the powers granted by the Constitution.” William E. Nelson, *Reason and Compromise in the Establishment of the Federal Constitution, 1787–1801*, 44 WM. & MARY Q. 458, 477 (1987).

<sup>147</sup> Political questions involve matters that are within the exclusive domain of another branch or involve so much entanglement with political issues that the judiciary is ill-suited to resolve the matter. The doctrine has changed over time and is sometimes conflated with standing and subject matter jurisdiction. See generally John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457 (2017).

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### 1. Checks and Balances Within the Federal Government

Constitutional questions are most frequent and direct in the executive branch of the federal government. “Every day, officers or employees in the [E]xecutive branch must interpret the [C]onstitution” to conduct law enforcement actions, expend funds, direct the military, and engage in foreign affairs.<sup>148</sup> In contrast, the main concern for congressional action involves the constitutionality of its statutes.<sup>149</sup> In both the executive and legislative efforts, the coordinate branches of federal government consider Supreme Court precedent and their own interpretation<sup>150</sup> of constitutional text.

Generally, executive branch actors assume authority to act unless there is a specific limit or prohibition; in contrast, the legislature regularly tries to predict how a court would rule on a proposed statute.<sup>151</sup> This may be attributed to substantially different probabilities of judicial review of executive and legislative acts. Many (perhaps most) executive branch acts will never be reviewed in court because either (1) they involve political questions such as legislative legerdemain and foreign affairs, or (2) the actors retreat before review, such as with proposed or threatened criminal and agency enforcement actions. By contrast, it is quite likely that some court

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<sup>148</sup> David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 113 (1993).

<sup>149</sup> CONG. RSCH. SERV., *Constitution of the United States: Analysis and Interpretation*, <https://constitution.congress.gov/about/congressional-research-service> (discussing Congressional “legislative and oversight powers under the Constitution, delineating the limits of federal power over individuals and the states, exploring challenges to enacted legislation and potential problems with contemplated legislation, and examining other constitutional and statutory issues, including the separation of powers, individual rights, federalism and statutory interpretation”) (last visited Mar. 28, 2021).

<sup>150</sup> Executive authority exercised based on its understanding of constitutional text independent of Supreme Court interpretation is a minority position; nonetheless, it is a significant assertion of power. Strauss, *supra* note 148, at 120–22. Congress must rely more on the courts to enable its operational power, such as enforcement of its subpoena authority. *See, e.g.*, TODD GARVEY, CONG. RSCH. SERV., R45653, CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE (2019).

<sup>151</sup> Mark V. Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, 50 DUKE L.J. 1395, 1400 (2001).

will eventually be asked to review the constitutionality or application of many statutes Congress enacts.<sup>152</sup>

Because an odd-numbered Court will never deadlock, it can decide cases involving actions by the executive branch or Congress relatively quickly.<sup>153</sup> It is not clear, however, that quick decisions are often needed. For the executive branch, the most significant questions on constitutional authority are often covered by the political question doctrine, such as military, national security, and foreign affairs.<sup>154</sup> Even when the disputes concern more legally cognizable concepts such as privilege, the conflict often intersects with legislative oversight authority.<sup>155</sup> And speed is rarely an issue for judicial review of statutes. Unlike time-sensitive executive acts where the challengers' objections may become moot or the remedy impossible, statutes remain in place for the same or future parties to contest.

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<sup>152</sup> Judicial review is reserved for enacted statutes and the Court does not comment on or give advice about policy choices. *See, e.g.*, *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 206 (2008) (Stevens, J., concurring) (“I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: ‘The Constitution does not prohibit legislatures from enacting stupid laws.’”).

<sup>153</sup> *See, e.g.*, *Youngstown Co. v. Sawyer*, 343 U.S. 579 (argued May 13, 1952; decided June 2, 1952); *United States v. Nixon*, 418 U.S. 683 (argued July 8, 1974; decided July 24, 1974); *Bush v. Gore*, 531 U.S. 98 (argued December 11, 2000; decided December 12, 2000).

<sup>154</sup> *See, e.g.*, *Luther v. Borden*, 48 U.S. 1, 34 (1849) (“President of the United States is vested with certain power by an act of Congress, and in this case, he exercised that power by recognizing the charter government”); *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.”). Professor John Harrison explains in greater detail the subtle distinctions between federal courts' jurisdiction and judicial power under the political question doctrine. *See* Harrison, *supra* note 147 at 486 (political question doctrine limits judicial power but not jurisdiction under Article III). Additionally, specific questions about the contours of presidential authority under the constitution can be the subject of great controversy at the time and well afterwards. *See, e.g.*, Daniel A. Farber, *Lincoln, Presidential Power, and the Rule of Law*, 113 *N.W. U. L. REV.* 667, 700 (2018) (explicating unresolved “tension between the need for presidential initiative in times of crisis and the need to confine the President within the rule of law”).

<sup>155</sup> Jonathan David Shaub, *The Executive's Privilege*, 70 *DUKE L.J.* 1, 5–7 (2020).



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If an even-numbered Court deadlocks, both the President and Congress may credibly assert authority to act as coordinate branches of government.<sup>156</sup> The occurrence of a deadlock will strengthen the conclusion that the other branches must take action to resolve the dispute. In most circumstances, conflicts between the executive and legislative branches will be resolved through political action, which typically involves compromise. It is a familiar exercise for both branches.<sup>157</sup> Moreover, political actors and entities sometimes pursue judicial orders because the political process is slow, or because the current alignment of political factions does not support their positions. Strategists of this variety should not be encouraged to seek a “win” by a single vote on an odd-numbered court.

## 2. Relationship Between Federal and State Governments

The Tenth Amendment, which states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,” has been dismissed as a “but a truism”<sup>158</sup> and described as “condescendingly descriptive.”<sup>159</sup> These perceptions arose from the increasing size and budget of the national government starting in the Depression, and the Court’s contemporaneous acceptance of the breadth of several Article I enabling provisions, particularly the Necessary and Proper and Interstate

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<sup>156</sup> Neither constitutional text nor Supreme Court precedent establishes hierarchically subordinate branches. *See also Nixon*, 418 U.S. 684, 703 (1974) (“In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.”).

<sup>157</sup> *See United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977) (expressing a belief that the Framers relied “on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system”).

<sup>158</sup> *See United States v. Darby*, 312 U.S. 100, 124 (1941).

<sup>159</sup> Edward Cantu, *The Roberts Court and Penumbra Federalism*, 64 CATH. U. L. REV. 271, 277 (2015) (criticizing those who read the Tenth Amendment merely as confirmation that federal overreach can exist, as compared with the view that state authority is a separate source of local governmental authority).

Commerce Clauses.<sup>160</sup> Like many constitutional principles, those affecting the power balance between the federal and state governments ebb and flow. Beginning with decisions by the Rehnquist Court, and particularly those by Justice Scalia,<sup>161</sup> the virtually unfettered deference to Congress in the previous era in matters affecting sovereign state authority has been declining for thirty years.<sup>162</sup> State governments, as well as federal agencies and congressional drafters, closely follow and sometimes participate in “federalism” cases.<sup>163</sup>

An odd-numbered, deadlock-proofed Court can resolve specific cases quickly. Similar to the structural tension inherent in federal checks and balances, the question however is whether in federalism cases speed is preferable to percolation of issues and consideration of arguments developed in multiple circuits. To the extent that resolution of federalism issues is influenced by a weighing of interests, the occasional delays caused by a Court deadlock could be much more beneficial in the long run than getting a bare majority holding in an early case. The deadlocks will encourage recognition of multiple interests that develop over time and by amendment of constitutional text. Voting law cases provide a ready and potent example.

Federalism (particularly when used as a synonym or proxy for states’ rights) has been a contentious issue since Reconstruction, especially if voting opportunities for minority groups are

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<sup>160</sup> U.S. CONST. art. I, § 8, cl. 3 (Congressional power to “regulate . . . Commerce . . . among the several states” and “to make all laws which shall be necessary and proper [to execute its powers]”).

<sup>161</sup> Justice Scalia sought to limit the Necessary and Proper Clause as the “last, best hope of those who defend ultra vires congressional action.” *Printz v. United States*, 521 U.S. 898, 923 (1997).

<sup>162</sup> See Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 433–38 (2002). Whether the Roberts Court will increase the limitations on federal power involving the states or merely preserve it is a matter of debate because results in cases impacting federalism have been “uneven.” Ilya Somin, *Federalism and the Roberts Court*, 46 PUBLIUS J. FEDERALISM 441, 441 (2016).

<sup>163</sup> “Federalism” issues arguably exist in the majority of the Court’s cases, including individual rights (e.g., recognition of an individual right necessarily means limits on state governments’ authority to regulate), federal spending, federal agency regulations, and federal preemption of state law. For our purposes in this section we focus on the structural balance between federal and state authority.

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limited.<sup>164</sup> Beginning in 2013 with *Shelby County v. Holder*<sup>165</sup> holding unconstitutional Section four of the Voting Rights Act, the Court is on an inevitable path to address federalism issues in future voting cases. Additionally, the 2020 presidential election has motivated political parties and participants to focus on changing state and federal voting laws. There will likely be facial and as-applied challenges to such changes. Even setting aside significant factual issues, the structural issues are complex. For example, constitutional arguments focused only on the Tenth Amendment necessarily fail to consider the prescriptive remedies within the Fourteenth and Fifteenth Amendments.<sup>166</sup> The fact that the country and the Court have wrestled with these issues for more than 150 years without achieving a satisfactory result should be sufficient proof that speed and finality are poor substitutes for extended consideration, reflection, and the pursuit of consensus.

### 3. SCOTUS Oversight of State Court Decisions

It is a maxim that the Supreme Court has “no supervisory authority over state judicial proceedings.”<sup>167</sup> “Supervisory authority” is an imprecise term, but it includes the power of one court to direct the procedures of another court even in the absence of a statute or court rule authorizing such direction.<sup>168</sup> However, state court “wrongs of a constitutional dimension” under

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<sup>164</sup> See, e.g., WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 152, 155 (1964) (“[T]he main beneficiary [of federalism] throughout American history has been the Southern whites, who have been given the freedom to oppress Negroes . . . . [I]f in the United States one approves of Southern white racists, then one should approve of American federalism.”).

<sup>165</sup> *Shelby County v. Holder*, 570 U.S. 529, 556–57 (2013).

<sup>166</sup> U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens . . . .”); U.S. CONST. amend. XV, § 1 (right to vote cannot be denied or abridged by any state based on race or color). See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 113 U. CHI. LEGAL F. 113, 133–143 (2015).

<sup>167</sup> *Smith v. Phillips*, 455 U.S. 209, 221 (1982).

<sup>168</sup> *McNabb v. United States*, 318 U.S. 332 (1943), is the seminal case establishing the authority of the Court to impose a rule not required by the Constitution or Congress. *McNabb* held that confessions obtained during detentions in violation of the rules of criminal procedure are inadmissible at trial, basing this evidentiary rule on “its supervisory authority over the administration of criminal justice in the federal courts.” *Id.* at 341.

the U.S. Constitution are reviewable by the Supreme Court.<sup>169</sup> This authority derives from Article III supremacy and, arguably, appellate jurisdiction enabled by federal statute.<sup>170</sup> Because federal courts other than SCOTUS exist within a separate judicial hierarchy, they lack direct appellate jurisdiction to review state court cases, which means state courts are only obligated to follow the Supreme Court for federal precedent on constitutional or federal law matters.<sup>171</sup>

As any state court judge or justice will attest, consideration of Supreme Court precedent is a regular part of their job.<sup>172</sup> Criminal procedure is largely based on constitutional principles, and most substantive areas of law, such as family relationships, discriminatory behavior, governmental takings, and equal protection and due process protections, include some constitutional provisions or basis. Parties assert and often seek to extend Supreme Court precedent. As noted above, state courts are not dependent on Supreme Court rulings to adjudicate their cases when no such Supreme Court rulings have issued. In the absence of controlling precedent, state courts have the same

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<sup>169</sup> *Smith*, 455 U.S. 209, 221 (1982).

<sup>170</sup> The extent to which the Supreme Court's authority over state court cases involving constitutional or federal law questions is a matter of some historical and theoretical debate. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 817 (1994). For practical purposes, we assume the pragmatic approach: state courts follow Supreme Court precedent because their decisions may be reversed by their own appellate courts or the Court itself if they do not do so.

<sup>171</sup> *Id.* at 825. Federal habeas corpus review is different from direct appellate jurisdiction, but rulings in individual cases might be perceived as appellate review. As Professor David Shapiro has observed, "purity of this [hierarchical] model is somewhat muddled in the criminal area, where the habeas corpus power does give the lower federal courts a kind of appellate jurisdiction over the state courts on certain matters." David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 771 (1979–1980). More recently, Professor Amanda Frost questioned the accuracy and adequacy of the conventional view that state courts are not bound by lower federal court precedent. See Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53, 53 (2015).

<sup>172</sup> See, e.g., *State v. Eastlack*, 180 Ariz. 243, 253 (1994).

To determine whether publicity reaches the presumptively prejudicial level, we look to the United States Supreme Court's rulings in *Rideau v. Louisiana*, 373 U.S. 723 (1963) (defendant's police interrogation and resulting confession were filmed and broadcast three times in the community where the trial was held); *Estes v. Texas*, 381 U.S. 532 (1965) (media allowed to overrun the courtroom itself during pretrial hearing); and *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (extremely inflammatory publicity and massive amounts of media allowed in the courtroom during trial).

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authority to interpret constitutional text, albeit subject to review by the Supreme Court. Even then, they usually do so against the backdrop of Supreme Court precedent on related issues, and to demonstrate that the Supreme Court has not ruled on the precise federal question before the state court.

An odd-numbered Court will assist state court judges in specific cases pending before the state court if the Court definitively rules on a particular question after it has been raised in a pending state court case, but before a decision must be issued in a pending state case. For this window of time, only a small number of state cases would be assisted by the Court's ruling. In no reasonable circumstance would a state court indefinitely delay ruling on a matter in the hope that the Supreme Court would, at some unknowable time in the future, grant review in, consider, and then issue a decision resolving the federal law issue. As a practical matter, there are too many cases, and too many issues in a single case, for Court precedent to make a measurable impact during the comparatively short pendency of the state court case. More likely, the state court expects the parties to notify it if recent Supreme Court precedent controls disposition of a pending issue (or if such a decision is imminent during the current term of the Court). In other words, there is little advantage to be gained from quick Supreme Court decisions for a state court in resolving cases currently pending before it.

An even-numbered Court may assist state courts more by issuing consensus decisions with uncomplicated holdings. State court judges and justices are certainly capable of dissecting 5-4 results with multiple conflicting and concurring opinions, although trial court judges less often have the adequate time or law clerk assistance to ensure that they have not overlooked an important

distinction affecting how the reasoning applies to the case before them.<sup>173</sup> *Miranda v. Arizona*<sup>174</sup> may have multiple flaws in its jurisprudential foundation and practical effects, but it is clear in its direction to law enforcement and the courts.<sup>175</sup> An even-numbered Court is somewhat more likely to provide the same level of clarity.

### G. NON-CONSTITUTIONAL CASES

The Supreme Court decides many cases<sup>176</sup> based on statutory interpretation or a non-constitutional ground. The cases typically arise from the Court's appellate jurisdiction.<sup>177</sup> Using the Supreme Court Database<sup>178</sup> for the terms 1946–2019, the cases can be categorized into three interpretative groups: (1) constitutional; (2) federal statutes; and (3) other, which consists of rules, state law, and miscellaneous federal law.<sup>179</sup> Each category roughly comprises one third of the total

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<sup>173</sup> For instance, in the past decade, lower courts and the Supreme Court have addressed implied consent and Fourth Amendment issues involving blood draws in drunk-driving prosecutions. This type of case is among the most common in trial courts. In a short time, the Court has twice issued plurality decisions requiring careful parsing of the issues and reasoning to determine their application to a standard motion to exclude the principal evidence. See *Missouri v. McNeely*, 569 U.S. 141 (2013); *Mitchell v. Wisconsin*, 139 S.Ct. U.S. 2525(2019).

<sup>174</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>175</sup> The Court itself recognized *Miranda's* clarity strengths in *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”). The 5-4 *Miranda* decision became a 7-2 affirmance in *Dickerson*, demonstrating that closely decided cases sometimes become consensus models. In this instance, it was the clarity of *Miranda's* instructions in a single opinion that is important.

<sup>176</sup> “Cases” in this context refers to matters brought before the Court for oral argument, which almost always result in decisions on the merits accompanied by a written explanation.

<sup>177</sup> U.S. CONST. art. III, § 2 (“[T]he Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make”). Appellate jurisdiction is among the more technical topics because it blends the inherent power of the Court to decide a small set of cases with Congressional power to create lower courts and to set jurisdiction of all federal courts. There are periodic proposals to limit jurisdiction when the Court inevitably disappoints some members of Congress. See, e.g., John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 204–05 (1997). Nonetheless, absent a statutory change to subject matter jurisdiction or an enlargement of cases subject to a right of appeal to the Supreme Court, these cases are still subject to discretionary rather than mandatory review.

<sup>178</sup> *The Supreme Court Database*, WASH. U. L., <http://supremecourtdatabase.org> [<https://perma.cc/P542-HKNY>](last visited Sept. 26, 2021).

<sup>179</sup> The respective “legal provisions” coding systems are (1) Constitution and Constitutional Amendment, (2) Federal Statute, and (3) Court Rules, Other, Infrequently Litigated Statutes, State or Local Law or Regulation & No Legal Provision. There are approximately 7,770 cases categorized using “Legal Provision Area” into these three groups.

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number of cases decided during this seventy-three-year period. In other words, one out of three cases is decided on a constitutional basis, while two out of three cases are decided on a non-constitutional basis. The percentages vary from term to term, but the one-to-two ratio of constitutional to non-constitutional decisions is generally stable over time.

Non-constitutional cases typically involve more statutory construction than the historical and policy analysis of constitutional cases. They also are more likely to involve the nuts and bolts of discrete practice areas such as substantive federal criminal law,<sup>180</sup> admiralty, arbitration, bankruptcy, elections, tax, and immigration. They also include many agency cases involving Social Security, Medicare, securities, and Veterans' Affairs. Statutory cases appear more likely to involve conflicts of interpretation of specific statutory provisions between the circuits, rather than the more general issues in constitutional law cases.

But there are also non-constitutional cases involving subjects of constitutional litigation. For instance, discrimination in voting, employment, and housing can be addressed by both statutory and constitutional law.<sup>181</sup> Native American rights and law are another major example of overlap between the Constitution and statutory (and regulatory) law.<sup>182</sup> These are important issues,

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Cases involving supervisory authority, common law, or diversity jurisdiction are not included in this coding system. *See id.*

<sup>180</sup> The reference here is to substantive criminal law defining crimes and penalties. Criminal procedure matters typically involve individual rights contained within the Bill of Rights, especially Amendments IV–VI.

<sup>181</sup> *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) (Title VII prohibits employers from discriminating on the basis of homosexuality or transgender status), which has been viewed in substance as interconnected with rights recognized in *Obergefell*. Noah Feldman, *How LGBTQ Rights Will Fare Under a Conservative Supreme Court*, BLOOMBERG OP. (Oct. 13, 2020), <https://www.bloomberg.com/opinion/articles/2020-10-10/how-lgbtq-rights-will-fare-under-a-conservative-supreme-court>.

<sup>182</sup> *See, e.g., McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481–82 (2020) (because Congress did not disestablish land reserved for the Creek Nation, it remains “Indian country” under the Major Crimes Act granting federal government exclusive jurisdiction to try certain major crimes committed by enrolled members of a tribe on that land); *see also* U.S. CONST. art. I, § 8, cl. 3, art. VI, cl. 2.

but to the extent the Court treats them as statutory and subject to revision by the legislature, they are better characterized as non-constitutional in this context.

On first inspection, these non-constitutional cases, which represent two thirds of the cases the Court decided, might be better served by an odd-numbered court to avoid deadlock. After all, although statutory construction rules can engender prolonged debates, many are of a nature similar to grammar disputes: at least in the interpretive process, it may be more a question of style than of substance, although the result of that process often is substantive. In that case, the Court should abide by the cardinal rule for all judges: it is more important to make any decision rather than delaying unnecessarily to avoid making a wrong decision. The alignment of votes in non-constitutional cases versus constitutional cases suggests that such a process may be in place currently.

Using our 2-1 division of cases among the three interpretative groups,<sup>183</sup> the frequency of 9-0 versus 5-4 votes varies significantly depending on whether the case is constitutional or non-constitutional. Specifically, over the more than seventy-year period analyzed, constitutional cases were one and a half times more likely to result in a 5-4 majority vote compared to non-constitutional cases.<sup>184</sup> The inverse trend for this same period is suggested on the opposite end (9-0), but it is less dramatic.<sup>185</sup> This graph illustrates the majority voting patterns (i.e., 5-4, 6-3, 7-2, 8-1, or 9-0) of the three types of cases since 1946:

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<sup>183</sup> See *WASH U. L.*, *supra* note 178.

<sup>184</sup> Nine percent versus 6% for federal statutes and 5% for miscellaneous cases.

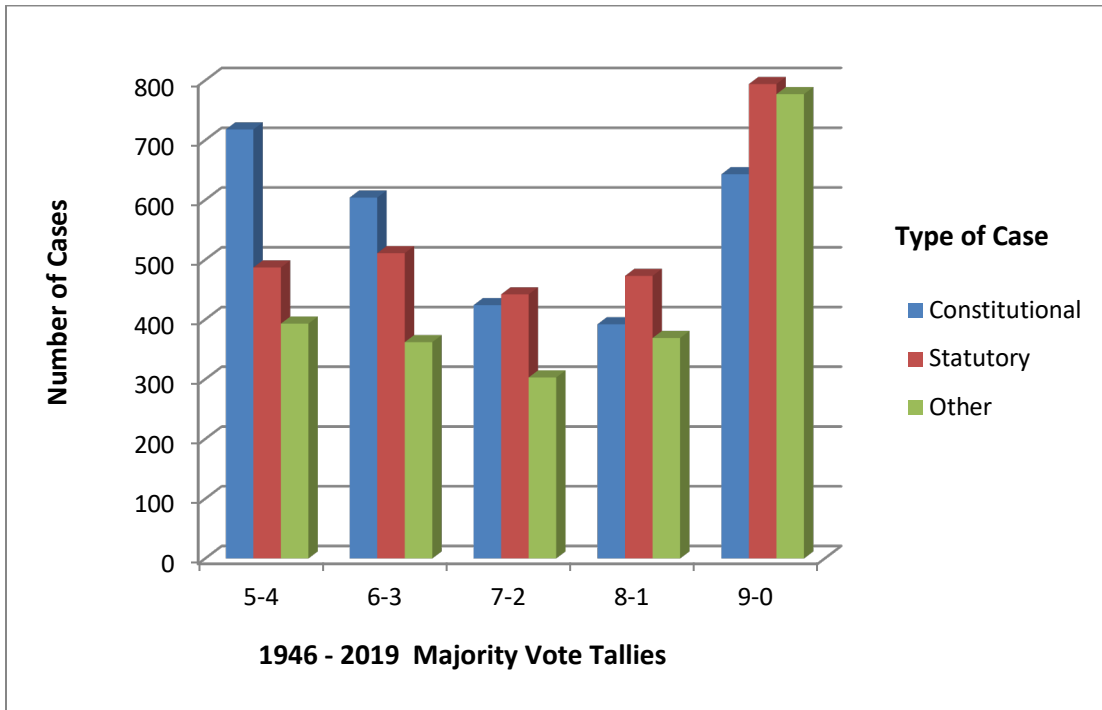
<sup>185</sup> Eight percent versus 10% each for federal statutes and miscellaneous cases.



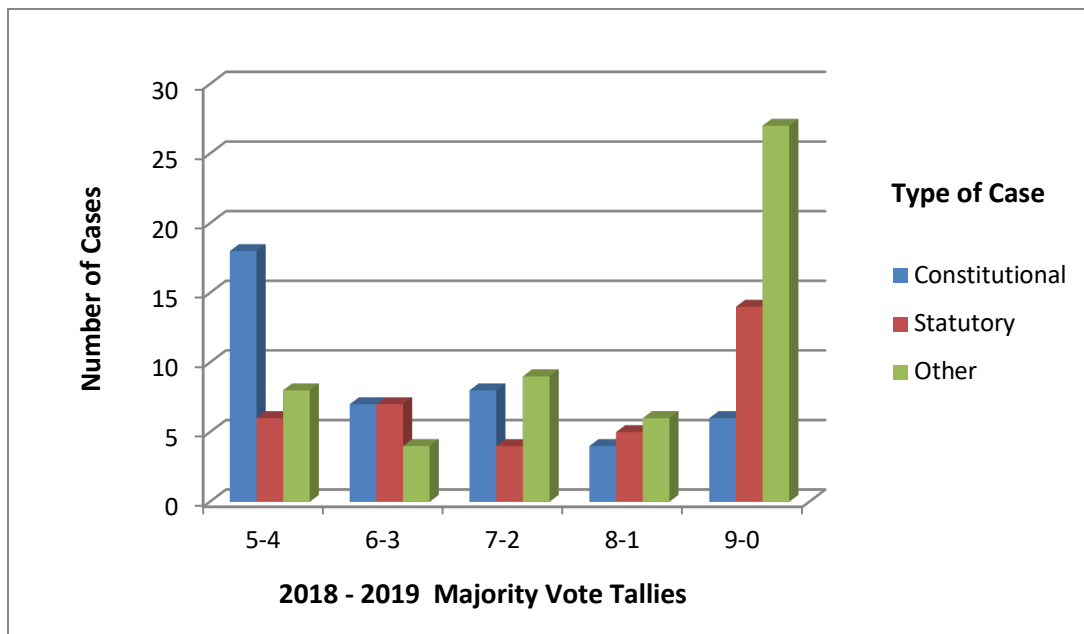
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The trend is more dramatic when the period is limited to the last two terms (2018-2019):



We did not attempt a rigorous statistical analysis to make an empirical proof.<sup>186</sup> These trends, however, at least suggest that the Court is less likely to deadlock (or have one-vote majorities) in non-constitutional cases than in constitutional cases. If so, an even-numbered Court does not appear to impede the resolution of non-constitutional cases because they are much more likely to garner the votes of all or a significant majority of the justices and, in any event, not be decided by a bare majority of one justice.

#### H. PUBLIC PERCEPTION OF DEADLOCKED DECISIONS AND PARTISAN DECISION-MAKING

It is common to attribute less authority or permanence to closely divided cases, especially those which could have gone the opposite direction with a single vote. Justice Ruth Bader Ginsburg, for example, is reported to have said, “I don’t think that 5-4 decisions have the same clout as a unanimous decision.”<sup>187</sup> Whether this perception is true, either as a matter of diminished precedential value or the likelihood such cases will be reversed or degraded, close decisions are a topic of continued professional study.<sup>188</sup> Public perception of closely divided cases is an associated issue that aggravates the issue of perceived Court legitimacy arising out of divisive or separate opinions.<sup>189</sup>

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<sup>186</sup> A detailed analysis, particularly one that examines trends in specific time periods, could be the subject of an entire article. See, e.g., Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769 (2015). Nonetheless, we are not aware of any efforts to compare the voting patterns using the type of categorization we present here.

<sup>187</sup> Adam Liptak, *On Supreme Court, Does 9-0 Add Up to More Than 5-4?*, N.Y. TIMES (Aug. 12, 2014), <https://www.nytimes.com/2014/08/12/us/politics/when-justices-disagree-public-may-not-care.html>

<sup>188</sup> Sunstein, *supra* note 186, at 770–71.

<sup>189</sup> Chief Justice Roberts reportedly implied public benefits when controversial issues are decided on the “narrowest possible grounds” because “the rule of law benefits from a broader agreement.” THE ASSOCIATED PRESS, *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES (May 22, 2006), <https://www.nytimes.com/2006/05/22/washington/22justice.html>; see also M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 284 (2007) (“In a speech at Georgetown Law School, Chief Justice Roberts explained that ‘[t]he broader the agreement among the justices, the more likely it is a decision on the narrowest possible grounds.’”) (citation omitted). He also advocates for fewer separate opinions,

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Measuring public perception of any particular Court decision is difficult because most citizens do not know the details of the case, let alone how the justices divided in their votes. There has been at least one attempt to determine experimentally whether the size of the majority vote affects public attitudes about the decision, its policy, and the Court as an institution. Professor Michael F. Salamone conducted a series of survey studies in which he examined the effects of a manipulated vote tally on the perception of the Court and its decisions. The cases were fictitious, but they were closely related to actual decisions involving gay civil rights, employee privacy, and contract dispute resolution. The outcome was randomly varied. The majority sizes were reported as unanimous, 5-4, 8-1, or no mention of the vote. He also obtained pre- and post-treatment (i.e., before and after the respondent was told about the Court's ruling) assessments of the respondents' attitudes on the issues and toward the Court as an institution.<sup>190</sup>

The results did not support the belief that divided decisions reflect poorly on the Court or are less convincing.<sup>191</sup> Particularly in cases involving high controversy, the respondents' pre-treatment beliefs about the Court remained unchanged regardless of the Court's decision or majority size. In fact, there was some indication that respondents can have a more favorable opinion about the Court if there is some dissent.

We report this experiment in some detail to highlight the difficulty of making an empirical prediction about the effects of majority voting patterns. Several possibilities are worth considering.

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"I think that every justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they're writing separately, about the effect on the Court as an institution." Jeffrey Rosen, *Robert's Rules*, THE ATLANTIC (January/February 2007), <https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559>.

<sup>190</sup> Michael F. Salamone, *Judicial Consensus and Public Opinion: Conditional Response to Supreme Court Majority Size*, 62 POL. RES. Q. 320 (2014).

<sup>191</sup> *Id.* at 331–32.

Unanimous decisions may not be the elixir to improve public perception of the Court or any particular decision, or the legitimacy of either. Cases involving subjects about which people routinely disagree might be viewed suspiciously if decided by a unanimous court. The presence of a dissent, even by one justice, shows that the Court considered an opposing view. In other words, the public arguably possesses a fairly sophisticated view of how Court decisions reflect many interests.

Would public perception be affected by the answer to The Question? We do not know. The general public may be less concerned about the particular result than the perception that the parties' arguments were fully considered. Dissents, whether by one or four justices on the nine-member SCOTUS, provide indirect proof that competing positions were considered. This is consistent with studies of procedural fairness in other courts. It may be that the public perception of a just result depends as much (or more) on perceptions about being heard than a favorable result.<sup>192</sup>

Except for a small number of especially divisive cases, it would appear that the public generally does not prefer one result over another. On the one hand, an odd-numbered court does not provide a particular advantage by avoiding deadlocked decisions. On the other hand, an even-

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<sup>192</sup> Cf. Frankfurter & Landis, *supra* note 17, at 1043 n.120

“Next to doing justice, it is important to satisfy the People that justice has been done. The confidence on their part, in the Judiciary of their country, produces that contentment and tranquility which is the best security against sudden and dangerous political excitements. The Judges of the Supreme Court now enjoy this confidence in an eminent degree . . . No suspicion has ever arisen against their personal or judicial integrity. Would the Supreme Court have enjoyed the same good fortune, if the judges had been entirely secluded from public observation, and had been confined, in the discharge of their important duties, to a room in this Capitol?”

(Quoting then-Member of Congress James Buchanan, Jr., citing 2 REG. DEB. 931 (1826), in the House of Representatives on January 10, 1826). Until 1935, the Court met in various locations, the last of which was at the Capitol. *Building History*, SUP. CT. U.S., <https://www.supremecourt.gov/about/buildinghistory.aspx> [<https://perma.cc/DKB5-C3PB>] (last visited May 11, 2021).

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numbered Court does not necessarily degrade the perception of the Court as long as the public can see that the deadlock reflects sincere disagreements that mirror contrasting positions.

## I. PARTISAN EFFORTS IN JUDICIAL NOMINATION AND APPOINTMENT

It is currently popular—and perhaps justified—to criticize partisanship in the nomination and confirmation process for appointment to the Supreme Court.<sup>193</sup> But it is not accurate to describe partisan rancor as a new development arising out of modern political polarization. Supreme Court nominations have always been and will always be grounded in politics as long as the official making the nomination is an office-holding, national politician. Similarly, the Supreme Court confirmation process has always been and will always be influenced by political issues as long as the authority to advise and consent rests with sitting Senators. The confirmation battles of Judge Robert Bork and others were not out of character with the historical record of presidential deal-making, withdrawn nominations, and Senate refusals to confirm.<sup>194</sup> What may have changed in the last forty years is public awareness of the political process underlying appointments,<sup>195</sup> an

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<sup>193</sup> See, e.g., Editorial, *Amy Coney Barrett is Qualified for the Supreme Court — but Should Not Be Confirmed*, L.A. TIMES (Sept. 25, 2020), <https://www.latimes.com/opinion/story/2020-09-25/supreme-court-trump-barrett> (“rushed confirmation also would exacerbate the poisonous partisanship that has infected the Senate confirmation process and undermine the credibility of the court”); Editorial, *A Better Court, Not Partisan Advantage, Should Drive Reform*, BANGOR DAILY NEWS (Oct. 28, 2020), <https://bangordailynews.com/2020/10/28/opinion/editorials/a-better-court-not-partisan-advantage-should-drive-reform> (“could be a much-needed correction toward a less partisan judicial nominations process”) (“modern era of hyper-politicized judicial nominations”); Editorial, *Breaking Judicial Norms: A History*, WALL ST. J. (Sept. 20, 2020), <https://www.wsj.com/articles/breaking-judicial-norms-a-history-11600639835>; Editorial, *Delay the Senate Vote on Supreme Court Nomination of Amy Coney Barrett*, HOUSTON CHRONICLE (Oct. 16, 2020), <https://www.houstonchronicle.com/opinion/editorials/article/Editorial-Delay-Senate-vote-on-Supreme-Court-amy-15651564.php> (advocating delay of confirmation for “the good of a nation that has been torn apart by partisan political maneuvering”); Editorial, *Supreme Court Confirmation Process Needs Overhaul*, STAR TRIB. (Oct. 6, 2018), <https://www.startribune.com/supreme-court-needs-to-overhaul-confirmation-process/495315901> (“join[ing] the call for changes that could restore integrity and a measure of independence to what has otherwise become a damaging exercise in partisan gamesmanship”).

<sup>194</sup> See generally Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988); Russell L. Weaver, “Advice and Consent” in Historical Perspective, 64 DUKE L.J. 1717 (2015).

<sup>195</sup> Freund, *supra* note 194, at 1146.

increasing perception that a justice's ideology plays a role in Supreme Court decision-making,<sup>196</sup> and the public performance aspects of televised confirmation hearings.<sup>197</sup> The answer to The Question will not remove the role and influence of partisanship in Court nominations or confirmation hearings, but it could have a subtle, significant impact on their tenor if the perception of the Court moves away from win-or-lose to consider-and-deliberate. We first consider the nature of partisan debate about the Court.

Supreme Court blocs are often characterized along the liberal-to-conservative continuum.<sup>198</sup> Although justices' ideological leanings may drift over time,<sup>199</sup> for any particular term, it is possible to create a snapshot of majority and minority blocs. These snapshots become descriptions of whether a term was made up of a conservative or liberal majority, and by how much. The labelling provides a non-legal, attitudinal account for past decisions. For instance, such labels are used to describe why a conservative majority votes to overrule past liberal holdings, to

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<sup>196</sup> Weaver, *supra* note 194, at 1741.

<sup>197</sup> Remarkably, when Justice Frankfurter was asked to appear before a Senate Committee regarding his nomination to the Supreme Court, he initially declined on the basis that his teaching duties came first, and he had "no wish to make any statement in support of my own nomination." Freund, *supra* note 194, at 1159.

<sup>198</sup> This continuum is an attitudinal measure, typically based on multidimensional scaling techniques derived from the justices' votes. The dimensions are conceptual areas, such as liberty or economic interests. The dimensional scores are sometimes reduced to a single value, which is placed on the liberal-to-conservative continuum. The coding and statistical methods are highly technical and provide inferential rather than causative conclusions. See generally GLENDON SHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946–1963* (1965); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); Andrew W. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002).

<sup>199</sup> Lee Epstein, Andrew D. Martin, Kevin M. Quinn, & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 N.W. U. L. REV. 1483, 1484 (2007).

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accept more cases presenting conservative issues, and to establish conservative-leaning holdings (and vice versa).<sup>200</sup> They also form the basis for predictions and exhortations in future cases.<sup>201</sup>

With the passing of Justice Ruth Bader Ginsburg and the confirmation of Justice Amy Coney Barrett, the Court has been described as the most conservative, with a 6-3 majority, in seventy years.<sup>202</sup> If that description is accurate, it is not clear whether or how it will affect future cases. Most social science models tend to explain why justices and majority blocs voted in the past. Despite the importance of testing a model for its predictive ability, there have been very few efforts to predict how individual justices and perceived majority blocs will vote on pending or future cases.<sup>203</sup> This lack of empirical models, of course, does not deter individuals from predicting how future cases will be decided. For our purposes, the important point is that partisans believe

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<sup>200</sup> For example, Professor Spann uses “conservative bloc” to address racial equality case voting. Girardeau A. Spann, *The Conscience of a Court*, 63 U. MIA. L. REV. 431, 437–41 (2009); Segal & Cover, *supra* note 198, at 559–60 (reporting correlations for individual justices that would function as a proxy for group votes). One of the Court’s most controversial decisions, *Dred Scott v. Sandford*, 60 U.S. 393 (1857), is also known for bloc voting by conservative Democrats to address the Missouri Compromise. Regardless of the technical validity for Chief Justice Taney to strike the 1820 enactment, there was little doubt alternative grounds existed to support the majority vote. Earl M. Maltz, *The Last Angry Man: Benjamin Robbins Curtis and the Dred Scott Case*, 82 CHI.-KENT L. REV. 265, 272–73 (2007).

<sup>201</sup> See, e.g., Amelia Thomson-DeVeaux & Laura Bronner, *How a Conservative 6-3 Majority Would Reshape the Supreme Court*, FIVETHIRTYEIGHT (Sept. 28, 2020) <https://fivethirtyeight.com/features/how-a-conservative-6-3-majority-would-reshape-the-supreme-court>; Peter J. Wallison, *Only the Supreme Court can Effectively Restrain the Administrative State*, NAT’L REV. (Dec. 1, 2020), <https://www.nationalreview.com/2020/12/only-the-supreme-court-can-effectively-restrain-the-administrative-state> (“Court’s conservative majority can use the nondelegation doctrine to begin restoring our constitutional balance of powers.”).

<sup>202</sup> Michael Bailey, *If Trump Appoints a Third Justice, the Supreme Court Would be the Most Conservative It’s Been Since 1950*, WASH. POST (Sept. 22, 2020), <https://www.washingtonpost.com/politics/2020/09/22/if-trump-appoints-third-justice-supreme-court-would-be-most-conservative-its-been-since-1950/>; Tyler Olson, *Senate Confirms Amy Coney Barrett to Supreme Court, Cements 6–3 Conservative Majority* (10/26/2020), FOX NEWS (Oct. 26, 2020), <https://www.foxnews.com/politics/senate-amy-coney-barrett-vote>.

<sup>203</sup> One of the most ambitious projects compared a statistical flow-chart method with expert predictions. See Theodore W. Ruger et. al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decision-Making*, 104 COLUM. L. REV. 1150 (2004). Another project relies on crowdsourcing using a multi-year, internet generated dataset. See Daniel Martin Katz, Michael J. Bommarito II, & Josh Blackman, *Crowdsourcing Accurately and Robustly Predicts Supreme Court Decisions*, SSRN (Dec. 11, 2017), <http://dx.doi.org/10.2139/ssrn.3085710>. Both statistical and crowd-sourced models performed better than a baseline prediction (i.e., about two-thirds of all decisions reverse the lower court) or expert predictions. *Id.*

that one can predict a conservative or liberal trend in decisions based on the how the justices can be categorized.

The perception that a particularly conservative or liberal justice is more predictable than a moderate or centrist justice is not inaccurate. Whether the predictions are made by experts, produced by a statistical model, or crowdsourced, justices at either end of the ideological continuum are more predictable voters.<sup>204</sup> For this reason, centrist justices are more likely to be seen as “swing justices,” even though they also may tend to generally lean conservative or liberal.<sup>205</sup> Their ideological leanings are often thought to be secondary to strategic voting in selected cases reflecting consideration of non-legal factors, such as public opinion.<sup>206</sup> Each of these judicial characteristics exerts an influence when those involved in the nomination and confirmation process consider not only the qualifications of a candidate, but also the candidate’s differences from and similarities to those of the justice being replaced. Usually, a candidate cements the loss by presenting a different ideological leaning or, alternatively, strengthening and increasing the number of justices on that end of the continuum. Presidents, and their party supporters, are more likely to select a candidate for pre-existing ideological leaning rather than adept, strategic voting.<sup>207</sup>

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<sup>204</sup> Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin, & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decision-Making*, 104 COLUM. L. REV. 1150, 1174 (2004); Katz et al., *supra* note 203, at 10.

<sup>205</sup> Justice Sandra Day O’Connor exemplifies how a justice may be generally classified as leaning in a particular ideological direction but who solidly occupied the middle in case votes. She was an elected Republican state politician and appointed by a conservative Republican president; nonetheless, she had such a strong influence on a large number of cases that, according to one report, looking at “almost any of the most divisive questions of American life, and Justice O’Connor either has decided it or is about to decide it on our behalf.” Rosen, *supra* note 49.

<sup>206</sup> Enns & Wohlfarth, *supra* note 142, at 1103–04.

<sup>207</sup> Todd S. Purdum, *Presidents, Picking Justices, Can Have Backfires*, N.Y. TIMES (July 5, 2005), <https://www.nytimes.com/2005/07/05/politics/politicsspecial1/presidents-picking-justices-can-have-backfires.html>.



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They rue justices who depart from expected ideological votes.<sup>208</sup> There is also no evidence that the Senate confirmation process focuses less on the strength and direction of a candidate's ideological leaning than on other qualities.

The answer to The Question seems unlikely to alter the general political calculus of the participants in the nomination and confirmation processes. Presuming they want justices to vote consistently with their ideological views, it will be in their political interest to advocate for candidates furthest along their preferred end of the ideological continuum because those candidates will more consistently vote as expected. Of course, other political considerations, such as reaction to a specific candidate or the power of the opposing party to thwart confirmation, will act as a brake on exclusive partisan focus. Additionally, demographic and special interest groups will support allied candidate characteristics independent of candidates' ideological leanings. This is not to say that the ferocity of the debate will not be affected by the answer to The Question.

Political actors respond to pressure brought by their supporters and the strength of the opposition. They know from experience, history, and empirical studies that it is rational to advocate for or against judicial candidates according to where they stand on the ideological spectrum. The answer to The Question may influence public perception of the Court and, in turn, weaken or strengthen the existing partisan pressure to nominate and confirm candidates as close to the ends of the continuum as possible.

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<sup>208</sup> President Eisenhower is reported to have said his nomination of Chief Justice Earl Warren "was the worst mistake I ever made." Stephen J. Wermiel, *The Nomination of Justice Brennan: Eisenhower's Mistake? A Look at the Historical Record*, 11 CONST. COMMENT. 515, 536 (1995). Brennan's appointment also serves as a counterfactual. As Wermiel persuasively argues, Eisenhower selected Brennan based on his demographic qualities going into the 1956 election, and the president's subsequent disappointment might have been more of a case of buyer's remorse, i.e., that the whole package was not worth its initial benefit. *Id.*

An odd-numbered Court supports the perception, especially if the Court is evenly divided, that victory (or defeat) on an important constitutional right is “one justice away.”<sup>209</sup> The emphasis on winning versus losing encourages the public to pressure politicians, and it provides the basis for politicians to solicit support from the public. It creates a feedback loop urging more rather than less political partisanship.

An even-numbered Court would convey to the public and their political parties the principle that judicial deadlock is not failure. Unlike elected democratic bodies, majoritarian rule is not necessary for the Court to function. Instead, non-judicial resolution of closely divided constitutional issues could turn on political decisions and compromise.

#### J. SYMBOLISM OF WINNING VERSUS LOSING

A principal difference between an even-numbered and odd-numbered Court is that the latter eliminates (or at least vastly reduces) the possibility of a tie vote. By definition, an odd-numbered Court would never have a tie vote, absent events like recusals or pluralities. That is a given. But it merits comparing that circumstance with an even-numbered court.

It is tempting to calculate the mathematical probability of a tie decision for a ten-member court. For instance, we could assume independent choices and the flip of a fair coin to calculate a probability of 24.6%,<sup>210</sup> but neither independent voting nor a coin toss is a reasonable model for

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<sup>209</sup> Lydia Wheeler, *Supreme Court Hands Victory to Labor Unions in 4-4 Tie*, THE HILL (Mar. 29, 2016), <https://thehill.com/regulation/court-battles/274543-supreme-court-upholds-mandatory-union-fees-in-4-4-tie> [<https://perma.cc/S5BH-3LLK>]; *2000 Democratic Party Platform*, AM. PRESIDENCY PROJECT <https://www.presidency.ucsb.edu/documents/2000-democratic-party-platform> [<https://perma.cc/9YEL-73BW>] (“[E]liminating a woman’s right to choose is only one justice away.”); Allan Smith, *The Judge Antonin Scalia Wanted to Replace Him Has Divergent Views on One of Scalia’s Signature Issues*, BUS. INSIDER (Feb. 18, 2016), <https://www.businessinsider.com/antonin-scalia-wanted-replacement-who-was-anti-gun-2016-2>.

<sup>210</sup> Assuming a binary result of affirm or reverse, there are ten possible votes. (10-0, 9-1, 8-2, 7-3, 6-4 for affirm and the same number for reverse). It is analogous to tossing a fair coin ten times, in which there are 1024 possible

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how justices would or should vote. In real life, we expect justices to confer with each other (something quite different from the independent results of random coin tosses) and to decide whether to affirm or reverse based on rigorous analysis, not on probabilistic factors. Therefore, this coin toss calculation only demonstrates that there are many more mathematical permutations of a decision to affirm or reverse by majority vote in which there is a “winner” and a “loser.”

The aversion to a tie vote might be better characterized as social or psychological than as statistical. Coach Vince Lombardi, a legend in the National Football League, never had any doubts about winners and losers:<sup>211</sup>

Winning is not a sometime thing; it's an all the time thing. You don't win once in a while; you don't do things right once in a while; you do them right all of the time. Winning is a habit. Unfortunately, so is losing. There is no room for second place. There is only one place in my game, and that's first place. I have finished second twice in my time at Green Bay, and I don't ever want to finish second again. There is a second place bowl game, but it is a game for losers played by losers. It is and always has been an American zeal to be first in anything we do, and to win, and to win, and to win.

The possibility that Lombardi could not know whether he and his team were winners might even be worse than coming in second place. Although this quote is about football, similar sentiments about winning can be found in most competitions. The determination to win (or at least to avoid losing) is also a dominant trait for attorneys, especially those who practice in the courtroom. Like Lombardi, clients also do not want to come in second place in a lawsuit, and they expect their attorneys to have the same goal.

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combinations of heads and tails, of which 252 consist of an even number of heads and tails. The probability of a tie is 252/1024 or .246094.

<sup>211</sup> This quote has been widely reported. *What it Takes to be Number One*, FAM. OF VINCE LOMBARDI, <http://www.vincelombardi.com/number-one.html> [<https://perma.cc/RW7U-XXWL>] (last visited Apr. 9, 2021).

Lawyers comprised the largest group by trade in the 1787 Constitutional Convention.<sup>212</sup> As would be expected, the influence of lawyers in the judiciary increased over the centuries. Membership on the Supreme Court is not technically limited to lawyers, although there has never been a justice without some legal training or experience. Given the near-exclusive participation of lawyers in constitutional law from the beginning, it is no surprise that the focus on winning has an outsize influence on court cases.

While courtroom attorneys may say they their ultimate goal simply is to win, the substantive reality is different. They know compromise and accommodation make up the majority of the results. “Winning” is redefined to mean “meeting client goals.” Usually, those goals are curated to exclude a complete courtroom win. This practical approach is productive and understandable.

Social scientists focus on the difference between hypercompetitiveness and ordinary competition. The former is manifested in a need to win. In its extreme form, hypercompetitiveness is maladaptive because it interferes with the usual give and take of daily life.<sup>213</sup> Competitiveness, which is the intent to achieve the best result, is an admirable state. It helps people achieve more than they might without the motivation to compete with others. This comparison is not meant to psychologize or demean a person who prefers competition with clear winners and losers. Instead,

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<sup>212</sup> The exact count depends on whether the person had legal schooling or was self-taught. In any event, more than half of the group attending the 1787 Constitutional Convention can be identified as law-related. *See, e.g., Biographical Index of the Framers of the Constitution*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/founding-fathers#:~:text=In%20all%2C%2055%20delegates%20attended,sessions%20in%20a%20sedan%20chair> [<https://perma.cc/HL2T-7EEN>].

<sup>213</sup> Psychoanalyst Karen Horney is credited with recognizing hypercompetition as maladaptive personality trait. *See generally* Karen Horney, *Culture and Neurosis*, 1 AM. SOCIO. REV. 221, 221–30 (1936). Her concept has been empirically demonstrated. Richard M. Ryckman, Bill Thonrton & J. Corey Butler, *Personality Correlates of the Hypercompetitive Attitude Scale: Validity Tests of Horney's Theory of Neurosis*, 62 J. OF PERSONALITY ASSESSMENT 84–94 (1994).

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the analogy is offered to show how intolerance for not knowing who was the winner, in a relatively small number of instances, can be maladaptive. In that respect, it does not match the usual expectations of life where we know the failure to win is not necessarily a failing. So, too, it may not be adaptive to expect the Court to always be able to announce a winner and a loser. An even-numbered court is arguably a better institution for its recognition that people are better off when a winner is not announced prematurely.

### III. CONCLUSION

Efforts to change the Supreme Court's structure<sup>214</sup> or justices<sup>215</sup> will likely increase before they decrease. Most proposals will be viewed through a partisan lens: Will a changed Court be more or less likely to vote in a preferred direction on social and economic constitutional cases in the future? The ideological leanings of the justices will be the primary focus.<sup>216</sup> As in the past, increasing the number of justices is an exclusively partisan exercise unless coupled with structural modifications that place nomination and confirmation processes beyond a reasonably foreseeable political landscape. A political party that does not control the presidency and the Senate will be

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<sup>214</sup> Unsurprisingly, even the appointment of the Presidential Commission on the Supreme Court of the United States was immediately attacked because it would not do enough to change the Court or it would change the Court in unacceptable ways. See Elie Mystal, *Biden's Supreme Court Commission Is Designed to Fail*, THE NATION (Apr. 13, 2021), <https://www.thenation.com/article/politics/supreme-court-commission>; Editorial, *Biden Commissions the Supreme Court*, WALL ST. J. (Apr. 9, 2021), <https://www.wsj.com/articles/biden-commissions-the-supreme-court-11618008493>. This immediate reaction is likely partisan. The commentary starts from assumptions about optimal Court structure, processes, and membership, and then decides whether a Commission Report is likely to support or oppose that vision.

<sup>215</sup> To maximize the likelihood of a majority bloc they preferred, many political actors urged past justices to either retire or hold on based on whether the alignment of the Senate and president favored their party. It is no longer an insider's game, as editorials and citizen petitions now urge sitting justices to resign. See e.g., *Justice Breyer: Retire Now*, ACTION NETWORK, <https://actionnetwork.org/forms/breyer-retire> [<https://perma.cc/X4GH-PFRQ>] (last visited Apr. 18, 2021); Mehdi Hasan, *Justice Stephen Breyer Should Retire from the Supreme Court*, MSNBC (Apr. 8, 2021), <https://www.msnbc.com/opinion/i-m-convinced-justice-stephen-breyer-should-retire-supreme-court-n1263399> [<https://perma.cc/JTS2-SJQR>]; Paul F. Campos, *Justice Breyer Should Retire Right Now*, N.Y. TIMES (Mar. 15, 2021), <https://www.nytimes.com/2021/03/15/opinion/stephen-breyer-supreme-court.html>.

<sup>216</sup> See Freund, *supra* note 194, at 1159.

unlikely to support changes to court size because it cedes too much influence to the opposing party. In that respect, the country has changed little since the Federalists' loss to the Republicans in 1800.

Proposals of structural changes are inevitable, primarily because proponents of altering the size of the court know that partisan change is difficult to achieve and, at best, temporary. But altering the structure of the Supreme Court can only be done within the constraints of constitutional checks and balances. Additionally, the contours of judicial authority are largely contained within Article III of the Constitution.<sup>217</sup> Changes to constitutional text by Article V amendment are practically impossible. That leaves statutory changes as the only realistically viable option. The Court, however, retains authority to review (and potentially reject) statutory structural changes involving the tenure of justices,<sup>218</sup> political balancing of nominees, or its internal procedures regarding case selection<sup>219</sup> and decisional processes.<sup>220</sup> Only appellate jurisdiction provides an unobstructed change path because of its explicit reference in the Constitution and its practical importance until the Judges' Bill was passed in 1925.<sup>221</sup> Nonetheless, changing the structure of the Court by adjusting its jurisdictional limits and duties is a crude and unpredictable means of change absent a labyrinthine statutory system.

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<sup>217</sup> U.S. CONST. art. III, § 9, § 2, par 1.

<sup>218</sup> Justices serve for life, but proposals have been made to limit their service on the Supreme Court to a defined term after which they would serve as a judge on a lower federal court. *See, e.g.,* Gabe Roth, *Supreme Court Term Limits do not Require a Constitutional Amendment*, USA TODAY (Sept. 24, 2020), <https://www.usatoday.com/story/opinion/2020/09/24/supreme-court-justices-give-them-term-limits-instead-life-tenure-column/3503999001>; Ilya Shapiro, *Term Limits Won't Fix the Court*, THE ATLANTIC (Sept. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/09/term-limits-wont-fix-court/616402>. The constitutional problems with statutory term limits are persuasively addressed in Steven G. Calabresi & James T. Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. AND PUB. POL'Y 769, 859–77 (2006).

<sup>219</sup> *See supra* text accompanying notes 106–114.

<sup>220</sup> Decisional processes include supermajority requirements, stare decisis principles, and summary adjudications.

<sup>221</sup> “In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. CONST. art. III, § 2. Johnson, *supra* note 115, at 593 (in 1925 Justices requested Congress give the Court control over its docket by curtailing its mandatory jurisdiction).

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It may be an opportune time to reconsider the role of the Supreme Court as the final arbiter of constitutional law in closely divided matters that are important to both the legal community and all of society. Doing so requires thinking about the best way to resolve constitutional questions, including societal recognition for when the questions are fully, partially, or temporarily resolved. The answer to The Question suggests boundaries and possibilities for these issues. Addressing The Question provides a template for how the Court's role and operation are viewed.

The view that an odd number of justices is the only acceptable answer suggests a preference for a strong, decisive Court that is the principal and preferred means to address constitutional questions. It is a Court for which no constitutional question is too difficult to resolve within months of presentation. To the extent that politics affects the Court's decision-making, this generally occurs over decades in the nomination and confirmation of candidates possessing ideological leanings consistent with the views of one political party or the other. A Court structured in this way also offers a substitute means to establish law where majoritarian politics and legislative change do not occur quickly enough, or which occur too quickly. This is a role the Court has assumed at various times in the country's history, but with increasing frequency in the last century. It is the default position, if only because alternatives have rarely been discussed.

Our conclusions about the implications of an odd number of justices are not meant to criticize or downplay traditional, nonpartisan legal analysis. Retaining an odd number of justices is a durable method of conflict resolution and law development that has served the country since its inception, and presumably will continue to do so for the foreseeable future and beyond. It is a

model looked to throughout the world.<sup>222</sup> Lawyers and their clients rely on it to provide predictability in cases and to structure their law-related decisions. Citizens expect it. But because the Supreme Court selection process starts and operates in a political context,<sup>223</sup> the Constitution adopts and arguably encourages political factors to shape the Court's interpretation of constitutional text. This is borne out by experience. Partisan battles over the ideological leanings of Supreme Court candidates are not Kabuki theater for a nonjudicial purpose. Those leanings have a real impact on case decisions that stand alongside traditional legal analysis of the Constitution.

An even-numbered Court would not be a radical departure from what the Court does and is expected to do. Constitutional litigation will continue as before. The powers and duties of the legislative and executive branches will be subject to judicial review. The power of citizens to enforce their Constitutional rights will be respected and enabled. When majoritarian politics and its code-based law moves too slowly or too quickly, recourse will be available to determine whether extant law passes constitutional muster. Traditional legal analysis will be the formal method of constitutional interpretation. Selection of justices will be a political process, and in the long term, will likely affect case decisions.

An even-numbered Court, however, more reflects subtle changes in perception, process, and empowerment. First, an even number of justices acknowledges and appreciates that some problems of a constitutional dimension are so evenly divided that the Court itself may be unable

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<sup>222</sup> See generally GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776-1989: A GLOBAL PERSPECTIVE*, (2009).

<sup>223</sup> Many state judicial candidates are screened first by nonpartisan commissions comprising citizens and lawyers based on their legal training and experience, before advancing to a more openly political process resulting in appointment. See generally Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIA. L. REV. 1 (1994); see also Jacob E. Tuskai, *Judicial Selection in the United States: An Overview*, 60 JUDGES' JOURNAL no. 4 at 32–35 (Nov. 2021).



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to reach a result. It will be a constant reminder that an extremely powerful Court has a limitation that is not a failing. It is an attribute that signals a need for an alternative approach by the justices or political institutions. Within the Court, it prevents decisions from resting on a single justice. It encourages concessions and compromise, which also creates a greater sense of shared responsibility for a particular result. It can be too easy to shift responsibility to one person when the structure allows that type of outcome.

There will always be cases in which the division is too sharp and the choices, too stark to allow compromise among evenly split justices. Whether the divide is an artifact of the particular justices on the Court when the case presents itself, or it is representative a divided country, a tie decision transparently and publicly informs the other branches of government that they must accept responsibility to reach a political resolution. In the unlikely event that justices' disagreements are not reflections of the body politic, time and public opinion usually provide a remedy, as occurred in the 1930s at the beginning of the New Deal. Extreme divisions in the country require intensive political work. The point is that responsibility for the most difficult constitutional questions returns to the political process and, although indirectly, the people.

Allowing for an even-numbered Court would require action by the legislative and most likely, executive branches. Only Congress can initiate the change to an even number of justices. Depending on the votes, the president's agreement may be necessary. Such leadership would be a necessary element for a change in perception and a greater acceptance of responsibility for constitutional issues.

The subtlety of an even number of justices is also apparent in what would not have changed from an odd-numbered Court. Two of the most criticized decisions of the Supreme Court were

decided by a strong majority: *Dred Scott* (7-2)<sup>224</sup> and *Korematsu* (6-3).<sup>225</sup> They were not 5-4 decisions that moved the country toward civil war or failed to protect its own citizens in a time of peril. Those failings could not be remedied by subtle changes to the decisional process.

In seeking to improve the process by which the Supreme Court makes its constitutional decisions and how other branches of government rely on those decisions, separate consideration should be given to an even-numbered Court. It has advantages in function and perception. And, even if it is rejected, the exercise of considering the option will make the process of thinking about the Court more thorough and complete and strengthen the outcome.

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<sup>224</sup> *Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>225</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).