# NOMINATIONS TO THE SUPREME COURT: MUCH ADO ABOUT NOTHING OR A POLARIZED PARTISAN COURT?

DR ANDREW HEMMING*



* Associate Professor in Law, University of Southern Queensland.

## I. OVERVIEW

*The state in commissioning its judges has commanded them to judge, but neither in constitution nor in statute has it formulated a code to define the manner of their judging.*

Benjamin N. Cardozo[1]

The purpose of this article is to examine the recent history of nominations to the Supreme Court with a view to establishing whether the Supreme Court has become a polarized partisan court basing its decisions on values and ideology. For the difficult cases, do Supreme Court Justices reason in reverse by deciding their position in advance and then seeking a logical reasoned argument to justify their pre-determined outcome? Is Posner correct in suggesting that Supreme Court Justices, by virtue of being at the top of the judicial tree, are uniquely free from the constraints on ordinary judges and uniquely tempted to engage in legislative forms of adjudication, with the Supreme Court being best understood as a political court?[2] Alternatively, as Green argues, does Posner overlook the strong influence of historical legalism in constraining Supreme Court Justices from acting like politicians?[3]

In view of the political battleground that the filling of Supreme Court vacancies has become, there is a clear expectation, at least on behalf of Presidents and Senators, that their nominated and carefully screened candidate will decide important cases in a manner consistent with their own political values and ideology. Legal commentators regularly refer to the relative number of conservative and liberal Justices on the Supreme Court, with the frequent identification of a single Justice as being a 'swing' voter.[4] Such expectations and commentary reinforce the popular notion that Justices on the Supreme Court are legal proxies for the political party which nominated them and do not decide important cases with an open mind. This article considers the extent to which this popular notion of a partisan Supreme Court is accurate.

---

[1] BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 17 (1928).

[2] RICHARD POSNER, HOW JUDGES THINK 150–51 (paperback ed. 2010).

[3] Craig Green, *What Does Richard Posner Know About how Judges Think?*, 98 CALIF. L. REV. 625, 659 (2010).

[4] Andrew D. Martin et al., *The Median Justice on the Supreme Court*, 83 N.C. L. REV. 1275, 1276 (2005).

## II. THE ROLE OF THE SUPREME COURT IN THE CONSTITUTION

*A Supreme Court comprised of nine politically appointed judges whose only oversight is the icy scythe of Death.*

Jon Stewart[5]

Article III section 1 of the United States Constitution sets out the judicial power of the United States which 'shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish'.[6] Article II section 2 provides that the President 'shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law'.[7]

Article III section 1 is silent on the term of office of Justices on the Supreme Court, instead simply stating that they 'shall hold their Offices during good Behaviour'.[8] This phrase has been interpreted to mean a lifetime appointment.[9] In addition a Justice's Compensation 'shall not be diminished during their Continuance in Office.'[10] The purpose behind an unrestricted period of office and guaranteed remuneration was to protect

---

[5] JON STEWART, AMERICA (THE BOOK): A CITIZEN'S GUIDE TO DEMOCRACY INACTION 1 (First Trade ed. 2006) (2004).

[6] U.S. CONST. art. III, § 1.

[7] U.S. CONST. art. II, § 2. This covers appointments to the federal judiciary, meaning that Presidential nominations to federal Courts of Appeal and federal District Courts are also subject to Senate scrutiny. *See id.* Note that Article II section 2 also provides that: "The President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." *Id.* Thus, under this provision, President Obama could have filled up the vacancy on the Supreme Court created by the death of Antonin Scalia in 2016, when the Senate refused to consider President Obama's nomination of Merrick Garland for the vacant seat on the Supreme Court. Ron Elving, *What Happened with Merrick Garland in 2016 and why It Matters Now*, NPR (June 29, 2018, 5:00 AM), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now. The Republican majority in the Senate had argued that it was improper to fill a Supreme Court vacancy in the final year of President Obama's second term of office, and that it should be left to the incoming President. *See id.*

[8] U.S. CONST. art. III, § 1.

[9] Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765, 766 (1989).

[10] U.S. CONST. art. III, § 1.

the independence of the judiciary from the political branches of government.[11] As Alexander Hamilton stated in Federalist Papers: No.78:

> If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.[12]

However, it is worth bearing in mind that when Alexander Hamilton, James Madison, and John Jay wrote the Federalist Papers between 1787 and 1788, the average life expectancy for a white male was about 38 years of age,[13] compared with the present day figure of 78.7 years (2018).[14]

Ironically, the independence of the judiciary has been compromised by the partisan political process of appointment of Justices to the Supreme Court, aided and abetted by the lack of a specified retirement age which allows Justices who do not die in office to select the timing of their retirement to coincide with the term of a President belonging to the political party who appointed them.[15] Recently, a trend has emerged to appoint Justices at a younger age,[16] thereby ensuring their membership of

---

[11] Edwards, *supra* note 9, at 776.

[12] THE FEDERALIST NO. 78 (Alexander Hamilton) (McLean's ed. 2008).

[13] Frank Whelan, *In the America of 1787, Big Families Are the Norm and Life Expectancy is 38*, THE MORNING CALL (June 28, 1987), https://www.mcall.com/news/mc-xpm-1987-06-28-2569915-story.html.

[14] Jiaquan Xu et al., *Mortality in the United States, 2018*, NCHS Data Brief No. 355, at 1 (Jan. 2020), https://www.cdc.gov/nchs/data/databriefs/db355-h.pdf.

[15] Terri Peretti & Alan Rozzi, *Modern Departures from the U.S. Supreme Court: Party, Pensions, or Power?*, 30 QUINNIPIAC L. REV. 131, 131 (2011). For example, Anthony Kennedy was appointed by President Reagan in 1987 and retired in 2018, thereby allowing President Trump to appoint one of Kennedy's former law clerks, Brett Kavanaugh, to the vacant seat on the Supreme Court. Robert Barnes, *Justice Kennedy Asked Trump to Put Kavanaugh on Supreme Court List, Book Says*, WASH. POST (Nov. 21, 2019), https://www.washingtonpost.com/politics/courts_law/justice-kennedy-asked-trump-to-put-kavanaugh-on-supreme-court-list-book-says/2019/11/21/3495f684-0b0f-11ea-8397-a955cd542d00_story.html.

[16] James E. DiTullio & John B. Schochet, *Saving this Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1112 (2004). The only major exception to this trend was the unsuccessful nomination of Merrick Garland, who was 63 years of age when nominated by President Obama in March 2016. Elving, *supra* note 7. Ironically, one of the reasons for the selection of Garland was his age, in an abortive attempt to offer a moderate candidate who would not be sitting on the Supreme Court for half a lifetime. *Id.* Compare Garland with Clarence Thomas who was appointed at 43 years of age and is now the senior Associate Justice with 29 years of service on the Supreme Court, with the very real prospect of serving for forty plus years. *Current Members*,

the Supreme Court for as long as possible.[17] Other countries like Australia have a fixed retirement age of 70 years for federal judges including High Court Justices[18] to avoid both strategic decisions on retirement and any issues with senility or ill health affecting their ability to function effectively.[19] By comparison, in the United States, on the one hand, there is the strategic timing of a retirement and on the other hand the randomness of a death in office,[20] both of which combine to be undemocratic mechanisms of appointment to the Supreme Court.

---

SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/justices.aspx (last visited July 29, 2021).

[17] Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 804 n. 33 (1986). For example, Clarence Thomas was appointed an Associate Justice in 1991 at 43 years of age; John Roberts was appointed Chief Justice at 50 years of age in 2005; Elena Kagan was appointed an Associate Justice at 50 years of age in 2010; Neil Gorsuch was appointed an Associate Justice at 50 years of age in 2017; Brett Kavanaugh was appointed an Associate Justice at 53 years of age in 2018; and Amy Coney Barrett was appointed an Associate Justice at 48 years of age in 2020. *Current Members*, *supra* note 16.

[18] COMMONWEALTH OF AUSTL. CONST. ACT § 72. The Constitution Alteration (Retirement of Judges) 1977 amended Chapter III of the Australian Constitution so that federal judges were required to retire at the age of 70. Const. Alteration (Retirement of Judges) 1977, BILLS DIGEST NO. 82. The question put in the referendum was: "It is proposed to alter the Constitution so as to provide for retiring ages for judges of federal courts. Do you approve the proposed law?" Alexey Sidorenko, *Australia. Referendum, 1977*, ELECTORAL GEOGRAPHY, https://www.electoralgeography.com/new/en/countries/a/australia/1977-referendum-australia.html (last visited July 29, 2021). Over 80 per cent of voters supported the amendment in the referendum, which applied prospectively. *Id.* The amendment reflected (i) a perceived need to maintain vigorous and dynamic courts; (ii) a need to open up avenues for able legal practitioners to achieve judicial positions; (iii) a growing community belief in a compulsory retiring age for judges; and (iv) an avoidance of the unfortunate necessity of removing a judge made unfit for office by declining health. SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS, REPORT ON RETIRING AGE FOR COMMONWEALTH JUDGES, 1976-414, ¶ 45 (Austl.).

[19] REPORT ON RETIRING AGE FOR COMMONWEALTH JUDGES, 1976-414, *supra* note 18 ¶ 45. For example, Thurgood Marshall was in ill health for many years before finally retiring in 1991 at the age of 83 years. Albert Sehlstedt, Jr., *Justice Thurgood Marshall Dies Nation Mourns Baltimore Native, Rights Leader, 84 Thurgood Marshall: 1908-1993*, BALT. SUN (Jan. 25, 1993), https://www.baltimoresun.com/news/bs-xpm-1993-01-25-1993025004-story.html. Similarly, Chief Justice William Rehnquist was in ill health with thyroid cancer before dying in office in 2005 at the age of 80 years. Gail Gibson, *Rehnquist Dies at Age 80*, BALT. SUN (Sept. 4, 2005), https://www.baltimoresun.com/news/bs-xpm-2005-09-04-0509040010-story.html.

[20] Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 806 (2006). For example, both Antonin Scalia (79 years of age) and Ruth Bader Ginsberg (87 years of age) died while on the Supreme Court in President Trump's first term of office. BARRY J. MCMILLION, CONG. RSCH. SERV., R44235, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT'S SELECTION OF A NOMINEE 18, 21

A further aspect, as Katz and Spitzer have shown, is the trend towards appointing younger Justices to the Supreme Court has a party political dimension, in that a differential has opened up between Republicans and Democrats.[21]

> An examination of recent appointments [the study covered up until Justice Kagan in 2010] has revealed that Democrats appoint older Justices than Republicans. The magnitude of the difference in age varies, depending on which nominees are counted. Since the appointment of William H. Rehnquist to the Supreme Court in 1971, Republican appointees to the Court have averaged 50.75 years of age, while Democratic appointees have averaged 55.25 years of age, for a difference of 4.50 years.[22]

Republican President Trump made three appointments to the Supreme Court since Katz and Spitzer's study (Neil Gorsuch at 50 years of age; Brett Kavanaugh at 53 years of age; and Amy Coney Barrett at 48 years of age), which means Republican appointees to the Court have averaged 50.63 years of age (down from 50.75 years of age), and hence the comparison with Democratic appointees, who have averaged 55.25 years of age, now yields a slightly higher difference of 4.62 years (up from 4.50 years).[23]

The significance of such a differential is that "the relative youth of Republican appointees should, in the long run, pull the law 'rightward'—

---

(2021). Thus, President Trump in one term of office has been able to fill three vacancies on the Supreme Court, a third of the Court, with Justices who, given their relative youth, may well each serve for thirty plus years. John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/.

[21] Jonathan N. Katz & Matthew L. Spitzer, *What's Age Got to Do with It? Supreme Court Appointees and the Long Run Location of the Median Justice*, 46 ARIZ. ST. L.J. 41, 81–82 (2014).

[22] *Id.* at 49.

> The Republican appointees, with their ages at time of nomination, are John Paul Stevens (fifty-five years old), Sandra Day O'Connor (fifty-one years old), Antonin Scalia (fifty years old), Anthony Kennedy (fifty-one years old), David Souter (fifty-one years old), Clarence Thomas (forty-three years old), John Roberts (fifty years old), and Samuel Alito (fifty-five years old). The Democratic appointees are Ruth Bader Ginsburg (sixty years old), Stephen Breyer (fifty-six years old), Sonia Sotomayor (fifty-five years old), and Elena Kagan (fifty years old).

*Id.* at 49 n.48.

[23] Micah Schwartzman & David Fontana, *Trump Picked the Youngest Judges to Sit on the Federal Bench. Your Move, Biden.*, WASH. POST (Feb. 16, 2021, 12:33 PM), https://www.washingtonpost.com/outlook/2021/02/16/court-appointments-age-biden-trump-judges-age/.

that is, result in more qualitatively conservative holdings by the Court."[24] Katz and Spitzer simulated the effect of a systematic difference in age of appointments on the ideological position of the median Justice, and concluded that the "simulated results clearly showed a conservative drift."[25] For present purposes, of greater significance was the finding that "the widely-touted proposal to limit Supreme Court Justices to a single eighteen-year term will almost completely eliminate the effect of the differential in age, and move the Court back to the center of the ideological spectrum."[26] The significance of addressing the negative ramifications of a life-time tenure on the Supreme Court is thrown into stark focus once it is understood the role the Supreme Court plays in interpreting the Constitution, and in particular the Bill of Rights.

The unique position of the Supreme Court as a quasi-legislative body results from the first ten amendments to the United States Constitution, often referred to as a Bill of Rights, which were ratified in 1791,[27] and explains why nominations to the Supreme Court in recent years have been so bitterly contested. Perhaps the best known of these ten amendments are the first amendment (rights of free speech and free press);[28] the second amendment (right of the people to keep and bear arms);[29] the fifth amendment (guarantees the right to a grand jury, forbids "double jeopardy," and protects against self-incrimination);[30] and the tenth amendment (residual powers are reserved to the States).[31] To this list should be added the fourteenth amendment which guarantees all citizens "equal protection of the laws" and was ratified in 1868.[32] Both the fifth and fourteenth amendments contain a 'due process of law' clause.[33] As

---

[24] Katz & Spitzer, *supra* note 21, at 52. "[T]he law should follow the ideological preferences of Justices under all of the theories of judicial behavior extant in political science, with the possible exception of a naïve claim that all judges find 'the law' in the same way, regardless of ideology." *Id.* at 88 n.67.

[25] *Id*. at 88.

[26] *Id.*

[27] Gary Lawson, *The Bill of Rights as an Exclamation Point*, 33 U. RICH. L. REV. 511, 517–18 (1999).

[28] U.S. CONST. amend. I.

[29] U.S. CONST. amend. II.

[30] U.S. CONST. amend. V.

[31] U.S. CONST. amend. X.

[32] U.S. CONST. amend. XIV, § 1; John F. Kowal, *The Equal Rights Amendment's Revival: Questions for Congress, the Courts and the American People*, 43 HARBINGER 141, 144–45 (2019).

[33] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

will be discussed, the Bill of Rights has been central to the role of the Supreme Court in determining such controversial issues as abortion, gun control, and immigration, which in turn has led to the political importance of the selection of Justices to sit on the Supreme Court.

While the Supreme Court is an independent third arm of government under the Constitution,[34] the jurisdictional limits of the Supreme Court are subject to the Constitution, federal statutes, and Congress.[35] The history of the federal statutes that impact the jurisdictional limits of the Supreme Court has been one of steadily eliminating the mandatory jurisdiction by providing greater discretion to the Supreme Court to select the cases it will review: the Judiciary Act of 1891;[36] the Judiciary Act of 1925;[37] and the Supreme Court Case Selections Act of 1988.[38]

Owens and Simon have summarised this trend in these terms:

> The Judiciary Act of 1891 was Congress's first attempt to ease the burden of the Court's workload. That Act created the United States Courts of Appeals and carved out a small discretionary docket for the Supreme Court. When it later enacted the Judiciary Act of 1925, Congress once again limited the Court's mandatory jurisdiction and expanded its discretionary docket. And, most recently in 1988, Congress passed legislation that removed virtually all of the Court's mandatory jurisdiction, leaving Justices free to select the cases they wished to hear.[39]

---

[34] The independence of the judicial branch from Congress and the President has been somewhat compromised by the melding of the third arm of the judiciary into a quasi-legislative arm following the passage of the Bill of Rights in 1791. *See* Judge Paul L. Friedman, *Threats to Judicial Independence and the Rule of Law*, ABA (Nov. 18, 2019), https://www.americanbar.org/groups/litigation/initiatives/committee-on-american-judicial-system/in-the-news/threats-to-judicial-independence-and-rule-of-law/.

[35] Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385, 389–90, 397 (1983); Edwin Meese II., *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 456–57 (1986).

[36] Judiciary Act of 1891, ch. 517, 26 Stat. 826.

[37] Judiciary Act of 1925, ch. 229, 43 Stat. 936, 937. For a fuller discussion, see Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1 (2008).

[38] Supreme Court Case Selections Act of 1988, Pub. L. No. 100–352, 102 Stat. 662 (codified at 28 U.S.C. §§ 1254, 1257–58, 2104 (1994)).

[39] Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1243–44 (2012).

The Supreme Court Case Selections Act of 1988 eliminated appeals as of right from state court decisions to the Supreme Court of the United States by amending 28 U.S.C. § 1257.[40]

> **§ 1257. State courts; certiorari**
>
> a. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> b. For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.[41]

The full legal effect of 28 U.S.C. § 1257 above is, in the vast majority of cases, to leave a litigant only able to obtain a review of a lower court decision through the writ of certiorari,[42] which is now granted at the discretion of the Supreme Court when exercising its appellate jurisdiction,[43] rather than being available to the litigant as a matter of right.[44] The only appeal as of right to the Supreme Court that still exists, pursuant to 28 U.S.C. § 1253, are cases "heard and determined by a district court of three judges."[45]

Given that since 1988 the primary avenue for a litigant to be heard by the Supreme Court is through the writ of certiorari,[46] Supreme Court Rule 10 takes on added significance. As can be seen below, under Rule 10 a petition for a writ of certiorari will be granted only for compelling

---

[40] H.R. REP. NO. 100-660, at 767–68, 772 (1988).

[41] 28 U.S.C. § 1257.

[42] Kevin H. Smith, *Justice for All?: The Supreme Court's Denial of Pro Se Petitions for Certiorari*, 63 ALB. L. REV. 381, 394 (1999).

[43] SUP. CT. R. 10. The Supreme Court has original jurisdiction over certain cases such as suits before two or more states. Thomas H. Lee, *The Supreme Court of the United States as Quasi-Int'l Tribunal: Reclaiming the Court's Original & Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1777 (2004).

[44] SUP. CT. R. 10.

[45] 28 U.S.C. § 1253.

[46] *See Types of Cases the Court Hears*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/how-the-court-works/how-the-court-works-types-of-cases-the-court-hears/ (last visited July 24, 2021).

reasons, which essentially involve either conflicting authorities between courts or important questions of federal law.[47]

> Rule 10. Considerations Governing Review on Writ of Certiorari
>
> Review on a writ of certiorari is not a matter of right, but of judicial discretion. 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.[48]

The ramifications of the Supreme Court Case Selections Act of 1988 and the subsequent importance of Supreme Court Rule 10 have been the subject of some debate. Some scholars suggest that the 1988 Act itself is the prime reason for the decline in the Supreme Court's docket,[49] while other academic writers have contended that there is a correlation between the ideological homogeneity of the Supreme Court Justices and docket size.[50] The reasons behind the Supreme Court's shrinking docket and the implications for the decision-making of the Supreme Court will be examined in the next Part.

---

[47] SUP. CT. R. 10.

[48] *Id.*

[49] *See, e.g.*, Michael Heise et al., *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court's Incredibly Shrinking Docket*, 95 NOTRE DAME L. REV. 1565, 1580–81 (2020).

[50] *See, e.g.*, Owens & Simon, *supra* note 39, at 1276–84.

## III. THE SUPREME COURT's SHRINKING DOCKET

*When it comes to the core of the Court's work, determining the contemporary meaning of the Constitution, it is ideology, not craft or skill, that controls the outcome of cases.*

Jeffrey Toobin[51]

Writing in 2001 under the heading "The Recent Decline in the Plenary Docket", Margaret Cordray and Richard Cordray set out the decline in plenary decisions made by the Supreme Court in the decade following the enactment of the Supreme Court Case Selections Act of 1988.[52]

> Beginning in the 1989 Term, the Court's docket – which had remained fairly constant at about 150 plenary decisions for the past decade – suddenly began to decline. In the 1988 Term, the Court issued 145 plenary decisions; in the 1989 Term, the number fell to 132; and in the 1990 Term, it fell to 116. It dropped slightly to 110 in the 1991 Term, held steady at 111 during the 1992 Term, then plunged to 90 in the 1993 Term. At present, the number of plenary decisions seems to have come to rest at a remarkably low plateau, ranging from 76 to 92 over the seven most recent Terms.[53]

This low plateau continued from 2000 to 2019, with a range of 63 to 92 cases decided per Term.[54] Such a steady state plateau raises three questions. First, what has caused the decline in the Supreme Court's docket? Secondly, is the low plateau in the plenary decisions a cause for concern? Thirdly, what implications for the decision making of the Supreme Court flow from the low plateau of cases decided per Term?

---

[51] JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 338 (2007).

[52] Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 743–45 (2001).

[53] *Id.* at 743.

[54] *See* Owens & Simon, *supra* note 39, Table 1, at 1271, which covers up until 2008. The author has updated the table until 2019: Term 2000 – Cases 87; 2001 – 89; 2002 – 83; 2003 – 90; 2004 – 88; 2005 – 87; 2006 – 79; 2007 – 71; 2008 – 85; 2009 – 92; 2010 – 85; 2011 – 78; 2012 – 79; 2013 – 75; 2014 – 74; 2015 – 80; 2016 – 70; 2017 – 75; 2018 – 73; 2019 – 63. *See Lists of United States Supreme Court Cases*, WIKIPEDIA, https://en.wikipedia.org/wiki/Lists_of_United_States_Supreme_Court_cases (last visited July 30, 2021); *see also Opinions of the Court*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/opinions/slipopinion/18 (last visited July 30, 2021).

### *A. WHAT CAUSED THE DECLINE IN THE SUPREME COURT'S DOCKET?*

In their study of the Supreme Court's plenary docket, the Cordrays identified two major causes of the decline in the docket in pointing to a multifaceted explanation: (i) the changing membership of the Supreme Court; and (ii) the changing pattern of federal civil litigation involving government parties.[55]

> At the outset, the much-anticipated legislation restricting the Court's mandatory jurisdiction appears to have had little or no effect on the caseload. Changes in the Court's personnel, however, have played a substantial role in shrinking the docket . . . . In addition, an important influence that has independently contributed to the decline is the changing pattern of federal civil litigation involving government parties.[56]

In relation to federal civil litigation, the Cordrays observed that because the federal government was winning more of its fewer cases in the lower courts, it was therefore seeking plenary review less frequently.[57] Similar factors were also in play in civil litigation involving state and local governments, as well as in criminal cases.[58] This led the Cordrays to conclude that their "analysis indicates that these factors – even apart from any changes in the Court's personnel – may have been responsible for as much as half of the overall reduction in the plenary docket."[59]

Thus, for present purposes, it is worth noting that the federal government's changing pattern of civil litigation has assisted in reducing the Supreme Court's docket, and therefore in turn has impacted the reach and precedent value of the Supreme Court's decisions.[60] This may prove to be strategically significant when a President is faced with a Supreme Court that is ideologically opposed to the President's legislative agenda, as is the case for President Biden who has to navigate around and neutralize a 6-3 conservative majority on the Supreme Court.[61] This point will be developed in Part V Much Ado About Nothing and the influence of the Office of the Solicitor-General (OSG) on the Supreme Court.

---

[55] Cordray & Cordray, *supra* note 52, at 793–94.

[56] *Id.*

[57] *Id.* at 794.

[58] *Id.*

[59] *Id.*

[60] *See id.*

[61] *See* Adam Liptak, *A Supreme Court Term Marked by a Conservative Majority in Flux*, N.Y. TIMES (July 2, 2021), https://www.nytimes.com/2021/07/02/us/supreme-court-conservative-voting-rights.html.

The view taken by the Cordrays that the main determinant of the decline in the Supreme Court's docket is the Court's composition finds support in other quarters.[62] Owens and Simon explain the decline somewhat differently, suggesting that ideology and context have led to a Supreme Court that decides fewer cases, based on empirical data from every Supreme Court Term between 1940 and 2008.[63]

> Ideology plays a role in the size of the Court's docket. When Justices share a world view, they decide more cases. When they sit on an ideologically fractured Court, they decide fewer cases. These findings accord with existing empirical legal scholarship which highlights the importance of ideology and decision making on the Court.[64]

In the above passage, the reference to the findings according with "existing empirical legal scholarship" is underpinned by a conclusion that Supreme Court Justices have a desire to improve the status quo.[65]

> Ryan Black and Ryan Owens found that Justices are 75 percent more likely to vote to grant review to petitions when they expect that the policy arising from the Court's merits decision will improve on the status quo.[66] In a similar vein, Gregory Caldeira, John Wright, and Christopher Zorn found that Justices are more likely to grant review of cases as those Justices become increasingly similar ideologically to the mean of the Court.[67] And Jan Palmer discovered that Justices strategically set the Court's agenda by placing cases on the docket that they believe they will win, while keeping off the docket those cases they are likely to lose.[68]

Given that the Owens and Simon hypothesis is a more homogeneous Supreme Court will decide more cases, presumably now that there is a 6-3 conservative majority on the High Court, their model will predict an increase in the Supreme Court's docket.

---

[62] *See, e.g.*, David M. O'Brien, *The Rehnquist Court's Shrinking Plenary Docket*, 81 JUDICATURE 58, 58–60 (1997); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 429–31.

[63] Owens & Simon, *supra* note 39, at 1284–85.

[64] *Id.* at 1284.

[65] *Id.* at 1264.

[66] *Id.* (citing Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. POL. 1062, 1066 (2009)).

[67] *Id.* (citing Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 563–64 (1999)).

[68] *Id.* (citing Jan Palmer, *An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions*, 39 PUB. CHOICE 387, 396 (1982)).

### *B. IS THE LOW PLATEAU IN THE PLENARY DECISIONS OF THE SUPREME COURT A CAUSE FOR CONCERN?*

There appears to be two schools of thought on whether the Supreme Court's diminished docket is a matter of concern. The first school points out that "the cautious exercise of the certiorari jurisdiction may be as important to judicial self-restraint as the Court's decisions on the merits."[69] Wilkinson identifies four main reasons why "the shrunken state of the contemporary Supreme Court's docket is no cause for alarm,"[70] suggesting that reform advocates are searching for dragons to slay.

> First, when the Court takes a big case, it accepts a big risk. The dangers of deciding are often vastly greater than the dangers of letting the political branches and the lower courts wrestle a question through . . . .
>
> Second, the Supreme Court is not failing to decide cases where its intervention is needed . . . .
>
> Third, the public clamor for Supreme Court docket reform is simply not present.
>
> Finally, even if the Supreme Court's docket really is something we should be worried about, the situation can be counted upon to resolve itself.[71]

The second school of thought argues that on policy grounds, the legal community should care about the Supreme Court's diminished docket size for at least four reasons.[72]

> First, a Court that hears few cases leaves important legal questions on the table. This can increase uncertainty among the lower court judges who must apply the law and parties who must operate within its confines. Second, a smaller docket can lead to a Supreme Court out of touch with the major legal issues of the day. Third, a small docket may put the Court in a position to be "captured" by certain interests or actors. And, finally, a small docket might cause public opinion to turn against the Court, leading to a loss of legitimacy for the institution whose strongest reservoir of power is legitimacy.[73]

There is an element of inconsistency in Wilkinson's first reason for there being no cause for alarm in the Supreme Court's declining docket, namely, the fewer cases the Supreme Court accepts, the fewer opportunities there are for mistakes that cannot be easily corrected, especially in the area of constitutional adjudication. "In many

---

[69] J. Harvie Wilkinson III, *If It Ain't Broke* . . ., 119 YALE L.J. ONLINE 67, 67 (2010).

[70] *Id.* at 68.

[71] *Id.* at 68–69, 71.

[72] Owens & Simon, *supra* note 39, at 1251–52.

[73] *Id.*

circumstances, therefore, deciding not to decide shows the Court at its statesmanlike best. But the Court, of course, is capable of leading constructively—if, that is, it has the time. For this reason, a highly selective docket is not only acceptable, but desirable."[74]

Such a risk averse strategy does not sit well with the Supreme Court's role as the highest court in the land: the court of last resort. As early as 1923, the two central purposes of discretionary case selection were identified in the following terms:

> The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort.[75]

Furthermore, as previously discussed, Supreme Court Justices have a desire to improve the status quo,[76] with '[p]erhaps the primary goal of all Justices is to write their policy views into the law of the land.'[77] This is the very reason why there is such controversy over Supreme Court appointments.[78]

In the same vein, Owens and Simon would appear to be drawing a longbow in suggesting a small docket possibly causing public opinion to turn against the Supreme Court. A far more likely scenario to undermine the legitimacy of the Supreme Court would be unbalanced decisions overturning long-standing precedents, such as reversing the 1973 decision in *Roe v. Wade*.[79] More likely, a 6-3 conservative-dominated Supreme

---

[74] Wilkinson, *supra* note 69, at 68.

[75] Magnum Imp. Co. v. Coty, 262 U.S. 159, 163 (1923).

[76] Owens & Simon, *supra* note 39, at 1264.

[77] DREW NOBLE LANIER, OF TIME AND JUDICIAL BEHAVIOR: UNITED STATES SUPREME COURT AGENDA-SETTING AND DECISION-MAKING, 1888-1997, at 177 (2003).

[78] For example, Republicans are clearly hopeful that Justice Amy Coney Barrett, who was raised in a small and intensely Catholic community called the People of Praise and who retains her faith, is open to reversing long-standing judicial decisions, such as *Roe v. Wade*, believing Justice Barrett sees *Roe* as "judicial imperialism" – a term for the Supreme Court overriding the democratic will of individual states. *See* Roger Sollenberger, *Supreme Court Nominee Amy Coney Barrett Signed Letter Calling for Overturn of "Barbaric" Roe v. Wade*, SALON (Oct. 2, 2020, 12:18 PM), https://www.salon.com/2020/10/02/supreme-court-nominee-amy-coney-barrett-signed-letter-calling-for-overturn-of-barbaric-roe-v-wade/.

[79] *Roe v. Wade*, 410 U.S. 113 (1973), was a landmark decision of the U.S. Supreme Court in which the Court ruled that the Constitution of the United States protects a pregnant woman's liberty to choose to have an abortion without excessive government restriction. Roe (a pseudonym) wanted an abortion, but Texas's laws denied access to the procedure unless the

Court might allow even greater state restrictions on abortion without banning abortion outright.

Finally, there is the question of whether or not the Supreme Court is failing to decide cases where intervention is required. Wilkinson argues such failure is not occurring.[80]

> Perhaps the most common complaint is that the Court should be resolving more lower court conflicts. Although it is true that the Court does not resolve all circuit splits, problems of disuniformity are very much overstated. Circuit splits are often more apparent than real . . . . Often, too, it may be more appropriate for Congress, a democratic body, to resolve circuit splits through legislation. And even with a reduced docket, the most important circuit splits remain likely to be resolved by the Court itself.[81]

By contrast, Owens and Simon support the view that the Supreme Court should resolve as many circuit splits as possible and unify the law, respectively calling in aid for different reasons the judicial philosophies of Justice White, Chief Justice Rehnquist, and Justice Brennan.[82]

> If we subscribe to Justice White's philosophy—that important cases, especially those that evince conflict among the lower courts, must be reviewed by the Court—the declining docket poses a clear and significant problem . . . . The Court's role was not, as he [Chief Justice Rehnquist] saw it, to allow uncertainty in hopes of achieving the "best" outcome. It was instead, among other things, a unifier of national law[83] . . . . Justice Brennan . . . thought that part of the Court's role was "to define the rights guaranteed by the Constitution."[84] He believed the Court's ability to do this increased as the number of cases it decided increased.[85]

In considering the merits of these two different perspectives on whether the Supreme Court's declining docket is leaving important legal issues unresolved, a common-sense view is that the Supreme Court is

---

mother's life was in danger, so Roe launched a legal challenge in 1970. Wade was the opposing Dallas County district attorney. During the appeal process, Roe gave birth, and the child was adopted. The Supreme Court ruled by a 7-2 majority in 1973 that the Texas law was unconstitutional. While the U.S. Constitution makes no mention of abortion, a majority of the Justices of the Supreme Court reasoned that a right to privacy extended to a right to have an abortion. Michael Carlson, *Norma McCorvey Obituary*, GUARDIAN (Feb. 19, 2020, 11:23 AM), https://www.theguardian.com/us-news/2017/feb/19/norma-mccorvey-obituary.

[80] Wilkinson*, supra* note 69, at 69–70.

[81] *Id.*

[82] Owens & Simon, *supra* note 39, at 1252–54.

[83] Owens & Simon, *supra* note 39, at 1252–54 (citing William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 12 (1986)).

[84] *Id.* (citing William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 482 (1973)).

[85] *Id.*

unlikely to place its own importance in jeopardy. Indeed, a smaller docket allows the Supreme Court more time to devote attention to the cases it considers the most significant.

### *C. WHAT IMPLICATIONS FOR THE DECISION MAKING OF THE SUPREME COURT FLOW FROM THE LOW PLATEAU OF CASES DECIDED PER TERM?*

One of the reasons offered by Owens and Simon to be concerned about the Supreme Court's declining docket is that it may leave the Court out of touch, citing the work of Schauer[86] in support.[87]

> [T]he Court is even less willing than in the past to provide legal guidance in the legally important cases it does take. This regrettable consequence is caused largely by an information deficit, for little in the Court's current procedures is directed to giving the Court the information it needs to decide which cases are legally important and to know what kind of guidance the lower courts are likely to require.[88]

Schauer continues by attacking the position taken by Wilkinson regarding the Supreme Court's unwillingness to fully recognize the costs of non-decision.[89] He writes, "Judge Wilkinson applauds the Court for minimizing the number of cases it takes, arguing that such an approach reduces the 'opportunities . . . for mistakes.' Such a view, however, assumes that Supreme Court mistakes are only mistakes of commission and not of omission."[90]

Schauer's main point concerns the serious distortion of information faced by the Supreme Court when facing the choices to be made in selecting cases to be heard.[91] Schauer contends that when the Supreme Court sets out a rule, standard, principle or test, there are three possible types of behaviour on the part of those impacted by the rule: compliance; violation; and "dropping out" or ceasing the behaviour the rule was designed to regulate.[92]

---

[86] Frederick Schauer, *Is It Important to Be Important?: Evaluating the Supreme Court's Case-Selection Process*, 119 YALE L.J. ONLINE 77, 77 (2009).

[87] Owens & Simon, *supra* note 39, at 1254–55.

[88] Schauer, *supra* note 86, at 77.

[89] *See id.* at 85.

[90] *Id.*

[91] *See id.* at 84.

[92] *Id.* at 84. Schauer cites *Miranda v. Arizona*, 384 U.S. 436 (1966), as an example. "Some police officers complied with *Miranda* by giving the required warnings before custodial

> The selection problem arises, in part, because the courts will never see the dropout cases, and will rarely see the compliance cases. By seeing only the violations, therefore, they find themselves subject to a severe information distortion because they have not seen the cases of compliance and have not seen the dropouts. And insofar as this process is exacerbated as litigation ascends the appellate ladder, the Supreme Court, even taking into account the information provided by amicus briefs, the research done by the Justices and their clerks, and the fact that the Justices read the newspapers, will be at a severe informational disadvantage in deciding which cases to decide and how broadly or narrowly to decide them.[93]

Schauer offers two possible solutions to this information problem in deciding whether or not to grant certiorari: (1) a variation on the "cert pool" whereby a few law clerks "did serious research for the use of all of the Justices about the frequency and nature of litigation below;"[94] (2) signal to litigants and amici that "petitions and briefs that did not contain a fair and comprehensive survey of the terrain of lower court litigation would be disfavored in the certiorari process."[95]

Owens and Simon identify a related concern raised by Hellman, namely, the irregular nature of the Supreme Court's decisions which may result in the law being skewed.[96]

> Quite apart from any gaps in precedent, paring the docket may impair the quality of the Court's work in the cases that it does take. When the Court addresses a particular statute or doctrine only in isolated cases at long intervals, the Justices may not fully appreciate how the particular issue fits into its larger setting. They may lose sight of the practical aspects of adjudication that emerge only when judges actually apply their rules to resolve disputes in a variety of factual contexts. The cases that attract the Court's attention may well be ones that involve extreme facts or idiosyncratic lower-court rulings. The resulting decisions, if not tempered by precedents deriving from more routine controversies, may skew the law in a way that would be avoided if the Court regularly adjudicated.[97]

By contrast, Wilkinson takes the view that the declining docket will resolve itself, identifying two future possibilities in support.[98]

> If more circuit courts begin to diverge from the Supreme Court in their outlook, more petitions for certiorari will be granted . . . . If a clear ideological majority

---

interrogation, others violated by conducting custodial interrogations without giving warnings, and some stopped conducting custodial interrogations." *Id.*

[93] Schauer, *supra* note 86, at 84.

[94] *Id.* at 85.

[95] *Id.*

[96] Owens & Simon, *supra* note 39, at 1255.

[97] Hellman, *supra* note 62, 435–36.

[98] Wilkinson, *supra* note 69, at 9.

> emerges, the Court may grant review more often. Thus, the reduced Supreme Court docket seems more the product of present conditions than a permanent state of affairs.[99]

With the appointment of Justice Barrett to the Supreme Court giving the conservatives a 6-3 majority,[100] the second possibility identified by Wilkinson in the above passage may occur. More likely, rather than granting certiorari review more often, the conservative majority will seek to focus on key precedents that were decided 5-4 which the conservatives are keen to overrule.

In this context, it is worth recalling that *Roe v. Wade* was decided 7-2 in 1973, but that a concerted attempt was made to overrule *Roe v. Wade* in *Planned Parenthood v. Casey*[101] in 1992, which only failed in a 5-4 decision.[102] Similarly, in *June Medical Services, LLC v. Russo*,[103] decided in 2020, the Supreme Court ruled 5-4 that a Louisiana state law that placed hospital-admission requirements on abortion clinics doctors was unconstitutional.[104] It would appear that the greatest protection to *Roe v. Wade* may lie in reform of the restrictive state laws dealing with abortion,[105] thereby reducing the reach of the Supreme Court. The alternative option is for members of the Supreme Court to seek to find a middle ground between the conservatives and the liberals, which is a role recently ascribed to Justice Kagan.[106] "Kagan seems determined to find common ground with the conservatives on the Court when she can, often

---

[99] *Id.* at 9–10.

[100] Leah Litman & Melissa Murray, *Shifting from a 5-4 to a 6-3 Supreme Court Majority Could Be Seismic*, WASH. POST (Sept. 25, 2020, 12:13 PM), https://www.washingtonpost.com/outlook/trump-ginsburg- conservative-supreme-court-majority/2020/09/25/17920cd4-fe85-11ea-b555-4d71a9254f4b_story.html.

[101] *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[102] *See id.* The four Justices who dissented in the upholding of *Roe v. Wade* were Chief Justice Rehnquist and Justices White, Scalia and Thomas. *See id.*

[103] June Med. Servs. v. Russo, 140 S. Ct. 2013 (2020).

[104] *Id.* at 2133. The four dissenting Justices were Thomas, Alito, Gorsuch and Kavanaugh. *Id.* at 2142.

[105] *See id.* at 2149. For example, the Louisiana state law would have required doctors performing abortions to have admission privileges at a state-authorized hospital within 30 miles of the abortion clinic. *Id.* at 2113.

[106] Richard Wolf, *Associate Justice Elena Kagan, After Decade on Bench, Emerges as Supreme Court 'Bridge-Builder'*, USA TODAY (Aug. 4, 2020, 1:26 PM), https://www.usatoday.com/story/news/politics/2020/08/04/elena-kagan-after-10-years-supreme-court-justice-wields-influence/5490349002/.

by framing the question at hand as narrowly as possible,[107] thereby diminishing the reach—or, from the liberal point of view, the damage—of some majority decisions."[108]

The above observation was made in 2019 prior to the death of Justice Ginsberg and the appointment of Justice Barrett in 2020, leaving concerns over the legitimacy and reputation of the Supreme Court as the only brake on the activism of the 6-3 conservative majority.[109] As Talbot noted in the same article on Kagan:

> [Chief Justice] Roberts has demonstrated a concern for the public legitimacy of the Court, and for the future of his own reputation, and this occasionally leads him to vote in unexpected ways: in 2012, he helped preserve Obamacare, and last term his vote prevented the Trump Administration from adding a citizenship question to the U.S. census on spurious grounds.[110]

As Owens and Simon have commented, "unpopular decisions by the Supreme Court can 'erode the institution's political capital'[111] . . . that 'sustained policy disagreement can undermine legitimacy'[112] . . . if the Court continually issues decisions that conflict with Americans' policy preferences, the Court's legitimacy may falter."[113]

---

[107] Margaret Talbot, *Is the Supreme Court's Fate in Elena Kagan's Hands?*, NEW YORKER (Nov. 11, 2019), https://www.newyorker.com/magazine/2019/11/18/is-the-supreme-courts-fate-in-elena-kagans-hands. Such an approach is consistent with Alexander Bickle's view that judges should exhibit "passive virtues" in judicial decision-making by refusing to decide on substantive grounds if narrower grounds existed to determine the case. *See* Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 45–46, 50–51 (1961).

[108] Talbot, *supra* note 107.

[109] Adam Liptak, *A Supreme Court Term Marked by a Conservative Majority in Flux*, N.Y. TIMES (July 2, 2021), https://www.nytimes.com/2021/07/02/us/supreme-court-conservative-voting-rights.html.

[110] Talbot, *supra* note 107.

[111] James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United*

*States Supreme Court*, 47 AM. J. POL. SCI. 354, 357 (2003) (citing Anke Grosskopf & Jeffrey Mondak, *Do*

*Attitudes Toward Specific Supreme Court Decisions Matter?: The Impact of Webster and Texas v. Johnson on*

*Public Confidence in the Supreme Court*, 51 POL. RSCH. Q. 633, 634 (1998)).

[112] *Id.* at 365.

[113] Owens & Simon, *supra* note 39, at 1261.

## IV. HOW JUDGES THINK.

*The great sin of the originalists is not to harbor a political agenda but to claim they do not, and to base that claim on a level of historical understanding they demonstrably do not possess.*

Joseph J. Ellis[114]

When a judge who has been nominated to fill a Supreme Court vacancy states at a Senate Judiciary Committee hearing words to the effect that he or she will decide cases based on the law and not on personal opinion, religious beliefs or ideology,[115] how should such sentiments be interpreted? For clearly, if there was only one logical legal conclusion to be drawn from a case, then there would be no dissents, no majority and minority decisions. The Supreme Court would not routinely split 5-4 and there would be no references to a "swing" voting Justice.[116] This begs the important question: what judicial philosophies and principles underpin the thinking of Supreme Court Justices? Does the Supreme Court operate as a liberal/conservative ideological divide or do Justices from each side of the ideological divide come together on particular issues?[117]

### *A. PRESIDENT ROOSEVELT'S COURT PACKING PLAN*

The history of the Supreme Court demonstrates that ideology plays a significant role in the Court's decisions, best illustrated by events in the

---

[114] JOSEPH J. ELLIS, AMERICAN DIALOGUE: THE FOUNDERS AND US 168 (2018).

[115] *See Barrett Confirmation Hearing, Day 1, Part 1*, C-SPAN (Oct. 12, 2020), https://www.c-span.org/video/?476315-1/barrett-confirmation-hearing-day-1-part-1.

[116] See, for example, *Maryland v. Craig*, 497 U.S. 836, 844 (1990), where the majority of the Supreme Court (O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, Blackmun and Kennedy, JJ., joined) held that the confrontation clause of the Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.") did not guarantee the accused an absolute right to a face to face meeting with the witnesses against him or her. Thus, the majority held that the procedure adopted by the State of Maryland to allow a six-year-old child to give evidence by closed circuit television did not violate the confrontation clause of the Sixth Amendment. *Id.*

[117] See, for example, Transcript of Oral Argument at 47–48, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091), where Justice Gorsuch and Justice Sotomayor joined forces in oral argument concerning the question of whether the state's seizing of the Land Rover vehicle violated the Eighth Amendment's prohibition against excessive fines. See also *Bostock v. Clayton County Georgia*, 140 S. Ct. 1731, 1736 (2019), where Justice Gorsuch joined Chief Justice Roberts and the four liberal justices in ruling that the Civil Rights Act's Title VII prohibition of discrimination in the workplace on the basis of "sex" includes a prohibition against discriminating against gay, lesbian, and transgender people.

1930s which culminated in President Roosevelt's unsuccessful "court-packing" plan.[118] When President Roosevelt first took office in January 1933 he was faced with a Supreme Court divided into two groups, popularly named "The Four Horsemen"[119] and "The Three Musketeers."[120]

The battle lines were drawn even before President Roosevelt's election, as in a campaign speech in Baltimore on October 5, 1932, Roosevelt had claimed the Supreme Court was under the complete control of the Republican Party.[121] "After March 4, 1929, the Republican party was in complete control of all branches of the government—the legislature, with the Senate and Congress; and the executive departments; and I may add, for full measure, to make it complete, the United States Supreme Court as well."[122]

President Roosevelt had won the 1932 election based on promoting a vision of giving America a "New Deal" to initiate and sustain national economic recovery, and in translating this vision into reality Roosevelt was aided by the Democrats taking control of both houses of Congress.[123] The President and Congress were committed to greater governmental involvement in the economy as a way to end the depression.[124] The sticking point was the Republican conservative majority on the Supreme Court, who considered much of the "New Deal" legislation to be

---

[118] This phrase was coined by Edward Rumely and referred to the Judicial Procedures Reform Bill of 1937. LEE EPSTEIN AND THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 451 (6th ed. 2007).

[119] *U.S. Supreme Court, Photograph, 1937*, U.S. CAPITOL VISITOR CTR., https://www.visitthecapitol.gov/exhibitions/artifact/us-supreme-court-photograph-1937 (last visited Aug. 1, 2021). The conservative Justices (Pierce Butler, James Clark McReynolds, George Sutherland, and Willis Van Devanter) were known as "The Four Horseman." *Id.*

[120] *Id.* The liberal Justices (Louis Brandeis, Benjamin Cardozo, and Harlan Fiske Stone) were dubbed "The Three Musketeers." *Id.*

[121] President Franklin D. Roosevelt, Campaign Address in Baltimore (Oct. 25, 1932) (transcript available at http://www.fdrlibrary.marist.edu/archives/collections/franklin/index.php?p=collections/findingaid&id=582&q).

[122] William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 348.

[123] *Congress Profiles: 73rd Congress (1933-1935)*, HIST., ART & ARCHIVES, https://history.house.gov/Congressional-Overview/Profiles/73rd/ (last visited Aug. 2, 2021).

[124] *Id.*

unconstitutional, particularly legislation which extended the power of the federal government.[125]

The initial trigger for the "court-packing" plan was a series of four cases in 1935 where the Supreme Court ruled against the President: *Railroad Retirement Board v. Alton Railroad Co*;[126] *Humphrey's Executor v. United States*,[127] *Louisville Joint Stock Land Bank v. Radford*,[128] and *Schechter Poultry Corp. v. United States*.[129] Essentially, in the next two years, the Supreme Court struck down several key pieces of the "New Deal" legislation on the grounds that the laws delegated an unconstitutional amount of authority to the executive branch and the federal government.[130]

Then, in November 1936, President Roosevelt won a second term in a landslide which emboldened him to address the hostility of the Supreme Court by proposing on February 5, 1937 to expand the Court to as many as 15 Justices in a controversial move described by its critics as the "court-packing" plan.[131] The plan provided for the retirement on full pay for all members of the Court over 70 years of age.[132] Should a Justice refuse to retire, an "assistant" with full voting rights was to be appointed, resulting in a maximum of six additional Justices.[133] Given that there were already three liberal Justices on the Supreme Court,[134] the plan ensured President Roosevelt a liberal majority.

However, whether it was the threat to the existing membership of the Supreme Court, a move to protect the Court's integrity and independence, or judicial recognition that President Roosevelt had the overwhelming endorsement of the American people for the "New Deal," two center swing Justices had a change of heart: Associate Justice Roberts and Chief

---

[125] *See* William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court – and Lost*, SMITHSONIAN MAG. (May 2005), https://www.smithsonian mag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/.

[126] 295 U.S. 330, 391–92 (1935).

[127] 295 U.S. 602, 631–32 (1935).

[128] 295 U.S. 555, 602 (1935).

[129] 295 U.S. 495, 550–51 (1935).

[130] *See* cases cited *supra* notes 127–30.

[131] Judicial Procedures Reform Bill of 1937.

[132] *FDR Announces "Court-Packing" Plan*, HIST. (Feb. 3, 2021), https://www.history.com/this-day-in-history/roosevelt-announces-court-packing-plan. Six of the nine Justices were over 70 years of age. Leuchtenburg, *supra* note 125.

[133] *FDR Announces "Court-Packing" Plan*, *supra* note 132.

[134] *U.S. Supreme Court, Photograph, 1937*, *supra* note 119.

Justice Charles Evans Hughes.[135] This strategic political move has been labeled "the switch in time that saved nine."[136]

The case that heralded "the switch" was *West Coast Hotel Co. v. Parrish*,[137] which was handed down on March 29, 1937 and upheld the constitutionality of state minimum wage legislation, thereby overturning an earlier holding in *Adkins v. Children's Hospital*,[138] that federal minimum wage legislation for women was an unconstitutional infringement of liberty of contract, as protected by the due process clause of the Fifth Amendment.[139]

Ironically, as events turned out, an even more important factor in the ultimate emergence of a liberal Supreme Court was the restoration of full-salary pensions on March 1, 1937 following amendments to the Supreme Court Retirement Act.[140] Subsequently, on June 2, 1937 conservative Associate Justice Willis Van Devanter announced his retirement at the end of the Term.[141] This provided President Roosevelt with his first opportunity to make a nomination to the Supreme Court.[142] Then, in short succession, the remaining three conservative Associate Justices departed the Supreme Court: George Sutherland retired in 1938; Pierce Butler died in 1939; and finally James Clark McReynolds retired in 1941, following President Roosevelt winning a third term in 1940.[143]

---

[135] *When a Switch in Time Saved Nine*, N.Y. TIMES (Nov. 10, 1985), https://www.nytimes.com/1985/11/10/opinion/l-when-a-switch-in-time-saved-nine-143165.html.

[136] John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine*," 73 OKLA. L. REV. 229, 229 (2021) (attributing this phrase or quip to humourist Cal Tinney).

[137] 300 U.S. 379, 398–99 (1937).

[138] 261 U.S. 525, 553 (1923).

[139] *Id.*

[140] Justices of the Supreme Court Retirement Act, Pub. L. No. 75-10, ch. 21, 50 Stat. 24 (1937).

[141] *Willis Van Devanter, 1911-1937*, THE SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/history-of-the-court-timeline-of-the-justices-willis-van-devanter-1911-1937/ (last visited July 29, 2021).

[142] *BRIA 10 4 a FDR Tries to "Pack" the Supreme Court*, CONST. RTS. FOUND., https://www.crf-usa.org/bill-of-rights-in-action/bria-10-4-a-fdr-tries-to-pack-the-supreme-court.html (last visited July 29, 2021).

[143] TIMOTHY L. HALL, SUPREME COURT JUSTICES 265 (2001). Justice McReynolds finally gave up trying to outlast President Roosevelt in the hope of retiring under a Republican President. This situation only occurred because Roosevelt broke with tradition and ran for a third term. *See id.* Such an outcome is no longer possible as the Twenty-Second Amendment states a

Thus, in the end, the "court-packing" plan proved to be unnecessary, which was just as well as on July 22, 1937, the Senate voted 70-20 to send the Judicial Procedures Reform Bill of 1937 back to the Senate Judiciary Committee, where the controversial language relating to the increased membership of the Supreme Court was removed.[144] The public was never enthusiastic about the plan, and Roosevelt faced strong opposition from members of his own Democratic party and Chief Justice Hughes.[145]

> The protracted legislative battle over the Court-packing bill blunted the momentum for additional reforms, divided the New Deal coalition, squandered the political advantage Roosevelt had gained in the 1936 elections, and gave fresh ammunition to those who accused him of dictatorship, tyranny, and fascism. When the dust settled, FDR had suffered a humiliating political defeat at the hands of Chief Justice Hughes and the administration's Congressional opponents.[146]

Another Chief Justice, William Rehnquist, writing some 67 years after the Supreme Court battle of 1937, observed that of all bodies it was the Senate, at the time comprised of 80 Democrats and just 16 Republicans, which derailed the "court-packing" plan.[147]

> President Roosevelt lost the Court-packing battle, but he won the war for control of the Supreme Court. He won it not by any novel legislation, but by serving in office for more than twelve years, and appointing eight of the nine Justices of the Court. In this way the Constitution provides for ultimate responsibility of the Court to the political branches of government.
>
> Ultimately, we have had the good fortune that through our system of checks and balances the independence of our Supreme Court and the federal judiciary has been preserved when such conflicts have arisen. We have seen that this in large part is dependent upon the public's respect for the judiciary. For it was the United States Senate—a political body if there ever was one—who stepped in and saved the independence of the judiciary . . . in Franklin Roosevelt's Court-packing plan in 1937.[148]

---

person can only be elected to be President two times for a total of eight years. U.S. CONST. amend. XXII.

[144] Barry Cushman, *The Judicial Reforms of 1937*, 61 WM. & MARY L. REV. 995, 1043–44 (2020); Gillian Brockell, *FDR Tried to Pack the Supreme Court During the Depression. It Was a Disaster for Him.*, WASH. POST (Sept. 24, 2020, 7:00 AM), https://www.washingtonpost.com/history/2020/09/24/fdr-supreme-court-packing-rbg-trump/.

[145] *See* MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937, 519–21 (2002); Leuchtenburg, *supra* note 125.

[146] Michael Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 737 (1984).

[147] William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV., 579, 595 (2004).

[148] *Id.*

In an argument that will be developed in Part V, the partisan political situation that has developed since 1937, and indeed has been further exacerbated since Chief Justice Rehnquist died in 2005, means that the factors crucial to the defeat of the "court-packing" plan no longer apply for two reasons. First, the Republican majority in the Senate, by denying a hearing to President Obama's nomination of Merrick Garland in 2016 on the grounds it was a Presidential election year and then hypocritically pushing through Amy Coney Barrett's nomination within weeks of the 2020 Presidential election,[149] has raised the political stakes. Democrats may well feel entitled to respond with a modern variation of the "court-packing" plan, at least to the extent of seeking to require all federal judges to retire at 70 years of age.

Second, in 1937, the public did not warm to the plan.[150] However, the status and reputation of the Supreme Court has declined since 1937, exacerbated by (i) the controversial appointments of Justice Thomas and Justice Kavanaugh in the face of two credible witnesses who testified before the Senate Judiciary Committee that each had been sexually assaulted by the respective nominee to the Supreme Court;[151] (ii) the

---

[149] Amy Davidson Sorkin, *The Republicans Finally Face Merrick Garland – and Act as if They Were the Ones Unfairly Treated*, NEW YORKER (Feb. 23, 2021), https://www.newyorker.com/news/daily-comment/the-republicans-finally-face-merrick-garland-and-act-as-if-they-were-the-ones-unfairly-treated. Justice Scalia died 269 days before the presidential election in 2016, while Justice Ginsburg died a mere 46 days prior to the 2020 presidential election. Adrian Blanco et al., *Is It Too Close to the Election to Confirm a Supreme Court Nominee?*, WASH. POST (Sept. 19, 2020), https://www.washingtonpost.com/politics/2020/09/19/is-it-too-close-election-confirm-supreme-court-nominee/. As has been pointed out, a President is in office for four years and not three years. Robert Barnes, *Ginsburg Suggests Senate Should Act on Garland Nomination, but Says It Cannot be Forced to*, WASH. POST (Sept. 7, 2016), https://www.washingtonpost.com/politics/courts_law/ginsburg-suggests-senate-should-act-on-garland-nomination-but-says-it-cannot-be-forced-to/2016/09/07/0f10b7b6-754c-11e6-b786-19d0cb1ed06c_story.html.

[150] Justin R. Braga, *The Other "Switch in Time": How the Opposition Changed the Debate over the Court-Packing Plan and Won*, 17 GEO. J. L. & PUB. POL'Y 653, 662–64 (2019).

[151] Julia Jacobs, *Anita Hill's Testimony and Other Key Moments from the Clarence Thomas Hearings*, N.Y. TIMES (Sept. 20, 2018), https://www.nytimes.com/2018/09/20/us/politics/anita-hill-testimony-clarence-thomas.html. Anita Faye Hill, an American lawyer and academic, came to national prominence in 1991 when in testimony before the Senate Judiciary Committee she accused Supreme Court nominee Clarence Thomas, her supervisor at the United States Department of Education and the Equal Employment Opportunity Commission, of sexual harassment. *Id.* Christine Blasey Ford, a professor at Palo Alto University, testified in 2018 that Brett Kavanaugh assaulted her at a party in Bethesda, Maryland, when the two were in high school. Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter,*

appointment of religious conservative Justice Barrett in the dying days of the Trump Presidency in the face of widespread public concern over her position on abortion, hostility toward LGBTQ rights, and membership of the faith group People of Praise;[152] and (iii) the cynical trend to appoint younger Justices not in the mainstream so that the newly installed Justices can occupy a Supreme Court seat for the maximum number of years before either dying in office or timing their retirement by handing over the baton to a President of the same party who nominated them.[153]

An emerging trend, consistent with youthful selections, is to appoint Supreme Court judges whose judicial experience is very limited and untested.[154] One reason for such appointments is the antithesis of sound practice, namely, to avoid the Supreme Court nominee having any significant judicial track record that can be criticized at the Senate hearings, as evidenced by the current Chief Justice John Roberts who had served just two years on the United States Court of Appeals for the District of Columbia Circuit before being elevated to Chief Justice in 2005.[155] As a further example, the most recent appointee to the Supreme Court, Justice Barrett, had only served three years as a Judge of the United States Court of Appeals for the Seventh Circuit before being elevated to the Supreme Court,[156] as compared with Chief Judge Merrick Garland of the United States Court of Appeals for the District of Columbia Circuit who was first appointed to the Court in 1997 and had been a Judge for 19 years when

*Speaks out About Her Allegation of Sexual Assault*, WASH. POST (Sept. 16, 2018), https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html.

[152] Elizabeth Dias & Adam Liptak, *To Conservatives, Barrett Has 'Perfect Combination' of Attributes for Supreme Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/09/20/us/politics/supreme-court-barrett.html.

[153] Kristen Bialik & John Gramlich, *Younger Supreme Court Appointees Stay on the Bench Longer, but There Are Plenty of Exceptions*, PEW RSCH. CTR. (Feb. 8, 2017), https://www.pewresearch.org/fact-tank/2017/02/08/younger-supreme-court-appointees-stay-on-the-bench-longer-but-there-are-plenty-of-exceptions/.

[154] Stephanie Mencimer, *Amy Coney Barrett Is the Least Experienced Supreme Court Nominee in 30 years*, MOTHER JONES (Oct. 23, 2020), https://www.motherjones.com/politics/2020/10/amy-coney-barrett-is-the-least-experienced-supreme-court-nominee-in-30-years/.

[155] *Current Members*, SUP. CT. OF THE U.S., *https://www.supremecourt.gov/about/biographies.aspx* (last visited Aug. 2, 2021).

[156] *Id.*

nominated by President Obama in 2016 for the vacant position on the Supreme Court following the death of Justice Scalia.[157]

Similarly, Justice Kagan, who was nominated by Democratic President Barack Obama, had no judicial experience when nominated to the Supreme Court in 2010 after being the Solicitor General of the United States for just one year.[158] Of course, such a reason does not apply if the Judge is seeking to establish a particular judicial track record in order to enhance his or her political appeal. For example, both Justices Gorsuch and Kavanaugh were appointed to the United States Court of Appeals by Republican President George W. Bush[159] and established a very conservative judicial track record,[160] which in turn drew the attention of President Trump after eight years in office of Democratic President Obama.[161] In either case, there is a strong support for the argument that recent Supreme Court nominees have limited judicial experience or have

---

[157] Josh Gerstein, *Merrick Garland Known as Moderate and Politically Connected Judge*, POLITICO, https://www.politico.com/story/2016/03/merrick-garland-who-is-he-220865 (last updated Mar. 16, 2016, 12:31 PM). There is a further irony in that for many years the Republicans had been suggesting Garland was an acceptable Democratic choice, but that did not stop the Republican majority in the Senate from blocking Garland's nomination. *See* Nina Totenberg, *If Clinton Wins, Republicans Suggest Shrinking Size of Supreme Court*, NPR (Nov. 3, 2016, 4:22 PM), https://www.npr.org/2016/11/03/500560120/senate-republicans-could-block-potential-clinton-supreme-court-nominees. Poetic justice has been served with President Biden's nomination of Garland as the United States Attorney General. *See* Sherman Hollar, *Merrick Garland*, BRITANNICA, https://www.britannica.com/biography/Merrick-Garland (last visited Aug. 28, 2021).

[158] *See Associate Justice of the U.S. Supreme Court - Elena Kagan*, COMM. ON JUDICIARY, https://www.judiciary.senate.gov/nominations/supreme-court/kagan (last visited Aug. 2, 2021).

[159] Justice Neil Gorsuch was nominated to the United States Court of Appeals for the Tenth Circuit on May 10, 2006, and Justice Brett Kavanaugh was nominated to the United States Court of Appeals for the District of Columbia Circuit on January 25, 2006. *Gorsuch, Neil M.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/gorsuch-neil-m (last visited Aug. 3, 2021); *Kavanaugh, Brett M.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/kavanaugh-brett-m (last visited Aug. 3, 2021).

[160] *See* Kevin Cope & Joshua Fischman, *It's Hard to Find a Federal Judge More Conservative than Brett Kavanaugh*, WASH. POST (Sept. 5, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/05/its-hard-to-find-a-federal-judge-more-conservative-than-brett-kavanaugh/.

[161] *See Presidents, Vice Presidents, & Coinciding Sessions of Congress*, HIST., ART & ARCHIVES, https://history.house.gov/Institution/Presidents-Coinciding/Presidents-Coinciding/ (last visited Aug. 3, 2021).

tailored their judgments for political purposes to enhance their chances of promotion.[162]

Thus, it is not entirely unreasonable to label the current Supreme Court membership as the 'B' team[163] when measured against judicial excellence and widely praised opinions. There is, of course, an important distinction between being a mediocre judge and being partisan. In many ways, the three most recent appointments to the Supreme Court under President Trump's four years in office, "The Three Trumpians" or "KGB",[164] represent a more insidious and real long term "court-packing" plan than President's Roosevelt's failed "court-packing" plan of 1937. Effectively, the Supreme Court has been injected with a triple dose of Justice Scalia's judicial philosophy for a generation. The only question is whether the trio's membership of the Supreme Court will temper or moderate their conservative judicial philosophy when faced with upholding the reputation and prestige of the premier court in the United States.

### *B. THE FOUR HORSEMEN AND THE THREE MUSKETEERS*

In seeking to understand the events of 1937, it is instructive to wind back the clock eight years to 1929 when Chief Justice Taft had written a letter to conservative Justice Butler indicating members of the Supreme Court perceived themselves as ideological warriors, such that when

---

[162] All three of President Trump's nominations, Justices Gorsuch, Kavanaugh and Barrett were members of the Federalist Society, "an ostensibly academic organization that serves as a training camp for conservative jurists, where candidates are recruited, vetted and prepared for the confirmation process." Frederick Hewett, *Amy Coney Barrett's Nomination Is Backed by Dark Money. So Is Her Refusal to Acknowledge Basic Climate Science*, WBUR (Oct. 16, 2020), https://www.wbur.org/cognoscenti/2020/10/16/amy-coney-barrett-climate-change-scotus-frederick-hewett.

[163] It would appear that there is a lower limit to the mediocrity of appointees to the Supreme Court, as exampled by President Nixon's nomination of Judge Carswell being rejected by the Senate in 1970, and President G. W. Bush's withdrawal of Harriet Miers in 2005. *See The 5 Most Disastrous Supreme Court Nominees*, WEEK (Jan. 8, 2015), https://theweek.com/articles/494499/5-most-disastrous-supreme-court-nominees.

[164] John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/.

Charles Evans Hughes was appointed Chief Justice a year later in 1930 there was no "swing" or "center" Justice on the Court.[165]

> Over the course of more than two centuries, the Supreme Court "center" that has attracted the most attention has been that presided over by Charles Evans Hughes. Yet when Hughes was appointed Chief Justice of the United States in February 1930, he inherited a Court that had no center whatsoever.
>
> For years, six conservatives—Chief Justice William Howard Taft, Edward Sanford, and the "Four Horsemen" (Pierce Butler, James McReynolds, George Sutherland, and Willis Van Devanter)—had faced off against three "liberals": Louis Brandeis, Oliver Wendell Holmes, Jr., and Harlan Fiske Stone. They were "liberals" less in the sense that they approved of social legislation than that they believed in judicial restraint. In the 1920s, the Taft Court struck down more laws than the Court had invalidated during the previous half-century, in what Roscoe Pound called a "'carnival of unconstitutionality,'"[166] to the accompaniment of what became a familiar refrain: "Brandeis, Holmes, and Stone dissenting."
>
> Some scholars disapprove of the terms "conservative" and "liberal," or "right, center, and left," when applied to judges because it may suggest that they are no different from legislators; but the private correspondence of members of the Court makes clear that they thought of themselves as ideological warriors. In the fall of 1929, Taft had written one of the Four Horsemen, Justice Butler, that his most fervent hope was for "'continued life of enough of the present membership . . . to prevent disastrous reversals of our present attitude. With Van [Devanter] and Mac [McReynolds] and Sutherland and you and Sanford, there will be five to steady the boat . . . .'"[167] Six counting Taft.[168]

As previously mentioned, the other three Justices were the liberal trio comprising Justices Louis Brandeis, Benjamin Cardozo, and Harlan Fiske Stone who were dubbed "The Three Musketeers."[169] An insight as to how these three Justices approached the task of judicial interpretation or how judges decide cases can be gauged from a reading of Benjamin Cardozo's classic book *The Nature of the Judicial Process* published in 1921.[170] A measure of Cardozo's towering stature within the legal profession can be gathered from the surprising fact that President Hoover, a Republican,

---

[165] *See* William E. Leuchtenburg, *Charles Evans Hughes: The Center Holds*, 83 N.C. L. REV. 1187, 1187 (2005).

[166] *Id.* (citing ALPHEUS THOMAS MASON, THE SUPREME COURT FROM TAFT TO WARREN 70 (1968)).

[167] *Id.* (citing HENRY PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 1044 (1939)).

[168] *Id.*

[169] *U.S. Supreme Court, Photograph, 1937*, *supra* note 119.

[170] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

nominated Cardozo, a Democrat, to the Supreme Court; a rare example of a nominee's legal expertise triumphing over partisanship.[171]

Cardozo identified the problem that confronts the judge in deciding a case as having two distinct steps: "[H]e must first extract from the precedent the underlying principle, the *ratio decidendi*; he must then determine the path or the direction along which the principle is to move or develop, if it is not to wither and die."[172] For Cardozo, the second step is the more important and he identified four methods of applying a principle or rule of law to a case.[173]

> The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I will call the method of sociology.[174]

Each of these methods may prevail in a given case and no test or formula can be applied.[175]

> [T]he demon of formalism tempts the intellect with the lure of scientific order. I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance . . . . So in this field, there may be a paramount public policy, one that will prevail over temporary inconvenience or occasional hardship, not lightly to sacrifice certainty and uniformity and order and coherence. All these elements must be considered. They are to be given such weight as sound judgment dictates. They are constituents of that social welfare which it is our business to discover. In a given instance we may find that they are constituents of preponderating value. In others, we may find that their value is subordinate. We must appraise them as best we can.[176]

In the above passage, Cardozo, as a legal realist, was attacking formalism by demonstrating that judging is inherently discretionary, underpinned by values, and not a mechanical act of applying the law to the

---

[171] *See* Ira H. Carmen, *The President, Politics and the Power of Appointment: Hoover's Nomination of Mr. Justice Cardozo*, 55 VA. L. REV. 616, 616–17 (1969).

[172] CARDOZO, *supra* note 170, at 28.

[173] *Id.* at 29.

[174] *Id.* at 30–31.

[175] *Id.* at 58.

[176] *Id.* at 66–67.

facts of a particular case.[177] "For instance, a tort law that makes recovery difficult for injured workers because of doctrines like assumption of risk, contributory negligence, and the fellow servant rule reflects judges' choices to favour employers over employees."[178]

However, Cardozo recognized the limits on judicial discretion: "We must keep within those interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges through the centuries of the common law have set to judge-made innovations."[179] Furthermore, "statutes are to be sustained unless they are so plainly arbitrary and oppressive that right-minded men and women could not reasonably regard them otherwise."[180] Finally, in judging the validity of statutes, the standard must be an objective one, as judges are not "free to substitute their own ideas of reason and justice for those of the men and women whom they serve."[181]

Cardozo's position on the limits of judicial activism is summed up by two colourful images that act as bookends constraining judicial decision making. A judge "is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness,"[182] rather a judge's power of innovation is insignificant "when compared with the bulk and pressure of the rules that hedge him on every side."[183]

As the great American Judge Learned Hand put it, in his review of Benjamin Cardozo's book *The Nature of the Judicial Process*: "The . . . structure of the common law . . . stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built on the relics which his predecessors left, and in his turn left a foundation upon which his successors might work."[184]

---

[177] *See id.*

[178] Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law*, 54 OKLA. L. REV. 1, 1 (2001).

[179] Cardozo, *supra* note 170, at 103.

[180] *Id.* at 91.

[181] *Id.* at 88–89.

[182] *Id.* at 141.

[183] *Id.* at 136–37.

[184] J. Learned Hand, Book Review, 35 HARV. L. REV. 479, 479 (1922) (reviewing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921)).

### *C. JUDICIAL PHILOSOPHIES OR VALUE LADEN CLOAKS?*

One guide to a Justice's judicial philosophy can be gleaned from an analysis of his or her opinions and voting record. For example, Professor Shapiro identified three basic propositions underpinning Chief Justice Rehnquist's judicial philosophy derived from an appraisal of his votes on the cases in which Justice Rehnquist (as he then was) had taken part five years into his tenure on the Supreme Court.[185]

> (1) Conflicts between the individual and the government should, whenever possible, be resolved against the individual;
>
> (2) Conflicts between state and federal authority, whether on an executive, legislative or judicial level, should be resolved in favor of the states; and
>
> (3) Questions of the exercise of federal jurisdiction, whether on the district court, appellate court or Supreme Court level, should, whenever possible, be resolved against such exercise.[186]

Thus, as Chemerinsky has pointed out, it should be generally apparent that formalism is dead and buried, with judicial values being determinative of case outcomes, particularly in the area of constitutional law.[187] "Supreme Court rulings in important constitutional cases—whether the Boy Scouts can exclude gays,[188] or whether states can prohibit partial birth abortions,[189] or whether the government can give aid to parochial schools[190]—reflect the Justices ideologies."[191]

Yet, there is still a widely held belief that judging is value neutral, which finds expression in a rebadged formalism under the rubrics of originalism or textualism, rightly criticised by Chemerinsky.[192]

> Justice Scalia, for example, consistently has expressed the view that Justices' own values should play no role in constitutional law. He declared that "a rule of law that binds neither by text nor by any particular, identifiable tradition is

---

[185] David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 293–94 (1976).

[186] *Id.*

[187] Chemerinsky, *supra* note 178, at 2.

[188] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000) (holding that Boy Scouts of America may exclude homosexuals based on freedom of expressive association).

[189] *Stenberg v. Carhart*, 530 U.S. 914, 921–22 (2000) (declaring that Nebraska law prohibiting partial birth abortions unconstitutional).

[190] *Mitchell v. Helms*, 530 U.S. 793, 801, 835 (2000) (plurality opinion) (allowing the government to provide instructional equipment to parochial schools).

[191] Chemerinsky, *supra* note 178, at 2.

[192] *Id.*

> no rule of law at all."[193] He said that for judges to impose "our personal preferences" is "to replace judges of the law with a committee of philosopher-kings."[194]

> My thesis is that the continuing allure of formalism dominates constitutional law. This has led to the continuing misguided quest for value-neutral judging. The result has been purported adherence to undesirable theories of judging and interpretation. Value choices are hidden rather than defended and made explicit. Constitutional law is all about value choices in giving meaning to the majestic document written over 200 years ago.[195]

Justice Scalia appears to have been blind to the simple point that it is a value laden decision to interpret the constitution through the eyes of an originalist. Originalism is not value neutral, and erroneously almost egregiously implies a purity of legal purpose, as opposed to branding as *ultra vires* the methods of statutory interpretation adopted by more progressive judges. As Posner has highlighted, the Constitution does not come with an explanatory manual as to whether it should be read in a particular manner.[196]

> Even the decision to read the Constitution narrowly, and thereby to "restrain" judicial interpretation, is not a decision that can be read directly from the text. The Constitution does not say, "Read me broadly," or, "Read me narrowly." The decision to do one or the other must be made as a matter of political theory and will depend on such things as one's view of the springs of judicial legitimacy and the relative competence of courts and legislatures in dealing with particular types of issue.[197]

The twin methods of statutory interpretation of originalism and textualism are closely allied, as can be seen from the following two extracts from the writings of Justice Amy Coney Barrett, a disciple of the late Justice Scalia for whom she clerked.[198]

> Originalism is characterized by a commitment to two core principles. First, the meaning of the constitutional text is fixed at the time of its ratification. Second, the historical meaning of the text "has legal significance and is authoritative in most circumstances." Commitment to these two principles marks the most significant disagreement between originalists and their critics. A non-

---

[193] *Id.* (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion)).

[194] *Id.* (citing *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (plurality opinion)).

[195] *Id.*

[196] Richard A. Posner, *What Am I? A Potted Plant?: The Case Against Constructionism.*, NEW REPUBLIC, Sept. 28, 1987, at 24.

[197] *Id.*

[198] Grace Sandman, *Supreme Court's Newest Justice Follows in the Seat but Not the Footsteps of Ruth Bader Ginsburg*, GLOB. STUDENT SQUARE (Dec. 22, 2020), https://www.globalstudentsquare.org/supreme-courts-newest-justice-follows-in-the-seat-but-not-the-footsteps-of-ruth-bader-ginsburg/.

> originalist may take the text's historical meaning as a relevant data point in interpreting the demands of the Constitution, but other considerations, like social justice or contemporary values,[199] might overcome it. For an originalist, by contrast, the historical meaning of the text is a hard constraint . . . when we refer to the originalist commitment to "text," we mean text as originalists interpret it—i.e., in accordance with its original public meaning.[200]

The notion, that for originalists the historical meaning of the text is a hard constraint, is reinforced in the second extract expounding the meaning of textualism.[201]

> Textualism, a method of statutory interpretation closely associated with Justice Scalia, insists that judges must construe statutory language consistent with its "ordinary meaning."[202] The law is comprised of words—and textualists emphasize that words mean what they say, not what a judge thinks that they ought to say. For textualists, statutory language is a hard constraint. Fidelity to the law means fidelity to the text as it is written.[203]

However, there is a distinction, apparently overlooked by those who conflate originalism with textualism,[204] between the original understanding of the meaning of a word in a document written several hundred years ago and the contemporary meaning of the same word. For example, the words "marriage" and "arms" have a very different meaning in the 21st century than they did in the 18th century.[205] The word is the same, but the meaning is different.[206] So, when textualists refer to the "ordinary meaning" of a word and uphold the notion of "fidelity to the text as it is written,"[207] to what time period are they referring? If the period is fixed at the time when the text was written, then the textualist is equating textualism with originalism by requiring the meaning of the word in the

---

[199] Note the use of "contemporary values" and not contemporary meaning.

[200] Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 1, 5 (2016).

[201] Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RSRV. L. REV. 4, 855–56 (2020).

[202] *Id.* (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69–77 (2012)).

[203] *Id.*

[204] *Id.* at 859. On one view, textualism refers to statutory interpretation and originalism to constitutional interpretation. *Id.*

[205] *How Marriage Has Changed over Centuries*, THE WEEK (Jan. 10, 2015), https://theweek.com/articles/475141/how-marriage-changed-over-centuries; *see* David Kopel, *Firearms Technology and the Original Meaning of the Second Amendment*, WASH. POST (Apr. 3, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/03/firearms-technology-and-the-original-meaning-of-the-second-amendment/.

[206] *How Marriage Has Changed*, *supra* note 205; Kopel, *supra* note 205.

[207] Barrett, *supra* note 202, at 856.

text to have the meaning understood by the author(s) at the time the text was originally written. If the period is not fixed at the time of writing but is contemporary, then the textualist is effectively cutting the bonds from the original meaning of the word and substituting the contemporary meaning, whilst still staying faithful to the intention of the whole text as originally written. Gerhardt has suggested that for a textualist it is necessary to remain faithful to the constitutional text.[208] "Where the text is clear, this approach requires adhering to its plain meaning. Where the text is unclear, this approach requires adhering to its original meaning."[209] In practice, for adherents to originalism, there is no bright dividing line between textualism and originalism, or, in other words, between statutory interpretation and constitutional interpretation.

Thus, for example, the Second Amendment to the United States Constitution which was ratified on 15th December 1791 states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[210] Now, on one view, to be consistent, an originalist would be required to interpret the word "Arms" as meaning the type of arms manufactured in 1791. This is clearly impracticable and defies common sense. Thus, an originalist would *per force* be required to argue instead that, because the meaning of "Arms" is clear and unambiguous, its meaning is not frozen in time. Justice Scalia in *District of Columbia v. Heller*[211] (discussed further below) chose to interpret "Arms" as meaning weaponry.[212] According to Justice Scalia, any suggestion that the second Amendment only protects "Arms" that existed in the 18th century is at odds with the manner in which constitutional rights should be interpreted,[213] thereby leaving open Justice Scalia's conclusion that the Second Amendment extends to modern forms of weaponry[214] consistent with the First Amendment protecting modern

---

[208] Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 29 (1994).

[209] *Id.*

[210] *Id.*

[211] 554 U.S. 570 (2008).

[212] *Id.* at 581.

[213] *Id.* at 582.

[214] *Id.*

forms of communication[215] and the Fourth Amendment applying to modern forms of search.[216]

On the other hand, a textualist, who is not an originalist, would be able to interpret "Arms" as having its contemporary meaning, without the strained reasoning of an originalist to arrive at the same conclusion. In neither case is the right to keep and bear arms in question. But is that right linked to service with a militia? Such a reading would appear to be the plain meaning of the text, leading to the logical conclusion that the right to "keep and bear arms" did not apply to private citizens amassing a veritable arsenal of military grade weaponry.

The most recent consideration of the Second Amendment by the Supreme Court occurred in 2008 in *District of Columbia v. Heller*[217] where the Court split 5-4 as to whether the District of Columbia's Firearms Control Regulations Act 1975 was unconstitutional.[218] The majority opinion was written by Justice Scalia who held that the Second Amendment protects an individual right (as opposed to a collective right through participation in a militia) to possess a firearm unconnected with service in a militia, and to use that firearm for traditionally lawful purposes, such as self-defense within the home.[219] The minority opinion was written by Justice Stevens who dissented for two main reasons: (1) if the Framers of the Constitution had intended an individual right, it would have been expressly stated; (2) the reference to a militia necessitated a conclusion that the right "to keep and bear Arms" meant on state militia service only.[220]

So how then did Justice Scalia, an avowed originalist, interpret the Second Amendment in such a manner as to reason that an individual right to possess a firearm was unconnected with service in a militia? Essentially, the basis for Justice Scalia's interpretation was the phrase "right of the people" in the Second Amendment, which despite the specific wording referring to "a well *regulated* Militia" (author's emphasis in the context of the *Heller* case dealing with the constitutionality of the District of

---

[215] *Id.* (citing Reno v. Am. Civil Liberties Union, 521 U.S. 844, 849 (1997), which applied the First Amendment to the internet).

[216] *Id.* (citing Kyllo v. United States, 533 U.S. 27, 31–36 (2001), which applied the Fourth Amendment to a thermal-imaging search).

[217] 554 U.S. 570 (2008).

[218] *Id.* at 572–73.

[219] *See id.* at 572, 595.

[220] *See id.* at 637–44, 651 (Stevens, J., dissenting).

Columbia's Firearms Control Regulations Act 1975), Justice Scalia imported an individual right into the Second Amendment because "[n]owhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right."[221]

Having imported an individual right into the Second Amendment, Justice Scalia, being an originalist, was obliged to recognize that this private right was not absolute,[222] as Schaerer has helpfully elucidated, because constitutional provisions enshrine the "original meaning" of a right, as understood by the Framers.[223]

> It has never been unlimited, not at the time of the Framing and thus not today. The Second Amendment, Justice Scalia explained, enshrined a pre-existing right that was subject to "important limitation[s]"; it plainly was not a right to have and carry any weapon in any manner for any purpose. That is, in colonial times, one had a right to keep and bear only certain weapons in certain manners for certain purposes. And Justice Scalia emphasized that the same weapon-manner-and-purpose limitations that applied in the Framing era still apply today.[224] (Footnotes omitted.)

As to current weapon-manner-and-purpose limitations, according to Justice Scalia, "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes."[225] This does not fit with an originalist interpretation because it is a present time perspective, as Justice Breyer observed in his dissent from the majority opinion in *Heller*.[226]

> On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning.[227]

More generally, Justice Stevens concluded his dissenting opinion with this eviscerating attack on the majority opinion:

---

[221] *Id.* at 580.

[222] *Id.* at 626.

[223] Enrique Schaerer, *What the Heller?: An Originalist Critique of Justice Scalia's Second Amendment Jurisprudence*, 82 U. CIN. L. REV. 795, 810 (2014).

[224] *Id.*

[225] Dist. of Columbia v. Heller, 554 U.S. 570, 625 (2008).

[226] *Id.* at 721 (Breyer, J., dissenting).

[227] *Id.* (Breyer, J., dissenting).

> The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun control policy. Absent compelling evidence that is nowhere to be found in the Court's opinion, I could not possibly conclude that the Framers made such a choice.[228]

The significance of the difference between the majority and minority opinions in *Heller* will now be considered in the context of two very different textualists: Justice Hugo Black and Justice Antonin Scalia, who both believed that an active judiciary undermined democratically elected governments and the antidote was close adherence to the constitutional text.[229] This comparison will be conducted bearing in mind the accuracy of Posner's perceptive observation that the generality of the provisions of the Constitution leave it open to multiple interpretations.[230]

> Many provisions of the Constitution . . . are drafted in general terms. This creates flexibility in the face of unforeseen changes, but it creates the possibility of alternative interpretations, and this possibility is an embarrassment for a theory of judicial legitimacy that denies judges have any right to exercise discretion. A choice among semantically plausible interpretations of a text, in circumstances remote from those contemplated by its drafters, requires the exercise of discretion and the weighing of consequences.[231]

Justice Hugo Black was a Democratic Senator and supporter of the "New Deal"[232] prior to being nominated to the Supreme Court by Democratic President Roosevelt in 1937 with no prior judicial experience.[233] Justice Antonin Scalia served in the administrations of Republican Presidents Nixon and Ford, eventually becoming Assistant Federal Attorney General between 1974 and 1977.[234] In 1982, Republican President Reagan nominated Justice Scalia to the U.S. Court of Appeals

---

[228] *Id.* at 680 (Stevens, J., dissenting).

[229] Gerhardt, *supra* note 208, at 28–30.

[230] Posner, *supra* note 196, at 24.

[231] *Id.*

[232] The "New Deal" was a series of public works programs and relief operations undertaken between 1933 and 1939 which were initiated by President Roosevelt and designed to address the chronic unemployment that followed the Great Depression of 1929-1933. *See New Deal*, BRITANNICA, https://www.britannica.com/event/New-Deal (last updated July 28, 2021).

[233] *See* Richard L. Parcelle Jr., *Hugo Black*, FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1310/hugo-black.

[234] *Antonin Scalia,* BALLOTPEDIA, https://ballotpedia.org/Antonin_Scalia (last visited Jul. 28, 2021).

for the District of Columbia Circuit and thence to the Supreme Court in 1986 with a mere four years of judicial experience.[235]

As Gerhardt has astutely observed, the textualism espoused by Justices Black and Scalia, one a progressive liberal and the other an arch conservative, is insufficient to explain their respective positions regarding judicial opinions they have expressed in interpreting a constitution drafted in general terms. "Rather, their approaches to constitutional interpretation have turned primarily on their personal and political judgments regarding the role of the federal judiciary in American society, which have reflected changing attitudes toward judicial restraint and activism."[236]

Gerhardt goes on to suggest that the failure of Justices Black and Scalia to remain within the four corners of the constitutional text and to acknowledge the extent of such departure leads to the conclusion that the problem lies within textualism itself.[237]

> In confronting ambiguous text, an interpreter must choose the appropriate level of generality at which to state the constitutional norm at its core.[238] In making this choice, the interpreter must be guided by something. Textual ambiguity makes this choice possible. And it makes relying solely on the text for guidance impractical.[239]

Gerhardt concludes by observing that textualism fails to account for the impracticality of relying solely on the text of a Constitution, written in general terms, in order to adjudicate on its meaning.[240]

> If it is ever to achieve its stated objective of explaining constitutional interpretation, textualism must clarify the inevitability of a justice's development of non-constitutional premises from which to proceed in constitutional adjudication and the unstable relationship between these premises and the text of the Constitution. The purpose of constitutional theory is to explain these premises, including the degree to which they turn on moral or political judgments about the propriety of judicial activism and restraint.[241]

Armed with Gerhardt's analysis of the limitations of textualism, the difference between the majority and minority opinions in *Heller* can be re-examined through the lens of personal and political judgments toward judicial restraint and activism. As such, it can be seen that Justice Scalia's

---

[235] *See id.*

[236] Gerhardt, *supra* note 208, at 55.

[237] *Id.* at 63.

[238] *Id.*

[239] *Id.*

[240] *Id.* at 66.

[241] *Id.*

majority opinion was grounded in his conservative hostility to intrusive government gun regulations but, which in the guise of textual adherence, was masked by the importation of an individual right into the Second Amendment, and only prevented from being an absolute right by the unconvincing use of a common use present time perspective.

How Justice Black might have hypothetically voted in *Heller* is unknowable, but a reasonable guide can be found in Justice Black's dissenting opinion in *United States v Causby*.[242] The majority in *Causby* held that compensation was due to a farmer whose chickens died as a result of military aircraft based at a nearby airfield regularly flying at very low altitude over Causby's property during World War II.[243] In Justice Black's opinion, the majority in *United States v Causby* opened a "wedge for an unwarranted judicial interference with the power of Congress to develop solutions for new and vital national problems."[244] A further wartime example can be found in *Korematsu v. United States*,[245] where Justice Black wrote the majority opinion (6-3) that validated President Roosevelt's decision to intern Japanese Americans during World War II, based on the need to protect America against possible Japanese espionage outweighed the rights of Japanese Americans.[246] The acknowledgement by Justice Black of government responsibility to find solutions to national problems is echoed in the dissenting opinions of Justices Breyer and Stevens in *Heller* when addressing the vital national problem of gun control.[247]

The conclusion to be drawn from the foregoing is that the limitations of textualism are exposed by the ongoing tension between judicial activism to protect individual rights on the one hand, and judicial restraint in the face of democratically elected governments enacting promised legislation on the other hand. Where a Justice sits on the judicial activism - judicial restraint spectrum is, *per force* of the general language employed in the Constitution, less a matter of text and more a matter of personal and political judgment. Potentially, such an analysis lends support to the proposition that the United States Supreme Court is a polarized partisan

---

[242] 328 U.S. 256, 268–75 (1946) (Black, J., dissenting).

[243] *Id.* at 267–68.

[244] *Id.* at 275 (Black, J., dissenting).

[245] 323 U.S. 214 (1944).

[246] *See id.* at 216–17, 219–20, 223–24.

[247] *See* D.C. v. Heller, 554 U.S. 570, 636–723 (2008) (Stevens & Breyer, JJ., dissenting).

court. This begs the question: does the Supreme Court consciously temper such partisanship to protect its reputation?

## V. MUCH ADO ABOUT NOTHING?

*When you have a sharply political, divisive hearing process, it increases the danger that whoever comes out of it will be viewed in those terms. If the Democrats and Republicans have been fighting so fiercely about whether you're going to be confirmed, it's natural for some member of the public to think, well, you must be identified in a particular way as a result of that process*.

John Roberts, Chief Justice of the United States Supreme Court.[248]

The rising tide in the divisive political hearing process for Supreme Court nominees can be illustrated by some comparisons of the voting in the Senate. In 1986, Justice Scalia was confirmed 98-0, while Justice Ginsberg was confirmed 96-3 in 1993.[249] These overwhelming numbers were achieved despite both Justices occupying extreme wings on the judicial philosophy spectrum.[250] For "The Three Trumpians" or "KGB", the votes were 50-48 for Justice Kavanaugh; 54-45 for Justice Gorsuch; and 52-48 for Justice Barrett.[251] In the event that Merrick Garland's 2016 nomination[252] had been dealt with by the Senate, it would have provided an insight into the current divisive nomination process in the Senate, as to whether an acknowledged and respected "mainstream" judge could have secured the overwhelming majorities enjoyed by Justices Scalia and Ginsberg some thirty years previously. Similarly, it is debatable whether, had President Trump nominated three "mainstream" judges, the narrow majorities based on party lines in the Senate would have changed

---

[248] Adam Liptak, *John Roberts Criticized Supreme Court Confirmation Process, Before There Was a Vacancy*, N.Y. TIMES (Mar. 21, 2016), https://www.nytimes.com/2016/03/22/us/politics/john-roberts-criticized-supreme-court-confirmation-process-before-there-was-a-vacancy.html.

[249] *Supreme Court Nominations (1979-Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm (last visited July 30, 2021).

[250] *See Ginsburg and Scalia: 'Best Buddies'*, NPR (Feb. 15, 2016, 4:28 PM), https://www.npr.org/2016/02/15/466848775/scalia-ginsburg-opera-commemorates-sparring-supreme-court-friendship.

[251] *Supreme Court Nominations (1979-Present)*, *supra* note 249.

[252] *Id.*

significantly. As it was, 48 Senators voted against Justice Barrett who was mentored by Justice Scalia.[253]

Nevertheless, despite the rampant partisanship in appointments to the Supreme Court, since 2000, 36 percent of the Supreme Court's decisions have been unanimous, making that the single most probable outcome.[254] 51 percent of decisions received support from at least seven of the nine justices and 80 percent of all votes were cast in favor of the majority opinion.[255] Five-to-four decisions comprised only 19 percent of cases, and they were not always along perceived ideological battle lines.[256] This evidence suggests that once appointed, Justices may become concerned to protect the reputation of the Supreme Court and to act in a more collegiate manner by building coalitions across party lines. One factor in such consensus building is the influence of the parties appearing before the Supreme Court.

The third point of concern raised by Owens and Simon discussed in Part 3B was that a depleted Supreme Court docket might lead to the excessive influence of certain parties.[257] Owens and Simon identified two potential actors who were in a position to "capture" the Supreme Court: the Supreme Court bar and the Office of the Solicitor General (OGS).[258] For present purposes, the focus will be placed on the OGS, which supervises and conducts federal government litigation in the United States Supreme Court, because a Democratic President facing a 6-3 conservative majority on the Supreme Court will need the countervailing power of the OGS to inject some balance into the Court's decisions. According to the OGS website, "the United States is involved in approximately two-thirds of all the cases the U.S. Supreme Court decides on the merits each year."[259]

---

[253] *Id.*

[254] Kaitlyn Van Baalen, *Civil Forfeiture and the Sotomayor-Gorsuch Team*, THE GATE (Feb. 7, 2019, 3:14 PM), http://uchicagogate.com/articles/2019/2/7/civil-forfeiture-and-sotomayor-gorsuch-team/.

[255] *Id.*

[256] *Id.*

[257] Owens & Simon, *supra* note 39, at 1254–56.

[258] *Id.* at 1256–60.

[259] *About the Office*, U.S DEP'T JUST., https://www.justice.gov/osg/about-office (last updated May 24, 2021) ("The Solicitor General determines the cases in which Supreme Court review will be sought by the government and the positions the government will take before the Court . . . . Another responsibility of the Office is to review all cases decided adversely to the government in the lower courts to determine whether they should be appealed and, if so, what position should be taken.").

Owens and Simon[260] cite the work of Ryan Black and Ryan Owens.[261]

> The authors examined every case coming from a federal court of appeals in which the OSG filed an amicus curiae brief at the agenda stage between the 1970 and 1993 Terms.[262] They analyzed each Justice's general ideological views as well as his or her theoretically expected agenda vote in the case.[263] They then examined whether each Justice cast a vote consistent with the recommended action of the OSG.[264] The findings are remarkable. Even those Justices most likely to disagree with the OSG—both in a general ideological sense and in the particulars of the case before them—still followed the OSG's recommendation more than 35 percent of the time.[265]

Black and Owens in a further work[266] compared the success of OSG attorneys with the success of attorneys who formerly worked in the OSG, and with the success of attorneys who never worked in the OSG.

> The results are compelling. In terms of success before the Court, an OSG attorney is 12 percent more likely to win than an otherwise identical non-OSG attorney who formerly worked in the OSG, and 14 percent more likely to win than an otherwise identical non-OSG attorney who never worked in the OSG. Moreover, the Court's majority opinions are significantly more likely to borrow language from the OSG's briefs than from otherwise identical non-OSG attorney's briefs. Finally, the Court is much more likely to positively or negatively interpret precedent when the OSG makes such a recommendation versus an identical case in which it does not. In short, the OSG wields considerable influence across the Court's decision-making process. Such influence, we believe, will be magnified exponentially with a depleted docket.[267]

It is an open question whether the considerable influence of the OSG identified by Black and Owens will continue with a 6-3 conservative majority on the Supreme Court, or indeed whether the docket size may rebound with a more homogeneous Court. However, it can reasonably be predicted that a Democratic President will use the OGS to minimize the

---

[260] Owens & Simon, *supra* note 39, 1256–60.

[261] *Id.* at 1258–60.

[262] *Id.* (citing Ryan C. Black & Ryan J. Owens, *Solicitor General Influence and Agenda Setting on the United States Supreme Court*, 64 POL. RES. Q. 765, 769 (2011)).

[263] *Id.* (citing Ryan C. Black & Ryan J. Owens, *Solicitor General Influence and Agenda Setting on the United States Supreme Court*, 64 POL. RES. Q. 765, 769 (2011)).

[264] *Id.* (citing Ryan C. Black & Ryan J. Owens, *Solicitor General Influence and Agenda Setting on the United States Supreme Court*, 64 POL. RES. Q. 765, 769 (2011)).

[265] *Id.* (citing Ryan C. Black & Ryan J. Owens, *Solicitor General Influence and Agenda Setting on the United States Supreme Court*, 64 POL. RES. Q. 765, 768 (2011)).

[266] RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS (2012).

[267] Owens & Simon, *supra* note 39, 1259–60.

reach or "damage" of Supreme Court decisions, aided by Justice Kagan seeking to narrow the question to be resolved[268] and by Chief Justice Roberts concerned with the preservation of the reputation of the Supreme Court for fairness and an even-handed judicial approach,[269] as exemplified by the words "equal justice under law" which are written above the main entrance to the Supreme Court Building.[270]

In any event, the limits on consensus building will come the fore when the matter before the Supreme Court is particularly important, as in the 5-4 decision in *Bush v. Gore*,[271] which Balkin has severely criticised because "the five conservatives seemed to adopt whatever legal arguments would further the election of the Republican candidate, George W. Bush."[272] More significantly, Balkin went on to point out that all the Supreme Court Justices had a conflict of interest: "By effectively deciding who would become the next president, they were also effectively deciding who would appoint their replacements and future colleagues."[273] Similarly, the Supreme Court split 5-4 in *Citizens United v. Federal Election Commission*[274] in striking down political campaign finance restrictions[275] which, depending on your political standpoint, either restored First Amendment rights (Republican) or represented a victory for special interest groups and a blow to representative democracy (Democrat).

Nevertheless, as Bickel has pointed out, friend and foe of the Supreme Court alike have constantly inflated the Supreme Court's supposed power.[276]

---

[268] Talbot, *supra* note 107.

[269] *Id.*

[270] *The Court and Constitutional Interpretation*, SUP. CT. U.S., https://www.supremecourt.gov/about/constitutional.aspx (last visited July 26, 2021).

[271] 531 U.S. 98 (2000).

[272] Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1409 (2001).

[273] *Id.* at 1440. Balkin noted that in 2001 President Bush ended the fifty-year practice of submitting judicial nominations to the American Bar Association before they were publicly announced on the presumption this provided for less scrutiny and made it easier to nominate ideological conservatives to the federal judiciary. (citing Neil A. Lewis, *White House Ends Bar Association's Role in Screening Federal Judges*, N.Y. TIMES (Mar. 23, 2001), https://www.nytimes.com/2001/03/23/us/white-house-ends-bar-association-s-role-in-screening-federal-judges.html.).

[274] 558 U.S. 310 (2010).

[275] *Id.*

[276] ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 94 (1978).

> The Court's effectiveness . . . depends substantially on confidence, on what is called prestige . . . there is a natural quantitative limit to the number of major, principled interventions the Court can permit itself. It is a matter of credibility . . . . A Court unmindful of this limit will find that more and more of its pronouncements are unfulfilled promises, which will ultimately discredit and denude the function of constitutional adjudication.[277]

There is further reason why the Supreme Court's supposed power is constrained, which relates to the lack of a unifying general appellate jurisdiction vested in the Supreme Court under the United States Constitution,[278] unlike, for example § 73 of the Australian Constitution which sets out the appellate jurisdiction of the High Court of Australia.[279] While Article III section 1 vests the judicial power of the United States "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,"[280] section 2 does not give the Supreme Court a unifying general appellate jurisdiction.[281]

> The 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,[282]—between Citizens of different States,—between Citizens

---

[277] *Id.* at 94–95.

[278] U.S. CONST. art. III, § 2.

[279] AUSTRALIAN CONSTITUTION, § 73.

> The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences: (i) of any Justice or Justices exercising the original jurisdiction of the High Court; (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council; (iii) of the Inter-State Commission, but as to questions of law only; and the judgment of the High Court in all such cases shall be final and conclusive. But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council. Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

*Id.*

[280] U.S. CONST. art. III, § 1.

[281] *See id.* § 2.

[282] Article III section 2 of the Constitution was modified by U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity,

> 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.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. 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.[283]

The appellate jurisdiction set out in the second paragraph of Article III section 2 above is limited to those matters identified in the first paragraph.[284] This means that the common law in the United States is not uniform between jurisdictions.[285] Such differences in the common law are compounded by the different methods of appointment of judges across the individual States outside of the federal judiciary.[286] Thus, while the Supreme Court sits at the apex of the federal judicial system, matters coming to the Supreme Court from the various States may not set a precedent for other States,[287] thereby diluting the impact of Supreme Court decisions.

However, set against the lack of a unifying general appellate jurisdiction vested in the Supreme Court, is the unique position of the Supreme Court as a quasi-legislative body resulting from the first ten amendments to the United States Constitution, often referred to as a Bill of Rights. It is for this reason that there are regular calls to appoint Justices to the Supreme Court to overrule, for example, *Roe v. Wade*.[288] Yet, as previously mentioned, even here with a 6-3 conservative majority on the Supreme Court at present, it would appear that the greatest protection to *Roe v. Wade* may lie firstly in an innate reluctance by the Supreme Court to outlaw abortion completely in the face of widespread

---

commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

[283] *Id.*

[284] U.S. CONST. art. III, § 2.

[285] *See* Morris L. Cohen, *The Common Law in the American Legal System: The Challenge of Conceptual Research*, 81 L. LIBR. J. 13, 22 (1989).

[286] *Judicial Selection in the States*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_the_states (last visited July 23, 2021).

[287] *See* John M. Walker, Jr., *The Role of Precedent in the United States: How do Precedents Lose Their Binding Effect?*, STAN. L. SCH. CHINA GUIDING CASES PROJECT (Feb. 29, 2016), https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2016/02/CGCP-English-Commentary-15-Judge-Walker.pdf.

[288] 410 U.S. 113 (1973); Anna North, *What Amy Coney Barrett on the Supreme Court Means for Abortion Rights*, VOX (Oct. 26, 2020, 8:17 PM), https://www.vox.com/21456044/amy-coney-barrett-supreme-court-roe-abortion.

community anger if such a ruling were made, and secondly in the reform of the restrictive state laws dealing with abortion. This reaffirms the limits on judicial discretion recognized by Cardozo and discussed in Part IV B.[289] The Supreme Court does not operate in a vacuum, and the Justices are mindful of both the Court's reputation[290] and prestige.[291]

## VI. CONCLUSION

*Afterwards the question on many legal scholars' minds was not whether Justice Thomas had in fact made these statements. The question was whether he also told the students that he believed in Santa Claus, the Easter Bunny, and the Tooth Fairy.*

Jack M. Balkin.[292]

This article has sought to distinguish between the overtly political nature of the choice of nominee to the Supreme Court, and the decisions taken by Justices once they have secured lifetime tenure on the Court. The argument has been put that a Justice may be disposed to take a more nuanced view than previously held ideological positions might suggest. The caveat has been made that the true colors of an individual Justice will likely emerge in pivotal watershed cases such as *Gore v Bush*, where all nine Justices had a conflict of interest in the outcome of the Presidential election in 2000.[293] However, the checks and balances that have been embedded in the United States Constitution equally apply to the Supreme Court.[294] Justices are not free to roam at large exercising judicial discretion in a cavalier, *carte blanche* fashion. There are also countervailing forces at work such as the influence of the Office of the Solicitor General and the Supreme Court's smaller docket.

Justices of the Supreme Court, having finally achieved membership of the Court at the apex of the federal judicial system, will not readily undermine the reputation and prestige of the Court by taking overtly political positions. Judges are required to provide published reasons for

---

[289] Cardozo, *supra* note 170, at 103.

[290] Owens & Simon, *supra* note 39, at 1260–61.

[291] BICKEL, *supra* note 276, at 94–95.

[292] Balkin, *supra* note 272, at 1407 (commenting on reports that Justice Thomas told students in a speech "that he believed that the work of the Court was not in any way influenced by politics or partisan considerations.").

[293] *Id.* at 1439–41.

[294] *See* U.S. CONST. arts. I–III.

their decisions, which in turn are subject to scrutiny and criticism.[295] Within the inner sanctum of the Supreme Court building, the nine Justices will be ever mindful to build a respectful collegiate environment and narrow the scope of the decision to build consensus, given the real prospect of having to work together for many decades. While it would be unrealistic to pretend that the Supreme Court is not populated by partisan political appointments, commentators have constantly inflated the Supreme Court's supposed power, although falling well short of being "much ado about nothing."

In the absence of significant reform to the tenure of Supreme Court Justices through introducing a compulsory retirement age or a lengthy fixed term appointment, nominations to the Supreme Court will continue to be an ongoing lottery based on which party holds the Presidency and when a sitting Justice dies. It seems fair to conclude that the present 6-3 conservative majority on the Supreme Court tilts the answer to the question posed in the title to this article in favor of a polarized partisan court, certainly on the watershed cases that come before the Supreme Court in the future, such as the right to life lobby seeking to have *Roe v. Wade* overruled. It remains to be seen whether the current 6-3 conservative majority on the Supreme Court is transformative and conservative parties in litigation are encouraged to bring cases that challenge previous 5-4 decisions they oppose, or whether the Supreme Court's own sense of its prestige and other countervailing forces contain the extent of such a possible legal upheaval. President Biden will be a keen bystander, fortified for the present by the fact that the Democrats control both houses of the Congress, but the Supreme Court may surprise legal commentators one way or another.

[295] 28 U.S.C. § 411; Arthur S. Miller, *A Note on the Criticism of Supreme Court Decisions*, 10 J. PUB. L. 139, 140 (1961).