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Eight Justices Are Enough: A Proposal To Improve The United States Supreme Court

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Eight Justices Are Enough: A Proposal To Improve The United States Supreme Court

Eric J. Segall*

Abstract

Over the last twenty-five years, some of the most significant Supreme Court decisions involving issues of national significance like abortion, affirmative action, and voting rights were five-to-four decisions. In February 2016, the death of Justice Antonin Scalia turned the nine-Justice court into an eight-Justice court, comprised of four liberal and four conservative Justices, for the first time in our nation's history. This article proposes that an evenly divided court consisting of eight Justices is the ideal Supreme Court composition. Although the other two branches of government have evolved over the years, the Supreme Court has undergone virtually no significant changes. Thus, Congress should pass or amend a statute permanently implementing a Supreme Court comprised of an even number of Republicans and Democrats. To reach a decision and avoid deadlock on such a Court, at least one Justice would need to cross ideological lines, resulting in more positively received decisions, especially in politically charged cases. This article concludes that an evenly balanced Court would uphold the supremacy and uniformity of federal law, be more favorably viewed as a Court of law rather than a politicized institution, and would enable well-thought-out and rational procedure—rather than death, serious illness, or politically timed retirements—to drive the

* Kathy & Lawrence Ashe Professor of Law, Georgia State University College of Law. I would like to thank Richard Posner, Jonathan Adler, Adam Liptak, Mark Graber, and Howard Wasserman for extremely helpful comments (though to be clear none agreed with the proposal) as well as the participants at the University of Chicago Judicial Behavior Workshop. I would also like to thank Sandy Levinson and Mark Tushnet for their moral support during the time I advocated for this solution to the problem of the empty Scalia seat.

judicial confirmation process.

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I. INTRODUCTION

I want to thank Pepperdine University School of Law for holding a wonderful symposium on structural suggestions to improve the United States Supreme Court. This coming together of scholars and judges to discuss ways to change the Court could not have come at a better time given the nearly fourteen-month partisan battle over the replacement for the late Justice Scalia resulting in Justice Gorsuch's confirmation in April 2017.¹

Ever since Alexander Bickel coined the phrase the “counter-majoritarian difficulty” to describe unelected federal judges overturning political decisions made by more accountable governmental officials,² both liberal and conservative scholars have struggled to construct theories of constitutional interpretation to limit judicial discretion.³ These theories include originalism, minimalism, representation reinforcement, and numerous other intellectual precommitments designed to curb the power of federal judges.⁴ These academic proposals have failed at least in part because grand theory simply does not

1. See Richard L. Hasen, *The Battle Over Replacing Justice Scalia is Just the Start of a War Over the Supreme Court*, WASH. POST (Feb. 15, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/15/the-battle-over-replacing-justice-scalia-is-just-the-start-of-a-war-over-the-supreme-court/?utm_term=.8378d49f9a02.

2. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

3. For an excellent summary of many of these theories, see SOTIRIOUS BARBER & JAMES FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* (2007).

4. *Id.*

alter the way judges decide cases on the ground.⁵

One does not have to be a hardline legal realist to accept that the politics and values of Supreme Court Justices play a significant role in their legal decisions.⁶ Studies have shown that conservative Justices usually vote conservative and liberal Justices normally vote liberal.⁷ Similarly, Republican Justices often vote in ways that favor the Republican Party and Democrat Justices generally vote in ways that serve Democrats.⁸ There are exceptions, but this partisanship is real and appears to be getting worse.⁹ For those who believe that the Supreme Court often exercises its discretion to reverse political decisions made by other governmental actors even when those choices are not clearly foreclosed by the Constitution (like this author),¹⁰ only significant structural change to the Court can make a serious impact on how often the Justices strike down laws based on ideology rather than demonstrable constitutional infirmity.¹¹

After Justice Scalia passed away in February 2016, and Senate Majority Leader Mitch McConnell announced that the Senate would not even grant a hearing to any President Obama nominee, the Supreme Court was composed of four Justices appointed by Republican presidents and four Justices appointed by Democrat presidents.¹² As importantly, during that time, the most liberal Republican (Justice Kennedy) was more conservative than the most

5. See RICHARD A. POSNER, *HOW JUDGES THINK* (2008) (providing a detailed analysis of the thought processes behind judicial decision making).

6. This paper is devoted mostly to curbing the discretion of Supreme Court Justices who, unlike the judges of the lower courts, are free to ignore or dilute prior cases as they see fit. To the extent that my proposal would increase the power of lower court judges, and it likely would, those issues are addressed in Part III.

7. See Jeffrey A. Segal, Lee Epstein, Charles M. Cameron & Harold J. Spaeth, *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995); Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1049, 1052–54 (1996).

8. See Segal, *supra* note 7; see also Cass R. Sunstein, *Moneyball for Judges*, NEW REPUBLIC (Apr. 9, 2013), <https://newrepublic.com/article/112683/moneyball-judges> (“On the Supreme Court, voting is pretty political . . .”).

9. See Lucas Rodriguez, *The Troubling Partisanship of the Supreme Court*, STAN. POL. (Jan. 7, 2016), <https://stanfordpolitics.com/the-troubling-partisanship-of-the-supreme-court-da9fd5a900ac#.2m85xox6a> (explaining that the partisanship of Supreme Court decisions is getting worse).

10. ERIC SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES* (2012).

11. See *id.* at 1–11.

12. See Harper Neidig, *No Hearing for Obama's Supreme Court Nominee, McConnell Says*, HILL (Mar. 16, 2016, 12:04 PM), <http://thehill.com/blogs/blog-briefing-room/news/273230-mcconnell-no-hearing-for-garland>.

conservative Democrat (Justice Breyer).¹³ The result was an evenly balanced Supreme Court among liberals and conservatives, Republicans and Democrats, for the first time in our nation's history.¹⁴

This paper's thesis is that Congress should have enacted laws and procedures to make permanent an even-numbered Supreme Court with four Republicans and four Democrats (this proposal would now have to be prospective only starting with the next deceased Justice whose absence would leave the Court evenly divided).¹⁵ This structural change could significantly change how the Justices decide cases as well as improve our broken confirmation process.¹⁶ To alleviate possible concerns that my proposal is motivated by current partisan concerns, I must note that I urged this change to the Court a few months after Justice Scalia passed away, when most people believed that Hillary Clinton would be our next President.¹⁷

A permanent, evenly divided Supreme Court along partisan and liberal/conservative lines would result in narrower, more consensus, and bi-partisan decision-making, reduce the opportunities for five or more Justices to impose rigid ideological agendas over long periods of time, and improve the irrational procedures we now use to select the Justices.¹⁸ Under our current system, the political make-up of our highest Court is largely the result of death and sickness or, even worse, strategically timed or ill-timed retirements.¹⁹

13. See SEGALL, *supra* note 10, at 1–11.

14. Professor Jonathan Adler chided me on Twitter on this topic, arguing that with Justice Kennedy, the Court wasn't really evenly-divided. See @Jadler1969, TWITTER (Jan. 9, 2017, 5:27 AM), <https://twitter.com/jadler1969/status/818449191743746048>. Of course, it is true that Justice Kennedy has sided with the liberals on gay rights, abortion, school prayer, and a few other cases. Dana Milbank, *Anthony Kennedy restores a liberal Supreme Court*, WASH. POST (Jun. 27, 2016), https://www.washingtonpost.com/opinions/a-liberal-majority-returns-to-the-supreme-court/2016/06/27/b6d53370-3ca1-11e6-80bc-d06711fd2125_story.html?utm_term=.7cde8784afac. But over his long career, these votes, while extremely important, are the exception not the rule. See *id.* For example, Justice Kennedy has been a reliable vote on federalism, criminal procedure, free speech, campaign finance, and non-school prayer church/state cases. See *id.* More importantly, I do not argue that political party affiliation always lines up with liberalism or conservatism, just that my proposal over time will make it much more likely that the Court will be more balanced than it has been over the last two hundred years and likely to be in the future without my proposal. See *infra* Part II.

15. See *infra* Part II.

16. See *infra* Part III.

17. Eric Segall, *Benefits of an Evenly Split Court Will Become Apparent*, N.Y. TIMES (May 18, 2016, 3:22 AM), <https://www.nytimes.com/roomfordebate/2016/05/18/is-a-deadlocked-supreme-court-such-a-bad-thing/benefits-of-an-evenly-split-court-will-become-apparent>.

18. See *infra* Part III.

19. See *infra* Section III.B.

The likely costs of my proposal include the potential loss of uniformity in national decisions resulting from four-four ties among the Justices, the awkwardness of requiring nominees to identify their political party affiliations, and the question of what to do with nominees who identify as Independents.²⁰ While these costs are significant, they are far outweighed by the many benefits of an evenly divided Supreme Court.²¹

Before presenting my specific proposal, three caveats need to be mentioned. First, my burden is not to demonstrate that this proposal is perfect or even very good. Instead, my job is to show that an evenly divided Supreme Court would result in an institution that significantly improves our constitutional democracy when compared to our current Court.²²

Second, because this paper advocates a major change to the Supreme Court, the proposal runs headlong into something I have previously called “comfort zone constitutionalism.”²³ Those who think, write, and comment on our nation’s highest Court are used to the Justices resolving many of our country’s hardest social, political, and legal questions.²⁴ Our Court has been the most powerful judicial body in the world for centuries, so any proposal that might reduce the Court’s authority understandably makes people nervous about how our fundamental liberties and freedoms will be protected and by whom.²⁵ Those satisfied with how the Court does its job will not be sympathetic to my proposal. But for those who feel the Court too often interferes with our social and political order based on ideological opposition rather than clear constitutional mistake, this proposal allows the Court to maintain the supremacy and uniformity of federal law while making it more difficult for the Justices to impose their own personal agendas and values.

Both the President and Congress now exercise power that would have been inconceivable to most people eighty-five years ago.²⁶ Moreover, like it or not, it appears that there may be significant changes coming to many of our

20. See *infra* Section III.C.

21. See *infra* Section III.C.

22. See *infra* Section III.B.

23. See Eric Segall, *Comfort Zone Constitutionalism*, DORF ON L. (Sept. 19, 2016, 4:00 PM), <http://www.dorfonlaw.org/2016/09/comfort-zone-constitutionalism.html>.

24. See *id.*

25. See BICKEL, *supra* note 2, at 1.

26. See e.g., Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 2, 5–6 (2002) (discussing the increase in presidential power through the modern use of executive orders).

political institutions under President Trump.²⁷ The Supreme Court, unlike the other two branches of government, has undergone virtually no major institutional change for hundreds of years.²⁸ There is no reason in law or logic why the Court should not evolve like other important governmental institutions.²⁹

Professor Mark Graber suggested to me that a world in which members of Congress could rally behind such a bi-partisan proposal is also likely a world “in which judges are constrained by constitutional theory,” and in that imaginary world, my proposal would not be needed.³⁰ However, a permanent four-to-four evenly divided Court would surely weaken the Supreme Court’s power to strike down federal and state laws.³¹ That being the case, it is in the long-term self-interests of both political parties to support my proposal even considering that Republicans now control the Congress and two-thirds of state legislatures.³²

Third, while it is extremely unlikely that Congress will adopt this proposal, reflecting on the possibility of a permanent, evenly divided Supreme Court provides new insights into how the Justices decide cases.³³ As I will show in Part III, over the last fifty years there have been many five-to-four decisions decided along ideological lines that set forth national rules governing many of our most divisive and important public policy questions.³⁴ My proposal is designed, among other things, to reignite a debate that occurred at the beginning of the twentieth century over whether it is appropriate for a bare majority of Justices to wield so much authority, especially when the difference

27. See Stephen Collinson, *Trump’s Plan to Dismember Government*, CNN (Mar. 14, 2017, 6:01 PM), <http://www.cnn.com/2017/03/14/politics/donald-trump-dismember-government/index.html>.

28. See Peter Nicolas, “*Nine, Of Course*”: *A Dialogue on Congressional Power to Set by Statute the Number of Justice on the Supreme Court*, 2 N.Y.U. J.L. & LIBERTY 86, 89 n.10 (2006) (discussing how the number of Justices has changed over time).

29. See *supra* notes 27–28 and accompanying text.

30. E-mail from Mark Graber, Professor of Law, The University of Maryland Francis King Carey School of Law, to Eric Segall, Kathy and Lawrence Ashe Professor of Law, Georgia State University College of Law (Jan. 9, 2017) (on file with author).

31. See Richard Wolf, *Supreme Court: What happens in Case of a Tie?*, USA TODAY (Feb. 14, 2016, 2:39 PM), <https://www.usatoday.com/story/news/2016/02/14/supreme-court-scalia-vacancy-tie-votes/80375846/> (explaining that when the Supreme Court is split in a given case, its decision is practically “meaningless”); David G. Savage, *Here’s How a Divided Supreme Court Ruled (or Didn’t Rule) on Big Issues This Session*, LA TIMES (Jun. 27, 2016, 7:52 AM) <http://www.latimes.com/nation/la-na-supreme-court-major-cases-20160527-snap-story.html>.

32. See Segal, *supra* note 23.

33. See *id.*; Robert Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-90*, 21 HOFSTRA L. REV. 667, 667–68 (1993).

34. See *infra* Part III.

between the majority and dissent in such cases usually represents disagreements among the Justices over differing politics and values, not legal interpretations.³⁵ Identifying the pros and cons of my proposal to end that practice may reveal some important insights about our nation's highest Court.³⁶

Part II outlines the details of my proposal and argues Congress could implement it without the need for a constitutional amendment. Part III details how the plan improves both the Court and the nomination process, and addresses the major objections to the proposal.

II. THE PROPOSAL

The United States Constitution does not specify the number of Justices who must sit on the United States Supreme Court.³⁷ The first Court had six Justices.³⁸ The number then fluctuated between six and ten until 1869, when Congress fixed the number at nine—which has been the case ever since.³⁹ The first part of my proposal is that the Congress pass a statute or amend an existing one to require that eight Justices (or any even number) sit on the Court.⁴⁰

Second, there must be a requirement that the Court always be composed of an even number of Republicans and Democrats. One way to effectuate this balance would be for the entire Congress to pass a statute to that effect. Currently the Federal Election Commission (FEC), a so-called independent agency, is required by law to have no more than three members from each political party.⁴¹ Many think this Commission has been a failure because it

35. See Riggs, *supra* note 33 (“In the early decades of this century, when 5-4 decisions were few and unanimity was the rule, critics of the Court often suggested that decisions by a single vote—especially when voiding a statute—were somehow illegitimate.”).

36. See *infra* Part III.

37. See U.S. CONST. art. III, § 1.

38. See Elizabeth Nix, *7 Things You Might Not Know About the U.S. Supreme Court*, HIST. (Oct. 8, 2013), <http://www.history.com/news/history-lists/7-things-you-might-not-know-about-the-u-s-supreme-court>.

39. *Id.*

40. See, e.g., *id.*; Nicolas, *supra* note 28, at 90 n.11 (noting that Congress has amended the Judiciary Act of 1789 to change the number of Justices).

41. See *Leadership and Structure*, FED. ELECTION COMMISSION, <https://www.fec.gov/about/leadership-and-structure/> (last visited Feb. 3, 2018).

often fails to act.⁴² However, there is a major difference between the Commission and the Supreme Court.⁴³ When the Commissioners are deadlocked along partisan lines, no action may be taken by anyone on the issue.⁴⁴ When an evenly divided Supreme Court is tied four to four, by contrast, the lower court decision resolves the controversy.⁴⁵ The importance of the FEC for our purposes is that it shows Congress knows how to require an ideologically balanced federal instrumentality and maintain that balance over a long period of time (forty years).⁴⁶

Even if Congress enacted such a bi-partisan requirement for the Supreme Court, the President could nominate whomever he wanted pursuant to his constitutional prerogatives.⁴⁷ Pursuant to its own prerogatives, however, the Senate could refuse to confirm a nominee who would disrupt the balance on the Court.⁴⁸

Another potentially easier method of insuring an equal number of Republicans and Democrats on the Court would be for the Senate to pass an internal rule to that effect.⁴⁹ Such a rule would not be binding on future Senates, but that is true for all Senate rules, such as the cloture/filibuster procedure that, although likely ending now, has been effective and in place in one form or another since the middle of the nineteenth century.⁵⁰

Whether Congress makes the change through statute or rule, there should be a provision that any person who changed political party affiliation within the preceding five years be approved by a two-thirds vote of the Senate. This

42. See, e.g., Craig Holman, *Roiled in Partisan Deadlock, FEC is Failing*, HUFFINGTON POST (May 20, 2015, 10:04 AM), http://www.huffingtonpost.com/craig-holman/roiled-in-partisan-deadlock_b_7334888.html.

43. See *infra* notes 44–45 and accompanying text.

44. See Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp*, FED. ELECTION 1, 7 (Feb. 2017), http://classic.fec.gov/members/ravel/ravelreport_feb2017.pdf.

45. See Brendan I. Koerner, *What Happens in a SCOTUS Tie?*, SLATE (Feb. 13, 2016, 6:50 PM), http://www.slate.com/articles/news_and_politics/explainer/2004/11/what_happens_in_ascotus_tie.html. The only exception may be cases within the Court's original jurisdiction, although the Court has held that its original jurisdiction is not exclusive. See, e.g., *Rhode Island v. Massachusetts*, 37 U.S. 657, 731 (1838).

46. See *Federal Election Commission*, ALLGOV, <http://www.allgov.com/departments/independent-agencies/federal-election-commission?agencyid=7324> (last visited Feb. 12, 2018).

47. See U.S. CONST. art. II, § 1.

48. See U.S. CONST. art. I, § 3.

49. See *id.* § 5.

50. See Sarah A. Binder, *The History of the Filibuster*, BROOKINGS (Apr. 22, 2010), <https://www.brookings.edu/testimonies/the-history-of-the-filibuster/>.

requirement would make it much harder for possible nominees to game the system.⁵¹ In addition, so that people without a political party affiliation will not be excluded from consideration as potential Justices, there should be a rule that a nominee unwilling to identify her affiliation can be confirmed with a supermajority vote of two-thirds of the Senate.⁵² That person, for balance purposes, would be considered by the Senate to be of the same party affiliation as the nominating President.

The final detail of the proposal would require a majority vote of the nominee's political party representatives on the Senate Judiciary Committee before any final Senate vote could take place. This procedural hurdle would make it much more difficult for the President to stack the Court with members of the other political party whose politics are much more aligned with the President's own party.⁵³

The political incentives for the Senate's majority party to confirm a Supreme Court nominee of the opposing party are similar to the incentives that have supported the filibuster for all this time—the majority party knows that someday it will be the minority.⁵⁴ The requirement that sixty Senators approve cutting off debate has had major consequences over the years for important legislation such as civil rights and immigration bills, but the majority parties at the time went along.⁵⁵ Another incentive is that in the case of a balanced Supreme Court, unlike the filibuster, both political parties in the Senate, and for that matter the entire Congress and the President, benefit from a Supreme Court less able to impose its will on the other branches of government.⁵⁶

51. *See id.*

52. *See* Robert Longley, *The Supermajority Vote in US Congress*, THOUGHTCO. <https://www.thoughtco.com/the-supermajority-vote-in-us-government-3322045>.

53. This wrinkle was suggested by Art Pasternak of Gibson, Dunn & Crutcher.

54. *See* Dan Rockmore, *According to Game Theory, the Senate is Already Lost*, SLATE (Apr. 6, 2017, 10:47 AM), http://www.slate.com/articles/news_and_politics/science/2017/04/game_theory_suggests_forgiveness_is_the_only_way_to_avoid_nuclear_winter.html (explaining that the filibuster has survived because this “tit for tat” rationale encourages the current majority to maintain the status quo until the majority becomes the minority and vice versa).

55. *See, e.g.*, Binder, *supra* note 50 (noting nearly every Congress has experienced “at least one bout of obstructionism” over civil rights); Brian Montopoli, *DREAM Act Dies in the Senate*, CBS NEWS (Dec. 18, 2010, 11:48 AM), <https://www.cbsnews.com/news/dream-act-dies-in-the-senate-18-12-2010/> (noting that the Dream Act died on the Senate floor “short of the 60 votes needed to overcome” a filibuster).

56. *See The Court and Constitutional Interpretation*, SUP. CT. OF U.S., <https://www.supremecourt.gov/about/constitutional.aspx> (last visited Feb. 4, 2018) (recognizing the extraordinary power of the

Congressional leaders of both major political parties could announce that from now on the Senate will require partisan balance on our highest Court in the spirit of playing fair regarding the selection of our most important judges. We need a new nomination procedure more than ever, given the GOP's willful and successful efforts to block President Obama from appointing a new Justice for almost the entire last year of his Presidency.⁵⁷ It is likely that the Democrats, once they are the majority party again in the Senate, will take similar action against a Republican President, and this extreme partisan wrangling is no way to staff our nation's highest Court.⁵⁸

Many commentators have offered other structural solutions to curb the power of the Court and improve the confirmation process. Some proposals include ending life tenure or requiring a super-majority vote of the Justices to strike down federal and state laws.⁵⁹ I support such solutions, but they either would likely require constitutional amendments or complicated legislative wrangling.⁶⁰ My proposal does not raise constitutional concerns, and its implementation would be relatively easy.⁶¹

III. THE BENEFITS OF AN EVENLY DIVIDED COURT

A. *Divided Government*

An important element of our constitutional structure is that separated and shared powers both protect freedom and yield an efficient government when necessary. To that end, the Constitution created three different branches of

Supreme Court to invalidate legislation and executive orders it deems unconstitutional).

57. See *When the GOP Stole Merrick Garland's Supreme Court Seat, They Set the Stage for a Miserable Battle*, L.A. TIMES (Jan. 31, 2017, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-supreme-court-nomination-20170131-story.html>; Adam Liptak, *Study Calls Snub of Obama's Supreme Court Pick Unprecedented*, N.Y. TIMES (Jun. 13, 2016), https://www.nytimes.com/2016/06/14/us/politics/obama-supreme-court-merrick-garland.html?_r=0.

58. See Ed O'Keefe, *Home Stretch for Gorsuch's Supreme Court Nomination Could Forever Alter the Senate*, CHI. TRIB. (Apr. 2, 2017, 8:50 PM), <http://www.chicagotribune.com/news/nationworld/politics/ct-gorsuch-supreme-court-confirmation-20170402-story.html> (noting Gorsuch's confirmation "will likely reshape how the Senate confirms future justices"); see also Rockmore, *supra* note 54 (noting that the "tit for tat" mindset will likely predict how the current minority party will treat the current majority party when power dynamics shift).

59. See, e.g., Jeremy Waldron, *Five to Four: Why do Bare Majorities Rule on Courts*, 123 YALE L.J. 1692, 1694–95 (2014); Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 771 (2006).

60. See Waldron, *supra* note 59; Calabresi & Lindgren, *supra* note 59.

61. See *supra* Part II.

the federal government and divided powers between the state and federal governments.⁶²

The advantages of dividing power in this manner are well documented. Diffused power makes it more difficult for political officials to enact controversial and divisive legislation while making it more likely that they will enact beneficial laws that will be effectively maintained due to support from wider and more diverse interests.⁶³ Moreover, requiring more compromise and negotiation between different political parties and among the various branches of government will likely result in legislation more favorable to the entire population.⁶⁴

Although the analogy is far from perfect, “many of these same principles and advantages support an evenly divided Supreme Court.”⁶⁵ The essential question in most constitutional law cases is whether the Justices should displace a political decision made elsewhere and impose a national rule that, depending on the case, may bind the fifty states, the Congress, the Executive, hundreds of millions of Americans, or even sometimes all of the above.⁶⁶ Although Alexander Hamilton hoped that the Court would invalidate laws only when they were at an “irreconcilable variance” with the Constitution,⁶⁷ the Justices have in fact regularly exercised their “will” to set national economic, social, political, and legal policy even where no clear constitutional inconsistency exists.⁶⁸

The Court also decides cases involving the interpretation of federal laws. With rare exceptions, these controversies do not divide the American people

62. Eric Segall, *Divided Government is Great So Why Not for SCOTUS*, DORF ON L. (Oct. 16, 2016), <http://www.dorfonlaw.org/2016/10/divided-government-is-great-so-why-not.html>.

63. See William A. Niskanen, *A Case for Divided Government*, CATO INST. (May 7, 2003), <https://www.cato.org/publications/commentary/case-divided-government>.

64. See *id.*

65. *Id.*

66. *Id.*; see *The Court and Constitutional Interpretation*, *supra* note 56 (“The complex role of the Supreme Court in this system derives from its authority to invalidate legislation or executive actions which, in the Court’s considered judgment, conflict with the Constitution. This power of ‘judicial review’ has given the Court a crucial responsibility in assuring individual rights, as well as in maintaining a ‘living Constitution’ whose broad provisions are continually applied to complicated new situations.”). Occasionally the Court hears cases, such as some criminal procedure disputes, that are fact specific in ways that aren’t generalizable, but these are the exceptions. See, e.g., Lester B. Orfield, *Supreme Court Decisions on Federal Criminal Procedure*, 33 J. CRIM. L. & CRIMINOLOGY 219 (1943) (discussing such cases).

67. THE FEDERALIST NO. 78 (Alexander Hamilton).

68. See SEGALL, *supra* note 10 (detailing the numerous cases across vast doctrinal constitutional law areas where the Court has struck down laws without a solid basis in text or history).

to the same extent as major constitutional cases.⁶⁹ In any event, Congress can always overturn these decisions, so the stakes are not quite as high as with virtually non-reviewable constitutional cases.⁷⁰ Additionally, most of the advantages and disadvantages of my proposal apply with equal force to statutory interpretation cases, especially when laws enacted by a Congress in which one political party controls both Houses are reviewed by Supreme Courts dominated by a different political party.

Some observers point to the fact that, because roughly fifty percent of the Court's decisions are unanimous, the Court is less partisan and less value oriented than legal realists suggest.⁷¹ Therefore, the argument goes, proposals to reduce the Court's partisanship are not needed.⁷² The purpose of my proposal, however, is to address the Court's most difficult and nationally divisive cases where partisanship and personal values play a major role.⁷³

Over the last twenty-five years, the Supreme Court has regularly decided the most important constitutional law cases by five-four votes even though such split decisions constitute only about twenty percent of the Court's decisions overall.⁷⁴ The following list of five-four cases since 1990 demonstrates

69. See Stephen Gottlieb, *Blame the Supreme Court for America's Sharp Political Divide*, HILL (Aug. 24, 2017, 10:40 AM), <http://thehill.com/blogs/pundits-blog/the-judiciary/347771-blame-the-supreme-court-for-our-nations-sharp-political> ("The contentiousness of our national politics is partly driven by the issues the Supreme Court put on the national agenda, including the rights of racial, sexual and religious groups.").

70. See Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. R. 1317 (2014) (discussing the history and importance of subsequent congressional overrides of Supreme Court decisions regarding federal law); see also Eric J. Segall, *The Constitution Means What the Supreme Court Says It Means*, 129 HARV. L. REV. F. 175, 187 (2015-2016) ("[O]ur constitutional law is not about the text of the document but about Supreme Court interpretations of that text.").

71. See, e.g., Max Bloom, *The Supreme Court Knows How to Find a Consensus*, NAT'L REV. (June 29, 2017, 12:00 PM), <http://www.nationalreview.com/article/449088/unanimous-supreme-court-decisions-are-more-common-you-think> (arguing that "a surprising number of politically contentious cases are decided unanimously or close to unanimously").

72. See *id.* (concluding that "there are dozens of unanimous and near-unanimous decisions that clarify important legal questions and provide guidance to the lower courts" and "unexpected alignment of justices reminds us that abstract principles can still best partisan considerations").

73. See James Huffman, *The Supreme Court in the Balance*, HOOVER INSTITUTION (Sept. 21, 2016), <http://www.hoover.org/research/supreme-court-balance> ("[P]olitics does appear to rule in most of the cases that draw public attention. It might be argued that those cases draw such attention because the Court has split along apparently political lines, but the reality is that they draw it long before they are decided—with the left and the right expecting that 'their' Justices will rule along party lines. And there is predictable outrage when a Justice deviates from what is expected. Clearly, the public sees the Supreme Court as a political institution . . .").

74. See Eric Posner, *Why Does the Court Usually Decide Cases Either 9-0 or 5-4?*, SLATE (July

how important such decisions are to our country: *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁷⁵ (abortion); *Parents Involved in Community Schools v. Seattle School District No. 1*⁷⁶ (affirmative action); *Citizens United v. FEC*⁷⁷ (campaign finance reform); *Shelby County, Alabama v. Holder*⁷⁸ (voting rights); *District of Columbia v. Heller*⁷⁹ (Second Amendment); *Printz v. United States*⁸⁰ (anti-commandeering/federalism); *Seminole Tribe of Florida v. Florida*⁸¹ (sovereign immunity, federalism); *United States v. Lopez*⁸² and *United States v. Morrison*⁸³ (commerce clause, federalism); *Town of Greece v. Galloway*⁸⁴ (church/state); *Obergefell v. Hodges*⁸⁵ and *United States v. Windsor*⁸⁶ (gay rights); *Roper v. Simmons*⁸⁷ (death penalty); and, of course, *Bush v. Gore*⁸⁸ (the fate of the Presidency).

Suffice it to say that these five-to-four cases represent many if not most of the significant Supreme Court constitutional law decisions over the last twenty-five years.⁸⁹ Moreover, every one of the listed cases was decided by a majority of five conservatives with four liberals dissenting, except for the abortion, death penalty, and gay rights decisions.⁹⁰ Although some of these cases involved two Republican Justices (Souter and Stevens) voting with the liberal bloc,⁹¹ as discussed in Part III it is highly unlikely that we will see

1, 2014, 11:07 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_2014_why_are_most_cases_either_9_0_or_5_4.html.

75. 505 U.S. 833 (1992).

76. 551 U.S. 701 (2007).

77. 558 U.S. 310 (2010).

78. 570 U.S. 529 (2013).

79. 554 U.S. 570 (2008).

80. 521 U.S. 898 (1997).

81. 517 U.S. 44 (1996).

82. 514 U.S. 549 (1995).

83. 529 U.S. 598 (2000).

84. 134 S. Ct. 1811 (2014).

85. 135 S. Ct. 2584 (2015).

86. 570 U.S. 744 (2013).

87. 543 U.S. 551 (2005).

88. 531 U.S. 98 (2000).

89. See *supra* notes 75–88 and accompanying text.

90. See *supra* notes 75–88 and accompanying text.

91. See David G. Savage, *Justice Souter: Liberal or Conservative?*, L.A. TIMES (May 4, 2009), <http://articles.latimes.com/2009/may/04/nation/na-souter4> (discussing Justice Souter's tendency to vote with the liberal bloc); David G. Savage, *John Paul Stevens' Unexpectedly Liberal Legacy*, L.A. TIMES (Apr. 9, 2010), <http://articles.latimes.com/2010/apr/09/nation/la-na-stevens-legacy10-2010apr10> (discussing Justice Stevens' history of voting with the liberal bloc).

similar non-partisan Justices in the future.⁹²

There have been several eras in American history when a Court dominated by five or more liberals or five or more conservatives has been able to quickly and efficiently impose political agendas on the American people.⁹³ Between 1900 and 1936, for example, a conservative Court invalidated a significant number of progressive state and federal laws protecting workers' rights and safety, including federal laws curtailing horrific child labor practices.⁹⁴ Virtually all the laws struck down by the Justices during this time would be constitutional today.⁹⁵

The liberal Warren Court of the 1960s and the early Burger Court of the 1970s created new "fundamental" constitutional rights and procedural protections for criminal defendants that many people opposed.⁹⁶ More recently, and moving in the opposite direction, the Rehnquist and Roberts Courts have made it much harder for plaintiffs to successfully litigate habeas corpus, class-action, civil-rights and constitutional law cases than under prior legal regimes.⁹⁷

Regardless of where one stands on these controversial issues, if we are going to allow a small governmental body composed of nine judges to set national policy, we should insist on better checks and balances to make it a little more difficult for that institution to impose its will so efficiently.⁹⁸ So far, no amount of academic theorizing has placed significant limits on the Court's discretion.⁹⁹

92. See *supra* Section III.A.

93. See Ben Railton, *The Supreme Court Has Always Been Political*, HUFFPOST (Feb. 18, 2017, 7:31 PM), https://www.huffingtonpost.com/ben-railton/the-supreme-court-has-alw_b_9268616.html (discussing the historical roots of a highly politicized Supreme Court).

94. See Ian Millhiser, *Worse Than Lochner*, YALE L. & POL'Y REV. INTER ALIA (Nov. 15, 2011, 4:45 PM), http://ylpr.yale.edu/inter_alia/worse-lochner.

95. See David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 386 (2003) ("There is a time for judicial crusades on behalf of principles of the highest importance; the Warren Court's campaign against racial discrimination is an example. More often, though, judicial review requires courts to recognize the complexity of the issues they confront and to develop doctrines that, while vindicating constitutional rights, also accommodate values that are in tension with those rights. *Lochner* presented the latter, but the Court treated it as the former, and that is why *Lochner* deserves the reputation it has today.")

96. See David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7 (1999).

97. See Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 437 (2007).

98. See Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J.L. & LIBERTY 18 (2016).

99. See *id.* at 117 ("The weapons [to check the court] exist. They are constitutionally legitimate. And they form an integral part of our constitutional system of separation of powers. It is time to be

A better system would allow the Justices to exercise their power of judicial review as a veto mechanism only when there is some bi-partisan support among the Justices for their difficult decisions and where the difference between who wins and who loses is more than one slim vote.¹⁰⁰ There are at least five additional reasons to divide and diffuse power in this manner.¹⁰¹

First, most would agree that the Court should not overturn decisions made by elected government officials unless there are substantial reasons for that reversal beyond pure ideological or political disagreement.¹⁰² Although a divided Court would still inevitably issue political or value laden decisions, it will be harder for it to do so in the long run because it is less likely there will be five or more Justices ideologically aligned than it is under our current regime.¹⁰³ My proposal cannot guarantee such a result, as political party affiliation does not always align with liberal or conservative ideology. But the important point is that my proposal makes it more likely, maybe even much more likely, that the Court will be more ideologically balanced than it is under our current nomination process.¹⁰⁴

My proposal shifts to the courts of appeals final decision-making authority in those nationally important cases where the Justices divide four-to-four.¹⁰⁵ Those court of appeals judges are just as likely to impose their political will as the Supreme Court. I will have a lot more to say about lower court judges in Section III.C when addressing the uniformity objection to my proposal. For now, it is enough to note that the power to impose a rule on all of

candid and clear in embracing their constitutional propriety.”).

100. See Mark Pulliam, *It's Not Just a Question of "Restraint" Versus "Activism,"* NAT'L REV. (Apr. 8, 2015, 4:00 AM), <http://www.nationalreview.com/article/416590/quandary-judicial-review> (discussing the pros and cons of the Supreme Court's power of judicial review and why the issue goes much deeper than the simple labels of “judicial restraint” or “judicial activism”).

101. See *infra* notes 102–21 and accompanying text.

102. See, e.g., Eric Black, *Why Should the Unelected Supreme Court Get the Final Say About Our Laws?*, MINNPOST (Nov. 19, 2012), <https://www.minnpost.com/eric-black-ink/2012/11/why-should-unelected-supreme-court-get-final-say-about-our-laws>.

103. See Joel Eastwood & Jessie Ma, *How Obama's Nominee Could Change the Face of the Supreme Court*, WALL ST. J. (Mar. 16, 2016, 11:15 AM), <http://graphics.wsj.com/supreme-court-diversity/>.

104. Compare *supra* Part II (laying out my proposal) with Arne Cools, Cédric Labens, Liselotte Leenaerts, Manon Moerman, Jurgén Goossens & Pieter Canoot, *Ideological Balance in US Supreme Court and Belgian Constitutional Court*, BELCONLAWBLOG (Apr. 20, 2016), <https://belconlawblog.com/2016/04/20/ideological-balance-in-us-supreme-court-and-belgian-constitutional-court/> (comparing the United States Supreme Court with the Belgian Supreme Court and finding that the ideologies of each justice in Belgium matter much less than in the United States).

105. See *infra* Section III.C.

America is substantially different than the power to do so for part of America;¹⁰⁶ that different circuits will likely reach different decisions if it is the kind of case likely to divide the Supreme Court;¹⁰⁷ that there are many benefits to having diverse judges spread out over the country to consider and have effective final say on hard constitutional law questions;¹⁰⁸ and few constitutional cases actually raise the kind of uniformity issues that require one single answer.¹⁰⁹

The second benefit of my proposal is that, when the Justices do cross ideological lines in politically charged cases, as at least one Justice would have to do if the Court wants to reach a decision, that result will likely be better received by the public and less likely to be changed or whittled down over time by future Justices.¹¹⁰ This requirement of some bi-partisan agreement serves the interests of consistency, fairness, and the core rule of law principle that similarly situated litigants should be treated similarly.¹¹¹ As Cass Sunstein has written,

When the court decides by a margin of 5-4, its ruling does not seem firm and fixed. With a single new appointment or a shift in just one person's view, the law could lurch in a new direction. True, the court does not like to overrule its own precedents, but it has done so well more than 200 times, and a 5-4 decision is not likely to receive the highest level of respect.¹¹²

Over the last one hundred years or so, the Justices have wavered back and forth in virtually every area of litigated constitutional law, including free speech, freedom of religion, the commerce clause, federalism, sovereign immunity, race relations, and the separation of powers.¹¹³ These pivots, back-

106. *See supra* notes 66–68 and accompanying text.

107. *See infra* notes 172–74 and accompanying text.

108. *See infra* notes 165–66 and accompanying text.

109. *See infra* notes 143–50 and accompanying text.

110. *See* Associated Press, *This is What Happens if There's Only 8 Supreme Court Justices*, N.Y. POST (Feb. 17, 2016, 7:05 PM), <http://nypost.com/2016/02/17/this-is-what-happens-if-theres-only-8-supreme-court-justices/> (arguing that the Supreme Court “could manifest itself in a greater search for compromise”).

111. *See* Cass R. Sunstein, *Why Care If the Court Splits 5-4?*, BLOOMBERG (Jun. 17, 2014, 8:03 AM), <https://www.bloomberg.com/view/articles/2014-06-17/why-care-if-the-court-splits-5-4>.

112. *Id.*

113. *See* Eric Segall, *Constitutional Change and the Supreme Court: The Article V Problem*, 16 U.

tracks, doctrinal shifts, and outright reversals reveal with stark clarity that ideological differences more often explain the Court's five-to-four decisions than legal principles, logic, precedent, or reliance on text or history.¹¹⁴

Third, if the Congress permanently set the Court at eight Justices with a required four-to-four partisan balance, the Justices would know that to maintain their power and influence over time, they would have to deadlock in fewer cases because when such ties occur, the lower court decisions retain full legal effect.¹¹⁵ This reality would inevitably lead to more consensus-driven decision-making and narrower opinions by the Justices, who would have to be more modest and cautious.¹¹⁶ Just like with all divided governments, the advantages of avoiding tyranny, in this case the tyranny of five or more ideologically similar but unelected life-tenured Justices, are significant.

Fourth, this proposal would have the additional benefit of likely producing more moderate nominees to the Court because from time to time Presidents will have to nominate Justices from the opposing political party.¹¹⁷ In those circumstances, more liberal Republicans and more conservative Democrats will be the likeliest candidates.¹¹⁸ In time, having more moderate Justices on the bench who are not clearly aligned with either the far left or the far right might lessen the partisan decision-making on the Court. Of course, it is always possible that a Justice may veer far away from the politics she started with or the politics expected by the nominating President, but that happens with our current process as well, as the examples of Justices White, Blackmun, and Souter demonstrate.¹¹⁹

PA. J. CONST. L. 443 (2013).

114. *See id.* at 444–45.

115. *See* Todd Richmond, *Supreme Court's Kagan Says Scalia Death Forced Compromises*, U.S. NEWS (Sept. 8, 2017, 7:15 PM), <https://www.usnews.com/news/best-states/wisconsin/articles/2017-09-08/supreme-courts-kagan-to-speak-at-uw-madison> (noting that, after Justice Scalia's death, "the justices worked hard to avoid 4-4 ties").

116. *See id.*

117. *See supra* notes 53–54 and accompanying text; *see also* Ed Grabianowski, *How Supreme Court Appointments Work*, HOWSTUFFWORKS (July 15, 2005), <https://people.howstuffworks.com/supreme-court-appointment.htm/printable> (discussing the role a Supreme Court nominee's ideology plays in their nomination).

118. *See supra* note 54 and accompanying text.

119. *See* Grabianowski, *supra* note 117 ("Even if the president gets his ideal nominee confirmed by the Senate, there are no guarantees that the justice will decide cases in the way the president hopes."); Oliver Roeder, *Supreme Court Justices Get More Liberal as They Get Older*, FIVETHIRTYEIGHT (Oct. 5, 2015, 8:30 AM), <https://fivethirtyeight.com/features/supreme-court-justices-get-more-liberal-as-they-get-older/>.

Fifth, when a President of one political party is required to nominate someone from the other party, there will likely have to be more coordination between the two parties before the actual selection is made.¹²⁰ This coordination might lead to more bi-partisanship (which this country desperately needs).¹²¹

In sum, there are many reasons why a permanent, evenly divided Supreme Court may serve our country much better than Courts dominated by five or more ideologically aligned Justices of the same political party.¹²² But even if that turns out not to be the case, the benefits of the change for our broken nomination process as set forth below are so substantial that they alone justify the proposal.¹²³

B. Life Tenure and Our Absurd Nomination Process

Our Justices are the only high court judges in the free world who have life tenure.¹²⁴ The political make up of our Supreme Court is determined by death, serious illness, and, maybe even worse, politically timed or mistimed retirements.¹²⁵ That is an irrational way to decide who becomes one of our nine most important judges.¹²⁶

A leading study on the retirement of Supreme Court Justices summarized its findings as follows:

Judges are influenced in their retirement decisions by their sense of importance and utility on the Court, a critical component of the self-esteem, prestige, and professional satisfaction they naturally seek to

120. See, e.g., Michael A. Memoli & Lisa Mascaro, *Obama's Choice of Popular Centrist Merrick Garland for Supreme Court Puts GOP to the Test*, L.A. TIMES (Mar. 16, 2016, 6:03 PM), <http://www.latimes.com/nation/politics/la-na-supreme-court-nominee-20160316-story.html> (illustrating that President Obama nominated a moderate judge in an attempt to work with Republicans).

121. See *id.*

122. See *supra* notes 100–21 and accompanying text.

123. See *infra* Section III.C.

124. See Stuart Taylor Jr., *Life Tenure Is Too Long for Supreme Court Justices*, ATLANTIC (June 2005), <http://www.theatlantic.com/magazine/archive/2005/06/life-tenure-is-too-long-for-supreme-court-justices/304134/>.

125. See *id.*; Calabresi & Lingren, *supra* note 59, at 802 (“To sitting Justices contemplating retirement, the political views of a likely replacement (and hence those of the presiding President) may lead to their timing their resignations strategically.”).

126. See Calabresi & Lingren, *supra* note 59, at 771 (“[G]ranting life tenure to Supreme Court Justices is fundamentally flawed”).

safeguard and enhance. Thus, we find that justices are less inclined to leave the bench when fulfilling an ideological mission by “fighting the good fight” from the wings or when steering the Court by writing majority opinions that shape legal doctrine *Timing their retirement to insure an ideologically-suitable replacement may in fact be a goal of Supreme Court Justices.* However, that goal appears to be secondary to other objectives such as continuing to exercise power and preserving their ideological and leadership roles on the Court. Additionally, Justices may try to retire strategically but fail.¹²⁷

The major flaw in our nomination process is not that many Justices have politically timed their retirements, although certainly some have, it is that the political balance on the Court is often determined by factors having nothing to do with elections or any well-thought-out transition procedure.¹²⁸ There are many examples of Supreme Court Justices dramatically changing the course of American history based on retirement decisions, death, or illness.

The most glaring example might be that of Justice Thurgood Marshall.¹²⁹ In 1991, the Justice was not in good health and was disenchanted with the conservative direction the Court had taken over the previous twelve years when Ronald Reagan had appointed three conservative Justices (O’Connor, Scalia, and Kennedy).¹³⁰ Rumor has it that Justice Marshall believed that George H.W. Bush was likely to win re-election in 1992.¹³¹ Thus, Justice Marshall retired (somewhat bitterly), and President Bush nominated and the Senate confirmed Clarence Thomas.¹³²

127. Emily Brandon, *How Supreme Court Justices Decide When to Retire*, U.S. NEWS MONEY (Feb. 9, 2009, 1:49 PM) <http://money.usnews.com/money/blogs/planning-to-retain-to-2009/02/09/how-supreme-court-justices-decide-when-to-retain> (emphasis added).

128. See Taylor Jr., *supra* note 124 (noting that life tenure affects a president’s opportunity to nominate a justice “to chance, skewed by individual justices’ efforts to hang on so as to thwart the ambitions of presidents they don’t like”); David R. Stras, *Retaining Life Tenure: The Case for a “Golden Parachute,”* 83 WASH. U. L.Q. 1397, 1440 (2005) (recounting Justice Baldwin’s decision to remain on the bench, despite his mental infirmity, in order to continue receiving his salary).

129. See Greg Henderson, *Supreme Court Justice Thurgood Marshall Retires*, UPI (June 27, 1991), <https://www.upi.com/Archives/1991/06/27/Supreme-Court-Justice-Thurgood-Marshall-retires/8252677995200/>.

130. See Andrew Rosenthal, *Marshall Retires from High Court; Blow to Liberals*, N.Y. TIMES (June 28, 1991), <http://www.nytimes.com/1991/06/28/us/marshall-retires-from-high-court-blow-to-liberals.html>.

131. See *id.*; Henderson, *supra* note 129.

132. Maureen Dowd, *The Supreme Court; Conservative Black Judge, Clarence Thomas, Is Named to Marshall’s Court Seat*, N.Y. TIMES (July 2, 1991), <http://www.nytimes.com/1991/07/02/us/supreme-court-conservative-black-judge-clarence-thomas-named-marshall-s-court.html?pagewanted=all>.

Had Justice Marshall decided to wait just one more year until after the 1992 election, Justice Thomas would not have made it to the Court (at least not at that time). That difference very likely would have changed the results in *District of Columbia v. Heller*,¹³³ *Citizens United v. FEC*,¹³⁴ and *Shelby County v. Holder*,¹³⁵ not to mention many of the Rehnquist Court's federalism decisions such as *Seminole Tribe of Florida v. Florida*,¹³⁶ *Printz v. United States*,¹³⁷ and *Bush v. Gore*.¹³⁸ In other words, our national policies on guns, campaign finance reform, voting rights, sovereign immunity, commandeering of state governments, and possibly even who served as the President of the United States, might well be dramatically different had Justice Marshall made a slightly different decision as to the timing of his retirement.

Under my proposal, politically timed retirements, death, and sickness, would no longer matter quite as much.¹³⁹ The Justices would know that they cannot change the partisan political balance on the Court by leaving (either voluntarily or involuntarily), and the balance would not be affected as much by sudden serious illness or Justices who die on the bench.¹⁴⁰ This would be a much more rational process for selecting the Justices who sit on the United States Supreme Court.¹⁴¹

C. Objections

The most substantial objection my proposal has engendered is that, when the Justices tie four-to-four, the lower court decision is affirmed as if the Court had not heard the case.¹⁴² When there is a split on the issue in the courts of appeals, or more rarely among state supreme courts, there would be no way

133. 554 U.S. 570 (2008) (a 5-4 decision).

134. 558 U.S. 310 (2010) (a 5-4 decision).

135. 570 U.S. 529 (2013) (a 5-4 decision).

136. 517 U.S. 44 (1996) (a 5-4 decision).

137. 521 U.S. 898 (1997) (a 5-4 decision).

138. 531 U.S. 98 (2000) (a 5-4 decision).

139. *See supra* Part II.

140. *See Taylor Jr.*, *supra* note 124; *Brandon*, *supra* note 127.

141. *See Eric Segall, Why We Don't Need a Ninth Supreme Court Justice*, DAILY BEAST (Sept. 14, 2016, 1:43 PM), <https://www.thedailybeast.com/why-we-dont-need-a-ninth-supreme-court-justice>.

142. Kermit Roosevelt, *Liberal Supreme Court Justices Have Little Reason to Compromise*, N.Y. TIMES (May 18, 2016, 3:22 AM), <http://www.nytimes.com/roomfordebate/2016/05/18/is-a-deadlocked-supreme-court-such-a-bad-thing/liberal-supreme-court-justices-have-little-reason-to-compromise>.

for the Justices to unify federal law.¹⁴³ This objection, however, is vastly overstated.

The Supreme Court only hears about seventy-five cases a year, which is less than one percent of all cases in state and federal courts.¹⁴⁴ Therefore, well over ninety-nine percent of state and federal cases that raise federal law issues never reach the Justices.¹⁴⁵ The country has not suffered from any lack of uniformity in those cases.¹⁴⁶

Of the seventy-five or so cases the Court hears every year, roughly twenty percent have been decided by five-four votes.¹⁴⁷ Of those cases, which are often the most important and controversial, few raise true uniformity concerns where a single national rule is important just for the sake of having a national rule.¹⁴⁸ We all prefer that our choices regarding abortion, affirmative action, or gun control be adopted by the Court, but that is different from suggesting that we need national rules in those and other areas of law for the sake of uniformity.¹⁴⁹ The reality is that in many, if not most controversial areas of constitutional law, there have been wide variations in how the circuit courts apply and interpret the Court's rulings.¹⁵⁰ Abortion, affirmative action, and gun control are just three of many examples.¹⁵¹

There certainly might be areas of the law, such as statutory interpretation

143. *See id.* (“When the Supreme Court splits 4-4, it fails to perform its basic function of saying what the law is. A 4-4 split creates no precedent and resolves no legal issues. It leaves the decisions of lower courts in place—even if those decisions are in conflict . . .”).

144. *See* Segall, *supra* note 141; *see also* Oliver Roeder, *The Supreme Court's Caseload is on Track to Be the Lightest In 70 Years*, FIVETHIRTYEIGHT (May 17, 2016, 9:00 AM), <https://fivethirtyeight.com/features/the-supreme-courts-caseload-is-on-track-to-be-the-lightest-in-70-years/>.

145. *See* Segall, *supra* note 141; *see also* Kedar S. Bhatia, *Likelihood of a Petition Being Granted*, DAILYWRIT (Jan. 10, 2013), <http://dailywrit.com/2013/01/likelihood-of-a-petition-being-granted/> (stating that a writ of certiorari has about a one percent chance of being granted).

146. *See* Segall, *supra* note 141.

147. *See id.*; *The Supreme Court's Divided Decisions*, BROOKINGS (Oct. 6, 2005), <https://www.brookings.edu/opinions/the-supreme-courts-divided-decisions/>.

148. *See* Segall, *supra* note 141 (“[I]f a national rule is urgently needed for economic or other reasons, the justices will in all likelihood recognize that need and act accordingly, especially if an evenly divided court were to be a permanent aspect of our legal system”).

149. *See id.*

150. *See* Richard M. Re, *Legal scholarship highlight: When Lower Courts Don't Follow Supreme Court Precedent*, SCOTUS BLOG (Oct. 18, 2016, 10:02 AM), <http://www.scotusblog.com/2016/10/legal-scholarship-highlight-when-lower-courts-dont-follow-supreme-court-precedent/>.

151. *See* Ashutosh Bhagwat, *Separate But Equal: The Supreme Court, the Lower Federal Courts, and the Nature of the Judicial Branch*, 80 B. U. L. REV. 967, 999 (2000).

cases involving federal laws governing the national economy, or constitutional law cases implicating Congress' commerce clause power, or dormant commerce clause limitations on the states, where a single national rule is preferable to govern interstate economic transactions and relationships most efficiently.¹⁵² Should such a case present itself, the Justices would likely work hard to find common ground to avoid grave economic consequences, just as occasionally they vote to affirm prior cases based on stare decisis even if they would have voted differently in the first instance.¹⁵³ Moreover, maybe for collegiality reasons, if uniformity of federal law is essential, the Justices will likely find a way to issue a narrow national rule.¹⁵⁴ And, if an evenly divided Court were to become a permanent feature of our constitutional system, the Justices would work even harder to avoid being deadlocked to protect the Justices' own power over time.¹⁵⁵

The second objection to my proposal is that an evenly divided Court will inevitably deadlock on some major questions, thus transferring final decision-making authority to the courts of appeals.¹⁵⁶ This objection, however, is a positive element of my proposal.¹⁵⁷

The courts of appeals hear cases through three-judge panels, but there is always the possibility of *en banc* review consisting of all active judges in the circuit.¹⁵⁸ *En banc* review is most likely to occur in the politically charged cases likely to divide the Supreme Court.¹⁵⁹

The circuits vary in size with all but one having more than nine judges.¹⁶⁰ The partisan balance on these courts shifts over time depending on who has been President in the recent past and how long the judges serve.¹⁶¹ However,

152. See Segall, *supra* note 141.

153. See *id.*; see also *Planned Parenthood v. Casey*, 505 U.S. 833, 845–46 (1992).

154. See Adam Liptak, *A Supreme Court Not So Much Deadlocked as Diminished*, N.Y. TIMES (May 17, 2016), https://www.nytimes.com/2016/05/18/us/politics/consensus-supreme-court-roberts.html?_r=0 (stating that with only eight Justices, the Justices will likely issue many “modest and ephemeral” decisions).

155. See *id.*

156. See *id.*

157. See *infra* notes 158–171 and accompanying text.

158. See *The Politics of En Banc Review*, 102 HARV. L. REV. 864, 864 (1989) (“En banc review gives all the judges on a circuit court of appeals an opportunity to reconsider a decision rendered by a three-judge panel.”).

159. See *id.* at 864–65.

160. *Circuits*, USLEGAL, <https://system.uslegal.com/us-courts-of-appeals/circuits/> (last visited Feb. 4, 2018).

161. See DONALD R. SONGER, REGINALD S. SHEEHAN & SUSAN B. HAIRE, CONTINUITY AND

given life tenure, it is likely, absent two or more consecutive two-term Presidents from the same political party, that there will be a reasonably healthy political balance among and between circuit court judges.¹⁶² That is much less true of the Supreme Court, where a simple five-to-four majority can have substantial consequences for the country.¹⁶³ Dispersing decision-making authority in important cases among highly qualified judges of both political parties would not necessarily produce worse decisions and may well produce better ones for the reasons stated below.¹⁶⁴

Court of appeals judges as a group are far more diverse politically, educationally, socially, and geographically than Supreme Court Justices.¹⁶⁵ They include former defense attorneys, trial lawyers, and attorneys who specialized in commercial law prior to taking the bench, whereas the Supreme Court has been composed in recent years entirely of former government lawyers or attorneys with only large firm experiences.¹⁶⁶ As Justice Sotomayor recently said, the Supreme Court is “never going to be a melting pot reflective of this country.”¹⁶⁷ Additionally, Supreme Court Justices spend almost all their careers in Washington D.C., whereas court of appeals judges sit throughout the country and may be much more aware of the local consequences of important decisions.¹⁶⁸

CHANGE ON THE UNITED STATES COURTS OF APPEALS 30 (2000) (stating that some presidents could appoint a substantial number of judges, and “[s]hifts in the partisan balance of the courts reflect on these political dynamics”).

162. See *id.* at 29.

163. See Steven I. Friedland, *Controversial Five to-Four Supreme Court Decisions and the Politization of the Majority of One*, 12 DARTMOUTH L.J. 12, 13–17 (2014).

164. See *infra* notes 165–71 and accompanying text.

165. See Segall, *supra* note 141; Adam Liptak, *Sonia Sotomayor and Elena Kagan Muse Over a Cookie-Cutter Supreme Court*, N.Y. TIMES (Sept. 5, 2016), <http://www.nytimes.com/2016/09/06/us/politics/sotomayor-kagan-supreme-court.html>.

166. See Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 906–07 (2003).

167. See Segall, *supra* note 141; Liptak, *supra* note 165.

168. See Devin Dwyer, *‘Cushy’ Job, or ‘Isolated’ Hell? Life as a Supreme Court Justice*, ABC NEWS (Apr. 23, 2010), http://abcnews.go.com/Politics/Supreme_Court/life-supreme-court-cushy-job-justice/story?id=10449434. To the extent that some prominent lower court judges might “audition” for possible Supreme Court appointment by writing overly partisan decisions, this proposal may well change that strategy and for the better. See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 359 (Harvard University Press, 2013); Rodriguez, *supra* note 9 (“[T]he two parties have begun vetting Court candidates years in advance, closely watching their decisions in lower courts to ensure they are in line with the party’s goals.”). For example, if my plan were in effect now, given

In addition to the benefits of having a deeper and more diverse pool of judges having final authority in those cases likely to result in a deadlocked Supreme Court, there may be some rule of law benefits as well. Imagine a situation where the judges of a circuit are hostile to either the high Court's abortion or Second Amendment jurisprudence.¹⁶⁹ They issue decisions inconsistent with the Court's prior legal rules, believing the Court will deadlock four-to-four in the case.¹⁷⁰ In that circumstance, a Justice on the losing side of those questions might well be more willing to join the other side for both *stare decisis* reasons and to let the courts of appeals know that they must follow existing Supreme Court doctrine even if they think a new case might trigger a four-to-four split. In that circumstance, the Supreme Court might take the doctrine of *stare decisis* more seriously than it does now where, as noted earlier, the Court has gone back and forth over the years in virtually every area of litigated constitutional law.¹⁷¹

In those cases where eight Supreme Court Justices simply cannot reach agreement, perhaps that tie vote is a signal that a small body of unelected, life-tenured judges should not impose its will on the rest of the country.¹⁷² Especially if there are circuit splits as well, it seems unlikely that there is one clear or correct answer to a case causing so much division.¹⁷³ In such circumstances, absent the rare case raising uniformity concerns for uniformity's sake, perhaps the best result is to have different constitutional rules in New York, Mobile, Chicago, and Seattle. If the variations become unworkable over time, then the Court can always step in and solve any serious problems raised by

the ages of Justices Breyer and Ginsburg (as opposed to the much younger Alito and Roberts), liberal lower court judges might well write less partisan decisions trying to attract the attention of President Trump, who would have to choose a Democrat. See Rodriguez, *supra* note 9; EPSTEIN, LANDES & POSNER, *supra*.

169. See, e.g., Irin Carmon, *The Supreme Court's Momentous Abortion Decision*, MSNBC (June 15, 2015, 10:25 AM), <http://www.msnbc.com/msnbc/the-supreme-courts-momentous-abortion-decision> ("For the past five years, states and judges hostile to abortion have been engaged in a kind of ongoing dare aimed at Justice Kennedy. But no major opinion has been as flagrant as the one issued by a three-judge panel of the 5th Circuit Court of Appeals a week ago, giving the green light to the Texas Law.").

170. See *id.*

171. See Stephen Dillard, *A Supreme Court Without Stare Decisis*, FIRST THINGS (Aug. 26, 2009), <https://www.firstthings.com/blogs/firstthoughts/2009/08/a-supreme-court-without-stare-decisis>.

172. See Segall, *supra* note 141 (stating that we should make it more difficult for the Supreme Court to impose its will on the American people).

173. See Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1139 (2012) (arguing that circuit splits are not "trivial" and discussing "problems of disuniformity").

different rules in different circuits.¹⁷⁴

The third set of objections to my proposal involve requiring nominees to identify their political party affiliations. This may marginalize independents;¹⁷⁵ further ensconce the two-party system into our government;¹⁷⁶ and might not work because political party affiliation is not always a good proxy for a nominee's liberal, moderate, or conservative views.¹⁷⁷ Thus, even requiring an even number of Republicans and Democrats will not guarantee political balance on the Court.¹⁷⁸

As to requiring that nominees to the Court identify their political party affiliations, virtually all Supreme Court Justices have strong party loyalties as, without them, it is unlikely they would be nominated by the President in the first place.¹⁷⁹ Moreover, given the large role that politics and values play in Court decisions,¹⁸⁰ perhaps nominees should be required to indicate their party affiliations, if any, prior to being placed on our highest Court.¹⁸¹

174. See Helen Wilson Nies, *Dissents at the Federal Circuit and Supreme Court Review*, 45 AM. U. L. REV. 1519, 1519 (1996) (“These ‘intercircuit conflicts’ are a frequent trigger for Supreme Court review.”).

175. See Michael Coblenz, *The Two-Party System is Destroying America*, HILL (Jan. 28, 2016, 12:00 PM), <http://thehill.com/blogs/congress-blog/politics/267222-the-two-party-system-is-destroying-america> (noting that the polarization of the two-party system marginalizes other third-party views and skews the discussion on issues to the outside liberal and conservative paradigms); Rodriguez, *supra* note 9.

176. See Rodriguez, *supra* note 9.

177. See, e.g., Paul Waldman, *GOP Candidates Will Now Have to Promise Supreme Court Litmus Tests*, WASH. POST (June 29, 2015), https://www.washingtonpost.com/blogs/plum-line/wp/2015/06/29/gop-candidates-will-now-have-to-promise-supreme-court-litmus-tests/?utm_term=.6897d5ef4945 (showing that conservative Justices have “betrayed” conservative views by voting with liberal Justices).

178. See, e.g., Josh Gerstein, *SCOTUS Splits 6-2 on First Cases Since Scalia's Death*, POLITICO (Mar. 1, 2016, 11:02 AM), <https://www.politico.com/blogs/under-the-radar/2016/03/supreme-court-6-2-split-scalia-death-220028> (“[T]he court’s four conservative justices voted together and picked up the votes of two of the Democratic appointed justices, while the other two Democratic appointees dissented.”).

179. See Sunstein, *supra* note 8 (noting that justices “are inevitably political actors, and hence their decisions are ultimately based on their ideological convictions” and that presidents are rarely disappointed with their nominees’ voting records).

180. See Rodriguez, *supra* note 9.

181. In addition, to the extent the nominee is a lower court judge, he would also have had a confirmation hearing where his party affiliation was probably made clear. See American Constitutional Society, *How the Confirmation Process Works*, JUD. NOMINATIONS, <http://judicialnominations.org/how-the-confirmation-process-works> (last visited Feb. 5, 2018); John M. Walker, Jr., *The Unfortunate Politicization of Judicial Confirmation Hearings*, ATLANTIC (July 9, 2012), <https://www.theatlantic.com/national/archive/2012/07/the-unfortunate-politicization-of-judicial-confirmation-hearings/259445/> (noting that the trend in confirmation hearings is toward asking nominees their views on constitutional

The objection that my proposal marginalizes independents and further enforces the two-party system into our government is a strong one. Nevertheless, the reality is that it is extremely difficult to identify any modern Justices who were independents before taking their seats on the Court.¹⁸² Moreover, my proposal includes a provision whereby a nominee who refuses to identify her party affiliation could be placed on the Court with a two-thirds vote of the Senate.¹⁸³ Such a hypothetical nominee would count, for future nominations, as being a member of the political party of the nominating President. This feature allows a truly outstanding and consensus independent nominee to be placed on the Court.

It is hard to deny that there is something unsettling about requiring political party affiliation to play such a dramatic role in the nomination process.¹⁸⁴ But, the FEC is a precedent for that required balance;¹⁸⁵ the current nomination process is irrational in many more serious ways as detailed earlier;¹⁸⁶ and virtually all Justices do have an identifiable political party affiliation.¹⁸⁷

Political party affiliation has not always been a reliable proxy for a nominee's liberal, conservative, or moderate views.¹⁸⁸ From Chief Justice Earl Warren¹⁸⁹ to Justice White¹⁹⁰ to Justices Blackmun¹⁹¹ and Souter,¹⁹² there have

issues).

182. See *Supreme Court Justices*, INSIDE GOV, <http://supreme-court-justices.insidegov.com/> (last visited Oct. 29, 2017) (showing that only one previous Supreme Court Justice registered as an independent).

183. See *supra* note 52 and accompanying text.

184. See Rodriguez, *supra* note 9 (noting that polarization of the Court will have serious consequences, especially with regards to the Court's legitimacy); The Associated Press, *Chief Justice Roberts: Confirmation Process for Justices Too Politicized*, POLITICO (July 26, 2017, 8:43 AM), <https://www.politico.com/story/2017/07/26/chief-justice-roberts-confirmation-process-for-justices-too-politicized-240979> (quoting Chief Justice Roberts's statement that "[j]udges are not politicians, and they shouldn't be scrutinized as if they were You're not electing a representative, so you're not entitled to know what their views on political issues are").

185. See *supra* note 41 and accompanying text.

186. See discussion *supra* Section III.B.

187. See *Supreme Court Justices*, *supra* note 182.

188. See Waldman, *supra* note 177.

189. See Benjamin L. Hooks, *The Supreme Court as a Political Institution*, 26 U. RICH. L. REV. 451, 453 (1992).

190. See Linda P. Campbell, *Justice White: The Democrat Who Often Votes with Court Conservatives*, CHI. TRIB. (Mar. 21, 1993), http://articles.chicagotribune.com/1993-03-21/news/9303310169_1_raw-judicial-power-supreme-court-civil-rights-enforcement.

191. See Joan Biskupic, *Justice Blackman Dies, Leaves Legacy of Rights*, WASH. POST (Mar. 5, 1999), <http://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/blackmun030599.htm>.

192. See Savage, *supra* note 91.

been liberal Republicans and conservative Democrats on the Supreme Court of the United States.¹⁹³

While conceding the above, it is also unclear whether we will again see such political sways among the Justices.¹⁹⁴ The cries of “No More Souters,”¹⁹⁵ as well as Justice Kennedy’s votes in abortion, death penalty, and gay rights cases,¹⁹⁶ have led to the GOP being much more careful to insure reliably conservative Justices like Roberts and Alito.¹⁹⁷ Moreover, there has been no Democrat Justice since Byron White who was not reliably liberal, and he was nominated almost fifty years ago.¹⁹⁸ Two leading scholars have recently concluded that “[t]oday’s partisan split” between Republican and Democrat Justices “is likely enduring. The very political changes that underlie [today’s] split make it likely that, for the foreseeable future, a Court with five Democratic-nominated [J]ustices [will] reach [sets of] decisions [that are] quite different from those a Court with five Republican-nominated Justices would reach.”¹⁹⁹

There can be little debate that the Supreme Court’s nomination process is now completely partisan and dysfunctional.²⁰⁰ This could change if Congress adopted my proposal and from time to time a President of one political party would have to find an acceptable nominee from the other party.²⁰¹ Moreover, predetermining the political balance on the Court prior to nomination battles should lessen partisan friction and might even result in more moderate Supreme Court Justices.²⁰²

193. See *supra* notes 189–92.

194. See Rodriguez, *supra* note 9.

195. Waldman, *supra* note 177.

196. See *id.*

197. See Tom Donnelly & Brienne Gorod, *None to the Right of Samuel Alito*, ATLANTIC (Jan. 30, 2016), <https://www.theatlantic.com/politics/archive/2016/01/none-to-the-right-of-samuel-alito/431946/>.

198. See Adam Liptak, *The Polarized Court*, N.Y. TIMES (May 10, 2014), https://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html?_r=0 (“[I]t has been more than 50 years since a Democratic president last appointed a justice who often voted with the court’s conservatives: Justice Byron R. White, who was nominated by President John F. Kennedy in 1962.”).

199. Neil Devins & Lawrence Baum, *Split Definitive: How Party Politics Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 302, 365 n.1 (2017).

200. See Rodriguez, *supra* note 9; discussion *supra* Section III.B.

201. See discussion *supra* Sections II, III.A.

202. See discussion *supra* Section III.A.

IV. CONCLUSION

Diffusing political power and dividing partisan loyalties brings many benefits, especially if it also allows government officials to act efficiently when the need arises.²⁰³ Approximately eighty percent of the Court's docket would not be affected by my proposal, because the Justices issue five-to-four opinions roughly twenty percent of the time.²⁰⁴ Therefore, my plan to have an even partisan balance on the Court would allow the Justices to maintain both the supremacy and uniformity of federal law, which is why our Founding Fathers created federal courts in the first place.²⁰⁵

Although many of the twenty percent of decisions where the Justices divide five-to-four involve the Court's most difficult and important issues, few of them raise uniformity concerns.²⁰⁶ It is in these cases where my proposal would have the most beneficial effect.²⁰⁷ An evenly divided Court with no obvious partisan advantage may well be viewed over time by the American people as more of a court of law than our current politicized institution.²⁰⁸

Finally, my proposal would reform our absurd confirmation process through which the partisan balance on our highest Court is decided not by a well-thought procedure, but by the happenstance of death, serious illness or politically timed retirements.²⁰⁹ It is well past time that we figure out a way to end the most irrational judicial selection process in the free world.²¹⁰

203. See discussion *supra* Section III.A.

204. See Rodriguez, *supra* note 9.

205. See March Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 541 (2010) (“[T]he ultimate function of the Supreme Court is to maintain the supremacy and uniformity of the Constitution and laws of the United States.”); see also Segall, *supra* note 23 (explaining why this proposal does not undermine federal law's uniformity).

206. See Segall, *supra* note 23.

207. See *id.*

208. See Walker, *supra* note 181.

209. See Taylor, *supra* note 124 (noting that life tenure is unreasonable); Brandon, *supra* note 127 (noting that the timing of a Justice's retirement may be strategic and politically motivated).

210. See Ellie Mystal, *3 Ways to Fix the Supreme Court Confirmation Process*, ABOVE THE L. (Apr. 3, 2017, 12:31 PM), <https://abovethelaw.com/2017/04/3-ways-to-fix-the-supreme-court-confirmation-process/>.