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**THE SUPREME COURT, QUESTION-SELECTION, LEGITIMACY,
AND REFORM: THREE THEOREMS AND ONE SUGGESTION**

BENJAMIN B. JOHNSON*

ABSTRACT

An easily overlooked feature of the Supreme Court is that the justices do not decide cases; they answer questions. This turns out to have several interesting implications. Theoretically, it undermines the Court's appellate powers; functionally, it turns the Court into an unpopular and democratically illegitimate policymaker. This piece formalizes the theory and builds on recent empirical work for the functional case. It concludes with a modest suggestion: make the Court a court again.

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INTRODUCTION

Professor Vladeck's address quite helpfully asks us to take a moment and think about how we talk about the Court. Since the topic of this symposium is the Court's docket, and the docket is how the Court processes its "cases," let us stop and think about what we mean when we say, "The Court decided the case." As a matter of plain text, this statement is flat wrong. A more accurate statement would be, "The Court answered the question(s)."¹ But is this a meaningful difference? I think so, and my hope is that if we think through what it means to say the one rather than the other, we will recognize a real crack in the foundations of our theory of the Court's law declaration powers. Rather than shore up the foundation, we have instead built ever more elaborate rooms atop it, and this has, I believe, driven us (and the Court) into the position where the institution can and will only become more polarized and politicized, at least so long as it continues its present course.² Fortunately, the diagnosis presents an obvious solution: make the Court a court again.

THE THEORETICAL CONSEQUENCES OF PICKING QUESTIONS

The Court has been largely out of the case-deciding business for decades.³ Instead, the Court picks (and sometimes writes for itself) the questions it wants to answer.⁴ The likely consequence of its practice of eschewing the court-ish duty of deciding cases in favor of the more legislative task of declaring law is a more divided and politicized Court.⁵ But if I may abuse a line from theoretical physics and economics, "sure it's bad in practice, but is it bad in theory?"⁶

Let us start with some definitions and axioms:

Definition 1: A *case* is a dispute between two or more parties involving one or more question of law that frequently will be applied to some possibly disputed facts.⁷

1. See SUP. CT. R. 14.

2. Benjamin B. Johnson, *The Active Vices*, 74 ALA. L. REV. (forthcoming 2023).

3. Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 864 (2022).

4. See e.g., *Furman v. Georgia*, 403 U.S. 952, 952 (1971) (mem.); *Hollingsworth v. Perry*, 568 U.S. 1066, 1066 (2012) (mem.); *Nat'l Lab. Rels. Bd. v. Noel Canning*, 570 U.S. 916, 916 (2013) (mem.); *Gideon v. Cochran*, 370 U.S. 908, 908 (1962) (mem.), cert. granted sub nom. *Gideon v. Wainwright*, 372 U.S. 335, 338 (1963).

5. Cf. RICHARD H. FALLON, JR. ET. AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 67–72 (7th ed. 2015).

6. See *That Works Very Well in Practice, But How Does It Work In Theory?*, QUOTE INVESTIGATOR (Aug. 30, 2015), <https://quoteinvestigator.com/2015/08/30/practice/#:~:text=%E2%80%9CAn%20economist%20is%20someone%20who,the%20Council%20of%20Economic%20Advisers> [https://perma.cc/43FK-6XU6].

7. There are, to be sure, cases where there is no dispute over the law only a difference over the facts. There are even cases where the law and the facts are agreed upon, but the application of the law is in dispute. Finally, there are even cases where the law, facts, and application are all

Let us assume the facts are not in doubt so that we can focus on the legal questions. The point of tribunals is to resolve disputes between the parties.⁸ To do this, they must render judgment in the case, which requires answering some or all of the questions.⁹ Suppose we call the set of answered questions *A* and the set of unanswered questions *U*. This leads us to:

Definition 2: A **judgment** is a resolution of a case that is supported by 1) a sufficient set of answers in *A* to justify the judgment; 2) no matter the answers to the remaining questions in *U*.¹⁰

Definition 3: A **court** is a tribunal that renders judgments in cases.¹¹

As an example, suppose Paul sues Dorothy for breaking a contract. Dorothy believes that she did not accept Paul's initial offer, and in any event, Paul waited too long to sue, and so his claim is time-barred. Suppose the Court agrees with Dorothy that there was no acceptance. That would satisfy judgment in favor of Dorothy because the lack of acceptance is sufficient to decide the case no matter the answer to the statute of limitations question. On the other hand, if the Court determines that Dorothy did accept the offer, that would not be enough to render judgment in favor of Paul. The Court would first need to decide whether the claim was or was not time-barred.

Definition 4: An **advisory opinion** is a court's answer to a legal question that is not given in support of a judgment in the case before the court.¹²

The classic example of an advisory opinion is the President asking the Court for guidance on how to interpret a treaty.¹³ This request does not appear in a live case or controversy, so the usual move is to observe that the Court has no constitutional authority to exercise the judicial power.¹⁴ For our purposes though, it is enough to observe that 1) the request asked for an answer to a legal question, 2) there were no conflicting parties, so 3) there was no case, and thus 4) there could be no judgment in a case.

The definition will sweep more broadly, however. Consider again the hypothetical case between Paul and Dorothy. Suppose the Court simply declares that the claim is not time barred, but it does not actually answer the question of whether Dorothy accepted Paul's offer. Without answering the acceptance

agreed upon, but one party proceeds anyway hoping for the jury to nullify, the other side to make a procedural error, or the judge to show mercy. All of these varieties would fit the definition of a case. See *Case*, BLACK'S LAW DICTIONARY (11th ed. 2019).

8. See MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1 (1981).

9. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule.")

10. See generally *Judgment*, BLACK'S LAW DICTIONARY (11th ed. 2019).

11. See generally *Court*, BLACK'S LAW DICTIONARY (11th ed. 2019).

12. Cf. Christian R. Buset, *Advisory Opinions and the Problem of Legal Authority*, 74 VAND. L. REV. 621, 626 (2021) (defining advisory opinions as "legal opinion[s] delivered by one or more judges in their official capacities but outside of the ordinary process of litigation").

13. See FALLON ET AL., *supra* note 5, at 78–79.

14. U.S. CONST. art. III.

question, the court cannot justify a judgment. Thus, if it published an opinion as to the statute of limitations question, it would simply be an advisory opinion.

With these definitions in hand, we can turn to a few axioms.

Axioms:

1. A federal court has a duty to render judgment in all cases within its jurisdiction.¹⁵

2. Ought implies can.¹⁶

3. A federal court advisory opinions are ultra vires.¹⁷

Of these, the second axiom requires a bit more discussion. In effect, it says that the obligation to do something means that one has the power to do that which is necessary to fulfill the obligation. However, the obligation does not generate a freestanding power. For instance, suppose Derek is an ambulance driver who has an obligation to get a patient to the hospital as quickly as possible. Getting the patient to the hospital as quickly as possible means that Derek must go faster than the speed limit on the highway. The obligation to get the patient to the hospital thus implies that Derek has the power to speed *on the way to the hospital*. Once Derek delivers the patient, he no longer has an obligation to get the patient to the hospital, and thus he no longer has the power to break the speed limit. Similarly, if Derek has the patient in the back of the ambulance and instead of going to the hospital he decides to head out onto the interstate heading away from the hospital to see how fast his ambulance can go (perhaps he thinks it is important for ambulance drivers to know how fast their vehicles can travel), Derek cannot justify his speeding on the grounds that he has an obligation to get the patient to the hospital. These examples show the limits of axiom 2, namely, the power implied by an obligation only exists when the actor is attempting to fulfill the obligation.

Having stated the preliminaries, we can now state three theorems:

Theorem 1: *A court **must** answer any question if the answer is a necessary element of any set of answers sufficient for any judgment in the case.*

Theorem 2: *A court **may** answer a question if it is a necessary element of some set of answers that renders judgment.*

Theorem 3: *A court **may not** answer **any** question if it does not render judgment.*

Proof of Theorem 1: To prove the first theorem, we first show that the Court has the power to answer such a question and then that it must do so. From axiom

15. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (“[W]ith whatever difficulties, a case may be attended, we must decide it. . . . [The Court has] no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”).

16. IMMANUEL KANT, *CRITIQUE OF PURE REASON* 540 (Paul Guyer & Allen W. Wood eds. & trans., 1998) (“[T]he action must be possible under natural conditions” to which “the ought” applies.).

17. *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

1, if a case is in the Court's jurisdiction, the Court has an obligation to render judgment. To satisfy this obligation, the Court must, of course, render judgment. If it is to render judgment, it must have the power to do so. This need is covered by axiom 2, from which we can take that the duty to render judgment implies the power to render judgment. Now, from the definition of judgment, we know that rendering it will require answering a subset of questions that will support the judgment independent of answers to any other questions in the case.

If there is a question that must be answered if the case is to be decided at all—that is if any set of answers sufficient to decide the case includes an answer to that question—then the Court has an obligation to answer that question. Again, by axiom 2, this obligation implies the power to answer the question. Furthermore, if the Court does not exercise this power and answer the question, it cannot render judgment. If it does not render judgment, it fails in its obligation. Thus, the Court must answer the question.

Proof of Theorem 2: From axiom 1, if a case is in the Court's jurisdiction, the Court has an obligation to render judgment. To satisfy this obligation, the Court must, of course, render judgment. If it is to render judgment, it must have the power to do so. This need is covered by axiom 2, from which we can take that the duty to render judgment implies the power to render judgment. Now, from the definition of judgment, we know that rendering it will require answering a subset of questions that will support the judgment independent of answers to any other questions in the case.

Suppose there are various combinations of questions and answers that would support a judgment and that a particular question is an element of one such combination. The Court has an obligation to pick one, and thus it has (per axiom 2) the power to pick one. If the Court picks a combination that includes our particular question, it has the power to do so. However, it also has the power to pick a different combination, thus the Court may or may not answer the question depending on the set of questions and answers it chooses to dispose of the case.

Proof of Theorem 3: If the Court answers a question but does not issue judgment, then the offered answer cannot be given in support of a judgment. It is thus by definition an advisory opinion, and per axiom 3, it is *ultra vires*. A second proof requires an additional assumption: if the Court is not rendering judgment, then it is not attempting to fulfill its obligations. If it is not attempting to fulfill its obligation, then it cannot avail itself of the derivative power to answer questions necessary to support the judgment. If one assumes the Court has no other source of power to answer questions, the Court then has no power to answer questions.

It is immediately apparent how the Court's practice of answering questions intersects with the logic above. When the Court chooses to answer particular questions instead of deciding cases, it places itself in real danger (or at least in the sort of theoretical danger that worries academics). If the Court selects a set of questions that are sufficient to render judgment, then all is well, but, quite

often, the Court simply treats cases as vehicles to answer a question that catches the justices' fancy.¹⁸ The answer to that question will, most likely, only rarely—and only by chance—be sufficient to render judgment. As such, theorem 3 applies, and the Court's opinion is essentially merely advisory.

A PROPOSED ALTERNATIVE: A DIFFERENT OBLIGATION

If the logic above holds, and I think it does, we have three alternatives. First, we can admit that the Court is acting *ultra vires* and do something about it. Second, we can admit it and do nothing. Third, we can try to find some other way to legitimize the Court's practice. Cards on the table, I would prefer door number one, although I think we are stuck with door number two, because for reasons I sketch here, I think door number three is closed.

The most obvious, and I think common, way to justify the Court's practice is to assert that within our constitutional structure we need the Court to declare the law,¹⁹ or that the Court's job is to “establish our national priorities in constitutional and legal matters,”²⁰ or the Court needs to be able to focus on questions that split or at least pervade and confuse lower courts.²¹ These are claims that the Court has an obligation to answer (at least some) questions.

Yet this seems an incomplete description of the obligation, since any old answer will not do. National policies should be democratically legitimate, and they should be made with due care based on evidence and expertise. Indeed, this is why so many people are currently livid at the Court. They assert that the Court is thwarting the will of majorities and making bad policy.²² If the Court's only job is to make policy—any policy—then there is no reason to complain. People complain because they feel that the Court has fallen short of fulfilling its obligation to make good and democratically supported policy.

18. H.W. PERRY, *DECIDING TO DECIDE* 234–36 (Harvard Univ. Press 1991).

19. This seems to be a rather aggressive reading of *Marbury*. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

20. Warren E. Burger & Earl Warren, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Groups Composition and Proposal*, 59 A.B.A. J. 721, 728 (1973).

21. See, e.g., Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (Congress may not make exceptions that destroy the Supreme Court's “essential role”); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960) (Congress may not make exceptions that prevent Supreme Court from performing “essential functions” of ensuring supremacy and uniformity of federal law).

22. E.g., Ezra Klein, *Dobbs Is Not the Only Reason to Question the Legitimacy of the Supreme Court*, N.Y. TIMES (June 30, 2022), <https://www.nytimes.com/2022/06/30/opinion/dobbs-mccconnell-supreme-court.html> [<https://perma.cc/6FAP-M56P>]; Damon Silvers, *The Problem Isn't Judicial Review; It's the Court's Politics*, AM. PROSPECT (July 18, 2022), <https://prospect.org/justice/the-problem-isnt-judicial-review-its-the-courts-politics/> [<https://perma.cc/8UXD-LN48>].

If the Court has such an obligation, that would seemingly solve the ultra vires problem. If the Court has an obligation to answer these questions, then (per axiom 2) it must have the ability, and thus the power, to do so.²³ But that is hardly the end of the argument. Obviously, a host of questions related to the separation of powers generally and the case and controversy limitation on the Judicial Power specifically will arise. But set these objections aside for the moment.

Instead, let us take seriously the idea that the Court may have an obligation to the nation or the judiciary to answer important questions with competence and in a way that enjoys democratic support. Per axiom 2, if the Court has such an obligation, it must be able to fulfill it. So far, we have focused on this link between duty and ability as related to a question of power, but more generally, it is a bridge between obligation and competence.²⁴ Thus, we can check to see if the Court has the obligation to answer competently and democratically by observing if it is capable of doing so.²⁵

Outside of the Court context, we have two familiar pathways to achieve (we hope) competent and legitimate policymaking: legislation and agency rulemaking. Legislation leans more toward the democratic, while rulemaking relies more on expertise. Nonetheless, legislators rely on policy experts (and many legislators become experts in a given field), and the rulemaking process is overseen by political appointees and incorporates public notice and comment to keep the people involved.

Supreme Court justices are neither democratically elected nor are they experts in every policy area they address. The system is simply not designed to select justices who will make competent and democratically legitimate policy decisions. Moreover, the Court—and individual justices—appear to be entirely unconcerned with what public majorities want, at least in the main.^{26*} In some related work with Logan Strother, we show that neither the decisions of the Court nor the votes of any individual justice (with the possible exception of Justice Sotomayor) track public mood.²⁷ This finding is entirely consistent with the structural—indeed constitutional—protections of judicial independence that include life tenure, salary protections, and the appointment and confirmation process. The whole idea is that justices should not be institutionally bound to popular majorities.

23. KANT, *supra* note 16, at 540.

24. A somewhat frivolous example would be to consider a hypothetical obligation to overturn the law of gravity. Suppose Congress gave the Court legal authority to do so. Since the Court cannot eliminate gravity, it can have no obligation to overturn gravity.

25. This is simply the contrapositive of axiom 2: if the Court is not competent to do something (that is, it cannot do it), then it cannot have the obligation to do that thing.

26. Benjamin B. Johnson & Logan Strother, *The Least Responsive Branch* (Mar. 2023) (unpublished manuscript) (*on file with author).

27. *Id.*

In short, our judiciary is not structured or staffed in such a way as to consistently generate expert and democratically supported policy decisions.²⁸ It lacks the competence to fulfill the obligation, not because we have selected the “wrong” people to be justices, but because the institution is designed this way. And now the contrapositive of axiom 2 bites: since the Court cannot answer questions with the relevant expertise and democratic support, it does not have the obligation to do so. It immediately follows that if it lacks the obligation, axiom 2 cannot be used to show an implied power.

MAKE THE COURT A COURT AGAIN

Observing the Court cannot reliably give us good and democratically supported policies does not mean that people do not want these things. It simply means the Court will not be the source of such policies. This does not prevent the Court from making policy anyway. Unsurprisingly, detractors find many of these policies unwise and/or against the public’s preferences. As a result, there have been growing calls for Court reform.²⁹ Two regular suggestions are term limits and Court-packing.³⁰

There are, of course, a standard set of responses to these proposals: packing will threaten judicial independence and lead to partisan tit-for-tat strategies while term limits might lead justices to consider their future career prospects while deciding cases.³¹ What is less-seldom remarked upon is that these proposals make a rather strong and unwarranted assumption: that justices added through packing or those appointed upon the expiration of another’s term would be more reflective of the public and/or make better decisions. As I mentioned above, my own work shows that the Court is not—and has never been—responsive to broad popular trends, nor have any justices. This is by design. Neither packing nor term limits do much to change the protections justices enjoy while on the Court. So, these proposals are not so much aimed at getting justices who will track the public and make good policy, so much as they are about getting new justices regularly, so that the churn will constantly refresh the Court with new justices.

28. We should be careful about how strong this claim is. The Court may often reach popular outcomes, and it may regularly make good policies. Broken clocks are correct twice a day, after all. It is not even that bad for the Court. The most common outcome is a 9-0 vote, which signals that many cases are pretty “easy.” See, e.g., REPORT OF PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES 26 (Dec. 2021), available at <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf> [<https://perma.cc/JH52-J897>].

29. See, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 164–65 (2019).

30. See, e.g., REPORT OF PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, *supra* note 28, at 20.

31. *Id.* at 82.

This would only lead to better and more democratically legitimate policies if new justices are more reflective of the public and more likely to make wise policy decisions than the old justices. But there is no good reason to think that a new justice would make better or more representative policy.³² Justices are not selected for their policymaking abilities, but for their legal credentials and ability to pay off the narrow part of the President's coalition that really cares about the Court. They are then confirmed by the intentionally non-majoritarian Senate and Senators who may not face re-election for years. This process is hardly well-suited to generate excellent or representative policymakers.

So, to take stock of where we are, the Court is currently making policy though it has no justification for the exercise of that power, and the policies it makes will only be good or representative by chance. In short, the Court is becoming an illegitimate, unpopular, and incompetent legislature. Moreover, the proposed reforms do not address the underlying problems.

My new suggestion is something rather old: make the Court a court again. If the Court simply followed the law and took the entire case up for review, considered the full record, and then decided whether the decision below should be reversed or affirmed, then the theoretical problem introduced above is solved immediately. If the Court focuses on cases, judgments, and records, then the justices are focused on what they are actually good at and selected for: their ability as lawyers and judges. And if the Court is focused on the parties rather than the policy, the problems of representativeness and expertise recede somewhat. Nobody really wants judges to decide private disputes with an eye on popular majorities, and if decisions were consciously targeted at cases, the holdings would almost necessarily be far more fact-bound, minimalist, and tentative than the oracular pronouncements that result from myopic attention to a narrow set of "interesting" questions.

Two objections immediately appear: 1) Will this not make it too hard for the justices to answer the questions we "need" them to answer? and 2) Will the justices just not be clever about how they decide these cases so they can still answer the questions they want to? I am never entirely sure how to respond to these twin objections insofar as they cannot really both be true at the same time.

If there is a question that is central to lots of big cases, then the Court will answer it when it decides the cases. But sometimes, it may be that many cases we think present a common big question that cries out for a uniform solution could all be decided on other grounds. If it turns out that cases can be resolved without making big policy pronouncements, it is hard to say that we actually "need" the Court to resolve the question.

32. Indeed, if I may make a sociological observation, there are not many vocal supporters of Court-packing or term limits who think Justices Kavanaugh and Coney Barrett makes better and more representative policy choices than Justices Kennedy and Ginsburg.

As to whether clever justices will find a way to answer questions as a part of the case: of course! The problem is not that justices decide important questions *when deciding a case*. The problem is that they *only* decide the question and not the case. When they do that, they undermine their own authority and set themselves up as legislators rather than judges. Deciding cases rather than questions will not mean that the Court is never wrong—if case-deciding was a mechanism to generate perfect judging, we would not need appellate courts anyway—but it would make those errors both more palatable and easier to revisit in subsequent cases.

There is also something here for reformers. Returning to a case model rather than a question model, especially if paired with an increase in the number of certiorari petitions granted, would also create a natural pressure to shorten justices' terms. Deciding cases is hard and sometimes boring work. This is especially true in equity cases where the Court would have to review the factual as well as the legal questions. And if the stakes are lower, the job is likely less rewarding over time. If justices were deciding cases rather than questions, would they really want to hang on for so long?

In short, making the Court a court again seems to have a lot of benefits. It provides a proven foundation for judicial review and law declaration. It gets the Court largely out of politics and puts justices back to work at the craft they are actually good at: deciding cases. And if you are a fan of more turnover among the justices, it probably gives you that too.

Unfortunately, Congress seems unlikely to force the Court to be a court, and being an oracle is a much more interesting (and less taxing) job than a mere judge. It seems unlikely, then, that the Court will become a court again anytime soon. So, if we cannot re-ground the Court's decisions with a new obligation, we are stuck with those decisions being left illegitimate. If we cannot do something about it, then we will have to live with it. So, as I said above, I think we are stuck with door number two. We can, at least, take care with how we talk about the Court. We should just stop saying the Court decides cases.