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## "The Threes": Re-Imagining Supreme Court Decisionmaking

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# “The Threes”:<sup>1</sup> Re-Imagining Supreme Court Decisionmaking

*Tracey E. George & Chris Guthrie\**

INTRODUCTION .....	1825
I. COST-BENEFIT ANALYSIS OF PANELS .....	1830
A. <i>The Benefits</i> .....	1830
B. <i>The Costs</i> .....	1837
1. Different Outcomes? .....	1837
2. Lower-Quality Decisions? .....	1845
3. Summary .....	1847
II. PANEL PROPOSALS .....	1847
A. <i>The “Mandatory Panels” Approach</i> .....	1848
B. <i>The “Discretionary En Banc” Approach</i> .....	1849
C. <i>The “Discretionary Panels” Approach</i> .....	1851
CONCLUSION .....	1852
APPENDIX .....	1856

## INTRODUCTION

Article III is odd. In contrast to Articles I<sup>2</sup> and II,<sup>3</sup> which specify in some detail how the legislative and executive branches are

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1. This title is derived from Jeffrey Toobin’s recent book on the Supreme Court called *THE NINE*. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2007).

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2. U.S. CONST. art. I, § 2 (providing that “[t]he House of Representatives shall be composed of members chosen every second year” and setting forth the qualifications for a Representative); *id.* § 3 (providing that “[t]he Senate of the United States shall be composed of two Senators from each state . . . for six years; and each Senator shall have one vote” and setting forth the qualifications for a Senator); *id.* § 5 (setting “a majority of each [House]” as “a quorum to do

to be assembled, Article III says virtually nothing about the institutional design of the Supreme Court.<sup>4</sup>

Consistent with this Constitutional silence, the Court's look, shape, and behavior have adapted to changed circumstances.<sup>5</sup> For example, the Court's *membership* has changed substantially.<sup>6</sup> Initially, six Justices sat on the Court; in time, the Court grew to ten and shrank to seven. Only in 1869 did it settle at nine.<sup>7</sup> Likewise, the Court's *jurisdiction* has changed, first expanding, then contracting, and then shifting.<sup>8</sup> The Court's *caseload*, which is now almost entirely

business" and allowing that "a small number may adjourn from day to day, and may be authorized to compel the attendance of absent members").

3. *Id.* art. II, § 1 (detailing the method of election of and the qualifications for the President).

4. *Id.* art. III, § 1 (vesting "[t]he judicial Power of the United States . . . in one supreme Court," but making no provision as to qualifications or number of judges for this Court and offering no guidance as to the Court's internal organization or procedures).

5. Both Congress and the Court have changed the institutional design of the Court. For example, Congress gradually diminished the Court's mandatory docket to only a handful of cases, granting the Court discretion over its docket through the writ of certiorari. *See infra* note 9. But Congress was silent as to how the Justices should select cases for review. *See* statutes cited *infra* note 9. The Justices have adopted their own internal practices including the Rule of Four, by which any four Justices may vote to grant review to a petition. *See, e.g.*, John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 10–14 & nn.48–61 (1983) (recounting the history of the Rule of Four and the Justices' process for reviewing writs of certiorari).

6. In addition to the adjustments in number discussed in the text, the qualifications and characteristics of the Justices have changed dramatically since the first appointments in 1789. Article III, for example, lists no qualifications and, as recently as 1941, a Justice, Robert Jackson, took the bench without an undergraduate or law degree. LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, & DEVELOPMENTS* tbl. 4-4 (4th ed. 2006) (listing each justice's educational background and legal training). The list of other significant changes is long and includes demographic characteristics (age, country of origin, race, religion, and sex) as well as professional ones (educational, judicial, and political experience). For biographical information on all Justices, see Federal Judicial Center, Federal Judges Biographical Database, [www.fjc.gov/public/home.nsf/hisj](http://www.fjc.gov/public/home.nsf/hisj) (last visited Sept. 3, 2008).

7. *See* Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73 (six Justices); Judiciary Act of 1807, ch. 16, § 5, 2 Stat. 420, 421 (seven); Judiciary Act of 1837, ch. 34, § 1, 5 Stat. 176, 176 (nine); Judiciary Act of 1863, ch. 100, § 1, 12 Stat. 794, 794 (ten); Judiciary Act of 1866, ch. 210, § 1, 14 Stat. 209, 209 (seven); Judiciary Act of 1869, ch. 22, § 1, 16 Stat. 44, 44 (nine). As part of major reorganization of the federal courts in 1801, Congress decreased the Court's size to five Justices (four Associate Justices and the Chief Justice). Judiciary Act of 1801, ch. 4, 2 Stat. 89. As the Court had six justices protected by life tenure at the time of the legislation, the smaller Court size would not take effect until the next Court vacancy; however, the Act was repealed in 1802 before a vacancy had occurred. Repeal of the Judiciary Act of 1801, 2 Stat. 132.

8. *See generally* RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHLSER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 28–41, 268–73, 1552–56 (5th ed. 2003) (describing the history of the Court's original and appellate jurisdiction).

discretionary, was once almost entirely mandatory.<sup>9</sup> And the Court has altered its *courtroom practices* in a variety of ways; for instance, the Court once allowed advocates, who rarely submitted briefs, to present oral arguments that lasted for days!<sup>10</sup>

These examples tell us something important about the past, present, and future of the Supreme Court. The current Court may consist of nine members who decide a small number of discretionary appeals en banc, but this was not always so, nor need it be so in the future. So, in light of the many important roles the Court plays in our constitutional democracy, how should it conduct its affairs?

In this Essay—the first in a series of essays designed to re-imagine the Supreme Court—we argue that Congress should authorize the Court to adopt, in whole or part, panel decisionmaking.<sup>11</sup> We recognize, of course, that this proposal is likely to elicit a visceral reaction. If your politics skew left, you might tremble at the thought of Justices Scalia, Kennedy, and Thomas deciding *Grutter*,<sup>12</sup> or Justices

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9. See Circuit Courts of Appeals Act of 1891, ch. 517, § 6, 26 Stat. 826, 828 (requiring parties in certain cases that previously were appealed to the Court by right, to petition for the right to be heard); Judges' Bill of 1925, ch. 229, sec. 1, §§ 237, 240, 43 Stat. 936, 937–39 (extending certiorari to the vast majority of cases within the Court's appellate jurisdiction). For a detailed treatment of the history of discretion on the Supreme Court, see Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1649–1713 (2000).

10. See Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court's Timing Affects Its Decisionmaking*, 36 ARIZ. ST. L.J. 183, 189–90 (2004) (describing the absence of a time restriction on oral arguments during the Marshall Court and how one case was argued for "a full ten days"). For a general discussion of the evolution of oral argument including the current thirty-minute limit, see generally JOAN BISKUPIC & ELDER WITT, CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 792–97 (3d ed. 1997). The most recent innovation is the same-day release of recordings of important oral arguments. See John Bacon, *Gun Control Arguments to Be Released Day of Hearing*, USA TODAY, Mar. 5, 2008, at 9A.

11. Congress has the authority to "make all Laws which shall be necessary and proper for carrying into Execution" the powers vested in it by the Constitution. U.S. CONST. art. I, § 8. This authority has been recognized as extending to setting the Supreme Court's procedural rules. See *supra* text accompanying notes 7–9. Rather than directing the Court to follow specific procedures, Congress typically has authorized the Court to take certain actions under specified circumstances. See, e.g., *supra* note 5. For example, Congress has set the Court's quorum at six Justices. 28 U.S.C. § 1 (2000) ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."). In direct appeals from district courts in which a quorum cannot be met, Congress gives the Chief Justice the discretion to assign the case to a special panel of the originating circuit court which will act as the "final and conclusive" court. *Id.* § 2109. If the Chief Justice does not do so, the lower court decision stands. *Id.* In this Essay, we assume that any action by Congress would follow this typical pattern of granting the Court the power to sit in three-judge panels under a scheme that it may devise.

12. *Grutter v. Bollinger*, 539 U.S. 306 (2003). Justice O'Connor wrote the majority opinion upholding the law school's affirmative action plan which was joined by Justices Stevens, Souter,

White and Rehnquist deciding for a divided panel that a woman does not have the right to choose.<sup>13</sup> If your politics skew right, you might fear a world in which the “inconvenient truth” is not an Academy Award-winning documentary,<sup>14</sup> but rather a decision by Justices Stevens, Souter, and Ginsburg to send Al Gore to the White House.<sup>15</sup> Whatever counterfactual you find troubling, your visceral reaction probably reflects two presumed costs associated with a move to a panel system: the prospect of *different* outcomes and the prospect of *lower-quality* decisions.

With respect to the prospect of different Court outcomes, we demonstrate empirically in this Essay that the vast majority of cases decided during the late twentieth and early twenty-first centuries—including *Grutter*, *Roe*, and *Bush v. Gore*<sup>16</sup>—would have come out the same way if the Court had decided them in panels rather than as a full Court.<sup>17</sup> Indeed, if the Supreme Court had implemented three-Justice panels plus an en banc procedure similar to the one used by the United States Courts of Appeals,<sup>18</sup> we think you could count on one, two, or maybe a few hands the number of cases that would have come out differently. If past is prologue, we would expect panels to reach outcomes in future cases that are substantially similar to those the Court would reach as a whole.

With respect to the prospect of lower-quality decisions, we examine in this Essay some of the empirical evidence on group decisionmaking. From this evidence, we conclude that there is no reason to presume that panels will make lower-quality decisions than the Court as a whole.<sup>19</sup> If anything, the research suggests that panels might perform the very tasks the Court is required to perform even better than the Court as a whole. In fact, if we believed panels made

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Ginsburg, and Breyer. Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas dissented from the Court's holding.

13. *Roe v. Wade*, 410 U.S. 113 (1973). Justice Blackmun, joined by Chief Justice Burger, Justices Douglas, Brennan, Stewart, Marshall, and Powell, recognized a woman's right to an abortion. Justices White and Rehnquist dissented.

14. AN INCONVENIENT TRUTH (Paramount Classics 2006).

15. *Bush v. Gore*, 531 U.S. 98 (2000). Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas in a *Per Curiam* opinion upheld the 2000 Florida presidential election results, securing victory for George W. Bush. Justices Stevens, Souter, Ginsburg, and Breyer dissented.

16. If these cases had been heard by three-Justice panels rather than the Court as a whole, there is a 59.5% chance that *Grutter* would have come out the same way, a 91.7% chance that *Roe* would have come out the same way, and a 59.5% chance that *Bush v. Gore* would have come out the same way. For an explanation, see *infra* text accompanying notes 57–59.

17. See *infra* Part I.B.1.

18. See FED. R. APP. P. 35.

19. See *infra* Part I.B.2.

inferior decisions to those made by the en banc Court, we would be concerned about the operation of the United States Courts of Appeals, which make most of their decisions in panels and are ultimately responsible for significantly more dispute resolution and lawmaking than the Supreme Court.

Moving to a panel system makes sense, of course, only if the benefits of doing so exceed the costs. Thus, not only do we demonstrate that the costs of a panel system are negligible, but we also identify several benefits. Namely, we explain that if the Court sat in panels, it would have the capacity to decide many more cases: at least twice and maybe three times as many as it decides now. This capacity—particularly if exercised, but even if available only as a threat—would enable the Court to do a better job correcting lower court error, ensuring consistency in federal law, monitoring the other branches of government, and safeguarding principles of federalism. Panel practice also may offer other benefits independent of docket size. These benefits are both internal, such as greater collegiality, consensus, and deliberation, and external, such as more effective signaling and monitoring.

Even in the unlikely event that the costs of a panel system exceed its benefits, this Essay is important because it tackles an often overlooked but critically important component of Supreme Court lawmaking—the Court's institutional design. The Court's institutional design, by which we mean its structure and procedures, influences every aspect of the Court's work and role. And, the Court's design is not fixed—indeed, it has changed frequently—and should be open to reevaluation and reformation. By considering how our panel proposal may improve the Court's functioning, we identify areas where improvement is needed. By responding to likely criticisms of the proposal with empirical evidence, we reveal the inaccurate assumptions that have been made about the Court. Finally, we counter the mistaken belief that the Court as an institution is unassailable and unchangeable. The Court is a political institution that *has* changed—and should continue to change—to serve the functions assigned to it by the people.

We proceed as follows. In Part I, we conduct our cost-benefit analysis of a Supreme Court panel system, focusing first on benefits and then on costs. Concluding that the benefits trump the costs, we propose in Part II three different approaches to panel decisionmaking, ranging from discretionary panels to the full-time use of panels in all cases. Finally, we conclude by observing that our seemingly radical panel proposal is actually quite modest. This conclusion is based on historical Supreme Court practice, the realities of contemporary

Supreme Court decisionmaking, Congress's prior consideration of Court panels as an option, and the behavior of other courts of last resort.

## I. COST-BENEFIT ANALYSIS OF PANELS

The Court should embrace a panel system only if the expected benefits of doing so exceed the expected costs. Below, we first identify the benefits associated with a panel system and then identify the costs. We argue that the benefits are substantial and that the costs are negligible, leading us to conclude that the Court should embrace a panel system.

### A. *The Benefits*

Panels increase a court's decisionmaking capacity.<sup>20</sup> If the Supreme Court decided to sit in three-Justice panels rather than en banc, the Court's output could, at least in theory, triple.<sup>21</sup> As a practical matter, it is difficult to quantify *exactly* how much more output we could expect. Some factors—for example, the increased opinion-writing demands accompanying a panel system—would decrease the capacity gains associated with a move to panels.<sup>22</sup> Other factors—for example, the efficiencies associated with conferring with two rather than eight colleagues—could increase the Court's output even more.<sup>23</sup> Regardless, it seems safe to assume that a Court sitting

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20. When state legislatures consider adopting a divisional or panel system, they generally do so in order to expand the docket of the court of last resort. For example, a 1927 advisory commission to the Virginia legislature recommended amending the constitution to allow two divisions of the state's high court, as well as an expansion in its size, to allow the court to hear more cases while continuing to produce "opinions that are worth the writing." REPORT OF THE COMMISSIONERS TO SUGGEST AMENDMENTS TO THE CONSTITUTION TO THE GENERAL ASSEMBLY OF VIRGINIA ix (1927), *quoted in* Susie M. Sharp, *Supreme Courts Sitting in Divisions*, 10 N.C. L. REV. 351, 363–64 (1931–1932) (providing a detailed explanation of states where panel sittings were authorized). Yet, the commission counseled the retention of one court "to promote uniformity of decision and keep each of the judges in touch with all of the decisions of the appellate court." *Id.* at 364. The legislature adopted the recommendations. *Id.* at 363.

21. For commentary on the ability of states to decide more cases and/or more quickly because of divisional sittings, see Emmett N. Parker, *A Supreme Court With Two Divisions*, 6 J. AM. JUDICATURE SOC'Y 177, 177–179 (1923) (commenting on Washington); Sharp, *supra* note 20, at 361 (commenting on Colorado, Florida, Georgia, Iowa, Mississippi, and Oregon).

22. For a consideration of the relative weight of various case-related responsibilities, see Henry M. Hart, Jr., *The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 94–95 (1959) (comparing time spent on opinion writing to time spent on other tasks).

23. For evidence of the collaborative nature of Supreme Court opinion writing, see, e.g., Pamela C. Corley, *Bargaining and Accommodation on the United States Supreme Court*, 90 JUDICATURE 157 (2007) (finding in the Blackmun Papers evidence of collaboration and

entirely (or even primarily) in panels could hear *at least* twice as many cases as the en banc Court. Thus, a panel system could have a dramatic impact on the quantity of the Court's output.<sup>24</sup>

Some might argue, as a matter of judicial philosophy, that the Supreme Court should not play a more active role than it already plays, given that its members, in contrast to the lead actors in the other branches of government, are unelected.<sup>25</sup> Others might argue, on a more pragmatic level, that the value of increased Supreme Court capacity depends on the composition of the Court. At present, conservatives might be more receptive than liberals to expanded Court capacity; during the Warren Court era, by contrast, the opposite would probably have been true.<sup>26</sup> Despite these philosophical and pragmatic objections, we believe that the expansion of decisionmaking capacity

negotiation among Justices over the content of opinions, consistent with studies of other Justices' papers); cf. DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM* 230–32 (1988) (describing how the growth of the Fifth Circuit complicated the en banc procedure, requiring lengthy discussions that did little to expand on an understanding or examination of the issues presented).

24. We intentionally say "could" rather than "would" for two reasons. First, the Court's docket is almost entirely plenary, and the Justices therefore would not be required to hear more cases than they currently hear. The dynamics of the certiorari process would influence the decision. Second, the Court may not be overburdened. Some scholars and Justices have argued that the Court is not capacity constrained. See, e.g., *Tidewater Oil Co. v. United States*, 409 U.S. 151, 174–78 (1972) (Douglas, J., dissenting) (claiming that "[w]e are vastly underworked" as reflected in "the vast leisure time we presently have"); William O. Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401 (1960) (arguing that he could decide more cases, and presumably still write books, if the Court granted review to more cases). Of course, far greater numbers have made a contrary assertion. See, e.g., WARREN BURGER, *YEAR-END REPORT ON THE JUDICIARY* 6 (1984); Note, *Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court*, 97 HARV. L. REV. 307, 307 n.5 (1983) (presenting statements from eight of the sitting Justices that the Court was overworked). As we discuss later, panels offer advantages beyond the possibility of resolving larger numbers of cases. That said, we believe expanded capacity is the greatest advantage of our proposal.

25. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (2d ed. 1986) (coining the phrase "counter-majoritarian difficulty," which has come to mean the dilemma posed by unelected judges overturning elected policymakers in a democratic regime); see also MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 175–76 (1999) (arguing that the Constitution should be taken away from judges and returned to the people to allow for a "populist constitutional law"); Steven G. Calabresi, *The Congressional Roots of Judicial Activism*, 20 J.L. & POL. 577, 588–90 (2004) (advocating for a contraction of Court jurisdiction in order to prevent judicial subrogation of the legislative function); Edwin Meese III & Rhett DeHart, *Reining in the Federal Judiciary*, 80 JUDICATURE 178, 182 (1997) (arguing that Congress should regulate and/or restrict Court jurisdiction to curb judicial policymaking).

26. See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1453–55 (2001) (concluding that attacks on the legal legitimacy of the Supreme Court's exercise of judicial review is tied closely to the social legitimacy of its decisions).



made possible by a panel system offers at least five benefits to litigants and society as a whole.

First, if the Court were able to decide more cases, it would likely do a better job correcting errors committed below. The Supreme Court, like other appellate courts, is responsible for correcting legal errors committed by the lower courts.<sup>27</sup> Indeed, if lower courts were somehow imbued with the power of perfection, there would be little need for appellate courts.<sup>28</sup> This of course is not the case, so the Supreme Court bears responsibility for monitoring lower court decisions and remedying errors that litigants bring to the Court's attention. While the Court cannot and, some would argue, should not aim to correct all errors, it should address those that are so substantial as to "depart[] from the accepted and usual course of judicial proceedings."<sup>29</sup> By embracing a panel system, the Court could hear many more cases and remedy many more legal errors. The more errors the Supreme Court can address, the greater the likelihood that the law will be "accurate" and that litigants' fates will turn on appropriate legal interpretations.

Second, a Supreme Court panel system should lead to more uniform federal law.<sup>30</sup> The Supreme Court, as the *supreme* judicial

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27. See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 128 (1928).

28. We recognize, of course, that even if the Supreme Court were unnecessary as a practical matter, which it clearly is not, the Constitution requires its existence. See U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one supreme Court . . .").

29. SUP. CT. R. 10(a). We of course are not asserting that the Supreme Court's primary function is as a court of error correction. A single institution, even with panels, could not correct error in the more than 30,000 cases decided on the merits by the federal courts of appeals and the many more issued by state high courts. See ADMIN. OFFICE OF THE U.S. COURTS, *JUDICIAL BUSINESS OF THE UNITED STATES COURTS* 2007, tbl. S-1 (2008), available at <http://www.uscourts.gov/judbus2007/tables/S01Sep07.pdf> (reporting that the U.S. Courts of Appeals terminated 31,717 cases on the merits for the one-year period ending September 2007); NAT'L CTR. FOR STATE COURTS, *COURT STATISTICS PROJECTS: STATE COURT CASELOAD STATISTICS*, tbl. 17 (2007), available at [http://www.ncsconline.org/D\\_Research/csp/2006\\_files/StateCourtCaseloadTables-AppellateCourts.pdf](http://www.ncsconline.org/D_Research/csp/2006_files/StateCourtCaseloadTables-AppellateCourts.pdf) (reporting the total number of dispositions by signed opinion by state for state courts of last resort and, where applicable, state intermediate appellate courts). Instead we are pointing out that the Court does have a responsibility to correct error that undermines the clarity, predictability, and uniformity of national law (as Rule 10 acknowledges); cf. Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 92 (2006) (arguing that the Supreme Court is not a court of error correction per se).

30. For a discussion of the Supreme Court's responsibility to maintain uniformity in federal law, see, e.g., Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1405-07 (1987) (describing how the Court took on this responsibility as part of the expansion of the federal docket and the federal judicial system itself); Breyer, *supra* note 29, at 92 ("[T]he Supreme Court is charged with providing a uniform rule of federal law in areas that require one.").

body, is responsible for addressing "circuit splits," which arise when two or more courts of appeals interpret the same law differently.<sup>31</sup> As lower federal court dockets have expanded,<sup>32</sup> circuit splits have increased.<sup>33</sup> Over the last twenty years, the Supreme Court has cited a circuit conflict as the reason for granting review in more than one-third of its cases.<sup>34</sup> Despite the attention given to circuit splits, however, the Court is currently unable to address even half of those identified by litigants.<sup>35</sup>

Circuit splits are a problem for several reasons: they create uncertainties in the law, lead to outcomes in which similarly situated litigants are treated differently, encourage forum shopping, discourage

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31. Supreme Court Rule 10 includes as a compelling reason to grant a petition that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or "that conflicts with a decision by a state court of last resort." SUP. CT. R. 10(a). The Supreme Court appears sensitive to Rule 10's position as reflected in the fact that it is far more likely to grant a petition if the case involves a direct conflict between circuits. See Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 195 tbl.4 (2001) (reporting the results from a multivariate analysis of the Supreme Court's decision to grant certiorari). For the purposes of that study, George and Solimine defined a circuit split as a case in which any judge on a panel which decided the case below "explicitly stated [in a majority, concurring, or dissenting opinion] that another circuit or circuits had reached a different decision in analogous circumstances," and moreover, the judge described the conflict as direct rather than a matter of mere inconsistency. *Id.* at 188.

32. See, e.g., Tracey E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 VAND. L. REV. 1, 48-49 (2008) (detailing the growth in the lower court docket).

33. See George & Solimine, *supra* note 31, at 195 tbl.4 (reporting, based on a random sample of en banc and panel decisions in circuit courts, that 14 out of 71 en banc cases and 34 out of 213 panel cases involved a direct circuit conflict); Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 LAW & SOC'Y REV. 135, 142 (2006) (estimating, as part of a study of the Supreme Court's treatment of cases involving splits, that at least 16% of circuit cases from 1985-1995 included a split); see also A. Benjamin Spencer, Split Circuits Blog, <http://splitcircuits.blogspot.com> (last visited Sept. 1, 2008) ("tracking developments concerning splits among the federal circuit courts" and demonstrating, in a uniquely modern way, the size of the problem).

34. See HAROLD J. SPAETH, THE ORIGINAL UNITED STATES SUPREME COURT JUDICIAL DATABASE, 1953-2005 TERMS (2006) [hereinafter SPAETH DATABASE]. The database begins with the first term of the Warren Court and is continuously updated with a lag to allow for collecting data. See generally Harold J. Spaeth & Jeffrey A. Segal, *The U.S. Supreme Court Data Base: Providing New Insights into the Court*, 83 JUDICATURE 228 (2000) (offering a highly accessible explanation of and guide to the database as part of an issue devoted to publicly available data on the courts). The University of South Carolina Judicial Research Initiative maintains a website from which researchers may download datasets of court cases including the Spaeth Database. Judicial Research Initiative, U.S. Supreme Court Databases, <http://www.cas.sc.edu/poli/juri/sctdata.htm> (last visited on September 18, 2008).

35. See George & Solimine, *supra* note 31, at 193 tbl.2 (finding that the Court granted certiorari to less than half of the petitions in their study that demonstrated a direct conflict between circuits and further finding that this included en banc cases which presumably involve issues of greater importance).

settlement, and so on.<sup>36</sup> Indeed, courts, Congress, and commentators have long worried about circuit splits and attempted to devise various ways of addressing them, including proposing the creation of a new court solely for that purpose.<sup>37</sup> Congress granted the Court discretion over the majority of its jurisdiction in order to allow the Court to focus on maintaining uniformity of law.<sup>38</sup> If the Supreme Court were able to hear more cases, it could perform this function better.

Third, the Court would explain the law more often under a panel system. The Court is not merely a dispute resolution body—it is also a “reason-giving” body. Through its decisions, the Court explains the law and thereby offers guidance for how future cases should be treated.<sup>39</sup> If the Court decided more cases, it would issue more majority opinions and probably speak to a wider array of subjects. We recognize, of course, that the content of opinions issued by a three-Justice panel might differ from those produced by the Court en banc. But as between fewer opinions reflecting the insights of all eligible Justices and a greater number of opinions produced by panels of three, we believe the latter is preferable to the former.

Fourth, by embracing a panel system, the Court could play a more active separation-of-powers role. Under our constitutional

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36. See PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, *JUSTICE ON APPEAL* (1976) (describing “[t]he institutional functions of appellate review” as “declaring and harmonizing general principles”); Baker & McFarland, *supra* note 30, at 1407–08 (explaining how “discrepancies created by [lack of Supreme Court action] attract strategic and inefficient litigation”); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 544 (1989) (explaining why “a high degree of consistency and predictability in the law is necessary to the successful operation of the legal system”).

37. See *Hearings on S. 704 Before the Subcomm. on Courts of the S. Comm. on the Judiciary*, 99th Cong. 1st Sess. (1985) (hearings before the Senate Judiciary Committee on the creation of an Intercircuit Panel, suggested by Chief Justice Burger); COMM’N ON REVISION OF THE FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES, RECOMMENDATIONS FOR CHANGE: A PRELIMINARY REPORT 3–4, 8 (1975) (noting that Congress was considering restricting access to the federal courts in order to alleviate stress on the judicial system and proposing in the alternative the creation of a new National Court of Appeals to resolve intercircuit conflicts, subject to the review of the Supreme Court). For comparative evaluations of various proposals, see, e.g., FED. JUDICIAL CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 75–83 (1993) (examining proposals to create a national court of appeals or an intercircuit tribunal); Thomas E. Baker, *A Generation Spent Studying the United States Courts of Appeals: A Chronology*, 34 U.C. DAVIS L. REV. 395 (2000) (collecting and synthesizing prior proposals to address intercircuit conflict).

38. See Hartnett, *supra* note 9 at 1685, 1698 (recounting the testimony of Justices Taft and Van Devanter to Congress on how the expansion of the Court’s discretion over its jurisdiction would increase uniformity of the law).

39. See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 641 (1995) (arguing that in a common-law system the reasons given for a court’s decision for or against a particular party matter more than the decision itself).

scheme, the Supreme Court (along with the rest of the federal judiciary) comprises a third and ostensibly "coequal" branch of government, charged with providing a "check" on the other two branches.<sup>40</sup> In fact, however, the judiciary may be the weakest branch of government because it lacks both resources (in contrast to the legislative branch) and enforcement power (in contrast to the executive branch).<sup>41</sup> Relative to the other branches, the Supreme Court also produces little law. During George W. Bush's presidency (thus far), Congress has passed 1,627 public laws.<sup>42</sup> Bush himself has contributed more than one-half-million pages to the *Federal Register*,<sup>43</sup> submitted ninety-six treaties to the Senate,<sup>44</sup> and issued 262 executive orders.<sup>45</sup> During roughly the same period, the Supreme Court has decided only 525 cases. If the Court's decisionmaking capacities doubled or tripled, it could play a much more prominent role in policing the actions of the other branches. Put a different way, if the Court is truly supposed to provide a check on executive and legislative action, its inability to expand its capacity as the other branches expand their capacities prevents the Court from playing that structural role.<sup>46</sup>

Finally, not only does the Supreme Court check the other branches of the federal government, it also monitors the state courts.<sup>47</sup> Indeed, the Supreme Court is the only federal court empowered to review state court interpretations of federal laws, including the U.S. Constitution. When it does so, the Court plays an important

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40. THE FEDERALIST NO. 51 (James Madison); see also *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.").

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

42. See The Library of Congress, THOMAS, <http://thomas.loc.gov/bbs/d110/d110laws.html> (noting that public laws "make up most of the laws passed by Congress" and providing access to the public laws passed by the 107th through 110th Congress).

43. See U.S. Government Printing Office, GPO Access, The Federal Register: Mainpage, <http://www.gpoaccess.gov/fr/index.html> (last visited Sept. 18, 2008). This site is a searchable database of the Federal Register that includes an index from which we calculated the total number of pages published annually from 2001 through August 2008.

44. See The Library of Congress, THOMAS, <http://thomas.loc.gov/home/treaties/treaties.html> (containing ninety-six treaties that were submitted to the Senate during the 107th through 110th Congress).

45. The National Archives, The Federal Register: Administration of George W. Bush (2001–Present), <http://www.archives.gov/federal-register/executive-orders/wbush.html>.

46. Cf. Erwin N. Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 343–44 (1975) (describing, based on his prior experience as Solicitor General, how the Court effectively defers to that office in deciding which government petitions to review).

47. 28 U.S.C. § 1257(a) (2000) (granting the Supreme Court the power to review state high court decisions on federal law).

federalism role because it ensures that state high courts protect the liberties of citizens.<sup>48</sup> With greater decisionmaking capacity, the Court is more likely to review state actions that run afoul of federal interpretations of federal law.

We recognize, of course, that the Court might choose not to use all of the additional decisionmaking capacity created by a panel system. After all, the Court would retain nearly complete control over its docket and would decide more cases only if it opted to grant certiorari more often.<sup>49</sup> It is difficult to estimate how a panel system might affect the certiorari voting process. Regardless, the increased decisionmaking capacity afforded by a panel system would lead to some or all of the benefits identified above because it would arm the Court with a more credible threat of review. While the Court would continue to review a relatively small number of federal lower court and state high court rulings and congressional and administrative agency decisions, the Justices are likely to focus on the most significant cases. Moreover, the cost of invalidation by the Court is sufficiently high that it magnifies any increase in the probability of Court action. Thus, increased capacity, even if unused, should incentivize lower courts and the other branches to toe the line, thereby minimizing shirking by the lower courts<sup>50</sup> and overreaching by the other two branches.<sup>51</sup> Moreover, the Court may craft more effective decisions because the panel system would allow the Justices greater

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48. From 1953 through 2006, the Supreme Court decided 1388 cases appealed from state and territorial courts and reversed more than 70% of those lower courts' rulings. See SPAETH DATABASE, *supra* note 34 (providing the raw data from which we draw these figures).

49. The Court is more likely to use the capacity in order to review decisions with which it disagrees. See Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 102–14 (2000) (developing a model of Supreme Court auditing of lower courts based on likely agreement with lower court decisions and finding empirical support for the conclusion that the Court grants certiorari to review decisions with which it disagrees).

50. See Donald Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 681–89 (1994) (finding that courts of appeals are responsive to Supreme Court doctrinal changes but will look for opportunities to further their own preferences); see also Jeffrey R. Lax, *Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation and the Rule of Four*, 15 J. THEORETICAL POL. 61, 62–67 (2003) (offering a formal model of Supreme Court auditing of lower courts).

51. See James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction*, 45 AM. J. POL. SCI. 84, 84, 97–98 (2001) (concluding, based on a formal model of court-legislature interaction, that “[t]he possibility of informative judicial review affects the quantity and informational quality of legislation enacted by the Legislature relative to legislation that would be enacted in the absence of judicial review”); see also Andrew D. Martin, *Congressional Decision Making and the Separation of Powers*, 95 AM. POL. SCI. REV. 361, 361, 370, 373–76 (2001) (finding, based on empirical evidence, that the Supreme Court “profoundly constrain[s] House members and senators when casting roll call votes”).

consideration and deliberation of those cases to which they are assigned.<sup>52</sup>

In addition, panel practice offers benefits that are independent of its effect on the Court's docket. A change in group context—from all eight of a Justice's colleagues to only two—could improve collegiality.<sup>53</sup> On lower courts, greater consensus emerges from three-judge panels. While this may be a product of the closeness of the question presented, it also may grow out of greater efforts to persuade a single dissenter to join the majority. As a consequence, we would expect fewer separate opinions by Supreme Court panelists. For similar reasons, a three-judge panel may feel more constrained by precedent than the full Court. And, if the Court adopted a panel system with an en banc procedure, this would provide the Court with an additional tool for signaling the importance or seriousness of a decision.

### B. *The Costs*

Of course, any benefits a panel system might offer must be balanced against any costs it might impose. Namely, some might argue that panels will lead to different outcomes and lower-quality Court decisions. However, we show below that panels are likely to reach conclusions substantially similar to those reached by the Court as a whole, and that panels are likely to produce decisions that are of comparable quality to those produced by the Court as a whole.

#### 1. Different Outcomes?

One potential cost of panel decisionmaking is that it might lead to different decision outcomes than those reached by the full Court. Not so. Although it might seem provocative to contend that most Supreme Court cases would turn out the same way whether heard en banc or in panels, the proposition is actually uncontroversial. For the Court to issue a decision, a majority of Justices must agree on the outcome. If a majority agrees, then obviously a majority of panels made up of those Justices would also agree. (For purposes of calculation, we assume "sincere voting" by Justices. That is, we

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52. See, e.g., Hart, *supra* note 22, at 123, 124 (arguing that the real difficulty posed by the Court's workload is that the Justices lack sufficient time for reflection and consideration of the cases presented, and attributing the politicization of the Court to this problem).

53. See Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 4–5 (1993) (defining collegial enterprises as "team enterprises in that each participant must consider and respond to her colleagues as she performs her tasks," and noting that "the objective of collegial enterprise often reaches beyond accuracy to other measures of quality").

assume that a Justice votes to affirm or reverse based on her individual assessment of the case rather than the votes of one or more of her colleagues. We discuss the possibility of relaxing this assumption later in this Section and conclude that it would not have a meaningful impact on our estimates.<sup>54</sup>)

But to say that a majority of cases would come out the same way does not tell us very much. We would want to know more precisely how many cases would likely come out the same way and what characteristics distinguish those cases that would from those that would not. To answer those questions, we use a mathematical technique developed in the field of combinatorics to assess the likelihood that any given case would have come out the same way under a panel system as it did under the existing en banc system. Examining every Supreme Court case decided between the 1953 and 2006 terms, we conclude that if the Supreme Court had decided cases in three-Justice panels during this period, it would have reached the same result in roughly nine of every ten cases. Let us explain.

Determining how Supreme Court cases *would have* come out under a panel system requires us first to determine how they actually *did come* out under the en banc system in place. In other words, we need to know how many cases the Court decided and how many of the Court's decisions were unanimous, 8-1, 7-2, 6-3, 5-4, and so on. During the period from 1953 to 2007, the Supreme Court decided 6,133 cases, or roughly 114 per calendar year.<sup>55</sup> As Table 1 illustrates, the Court decided many of these cases by a wide margin: nearly 40% of the cases were unanimous and another 10% or so involved only one dissenting Justice.

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Table 1. U.S. Supreme Court Cases,  
October Terms 1953 – 2006

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Unanimous	2347 (38.3%)
8-1	492 (8%)
7-2	625 (10.2%)

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54. Unfortunately, there is no reliable way to revise the estimates to include strategic votes because of the number of unknowns: in which cases was a Justice's vote in fact affected, and how would other majority Justices have made the same concessions if on a panel with that Justice.

55. See SPAETH DATABASE, *supra* note 34 (presenting the data from which we calculate these numbers).

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6-3	908 (14.8%)
5-4	982 (16%)
7-1	153 (2.5%)
6-2	241 (3.9%)
5-3	224 (3.7%)
Other	206 (3.4%)
<i>Total</i>	6133 (100%)

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These figures do not tell us the precise probability that a given case would have come out the same way under a panel system, but they do provide some insight into this question. In unanimous cases and those cases in which only one Justice dissented, we know that every potential three-Justice panel that might have heard those cases would have reached the same conclusion as the Court as a whole. Because nearly 50% of the cases were decided without dissent or with only one dissenting Justice,<sup>56</sup> we know, based solely on these lopsided cases, that at least half of the Court's cases would have come out the same way if the Court had used a panel system.

Even when we examine the more closely divided decisions, we find that a surprisingly high percentage of them would also have come out the same way. To demonstrate this, we need to explore how the Court *might* have decided its cases if a panel system had been in place. That is, we need to identify every potential panel that could have heard each of the decided cases during the period of our study.<sup>57</sup> On a nine-member Court, 84 unique three-Justice panels are possible.<sup>58</sup>

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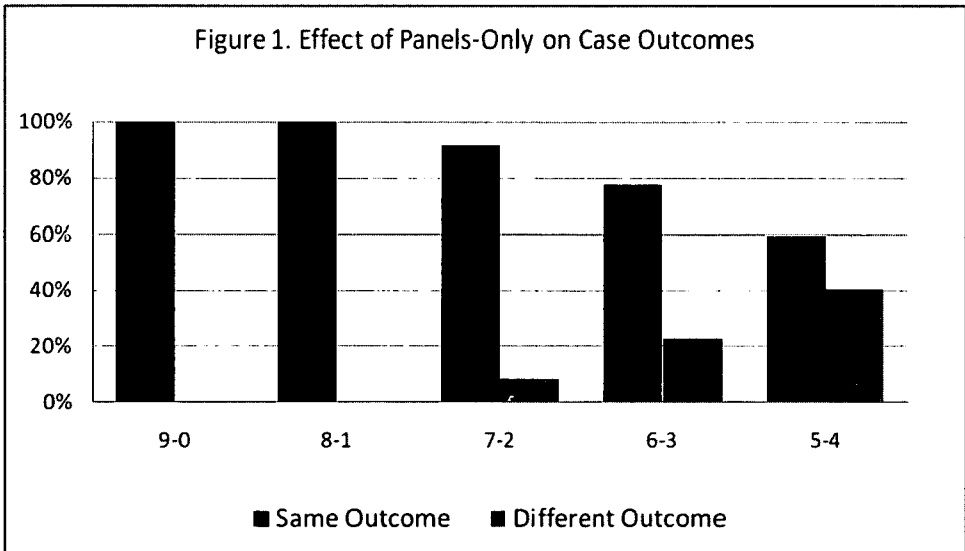
56. The Court decided 3,042 cases with none or one dissent, or 49.6% of all decisions. *Id.*

57. We assume random assignment of Justices to panels, meaning that each possible panel has an equal likelihood of being assigned to a given case. We further assume that panel membership rotates, meaning Justices do not serve on a fixed three-Justice panel for the entire term.

58. Detailed explanations of these and other calculations are available in the Appendix. We note the probability of different outcomes if one or more Justices did not participate, and thus were not available for the panel. We also delineate the probability of different outcomes for other odd-number panel sizes.



The likelihood that these 84 three-Justice panels would have reached the same outcome as the en banc Court depends on the “vote margin” in any given case. We first calculate this figure in the abstract; in other words, we calculate how many of the 84 potential panels would have reached the same outcome in cases with vote margins of 9-0, 8-1, and so on. As depicted in Figure 1, all of the unanimous and single-dissent cases would have turned out the same way under a panel system. Where there is more disagreement among the Justices, the likelihood that a case would have turned out the same way decreases, but it is still highly likely that the Court would have reached the same conclusions. In the 7-2 cases, for example, there is a 91.7% chance that the case would have been decided the same way; in other words, of the 84 potential panels that could have heard the case, 77 of them would have reached the same outcome as the en banc Court. In the 6-3 cases, there is a 77.4% chance the Court would have ruled the same way sitting in panels; in other words, 65 of the 84 potential panels would have decided the same way. And even in the closely divided 5-4 cases, nearly 60% (or 50 of the 84 potential panels) would have ruled the same way.<sup>59</sup>



59. We are only calculating the possibility of a different *outcome*. We recognize that the opinion—and perhaps even the reasons given for the outcome—may change even if the treatment of the lower court is the same. We weigh the significance of this possibility when we consider the benefit resulting from more offerings of reasons (i.e., more decisions). See *supra* note 58.

We then calculate the number of actual Supreme Court cases that would have come out the same way by multiplying the percentages in Figure 1 by the number of Court cases that were decided by the corresponding vote margin. For example, as shown in Table 1 above and Table 2 below, the Court decided 2,347 unanimous cases during the period of our study, so we multiplied this number of cases by the 100% likelihood that they would have been decided the same way in a panel system. Similarly, the Court decided 625 cases by a 7-2 margin, so we multiplied those cases by the 91.7% likelihood they would have come out the same way under a panel system, and so on. Having done this for every Court outcome, we then compute a total. As shown in Table 2, there is an 87.4% chance that a case decided by the Supreme Court from 1953 to 2007 would have come out the same way if heard by a panel.<sup>60</sup>

**Table 2. Effect of Using Panels on Case Outcomes: 1953-2006 Terms**

	All cases	Percentage decided the same way	Number remaining the same
Unanimous	2347	100.0%	2347
8-1	492	100.0%	492
7-2	625	91.7%	573
6-3	908	77.4%	703
5-4	982	59.5%	585
7-1	153	100.0%	153
6-2	241	89.3%	215
5-3	224	71.4%	160
Other	206	87.9%	181
<i>Total</i>	<i>6133</i>	<i>87.4%</i>	<i>5363</i>

60. This result is consistent across Chief Justices as well. The probability of the same outcome for the Warren Court is 88.9%, for the Burger Court, 86.9%, for the Rehnquist Court, 86.6%, and for the Roberts Court (through June 2007), 88.2%. High-consensus cases (i.e., no dissent or one dissent) comprised 51.7% of the Warren Court's caseload, 48.1% of the Burger Court's, 49.2% of the Rehnquist Court's, and 58.5% of the Roberts Court's. See SPAETH DATABASE, *supra* note 34 (presenting the data from which we calculate these numbers).

This analysis reveals that the Supreme Court would have reached the same result in most of its prior cases whether it sat as a full Court or in three-Justice panels.<sup>61</sup> Assuming Supreme Court behavior during the past half century is predictive of Supreme Court behavior in the future, the analysis also suggests that the Court would reach vastly similar results in future cases whether sitting in panels or as a full Court.<sup>62</sup>

Our analysis assumes that Justices vote sincerely; that is, their votes match their preferences with respect to outcome. But, what if a Justice's vote is in part the product of the identity of other panelists?<sup>63</sup> If so, the number of Justices in the majority will vary if the number of Justices on the panel deciding the case varies. A Justice may change her vote in response to a colleague's position because her view sincerely changes or because she decides to vote strategically. Under the strategic theory of judicial behavior, rational voting in some instances may lead a Justice to vote for a different outcome than the one she prefers because changing her vote allows her to join the majority and influence the content of the majority opinion.<sup>64</sup> But, the empirical evidence to support this theory is quite limited.<sup>65</sup> As to switching sides to affect the majority opinion, Justices rarely change

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61. The foregoing results are not uniformly true across all issue areas because some areas are more likely than others to produce dissent. Still, even in highly divisive areas, such as criminal procedure or the First Amendment, three-Justice panels would have produced the same outcome in more than eight out of ten Supreme Court cases.

62. The composition of the Court's docket might have changed under a panel system. To the extent Justices consider the likely outcome if they vote to grant certiorari, the panel system changes a Justice's estimates. For a discussion of the role of such strategic calculations in the certiorari process, see generally Jeffrey A. Segal & Robert Boucher, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995).

63. Justices' papers reveal instances of a Justice threatening to defect from the majority if the opinion is not revised to accommodate her position. See generally LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000). In such a case, the reported vote does not reflect what the vote might have been if the composition of the group were different. Instead, it overstates the level of consensus.

64. An alternative explanation is institutional: a Justice changes her vote to protect the Court's legitimacy or status. As to non-legal, institutional goals, *Brown v. Board of Education*, 347 U.S. 483 (1954), is the case cited as an example of such negotiation. But, it also is generally the only case cited. We all recognize how unusual that case is. There are many other cases that put the Court in the middle of politically divisive and emotionally charged issues—including *Bush v. Gore*, 531 U.S. 98 (2000)—yet the Court majority was minimum-winning.

65. Negotiation and accommodation generally take place among Justices who favor the same outcome; thus, strategic voting (as opposed to signing) is a relatively uncommon, though important, phenomenon. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86–110 (2002) (finding that a sincere voting model captures the large majority of Justices' votes).

their votes to serve this end. Bargaining is generally over whether a Justice will *sign* an opinion (as opposed to writing or signing a concurrence in the opinion or judgment), not over whether a Justice will vote in support of the majority's position.<sup>66</sup> There are few cases in which a Justice would change her vote as to outcome—whether to reverse or affirm, for example—based on a desire to influence the reasons given for the outcome.<sup>67</sup> We expect then that any effect of strategic voting would be small.

Even though the majority of cases would be decided the same way under a panel system, the probability of the same outcome depends on the vote division in the case. As noted above, the greater the level of agreement, the higher the likelihood that three Justices would reach the same conclusion as nine. If consensus is also correlated with the *importance* of a Court ruling, then the probability of a different outcome also would be correlated with the likelihood that a case is significant. The relationship might be positive: Unanimous cases, like *Brown v. Board of Education*, might be the most significant decisions because they reflect a united Court, perhaps signaling a societal consensus on the matter at issue. Conversely, divided rulings, particularly those that are closely divided, might be the most important Court decisions because they reflect disagreement among the Justices, perhaps signaling that an issue is still "up for grabs."

Unfortunately, there is no agreement regarding what cases are most significant, though most of us would agree that a handful of cases, like *Brown* (unanimous), *Roe* (7-2), and *Bush v. Gore* (5-4), would belong on such a list, largely because of the subject matter involved or the practical or policy implications of any ruling. More fundamentally, there is no agreement regarding how one would go

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66. Most of the research in this area has relied on the papers of the Justices to study the negotiation and accommodation among the Justices. In addition, the papers often reveal the development of the collection's author's views. Interestingly, scholars have reported limited instances of a Justice's own position on outcome changing between conference and final vote. See generally EPSTEIN & KNIGHT, *supra* note 63; MALTZMAN, SPRIGGS & WAHLBECK, *supra* note 63, at 132-37 ("[A J]ustice will be more likely to agree with the opinion, and thus join it, if he or she voted with the majority coalition at conference.")

67. In fact, under the median voter theory, the opinion will match the preferences of the Court median, rather than the majority median. Thus, changing sides should not affect the content of the opinion. Scholars have begun to question this relatively long-standing position, but generally they do so by treating a Justice's decision on which way to vote (i.e., to affirm or reverse) from her decision as to the reasons to give for that vote. See Cliff Carrubba, Barry Friedman, Andrew Martin & Georg Vanberg, *Does the Median Justice Control the Content of Supreme Court Opinions?* 1 (2007) (unpublished paper, on file with the Vanderbilt Law Review), available at <http://adm.wustl.edu/media/working/mjt1-5.pdf> ("[I]f [J]ustices do not switch their vote on the outcome in exchange for concessions in rationale, the median [J]ustice typically does not determine the content of Supreme Court decisions." (alteration in original)).

about determining what cases are most significant, perhaps because there is no good way of doing so.

Lee Epstein and Jeff Segal have devised one interesting potential measure of decision significance.<sup>68</sup> They constructed a “*New York Times* measure” by identifying the characteristics of the decisions receiving front-page headline coverage in the *New York Times* the day after the decisions were announced.<sup>69</sup> They found that the *Times* was more likely to focus on divided cases than on unanimous ones, but the difference was not as substantial as one might have expected. Divided cases were one and one-half to two times more likely than unanimous cases to be a lead story in the *Times* the next day.<sup>70</sup>

If the *New York Times* measure accurately captured decision importance, it would suggest that a lower percentage of “important” cases—as compared to the overall caseload—would have come out the same way if decided by panels rather than by the Court as a whole. But a media coverage measure, like any other possible proxy, may not capture whether a decision is significant or “landmark.” With the *New York Times* measure, this is true for at least two reasons. First, there is no reason to believe that a *New York Times* reporter can accurately distinguish important from unimportant cases. Second, the *New York Times* measure focuses on coverage in the immediate aftermath of the decision. As we know, some decisions that seem important immediately after being issued come to seem trivial; other decisions, largely unnoticed when issued, turn out to have enormous significance down the road. Thus, this measure provides valuable insight into the contemporaneous salience of a Court decision (as the authors intended), but it does not provide us with a definitive list of important or unimportant cases. The difficulty is that there is no other method that does a better job of identifying such cases.

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68. See Lee Epstein & Jeff Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 72–77 (2000) (describing their methodology, and subjecting it to extensive validity tests).

69. They found that 914 of the 6114 cases in their study were salient, or an average of about 15 cases per term from October Term 1946 to 1995. *Id.* Epstein and Segal sought to create an issue salience measure that could be used across institutions and measured contemporary, rather than retrospective, relevance.

70. *Id.* at 79, 80 fig.3 (reporting that 10.4% of unanimous cases, 13.5% of one-dissent cases, 17.2% cases with two or three dissents, and 22.1% of one-vote margin cases were the lead subject of a front-page *N.Y. Times* story the day after the decision was announced). Another widely cited and respected list of important rulings was originally created by Elder Witt based on scholarly evaluation of the cases. See BISKUPIC & WITT, *supra* note 10 at 1114–59. In the civil rights and liberties dominated *Congressional Quarterly* list, “major” cases were more likely to be decided with two or three dissents than were cases not on the list.

## 2. Lower-Quality Decisions?

Even assuming the outcomes under a panel system are likely to be the same as under the en banc system, the quality of the decisions might not be as high. Under a panel system, three Justices, rather than nine, would decide most or all cases. On the theory that "two heads are better than one," some might argue that nine heads are better than three. In fact, however, the research on group decisionmaking is equivocal about the impact of increased group size on decision quality.

Larger groups, like a nine-member Court, have some advantages over smaller groups, like a three-member Court panel. Because of their size, they often have more resources, including greater ability, expertise, energy, and diversity.<sup>71</sup> Moreover, larger groups tend to deliberate longer than smaller groups,<sup>72</sup> and deliberation might lead to better decisions. Finally, larger groups tend to outperform smaller groups on such tasks as "information-gathering and fact-finding" because such tasks "can be broken down into different components and specific subtasks [can be] allocated to different members of the group."<sup>73</sup>

On the other hand, larger groups are much more complicated, and that complexity can cause problems.<sup>74</sup> In a three-member group like a Supreme Court panel, there are a total of six potential within-group relationships.<sup>75</sup> If, for example, you assume Justices A, B, and C sit on a panel, the six potential relationships are: A-B, A-C, B-C, AB-

71. See, e.g., MARVIN E. SHAW, *GROUP DYNAMICS: THE PSYCHOLOGY OF SMALL GROUP BEHAVIOR* 173 (3d ed. 1981) (observing that "the added resources that are available in larger groups (abilities, knowledge, range of opinions, etc.) contribute to effective group performance" and that larger groups "tend to be more diverse"); John M. Levine & Richard L. Moreland, *Small Groups*, in 2 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 415, 422 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 1998) ("As a group grows larger, it has access to more resources (e.g., the time, energy, and exercise of its members), so its performance ought to improve."); Richard L. Moreland, John M. Levine & Melissa L. Wingert, *Creating the Ideal Group: Composition Effects at Work*, in *UNDERSTANDING SMALL GROUP BEHAVIOR: SMALL GROUP PROCESSES AND INTERPERSONAL RELATIONS* 11, 13 (E.H. Witte & J.H. Davis eds., 1996) (observing that larger groups "often perform better because they have access to more resources, including time, energy, money, and expertise").

72. Based on a meta-analysis of jury size studies, Michael Saks and Mollie Weighner Marti found that "[t]welve-person juries spend more time in deliberation" than six-person juries. Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 *LAW & HUM. BEHAV.* 451, 465 (1997).

73. DONALD C. PENNINGTON, *THE SOCIAL PSYCHOLOGY OF BEHAVIOUR IN SMALL GROUPS* 79 (2002).

74. William M. Kephart, *A Quantitative Analysis of Intragroup Relations*, 55 *AM J. SOC.* 544, 544-49 (1950) (illustrating this proposition mathematically).

75. *Id.* at 548.

C, AC-B, and BC-A. In a nine-member group like the Supreme Court as a whole, there are a total of 9,330 potential relationships!<sup>76</sup> Obviously, the more relationships a group member must navigate, the more complicated the group dynamics. It is hardly surprising, then, that larger groups are more likely to have communication and coordination problems,<sup>77</sup> to be less cooperative,<sup>78</sup> to fracture into subgroups,<sup>79</sup> to face such problems as “social loafing” and free-riding among some group members,<sup>80</sup> and to reach outcomes more slowly.<sup>81</sup> This means that larger groups tend to be less “effective at using information to come to a decision.”<sup>82</sup> In other words, larger groups are likely to be less effective than smaller groups at performing the very tasks that Justices perform when deciding cases.

On balance, the research on the impact of group size on decisionmaking calls into question the assumption that larger groups outperform smaller groups. On some tasks, larger groups are likely to do better; on other tasks, including those arguably more akin to the kinds of tasks that appellate courts perform, smaller groups are likely to do better.<sup>83</sup> At a minimum, the research suggests that Supreme

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76. *Id.*

77. *See, e.g.*, Levine & Moreland, *supra* note 71, at 422 (observing that “in larger groups, coordination losses are also more likely”); Moreland, Levine & Wingert, *supra* note 71, at 13 (observing that larger groups “often experience coordination problems that can interfere with their performance”).

78. *See, e.g.*, Axel Franzen, *Group Size Effects in Social Dilemmas: A Review of the Experimental Literature and Some New Results for One-Shot N-PD Games*, in *SOCIAL DILEMMAS AND COOPERATION* 117, 117, 132 (Ulrich Schulz, Wulf Albers & Ulrich Mueller eds., 1994) (observing that it is “common knowledge in the social sciences that large groups show less cooperative behavior than small groups,” but finding, based on prisoner’s dilemma experiments, that this is true in repeat play games only); Moreland, Levine & Wingert, *supra* note 71, at 14 (“There is more conflict among the members of larger groups, who are less likely to cooperate with one another.” (citations omitted)).

79. *See, e.g.*, PENNINGTON, *supra* note 73, at 79 (“Larger groups, of say seven or more, do have a tendency to break down into smaller subgroups.”).

80. *See, e.g. id.* at 56–68 (observing that social loafing is more likely to be a problem as group size increases); Steven J. Karau & Kipling D. Williams, *Social Loafing: A Meta-Analytic Review and Theoretical Integration*, 65 *J. PERS. & SOC. PSYCHOL.* 681, 700–02 (1993) (finding, using meta-analytic techniques, a positive correlation between group size and social loafing and noting various factors that can dampen it); Levine & Moreland, *supra* note 71, at 422 (noting that “motivation losses due to social loafing, free riding, and efforts to avoid exploitation” are more likely in larger groups).

81. *See, e.g.*, PENNINGTON, *supra* note 73, at 79 (“Research shows that smaller groups, of between three and eight, are faster at completing tasks than are larger groups of 12 or more members.”).

82. *See id.*

83. *See, e.g.*, SHAW, *supra* note 71, at 173–74 (identifying the resource advantages of large groups and the process advantages of small groups and concluding that “whether the [group] performance will become more or less effective as size increases will depend upon the degree to which added resources can be utilized and the degree to which group processes exert negative

Court panels might perform just as well as, or even better than, the en banc Court. In short, two heads may be better than one, but nine heads are not necessarily better than three.<sup>84</sup>

### 3. Summary

We believe that the gains associated with a move to panels outweigh the costs identified above. That is, we believe that the benefits associated with doubling or tripling the Court's output—even if this means that some panel decisions would differ from decisions the Court would make as a whole, or that some of the decisions would be of lower quality—would be worth it. And indeed, if we believed strongly to the contrary, we would feel compelled to question the operations of the United States Courts of Appeals. These courts, after all, are much more important than the Supreme Court in terms of the sheer volume of decisions they make and law they produce, yet they decide the vast majority of their cases in panels rather than en banc. If panel decisionmaking is inappropriate on the Supreme Court, is it not also inappropriate on the courts of appeals?

## II. PANEL PROPOSALS

Because we believe that the benefits of a panel system outweigh the costs, we propose that Congress adopt a statute either requiring or authorizing the Court to decide cases in three-Justice panels.<sup>85</sup> We consider three possible approaches to panel

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influence on group output"); Glenn E. Littlepage, *Effects of Group Size and Task Characteristics on Group Performance: A Test of Steiner's Model*, 17 PERS. & SOC. PSYCHOL. BULL. 449, 449 (1991) ("The relationship between group size and group performance shows substantial variability across studies.").

84. To be sure, we do not want to overstate the import of this research for the question we are exploring here. As noted above, none of this research is based on Supreme Court Justices or judges generally, nor does any of it ask experimental subjects to perform the tasks that appellate judges perform—i.e., review a record, digest legal briefs, preside over oral arguments, analyze and synthesize the information, reach a decision, and produce an opinion. Moreover, this research compares groups of varying sizes, often very small groups to quite large groups; only occasionally do researchers compare three-person groups to nine-person groups.

85. We do not consider in this paper whether Article III's dictate of "one supreme Court" requires that all Justices participate in all decisions. We instead assume that it is constitutional in light of the following: (1) Congress's repeated consideration of the idea; (2) the American Bar Association's examination of panel proposals in the early and mid-twentieth century; (3) the Court's delegation of some decisions to a single Justice; and (4) the lack of sufficient contrary record relating to Article III. See *infra* text accompanying notes 97–100. Even on a literal reading, divisions do not produce multiple courts. But see Ross E. Davies, *A Certain Mongrel Court: Congress's Past Power and Present Potential to Reinforce the Supreme Court*, 90 MINN. L. REV. 678, 678–87 (2006) (arguing that the language should be read as "one [indivisible] supreme Court").



decisionmaking on the Supreme Court: the “mandatory panels” approach, the “discretionary en banc” approach, and the “discretionary panels” approach. Each of these offers distinct advantages and disadvantages relative to the others, but all of the panel proposals, in our view, offer improvements over the current approach to Supreme Court decisionmaking.

### A. The “Mandatory Panels” Approach

*Approach #1: Cases and controversies shall be heard and determined by a panel of three Justices.*

At the most extreme end of the spectrum, the Court could hear *all* of its cases in panels. Under this approach, the Court would never sit en banc; instead, it would conduct all of its business in threes. The primary advantage of the panels-only approach is obvious: it would do more than either of the other approaches identified below to expand the Court’s capacity to address more cases.<sup>86</sup> The primary disadvantage is also obvious: if the Court lost the ability to act as a collective body, it might suffer a loss of institutional legitimacy in the eyes of the public.<sup>87</sup> Given the Court’s lack of enforcement power, its institutional legitimacy is important, at least in those cases involving deeply controversial issues. To give effect to rulings desegregating the public schools,<sup>88</sup> effectively deciding the winner of a presidential election,<sup>89</sup> or prohibiting capital punishment in the states,<sup>90</sup> the Court might need to stand together as a whole, even if the Justices are not fully in agreement with one another.

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86. Some might wonder whether if the Court acted only in panels, it would have difficulty furthering the justice system’s interest in finality. A litigant dissatisfied with the outcome on one panel might be inclined to relitigate her case, hoping that she would draw a different panel the second time around. Such opportunistic behavior was a concern on the circuits prior to the recognition of en banc rehearing. However, it seems less of a concern on the Supreme Court where the Justices may weed out such petitions in the certiorari process.

87. Other countries’ high courts act entirely through divisions or panels without an apparent loss in legitimacy. In the United Kingdom, for example, both the Privy Council and the House of Lords hear cases in panels, although panel size may grow in very important cases. *United Kingdom, in 4 LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 1697–1700* (Herbert Kritzer ed., 2002).

88. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954).

89. *Bush v. Gore*, 531 U.S. 98, 110–11 (2000).

90. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

B. The "Discretionary *En Banc*" Approach

*Approach #2: Cases and controversies shall be heard and determined by a panel of not more than three Justices, unless a majority of the Justices orders hearing or rehearing before the Court en banc.*

The Court could pursue a still ambitious, though less extreme, approach to panel decisionmaking by mimicking the approach used by the courts of appeals since 1941.<sup>91</sup> Under this approach, the Court would decide cases in panels but allow en banc review in those rare instances where a majority of Justices so orders in response to a party's suggestion or a Justice's recommendation. The Court, in short, could follow a rule similar to Rule 35(a) of the Federal Rules of Appellate Procedure, which governs the circuit courts' panel practice.<sup>92</sup>

Assessing the relative advantages and disadvantages of this approach requires us to speculate about the cases the Court would choose to hear or rehear en banc. As a threshold matter, it seems reasonable to speculate that the Court would choose to hear its most significant cases en banc. Determining what cases are most significant is a matter of some debate, of course, and the Justices would not have the benefit of the following day's *New York Times* to guide them. Nonetheless, two types of cases seem most likely to fall into this category. First, it seems reasonable to suggest that those cases in which the Court exercises judicial review and declares an act unconstitutional are among the most significant cases the Court decides.<sup>93</sup> Since 1953, the Court has declared a statute

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91. *Textile Mills Sec. Corp. v. Comm'r of Internal Revenue*, 314 U.S. 326, 333 (1941) (recognizing the power of circuits to sit en banc).

92. See FED. R. APP. P. 35(a):

A majority of the circuit judges who . . . are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.

93. Other countries' high courts have singled out such cases for special treatment. For example, Australia's court of last resort, which generally uses panels, usually sits en banc for cases involving the interpretation of the Constitution. High Court of Australia, *About the Court: Operation of the Court*, [http://www.hcourt.gov.au/about\\_03.html](http://www.hcourt.gov.au/about_03.html) (last visited Aug. 30, 2008):

Cases which involve interpretation of the Constitution, or where the Court may be invited to depart from one of its previous decisions, or where the Court considers the principle of law involved to be one of major public importance, are normally determined by a full bench comprising all seven Justices if they are available to sit.

unconstitutional 461 times, or in nearly 8% of all cases.<sup>94</sup> Second, it seems likely that the Court would take the position, which is universal in the circuits, that any case in which the Court would overturn precedent is also significant and therefore worthy of en banc consideration.<sup>95</sup> Since 1953, the Court has overturned precedent in only 134 cases or roughly 2% of the total number of cases. In light of prior decisions, then, we would expect the Supreme Court to sit en banc in approximately 10% of its cases.<sup>96</sup> We expect that two cases we mentioned at the beginning of our Essay—*Bush v. Gore* and *Roe v. Wade*—would have been heard en banc, in one instance because of the obvious political importance (*Bush v. Gore*), and in the other because the constitutionality of a state statute was at issue (*Roe v. Wade*). The Court should be able to keep an active panel docket while sitting en banc in that small number of cases.

This analysis brings into sharper relief the relative advantages and disadvantages of the discretionary en banc approach. Compared to the mandatory panels approach, the discretionary en banc approach limits the capacity gains associated with panels because the Court would hear or rehear about a tenth of its docket en banc. Still, the Court's caseload could easily double, capturing substantial quantity gains. Moreover, relative to the mandatory panels approach, this approach should reduce the number of panel rulings that are contrary to the Court majority's position. At least in those instances where the majority's position is relatively clear, we would expect a panel to rule consistently with the majority rather than risk being overturned by the en banc Court. If the panel nevertheless adopts a position contrary to the majority's, we would expect a majority of Justices to vote for en banc review.<sup>97</sup> In other words, this approach captures most of the

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94. Congress has ordered the courts of appeals to sit en banc when hearing challenges to the constitutionality of certain statutes. See, e.g., Federal Election Campaign Act, 2 U.S.C. § 437 (2000).

95. See Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 699 n.20 (1995) (explaining that all courts of appeals follow a rule that panel rulings bind later panels unless overruled by the en banc circuit or the Supreme Court although a few have an en banc bypass procedure).

96. This estimate is likely too high. If a panel system had been used in those earlier cases, the Justices on the panel might have been those who disagreed with the Court majority's decision to overturn precedent. Thus, the panel would not have favored overruling and would not have automatically triggered full Court review. That review would have to wait for a later day when a panel of Justices in favor of such a change controlled the decision.

97. This is certainly what has been found on the courts of appeals. See Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 267-68, 273 (1999) (observing that courts of appeals are more likely to grant en banc review when a panel reaches a decision contrary to the policy preferences of the circuit's majority and less likely to grant en banc review when the panel affirms a lower court's ruling and when the

efficiency gains of the mandatory panels approach; at the same time, it reduces the likelihood that panels will make decisions that fail to reflect the Court's overall view. And, it ensures that the Court chooses to act en banc in controversial or divisive cases.

### C. The "Discretionary Panels" Approach

*Approach #3. The Court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three Justices. Such panels shall sit at the times and places and hear the cases and controversies assigned as the Court directs.*

The least ambitious proposal would retain en banc hearings as the default practice but authorize the Court to assign cases of its choosing to panels. As with the discretionary en banc approach, assessing the relative advantages and disadvantages of the discretionary panels approach requires us to speculate about the cases the Court would assign to panels. With en banc hearings as the default, we would expect the Court to assign its least controversial and most mundane cases—including many circuit splits—to panels. These cases have long plagued the Court both because they distract the Court from addressing more significant cases and because the Justices so seldom disagree with one another regarding the outcomes.<sup>98</sup> Since 1953, the Supreme Court has explicitly stated in 964

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panel is unanimous); Micheal Giles, Thomas Walker & Christopher Zorn, *Setting a Judicial Agenda: The Decision to Grant En Banc Review on U.S. Courts of Appeals*, 68 J. POL. 852, 865 (2006) (finding that courts of appeals are less likely to grant en banc review when the state of the law is certain and consistent).

98. See, e.g., *United States v. Watts*, 519 U.S. 148, 170 (1997) (Kennedy, J., dissenting) (questioning the Ninth Circuit's failure to grant an en banc rehearing of the panel's "departure from the rule followed in all other circuits"); *United States v. Shabani*, 513 U.S. 10, 11–12 (1994) (unanimous) (explaining that the Supreme Court granted certiorari to resolve a conflict between the Ninth Circuit and the other eleven circuits and questioning why the Ninth Circuit did not, as a member of the panel majority had requested, reconsider circuit precedent en banc); *Groves v. Ring Screw Works*, 498 U.S. 168, 172 n.8 (1990) (unanimous) ("Given the panel's expressed doubt about the correctness of the Circuit precedent that it was following, together with the fact that there was a square conflict in the Circuits, it might have been appropriate for the panel to request a rehearing en banc."). Justice Sandra Day O'Connor expressed the view, in remarks to the Ninth Circuit Judicial Conference in 1996, that the circuit should increase the number of en banc rehearings in order to review decisions in conflict with other circuits because the Court could not resolve all such splits. *Ninth Circuit Court of Appeals Reorganization Act of 2001: Hearing on H.R. 1203 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 63 (2002) (statement of Sidney R. Thomas, Judge, U.S. Court of Appeals for the Ninth Circuit), available at [commdocs.house.gov/committees/judiciary/hju80880.000/hju80880\\_0.HTM](http://commdocs.house.gov/committees/judiciary/hju80880.000/hju80880_0.HTM).

cases that it granted certiorari in order to resolve a disagreement among courts of appeals. As depicted in Table 3, the Court decided more than half of those cases unanimously or with a lone dissent; fewer than 16% of the circuit split cases were decided by a one-vote margin.<sup>99</sup>

**Table 3. Effect of Using Panels to Resolve Circuit Splits Only: 1953-2006 Terms**

	All circuit-split cases	Number decided differently under panels	Number decided differently as percentage of all cases
Unanimous	423 (43.9%)	0 (0.0%)	0.0%
One dissent	112 (11.6%)	0 (0.0%)	0.0%
Two dissents	124 (12.9%)	11 (10.1%)	1.2%
Three dissents	154 (16.0%)	37 (33.9%)	3.2%
Four dissents	151 (15.7%)	61 (56.0%)	6.2%
<i>Total</i>	<i>964</i> <i>(100%)</i>	<i>109</i> <i>(100%)</i>	<i>1.8%</i>

This approach would not be nearly as sweeping as the other two approaches described above. As a result, the Court would not enjoy the same capacity gains as it would under either of the other two approaches. Precisely because it is less sweeping, however, it would likely engender less controversy. Moreover, it would enable the Court to resolve circuit splits more efficiently and thereby allow it greater time and attention for more significant matters.

### CONCLUSION

When you think of the Supreme Court, what images come to mind? Most of us see a vivid picture of nine distinguished jurists, sitting side-by-side, peering out knowingly at those assembled in their courtroom. In this Essay, we have asked you instead to imagine three

99. The Court decided 151 circuit-split cases 5-to-4 and two cases 4-to-3. These cases constitute 15.9% of all circuit-split cases and 2.5% of all cases.

Justices sitting in one courtroom, three Justices sitting in another courtroom, and yet another three Justices sitting in yet another courtroom. As unsettling as this may be, there is nothing sacrosanct about the high court sitting as a group of nine,<sup>100</sup> nor is there anything unprecedented about a high court sitting in smaller groups.

Over the years, the Supreme Court's membership has varied dramatically, and as a result, the number of Justices authorized to hear any given case has varied considerably, ranging from six total Justices in 1789 to ten in 1863. Moreover, for nearly four decades, the Court directed one lone Justice to decide all of the Court's cases during the summer, effectively authorizing what might be termed a one-Justice panel.<sup>101</sup>

Even in the modern era, the Court has decided a surprisingly high percentage of its cases with fewer than nine Justices on the bench due to vacancies, illnesses, and recusals.<sup>102</sup> Since 1954, the Court has decided nearly one quarter of its merits decisions (1,369 cases) without a full complement of Justices. During the entire 1969 term, for example, only eight Justices sat on the Court while awaiting a replacement for Justice Abe Fortas. And two years later, Justices Hugo Black and John Marshall Harlan unexpectedly left the Court in September due to illness, meaning either a six-member or seven-member Supreme Court decided nearly half of the cases during the 1971 term. If the number of available Justices drops below the six required for a quorum, Congress has authorized the Chief Justice, in certain suits, to delegate the Court's authority to a special panel of the three most senior judges on the circuit of origin.<sup>103</sup>

Congress actually considered the possibility of divisional sittings as early as 1869<sup>104</sup> and formally offered a bill in 1880.<sup>105</sup>

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100. For a different view, see William Brennan, *State Court Decisions and the Supreme Court*, 31 PA. BAR ASS'N Q. 393, 406 (1960) (taking the position that because the Constitution states that "the judicial power. . . shall be vested in one Supreme Court," the Constitution "does not permit Supreme Court action by committees, panels, or sections").

101. Ross E. Davies, *The Other Supreme Court*, 31 J. SUP. CT. HIST. 221, 221 (2006).

102. By statute, six Justices constitute a quorum. 28 U.S.C. § 1 (2000); see also SUP. CT. R. 4 (2) (providing that "[s]ix Members of the Court constitute a quorum").

103. See 15 U.S.C. § 29 (1946) (recodified at 28 U.S.C. § 2109 (2000)) (allowing the Chief Justice to grant the circuit court the power to act as a court of last resort in suits typically involving a district court case striking a law as unconstitutional).

104. See CONG. GLOBE, 41st Cong., 1st Sess. 208–13 (1869) (recording discussion of Sen. George Henry Williams's proposal that Congress increase the number of Justices to eighteen and then divide the Court into two nine-Justice divisions). While other senators expressed support for the idea, at least one supporter doubted that it would be constitutional. *Id.* at 210 (reflecting Sen. Alan Thurman's statements that "a court divided into sections, if our Constitution permitted it, would be the very best system"). The next record of congressional consideration of panels appeared in 1876 when Sen. Knott suggested "divid[ing] the Supreme Court into divisions

Representative Van Manning introduced the bill as a possible solution to the caseload crisis in the Court. After no action was taken on the bill during the 46th Congress, Manning offered a new bill in 1881 that would have divided the Court into three-Justice divisions to handle most disputes but would have assigned all constitutional questions and those questions deemed of great importance to the full Court.<sup>106</sup> The Senate Judiciary Committee considered Manning's idea when it sought to restructure the federal judiciary to decrease delay and relieve the overburdened Court. The committee majority ultimately recommended creating intermediate appellate courts, but the minority, including the committee chair, supported the establishment of panels on the Supreme Court for all but the most important cases.<sup>107</sup>

Although Congress ultimately rejected the panel idea, other countries did not. Britain, for example, first adopted the panel practice for its high court in the Judicature Act of 1875, and the House of Lords and Privy Council continue to sit in divisions.<sup>108</sup> Other common law countries, including Australia, Canada, India, Ireland, and New Zealand, also allow their courts of last resort to decide cases in panels. And in the United States, nine state high courts use panels to decide

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of three and giv[ing] each division exclusive jurisdiction over a particular class of cases." 4 CONG. REC. 1126 (1876).

105. See 10 CONG. REC. 528 (1880) (reflecting Rep. Manning's introduction of H.R. 3843, 46th Cong. (2nd Sess. 1880)); see also Felix Frankfurter, *The Business of the Supreme Court of the United States - A Study in the Federal Judicial System*, 39 HARV. L. REV. 35, 60 n.113, 61 n.124 (1925).

106. See 13 CONG. REC. 157 (1881) (reflecting Rep. Manning's introduction of H.R. 865, 47th Cong. (1st Sess. 1881)); see also *Remedy for the Delays Incident to the Determination of Suits in the Highest Courts of the United States*, 5 A.B.A. REP. 363, 373 (1882) (explaining the facets of Manning's Bill) [hereinafter *Remedy for the Delays*], reprinted in MAKING OF MODERN LAW, MAJORITY AND MINORITY REPORTS OF A SPECIAL COMMITTEE OF NINE ON THE REMEDY FOR THE DELAYS INCIDENT TO THE DETERMINATION OF SUITS IN THE HIGHEST COURTS OF THE UNITED STATES 11 (Thomson Gale 2004) (1882).

107. See 21 CONG. REC. 10,219-32 (1890). A leading proponent of Manning's Bill was William M. Evarts, the Chairman of the Judiciary Committee, who fought for the division of the Supreme Court in front of an American Bar Association committee formed specifically to consider the restructuring proposals then under consideration by Congress. See Frankfurter, *supra* note 105, at 77. The ABA committee split along the same lines as the Senate Judiciary Committee. See *Remedy for the Delays*, *supra* note 106, at 23, 45. *The American Law Review*, a prominent legal quarterly of the time, came out in support of the panel proposal. *The Supreme Court*, 9 AM. L. REV. 668, 675 (1874-1875). In 1921, when Congress again was considering ways to alleviate the Court's workload, the ABA Committee on Jurisprudence and Law Reform recommended increasing the Court's size to twelve Justices and allowing it to act with as few as six Justices. Everett P. Wheeler, *Report of the Committee on Jurisprudence and Law Reform*, 46 A.B.A. REP. 384, 391 (1921), quoted in Hartnett, *supra* note 9, at 1668.

108. ROSCOE POUND, ORGANIZATION OF COURTS 165 (1940); *United Kingdom*, *supra* note 87.

at least some of their cases.<sup>109</sup> In Delaware<sup>110</sup> and Mississippi,<sup>111</sup> for example, three-judge panels act for the full court if the panel is unanimous about the outcome. If a panelist dissents or the panel proposes to overrule precedent, the high courts in both states rehear the matter en banc.

We do not offer this evidence to justify our argument that the Supreme Court should sit in panels but rather to counteract the status quo bias that might otherwise make our panel proposal unthinkable. Panels, even Supreme Court panels, are not unthinkable, and en banc decisionmaking, even Supreme Court en banc decisionmaking, is not inevitable. In 1940, Roscoe Pound claimed that panel decisionmaking had done "more than any other innovation to enhance the administration of justice in the courts."<sup>112</sup> That innovation, implemented long ago in the courts of appeal, should now find a home at the Supreme Court.

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109. The states are Alabama, Connecticut, Delaware, Massachusetts, Mississippi, Montana, Nebraska, Nevada, and Virginia.

110. DEL. SUP. CT. R. 1(e), available at <http://courts.delaware.gov/rules/?supremerules.pdf>.

111. MISS. R. APP. P. 24, available at [http://www.mssc.state.ms.us/rules/msrulesofcourt/rules\\_of\\_appellate\\_procedure.pdf](http://www.mssc.state.ms.us/rules/msrulesofcourt/rules_of_appellate_procedure.pdf).

112. See POUND, *supra* note 108, at 108.



## APPENDIX

In this Appendix, we offer a detailed explanation of the computations that are the basis of the empirical results presented in the text. We also consider the implications of other possible panel sizes. In the text, we focus on a three-judge panel system because it is already in place in the federal courts and it offers the greatest increase in capacity while retaining collective decisionmaking. But, other panel sizes—including a single judge—are possible. We assume that only odd-numbered panels would be considered. We begin by computing probabilities for a nine-Justice court. We then look at the consequences of a smaller number of Justices available to sit on panels.

In order to evaluate the effects of panel size on outcome, we have to begin by determining how many different panels (or combinations) may be formed for each panel size.<sup>113</sup> The mathematical representation is:  $C_{n,k} = n!/k!(n-k)!$ <sup>114</sup> where  $n$  = the total number of Justices on the Court and  $k$  = the number of Justices on the panel. The order of the Justices within the panel is unimportant—only the composition matters.

### Nine-Justice Court

The possible number of  $k$ -number panels from nine Justices is:

- Number of seven-Justice panels =  $C_{9,7} = 9!/7!(9-7)! = 36$
- Number of five-Justice panels =  $C_{9,5} = 9!/5!(9-5)! = 126$
- Number of three-Justice panels =  $C_{9,3} = 9!/3!(9-3)! = 84$
- Number of one-Justice panels =  $C_{9,1} = 9!/1!(9-1)! = 9$

Armed with the number of possible combinations, the next step is to calculate the number of those panels that would disagree with the original outcome. The probability of a different outcome ["Pr(d)"] may be examined by focusing on the *size* of the winning coalition. The probability of a different outcome is the number of panels that would have dissenting Justices as a panel majority divided by the number of  $k$ -Justice panels that can be formed. We assume that Justices will be

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113. See generally MORRIS H. DEGROOT & MARK J. SCHERVISH, *PROBABILITY AND STATISTICS* ch. 1 (3d ed. 2002); MARSHALL HALL, JR., *COMBINATORIAL THEORY* 1–6 (2d ed. 1983) (explaining the mathematics behind determining the probability of outcomes based on different combinations of events).

114. The factorial of a number ( $n!$ ) is equal to the product of all positive, non-zero integers less than or equal to the number. Thus,  $n! = n * n-1 * n-2 * \dots * n-(n-1)$ . The factorial of 0 is 1. For discussion, see KENNETH P. BOGART, *INTRODUCTORY COMBINATORICS* 3–6 (3d ed. 2000).

assigned at random to panels. (That is, there is an equal probability that any specific Justice would be assigned to a panel.) Thus,

$$\Pr(d) = \sum_{i=1}^{k-k/2} (C_{\# \text{ of dissenters, } l}) * (C_{\# \text{ in majority, } k-l}) / C_{n,k}$$

where  $l$  is a positive integer that takes all values between  $k/2$  and  $k$ , including  $k$ .

**Unanimous decisions.** If all Justices agree, then the probability that a panel of any size will produce a different outcome is zero. There are no panels that would reach a different outcome.

**8-1 decisions.** If only one Justice dissents, then the probability that a panel of three or more Justices will produce a different outcome is zero. The probability that one-Justice panels will change the outcome is  $\Pr(d) = 1/9 = 11.11\%$  (i.e., there is a single one-Justice panel—the dissenter—that would reach a different outcome out of the nine one-Justice panels that are possible).

**7-2 decisions.** If two Justices dissent, then the probability that five or seven-Justice panels will produce a different outcome is zero.

The probability that three-Justice panels will change the outcome is:

$$\Pr(d) = C_{7,1} / 84 = 7/84 \text{ or } 8.33\%$$

The formula reflects that both dissenting Justices would have to be on a three-Justice panel for it to reach a different outcome than the one chosen by the en banc Court. Those two Justices could serve on a three-Justice panel with any one of the seven Justices in the majority. Hence, there are 7 panels, out of the 84 possible panels, that would produce a different outcome.

The probability that one-Justice panels will change the outcome is:

$$\Pr(d) = 2/9 = 22.22\%$$

**6-3 decisions.** If three Justices dissent, then a seven-Justice panel will not change the outcome.

The probability that a five-Justice panel will change the outcome is:

$$\Pr(d) = C_{6,2} / 126 = 15/126 \text{ or } 11.9\%$$

The probability that a three-Justice panel will change the outcome is:

$$\Pr(d) = ((C_{3,2}) * (C_{6,1})) + (C_{3,3}) / 84 = 19/84 = 22.62\%$$

The formula reflects that a three-Justice panel will support a different outcome if it has two dissenting Justices and one majority Justice or all three dissenting Justices. The possible combinations of two dissent and one majority is the number of combinations of two dissenters out of a pool of three  $\{(C_{3,2}) = 3\}$  times the number of majority Justices  $\{(C_{6,1}) = 6\}$ , or 18 possible panels with two dissenters and one majority Justice. In addition, a panel would change the outcome if all three dissenters were on the panel. Thus, there are 19 panels that would reach a different outcome while 65 would reach the same outcome.

The probability that one-Justice panels will change the outcome is:

$$\Pr_d = 3/9 = 33.33\%$$

#### 5-4 decisions.

The probability that a seven-Justice panel ( $k = 7$ ) would produce a different outcome is:

$$\Pr(d) = ((C_{4,4}) * (C_{5,3})) / C_{9,7} = (1 * 10) / 36 = 5/18 = 27.78\%$$

The calculation reflects that all four dissenters would have to be on a seven-Justice panel in order for it to reach a different outcome than the en banc court.

The probability that a five-Justice panel ( $k = 5$ ) would produce a different outcome is:

$$\begin{aligned} \Pr(d) &= ((C_{4,4}) * (C_{5,1}) + (C_{4,3}) * (C_{5,2})) / C_{9,5} \\ &= ((1 * 5) + (4 * 10)) / 126 = 45/126 = 5/14 = 35.71\% \end{aligned}$$

The probability that a three-Justice panel ( $k = 3$ ) would produce a different outcome is:

$$\begin{aligned} \Pr(d) &= ((C_{4,3}) * (C_{5,0}) + (C_{4,2}) * (C_{5,1})) / C_{9,3} \\ &= ((4 * 1) + (6 * 5)) / 84 = 34/84 = 17/42 = 40.48\% \end{aligned}$$

The probability that a one-Justice panel ( $k=1$ ) would produce a different outcome is  $4/9$  or 44.44%.

All of the computations above assume a pool of nine Justices. But, due to recusals, vacancies, or other absences, the Supreme Court

frequently acts with fewer than nine Justices available to participate in a case.

### **Eight-Justice Court**

Only eight Justices sat in 17.8% of the cases decided since 1953, as compared to 77.6% of cases that were decided by nine Justices. The effect of a panel system would be different in those cases.

For one-Justice panels ( $k=1$ ), the probability of a different outcome would be:

$$7-1 \text{ decision: } \Pr(d) = 1/8$$

$$6-2 \text{ decision: } \Pr(d) = 1/4$$

$$5-3 \text{ decision: } \Pr(d) = 3/8$$

For three-Justice panels ( $k=3$ ), the probability of a different outcome would be:

$$7-1 \text{ decision: } \Pr(d) = 0$$

$$6-2 \text{ decision: } \Pr(d) = ((C_{2,2}) * (C_{6,1})) / C_{8,3} = (1*6)/((8!/3!5!)) = 6/56 = 10.71\%$$

$$5-3 \text{ decision: } \Pr(d) = ((C_{3,3}) * (C_{5,0}) + (C_{3,2}) * (C_{5,1})) / C_{8,3} \\ = ((1*1) + (3*5))/((8!/3!5!)) = 16/56 = 2/7 = 28.57\%$$

For five-Justice panels ( $k=5$ ), the probability of a different outcome would be:

$$7-1 \text{ decision: } \Pr(d) = 0$$

$$6-2 \text{ decision: } \Pr(d) = 0$$

$$5-3 \text{ decision: } \Pr(d) = ((C_{3,3}) * (C_{5,2})) / C_{8,5} \\ = (1*10)/((8!/3!5!)) = 10/56 = 5/28 = 17.86\%$$

### **Seven-Justice Court**

Only seven Justices participated in 4% of the cases decided since 1953. Combined with the cases involving eight or nine Justices, this produces a total of 99.4% of cases decided by at least seven Justices.

For one-Justice panels ( $k=1$ ), the probability of a different outcome would be:

$$6-1 \text{ decision: } \Pr(d) = 1/7 = 14.29\%$$

$$5-2 \text{ decision: } \Pr(d) = 2/7 = 28.57\%$$

$$4-3 \text{ decision: } \Pr(d) = 3/7 = 42.86\%$$

For three-Justice panels ( $k=3$ ), the probability of a different outcome would be:

6-1 decision:  $\Pr(d) = 0$

5-2 decision:  $\Pr(d) = ((C_{2,2}) * (C_{5,1})) / C_{7,3} = (1*5)/((7!/3!4!))$   
 $= 5/35 = 1/7 = 14.29\%$

4-3 decision:  $\Pr(d) = ((C_{3,3}) * (C_{4,0}) + (C_{3,2}) * (C_{4,1})) / C_{7,3}$   
 $= ((1*1) + (3*4))/((7!/3!4!)) = 13/35 = 37.14\%$

For five-Justice panels ( $k=5$ ), the probability of a different outcome would be 0.