

1-2021

## Rethinking Swing Voters

Jonathan S. Gould

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Jonathan S. Gould, Rethinking Swing Voters, 74 *Vanderbilt Law Review* 85 (2021)  
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol74/iss1/2>

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# Rethinking Swing Voters

*Jonathan S. Gould\**

*In recent decades, swing voters in courts and legislatures have made many of the United States' most important decisions of law and policy. It would be easy to conclude from the recent history of the Supreme Court and Congress that democracy or majority rule inevitably entails placing many of a society's most important decisions in the hands of swing voters. Far from being inevitable, however, swing voters result from a highly contingent set of circumstances, both ideological and institutional.*

*This Article probes these contingencies, describing and evaluating swing voters and the power they hold. It first explains the conditions under which swing voters will exist and wield power, including an account of why swing voters hold greater power than other pivotal voters. Understanding swing voters requires understanding institutional design and internal procedures: some arrangements increase swing voter prevalence and power, while others have the opposite effect. The ways in which rules construct swing voters give institutional designers and reformers ample tools at their disposal to increase or decrease the prevalence of swing voters and the extent of their power. But nearly any judgment about swing voters and the power they exercise necessarily rests on thorny empirical and normative issues—including the relative importance of moderation and stability in different institutions, the performance of swing voters as compared to other voters, and how swing voter power interacts with principles of majority rule. Swing voters are therefore best understood not as ends unto themselves, but as windows into broader issues in democratic theory and institutional design.*

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\* Assistant Professor of Law, Berkeley Law School. © 2021 Jonathan S. Gould. Thanks to Eric Beerbohm, Erwin Chemerinsky, Gregory Elinson, Lee Epstein, Daniel Farber, Rebecca Goldstein, Bert Huang, Tonja Jacobi, Gabriel Karger, Niko Kolodny, Christopher Kutz, Priyanka Menon, Eric Nelson, David Pozen, Kenneth Shepsle, Richard Tuck, and workshop participants at Berkeley Law School and in the Harvard University Department of Government for helpful comments and suggestions. Thanks also to Kevin Bocek, Derek Ha, Oliver Rosenbloom, Oscar Sarabia Roman, and Daniel Twomey for excellent research and editorial assistance.

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## INTRODUCTION

In recent decades, swing voters in courts and legislatures have made many of the United States' most important decisions of law and policy. On the Supreme Court, Justice Anthony Kennedy spent over a decade as the decisive voter in nearly every major constitutional case, occupying a role previously held by Justice Sandra Day O'Connor.<sup>1</sup> In Congress, swing legislators have determined everything from the fate of the Affordable Care Act to the outcomes of major confirmation battles.<sup>2</sup> The Supreme Court and Congress differ in many obvious ways, but in each institution swing voters have played decisive roles at high-stakes moments.

It would be easy to conclude from this recent history that democracy or majority rule inevitably entails placing many of a society's most important decisions in the hands of a swing voter—defined as a decisionmaking body's pivotal voter who possesses distinctive power by dint of the ideological distance between them and their colleagues.<sup>3</sup> Swing voters have existed and exercised enormous power in the late twentieth and early twenty-first century Supreme Court and Senate, as well as in some subnational U.S. institutions. Far from being inevitable, however, swing voters result from a highly contingent set of circumstances—both ideological and institutional.

Swing voters only exist if the views or preferences of a decisionmaking body's members are distributed in a highly specific way. The body must be closely divided: there is no swing voter if a vote is unanimous or if margins are wide. Nor is there a swing voter if too many votes are up for grabs, such that there are many different plausible winning coalitions. The existence of a swing voter depends on the ideological distribution of a body's voters.

But swing voters are contingent in a deeper way as well. Swing voters are constructed by the institutional rules that organize and govern courts, legislatures, and other decisionmaking bodies.<sup>4</sup> Some rules increase swing voter prevalence and power, while others have the opposite effect. On a court, swing voter power will vary based on how the court sets its agenda, how opinions are assigned, and which opinions are treated as controlling. Similarly, swing voter power in a legislature depends on the extent to which rules empower party leaders to discipline their caucuses and allow for amendments, logrolls, or

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1. See *infra* Sections II.B.1, II.C.1.

2. See *infra* Sections II.B.2, II.C.2.

3. For a formalization and elaboration of this definition, see *infra* Part I.

4. See *infra* Part III.

earmarks. Reckoning with swing voter power requires grappling with the rules that govern the institutions where swing voters exist.

Swing voters matter because they hold two sorts of power: power over outcomes and power over agendas.<sup>5</sup> With respect to outcomes, the fact that a swing voter's support is necessary for a majority to exist allows the swing voter to dictate the content of legislation or judicial doctrine, within certain bounds.<sup>6</sup> The agenda-setting power is more subtle. When the presence of a swing voter is recognized, other actors orient their actions around that swing voter's preferences. In courts, strategic litigants may only bring cases that can garner a swing voter's support, and briefs may propose legal theories designed to appeal to a swing voter. In legislatures, party leaders and interest groups focus their energies on winning over swing legislators. In these respects, a swing voter becomes the sun around which others begin to orbit.<sup>7</sup>

The combination of swing voters' contingency and their power opens the door to questions about their appropriate role in governmental institutions.<sup>8</sup> Nearly any judgment about swing voters and the power they exercise necessarily rests on controversial premises about how institutions of government should perform. But there are plausible arguments both in favor of and against swing voters. On one account, swing voters are an important source of moderation in a polarized age. Swing voters also hold the promise of stability, preventing law or policy from oscillating dramatically between left and right poles. Yet there are also reasons to be concerned about swing voter power. In courts, swing voters can lead to doctrine that is idiosyncratic or not grounded in a consistent interpretive theory. In legislatures, swing voters can undermine party government or put parochial concerns ahead of the broader public interest.

Regardless of one's view about swing voters, a close look at the determinants of swing voter power can inform institutional design. For those who seek to prop up swing voters, institutional changes can do just that. Those taking the opposite view can likewise look to institutional design to make it less likely that swing voters emerge and to limit their power when they do exist. Swing voters are a function of design choices—not an inevitable feature of multimember bodies.<sup>9</sup>

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5. Cf. Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 948 (1962) ("Of course power is exercised when A participates in the making of decisions that affect B. But power is also exercised when A . . . limit[s] the scope of the political process to public consideration of only those issues which are comparatively innocuous to A.").

6. See *infra* Section II.B.

7. See *infra* Section II.C.

8. See *infra* Part IV.

9. See *infra* Part III.

Swing states in the Electoral College provide an instructive analogy. Nobody would allege that the Electoral College is an inescapable requirement of democracy. To the contrary, all recognize that the Electoral College is a creature of law and, by extension, swing states are as well. The Electoral College advantages swing states by shaping candidates' campaign strategies,<sup>10</sup> federal spending,<sup>11</sup> and executive branch policymaking in areas ranging from trade to environmental regulation.<sup>12</sup> The Electoral College's obvious contingency invites both criticisms and defenses of the institution.

Swing voters in multimember decisionmaking bodies are just as much creations of law as are swing states in the Electoral College. The difference is that the rules constituting the courts and legislatures where swing voters hold power are often taken for granted, assumed to be unchangeable, or seen as merely technocratic in character. Seeing how institutional design impacts the prevalence and power of swing voters invites us to consider whether and how things might be different.

Now might seem an odd time for a study of swing voter power. Swing voters are most associated with the Supreme Court, at least in the popular imagination. After decades in which swing voters charted the Court's path, there now exists a solid conservative majority that is not dependent on a swing voter.<sup>13</sup> Part of this Article's goal is to show that swing voters are never natural or preordained features of any institution, including the Supreme Court. As easy as it would be to have been fooled by the decades in which Justices O'Connor and Kennedy set the direction of legal doctrine, swing voters need not exist. If the Court indeed lacks a swing voter in the near future, as seems likely, this

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10. See, e.g., David Strömberg, *How the Electoral College Influences Campaigns and Policy: The Probability of Being Florida*, 98 AM. ECON. REV. 769 (2008) (finding that Electoral College swing states command a disproportionate share of candidate visits and campaign spending).

11. See, e.g., DOUGLAS L. KRINER & ANDREW REEVES, *THE PARTICULARISTIC PRESIDENT: EXECUTIVE BRANCH POLITICS AND POLITICAL INEQUALITY* 136–38 (2015) (finding that swing states receive billions of dollars of additional federal grant spending relative to other states and that federal grant funding to counties in swing states doubles during election years).

12. See, e.g., Xiangjun Ma & John McLaren, *A Swing-State Theorem, With Evidence* 49 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24425, 2018), <https://nber.org/papers/w24425> [<https://perma.cc/WF4H-33UJ>] (finding, in a study of trade policy, that the executive branch weighs the welfare of nonswing state residents at only seventy-seven percent of that of swing state residents); Susan Page, *Bush Policies Follow Politics of States Needed in 2004*, USA TODAY, <http://usatoday30.usatoday.com/news/politics/2002/06-17-bushstates.htm> (last updated June 16, 2002, 11:11 PM ET) [<https://perma.cc/E7H5-QTRP>] (highlighting President George W. Bush's policy decisions addressing swing state priorities in the run-up to the 2004 election).

13. See, e.g., *How Amy Coney Barrett Could Shape the Supreme Court for Decades*, NPR (Oct. 26, 2020, 5:01 AM ET), <https://npr.org/2020/10/26/927743311/how-amy-coney-barrett-could-shape-the-supreme-court-for-decades> [<https://perma.cc/7XLU-YZB8>] (“[W]e’ve never really had a court like this in my adult lifetime. We have always had a swing vote. We had Justice Powell, followed by Justice O’Connor, followed by Justice Kennedy. . . . With six—potentially six people in the [conservative] coalition, we could expect a lot less swing.” (quoting Randy Barnett)).

Article's analysis can help us think through the implications of a Court without a swing voter.

Moreover, extending analysis of swing voters beyond the Supreme Court can shed light on other institutions. In a divided nation, the conditions are ripe for swing voters in legislative bodies. Swing voters have recently existed and exercised power both in the Senate and in some state legislative chambers.<sup>14</sup> In particular, in the past quarter-century, the majority party in the Senate has held control by a one- or two-vote majority roughly half of the time,<sup>15</sup> and these close divides have allowed swing voters to emerge. The prevalence of swing voters in legislatures calls for a better understanding of their power.

A brief disclaimer before proceeding: this Article examines swing voters in decisionmaking bodies with two blocs or two parties, but it does not address multibloc or multiparty systems. This focus is appropriate for the contemporary U.S. context, given the polarization between left and right (typically, Democrats and Republicans) in many multimember decisionmaking bodies. It does not, however, speak to the many democracies that feature three or more parties.<sup>16</sup> In these systems, a small party can sometimes be decisive as to whether a policy is enacted or whether a governing coalition can be formed.<sup>17</sup> These dynamics implicate a different set of descriptive and normative considerations than do individual swing voters in U.S. institutions, and are thus beyond this Article's scope.

The remainder of this Article proceeds in five parts. Part I defines swing voters. Part II explores the character of swing voter power. It shows how swing voters hold more power than other pivotal voters, how swing voter power includes power over both outcomes and agendas, and how swing voter power operates in both unidimensional and multidimensional space. Part III shows how institutional design choices construct swing voters. It focuses on particular rules that shape the likelihood that swing voters exist and the extent of swing voter power in both courts and legislatures. The ways in which rules construct swing voters give institutional designers and reformers tools to increase or decrease the prevalence of swing voters and the extent of their power. Part IV discusses the normative stakes of swing voter power, including its relationship to the values of moderation, stability, and majority rule. Part V considers the relationship between swing

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14. See *infra* Sections II.B.2, II.C.2 (providing examples).

15. See *Party Division*, U.S. SENATE, <https://senate.gov/history/partydiv.htm> (last visited Dec. 13, 2020) [<https://perma.cc/X6J7-ESNU>].

16. See generally ALAN WARE, *POLITICAL PARTIES AND PARTY SYSTEMS* (1996) (discussing various party systems).

17. See, e.g., JENNIFER CYR, *THE FATES OF POLITICAL PARTIES* 54 (2017) (providing examples).

voters and polarization, highlighting in particular the ways in which the contemporary Supreme Court is an outlier relative to other institutions.

## I. SWING VOTER BASICS

What are swing voters? The term is often used more as a colloquialism than as a term of art. This Article defines a swing voter as a voter who is pivotal to outcomes in a multimember body and who exercises power by virtue of the ideological distance between them and their colleagues.<sup>18</sup>

### A. Plotting Voter Preferences

This definition of a swing voter depends on the premise that voters' views can be plotted in what political scientists call one-dimensional issue space. Legislators' positions can be plotted from least to most sympathetic on issues such as social welfare spending, environmental regulation, and military intervention. Judges' views can be plotted similarly: they may favor more or less federal power, a broader or narrower reading of the Equal Protection Clause, or greater or lesser procedural rights for criminal defendants. These spectrums will often range from the most liberal to most conservative outcomes,<sup>19</sup> but in principle they could cover any unidimensional range.

On this approach, each voter's most preferred outcome can be plotted as a single point in unidimensional space, often called an ideal point. Preferences are typically taken to be single-peaked, with voters preferring outcomes closer to their ideal point over those further away.<sup>20</sup> Figure 1 illustrates this type of preference. Its left panel pictures a hypothetical legislator's views about the minimum wage. Her ideal is a \$12/hour minimum wage. Note that because her utility function is symmetrical, she is indifferent as between an \$11/hour and a \$13/hour minimum wage. But she prefers either of those to minimum wages of either \$10/hour or \$14/hour, since \$10/hour and \$14/hour are further from her ideal point.

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18. This definition builds on two concepts in the scholarly literature: Keith Krehbiel's pivotal voters, *see infra* Section I.B.1, and Lee Epstein and Tonja Jacobi's super-median voters, *see infra* Section I.B.2.

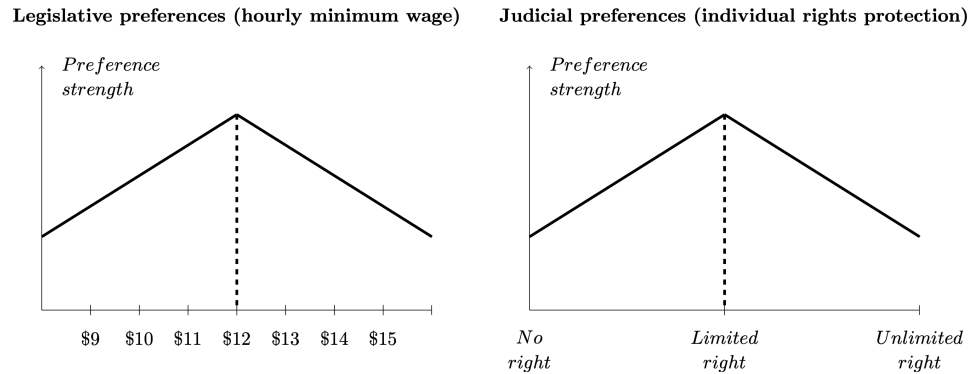
19. KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 21 (1998) ("It is convenient and intuitive to think of the policy space as a continuum on which liberal policies are located on the left, moderate policies are located in the center, and conservative policies are located on the right.")

20. *See, e.g., id.* at 22; Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 46 (2008).



The same exercise is possible even when preferences are not easily expressed in numerical terms. Figure 1's right panel pictures a hypothetical judge's views about an individual rights issue, such as whether the Second Amendment should protect an individual right to bear arms. The judge's ideal point might be a limited right: some constitutional protection for an individual right to bear arms, but allowing for some limits on that right (such as laws barring possession of guns by certain populations or in sensitive places such as schools).<sup>21</sup> On each side of that ideal point lie options that the judge prefers less, with no constitutional protection at the left pole and an absolute right that allows no regulation whatsoever at the right pole.

FIGURE 1: SINGLE-PEAKED PREFERENCES



For any given issue, all voters in a decisionmaking body can be plotted together on the same unidimensional left-right axis. This yields a median voter: a voter whose ideal point is at the median of the distribution of ideal points of all members of the body, such that equal numbers of members have ideal points to the median's left and to the median's right.<sup>22</sup> Plotting all legislators' positions on the minimum wage or all judges' positions on gun rights would yield a median voter on each of those issues. Other issues would have median voters of their own. Scholars often seek to identify a median voter across all issues by plotting many issues together on a single, unidimensional left-right axis.<sup>23</sup> Others push back on attempts to plot all or many issues in this

21. *Cf. infra* notes 58–59 and accompanying text (discussing *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

22. In a body with an odd number of members, one member is the median; in a body with an even number of members, the median will lie between two members.

23. On Congress, see, for example, NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 22 (2006) (“One

way as an oversimplification of attitudes that in fact vary across issues.<sup>24</sup> This Article’s analysis does not rest on the idea of consistent ideological alignment across issues. A voter can be the median voter on some issues even if they are not the median voter on all issues. With this background in mind, we turn to a definition of swing voters.

### B. Defining Swing Voters

#### 1. Pivotality

The first feature of swing voters is that they are pivotal, which is to say that they are determinative as to an ultimate outcome on a given issue.<sup>25</sup> The identity of the pivotal voter depends on the institutional rules under which a given body operates. When an institution operates by majority rule, such as when the Supreme Court decides a merits case or when the House of Representatives considers a bill on the floor, the median voter is also the pivotal voter.

An institution’s rules and organization can complicate the search for the pivotal voter. Congress, for example, has many median voters. There are median voters on the House and Senate floor, in each committee, and in each party caucus. Depending on the circumstances,

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way of directly measuring the predictive power of the liberal-conservative dimension is to compute the percentage of votes on which a legislator actually votes for the roll call alternative that is closest to her on the dimension. This ‘classification’ success exceeds 84 percent across all congresses since 1789.”); Keith T. Poole & Howard Rosenthal, *The Unidimensional Congress, 1919–84*, at 1 (Glob. Sustainable Inv. All., Working Paper No. 44-84-85, 1985), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3375689](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3375689) [<https://perma.cc/7YS9-XH87>] (“A simple unidimensional spatial model provides a highly accurate description of roll call voting in the United States Congress. Moreover, the dimension exhibits remarkable temporal stability.”). On the Supreme Court, see, for example, Epstein & Jacobi, *supra* note 20, at 45 n.33 (“Nearly all systematic quantitative work . . . suggests that the issue space is single-dimensional—that is, despite their individual differences, in the aggregate, Supreme Court cases can be arrayed meaningfully on a single left-right dimension.”) (citing Bernard Grofman & Timothy J. Brazill, *Identifying the Median Justice on the Supreme Court Through Multidimensional Scaling: Analysis of “Natural Courts” 1953–1991*, 112 PUB. CHOICE 55, 58 (2002)); Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 145 (2002) (“[W]e restrict our attention to the unidimensional case. This is an assumption made in nearly all statistical analyses of Supreme Court behavior.”).

24. In the context of the Supreme Court, see, for example, Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671 (2016) (demonstrating that judicial preferences can be plotted on a legalism-pragmatism dimension that does not track traditional left-right ideological divisions), and Benjamin E. Lauderdale & Tom S. Clark, *The Supreme Court’s Many Median Justices*, 106 AM. POL. SCI. REV. 847, 863–64 (2012) (showing that because “judicial preferences are simultaneously systematic and predictable but also variable across substantive areas of the law,” those preferences “cannot be succinctly represented as simple left-right ideology”).

25. See generally KREHBIEL, *supra* note 19, at 20–48 (developing a theory of lawmaking based on pivotal voters).

a different median voter could be pivotal in determining a bill's content and whether it ultimately becomes law. The extent to which any given voter matters to a legislative outcome depends not only on the distribution of preferences within and between the chambers, but also on the rules governing the lawmaking process.

A pivotal voter will sometimes not be a median voter at all. When a body uses a decisionmaking procedure other than simple majority rule, the pivotal voter will be the voter necessary to achieve whatever the relevant vote threshold is. Senate rules, for example, require a three-fifths majority to close debate on most legislation.<sup>26</sup> The result is that in the Senate, the sixtieth senator is often more important than the median senator in determining legislative outcomes.<sup>27</sup> A similar dynamic holds wherever else a supermajority rule is used. Supermajority rules govern the adoption of federal and state constitutional amendments,<sup>28</sup> taxing and spending policy in many states,<sup>29</sup> and select functions in some courts<sup>30</sup> and multimember agencies.<sup>31</sup> When supermajority rules exist, the pivotal voter will be not the median voter but rather the one necessary to meet the supermajority threshold.<sup>32</sup>

## 2. Ideological Distance

The second feature of swing voters is ideological distance from their colleagues. Not all pivotal voters are equally influential. A pivotal voter's power depends on the ideological distribution of voters as a

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26. STANDING RULES OF THE SENATE, Rule XXII(2), S. DOC. NO. 113-18, at 15–16 (2013), <https://rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf> [<https://perma.cc/PAN5-376Q>] [hereinafter SENATE RULES].

27. See KREHBIEL, *supra* note 19, at 23 (“[Some voters] may have unique pivotal status due to supermajoritarian procedures, even though these players possess no unique parliamentary rights.”).

28. See U.S. CONST. art. V; *Supermajority Vote Requirements*, NAT'L CONF. OF STATE LEGISLATURES, <https://ncsl.org/research/elections-and-campaigns/supermajority-vote-requirements.aspx> (last visited Oct. 1, 2020) [<https://perma.cc/MR3M-ELGR>].

29. Allison Hiltz & Luke Martel, *Supermajority Vote Requirements to Pass the Budget*, NAT'L CONF. OF STATE LEGISLATURES: LEGISBRIEF, Jan. 2015, <https://ncsl.org/research/fiscal-policy/supermajority-vote-requirements-to-pass-the-budget635566644.aspx> [<https://perma.cc/H3YG-6PUL>].

30. See, e.g., NEB. CONST. art. V, § 3 (requiring a supermajority of five out of seven members of the Nebraska supreme court to invalidate a state statute as unconstitutional).

31. See, e.g., 12 U.S.C. § 5513(c)(3)(A) (requiring a two-thirds vote of the Financial Stability Oversight Council to set aside a regulation promulgated by the Consumer Financial Protection Bureau).

32. Similarly, the median voter is not the pivotal voter under submajority rules, such as rules allowing one-fifth of legislators present in the House or Senate to force a roll call vote or rules allowing four Supreme Court Justices to grant certiorari on a case. Cf. Adrian Vermeule, *Submajority Rules: Forcing Accountability Upon Majorities*, 13 J. POL. PHIL. 74, 80–83 (2005).

whole. Lee Epstein and Tonja Jacobi have identified a subset of especially powerful pivotal voters: those voters who are most ideologically distant from their nearest neighbors, again based on ideal points plotted along a single unidimensional axis.<sup>33</sup>

The most straightforward element of ideological distance is the gap between the pivotal voter and their nearest neighbors.<sup>34</sup> When this gap is large, “fewer possibilities exist for the formation of a [winning] coalition without the” swing voter.<sup>35</sup> On the Supreme Court, this means that the pivotal voter is the only hope for either the four most liberal or four most conservative Justices to form a majority coalition. When the ideological distance between the pivotal voter and their neighbors is smaller, it is possible for winning coalitions to form that do not include the pivotal voter. (This assumes a degree of multidimensionality in the issues under consideration, a condition I revisit below.) On the Court, for example, perhaps the four most liberal Justices could create a coalition with the sixth most liberal Justice—bypassing the pivotal voter. This becomes more difficult as the distance between the pivotal voter and their nearest neighbors grows.

Also relevant is the degree to which the preference distributions of the pivotal voter and their nearest neighbors overlap.<sup>36</sup> The pivotal voter’s power is at its height when preferences slope so as to minimize overlap between their preferences and those of their nearest neighbors.<sup>37</sup> Ideological gaps and overlaps are analytically distinct concepts. But they are related in that a smaller gap makes overlap more likely, while a larger gap makes overlap less likely.

Figure 2 shows how these features play out in practice. Its two panels depict two different distributions of preferences in a hypothetical body with fifteen voters that operates based on majority rule. In the top panel, no swing voter exists because the preferences of the pivotal voter

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33. See Epstein & Jacobi, *supra* note 20, at 40–41. Epstein and Jacobi describe such voters as “super medians,” given their focus on the Supreme Court, but the logic of their account holds even if an institution’s rules result in someone other than the median voter being pivotal to outcomes.

34. See *id.* at 43 (describing “power on the Court” as “a function of the relative proximity between the swing Justice and those nearest to him”). An apparent complication in measuring distances between ideal points is that most issues do not have natural units of measurement. The apparent distance between legislators in the minimum wage example, for instance, would change if the minimum wage were measured in dollars per week rather than dollars per hour. But a linear transformation of this sort would not change the *relative* positioning of various voters. In the lower panel of Figure 2, for example, for the left bloc, the swing voter is twice as close to their ideal point as are voters in the right bloc, regardless of what units of measurement are used.

35. *Id.* at 76.

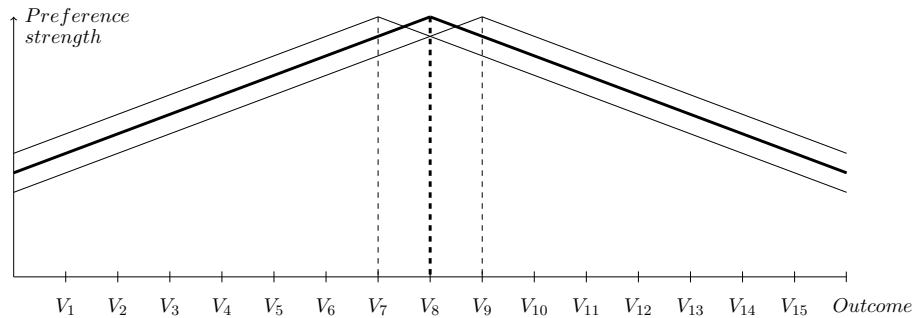
36. See *id.* at 73.

37. When this overlap is large, it becomes easier to introduce a second dimension that would allow for the creation of a winning coalition that does not include the median voter. See *infra* notes 40–42, 98–109 and accompanying text.

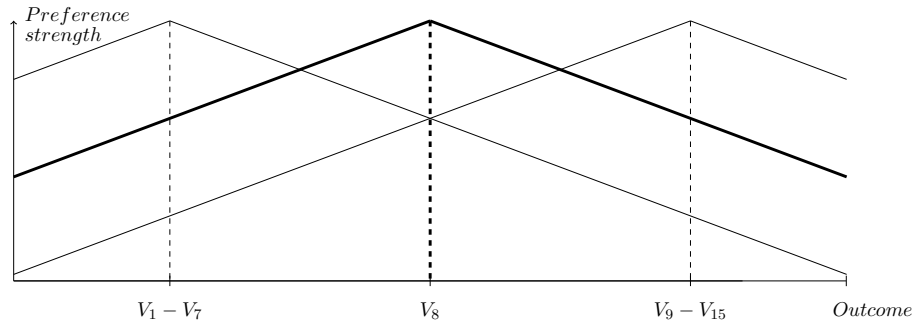
( $V_8$ , in bold) lie very close to and heavily overlap with those of their nearest neighbors to the left ( $V_7$ ) and to the right ( $V_9$ ). In the bottom panel, by contrast, the pivotal voter is also a swing voter. The reason is the wide ideological spread between the preferences of the pivotal voter ( $V_8$ , in bold) and those of their nearest neighbors (in left and right blocs).

FIGURE 2: MULTIMEMBER BODIES WITH AND WITHOUT A SWING VOTER

Distribution of preferences (no swing voter, median voter and nearest neighbors pictured)



Distribution of preferences (swing voter with left and right blocs)



A swing voter, in summary, has two qualities: pivotality and ideological distance from their nearest neighbors. An institution's pivotal voter might be its median voter, or it might instead be the pivotal voter on a relevant committee or one necessary to overcome a supermajority requirement.

This definition of swing voters differs in several ways from how the term has been used in some past work. First, swing voters can exist even without unified left and right blocs. Though Figure 2 provides an example of a swing voter sitting between two unified blocs, a swing voter can exist even if the voters to their left or their right are internally fragmented—what matters is the pivotal voter's distance from their

nearest neighbors.<sup>38</sup> Second, a swing voter need not swing equally between left and right. Even if a pivotal voter consistently sides with either the left or the right, they will still be a swing voter so long as they are the pivotal voter and there is sufficient ideological distance between them and their nearest neighbors. Third, to the extent that voter preferences differ across issues, a voter could be the swing voter on one issue or set of issues but not on others.<sup>39</sup>

This analysis is not only definitional. It also sets the stage for examining the nature of swing voter power. The features that set swing voters apart from other pivotal voters help explain the character of the power that swing voters hold. We now turn to that power.

## II. SWING VOTER POWER

Swing voters matter because of the power they exercise in multimember decisionmaking bodies. This Part explores the nature of swing voter power, first on a conceptual level and then with examples from courts and legislatures. Swing voters' power derives in part from their position relative to other voters on the ideological spectrum. Their power results in outcomes gravitating toward swing voter preferences, with swing voters dictating the content of judicial opinions and legislation. It also causes agendas to reflect swing voter preferences, as others—from judges and litigants to legislative leadership and interest groups—act in anticipation of how the swing voter will behave.

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38. Many accounts of swing voters—unlike the Epstein and Jacobi account on which I build—assume unified blocs on the left and right, with a swing voter who sometimes votes with one bloc and sometimes with the other. See, e.g., *Mr. Justice Reed—Swing Man or Not?*, 1 STAN. L. REV. 714, 717–18 (1949) (“Prerequisites to a concentration of power in a single [swing] Justice are the existence of two equal and counterbalancing blocs plus a middle Justice who is reasonably susceptible of being attracted to either bloc.”); Janet L. Blasecki, *Justice Lewis F. Powell: Swing Voter or Staunch Conservative?*, 52 J. POL. 530, 533 (1990) (describing “the bifurcation of the Court into two roughly equal ideological blocs as the prerequisite for the existence of a swing vote” and arguing that “[t]he [J]ustice holding the swing position may occupy either a center position between the two blocs or be so loosely affiliated with a bloc of four that he is susceptible to attraction to the opposite bloc in a significant number of cases”); Robert E. Riggs, *When Every Vote Counts: 5–4 Decisions in the United States Supreme Court, 1900–90*, 21 HOFSTRA L. REV. 667, 706 (1993) (“A swing voter on the Court is almost by definition identified with moderate voting, given the assumption that the swing voter tips the balance by voting sometimes with a liberal and sometimes with a conservative coalition.”); William B. Schultz & Philip K. Howard, *The Myth of Swing Voting: An Analysis of Voting Patterns on the Supreme Court*, 50 N.Y.U. L. REV. 798, 799 n.3 (1975) (“By ‘swing’ voting we mean that certain Justices do not systematically vote with either bloc of the Court, but rather align themselves with the ‘right’ bloc in some types of cases and with the ‘left’ bloc in other kinds of cases.”).

39. See sources cited *supra* note 24.

*A. Sources of Power*

The features that distinguish swing voters from other pivotal voters also help explain swing voter power. A significant ideological distance between a swing voter's preferences and those of their nearest neighbors typically makes the swing voter the *only* reasonable path to a winning coalition, which in turn gives the swing voter their power.

The two panels in Figure 2, above, illustrate the character of swing voter power. Imagine that a coalition of voters on the ideological left ( $V_1$  through  $V_7$ ) put forward a proposal to move policy leftward in unidimensional space. The coalition is one vote short of a majority. In both panels, the most likely prospect for securing a majority is by securing the vote of the pivotal voter ( $V_8$ ), since the pivotal voter's preferences are closer to those of the coalition ( $V_1$  through  $V_7$ ) than are the preferences of any other voters who are not members of the coalition ( $V_9$  through  $V_{15}$ ). The left coalition can seek to secure the support of the pivotal voter in either of two ways. First, the coalition can moderate its proposal, moving the proposal rightward toward the pivotal voter's ideal point, such that the pivotal voter prefers the more moderate version of the proposal to the status quo. Second, the coalition could offer the pivotal voter something *other than* a more moderate proposal—thereby introducing a second dimension to what has thus far been a unidimensional exercise.<sup>40</sup> The coalition could, for example, offer the pivotal voter a targeted appropriation for his district (in a legislature) or a majority opinion that takes her preferred jurisprudential approach (on a court).<sup>41</sup> Regardless of which tactic the coalition uses, in each instance it acts in an attempt to woo the pivotal voter's support.

This dynamic works quite differently depending on the distribution of preferences. A close look at the two panels in Figure 2 shows why the swing voter in the bottom panel has more power than the pivotal (but not swing) voter in the top panel.

In the top panel, if the pivotal voter,  $V_8$ , makes demands that the majority finds unreasonable, the coalition could attempt to circumvent  $V_8$  by securing the vote of  $V_9$ . The vote of  $V_9$  will never be pivotal in one-dimensional space, since any move to the right sufficient to secure the support of  $V_9$  would also, by definition, be sufficient to secure the vote of  $V_8$ . But introducing a second dimension can allow the coalition to capture the vote of  $V_9$ . Because  $V_9$  holds preferences that

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40. See *infra* Section II.D.

41. For examples of multidimensional decisionmaking of these sorts, see *infra* notes 98–99 and accompanying text (discussing legislatures), and *infra* notes 100–109 and accompanying text (discussing courts).

are only slightly to the right of those of  $V_8$ , the coalition might be able to secure the vote of  $V_9$  by making an offer on a different dimension. Introducing additional dimensions, in other words, makes it possible for a left coalition in the top panel to create a winning majority made up of  $V_1$  through  $V_7$ , plus  $V_9$ —while circumventing  $V_8$ .

This is less possible in the bottom panel. There, the wide distance between  $V_8$  and their nearest neighbors makes  $V_8$  a swing voter in addition to a pivotal voter. In the bottom panel, if the left coalition of  $V_1$  through  $V_7$  wishes to assemble a majority, it has no choice but to secure the support of  $V_8$ . The reason is that  $V_9$  holds preferences on the main issue so distant from those of the left coalition that it is difficult to imagine any offer that the coalition could make that would be sufficient to induce  $V_9$  to support an outcome so far to the left of their ideal point. This fact gives the swing voter bargaining power: the swing voter can make demands on the left coalition, which will have no choice but to capitulate to the swing voter's demands if it wishes to garner a majority. In many instances, the swing voter will not even need to make demands on other voters; bargaining will be unnecessary as other voters act in anticipation of the swing voter being decisive. The swing voter holds a monopoly on the coalition's ability to secure a majority: just as in an economic monopoly, the buyer (a coalition) has a goal (a winning coalition) and no choice but to turn to a monopolist (the swing voter) to achieve that goal.<sup>42</sup>

### *B. Power over Outcomes*

This account of swing voters' leverage helps explain the most obvious aspect of their power: the power to determine outcomes. A judicial swing voter can determine the holding of a case. A legislative swing voter can determine the fate of a bill or amendment. Swing voters may choose to join one bloc or the other, may condition their support on a bloc moderating its position, or may demand a side payment as a

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42. A limit of the swing-voter-as-monopolist analogy is that it does not capture the zero-sum nature of decisionmaking in multimember bodies. A monopolist can sell to multiple buyers, but the swing voter can only create one winning coalition. Another analogy from economics—the auction—captures this zero-sum dynamic. Just as bidders in a standard, ascending-bid auction compete to purchase whatever is being sold, and the success of one buyer necessarily entails the failure of all others, so too the presence of one winning coalition means the absence of another. Like an auctioneer selling something desired by multiple bidders, the swing voter may receive offers, either express or tacit, from competing blocs attempting to secure their vote.



condition for their support. Examples of these types of swing voter influence abound in both courts and legislatures.<sup>43</sup>

### 1. Courts

For supreme courts and appellate courts, judicial outcomes include both the bottom-line result of a given case and the rules and rationales that the court sets out to guide future decisionmaking. Swing judges have power over each of these kinds of outcomes.

The most basic feature of a swing judge's power is the ability to determine a case's outcome. In Justice Kennedy's last five terms on the Supreme Court, he was in the majority with greater frequency than any of his colleagues.<sup>44</sup> On two occasions during his career he was in the majority in every single one of a term's 5–4 cases.<sup>45</sup> He was the decisive vote on divided decisions concerning social issues and civil rights,<sup>46</sup> campaign finance and redistricting,<sup>47</sup> the death penalty,<sup>48</sup> and labor unions,<sup>49</sup> among many other topics.

Judicial swing voters also impact the development of legal doctrine. On the Supreme Court, swing Justices have determined the direction of constitutional law by authoring opinions in major cases on nearly every topic.<sup>50</sup> A swing Justice can also shape the direction of the

43. Swing voter power over outcomes is most evident when a decision is made by a one-vote margin, but swing voters may be decisive even in decisions not made by a one-vote margin (such as a 6–3 Supreme Court decision or a 53–47 Senate vote). Once the swing voter announces their decision and thus renders the outcome a fait accompli, other voters may then vote strategically, knowing that they will not be decisive. Cf. David C. King & Richard J. Zeckhauser, *Congressional Vote Options*, 28 LEGIS. STUD. Q. 387, 388–91 (2003) (providing examples of this sort of strategic voting in Congress).

44. Kedar S. Bhatia, *Stat Pack for October Term 2017, Frequency in the Majority*, SCOTUSBLOG 17 (June 29, 2018), [https://scotusblog.com/wp-content/uploads/2018/06/SB\\_frequency\\_20180629.pdf](https://scotusblog.com/wp-content/uploads/2018/06/SB_frequency_20180629.pdf) [<https://perma.cc/A6UP-HCBZ>].

45. See *The Supreme Court, 2013 Term – The Statistics*, 128 HARV. L. REV. 401, 407 tbl.I(E) (2014); *The Supreme Court, 2006 Term – The Statistics*, 121 HARV. L. REV. 436, 442 tbl.I(E) (2007).

46. See, e.g., *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (public prayer); *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015) (Fair Housing Act); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (same-sex marriage); *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (affirmative action).

47. See, e.g., *McCutcheon v. FEC*, 572 U.S. 185 (2014) (campaign finance); *Citizens United v. FEC*, 558 U.S. 310 (2010) (campaign finance); *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015) (redistricting).

48. See *Hall v. Florida*, 572 U.S. 701 (2014); *Glossip v. Gross*, 576 U.S. 863 (2015).

49. See *Harris v. Quinn*, 573 U.S. 616 (2014); *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448 (2018).

50. Major 5–4 decisions authored by Justice Kennedy during his time as the swing Justice include *Obergefell*, 576 U.S. 644; *Texas Department of Housing & Community Affairs*, 576 U.S. 519; *Hall*, 572 U.S. 701; *Town of Greece*, 572 U.S. 565; *United States v. Windsor*, 570 U.S. 744 (2013); *Citizens United*, 558 U.S. 310; *Boumediene v. Bush*, 553 U.S. 723 (2008); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); and *Gonzales v. Carhart*, 550 U.S. 124 (2007). Those authored by Justice O'Connor during her time as the swing Justice include *Hamdi v. Rumsfeld*, 542 U.S. 507

law through authoring controlling concurrences, which can be more important than majority opinions in determining doctrine.<sup>51</sup> Controlling opinions authored by swing Justices have determined doctrine on employment discrimination,<sup>52</sup> the role of race in education,<sup>53</sup> and the lawfulness of military commissions,<sup>54</sup> among other topics.

Even when a swing Justice does not write an opinion, they can influence the direction of the law through requesting specific changes to a draft opinion or even expressly conditioning their joining the majority on those changes being made.<sup>55</sup> In *Plyler v. Doe*,<sup>56</sup> Justice Powell “wanted the case to be about the education of children, not the equal protection rights of immigrants, and so the decision was.”<sup>57</sup> Justice Kennedy similarly conditioned his vote in *District of Columbia v. Heller*<sup>58</sup> on the conservative bloc’s inclusion of language limiting the scope of the Second Amendment right at issue.<sup>59</sup> To be sure, swing voters do not unilaterally control opinion content, as the opinion author and majority party median also play important roles.<sup>60</sup> But in some

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(2004); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003); and *Shaw v. Reno*, 509 U.S. 630 (1993).

51. When no single rationale for a decision commands majority support, courts treat the opinion resting on the “narrowest grounds” as controlling. See *Marks v. United States*, 430 U.S. 188, 193 (1977); see also *infra* notes 125–126 (discussing *Marks*).

52. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 261 (1989) (O’Connor, J., concurring in the judgment).

53. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and in the judgment); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269 (1978) (Powell, J.).

54. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Kennedy, J., concurring in part).

55. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 31–33, 65–76 (1998) (discussing how bargaining has shaped legal doctrine).

56. 457 U.S. 202 (1982).

57. Linda Greenhouse, *What Would Justice Powell Do?: The “Alien Children” Case and the Meaning of Equal Protection*, 25 CONST. COMMENT. 29, 47 (2008); see also *id.* (“Powell extracted an opinion that, if not unique, has had little generative force.”).

58. 554 U.S. 570 (2008).

59. See Adam Liptak, *It’s a Long Story: Justice John Paul Stevens, 98, Is Publishing a Memoir*, N.Y. TIMES (Nov. 26, 2018), <https://nytimes.com/2018/11/26/us/politics/john-paul-stevens-memoir.html> [<https://perma.cc/E2NA-H23C>]. The limiting language provides that the opinion should not “be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Heller*, 554 U.S. at 626–27.

60. See, e.g., Charles Cameron, Jee-Kwang Park & Deborah Beim, *Shaping Supreme Court Policy Through Appointments: The Impact of a New Justice*, 93 MINN. L. REV. 1820, 1838–53 (2009) (summarizing research and collecting citations on the relative influence over opinion content of the median Justice on the Court, the median Justice in the majority, and the opinion author); Nancy Staudt, Barry Friedman & Lee Epstein, *On the Role of Ideological Homogeneity in Generating Consequential Constitutional Decisions*, 10 U. PA. J. CONST. L. 361, 370–71 (2008) (arguing that though “the median Justice holds enormous power over the Court’s judgment, i.e., who wins or loses the case,” the median Justice cannot “control every detail of the written opinion,”

cases, swing voters can exercise powerful influence over the content of opinions written by others.

The power swing judges hold over outcomes can shape the behaviors of both public and private actors. The case of racial diversity in education highlights this type of influence. For nearly a half century, universities nationwide modeled their approach to race-based affirmative action on the “Harvard plan” blessed by Justice Powell in his opinion in *Regents of the University of California v. Bakke*.<sup>61</sup> At the K–12 level, public school systems have closely followed the playbook set out in Justice Kennedy’s partial concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>62</sup> That opinion struck down two cities’ integration plans, but Justice Kennedy listed other approaches to achieving racial diversity that he viewed as consistent with the Equal Protection Clause: “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; [and] recruiting students and faculty in a targeted fashion.”<sup>63</sup> Taking cues from Justice Kennedy, school districts subsequently used precisely these strategies to pursue racial integration.<sup>64</sup>

## 2. Legislatures

Swing legislators likewise exercise power over outcomes.<sup>65</sup> When a swing legislator exists, they have the power to determine whether a bill will pass a closely divided chamber. Contestation over the Affordable Care Act (“ACA”) represents a particularly high-stakes instance of swing legislators’ power over outcomes. Both the ACA’s passage in 2009 and the failure of repeal efforts in 2017 rested on the

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in part because “the median Justice cannot always credibly threaten to change sides and dispose of the case differently if she does not get her way in terms of the content of the opinion”).

61. 438 U.S. 265, 316–18 (1978) (Powell, J.); see also Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 578 (2000) (noting that if the Court says “[s]tart talking about diversity—and downplay any talk about rectification of past social injustice,” then “the [public] conversation proceeds exactly in that direction”).

62. 551 U.S. 701, 782–98 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

63. See *id.* at 789.

64. See Erica Frankenberg, *Voluntary Integration After Parents Involved: What Does Research Tell Us About Available Options?* 8–14 (Charles Hamilton Houston Inst. for Race & Just., Working Paper, Dec. 2007), <https://charleshamiltonhouston.org/wp-content/uploads/2013/11/Frankenberg-Voluntary-Integration-After-PICS.pdf> [<https://perma.cc/X8BW-3MZ2>] (discussing school district integration plans adopted in light of Justice Kennedy’s *Parents Involved* opinion).

65. See KREHBIEL, *supra* note 19, at 34–38 (modeling the incentives of various actors in the legislative process and finding three possible outcomes: policy that fully converges to the preferences of the median voter, policy that partially converges to the preferences of the median voter, and the status quo).

decisions of a very small number of senators.<sup>66</sup> Each time, the outcome was determined by a razor-thin margin, with all involved knowing in advance precisely which senators would be decisive.

Swing legislators can also use their leverage to extract concessions, often targeted to benefit their constituents. The ACA is again illustrative. Negotiations around both passage and repeal featured state-specific money designed to gain the votes of swing senators. One version of the proposed ACA contained special treatment for Nebraska—derisively called the “Cornhusker kickback”—designed to woo Senator Ben Nelson (D-NE).<sup>67</sup> Repeal proponents likewise offered special treatment for Alaska in an attempt to gain the support of Senator Lisa Murkowski (R-AK).<sup>68</sup> In addition, swing voters on legislative committees, like swing voters on the floor, can extract funding or other particularized benefits for their constituencies.<sup>69</sup> And similar dynamics hold in state legislatures: a recent swing voter in the New York State Senate used his status as a swing voter to secure disproportionate state funding for his district.<sup>70</sup>

Swing legislators may use their power to pursue goals other than particularized benefits for their constituencies. Senator John McCain’s (R-AZ) stated reason for voting against ACA repeal efforts in 2017 was

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66. Passage of the ACA required Democrats to gain the support of Senator Joseph Lieberman (ID-CT) and Senator Ben Nelson (D-NE) in 2009–10, while attempts to repeal the Act in 2017 required Republicans to court Senator Lisa Murkowski (R-AK) and Senator John McCain (R-AZ). See David M. Herszenhorn & Carl Hulse, *Democrats Clinch Deal for Deciding Vote on Health Bill*, N.Y. TIMES (Dec. 19, 2009), <https://nytimes.com/2009/12/20/health/policy/20health.html> [<https://perma.cc/L2EK-Z52M>]; Jessie Hellmann, *The Two Senators Who Will Likely Decide Fate of Obamacare Repeal*, HILL (Sept. 20, 2017, 6:00 AM), <https://thehill.com/homenews/senate/351465-mccain-and-murkowski-hold-the-key-to-bills-fate> [<https://perma.cc/5MGF-ERUU>].

67. See Steve Jordon, *The Story of Nelson and the ‘Cornhusker Kickback,’* ASSOCIATED PRESS (July 22, 2017), <https://apnews.com/article/e0da557d50ac459f990d74d264e7add6> [<https://perma.cc/26S8-3XY8>] (describing the inclusion of federal funding for Nebraska’s Medicaid program in the Senate bill in order to garner Nelson’s vote to overcome a filibuster, but noting that the funding was absent from the version of the ACA that became law).

68. See Liz Ruskin, *ACA Repeal Bill Now Peppered with Alaska Money to Draw Murkowski*, ALASKA PUB. MEDIA (Sept. 25, 2017), <https://alaskapublic.org/2017/09/25/aca-repeal-bill-now-peppered-with-alaska-money-to-draw-murkowski> [<https://perma.cc/N464-P7NU>].

69. See, e.g., Glenn Kessler & Thomas B. Edsall, *Senate Democrats Offer Stimulus Plan*, WASH. POST (Nov. 7, 2001), <https://washingtonpost.com/archive/politics/2001/11/07/senate-democrats-offer-stimulus-plan/4343e7fc-3ac9-4066-8f95-44ee367f8c4b> [<https://perma.cc/9EY3-RPKJ>] (describing the addition of “agricultural stimulus” in an economic stimulus package as part of an effort to gain the support of a swing voter on the Senate Finance Committee); see also John F. Manley, *Wilbur D. Mills: A Study in Congressional Influence*, 63 AM. POL. SCI. REV. 442, 461 (1969) (“The Chairman’s influence in the Committee is on some issues closely related to his position as the crucial swing vote between the coalitions that appear most often on Ways and Means issues.”).

70. See, e.g., Carl Campanile, *Simcha Felder’s Swing Vote Has Landed \$1.2M for His District*, N.Y. POST (May 9, 2018, 10:23 PM), <https://nypost.com/2018/05/09/simcha-felders-swing-vote-has-landed-1-2m-for-his-district> [<https://perma.cc/8RZJ-G9FT>].

that those efforts did not proceed through traditional Senate procedures (sometimes called “regular order”), which would have provided for hearings and the possibility of amendments.<sup>71</sup> Other times, swing voters may seek to influence policy for more idiosyncratic or even personal reasons. Consider Senator Joseph Lieberman (ID-CT), who one journalist described as having engaged in a “petulant use of his power as a swing vote” during the first two years of the Obama Administration.<sup>72</sup> Regardless of what motivates legislative swing voters and the kinds of demands that they make, the key feature of their power is that they exercise significant control over legislative outcomes.

### C. Power over Agendas

A swing voter’s power to impact a decisionmaking body’s agenda and the actions of third parties is more subtle than their role in shaping outcomes, but at times just as consequential. Swing voters typically have no formal power over a body’s agenda. Yet they can, and sometimes do, make known to their colleagues that certain outcomes are or are not acceptable to them, which in turn affects the agenda of the decisionmaking body as a whole. Even when swing voters do not proactively state their preferences, the mere presence of a swing voter can affect agendas. When a swing voter will likely be decisive as to ultimate outcomes, those who control agendas often make decisions based on the swing voter’s preferences, real or perceived. Even without formal agenda power, swing voters may thus have the de facto power to put certain issues onto the decisionmaking body’s agenda (positive agenda control) and to prevent the body from taking up other issues (negative agenda control).<sup>73</sup>

#### 1. Courts

In the judicial context, the impact of a swing judge on agenda setting manifests in several different ways. In courts that have control

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71. See Hellmann, *supra* note 66; Russell Berman, *The Two Republicans Who Will Likely Determine Obamacare’s Fate*, ATLANTIC (Sept. 19, 2017), <https://theatlantic.com/politics/archive/2017/09/mccain-murkowski-senate-obamacare-repeal/540378> [<https://perma.cc/6URD-854G>].

72. Alex Koppelman, *The Last of the Moderates*, NEW YORKER (Aug. 16, 2012), <https://newyorker.com/news/daily-comment/the-last-of-the-moderates> [<https://perma.cc/UM8A-7JHT>]; see also Ezra Klein, *Joe Lieberman: Let’s Not Make a Deal!*, WASH. POST (Dec. 14, 2009, 7:01 AM), [http://voices.washingtonpost.com/ezra-klein/2009/12/joe\\_lieberman\\_lets\\_not\\_make\\_a.html](http://voices.washingtonpost.com/ezra-klein/2009/12/joe_lieberman_lets_not_make_a.html) [<https://perma.cc/3B4N-KRW8>]. For a satirical but incisive portrayal of the demands that swing voters are able to make, see *Parks and Recreation: Swing Vote* (NBC television broadcast Apr. 25, 2013).

73. Cf. GARY W. COX & MATHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES 20 (2005). Negative agenda control is often

over which cases to hear, judges might look to the swing voter in deciding whether to take a case. On the Supreme Court, the swing voter is formally superfluous to the certiorari process, given that the four left- or right-most Justices can grant certiorari without the swing Justice's support.<sup>74</sup> But as a functional matter, the swing voter is critical. A bloc of four Justices has little reason to grant certiorari unless they think they have at least a chance of later securing the swing Justice as a fifth vote for their preferred outcome or reasoning.<sup>75</sup>

Litigants also look to judicial swing voters, tailoring their arguments to their perceptions of swing voter preferences.<sup>76</sup> During Justice Kennedy's time as the Supreme Court's swing Justice, one leading litigator described briefs in a major case as "love letters to Justice Kennedy,"<sup>77</sup> and another quipped that he "would put Justice Kennedy's photo on the cover" of his briefs if permitted.<sup>78</sup> This strategy of targeting a swing Justice makes perfect sense, given the need to garner five votes for a Supreme Court majority.<sup>79</sup>

Judicial swing voters can also matter long before a case is on the docket. Litigants may only file a case in the first instance if they believe

hard for outsiders to observe, given the difficulty of identifying proposals that would have been made, counterfactually, if power was distributed differently within a body.

74. See M. Patrick Yingling, *Judicial Conventions: An Examination of the US Supreme Court's Rule of Four*, 38 U. DUBLIN L.J. 477 (2015). On the Supreme Court's certiorari process, see generally H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389 (2004); Margaret Meriwether Cordray & Richard Cordray, *Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme Court*, 57 U. KAN. L. REV. 313 (2009).

75. See Erwin Chemerinsky, *The Incredible Shrinking Docket*, TRIAL, Mar. 2007, at 64, 65 ("[I]t might be that four [J]ustices will vote to grant certiorari only when they are reasonably confident that they will have a fifth vote lined up for an opinion."); see also, e.g., *Liles v. Oregon*, 425 U.S. 963, 964 (1976) (Stevens, J., concurring in the denial of certiorari) ("[R]egardless of how I might vote on the merits after full argument, it would be pointless to grant certiorari in case after case of this character only to have *Miller [v. California]* reaffirmed time after time."); *Carter v. United States*, 422 U.S. 1020, 1022 n.\* (1975) (Brennan, J., dissenting in the denial of certiorari) ("Although four of us would grant and reverse, the Justices who join this opinion do not insist that the case be decided on the merits.").

76. See, e.g., Epstein & Jacobi, *supra* note 20, at 95–96; Dahlia Lithwick, *A High Court of One: The Role of the "Swing Voter" in the 2002 Term*, in *A YEAR AT THE SUPREME COURT* 13, 20 (Neal Devins & Davison M. Douglas eds., 2004).

77. Robert Barnes, *Justices Weigh Courts' Role in Detainee Cases*, WASH. POST, Dec. 5, 2007, at A20 (quoting Kathleen Sullivan).

78. Joe Fox, Ann Gerhart & Kevin Schaul, *In His Final Term, Justice Kennedy Handed Conservatives Many Victories*, WASH. POST (June 27, 2018, 1:30 PM), [https://washingtonpost.com/politics/courts\\_law/justice-kennedy-the-pivotal-swing-vote-on-the-supreme-court-announces-retirement/2018/06/27/a40a8c64-5932-11e7-a204-ad706461fa4f\\_story.html](https://washingtonpost.com/politics/courts_law/justice-kennedy-the-pivotal-swing-vote-on-the-supreme-court-announces-retirement/2018/06/27/a40a8c64-5932-11e7-a204-ad706461fa4f_story.html) [https://perma.cc/T8JM-NW3Y] (quoting Erwin Chemerinsky).

79. Cf. Anthony Lewis, *In Memoriam, William J. Brennan, Jr.*, 111 HARV. L. REV. 29, 32 (1997) ("Justice Brennan used to joke that a critical talent for a Supreme Court Justice was the ability to count to five.").

that a swing voter is likely to move the law in their favored direction. After a decision by a federal court of appeals, the losing party might only petition the Supreme Court for certiorari if it believes that it is likely, or at least plausible, that it will ultimately secure the fifth vote necessary to prevail on the merits.

A swing Justice may also signal to would-be litigants about what cases to bring or what legal theories they would be open to. Justice Kennedy sent such a signal in *Vieth v. Jubelirer*,<sup>80</sup> a 2004 constitutional challenge to partisan gerrymandering. In *Vieth*, four Justices would have found for plaintiffs on their political gerrymandering claim, and four Justices would have found all political gerrymandering claims nonjusticiable.<sup>81</sup> Justice Kennedy concluded that “[t]he failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention [in this case] improper,” but reserved the right to grant relief if in the future “workable standards do emerge to measure these burdens.”<sup>82</sup> Justice Kennedy’s concurrence spurred a wave of social science research seeking to define judicially manageable standards for partisan gerrymandering,<sup>83</sup> as well as new litigation proposing standards that plaintiffs hoped Justice Kennedy would find “workable.” That litigation ultimately failed: in the days before his retirement, Justice Kennedy declined to provide a fifth vote to find any proposed standard of partisan gerrymandering judicially administrable.<sup>84</sup> But Justice Kennedy’s *Vieth* concurrence influenced litigation and scholarship around partisan gerrymandering for over a decade. And it is one example of many: across areas of law, swing Justices have expressly invited litigants to bring cases advancing particular legal theories.<sup>85</sup>

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80. 541 U.S. 267, 306–17 (2004) (Kennedy, J., concurring in the judgment).

81. Four Justices signed on to the plurality opinion finding all political gerrymandering cases nonjusticiable, *id.* at 270–306 (Scalia, J., joined by Rehnquist, C.J., O’Connor, J., and Thomas, J.), while four others each authored or joined dissents, *id.* at 317–42 (Stevens, J., dissenting); *id.* at 342–55 (Souter, J., dissenting, joined by Ginsburg, J.); *id.* at 355–68 (Breyer, J., dissenting).

82. *Id.* at 317 (Kennedy, J., concurring in the judgment).

83. Leading contributions included Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015); Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 ELECTION L.J. 331 (2015); Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263 (2016); and Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 ELECTION L.J. 351 (2016).

84. See *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

85. See, e.g., *Davis v. Ayala*, 576 U.S. 257, 289–90 (2015) (Kennedy, J., concurring) (“In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”); *Direct Mktg. Ass’n v. Brohl*, 575 U.S. 1, 18–19 (2015) (Kennedy, J., concurring) (“[I]t is unwise to delay any longer a

## 2. Legislatures

Swing voters can exercise similar control over legislative agendas. Just as a swing Justice does not have formal power over which cases the Court hears, a swing legislator similarly has no formal power over which bills progress through the legislative process. That agenda-setting power lies with party leadership, committee chairs, and subcommittee chairs. Political scientists have shown the potency of agenda control as a tool that party leaders use to advance their policy goals.<sup>86</sup>

Yet swing legislators can still indirectly impact the legislative agenda. The legislators who hold formal control over the agenda may put forth some proposals and not others based on the stated or perceived preferences of swing legislators. Political scientists differ on the degree to which the agendas reflect the preferences of party leaders, the majority party median, and the chamber median.<sup>87</sup> But the chamber median—who is sometimes (though not always) a swing voter—exerts at least some degree of indirect influence over legislative agendas.<sup>88</sup>

Congressional leaders may advance proposals (bills, amendments, or nominations) only if they believe that they can garner a swing legislator's support. The legislative maneuvering over the ACA again provides an example. Many Democrats, both in the White House and in Congress, favored creating a government-run health insurance

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reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated. . . . The legal system should find an appropriate case for this Court to reexamine *Quill* . . ." (citation omitted)).

86. See, e.g., Sarah A. Binder, Eric D. Lawrence & Forrest Maltzman, *Uncovering the Hidden Effect of Party*, 61 J. POL. 815 (1999); Sean Gailmard & Jeffery A. Jenkins, *Negative Agenda Control in the Senate and House: Fingerprints of Majority Party Power*, 69 J. POL. 689 (2007); Molly C. Jackman, *Parties, Median Legislators, and Agenda Setting: How Legislative Institutions Matter*, 76 J. POL. 259 (2013); Eric D. Lawrence, Forest Maltzman & Steven S. Smith, *Who Wins? Party Effects in Legislative Voting*, 31 LEG. STUD. Q. 33 (2006). See also, generally GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (1993); DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* (1991).

87. See Jackman, *supra* note 86, at 259–60 (noting that “the presence of majoritarian rules should mean that the median legislator decides which bills come to a floor vote, in addition to which bills pass,” but citing sources demonstrating that “[t]his point . . . is contested” in the political science literature).

88. See, e.g., *id.* at 271 (“[M]ajoritarian rules [procedures that allow a chamber majority to circumvent majority-party gatekeeping] undermine the agenda-setting rights of the majority party, and, in so doing, shift power toward the median legislator.”); Andrew J. Clarke, Jeffery A. Jenkins & Nathan W. Monroe, *From Rolls to Disappointments: Examining the Other Source of Majority Party Failure in Congress*, 70 POL. RSCH. Q. 82, 84 (2017) (noting that if the chamber median would prefer the status quo to the agenda-setter's ideal point, the agenda setter can only succeed by either “do[ing] a better job of placing the proposal . . . mov[ing] the proposal just close enough to the median voter to elicit a ‘yes’ vote from that legislator based on sincere policy-distance preference” or by “us[ing] side-payments (of some form)” to garner a majority for its preferred outcome).



program open to all, colloquially known as a public option. The White House and Democratic congressional leadership did not include a public option in the final version of the ACA, however, largely on account of the preferences of two senators whose votes were necessary to garner the three-fifths majority needed to overcome a Senate filibuster.<sup>89</sup>

Recent debates over tax policy and judicial nominations illustrate a similar dynamic. Consider the power that Senator Susan Collins (R-ME) held during 2017–18, when Republicans held a bare majority in the Senate. During Senate debates over the 2017 Tax Cuts and Jobs Act,<sup>90</sup> Collins used her leverage to secure a number of significant changes to the bill.<sup>91</sup> The next year, the White House reportedly sought and received Collins’s approval before nominating then-Judge Brett Kavanaugh to the Supreme Court.<sup>92</sup> Had Collins denied her approval, the White House may well have nominated someone else. This type of influence is not manifest in roll-call votes or any other official record, but it is key to setting the agenda.

Swing voters in committees also hold power over agendas. When several women accused Kavanaugh of sexual assault or misconduct after he had been nominated,<sup>93</sup> Senator Jeff Flake (R-AZ), the lone swing voter on the Senate Judiciary Committee and one of several key voters on the Senate floor, came to play a critical role. Flake announced that he would only vote the nomination out of committee if the Republican leadership allowed for a one-week FBI investigation into one woman’s allegations against Kavanaugh. Republicans had strongly

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89. See Robert Pear & David M. Herszenhorn, *Lieberman Rules Out Voting for Health Bill*, N.Y. TIMES (Dec. 13, 2009), <https://nytimes.com/2009/12/14/health/policy/14health.html> [<https://perma.cc/RLJ6-6LU7>]; Eric Zimmermann, *Lieberman and Nelson: Public Option Compromise Still Not Good Enough*, HILL (Dec. 13, 2009, 4:15 PM EST), <https://thehill.com/homenews/senate/71967-lieberman-nelson-public-option-compromise-still-cause-for-concern> [<https://perma.cc/A95S-NWSQ>]. These two senators, Joseph Lieberman (ID-CT) and Ben Nelson (D-NE), differed from the paradigmatic swing voter in that there were two of them rather than one. But they collectively held power for the same reason that a swing voter does: because of the ideological distance between them and their nearest neighbors to the left and right.

90. Pub. L. No. 115-97, 131 Stat. 2054 (2017).

91. Collins claimed credit for the bill’s retention of the state and local tax deduction (albeit in a limited form), a deduction for high medical bills, and an allowance for public employees and employees of nonprofits to make “catch-up” contributions to their retirement accounts. See Susan Collins, *Sen. Susan Collins: New Tax Law Will Benefit Hardworking Mainers, Not Washington Elites*, PORTLAND PRESS HERALD (Dec. 27, 2017), <https://pressherald.com/2017/12/27/sen-susan-collins-new-tax-law-will-benefit-hardworking-mainers-not-washington-elites> [<https://perma.cc/3LHN-JW68>].

92. Laura Bassett, *Don’t Count on Susan Collins to Save Roe v. Wade*, HUFFINGTON POST (Aug. 31, 2018, 1:54 PM), [https://huffingtonpost.com/entry/susan-collins-brett-kavanaugh-roe-v-wade\\_us\\_5b8963d5e4b0511db3d7d20d](https://huffingtonpost.com/entry/susan-collins-brett-kavanaugh-roe-v-wade_us_5b8963d5e4b0511db3d7d20d) [<https://perma.cc/L39Z-TQ9M>].

93. See JODI KANTOR & MEGAN TWOHEY, SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT 188–245 (2019) (providing a detailed account of the allegations leveled against then-Judge Kavanaugh during his confirmation process).

resisted Democratic calls for a broader FBI investigation, but they had no choice but to relent to Flake's demand for an investigation that was limited in both time and scope.<sup>94</sup> A swing voter in committee, like a swing voter on the floor, can dictate the information and choices that their colleagues have when voting on legislation or nominations.

#### *D. One Dimension or Several?*

Swing voter power can shape outcomes and agendas in either of two respects. As already noted, swing voters can force moderation along a single decisional axis, or they can make demands not directly related to the main issue being considered. These two types of swing voter power differ, so it is worth examining them separately.

First, swing voters can moderate outcomes and agendas, pulling them toward the center of a unidimensional axis. Legislators' preferences about tax rates or the minimum wage can easily be plotted in unidimensional space. More complex legislation can be understood as unidimensional as well, even if doing so is an oversimplification. The ACA contained many hundreds of provisions, but the law's general policy scheme of expanded access without a public option can fairly be understood as a middle ground between no health care reform, on the one hand, and a universal, government-run health insurance program, on the other.

Judicial swing voters can likewise moderate outcomes along a single axis. The Supreme Court's affirmative action jurisprudence shows this sort of moderating influence. Contemporary Justices' positions on affirmative action can be understood as lying on a single axis, with a constitutional ban on all race-based affirmative action at one pole and the allowance of all race-based affirmative action on the other pole. For decades, three consecutive swing voters—Justices Powell, O'Connor, and Kennedy—staked out a middle position. All three viewed the Equal Protection Clause as permitting some forms of affirmative action but as barring numerical racial quotas or affirmative action justified as a remedy for past discrimination.<sup>95</sup> These swing

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94. See *id.* at 239–40; Michael D. Shear, Nicholas Fandos & Michael S. Schmidt, *A Tumultuous 24 Hours: How Jeff Flake Delayed a Vote on Kavanaugh*, N.Y. TIMES (Sept. 28, 2018), <https://nytimes.com/2018/09/28/us/politics/jeff-flake-kavanaugh-confirmation.html> [<https://perma.cc/FT7Z-2E6U>].

95. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978) (Powell, J.) (describing “attainment of a diverse student body” as “clearly . . . a constitutionally permissible goal for an institution of higher education”); *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (O'Connor, J.) (agreeing that a law school “has a compelling interest in a diverse student body,” a position “informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission” (citing *Bakke*, 438 U.S. at 318–19)); *Fisher v. Univ. of Tex.*,

voters moderated doctrine, leading the Court to neither allow nor prohibit affirmative action of all types. Instead, swing Justices led the Court to adopt a set of rules and tests that were not the first choices of larger blocs of voters on the left and right.<sup>96</sup>

Second, swing voters can secure concessions unrelated to the main issue under consideration. While swing voters sometimes force moderation on the main issue, at other times they leave that main outcome unchanged but instead extract concessions along an entirely different dimension.

Multidimensional dealing is pervasive in legislatures: for many bills, the price of a winning coalition is the inclusion of provisions on issues different from the main one under consideration.<sup>97</sup> Key legislators may condition their support for a bill on inclusion of targeted benefits for their constituents, such as grants, subsidies, or regulatory exemptions.<sup>98</sup> But such benefits need not be geographically targeted, and sometimes legislators demand policy changes of other types. A group of House members nearly derailed the ACA in 2010 by seeking to include language in the statute barring federal funding for abortions, even though they supported the Act's expansion of healthcare coverage.<sup>99</sup> When passage of a bill is a sufficiently high priority for party leaders, virtually any side deal that enables passage of the bill's core provisions will be worth making—even if party leaders would prefer to proceed with a “clean” bill. A swing voter's influence need not be to moderate a bill with respect to the main issue under consideration. The swing voter can, instead, induce a bill's supporters to modify the bill along a different axis.

Side payments of the kind common in legislatures do not exist in courts. There is a strong norm against judicial logrolling, whether

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570 U.S. 297, 298 (2013) (Kennedy, J.) (noting that universities may account for race in admissions when doing so “is ‘necessary’ for [a] university to . . . achieve the educational benefits of diversity” (citing *Bakke*, 438 U.S. at 305)).

96. Swing voters have similarly moderated constitutional doctrine in other domains. Consider the Court's Establishment Clause jurisprudence. Justice O'Connor's “endorsement test” asked whether a challenged practice or display “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). This test represented a doctrinal middle ground relative to more permissive and more restrictive approaches to the Establishment Clause.

97. See, e.g., WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* 150 (1986) (“[M]anipulation of dimensions is just about the most frequently attempted [tactical maneuver], one that politicians engage in a very large amount of the time.”).

98. See *supra* notes 67–70 and accompanying text.

99. See LAWRENCE R. JACOBS & THEDA SKOCPOL, *HEALTH CARE REFORM AND AMERICAN POLITICS: WHAT EVERYONE NEEDS TO KNOW* 118–19 (3d ed. 2015) (discussing the “Stupak Amendment,” a proposed House amendment that would have prohibited the use of federal funds to pay for abortion coverage, through either a public option or subsidies in health care exchanges).

across issues within a case or across multiple cases.<sup>100</sup> Nor do federal judges have electoral constituents for whom they are expected to secure particularized benefits. For these reasons, it might appear that bargaining on side issues exists in legislatures but not in courts. If that were the case, judicial swing voters could only moderate outcomes, rather than introduce other dimensions.

The reality is more complex. While judicial swing voters often play a moderating role, they can do more than move outcomes toward their ideal point on a unidimensional axis. Several other axes of decisionmaking—distinct from the substance of a judicial decision on a left-right dimension—can be present in multimember courts:

- A swing judge can be offered (or can ask for) a majority opinion that takes their preferred jurisprudential approach. Courts often confront cases in which they face a choice between multiple plausible rationales that could not be easily plotted on a single axis.<sup>101</sup> The Court's same-sex marriage jurisprudence illustrates this point. Though lower federal courts had proposed a variety of constitutional justifications for a right to marry,<sup>102</sup> Justice Kennedy's opinion for the Court in *Obergefell v. Hodges*<sup>103</sup> bore all the hallmarks of his distinctive jurisprudence.<sup>104</sup> It is only because Justice Kennedy was the Court's swing voter and

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100. See F. Andrew Hessick & Jathan P. McLaughlin, *Judicial Logrolling*, 65 FLA. L. REV. 443, 445 & nn.6–7 (2014) (collecting sources on the norm against judicial logrolling).

101. Constitutional law provides many examples of decisions that could rest on any of several different rationales that cannot be easily plotted on a left-right axis. Some forms of technological surveillance may implicate both the First and Fourth Amendments. See, e.g., *ACLU v. Clapper*, 785 F.3d 787, 821 (2d Cir. 2015). Constitutional protections for indigent criminal defendants and civil litigants may be grounded in due process or equal protection. See, e.g., Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 436 (1967). Political gerrymandering might be understood to violate the Equal Protection Clause or the First Amendment right of free association. See, e.g., Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159, 2161–62 (2018). Compulsory flag salutes of the sort struck down in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), are plausibly unconstitutional under either the First Amendment's Free Speech Clause or its Free Exercise Clause. A court tasked with deciding which rationale to employ in any of these cases is faced with a choice between multiple doctrinal frameworks, not merely between points on a single unidimensional axis.

102. One federal appeals court, for example, set out three distinctive rationales for striking down a state same-sex marriage ban, but those rationales did not lend themselves to being plotted on an obvious left-right or otherwise unidimensional axis. See *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014). One opinion found the ban to be unconstitutional discrimination on the basis of sexual orientation, see *id.* at 464 (majority opinion), a second found the ban to be unconstitutional discrimination on the basis of gender, see *id.* at 479 (Berzon, J., concurring), and a third found the ban to be a violation of a fundamental constitutional right to marry, see *id.* at 477 (Reinhardt, J., concurring).

103. 576 U.S. 644 (2015).

104. See Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015).

therefore the opinion author that his preferred rationale became the law, as opposed to a different rationale that other members of the majority might have preferred.<sup>105</sup>

- A swing judge can be offered (or can ask for) the opportunity to write a majority opinion. The opportunity to write a high-profile opinion can be important to a judge interested in their legacy or place in history.
- A swing judge can be offered (or can ask for) an opinion that does not engage with the core merits at issue in a case. Courts have many tools for avoiding merits questions: they can decide cases on narrow, fact-bound grounds;<sup>106</sup> interpret statutes to avoid reaching constitutional questions;<sup>107</sup> and employ various justiciability doctrines, such as standing, ripeness, mootness, or the political question doctrine.<sup>108</sup> In rare cases, courts even request that the parties resolve a matter outside of court.<sup>109</sup> None of these various means of declining to decide can be plotted on the same axis as a merits issue.

Each of these examples shows how judicial decisionmaking can involve more than a single issue. There are typically fewer issues at play in courts than in legislatures. But a judicial coalition seeking to assemble a majority, or a swing voter deciding which coalition to join, has more than one dimension on which to negotiate.

### III. CONSTRUCTING SWING VOTERS

Swing voters are not intrinsic to multimember decisionmaking bodies. Some bodies will never have a swing voter. Others might have a swing voter at certain times but not at others.<sup>110</sup> And, when a swing

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105. Swing Justices likewise dictated the Court's approach in *Plyler* and *Heller*. See *supra* notes 55–59 and accompanying text.

106. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1732 (2018) (“In this case the adjudication concerned a context that may well be different going forward.”).

107. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (“When the validity of an act of the Congress is drawn in question . . . it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”).

108. See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 101–266 (7th ed. 2015).

109. See, e.g., *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (remanding in hope that the parties “arrive at an approach going forward that accommodates” the interests of all relevant stakeholders).

110. See, e.g., Epstein & Jacobi, *supra* note 20, at 66–67 (discussing various periods during which the Court has and has not had what the authors refer to as a super median voter).

voter does exist, even slight changes in a body's composition or rules can dislodge or disempower the swing voter.

This Part explores the ways in which swing voters are contingent. A swing voter's *existence* depends on both the ideological distribution of voters within a decisionmaking body and the size of that body. When a swing voter does exist, their *power* depends on the rules governing the body of which they are a part. Examining these dynamics reveals that swing voters are constructed by the thicket of rules, often taken for granted, that structure decisionmaking bodies.

Understanding the ways in which swing voters are constructed requires recognizing the many forms that multimember decisionmaking bodies can take. They can be large or small. Their procedural rules and internal organizations can vary widely. Their members can be chosen in different ways and serve for different lengths of time. Design choices like these impact how institutions perform as a general matter.<sup>111</sup> It should come as no surprise, then, that institutional design choices can also affect both the prevalence and power of swing voters.

### A. Swing Voters' Contingent Existence

#### 1. Ideology

A decisionmaking body may lack a swing voter because the pivotal voter's views are not sufficiently ideologically distinct from those of other voters. The defining characteristics of a swing voter set out in Part I—a pivotal voter with preferences distant from those of their nearest neighbors—need not exist. The members of many institutions, at many times, are ideologically distributed in ways that do not give rise to a swing voter.

One possible reason for the absence of a swing voter is the presence of a unified bloc large enough to constitute a winning coalition without any additional voters. No swing voter exists in this situation because the pivotal voter's preferences align with those of other bloc members. For this reason, the House of Representatives typically does not have a swing voter on most issues. So too, swing voters are

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111. On legislative design and variation, see, for example, DAVID M. OLSON, *DEMOCRATIC LEGISLATIVE INSTITUTIONS: A COMPARATIVE VIEW* (Routledge 2015) (1994); THE OXFORD HANDBOOK OF LEGISLATIVE STUDIES (Shane Martin, Thomas Saalfeld & Kaare W. Strøm eds., 2014). On judicial design and variation, see, for example, VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 449–626 (3d. ed. 2014); *JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS* (Brice Dickson ed., 2007). See also, generally CONSTITUTE, <https://constituteproject.org> (last visited Oct. 1, 2020) [<https://perma.cc/J9Y9-MAG8>] (collecting national constitutions).

frequently absent in those multimember agencies where members “routinely vote as a bloc,”<sup>112</sup> such as the National Labor Relations Board (“NLRB”) and the Federal Election Commission (“FEC”). In the modern era there has been nearly complete bloc voting on the NLRB, with commissioners consistently dividing 3–2 along party lines in high-profile cases.<sup>113</sup> Similarly, an analysis of FEC votes from one recent year shows that the three Republican commissioners voted as one bloc in every case, while the other three commissioners (two Democrats and one Independent) voted as a bloc in all except a few circumstances.<sup>114</sup>

Swing voters also do not exist when the pivotal voter’s preferences are very similar to their nearest neighbors. In such a circumstance, there are multiple possible paths to a winning coalition. This dynamic has at times existed on the Supreme Court, when several Justices have been sufficiently ideologically clustered at the center of the ideological distribution to deny any of them the status of singular swing voter.<sup>115</sup> Similar dynamics can occur in legislatures, such as when a near-majority bloc solicits the support of many moderate legislators, all with similar preferences, any of whom might plausibly join the bloc in supporting a given bill. If many voters are clustered around the pivotal voter, no single voter will be a bloc’s only path to a winning coalition, and a swing voter will therefore not exist.

## 2. Size

A decisionmaking body’s size is inversely related to the prevalence of swing voters. A swing voter exists when there is a large ideological spread between the pivotal voter and their nearest

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112. Ann Ravel, Comm’r, Fed. Election Comm’n, Keynote Address at the Brookings Institution: The Campaign Finance Crisis in America and How to Fix It: A Solutions Summit 12 (January 21, 2016), [https://brookings.edu/wp-content/uploads/2016/01/20160121\\_campaign\\_finance\\_summit\\_transcript.pdf](https://brookings.edu/wp-content/uploads/2016/01/20160121_campaign_finance_summit_transcript.pdf) [<https://perma.cc/T6V7-QJUT>].

113. See Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1452–53 (2000). Examples of high-profile party-line votes include joint-employer rules relating to franchises and the recognition of unions of university students who work as teaching and research assistants. See Noam Scheiber, *Labor Board Reverses Ruling That Helped Workers Fight Chains*, N.Y. TIMES (Dec. 14, 2017), <https://nytimes.com/2017/12/14/business/economy/labor-employers.html> [<https://perma.cc/QFS4-UTM5>]; Noam Scheiber, *Grad Students Win Right to Unionize in an Ivy League Case*, N.Y. TIMES (Aug. 23, 2016), <https://nytimes.com/2016/08/24/business/graduate-students-clear-hurdle-in-effort-to-form-union.html> [<https://perma.cc/2ZM6-XL6Y>].

114. Tisha Thompson, Rick Yarborough, Stephen Stock, Kevin Nious, Steve Jones & Jeff Piper, *Deadlock: FEC Commissioners Say They’re Failing to Investigate Campaign Violations*, NBC NEWS-4 WASH., <https://nbcwashington.com/news/local/deadlock-fec-commissioners-say-theyre-failing-to-investigate-campaign-violations-2/114705> (last updated Sept. 20, 2016, 6:35 PM) [<https://perma.cc/92TW-UPGU>].

115. See, e.g., Epstein & Jacobi, *supra* note 20, at 75 & fig.8 (illustrating the lack of a swing Justice in the 1965 term).

neighbors. The larger a decisionmaking body is, the more crowded the ideological distribution of voters will be. The result is that larger bodies are, all else equal, less likely to have large spreads between the preferences of the pivotal voter and those of other voters.

A brief look at U.S. institutions supports the intuition that smaller decisionmaking bodies are more prone to having swing voters. Swing voters are quite common on the nine-member Supreme Court.<sup>116</sup> As institutions grow, swing voters become less prevalent. Swing voters sometimes exist in the hundred-member Senate and comparably sized state legislative bodies,<sup>117</sup> but they are not a fixture in the way they have been on the Supreme Court. Swing voters are much rarer in the 435-member House of Representatives.<sup>118</sup> In such a large body, there is almost never significant ideological spacing between the pivotal voter and their nearest neighbors on the left and right for a swing voter to exist. It is possible, in theory, for even a large decisionmaking body to have a swing voter, given a very particular ideological distribution of its members. And it is possible for a small body to lack a swing voter, as in the case of small multimember agencies whose members vote in partisan blocs.<sup>119</sup> But all else equal, smaller bodies are more likely than larger ones to have swing voters.

### *B. Swing Voters' Contingent Power*

#### 1. Decisionmaking Procedures: Courts

The procedural rules that govern multimember institutions are not neutral with respect to swing voters. Instead, such rules shape the extent and character of swing voter power. On courts, rules dictate how panels are composed, how opinion-writing responsibilities are allocated,

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116. *See id.* at 67 (“Justice Kennedy is only the most recent example of a super median. Taken collectively, our data suggest that since the onset of the Warren Court era in 1953, five others achieved that status: Justices Clark, Goldberg, White, Powell, and O’Connor.”).

117. State lower chambers range in size from twenty to sixty-seven members, while state upper chambers range in size from forty to 203 members (excluding one extreme outlier). *See Number of Legislators and Length of Terms in Years*, NAT’L CONF. OF STATE LEGISLATURES (Aug. 9, 2019), <https://ncsl.org/research/about-state-legislatures/number-of-legislators-and-length-of-terms.aspx> [<https://perma.cc/V4L4-RLV8>]. For an example of swing voter power in a state legislature, see *supra* note 70 and accompanying text.

118. Given the size of the House, a single voter is decisive only in rare circumstances. *See, e.g.*, Karen Tumulty, *When a Hard Vote Ends a Political Career*, TIME: SWAMPLAND (Mar. 3, 2010), <https://swampland.time.com/2010/03/03/when-a-hard-vote-ends-a-political-career> [<https://perma.cc/FDQ8-34JA>] (describing the decisive vote on President Clinton’s economic plan cast by Rep. Marjorie Margolies-Mezvinsky (D-PA)).

119. *See supra* notes 112–114 and accompanying text.



and how much precedential weight different opinions receive. Each of these types of rules bears on the extent of swing voter power.

Swing voter power on a multimember court is at its apex when every decision is made by the full court, sitting en banc. The Supreme Court dynamics discussed in Part II result from the Court sitting as a full court of nine Justices. This enables a swing voter to dictate outcomes, and the Court's agenda can come to reflect the swing voter's real or perceived preferences.

Swing voters hold less power when courts sit in panels. Every federal circuit court employs three-judge panels for appeals.<sup>120</sup> High courts of many democratic nations similarly use panels.<sup>121</sup> Constituting panels by random or semi-random draw prevents the same judge from repeatedly acting as the swing voter across many panels and issues. Because assignment of judges to panels takes place long after cases have been initiated, and in many instances after the parties have submitted their briefs, it is difficult for parties to litigate cases strategically to appeal to a swing voter. Some recent proposals advocating for a larger U.S. Supreme Court seek to harness this feature of panels. Under a panel system, proponents of one reform proposal note, “[n]o Justice would be able to advance an ideological agenda over decades of service, and no Justice would be the single swing voter over a period of years (and thus targeted by the lion’s share of advocacy).”<sup>122</sup>

Even if a court uses panels, a swing voter on the full court can still exercise power if rules allow the full court to review panel decisions. But even in courts that allow panel decisions to be reconsidered by the full court, the panel’s decision is still the last word in the vast majority

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120. See 28 U.S.C. § 46. One circuit allows litigants to petition from a three-judge panel for consideration by a larger panel. See 9TH CIR. R. 35-3 (“The en banc court . . . shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court.”).

121. See, e.g., Bundesverfassungsgerichts-Gesetz [BVerfGE] [Law on the Federal Constitutional Court], Mar. 12 1951, BUNDESGESETZBLATT, TEIL I [BGBl I] at 1473, §§ 2, 14–16, <https://germanlawarchive.iuscomp.org/?p=221> [<https://perma.cc/98X7-KHKR>] (Germany); *Panel Numbers Criteria*, SUP. CT., <https://supremecourt.uk/procedures/panel-numbers-criteria.html> (last visited Oct. 23, 2020) [<https://perma.cc/7EJB-L6A9>] (United Kingdom); *The Judiciary: The Court System*, ISR. MINISTRY OF FOREIGN AFFS., <https://mfa.gov.il/mfa/aboutisrael/state/democracy/pages/the%20judiciary-%20the%20court%20system.aspx> (last visited Oct. 1, 2020) [<https://perma.cc/69YK-5GRE>] (Israel).

122. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 183 (2019); see also Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts’ of Appeals Image*, 58 DUKE L.J. 1439, 1470 (2009) (noting that under a panel system “it is much less likely that one or two swing justices (a la Justice O’Connor or Justice Kennedy) would have disproportionate weight on the Court”). Panel composition would have to be random to prevent gamesmanship in the composition of panels. Cf. Lori Hausegger & Stacia Haynie, *Judicial Decisionmaking and the Use of Panels in the Canadian Supreme Court and the South African Appellate Division*, 37 L. & SOC’Y REV. 635, 654–55 (2003) (finding that ideology shapes how chief justices make panel assignments in Canada and South Africa).

of cases. Federal courts of appeals allow for en banc review, but only a vanishingly small number of cases are actually heard en banc.<sup>123</sup> As a practical matter, the three-judge panel typically has the last word.

Rules concerning opinion assignment also shape swing voter power. Discretionary opinion assignment empowers swing voters because blocs can offer the swing voter the chance to write the majority opinion and swing voters can condition their joining a bloc on their being permitted to write for the majority. But opinion assignment need not be discretionary. State supreme courts provide a range of alternative models of opinion assignment, including assignment by random draw or rotation among judges.<sup>124</sup> These approaches to opinion assignment reduce a swing voter's power by preventing the swing voter from writing majority opinions in an outsized number of major cases. Even if a swing voter can still make demands on their colleagues about the content of opinions—perhaps even threatening to change their vote if a majority opinion does not reflect their preferred views—making such demands can be costly for the swing voter, especially in small and collegial bodies. Swing voters can exert some influence over the content of opinions that they do not author, but their power in such cases is lower than it is when they author majority opinions themselves.

Rules dictating how much precedential weight different judicial opinions have can likewise favor or disfavor swing voters. When all members of a majority sign on to the same opinion, that opinion's reasoning controls. But when a majority is fractured as to its reasoning, which opinion should govern? One approach is the Supreme Court's *Marks* rule: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."<sup>125</sup> The *Marks* rule allows swing Justices to dictate the content of precedent even if no other Justice agrees with their reasoning. A swing Justice might even self-describe their approach as narrow in order to encourage other courts to take their view as controlling under *Marks*.<sup>126</sup> And the

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123. See Ryan Vacca, *Acting Like an Administrative Agency: The Federal Circuit En Banc*, 76 MO. L. REV. 733, 738 (2011) (calculating based on data provided by the federal judiciary that federal courts in the early 2000s resolved between 0.01 and 0.23 percent of their cases en banc).

124. See Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209, 210 tbl.1 (1990) (describing opinion assignment practices in all fifty state supreme courts and finding that more than half used either random draw or rotation in opinion assignment).

125. *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation marks omitted).

126. See, e.g., *Missouri v. Seibert*, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring in the judgment) (describing the plurality's test as "cut[ting] too broadly" and proposing instead "a narrower test"); see also Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942, 1973

rule can deter compromise: there is little reason for a swing Justice to join a bloc's opinion or reasoning if they know that their solo opinion—so long as it is narrower than that of the plurality—will be treated as binding precedent.

Other approaches to precedent would reduce swing voter power, relative to the *Marks* rule. If the reasoning for the holding that commanded the most votes was deemed controlling, solo opinions by a swing voter could not control. Under such an approach, a swing voter could only dictate doctrine if they could secure a majority of the majority in favor of their reasoning. Critics of the *Marks* rule have proposed other rules dictating which opinion (if any) should be controlling when five Justices cannot agree on a shared rationale. Under one approach, "Instead of asking about the 'narrowest grounds,' courts should simply ask whether a single rule of decision has the express support of at least five Justices."<sup>127</sup> On another view, a divided judgment should be treated as precedential in a future case only when "the reasons provided by *each* of the Justices whose vote was necessary to the judgment in the precedent case would compel the same result."<sup>128</sup> Though these alternatives to the *Marks* rule were not formulated with the intent of reducing swing voter power, they would have that effect by denying swing voters the ability to create precedent when they speak only for themselves.

## 2. Decisionmaking Procedures: Legislatures

Rules likewise shape swing voter power in legislatures. Rules that empower rank-and-file members can be especially potent in the hands of swing voters, and rules allowing logrolling can empower swing voters in some circumstances while limiting their influence in others.

Procedural rules that give rank-and-file legislators more opportunity to modify proposed legislation also give swing voters greater power to influence outcomes. In Congress, many rules shape how open or closed the legislative process is. At one extreme, in the House, a bill may be presented under an open rule, which allows any and all amendments to be introduced.<sup>129</sup> Under such a rule, a swing voter would have enormous leverage in seeking to modify a bill. They

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(2019) ("[D]ozens—though not all—lower courts have followed [Justice Kennedy's] lead [in *Seibert*], with many quoting his opinion's self-description as 'narrower' than the plurality.").

127. Re, *supra* note 126, at 1946.

128. Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 802 (2017).

129. Such open rules are rare in the contemporary Congress. See BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 28 (5th ed. 2017).

could seek to moderate the bill, moving it away from either the left or right side of the ideological distribution and toward their ideal point. Or they could make a demand on an entirely different issue, such as by amending the bill to address a different policy matter of importance to them or their constituents. The coalition seeking to pass the bill would face significant pressure to comply with the swing voter's demands, knowing that if they did not capitulate to the swing voter, the swing voter might vote against the bill and prevent it from passing.

The legislative process is not always so open. Congressional rules often lead to members facing narrow or binary choices. Unanimous consent agreements typically restrict amendment activity in the Senate,<sup>130</sup> and bills often arrive on the House floor under closed rules prohibiting all amendments or special rules severely limiting amendments.<sup>131</sup> Congress's rules do not allow any amendments or modifications when Congress operates under certain special procedures, such as when it considers resolutions under the Congressional Review Act<sup>132</sup> or fast-track trade authority.<sup>133</sup> Legislators instead must simply vote for or against the resolution. The same holds in the Senate for votes on whether to confirm executive branch or judicial nominees.<sup>134</sup> These restrictive rules do not eliminate swing voter power altogether. When a swing voter exists, they can still be decisive as to whether the yeas or nays prevail. But more restrictive amending rules will typically limit the swing voter to choosing between two predefined options, rather than empowering them to expand the range of possible outcomes.

Even on matters that arise as binary choices, swing voters can seek to shape the agenda by trying to influence which binary choice is put to the chamber. A Senate swing voter could make clear to the president which judicial nominees they would and would not vote to confirm, which in turn could influence the president's choice of who to nominate.<sup>135</sup> But these sorts of actions can be costly for the swing voter, in terms of both the foresight and political capital that they require. A

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130. VALERIE HEITSHUSEN, CONG. RSCH. SERV., 96-548, THE LEGISLATIVE PROCESS ON THE SENATE FLOOR: AN INTRODUCTION 7–8 (2019), <https://fas.org/sgp/crs/misc/96-548.pdf> [<https://perma.cc/EED7-YN7F>].

131. See Michael Doran, *The Closed Rule*, 59 EMORY L.J. 1363, 1366 (2010).

132. 5 U.S.C. §§ 801-808.

133. See IAN F. FERGUSSON & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43491, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS 1 (2019), <https://crsreports.congress.gov/product/pdf/R/R43491> [<https://perma.cc/6PRZ-GTE2>] (“[Trade Promotion Authority] ensures time-limited congressional consideration and an up-or-down vote with no amendments.”).

134. See SENATE RULES, *supra* note 26, at Rule XXXI.

135. See *supra* note 92 and accompanying text.

more closed legislative process limits the tools that swing voters can use to influence outcomes.

Rules governing logrolling can also impact swing voter power, though the exact effects will vary based on the ideological distribution of legislators. Logrolling entails an implicit or explicit trade, in which a first voter agrees to take a position important to a second voter, while the second voter agrees to take a position important to the first. This frequently occurs through linking multiple proposals together. In Congress, many appropriations are typically bundled into large bills, and substantive legislation often contains amendments unrelated to the core topic of the bill.<sup>136</sup> Internal procedural rules, ranging from earmark rules<sup>137</sup> to single-subject rules,<sup>138</sup> bear on how easy or difficult logrolling is.

Logrolling is a double-edged sword for swing voters. On the one hand, rules enabling logrolling can make it easier for swing voters, who already have leverage within the chamber, to make demands of party leaders and others in exchange for their vote. The more lax a legislature's rules are with respect to logrolling, the easier it will be for swing voters to extract side payments in exchange for their vote on a matter under consideration.

On the other hand, logrolling can help other legislators circumvent swing voters by allowing for the formation of coalitions that could not otherwise exist. Most modestly, a strategic logroll could allow a left coalition to gain the majority by picking up the vote of the member just to the right of the swing voter, or vice versa. More dramatically, logrolling can allow for unusual coalitions, drawing significant support from both left and right. In either instance, the legislator who would be pivotal in one-dimensional space will no longer be able to dictate outcomes.

The federal farm bill exemplifies how logrolls can create unusual coalitions. The farm bill links food stamps and agricultural subsidies in a single bill.<sup>139</sup> If either the food stamp program or agricultural

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136. See, e.g., Diana Evans, *Policy and Pork: The Use of Pork Barrel Projects to Build Policy Coalitions in the House of Representatives*, 38 AM. J. POL. SCI. 894 (1994).

137. See Mariano-Florantino Cuéllar, *Earmarking Earmarking*, 49 HARV. J. ON LEGIS. 249 (2012).

138. Such rules, which exist in many state legislatures, prevent logrolling by limiting each bill to a single subject. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 176–81 (2d ed. 2006).

139. For an account of the origins of this linkage, see, for example, John A. Ferejohn, *Logrolling in an Institutional Context: A Case Study of Food Stamp Legislation*, in CONGRESS AND POLICY CHANGE 223, 227–50 (Gerald C. Wright, Leroy N. Rieselbach & Lawrence C. Dodd eds., 1986). See also Jerry Hagstrom, *Food Stamps Are Key Component to Getting Farm Bill Passed*, NAT. J. (Apr. 10, 2013), <https://nationaljournal.com/s/81264/food-stamps-are-key-component-getting-farm-bill-passed> [<https://perma.cc/EF2S-R3UQ>].

subsidies were voted on individually, something resembling a traditional left-right divide would likely emerge on each issue. Instead, by linking the two issues, unusual coalitions of members from both the left and right side of the ideological spectrum have historically ensured the bill's passage.<sup>140</sup> The legislators with the strongest preferences about the two policy areas—mostly urban Democrats for food stamps, and mostly rural Republicans for agricultural subsidies—can together create a majority coalition for the two sets of policies. By allowing the two issues to be bundled in a single bill, congressional rules allow entrepreneurial legislators to circumvent the chamber's pivotal voter.

Finally, decisionmaking procedures in other institutions can at times enhance or diminish the power of swing legislators. Statutory interpretation methodologies provide a good example. Some scholars have argued that, in interpreting statutes, courts should seek to reconstruct the legislative bargain such that the intent of the pivotal voter (or group of voters) would become central to statutory interpretation.<sup>141</sup> The general advantages and disadvantages of such an approach are beyond this Article's scope. Relevant here, however, is the fact that methods of statutory interpretation that look to pivotal legislators would give those legislators' views more weight than would other sorts of approaches to statutory interpretation—whether textualist, purposivist, or otherwise. Statutory interpretation, then, is yet another lever that can ratchet up or down the power of legislative swing voters.

### 3. Competing Power Centers

Institutions with internal hierarchies or multiple power centers have natural counterweights to swing voter power. A flat hierarchy allows a swing voter maximum power. More complex structures—such as chamber leadership or internal committees with control over agendas—can dilute swing voter power. The more power other members

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140. See, e.g., Final Vote Results for Roll Call 31, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, <https://clerk.house.gov/evs/2014/roll031.xml> (last visited Oct. 23, 2019) [<https://perma.cc/N29N-LRE8>] (documenting a vote of 162–63 among House Republicans and 89–103 among House Democrats).

141. See, e.g., Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1422 (2003) (“Our fundamental claim is that the nature and scope of the bargain struck by the ardent supporters with the coalition of pivotal legislators is central to the meaning of the statute.”); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 725 (1992) (“How is a court to proceed in implementing an interpretive standard that plausibly represents the agreement of the enacting coalition? This entails the discovery of the preferences of the pivotal members of the enacting coalition.”).

of a decisionmaking body have, the less that remains for the swing voter.

U.S. legislative chambers are illustrative in this regard. Such chambers, especially smaller ones, sometimes have a swing voter. There are other power centers as well, however, created by both rules and norms. Party leaders, committee chairs, and subcommittee chairs wield significant power in two respects: they control legislative agendas, and they can reward or punish rank-and-file legislators. These other power centers serve as counterweights to swing voter power.

Party leaders exercise control over which bills come to the floor, in what order, and under what conditions. Specifics vary across chambers, but control of the floor is one of party leadership's most important powers. Committee and subcommittee chairs similarly have some degree of agenda control in their respective domains. This organization provides a counterweight to swing voter power. Party leadership, in particular, is likely to hold preferences well to the left or right of any swing voter.<sup>142</sup> Committee or subcommittee chairs will likely hew the party line more so than a swing voter who, by definition, has preferences distant from those of their copartisans.<sup>143</sup> Party leaders, committee chairs, and subcommittee chairs can and do use their formal control of the agenda to pursue priorities that diverge from swing voter preferences. A swing voter can, of course, make demands on those who control agendas. But no swing voter has the capacity to monitor all pending matters and insist that all committee and floor activity conform to their preferences.

Party leaders also have various points of leverage over swing voters.<sup>144</sup> Party leaders often control committee assignments and committee chairmanships, which they can use as carrots or sticks in attempting to secure party loyalty from swing voters or other wayward

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142. Some political scientists view party leaders as representative of party medians while others view them as more extreme than party medians. See Stephen Jessee & Neil Malhotra, *Are Congressional Leaders Middlepersons or Extremists? Yes*, 35 LEGIS. STUD. Q. 361, 361–65 (2011) (reviewing literature on both positions). But in either case, party leaders will be well to the left (for Democrats) or right (for Republicans) of the chamber's median voter.

143. On theories of committee composition and ideology, see Tim Groseclose & David C. King, *Committee Theories Reconsidered*, in CONGRESS RECONSIDERED 191, 191–97 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2001). For an example of a committee chair being replaced when they strayed too far from the party line, see Patrick O'Connor, *Waxman Dethrones Dingell as Chairman*, POLITICO (Nov. 20, 2008, 10:53 AM EST), <https://politico.com/story/2008/11/waxman-dethrones-dingell-as-chairman-015822> [<https://perma.cc/9X3F-AL32>].

144. A wide range of institutional mechanisms can ratchet up or down the power of party leaders over rank-and-file legislators, including swing voters. See generally Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. (forthcoming 2021); Gregory A. Elinson, *Fractured Parties and the Separation of Powers* (unpublished manuscript) (on file with author).

caucus members.<sup>145</sup> Party leaders also steer campaign funds to party members, providing another tool for inducing loyalty.<sup>146</sup> Some other legislators have distinctive power of their own: chairs of committees with jurisdiction over appropriations, for example, can seek to steer government funds toward or away from a swing voter's district, depending on how the swing voter behaves. Each of these powers weakens swing voters by putting them at the mercy of other legislators. Rules that disempower party leaders and committee chairs, by contrast, may empower swing voters by weakening competing power centers.

Courts rarely have as many competing power centers as legislatures. But courts sometimes assign some judges, most often chief judges, with special prerogatives that can serve as counterweights to swing voter power. On the U.S. Supreme Court, the Chief Justice assigns opinions when they are in the majority. Other nations' supreme courts assign their chief judges even greater power: some chief judges have the power to decide how large a panel will be or even to assign which judges hear which cases.<sup>147</sup> Rules or norms that empower chief judges or other judges can diminish swing voter power by creating alternate centers of power.

#### 4. (In)stability

Finally, swing voter power depends on at least a minimal degree of institutional stability. Swing voters hold more power when they retain that status for an extended period of time. Frequent changes in a decisionmaking body's composition, by contrast, can dislodge a swing voter when one exists. This instability limits the power of swing voters.

Law determines the degree of stability or instability in an institution of government. Legal rules can provide for long or short terms of service: members of the House and many state legislatures are elected for only two-year terms,<sup>148</sup> while federal judges serve for life.<sup>149</sup> Most institutions, including many legislative chambers and multimember commissions, have term lengths somewhere between

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145. See, e.g., Nicole Asmussen & Adam Ramey, *When Loyalty Is Tested: Do Party Leaders Use Committee Assignments as Rewards?*, 45 CONG. & PRESIDENCY 41 (2018) (showing empirically that party leaders use committee assignments to reward members who vote with leadership on key issues).

146. See MARIAN CURRINDER, *MONEY IN THE HOUSE: CAMPAIGN FUNDS AND CONGRESSIONAL PARTY POLITICS* 36–39 (2008).

147. BENJAMIN ALARIE & ANDREW J. GREEN, *COMMITMENT AND COOPERATION ON HIGH COURTS: A CROSS-COUNTRY EXAMINATION OF INSTITUTIONAL CONSTRAINTS ON JUDGES* 102–03, 121 (2017).

148. U.S. CONST. art. I, § 2, cl. 1 (specifying that House members serve two-year terms).

149. *Id.* art. III, § 1, cl. 2 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”).



these extremes.<sup>150</sup> Separate from term length is another variable: whether turnover is staggered. Changes in membership may happen simultaneously for all members (as in the House), may be partially staggered (as in the Senate), or may happen one by one (as in the federal courts). Even if terms are long, like in the Senate, if turnover is staggered there can be frequent changes in the body's membership. In addition, legislative districts can be drawn to be either safer or more competitive, with consequences for the frequency of turnover. Each of these sorts of rules influence whether the same individual is likely to be able to serve as a swing voter for an extended period of time.<sup>151</sup>

Even when a swing voter exists, it is harder to identify that swing voter in a body with frequently changing membership. A swing voter's existence depends on their preferences relative to the preferences of their colleagues. But the preferences of a legislator, judge, or other member of a decisionmaking body do not instantly reveal themselves. Only after a significant number of votes is it possible to discern precisely where each individual's preferences lie. New members' preferences may not be fully known. The result is that even if a swing voter exists in theory, others might not know who the swing voter is. This, in turn, reduces the swing voter's power, which we have seen depends in large part on being recognized as a swing voter by others.

Moreover, it is only possible to plan agendas around swing voter preferences when that swing voter is likely to remain a swing voter in the near future. In the judicial context, it can take several years for a case to wind its way from an initial filing to an appellate or high court decision. If a court's composition changes frequently, it is hard for litigants to strategically tailor suits and arguments to a swing judge. Even when a swing judge does exist, frequent turnover would prevent litigants from initiating cases designed to appeal to the swing judge.

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The fact that the existence and power of swing voters depends on legal rules opens the door to possible reforms. Whether one wishes to enhance or limit the prevalence of swing voters or the extent of their power, there are many levers to be pulled.

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150. See, e.g., *id.* art. I, § 3, cl. 1 (six-year Senate terms); NAT'L CONF. OF STATE LEGISLATURES, *supra* note 117 (four-year terms in most states' upper chambers and some states' lower chambers); 47 U.S.C. § 154(c)(1)(A) (five-year terms for FCC commissioners); 15 U.S.C. § 41 (seven-year terms for FTC commissioners).

151. In addition to law, norms can also bear on stability: legislators sometimes resign partway through a legislative session, while norms dictating that Supreme Court Justices resign between two of the Court's year-long terms promote stability during the course of each term.

For those who seek to increase the likelihood that swing voters exist, the most important variable that institutional designers can manipulate is size: the smaller an institution is, the more likely the ideological preconditions for the presence of a swing voter will be met. When swing voters do exist, their power can be enhanced through maximally flexible procedures that give the swing voter the ability to bargain with their colleagues and make demands with respect to both agendas and outcomes. And swing voter power is at its height when membership in a decisionmaking body is stable, with longer terms and infrequent turnover.

Those looking to weaken swing voters likewise have tools at their disposal. Increasing the size of an institution makes it less likely that a swing voter will exist. When a swing voter does exist, internal procedures can disempower the swing voter. In legislatures, highly structured procedures for how bills are considered and limits on amending activity can reduce the ability of swing voters to bargain. Empowering party leaders and committee chairs can create competing power centers, especially when those competing power centers have points of leverage over swing voters. In courts, swing voters can be weakened by deciding cases in panels rather than a full court, by assigning opinions by rotation or random draw, or by rules that prevent solo opinions from carrying precedential weight.

But *should* any of these reforms be undertaken? Answering that question requires a normative theory of swing voter power.

#### IV. EVALUATING SWING VOTER POWER

Evaluating swing voter power is trickier than it may seem at first glance. Any judgment about swing voter power depends on the answers to a variety of contestable normative questions, including questions about the importance of moderation and stability in multimember decisionmaking bodies. Evaluating swing voter power in a particular institution further depends on both a normative assessment of how the institution should function and an empirical assessment of whether swing voters advance or hinder the good functioning of the institution. Recognizing the inevitable disagreement on these issues,<sup>152</sup> this Part catalogues the various values that are at stake when we talk about swing voter power. Those values do not provide an easy way of evaluating swing voter power, but they do show what is at stake in the conversation.

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152. Cf. JEREMY WALDRON, LAW AND DISAGREEMENT 1–4 (1999).

*A. Decisional Moderation*

Swing voters often moderate collective decisions, leading to outcomes that lie between those favored by their colleagues to the left and right. This moderating impact might seem to provide a way of evaluating swing voters. If moderation is desirable in courts, legislatures, or other multimember bodies, that fact favors institutional designs that give rise to or empower swing voters. If moderation is undesirable, decisionmaking bodies should be designed to minimize swing voter prevalence and power.

This approach to evaluating swing voters and their power faces significant limits. Most obviously, it necessarily rests on contestable, substantive views about law and policy. Moderation will be more or less attractive depending on one's views about what outcomes should be. In any given context, welfarists, egalitarians, and libertarians might take different views of swing voters—members of one of those groups might find themselves wishing for a powerful swing voter, while members of another might find themselves lamenting swing voter power. In the face of widespread disagreement, any account of swing voters resting on a particular theory of justice is necessarily limited.

Even if we could all agree on an ideological fixed point from which to evaluate swing voter power, political context would still make it difficult to do so. The effects of swing voter power will change as a body's politics and membership change. Empowering a swing voter might advance a given value in the present but undermine that same value in the future, or vice versa, as the ideological distribution of a body's members changes. Swing voter power might also promote a given value in one institution but undercut it in another. An outcomes-focused analysis could allow those with particular views to praise or condemn a particular swing voter in a particular institution at a particular moment in time—but it does not lend itself to more general conclusions about swing voter power.<sup>153</sup>

*B. Stability*

Another factor, closely related to moderation, is stability. Swing voters often lessen the degree of change relative to what might

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153. Another approach would focus on the relationship between swing voters and compromise. Critics of contemporary U.S. politics have noted the growth of “an uncompromising mindset, a cluster of attitudes and arguments that encourage standing on principle and mistrusting opponents.” AMY GUTMANN & DENNIS F. THOMPSON, *THE SPIRIT OF COMPROMISE: WHY GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT* 3 (2012). Linking up swing voters with compromise might be a way to evaluate their role in democratic institutions. If swing voters were to promote compromise between left and right, allowing the two sides to come together around a

otherwise occur. Part II provides examples of swing voters limiting rapid or dramatic changes that might otherwise have taken place. In Congress, the ACA was landmark legislation, to be sure, but it produced less of a change from the status quo than it would have if swing voters had not prevented the inclusion of a public option.<sup>154</sup> On the Court, *Heller* recognized an individual right to bear arms for the first time, but a swing voter ensured that the decision would not lead to the overturning of several longstanding types of firearms regulations.<sup>155</sup> In these instances, and others, swing voters help maintain relative stability of law or policy, as compared to more dramatic changes that could have occurred if swing voters exercised less power.

Evaluations of this sort of stability rest on two sets of judgments. The first is a normative assessment of the status quo. Those with favorable views of the status quo might endorse swing voter power as a means of promoting stability—or, put differently, as a means of making it more difficult for either liberals or conservatives to make changes that would depart too dramatically from a positive (or at least tolerable) status quo. Those who are more critical of the status quo might view swing voters, and the stability that they bring, as obstacles to much-needed change.

Second, assessments of the stability that swing voters can provide rest on perceptions of the risks and rewards that might come from changes to law or policy.<sup>156</sup> Feelings about potential change are distinct from views of the status quo: someone who is satisfied with the status quo may still be optimistic about future change being even better, while someone disappointed with the current state of affairs may nonetheless be fearful about a further turn for the worse. Optimism about the likely direction and extent of future changes may imply skepticism about swing voters, given that swing voters could temper those changes. Pessimism about such future changes may imply an embrace of swing voters for the same reason. A sufficiently large risk that law or policy would change for the worse<sup>157</sup> counts in favor of institutional arrangements that temper change—with rules that enhance swing voter power serving as one such mechanism.

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picture of the common good, proponents of compromise would have reasons to want to enhance swing voter power. But swing voters typically pick winners between rival parties or ideological factions. In so doing, they sometimes induce one side or the other to moderate their position. But swing voters rarely bridge divides between opposing parties or factions on highly contested issues.

154. See *supra* note 89 and accompanying text.

155. See *supra* notes 58–59 and accompanying text.

156. On constitutionalism as a means of regulating political risk, see generally ADRIAN VERMEULE, *THE CONSTITUTION OF RISK* (2014).

157. Or a smaller risk that it would change for the worse in such a dramatic fashion that even the small risk is intolerable.

Stability, like moderation, is not a strictly neutral value. To the extent that swing voters and swing voter power are stability-enhancing features of institutions, evaluating them will turn on the value of stability. And that value depends on contestable judgments, both normative and empirical, about the status quo and changes that may take place in the future.

### *C. Institutional Context*

General values like moderation and stability do not get us very far in assessing swing voters and their power. What about more specific institutional contexts? Swing voters might be a positive force in one setting and a negative force in another. Taking stock of swing voter power requires attention to the specific features of the institutions in which they wield power.

Consider, first, the distinctive context of courts. The Supreme Court is famously beset with a countermajoritarian difficulty that arises from the power of unelected Justices to strike down legislation passed by a democratic Congress.<sup>158</sup> Against this backdrop, assessments of swing voters on the Court may rest in part on the importance that one attaches to the Court's sociological legitimacy, the "belief by citizens, whether warranted or not, that particular claims to authority deserve respect or obedience."<sup>159</sup> One sitting Justice has noted that the presence of a swing voter long "enabled the [C]ourt to look as though it was not owned by one side or another and was indeed impartial and neutral and fair."<sup>160</sup> This view links the Court's sociological legitimacy to the presence of a moderate swing voter. Assuming this link exists, views about the importance of a swing voter on the Court should vary with the importance that observers attach to the Court's sociological legitimacy. Those who attach great importance to the Court's sociological legitimacy will want to create the conditions for swing voters to exist and exercise power. Those who value the Court's sociological legitimacy less than other values—such as

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158. See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002). The term "countermajoritarian difficulty" dates to the mid-twentieth century. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1962).

159. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005). The description of this form of legitimacy as "sociological" contrasts it with what Fallon calls "moral legitimacy" and "legal legitimacy." *Id.* at 1794–1801.

160. Sophie Tatum, *Justice Kagan Worries About the 'Legitimacy' of a Politically Divided Supreme Court*, CNN (Oct. 5, 2018, 10:06 PM ET), <https://cnn.com/2018/10/05/politics/supreme-court-elena-kagan-legitimacy/index.html> [<https://perma.cc/HT4L-2A8M>] (quoting Justice Elena Kagan).

democratic values or the importance of arriving at the “right” answer on legal questions<sup>161</sup>—may be indifferent or even hostile to judicial swing voters.<sup>162</sup>

Other values might also be particularly important in courts as compared to in other institutions. Many believe that the value of stability, discussed above in general terms, holds special sway in the judicial context because of the relationship between stability and the rule of law.<sup>163</sup> In the Supreme Court’s words, “the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”<sup>164</sup> Stare decisis does not mean that doctrine cannot change, but it does slow the speed of such change.<sup>165</sup> Stare decisis is distinct to courts: there is not a parallel principle (either legal or normative) preventing the elected branches of government from making dramatic or abrupt policy changes.<sup>166</sup> If stability indeed assumes special importance in courts, judicial swing voters might be more defensible than their counterparts in other institutions.

Legislatures are very different from courts, but a more contextual analysis can also inform how we assess swing legislators’ power. Imagine a swing voter in a legislative chamber. When such a voter exists in a majority-rule chamber with two parties, the swing

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161. There is significant disagreement among scholars of jurisprudence as to whether legal questions have right answers in the first instance. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 335–48 (2013 ed.).

162. Cf. Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2272 (2019) (reviewing RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018)) (noting a “legitimacy dilemma,” wherein “a steadfast commitment to sociological legitimacy may lead a Justice to compromise the legal legitimacy of her own rulings”).

163. See Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 3, 26–29 (2012).

164. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

165. See Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1184 (2006) (noting that “constitutional law is able to grow and change” but that “these changes generally occur incrementally”).

166. In the United States, the extent of a policy change will not be a legal strike against it so long as the policy change is within the authority of the relevant lawmaking entity, does not violate individual rights, and is not irrational. On this last score, courts are generally deferential to policy changes made by the elected branches. See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955) (“[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of [legislative] requirements.”); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part) (“A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”). Some legal philosophers have warned against systems that make “such frequent changes in the rules that the subject cannot orient his action by them.” LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969). But few changes in law would run afoul of this principle, which permits a much broader range of changes—and permits them to occur much more quickly—as compared to the principle of stare decisis in the judicial context.

voter will necessarily be a member of the majority party—but a wayward member with different preferences from their copartisans.<sup>167</sup> Evaluating a legislative swing voter would therefore rest on both a theory of party loyalty and a more general account of the role of parties in legislatures. On one account, the swing voter, by breaking from the party line, undermines what some political scientists call “responsible party government”: the idea that parties in power should be able to pursue coherent programs such that voters may electorally reward or punish a party depending on their views about the party’s program.<sup>168</sup> Others dissent from the responsible parties thesis,<sup>169</sup> instead emphasizing other aspects of legislative representation, such as the importance of a legislator’s responsiveness to their constituents, regardless of party pressures.<sup>170</sup> On a view of representation that is more critical of parties, swing voters might be viewed as admirably resisting party pressures to better represent their constituents. Whether it is good or bad for swing voters to exercise power within a legislative body turns on one’s theory of the proper role of parties and party loyalty in legislative bodies.

#### *D. Swing Voter Performance*

Another question to ask in evaluating swing voters is whether those voters are more or less likely than their colleagues to act as “good” judges or legislators, on whatever set of criteria one thinks is appropriate for evaluating individuals holding those roles. This approach focuses on the relationship between swing voters and institution-specific virtues, independent of views about policy. In pursuing this line of thinking, my focus is not on the behavior of particular swing voters in particular circumstances. Anyone with opinions about law and policy will find some actions by swing voters to praise and some to condemn. Rather, my focus is more institutional and

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167. The median voter in a two-party majority-rule institution—such as the 218th House member—is necessarily a member of the majority party. In order to also be a swing voter, this median voter must be a wayward member of the majority party, because if they held preferences in accordance with party orthodoxy, the ideological distance from nearest neighbors necessary for a swing voter to exist would be absent. *See supra* Section I.B.2.

168. *See* COMM. ON POL. PARTIES, AM. POL. SCI. ASS’N, TOWARD A MORE RESPONSIBLE TWO-PARTY SYSTEM 20 (1950) (identifying a need for greater party loyalty); *see also* SAM ROSENFELD, THE POLARIZERS: POSTWAR ARCHITECTS OF OUR PARTISAN ERA 12–17 (2018) (recounting the origins of responsible party government theory).

169. *See* ROSENFELD, *supra* note 168, at 17–21 (discussing early critics of the responsible parties thesis); *id.* at 279 (describing later criticism by political scientist Nelson Polsby).

170. *See, e.g.*, SUZANNE DOVI, THE GOOD REPRESENTATIVE 69 (2012) (“Perhaps the most common and important standard used to evaluate the behavior of representatives is the standard of constituents’ interests.”).

systematic. By asking about swing voter behavior in the aggregate, we can begin to form views about whether institutional designers should seek to empower or disempower swing voters.

In the judicial context, there is fierce disagreement about how judges should decide hard constitutional<sup>171</sup> and statutory<sup>172</sup> questions. Even absent a comprehensive theory of judging, however, a more modest set of principles can allow for the evaluation of judges, including judicial swing voters. Judges should set out rules and rationales in ways that can be understood by other courts, the litigants, and the public at large.<sup>173</sup> They should not rest their decisions on unsupported or outright false empirical premises. They should engage in “principled decision making,” which requires that “case-specific judgments should yield to demands for the consistent application of sound interpretive principles.”<sup>174</sup>

Some swing voters might perform better than their colleagues on these metrics, while others might perform worse. Many commentators have described the distinctive jurisprudence of recent swing Justices on the Supreme Court: some have praised their moderation and constitutional vision, while others have criticized them for decisionmaking that was analytically undisciplined, empirically ungrounded, or insufficiently devoted to precedent.<sup>175</sup> Beyond the individual-level traits of particular Justices, political scientists have provided some evidence that swing Justices might behave differently

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171. Disagreement exists about the relative weight to be given to original meaning, structure, precedent, and evolving social norms. *See, e.g.*, PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3–119 (1982) (discussing these and other modalities of constitutional decisionmaking).

172. On different approaches to statutory interpretation, *see, for example*, HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1958); ROBERT A. KATZMANN, *JUDGING STATUTES* (2014); and Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 9–37 (Amy Gutmann ed., 1997).

173. *Cf.* FULLER, *supra* note 166, at 38–39 (laying out eight ways in which law can fail, including by failing to make prospective rules, be transparent to parties and the public, and make rules understandable).

174. FALLON, *supra* note 162, at 18. Fallon describes the point in terms of a moral requirement of “good faith in argumentation and consistency in the application of legal norms.” *See id.* at 130. He does, however, note that because an overly rigid interpretive approach “might yield intolerably unjust or practically disastrous outcomes in some cases . . . the Justices should approach the occasions of constitutional decisionmaking with a provisional commitment to interpretive methodological principles” and that interpretive commitments should be open to revision through a process of reflective equilibrium. *Id.* at 126.

175. *See, e.g.*, *Did Anthony Kennedy Just Destroy His Own Legacy?*, POLITICO MAG. (June 27, 2018), <https://politico.com/magazine/story/2018/06/27/anthony-kennedy-legacy-supreme-court-218900> [<https://perma.cc/CQ3K-TG5F>] (collecting a range of perspectives on Justice Kennedy’s legacy).



from other sorts of Justices as a more general matter. One empirical study finds that swing Justices are more attentive than their colleagues to public opinion<sup>176</sup>—a trait that could be either a virtue or a vice depending on one’s views about the proper role of public opinion in judicial decisionmaking. In short, evaluating judicial swing voters requires both an empirical grasp of how they differ from their colleagues and a normative theory of how judges should behave.

A similar dynamic holds in legislatures. No consensus exists on who legislators should be responsive to and how they should mediate between competing demands on them.<sup>177</sup> In deciding whether to support or oppose proposed legislation, some legislators might seek to do what is best for their constituencies, while others might seek to advance the national interest. Legislators might put more or less weight on public opinion in making decisions. And legislators might bring to bear any number of principles on how they approach policy questions. Reasonable observers can disagree about the relative weight of these various duties. As a result, fully evaluating a swing voter’s actions may require taking positions on hard questions about legislators’ duties. Consider the common case of a swing legislator who exploits their position to secure geographically particularized benefits not available to other legislators. Such a legislator may be admirably advocating for their constituents or may be wrongly putting their constituents ahead of the public good. The choice between these two perspectives necessarily rests on a theory of legislative representation.

Despite the room for reasonable disagreement about legislators’ duties, recent scholarship has proposed principles by which all legislators should abide, and that should be widely acceptable to those holding different policy views.<sup>178</sup> That work has emphasized the duties of majorities to consult with minorities; the duties of minorities to seek to make the government work (rather than just obstruct); and the duties of all legislators to seek to advance the public good, communicate with constituents, exercise opinion leadership, and follow constitutional norms.<sup>179</sup> Some swing voters may be more successful than their colleagues when judged on these metrics, while others might be less

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176. See Peter K. Enns & Patrick C. Wohlfarth, *The Swing Justice*, 75 J. POL. 1089 (2013) (showing that in closely divided cases, only swing Justices’ votes are correlated with public opinion).

177. This paragraph’s examples of the various duties that legislators plausibly have are discussed at greater length in Gould, *supra* note 144, Section I.A.

178. See Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM. & MARY L. REV. 1717 (2016); Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109 (2018).

179. See Jackson, *supra* note 178, at 1758–68; Siegel, *supra* note 178, at 146–54.

successful. Even the same swing voter might deserve mixed reviews: they may, for example, score better than partisans for trying to make government work rather than obstructing, while at the same time extracting district-specific concessions that run contrary to the public good. Evaluating swing legislators, like swing judges, requires a rich descriptive account of how they behave, to be measured against a normative account of how they should behave.

### *E. Majority Rule*

The value of majority rule provides a final way of assessing swing voter power. Majority rule is the most common decisionmaking procedure in legislatures<sup>180</sup> and on multimember courts.<sup>181</sup> Democratic theorists have developed several accounts of majority rule's benefits.<sup>182</sup> If swing voter power were either required by or incompatible with majority rule, that fact would counsel either in favor of or against swing voter power.

Principles of majority rule yield a mixed verdict on swing voter power: swing voter power seems consistent with or even required by majority rule when swing voters join existing blocs on the left or the right, but in tension with majority rule when swing voters force outcomes not favored by other voters.

To see why, imagine a hypothetical swing voter in a body with left and right blocs that makes decisions based on principles of majority rule. The swing voter's preferences are, by definition, distant from those of their nearest neighbors. Each bloc has a first-choice outcome that it strongly supports, and each bloc strongly opposes the other bloc's first-choice outcome. The swing voter has its own first-choice outcome, which is also each bloc's second-choice outcome. The swing voter may be indifferent as between the two blocs' preferred outcomes or

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180. "What it means for a bill to 'pass' the House or Senate . . . is constitutionally fixed by the implicit majority-rule meaning of 'passed.'" Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 83 (1996). Subnational legislative bodies likewise typically operate by majority rule for ordinary legislation, though some require a supermajority for certain types of legislation (such as tax increases). See Kim Rueben & Megan Randall, *Supermajority Budget and Tax Rules: How Voting Requirements Affect Budgets*, URB. INST. (Nov. 2017), [https://urban.org/sites/default/files/publication/94936/supermajority-budget-and-tax-rules\\_5.pdf](https://urban.org/sites/default/files/publication/94936/supermajority-budget-and-tax-rules_5.pdf) [<https://perma.cc/V2CZ-QCBX>].

181. For theoretical treatments, see Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692 (2014) and Guha Krishnamurthi, *For Judicial Majoritarianism*, 22 U. PA. J. CONST. L. 1201 (2020).

182. See, e.g., MAJORITY DECISIONS: PRINCIPLES AND PRACTICES (Jon Elster & Stéphanie Novak eds., 2014); ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 138–44 (1989); Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680 (1952); Mathias Risse, *Arguing for Majority Rule*, 12 J. POL. PHIL. 41 (2004).

(more realistically) may prefer one of the two. Table 1 summarizes these preferences.

TABLE 1: SWING VOTER SITUATED BETWEEN TWO BLOCS  
(UNIDIMENSIONAL PREFERENCES)

	First choice	Second choice	Third choice
<b>Bloc A</b> ( $n$ voters)	Outcome A	Outcome S	Outcome B
<b>Bloc B</b> ( $n$ voters)	Outcome B	Outcome S	Outcome A
<b>Swing voter</b> (1 voter)	Outcome S	Either prefers Outcome A, prefers Outcome B, or is indifferent	

Such a swing voter can plausibly exercise power in either of two ways, depending on the institution's procedures. First, the swing voter can join one of the two blocs, resulting in the body as a whole adopting either Outcome A or B. The swing voter is decisive, but their preferred outcome (Outcome S) does not itself prevail. This result seems compatible with majority rule, if not compelled by it. Whichever outcome the swing voter supports will have the support of  $n+1$  voters (a majority), while the other outcome will have the support of only  $n$  voters (a minority). From the standpoint of majority rule, there is no objection to the swing voter casting the decisive vote for either Outcome A or B.

The analysis changes when the swing voter can compel the body to adopt their preferred outcome (Outcome S) rather than the preferred outcome of a larger bloc (Outcome A or B). In that scenario, an outcome that is the first choice of one voter triumphs over two outcomes that are each the first choice of a larger bloc of  $n$  voters. As the examples in Part II show, swing voters sometimes induce institutions to adopt positions that are the first choice of no other voter.

If we conceptualize majority rule as a simple head count based on pairwise comparisons, then this is what majority rule requires. Outcome S defeats Outcomes A and B in such comparisons. But social choice theory provides reasons to doubt that this is necessarily the best decision rule when more than two options are at play.<sup>183</sup> Pairwise comparisons alone do not account for voters' full preference ordering or intensity. Indeed, under at least one alternative voting procedure used

183. See DENNIS C. MUELLER, PUBLIC CHOICE III 151–52 (2003) (discussing various voting rules).

to implement majority rule, Outcome S could never prevail over the other two outcomes.<sup>184</sup> Majority rule need not require, in short, that the swing voter's preference prevail. To the contrary, rules that allow a swing voter to force the adoption of Outcome S may be viewed as in tension with majority rule, since the preferences of one voter prevail over those of  $n$  voters. And this happens not once but twice: the swing voter's preferred outcome prevails over the preferred outcome of the  $n$  members to their left *and* that of the  $n$  members to their right.

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It is not possible, in sum, to declare swing voters as a universally good or bad feature of multimember decisionmaking bodies. This Part has, however, tried to unearth the values that are at stake in discussions of swing voter power. Any evaluation of swing voters is downstream from a host of thorny empirical and normative issues: the roles of moderation and stability, specific institutional contexts and the role moralities that should govern in those contexts, and principles of majority rule. Tempting as it may be to pronounce judgment on swing voters without settling these other issues, there is no way to judge swing voters in a vacuum.

## V. SWING VOTERS IN A POLARIZED AGE

### *A. Polarization and Congress*

Partisan polarization is a defining feature of contemporary U.S. politics.<sup>185</sup> Congress has witnessed “historic and ever-increasing levels of party polarization in recent decades, with Republican legislators increasingly conservative and Democratic legislators increasingly

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184. Under Hare voting, each voter identifies their first choice among various options, the option identified by the fewest voters as their first choice is eliminated, and this process is repeated as many times as necessary until a single victor emerges. *Id.* at 147. Hare voting gives significant weight to voters' first choices, such that an option that is the first choice of few or no voters cannot prevail. *See id.* at 149–50. I do not endorse Hare voting or any other specific voting rule for courts, legislatures, or other institutions, but the existence of Hare voting shows that principles of majority rule do not straightforwardly require that Outcome S prevail.

185. The large literature on polarization includes SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA (Nathaniel Persily ed., 2015); GOVERNING IN A POLARIZED AGE: ELECTIONS, PARTIES, AND POLITICAL REPRESENTATION IN AMERICA (Alan S. Gerber & Eric Schickler eds., 2016); POLITICAL POLARIZATION IN AMERICAN POLITICS (Daniel J. Hopkins & John Sides eds., 2015); 1 RED AND BLUE NATION? CHARACTERISTICS AND CAUSES OF AMERICA'S POLARIZED POLITICS (Pietro S. Nivola & David W. Brady eds., 2006); 2 RED AND BLUE NATION? CONSEQUENCES AND CORRECTION OF AMERICA'S POLARIZED POLITICS (Pietro S. Nivola & David W. Brady eds., 2008); ROSENFELD, *supra* note 168; BARBARA SINCLAIR, PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING (2006); SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS (2008).

liberal.”<sup>186</sup> Many observers, both inside and outside the academy, have lamented the effects of this polarization on U.S. democracy.<sup>187</sup>

Some might view empowering moderate legislators—including swing voters—as an antidote to this polarization.<sup>188</sup> But this view ignores the context in which legislative swing voters have emerged and exercised power: most notably, the shift from the low polarization of the mid-twentieth century to the high polarization of contemporary politics. As the parties moved leftward and rightward,<sup>189</sup> the few legislators who remained closer to the center of the ideological distribution at times had the chance to play the role of swing voters. Recall that the definition of a swing voter is a pivotal voter with considerable ideological distance from their nearest neighbors. It is no surprise that a decline in the number of centrists overall—the emptying out of the middle of the ideological distribution—created the opportunity for swing voters to emerge.

This analysis allows for tentative predictions about the future of legislative swing voters. Swing voters might well have staying power in Congress, but their existence depends on two political conditions. The first is a relatively even electoral match between the two parties. A defining feature of the Congresses of the late twentieth and early twenty-first centuries is the two parties competing roughly at parity with one another. Changes in party control of the House and Senate have been frequent, and majority parties often have held their chambers only by narrow margins.<sup>190</sup> The second condition is polarization. Both parties face at least as much pressure from the flanks

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186. Daniel J. Moskowitz, Jon C. Rogowski & James M. Snyder, Jr., *Parsing Party Polarization in Congress 1* (July 9, 2019) (unpublished manuscript), <https://scholar.harvard.edu/files/rogowski/files/npat-paper-july2019.pdf> [<https://perma.cc/4NXE-DULX>].

187. *See, e.g.*, Nathaniel Persily, *Introduction* to SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA, *supra* note 185, at 3 (arguing that polarization accounts for “an inability to pass much-needed and widely supported policies” and describing the “separation-of-powers system [a]s uniquely threatened by polarization”).

188. *See, e.g.*, Robin Toner, *Southern Democrats’ Decline Is Eroding the Political Center*, N.Y. TIMES (Nov. 15, 2004), <https://nytimes.com/2004/11/15/politics/southern-democrats-decline-is-eroding-the-political-center.html> [<https://perma.cc/N895-LA3G>]; Pam Belluck, *A G.O.P. Breed Loses Its Place in New England*, N.Y. TIMES (Nov. 27, 2006), <https://nytimes.com/2006/11/27/us/politics/27repubs.html> [<https://perma.cc/PNF3-YPCE>].

189. Polarization is highly asymmetric, however, with Republicans having moved considerably further to the right than Democrats have to the left. *See, e.g.*, Jacob S. Hacker & Paul Pierson, *Confronting Asymmetric Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA, *supra* note 185, at 59–60.

190. *See* MORRIS P. FIORINA, UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING, AND POLITICAL STALEMATE 10 (2017) (noting that in the late twentieth and early twenty-first centuries, “twelve elections have produced six different patterns of majority control of our three national elective institutions,” a degree of instability not witnessed since the nineteenth century); FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 1–5, 15–17 (2016) (discussing the effects of parties that increasingly compete at rough parity with one another).

of their respective caucuses—which have been emboldened in recent years—as they do from their more moderate members.<sup>191</sup> Extreme primary electorates have led to the defeat of some moderate members.<sup>192</sup> Parties still sometimes run more moderate candidates, especially in states or districts that favor the other party,<sup>193</sup> but the number of moderates in Congress is smaller than it once was.

Together, parity and polarization enable the emergence of legislative swing voters. If margins of party control were larger, the pivotal voter might be a loyal partisan—allowing the majority party to enact its agenda without having to rely on a more moderate pivotal voter. Similarly, if there were many moderate members, no single one of them would hold as much power as did Senate swing voters in recent years. Narrow margins of control and few moderates allow swing voters to emerge. There is little evidence that legislative polarization will reverse itself in the near future, but if it does, dynamics around swing voters will change. It is somewhat more likely that the parties stop competing at parity and one party or the other gains a more secure legislative majority. If this were to occur, as it has in many state legislative chambers, swing voters would become less common.

### *B. Polarization and the Supreme Court*

Like Congress, the Supreme Court has witnessed steadily growing polarization. For the first time in U.S. history, every Justice nominated by a Republican president is ideologically to the right of every Justice nominated by a Democratic president.<sup>194</sup> Some have contended that this sort of polarization—and the related phenomenon of a Court without a swing voter—threatens the Court’s legitimacy.<sup>195</sup> So too, as the Court likely turns rightward in the coming years, some progressives might become nostalgic for Justices O’Connor and

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191. See RUTH BLOCH RUBIN, *BUILDING THE BLOC: INTRAPARTY ORGANIZATION IN THE U.S. CONGRESS 225–94* (2017) (discussing the roles of liberal and conservative hardliners in the Democratic and Republican parties, respectively).

192. See David W. Brady, Hahrie Han & Jeremy C. Pope, *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?*, 32 LEGIS. STUD. Q. 79 (2007); Andrew B. Hall, *What Happens When Extremists Win Primaries?*, 109 AM. POL. SCI. REV. 18 (2015).

193. See, e.g., Ella Nilsen & Dylan Scott, *The Silent Majority of Democratic House Freshmen*, VOX (Jan 27, 2019, 10:05 AM EST), <https://vox.com/policy-and-politics/2019/1/23/18183636/congress-2019-new-members-moderates> [https://perma.cc/K73Y-FK8X].

194. See, e.g., Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 301 (“Since 2010 . . . all of the Republican-nominated Justices on the Supreme Court have been to the right of all of its Democratic-nominated Justices. This pattern is . . . unique in the Court’s history. Before 2010, the Court never had clear ideological blocs that coincided with party lines.”).

195. See *supra* notes 158–162 and accompanying text.

Kennedy. While conservative in many respects, the argument will go, at least they were swing voters who at times broke with conservative orthodoxy.

The simplest reason for the lack of a Supreme Court swing voter is that there is not currently a narrow 5–4 division on the Court, leaving little room for Justices to play the type of decisive role that Justices O’Connor and Kennedy once played.<sup>196</sup> But a deeper dynamic is at work as well. The parties’ vetting of judicial nominees has become ever-more sophisticated. In replacing Justices O’Connor and Kennedy, both Republican appointees from the 1980s, Republicans in the early twenty-first century sought to appoint loyal conservatives rather than new swing voters.<sup>197</sup> More broadly, over the past three decades both parties have succeeded in their efforts to nominate and confirm only Justices who will vote in accordance with the party line in most if not all high-profile cases.<sup>198</sup> Unless this changes, there is little reason to think that a new swing voter will emerge on the Court.

The absence of a swing voter on the Supreme Court is especially striking given that the Court’s structure and procedures provide fertile ground for the emergence of powerful swing voters. If one sought to design an institution that was maximally friendly to swing voters, one would likely design something that looks very much like the Supreme Court. The ways in which the institutional design of the Supreme Court stack the deck in favor of swing voters is instructive as to what lessons we should draw from either the presence or the absence of a swing Justice.

For each of the determinants of swing voters’ presence and power described in Part III, the Supreme Court lies on the pro-swing voter side of the ledger. The Court’s composition lends itself to long-term swing voters. With nine members, the Court is smaller than

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196. See *supra* note 13 and accompanying text.

197. See AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 154–55 (2014); Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 10, 2017), <https://newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> [<https://perma.cc/9LP3-XGYT>].

198. See BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 374 (2009) (“Only recently have Presidents become so single-mindedly focused on the ideology of their appointees . . .”). The last appointee to the Supreme Court who regularly voted differently than other Justices appointed by presidents of the same party was Justice David Souter, who was appointed by a Republican president in 1990. Justice Souter’s voting pattern led many Republicans to adopt “no more Souters” as a mantra to guide future appointments. See Linda Greenhouse, *David H. Souter: Justice Unbound*, N.Y. TIMES (May 3, 2009), <https://nytimes.com/2009/05/03/weekinreview/03greenhouse.html> [<https://perma.cc/7CWM-GAEW>]. One result of changes in the appointment process is that most high-profile Supreme Court decisions feature voting patterns that accord with the party of the appointing president. See Devins & Baum, *supra* note 194, at 316–17.

virtually all legislative bodies, many other nations' supreme courts,<sup>199</sup> and all but one of the federal courts of appeals.<sup>200</sup> The Constitution provides for life tenures for federal judges, including Supreme Court Justices,<sup>201</sup> an entitlement that distinguishes the federal judicial system from nearly all state and national high courts.<sup>202</sup> The result of this structure is a remarkable level of stability: the Court has at times gone a full decade without any change in its membership.<sup>203</sup>

When there are changes in the Supreme Court's membership, those changes often do nothing to change the Court's median voter—and therefore do not dislodge a swing voter, if one exists. When one right-of-median Justice replaces another (as occurred in 2005 and 2017) or when one left-of-median Justice replaces another (as occurred in 2009 and 2010), the identity of the Court's median voter does not change. The identity of the median voter only changes when the median voter leaves the Court (as occurred in 2006 and 2018), or if a Justice from one side of the ideological spectrum replaces one from the other (as occurred in 2020). The relative rarity of these sorts of changes allowed swing voters like Justices O'Connor and Kennedy to maintain their status as swing voters for long periods of time.

The Supreme Court's decisional procedures also enhance swing voter power. Unlike many other nations' high courts,<sup>204</sup> the Supreme

199. Despite all but one of the world's democracies being less populous than the United States, many have larger supreme courts. *See, e.g.*, Constitutional Reform Act 2005, pt. 3, § 23(2) (UK), <https://legislation.gov.uk/ukpga/2005/4/part/3> [<https://perma.cc/2XLQ-DSEF>] (twelve judges on the U.K. supreme court); Bundesverfassungsgerichts-Gesetz [BVERFGGE] [Law on the Federal Constitutional Court], Mar. 12 1951, BUNDESGESETZBLATT, TEIL I [BGBl I] at 1473, § 2 (Ger.), <https://germanlawarchive.iuscomp.org/?p=221> [<https://perma.cc/98X7-KHKR>] (sixteen judges on the German supreme court).

200. Admin. Off. of the U.S. Cts., *Chronological History of Authorized Judgeships—Courts of Appeals*, U.S. CTS., <https://uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-courts-appeals> (last visited Dec. 27, 2020) [<https://perma.cc/F8EK-5PAL>].

201. Subject only to the requirement of “good Behaviour.” U.S. CONST. art. III, § 1, cl. 2.

202. In every state except one, state supreme court justices serve a fixed term ranging from six to fourteen years. *See State Supreme Courts*, BALLOTPEdia, [https://ballotpedia.org/State\\_supreme\\_courts](https://ballotpedia.org/State_supreme_courts) (last visited Oct. 1, 2020) [<https://perma.cc/JFT3-E5G4>]. Some state supreme courts have mandatory retirement ages as well. *E.g.*, N.H. CONST., pt. 2, art. 78 (mandatory retirement age of seventy); MASS. CONST. pt. 2, ch. III, art. I (same). Justices on many nations' supreme courts are subject to fixed term lengths, mandatory retirement, or both. *See, e.g.*, Constitución Política de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 08-05-2020, art. 94 (fifteen-year terms); India Const. art. 124, cl. 2 (mandatory retirement at age sixty-five).

203. In the most recent long period of stability, the Court's composition was unchanged from 1994 to 2005. *Justices 1789 to Present*, SUP. CT. OF THE U.S., [https://supremecourt.gov/about/members\\_text.aspx](https://supremecourt.gov/about/members_text.aspx) (last visited Oct. 1, 2020) [<https://perma.cc/XL4Z-AXUQ>].

204. *See supra* note 121 (citing sources).



Court decides cases en banc rather than sitting in panels.<sup>205</sup> Unlike many state supreme courts,<sup>206</sup> the Supreme Court has a policy of discretionary opinion assignment: the most senior Justice in the majority assigns the opinion.<sup>207</sup> And the Supreme Court's *Marks* rule allows an opinion to become the law of the land even if it represents the view of only one Justice.<sup>208</sup> Each of these features of Supreme Court procedure represents a choice. While none were implemented with the intention of empowering swing voters, each has that effect.

The same holds for the lack of any other power center on the Supreme Court to counterbalance a swing voter. Neither the Chief Justice nor any other Justice has the power over agendas or outcomes that a party leader or committee chair has in Congress. The only formal power of the Chief Justice or senior Justice in the majority is the power to assign the majority opinion, but that power is blunted by the fact that a savvy swing voter can condition their joining the majority on their writing the majority opinion. The various other carrots and sticks that party leaders and committee chairs wield in Congress are absent on the Court. Without a competing power center, the swing voter's power is at its height.

These institutional features collectively tilt the playing field in favor of swing voters existing and exercising power on the Supreme Court. When swing voters exist on the Court, then, we should not regard them as natural or as a function only of ideological factors. Instead, they are largely a consequence of the Court's structure and rules. But when the Court lacks a swing voter, as it does now and will likely continue to in the near future, the reason *does* stem from ideological factors. Given the many institutional variables oriented toward creating and empowering swing voters, the current absence of a swing voter on the Court not only reflects the Court's increased polarization—it understates the extent of that polarization. If the Court were structured differently or used different procedures, swing voters might have been less important than they were in recent decades. If swing voter power indeed wanes on the Court, it will be because the realities of polarization have finally caught up with an institutional deck that was long stacked in swing voters' favor.

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205. While the Supreme Court never sits in multi-Justice panels, individual Justices do decide certain issues. See William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015); Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159 (2008).

206. See *supra* note 124.

207. Admin. Off. of the U.S. Cts., *Supreme Court Procedures*, U.S. CTS., <https://uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited Dec. 27, 2020) [<https://perma.cc/BG76-TUGB>].

208. See *supra* notes 125–126 and accompanying text.

## CONCLUSION

More than seven decades ago, a note in a leading law review observed that the swing voter on the Supreme Court received less attention than his more well-known colleagues.<sup>209</sup> No longer. Swing voters dominated public discourse about the Court from the 1970s to the 2010s. Changes in the Court's composition have led some observers to seek to anoint a new swing voter<sup>210</sup> and others to worry about what it would mean for the Court to lack a swing voter altogether.<sup>211</sup> In Congress, swing voters (when they exist) are showered with attention from party leaders and members of the media. They are often viewed as heroes or villains, but rarely in neutral terms. In both courts and legislatures, swing voters garner attention on account of the tremendous power they can exercise—despite their formally having the same voting power as their colleagues.

The public discourse on swing voters has rarely interrogated why they emerge and why they wield power in the first instance. Swing voters are not a fact of nature. They are a function of a certain distribution of preferences among the members of a decisionmaking body. Ideology alone does not explain swing voter power, however. Instead, understanding that power requires close examination of the institutional details that govern how courts and legislatures operate. Even features of institutions that seem unrelated to swing voters, like opinion assignment procedures in courts and amendment rules in legislatures, can shape swing voter power. A study of these and other determinants of swing voter power makes clear how institutional rules of many sorts together construct swing voter power.

Our polarized age will likely witness continued nostalgia for swing voters. This will be especially true among those out of power, who view loyal bloc voting by their ideological adversaries as a sign that something is amiss. But arguments about swing voters are often proxies

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209. See *Mr. Justice Reed — Swing Man or Not?*, *supra* note 38, at 714–15.

210. Following Justice Kennedy's retirement, many commentators began referring to Chief Justice Roberts as the Court's new swing voter. See, e.g., Lawrence Hurley, *U.S. Chief Justice's 'Swing' Role Shown in Census, Gerrymandering Rulings*, REUTERS (June 27, 2019, 5:20 PM), <https://reuters.com/article/us-usa-court-chiefjustice/us-chief-justices-swing-role-shown-in-census-gerrymandering-rulings-idUSKCN1TS3A4> [<https://perma.cc/G8H7-93JC>]; Christopher Ingraham, *Chief Justice John Roberts Is Now the Supreme Court's Swing Vote*, WASH. POST (June 27, 2018, 3:26 PM), <https://washingtonpost.com/news/wonk/wp/2018/06/27/chief-justice-john-roberts-is-now-the-supreme-courts-swing-vote> [<https://perma.cc/P2YQ-VKXV>]; Tom McCarthy, *John Roberts Is Now Supreme Court's Swing Vote—To Conservatives' Disdain*, GUARDIAN (June 30, 2020, 10:58 AM), <https://theguardian.com/law/2020/jun/30/john-roberts-supreme-court-conservatives> [<https://perma.cc/4W4A-L77R>].

211. See *supra* note 160 and accompanying text.

for arguments about something else. Claims about swing voters may in fact be claims about polarization, moderation, or stability in democratic institutions. The presence, absence, or power of swing voters is best understood not as important for its own sake, but rather as a useful window into important features of how our democratic institutions are performing.