REMAKING THE UNITED STATES SUPREME COURT IN THE COURTS' OF APPEALS IMAGE

TRACEY E. GEORGE†

CHRIS GUTHRIE††

ABSTRACT

We argue that Congress should remake the United States Supreme Court in the U.S. courts' of appeals image by increasing the size of the Court's membership, authorizing panel decisionmaking, and retaining an en banc procedure for select cases. In so doing, Congress would expand the Court's capacity to decide cases, facilitating enhanced clarity and consistency in the law as well as heightened monitoring of lower courts and the other branches. Remaking the Court in this way would not only expand the Court's decisionmaking capacity but also improve the Court's composition, competence, and functioning.

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† Professor of Law and Political Science at Vanderbilt University.

†† Professor of Law at Vanderbilt University.

We thank Chief Judge Anthony Scirica, Judge Michael Boudin, Scott Baker, Larry Baum, Jim Brudney, Erwin Chemerinsky, Mitu Gulati, Lawrence Zelenak, and other participants in this Symposium as well as participants in a workshop at the University of Texas School of Law for helpful comments.

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INTRODUCTION

> "[T]he number of cases coming before the Supreme Court grew steadily since 1925, while the number of cases the Court decides has been in steady decline."[1]

> "One of the most striking aspects of the [Supreme Court's] declining plenary docket is that it coincides with an unprecedented expansion in the dockets of the lower courts, particularly the United States Courts of Appeals. While the Supreme Court's plenary docket is approximately half as large in 2004 as it was in 1986, the dockets of the federal circuit courts have increased by 82.4% during that same period."[2]

> "I do think there's room for the court to take more cases. They hear about half the number of cases they did 25 years ago. There may be good reasons for that that I'll learn if I am confirmed but, just

1. Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1368 (2006).

2. David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 965–66 (2007) (book review).

> looking at it from the outside, I think they could contribute more to the clarity and uniformity of the law by taking more cases."[3]

Max Weber is nowhere to be found in the Supreme Court library, but Thorstein Veblen is probably on the shelves. The current Supreme Court—surely among the least active courts in history[4]—has apparently rejected Weber's "protestant work ethic"[5] in favor of Veblen's "conspicuous leisure."[6]

It was not always thus. Historically, the Court decided many more cases—both in absolute terms and as a percentage of its docket—than it has recently. During the 1947 Term, for example, the Court decided 143 cases by written, signed opinion (or roughly 11 percent of its docket); in 1967, it decided 155 cases by written, signed opinion (or just over 4 percent of its docket); and in 1987, the Court decided 151 cases by written, signed opinion (or about 3 percent of its docket).[7] This contrasts with the 2007 Term, in which the Court decided only 72 cases by written, signed opinion which was less than 1 percent of its docket.[8]

Even though it possesses resources unimaginable to its predecessors, including computers, enhanced communication

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3. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 337 (2005) (statement of John G. Roberts Jr.).

4. *See, e.g.*, Richard Brust, *Supreme Court 2.0*, A.B.A. J., Oct. 2008, at 38, 39 (quoting Professor Paul Carrington stating that current Supreme Court Justices "don't have to do too much work" and that the job of a Justice is "no sweat"); Philip D. Oliver, *Increasing the Size of the Court as a Partial but Clearly Constitutional Alternative*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 405, 411, 412 (Roger C. Cramton & Paul D. Carrington eds., 2006) (observing that "the job of justice seems much easier than in the recent past" and describing the position as "cushy").

5. *See* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans., Dover Publ'ns 2003) (1904).

6. *See* THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS 29 (Modern Library 2001) (1899) (describing "conspicuous leisure" as the "abstention from productive work").

7. *See* J. SUP. CT. U.S., Oct. Term 1947, at I; J. SUP. CT. U.S., Oct. Term 1967, at II; J. SUP. CT. U.S., Oct. Term 1987, at II.

8. We use the term "case" in the conventional sense to mean issued decisions, treating each opinion of the Court as one case. In its own statistics, the Court treats opinions that resolve multiple docket numbers as that number of cases. *See Statistics as of June 27, 2008*, J. SUP. CT. U.S., Oct. Term 2007, at II, *available at* http:www.supremecourtus.gov/orders/journal/jnl07.pdf (reporting that 1,614 paid petitions and 6,627 *in forma pauperis* petitions were filed during the October 2007 Term, that it heard argument in seventy-five separate docket-numbered cases, and issued sixty-seven written opinions).

technology, and a bevy of talented clerks,[9] the current Supreme Court decides only a trickle of cases.

In this Article, we argue that Congress should expand the Court's decisionmaking capacity by implementing three features of U.S. court of appeals decisionmaking. First, we argue that the Court should increase its membership so that it is comparable in size to the U.S. courts of appeals, seconding an argument made by others including Professor Jonathan Turley.[10] These courts have around thirteen authorized judgeships per circuit (ranging from six authorized judgeships on the First Circuit to twenty-nine on the Ninth Circuit).[11] Second, as we have argued in a recently published article,[12] the Court should hear most of its cases in panels rather than as a full Court, which could at least double and perhaps even triple the Supreme Court's decisionmaking capacity,[13] while having only a negligible impact on Court outcomes.[14] Third, the Court should retain the authority to grant en banc review in the small fraction of cases that call for the Court to speak as a full body.

By embracing these changes—that is, by increasing the number of Justices on the Supreme Court and by adopting the practice of panel decisionmaking with an en banc procedure available for selected cases—the Supreme Court could expand its decisionmaking capacity dramatically. Expanded decisionmaking capacity, if exercised, offers several benefits, including greater clarity and consistency in the law. And a Court with greater capacity, whether

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9. *See* KERMIT HALL, THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 185 (2d ed. 2005).

10. *See, e.g.*, Jonathan Turley, *Unpacking the Court: The Case for the Expansion of the United States Supreme Court in the Twenty-First Century*, 33 PERSP. ON POL. SCI. 155, 155–56 (2004); *see also* Oliver, *supra* note 4, at 408 (identifying Court expansion as an option if it is impossible to impose term limits on Justices).

11. This figure is the median number of judges, a more representative statistic than the mean in this instance. The mean is skewed by the Ninth Circuit which has twenty-nine judges, twelve more than the next largest circuit. To underscore its unique size among the thirteen circuits, the Ninth continues to grow while the others have not: Congress transferred one judgeship in 2008 from the D.C. Circuit to the Ninth Circuit. Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 509, 121 Stat. 2534, 2543 (2008) (codified at 28 U.S.C. § 44 note (2006)) (transferring a 2008 vacancy on the D.C. Circuit to the Ninth Circuit where it would be available on January 21, 2009). None of the other circuits has added a judge since 1990. Judicial Improvements Act of 1990 § 202, 28 U.S.C. § 44 (2006).

12. Tracey E. George & Chris Guthrie, *"The Threes": Re-imagining Supreme Court Decisionmaking*, 61 VAND. L. REV. 1825 (2008).

13. *Id.* at 1830–31.

14. *Id.* at 1837–47.

exercised or not, also would act as a more reliable check and balance on the other branches. But even if the Court opted not to exercise its expanded capacity and continued to hear only a handful of cases each year, our proposal would offer several other benefits, including a more credible threat of review, a more dynamic Court, and a more representative and diverse membership.

To develop our argument, this Article proceeds as follows. In Part I, we make our case for capacity. We identify three reasons—clarity, consistency, and checks and balances—why the Court should have, and should use, additional decisionmaking capacity. Having made the case for capacity in Part I, we propose in Part II that Congress expand the Court's capacity by adopting a three-pronged approach to decisionmaking: expand the Court's size, adopt panel decisionmaking, and retain limited en banc review. In Part III, we argue that remaking the Court in this fashion will produce other benefits, which, coupled with the prospective capacity gains, trump the concerns this proposal might raise. We conclude with some general observations about Supreme Court decisionmaking.

Our broader goal in this Article, as in our other work on Supreme Court decisionmaking, is to question the Court's "institutional design"—the rules, norms, and other practices that determine how an organization operates.[15] Questioning the Court's institutional design might seem heretical to some Court watchers, but it shouldn't. In contrast to Articles I[16] and II[17] of the Constitution, which describe in some detail how the legislative and executive branches are to function, Article III says almost nothing about the institutional design of the Supreme Court.[18] This constitutional silence

15. Political scientists may use the term "institution" to refer to institutional design as we describe it here. *See, e.g.*, Elinor Ostrom, *Institutional Rational Choice: An Assessment of the Institutional Analysis and Development Framework*, *in* THEORIES OF THE POLICY PROCESS: THEORETICAL LENSES ON PUBLIC POLICY 35, 36–37 (Paul A. Sabatier ed., 1999).

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

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

18. *See id.* art. III, §§ 1–3 (assigning the judicial power to a "Supreme Court" but making no provision as to the qualifications or number of judges for this Court and offering no guidance as to the Court's internal organization or procedures).

gives Congress and the Court license to alter the Court's practices and procedures, and historically, they have taken full advantage. In its early years, the Court's jurisdiction,[19] courtroom practices,[20] size,[21] and composition[22] changed significantly and with some frequency. In recent years, however, the Court's structure and practices have remained largely static, with very few meaningful changes in the Court's design. In rather stark contrast to the historical Supreme Court, the modern Supreme Court has come to seem fixed or untouchable, more like a museum without an acquisition budget than the complex political institution it is.

This stasis has not gone unnoticed. With increasing frequency since the end of the Rehnquist Court, commentators are recommending changes to the Court's institutional design, motivated in no small measure by the Court's stagnation.[23] Among other

19. For a description of the Court's changing jurisdiction, see RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 29–43, 268–73, 1552–56 (5th ed. 2003).

20. For a discussion of one such change—that is, the evolution of oral argument practice—in the Court, see generally DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT 848–60 (4th ed. 2004).

21. The Court's membership has ranged from six to ten Justices. *See* Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73, 73 (six Justices); Act of Feb. 24, 1807, ch. 16, § 5, 2 Stat. 420, 421 (seven); Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176, 176 (nine); Act of Mar. 8, 1863, ch. 100, § 1, 12 Stat. 794, 794 (ten); Judiciary Act of 1866, ch. 210, § 1, 14 Stat. 209, 209 (seven); Act of July 23, 1869, ch. 22, § 1, 16 Stat. 44, 44 (nine). As part of the major reorganization of the federal courts in 1801, Congress decreased the Court's size to five Justices (four Associate Justices and the Chief Justice). Act of Feb. 13, 1801, ch. 4, § 3, 2 Stat. 89, 89. Because the Court had six Justices protected by life tenure at the time of the legislation, the smaller Court size would not take effect until the next Court vacancy; however, the Act was repealed in 1802 before a vacancy had occurred. Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.

22. The qualifications and characteristics of the Justices have changed markedly over time, both demographically (for example, age, race, religion, gender) and professionally (for example, educational experience, judicial experience, political experience). Whereas Justices were once all white, Protestant men, the twenty-first-century Court includes Justices who are African American, female, Catholic, and Jewish. For the backgrounds of the Justices, see LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 263 (4th ed. 2006). At one time, a law degree—any degree—was not a prerequisite for appointment to the Court. But every Justice since 1941 (when President Franklin D. Roosevelt appointed Robert Jackson who had none) has had both undergraduate and law degrees. *See id.* at 291–302 tbl.4-4. Circuit court experience has become a de facto prerequisite. *See* Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333, 1336–40 (2008) (describing the change in the norm of prior federal judicial experience for Supreme Court Justices).

23. *See* REFORMING THE COURT, *supra* note 4 *passim*.

proposals, commentators have advocated mandatory retirement,[24] term limits,[25] "circuit riding,"[26] cameras in the courtroom,[27] alterations in judicial selection procedures,[28] and so on. We applaud these commentators for questioning the Court's institutional design, and in this Article, we attempt to make our own modest contribution to this endeavor by advancing our three-pronged approach to Supreme Court decisionmaking.

The proposal we advance in this Article might seem far-fetched because it challenges a widely held conception of the Supreme Court—nine Justices, sitting together, rendering decisions as a full body. In fact, however, our proposal is quite modest. In contrast to several of the other proposals that have been advanced, ours would not require a constitutional amendment.[29] Moreover, our proposal, again in contrast to several of the others, is consistent both with the Court's own history and with the practices of courts of last resort in other jurisdictions.[30] Thus, as preposterous as it might sound at first blush, the decisionmaking proposal we advance in this Article is not so far-fetched after all.

I. THE CASE FOR CAPACITY

The most striking feature of contemporary Supreme Court jurisprudence is how little of it there is. Originally, the Court, like many other appellate courts, had a mandatory docket.[31] In response to the Court's staggering caseload following the Civil War, Congress

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24. *See, e.g.*, Richard A. Epstein, *Mandatory Retirement for Supreme Court Justices*, *in* REFORMING THE COURT, *supra* note 4, at 415, 427–33.

25. *See id.* at 419.

26. *See, e.g.*, Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1388–89 (2006); David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1712 (2007).

27. *See, e.g.*, Marjorie Cohn, *Let the Sun Shine on the Supreme Court*, 35 HASTINGS CONST. L.Q. 161, 168 (2008).

28. *See, e.g.*, Terri L. Peretti, *Promoting Equity in the Distribution of Supreme Court Appointments*, *in* REFORMING THE COURT, *supra* note 4, at 435, 436 (advocating a guaranteed Supreme Court appointment in each presidential term).

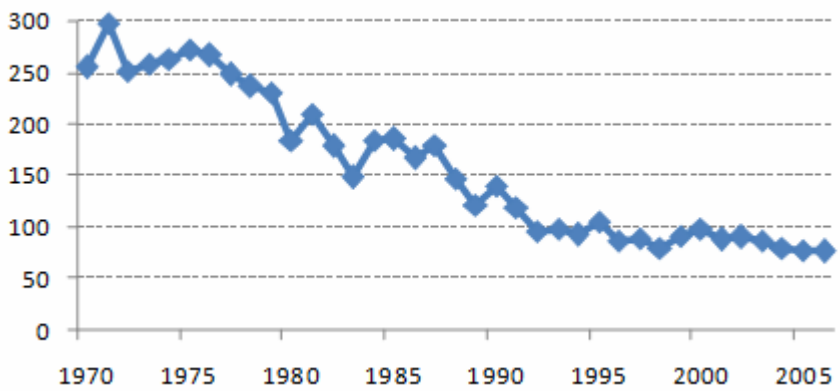
29. Term limits, for example, would be contrary to Article III's provision of life tenure for judges selected for the Supreme Court and inferior courts created pursuant to Article III. *See* U.S. CONST. art. III, § 1, cl. 2.

30. The most obvious examples of such proposals are term limits and mandatory retirement ages (separate, but related proposals). Both directly conflict with Article III's promise of life tenure and thus would require a constitutional amendment. *See id.*

31. *See* FALLON ET AL., *supra* note 19, at 1552–56.

granted the Court discretion over a portion of its docket in 1891.[32] That discretion was substantially expanded in 1925 to a level comparable to that which the Justices enjoy today.[33] For the next twenty-five years, the Court heard a significant number (and percentage) of the cases it was asked to hear: the Court typically heard 112 to 164 cases each year.[34] The Justices were granting 15 to 20 percent of paid petitions during this time (and a much smaller percentage of unpaid petitions), and the percentage of paid cases granted review did not drop below 10 percent until 1968. The Justices continued to hear more than one hundred cases annually until 1992, at which point the Court's decisionmaking output began to dwindle. In the seventies, the Court granted review to more than two hundred cases per term. But after 1992, the Justices granted full plenary review to fewer than one hundred cases, averaging ninety cases annually since that time. From a peak of 299 cases in 1971, the Court heard just over one-quarter as many cases twenty-five years later.[35]

Figure 1. All Cases Reviewed



32. *See* Act of Mar. 3, 1891 (Evarts Act), ch. 517, 26 Stat. 826, 826 (codified as amended at 28 U.S.C. § 1254 (2006)).

33. *See* Act of Feb. 13, 1925, ch. 229, 43 Stat. 936, 936 (codified as amended at 28 U.S.C. § 1257 (2006)).

34. *See* EPSTEIN ET AL., *supra* note 22, at 72–73 tbl.2-5. The range is one standard deviation above and below the average for the period.

35. *Id.* at 74–75 tbl.2-6. The caseload numbers are based on the figures reported by the Administrative Office for the U.S. Courts. For 1926–2004, see *id.* at 72–73 tbl.2-5, 74–75 tbl.2-6. For October Terms 2002–06, see JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 84 tbl.A-1 (2007), *available at* http://www.uscourts.gov/judbus2007/JudicialBusinespdfversion.pdf.

By hearing so few cases, the Court has neglected the many obligations it faces as a coequal branch of government and the pinnacle of the judiciary. To enable the Court to better fulfill those obligations, Congress should provide the Court with more opportunities to conduct review. Expanded decisionmaking capacity would offer several benefits, which we group loosely into three categories: clarity, consistency, and checks and balances.

A. Clarity

Expanded decisionmaking capacity, if exercised by the Court, would promote greater clarity in the law, as Chief Justice Roberts observed during his Senate confirmation hearings.[36] The Court could provide greater clarity in the law in at least two critical ways.

First, if the Court decided more cases, it would correct more errors committed by lower courts. Like all appellate courts, the Supreme Court bears at least some responsibility for monitoring lower court decisions and remedying errors that litigants bring to the Court's attention.[37] Although the Court cannot correct every error, it should strive, at a minimum, to correct those that are so substantial as to "depart[] from the accepted and usual course of judicial proceedings."[38] With expanded decisionmaking capacity, the Court would be able to hear many more cases and remedy many more legal errors, thereby ensuring greater clarity in the law.

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36. *See supra* note 3 and accompanying text.

37. *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 120 (1927).

38. SUP. CT. R. 10(a). We of course are not asserting that the Supreme Court's primary function is as a court of error correction. A single institution, even with panels, could not correct error in the more than thirty thousand cases decided on the merits by the federal courts of appeals and the many more issued by state high courts. *See* DUFF, *supra* note 35, at 113 tbl.B-5 (reporting that the U.S. courts of appeals terminated 31,717 cases on the merits for the one-year period ending September 2007); NAT'L CTR. FOR STATE COURTS, COURT STATISTICS PROJECTS: STATE COURT CASELOAD STATISTICS 47–50 tbl.17 (2007), *available at* http://www.ncsconline.org/D_Research/csp/2006_files/StateCourtCaseloadTables-AppellateCourts.pdf (reporting the total number of dispositions by signed opinion by state for state courts of last resort and, where applicable, state intermediate appellate courts). Instead we are pointing out that the Court does have a responsibility to correct error that undermines the clarity, predictability, and uniformity of national law (as Rule 10 acknowledges). *But see* Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 92 (2006) (arguing that the Supreme Court is not a court of error correction per se).

Second, the Court provides greater clarity in the law not only by deciding cases but also by providing reasons for those decisions. The Court, in other words, is not merely a dispute resolution body—it is also a "reason-giving" body. Through its decisions, the Court explains the law and thereby offers guidance for how future cases should be treated.[39] If the Court decided more cases, it would issue more majority opinions and speak to a wider array of subjects, providing more clarity about the rules that govern citizen behavior.

B. Consistency

With greater capacity, the Court could also produce a more uniform or consistent federal law, as Chief Justice Roberts also noted at his Senate confirmation hearing.[40] The Supreme Court, as the *supreme* judicial body, is responsible for addressing "circuit splits," which arise when two or more courts of appeals interpret the same law differently.[41] As lower federal court dockets have expanded,[42] circuit splits have increased.[43] Over the last twenty years, the Supreme

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

40. *See supra* note 3 and accompanying text. For a discussion of the Supreme Court's responsibility to maintain uniformity in federal law, see, for example, Breyer, *supra* note 38, at 92; Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1405–07 (1987).

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

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

43. *See* George & Solimine, *supra* note 41, at 192, 193 tbl.2 (reporting, based on a random sample of en banc and panel decisions in circuit courts, that 14 out of 71 en banc cases and 34 out of 213 panel cases involved a direct circuit conflict); Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 LAW & SOC'Y REV. 135, 142 (2006) (estimating, as part of a study of the Supreme Court's treatment of cases involving splits, that at least 16 percent of circuit cases from

Court has cited a circuit conflict as the reason for granting review in more than one-third of its cases.[44] Despite the attention given to circuit splits, however, the Roberts Court is unable to address even half of those identified by litigants because the Court hears so few cases.[45]

Circuit splits create uncertainties in the law, lead to outcomes in which similarly situated litigants are treated differently, encourage forum shopping, and cause other problems.[46] Indeed, courts, Congress, and commentators have long worried about circuit splits and have attempted to devise various ways of addressing them, including creating a new court solely for that purpose.[47] Congress

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1985–95 included a split); *see also* Split Circuits, http://splitcircuits.blogspot.com (last visited Feb. 8, 2009) ("tracking developments concerning splits among the federal circuit courts" and demonstrating, in a uniquely modern way, the size of the problem).

44. *See* HAROLD J. SPAETH, THE ORIGINAL UNITED STATES SUPREME COURT JUDICIAL DATABASE, 1953–2005 TERMS (2006). The database begins with the first term of the Warren Court and is continuously updated with a lag to allow for collecting data. *See generally* Harold J. Spaeth & Jeffrey A. Segal, *The U.S. Supreme Court Data Base: Providing New Insights into the Court*, 83 JUDICATURE 228 *passim* (2000) (offering a highly accessible explanation of and guide to the database as part of an issue devoted to publicly available data on the courts). The University of South Carolina Judicial Research Initiative maintains a website from which researchers may download datasets of court cases including the Spaeth Database. Judicial Research Initiative, U.S. Supreme Court Databases, http://www.cas.sc.edu/poli/juri/sctdata.htm (last visited Feb. 8, 2009).

45. *See* George & Solimine, *supra* note 41, at 193 tbl.2 (finding that the Court granted certiorari to less than half of the petitions in their study that demonstrated a direct conflict between circuits, and further finding that this included en banc cases which presumably involve issues of greater importance).

46. *See* PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 3 (1976) (explaining that "appellate courts are needed to announce, clarify, and harmonize the rules of decision employed by the legal system in which they serve"); Baker & McFarland, *supra* note 40, at 1407 (explaining how "discrepancies created by [lack of Supreme Court action] attract strategic and inefficient litigation"); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 544 (1989) (explaining why "a high degree of consistency and predictability in the law is necessary to the successful operation of the legal system").

47. *See Intercircuit Panel of the United States Act: Hearing on S. 704 Before the Subcomm. on Courts of the S. Comm. on the Judiciary*, 99th Cong. 130 (1985) (noting that Chief Justice Burger first suggested the creation of an Intercircuit Panel); COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES, RECOMMENDATIONS FOR CHANGE: A PRELIMINARY REPORT 3–4, 8 (1975) (noting that Congress was considering restricting access to the federal courts to alleviate stress on the judicial system and proposing in the alternative the creation of a new National Court of Appeals to resolve intercircuit conflicts, subject to the review of the Supreme Court). For comparative evaluations of various proposals, see, for example, FED. JUDICIAL CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 75–83 (1993); Thomas E. Baker, *A Generation Spent Studying the United States Courts of Appeals: A*

granted the Court discretion over the majority of its jurisdiction in order to allow the Court to focus on maintaining uniformity of law.[48] If the Supreme Court were able to hear more cases, it could perform this function better, providing greater consistency across the circuits.

Uncertainty is not limited to direct conflicts in circuit decisions, but can involve any ongoing litigation in which there is a significant ground for difference of opinion on a substantial question and where the circuit's incorrect resolution may be costly. The Supreme Court Rules already envision a procedure by which a circuit may seek the Court's input prior to the circuit's resolution of a question. Rule 19 allows a court of appeals to "certify to [the Supreme] Court a question or proposition of law on which it seeks instruction for the proper decision of a case."[49] Congress authorized appellate jurisdiction over questions certified by courts of appeals when it created these intermediate appellate courts in 1891[50] and continued to do so through a century of revisions to the Court's jurisdiction.[51]

Although certification gives Justices the authority to respond to "live" questions from circuit judges, the Justices no longer use that power with any regularity, discouraging circuit certification as they do certiorari petitions by refusing to hear them.[52] This is unfortunate as certification today could be even more valuable than it was a hundred

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Chronology, 34 U.C. DAVIS L. REV. 395, 396 (2000) (analyzing a "long line of studies, committees, commissions" which have addressed the problems facing the federal courts and suggesting various solutions).

48. *See* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1685, 1698 (2000) (recounting the testimony of Justices Taft and Van Devanter to Congress on how the expansion of the Court's discretion over its jurisdiction would increase uniformity of the law).

49. SUP. CT. R. 19(1).

50. Circuit Court of Appeals Act, Ch. 517, § 6, 26 Stat. 826 (1891) (providing that the newly minted circuit courts of appeals "in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision"); *see also* Act of June 25, 1948, Pub. L. No. 773, ch. 81, § 1254, 62 Stat. 869, 928 (codified at 28 U.S.C. § 1254 (2006)) (delineating that "[c]ases in the courts of appeals may be reviewed by the Supreme Court" by either of two methods—the first being a writ of certiorari from a party and the second being "[b]y certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired").

51. *See* 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 1438 (3d ed. 2008) ("It is noteworthy that Congress chose to retain the certification jurisdiction even as it was abolishing virtually all of the appeal jurisdiction.").

52. Technically, the Court refuses to entertain these requests for review in different ways: it dismisses certified questions and refuses to grant certiorari petitions. For a discussion of the history of circuit certification, see Hartnett, *supra* note 48, at 1650–57; Frederick Bernays Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 66 (1954).

years ago when the Supreme Court was more receptive to such requests.[53] As with interlocutory appeals in the courts of appeals, certification allows the Court to address a specific and substantial question that is the subject of meaningful uncertainty, and the Court thereby increases the probability of a correct outcome below.[54] Likewise, the Court may allow for more timely and cost-effective resolution of substantial cases by intervening to answer a limited question prior to the circuit's complete determination of all issues posed by an appeal (and before the possible remand to the trial court). Certification also offers a powerful and credible signal of a new and important question that merits Court resolution. Indeed, Professor Hartnett has argued that the Court has ignored congressional intent to grant circuit courts of appeals some influence over the Court's docket.[55] Expanded capacity could support revisiting the certification mechanism.

C. Checks and Balances

If the Court possessed more decisionmaking capacity, it could also play a more active separation of powers role. Under our constitutional scheme, the Supreme Court (along with the rest of the federal judiciary) comprises a third and ostensibly coequal branch of government, charged with providing a check on the other two branches.[56] Of the three branches, the judiciary is arguably the weakest because it lacks both resources (in contrast to the legislative branch) and enforcement power (in contrast to the executive branch).[57] Relative to the other branches, the Supreme Court also produces little law. During George W. Bush's presidency, Congress

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53. *See* 17A WRIGHT ET AL., *supra* note 51, §§ 1675–76 (reporting that eighty-five certified cases were docketed between 1927 and 1936, but only twenty from 1937 to 1946. Only three certified cases have been docketed in recent years.); Wiener, *supra* note 52, at 66 ("The certificate, once a fruitful source of cases heard by the Court, has dwindled in importance over the years, and recently there has been, on an average, only one certificate per Term.").

54. *See* James William Moore & Allan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 2, 26, 46–49 (1949) (including a detailed accounting of every case involving certification).

55. *See* Hartnett, *supra* note 48, at 1710–12; *see also* Moore & Vestal, *supra* note 54, at 21 (describing certification as "the tool given to the courts of appeals").

56. THE FEDERALIST NO. 51 (James Madison); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

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

passed nearly two thousand public laws.[58] Bush himself contributed more than one-half-million pages to the *Federal Register*,[59] submitted almost 100 treaties to the Senate,[60] and issued close to 300 executive orders.[61] During roughly the same period, the Supreme Court decided fewer than six hundred cases.[62] If the Court's decisionmaking capacities expanded, it could play a much more prominent role in policing the actions of the other branches.

Closely related to its role as a coequal branch of the federal government, the Supreme Court also provides a check on state courts.[63] Indeed, the Supreme Court is the only federal court empowered to review state court interpretations of federal law, including the U.S. Constitution. When it does so, the Court plays an important federalism role because it ensures that state high courts protect the liberties of citizens.[64] With greater decisionmaking capacity, the Court is more likely to review state actions that run afoul of federal interpretations of federal law.

D. Summary

Because it would enable the Supreme Court to play a more active role as a check on the other branches and as the head of the judicial hierarchy, the Court should have, and should use, more decisionmaking capacity. We recognize that some might find the idea of expanded Supreme Court decisionmaking troublesome. Some

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58. *See* Library of Cong.: Thomas, View Public Laws for the 109th Congress,, http://thomas.loc.gov/bss/d109/d109laws.html (last visited Feb. 8, 2009) (noting that public laws "make up most of the laws passed by Congress"); Library of Cong.: Thomas, Search Multiple Congresses, http://thomas.loc.gov/home/multicongress/multicongress.html (last visited Feb. 8, 2009) (providing access to the public laws passed by the 107th through 110th Congress).

59. *See* GPO Access, Federal Register: Simple Search, http://www.gpoaccess.gov/fr/search.html (last visited Feb. 12, 2009). This site is a searchable database of the Federal Register that includes an index from which we calculated the total number of pages published annually from 2001 through 2008.

60. *See* Library of Cong.: Thomas, Treaties, http://thomas.loc.gov/home/treaties/treaties.html (last visited Feb. 8, 2009) (containing treaties that were submitted to the Senate during the 107th through 110th Congress).

61. Nat'l Archives, The Federal Register: Administration of George W. Bush (2001–2009), http://www.archives.gov/federal-register/executive-orders/wbush.html (last visited Feb. 8, 2009).

62. *See* DUFF, *supra* note 35, at 84 tbl.A-1; *supra* Figure 1: All Cases Reviewed.

63. 28 U.S.C. § 1257(a) (2006) (granting the Supreme Court the power to review state high court decisions on federal law).

64. From 1953 through 2006, the Supreme Court decided 1,388 cases appealed from state and territorial courts and reversed more than 70 percent of those lower courts' rulings. *See* SPAETH, *supra* note 44 (providing the raw data from which we draw these figures).

might argue, for example, that the Supreme Court should not play a more active role interpreting or making law because its members are unelected.[65] Likewise, others might object to a more active Supreme Court on ideological grounds, if the Supreme Court's apparent political ideology is significantly more liberal or conservative than theirs.[66]

This concern, though certainly legitimate, is overblown for several reasons. First, as noted in Part II.B,[67] the Supreme Court reaches unanimous or near-unanimous decisions in roughly half of its cases, even given sharp ideological divisions on the Court. This suggests that ideological concerns, though nontrivial, are consequential in a smaller fraction of the Court's docket than the public might imagine. Second, even if the Court heard two, three, or even ten times as many cases as it hears today, its output would still pale in comparison to the law propounded by the other two branches (not to mention all of the lower courts). Third, the Court only takes cases and controversies that are brought to it. Even if it were to address many more matters than it does now, it would still only touch on a limited range of legal issues. Fourth, and finally, the Court does not have money or might, so the other branches provide a kind of ultimate check against any potential abuse of power.

II. PROPOSAL TO EXPAND COURT CAPACITY

To expand the Court's decisionmaking capacity, as advocated in Part I, Congress could adopt any number of reforms, including altering the Court's jurisdiction or imposing workload requirements.

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65. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (2d ed. 1986) (coining the phrase "counter-majoritarian difficulty," which has come to mean the dilemma posed by unelected judges overturning elected policymakers in a democratic regime); *see also* MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 174–76 (1999) (arguing that the Constitution should be taken away from judges and returned to the people to allow for a "populist constitutional law"); Steven G. Calabresi, *The Congressional Roots of Judicial Activism*, 20 J.L. & POL. 577, 588–90 (2004) (advocating for a contraction of Court jurisdiction in order to prevent judicial subrogation of the legislative function); Edwin Meese III & Rhett DeHart, *Reining in the Federal Judiciary*, 80 JUDICATURE 178, 182 (1997) (arguing that Congress should regulate and/or restrict Court jurisdiction to curb judicial policymaking).

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

67. *See infra* notes 105–07 and accompanying text.

We recommend, instead, that Congress expand the Court's capacity by enacting the following measures: First, Congress should expand the size of the Court. Second, Congress should establish panel decisionmaking as the default mode of decisionmaking on the Court. Third, because some cases are arguably so significant as to call for the full Court to speak, Congress should adopt an en banc procedure for selected cases. In short, we argue that Congress should remake the Supreme Court in the U.S. courts' of appeals image.

A. Expand the Court

We first recommend that Congress enact a statute authorizing the Court to expand the size of its membership. More Justices—particularly if they sit in panels, as we advocate in Section B—means many more decisionmaking opportunities for the Supreme Court.

To some, it might seem sacrilegious to suggest that Congress should alter the size of the Court's membership. In fact, however, there is nothing sacrosanct about nine Justices sitting on the Supreme Court. Other high courts have widely varying memberships. For example, the International Court of Justice has fifteen members[68] and the Indian Supreme Court can have twenty-six judges.[69] More tellingly, the U.S. Supreme Court itself has seen its membership change with some regularity. The Court's membership ranged from six Justices in 1789 to ten in 1863.[70] Moreover, for nearly four decades, the Court directed one lone Justice to decide all of the Court's cases during the summer, effectively creating a part-time, one-Justice Supreme Court.[71] And between 1866 and 1891, various members of Congress called for a dramatic expansion of the Supreme Court from nine to fifteen, eighteen, or even twenty-four Justices to respond to crippling caseloads.[72] Although these proposals were unsuccessful,

68. Sonya Brown, *International Court of Justice*, *in* 2 LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 720, 722 (Herbert Kritzer ed., 2002).

69. Jayanth K. Krishnan, *India*, *in* 2 LEGAL SYSTEMS OF THE WORLD, *supra* note 68, at 696 ("The Supreme Court of India is made up of the chief justice and no more than twenty-five other judges appointed by the president.").

70. *See supra* note 21.

71. *See* Ross E. Davies, *The Other Supreme Court*, 31 J. SUPREME CT. HIST. 221, 221 (2006).

72. *See, e.g.*, 10 CONG. REC. 528 (1880) (reflecting Representative Manning's introduction of H.R. No. 3843, 46th Cong. (2d Sess. 1880), to expand the Court and allow for divisional sittings); CONG. GLOBE, 41st Cong., 3d Sess. 214 (1870) (statement of Sen. Trumbull) (noting Edmunds' proposal that the number of Justices be doubled, as an alternative to adding circuit judgeships); CONG. GLOBE, 40th Cong., 3d Sess. 1484 (1869) (statement of the Chief Clerk)

this history suggests that the idea of a dramatically expanded Supreme Court had at least some traction in Congress. And President Franklin Roosevelt clearly believed that a larger Court was feasible, even if the context and means of his plan doomed it.[73]

Despite the variance in the size of the Court's membership in its earlier years, the Court has been frozen at nine Justices since 1869. But since then, the Court has often decided cases with fewer than nine Justices due to vacancies, illnesses, and recusals.[74] Since 1954, in fact, the Court has decided nearly one-quarter of its merits decisions (1,369 cases) without a full complement of Justices.[75]

This history shows that there is nothing inevitable about a nine-Justice high Court and that the administration of justice proceeds apace regardless of the number of sitting Justices. This means that the size of the Court—in contrast to the size of the Senate or the House of Representatives[76]—is truly up for grabs.

1. *Size.* Given that the size of the Court is up for grabs, what number of Justices should sit on the Court? What adjustments, if any, should Congress make to the size of the Court's membership?

One possibility is to reduce the number of Justices. Not long ago, the Court routinely heard about twice as many cases as it hears today,[77] so perhaps Congress should reduce the Court's membership by a similar amount. If five Justices worked at the same pace as their brethren in the 1970s and 1980s, they could decide, at least in theory,

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(recording Drake's motion to amend a judiciary bill by increasing the number of Associate Justices from eight to fourteen); *see also* Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Constitutional Regulation of the Courts*, 78 IND. L.J. 153, 186 (2003) (discussing proposals to divide the size of the Court).

73. Following his landslide reelection in 1936, President Franklin D. Roosevelt proposed a plan to allow him to appoint six additional Justices—one for each Justice over the age of seventy—to the Court. *See* Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1141 (1987) (noting that President Roosevelt veiled his proposal to add six Justices to the Court with a "smokescreen" argument to improve the efficiency of the judicial system).

74. By statute, six Justices constitute a quorum. 28 U.S.C. § 1 (2006); *see also* SUP. CT. R. 4(2) ("Six Members of the Court constitute a quorum.").

75. These calculations are based on an analysis of decisions in the Spaeth Supreme Court Database. (Focusing only on observations in which ANALU=1 and DEC_TYPE=1, 6, or 7, we computed the number of observations in which the vote totaled less than nine.) *See* Harold J. Spaeth, *The Original United States Supreme Court Judicial Database*, http://www.cas.sc.edu/poli/juri/sctdata.htm (last visited Feb. 8, 2009).

76. *See* U.S. CONST. art. I, § 2 (establishing the size of the House of Representatives); *id.* art. I, § 3 (establishing the size of the Senate).

77. *See supra* Part I.

the same number of cases as the current nine-member Court decides. Our goal, however, is not to improve the Court's work ethic; rather, our goal is to expand the Court's capacity to decide cases. Shrinking the Court won't do that.

Another possibility, surely the most likely, is to leave the Court as it is. The Court has had nine members—even if fewer than nine have participated in a large fraction of the Court's decisionmaking[78]—for nearly a century and a half. On the basis of an "if it ain't broke, don't fix it" rationale, some might lobby for the status quo. If nine Justices were to work as diligently as their predecessors appear to have worked, they could easily hear twice as many cases, thereby enabling the Court to better fulfill its obligation as a coequal branch and the top dog of the judiciary. Although we have seen some signs under Chief Justice Roberts that the Court might resolve more merits cases, we doubt that the Court, as presently constituted, will return to its 1970s and 1980s form. Moreover, we believe the Court should decide even more cases—or at least have greater opportunity to decide more cases—so we reject the status quo.

The third possibility, which is the one we embrace, is to expand the size of the Court. But how many Justices should there be? We do not know how to calculate an "optimal" number of Supreme Court Justices, but we can turn to several external criteria to shed light on this question.

First, we could look at the number of circuits. Until recently, the number of Justices was based on this number. As the federal judicial system currently has thirteen circuits, the Court would have thirteen Justices. The original rationale for tying the Court's size to the number of circuits was that the Justices were assigned to sit on the circuit courts. While Justices no longer ride circuit, they do continue to review circuit decisions. And, the number of circuit decisions is correlated roughly with the number of circuits.

Second, we could measure the size of the federal judiciary more directly rather than using the number of circuits as a proxy. We could look to the number of cases resolved on the merits or to the number of judges issuing rulings. Both make sense—the Justices can be perceived as reviewing cases or monitoring judges. In 1929, Congress added a tenth circuit without adding a tenth Justice.[79] And in that

78. *See supra* text accompanying note 74.

79. The D.C. Circuit was still the Court of Appeals of the District of Columbia in 1929. Five years later, Congress reorganized the court as the Court of Appeals for the D.C. Circuit

year, the circuits resolved approximately two thousand cases on the merits.[80] During the last term, that number had risen to more than thirty thousand.[81] If the Court's size expanded with lower court caseload, the number of justices would have to increase by a factor of fifteen to 135, an unworkable number. Moreover, it seems unlikely that each case justifies such weight. We could instead look at the expansion of the circuit bench during that time. The courts of appeals had forty-five active judgeships in 1930,[82] and have 179 today.[83] This four-fold increase is more tenable, but it would produce a Supreme Court larger than the largest court of appeals (the Ninth at twenty-nine).

Third, the size of the individual courts of appeals is relevant. Congress has evaluated, through hearings and special commissions, the proper size for an appeals court. Today, the average circuit has fourteen active judges (plus several senior judges).[84] Perhaps more tellingly, Congress allows circuits with more than fifteen judges to hold "mini" en banc sessions in which eleven judges, rather than all of the circuit's judges, sit on behalf of the full court.[85]

Ultimately, we conclude that Congress should authorize fifteen Supreme Court Justices, retaining the odd number that is useful in collective sittings and allowing for five panels of three. Congress, based on the feedback of numerous commissions and other studies, concluded that fifteen was the tipping point at which mini–en banc should be made an option. We conclude that this is a reasonable number to treat as the maximum workable and it still allows for an

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and the "justices" of the Court of Appeals of the District of Columbia became circuit judges. Act of June 7, 1934, ch. 426, 48 Stat. 926, 926.

80. *See* ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1929, at 8 (1929).

81. *See* DUFF, *supra* note 35, at 113–16 tbl.B-5.

82. *See* Act of June 10, 1930, 46 Stat. 538; *see also* Fed. Judicial Ctr., The U.S. Courts of Appeals and the Federal Judiciary, http://www.fjc.gov/history/home.nsf/autoframe?openform&top=/history/home.nsf/page/courtssitecontent&nav=/history/home.nsf/page/ca_nav&page=/history/home.nsf/page/ca_bdy (last visited Mar. 8, 2009) (follow the hyperlink for each circuit to determine the number of active judgeships in 1930).

83. *See* Admin. Office of the U.S. Courts, U.S. Courts of Appeals: Additional Authorized Judgeships, http://www.uscourts.gov/history/appealsauth.pdf (last visited Feb. 13, 2008).

84. *Id.* (reporting the number of judges per circuit and noting that the mean is 14 and the median is 12.5).

85. *See* 28 U.S.C. § 46(c) (2006) (allowing circuit courts to sit en banc and providing that the en banc court must consist of all active judges unless the circuit exceeds fifteen judges (as set in a separate statute)). The Ninth Circuit has fully implemented this system. 9TH CIR. R. 35-3.

easy division into panels of three. We know of no scientific basis for fifteen—or for nine.[86]

2. *Implementation.* If Congress were to expand the Court from nine Justices to fifteen Justices, as we advocate in Section A.1, it would also have to give some thought to how to implement this change. Authorizing the sitting president at the time to expand the Court by two-thirds would create a political uproar, as President Franklin D. Roosevelt discovered.[87] Moreover, it would not further our secondary goal of smoothing the timing and political composition of Supreme Court appointments.[88] The statutes would create new seats on a rolling basis: if no Justice retired during a congressional term, then a new seat would be added. Every president, then, would be allowed to appoint at least one Justice during each Congress—either into a new seat or a vacated one—until there were fourteen Associate Justices and one Chief Justice.[89] If no Justices retire, then a new seat would be created and the president would fill it. If one or more Justices retire, then no seats would be created but the president would fill the vacated seats. This slower addition of Justices would also allow the Court time to adjust its other rules, norms, and practices to its increasing size; new Justices to gain expertise and knowledge of the Court's workings; and the (interested) public to become accustomed to a larger bench. Finally, it would make the proposal more politically feasible.

B. Embrace Panel Decisionmaking

Adding more Justices by itself might or might not enhance Supreme Court decisionmaking capacity. But when coupled with our second proposed reform—panel decisionmaking[90]—the potential

86. Professor Turley suggests a Court of nineteen, but he does not offer any reason for that specific number. *See* Turley, *supra* note 10, at 158–59.

87. *See* Caldeira, *supra* note 73, at 1140–42.

88. As Professor Bradley Joondeph has argued, the system for appointing justices is flawed in that it "allocate[s] opportunities to influence the policy direction of the Court serendipitously, and this irregularity undermines the Court's legitimacy." *See* Bradley W. Joondeph, *Law, Politics, and the Appointments Process*, 46 SANTA CLARA L. REV. 737, 763 (2006) (book review).

89. Our proposal is similar to one made by Professor Terri Peretti, who has proposed granting every president at least one but no more than two appointments per presidential term. *See* Peretti, *supra* note 28, at 435, 449.

90. When state legislatures consider adopting a divisional or panel system, they generally do so in order to expand the docket of the court of last resort. For example, a 1927 advisory

capacity gains are enormous. If the current, nine-member Supreme Court sat in three-Justice panels rather than en banc, the Court's output could, at least in theory, triple.[91] If a fifteen-member Supreme Court sat in three-Justice panels, the Court's output could, at least in theory, increase by a factor of five. This means that the Court could decide roughly four hundred cases per year rather than seventy-five cases per year without working any harder.

Of course, the Court is not theoretical but practical, and as a practical matter, it is difficult to quantify *exactly* how large an impact expanded membership plus panel decisionmaking might have. Some factors—for example, the increased opinion-writing demands accompanying a panel system—would decrease the capacity gains associated with a move to panels.[92] Other factors—for example, the efficiencies associated with conferring with two colleagues rather than every other member of the Court—could expand the Court's output.[93] Regardless, it seems safe to assume that a larger Court sitting entirely

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commission to the Virginia legislature recommended amending the constitution to allow two divisions of the state's high court, as well as an expansion in its size, to allow the court to hear more cases while continuing to produce "opinions that are worth the writing." REPORT OF THE COMMISSION TO SUGGEST AMENDMENTS TO THE CONSTITUTION TO THE GENERAL ASSEMBLY OF VIRGINIA, H.R. DOC. NO. 2, at ix (1927). Yet, the commission counseled the retention of one court "to promote uniformity of decision and keep each of the judges in touch with all of the decisions of the appellate court."*Id.*; *see also* Susie M. Sharp, *Supreme Courts Sitting in Divisions*, 10 N.C. L. REV. 351, 363–64 (1932) (providing a detailed explanation of states where panel sittings were authorized and noting that in this instance the legislature adopted the advisory commission's recommendations).

91. We propose three-Justice panels for two reasons: (1) a three-judge panel constitutes the smallest odd-numbered, multi-judge panel possible; and (2) the federal judiciary has had great success with three-judge panels on courts of appeals of all sizes and for resolution of special issues by three-judge district courts. We do not propose any change in the selection of cases for review; thus all Justices would vote on certiorari as they currently do. Presumably, the Court would change its Rule of Four to some larger number. *Cf.* John Paul Stevens, *The Lifespan of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 10 (1983) (hypothesizing about the source of the unwritten norm).

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

93. For evidence of the collaborative nature of Supreme Court opinion writing, see, for example, Pamela C. Corley, *Bargaining and Accommodation on the United States Supreme Court*, 90 JUDICATURE 157 (2007). For a discussion of the inefficiencies of en banc panels, see DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 230–32 (1988).

(or even primarily) in panels could dramatically increase the quantity of the Court's decisions.[94]

Panel decisionmaking might seem like a radical idea, but Congress actually considered the possibility of Supreme Court panels as early as 1869,[95] and Representative Van Manning formally offered a bill in Congress in 1880 to address the caseload crisis in the Court at that time.[96] No action was taken on the bill, so Manning offered a new bill in 1881 that would have divided the Court into three-Justice divisions to handle most of its disputes.[97] The Senate Judiciary Committee considered Manning's idea when it sought to restructure the federal judiciary, but the committee majority ultimately recommended creating intermediate appellate courts rather than

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94. We intentionally say "could" rather than "would" for two reasons. First, the Court's docket is almost entirely plenary, and the Justices therefore would not be required to hear more cases than they currently hear. The dynamics of the certiorari process would influence the decision. Second, the Court may not be overburdened. Some scholars and Justices have argued that the Court is not capacity constrained. *See, e.g.*, Tidewater Oil Co. v. United States, 409 U.S. 151, 174–78 (1972) (Douglas, J., dissenting) (claiming that "[w]e are vastly underworked" as reflected in "the vast leisure time we presently have"); William O. Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401, 402–04 (1960) (arguing that he could decide more cases, and presumably still write books, if the Court granted review to more cases). Of course, far greater numbers have made a contrary assertion. *See, e.g.*, WARREN BURGER, YEAR-END REPORT ON THE JUDICIARY 8 (1984); Note, *Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court*, 97 HARV. L. REV. 307, 307 n.5 (1983) (presenting statements from eight of the sitting Justices that the Court was overworked). As we discuss later, panels offer advantages beyond the possibility of resolving larger numbers of cases. That said, we believe expanded capacity is the greatest advantage of our proposal.

95. *See* CONG. GLOBE, 41st Cong., 1st Sess. 208–13 (1869) (recording discussion of Senator George Henry Williams's proposal that Congress increase the number of Justices to eighteen and then divide the Court into two nine-Justice divisions). While other senators expressed support for the idea, at least one supporter doubted that it would be constitutional. *Id.* at 210 (statement of Sen. Thurman) ("[A] court divided into sections, if our Constitution permitted it, would be the very best system . . . ."). The next record of congressional consideration of panels appears in 1876 when Senator Knott suggests "divid[ing] the Supreme Court into divisions of three and giv[ing] each division exclusive jurisdiction over a particular class of cases." 4 CONG. REC. 1126 (1876).

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

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

authorizing Supreme Court panels. But the minority, including the committee chair, supported the establishment of panels on the Supreme Court for all but the most important cases.[98]

In contrast to Congress, which considered but ultimately rejected panel decisionmaking, other countries (and some U.S. states) embraced divisional sittings. Britain, for example, first adopted panel practice for its high court in the Judicature Act of 1875, and the House of Lords and Privy Council continue to sit in divisions.[99] Other common law countries, including Australia, Canada, India, Ireland, and New Zealand, allow their courts of last resort to decide cases in panels. And in the United States, nine state high courts use panels to decide at least some of their cases.[100] In Delaware[101] and Mississippi,[102] for example, three-judge panels act for the full court if the panel is unanimous. If a panelist dissents or the panel proposes to overrule precedent, the high courts in both states rehear the matter en banc.

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98. *See* 21 CONG. REC. 10,219–32 (1890). A leading proponent of Manning's Bill was William M. Evarts, the Chairman of the Judiciary Committee, who fought for the division of the Supreme Court in front of an American Bar Association committee formed specifically to consider the restructuring proposals then under consideration by Congress. *See* Frankfurter, *supra* note 96, at 77. The ABA committee split along the same lines as the Senate Judiciary Committee. *See Remedy for the Delays*, *supra* note 97, at 23, 45. *The American Law Review*, a prominent legal quarterly of the time, came out in support of the panel proposal. *The Supreme Court*, 9 AM. L. REV. 668, 675 (1875). In 1921, when Congress again was considering ways to alleviate the Court's workload, the ABA Committee on Jurisprudence and Law Reform recommended increasing the Court's size to twelve Justices and allowing it to act with as few as six Justices. Everett P. Wheeler, *Report of the Committee on Jurisprudence and Law Reform*, 44 ANN. REP. A.B.A. 384, 391 (1921), *quoted in* Hartnett, *supra* note 48, at 1668.

99. ROSCOE POUND, ORGANIZATION OF COURTS 165 (1940); *United Kingdom*, *in* 4 LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 1695, 1698–99 (Herbert Kritzer ed., 2002).

100. The state high courts that use a subset of judges to decide at least some cases include (with relevant website if available) Alabama, Connecticut (http://www.jud.ct.gov/ystday/orgcourt.html), Delaware (http://courts.delaware.gov/rules/?supremerules.pdf) Massachusetts (http://www.mass.gov/courts/sjc/about-the-court.html), Mississippi (http://www.mssc.state.ms.us/rules/msrulesofcourt/rules_of_appellate_procedure.pdf), Montana (http://courts.mt.gov/supreme/rules/inter_oper.asp), Nebraska, Nevada (http://www.nvsupremecourt.us/info/about/), and Virginia (http://www.courts.state.va.us/scov/cover.htm). Information on Alabama's and Nebraska's practices was obtained by telephone interview with the courts' staffs. Telephone Interview with Celeste W. Sabel, Senior Staff Att'y, Ala. Supreme Court (2007); Telephone Interview with Janice Culver, Deputy Clerk, Neb. Supreme Court (2007). General information on state high courts' structure can be found on the National Center for State Courts interactive website. Nat'l Ctr. for State Courts, Court Statistics Project, http://www.ncsconline.org/D_Research/Ct_Struct/Index.html (last visited Mar. 8, 2009).

101. DEL. SUP. CT. R. 1(e).

102. MISS. R. APP. P. 24.

The fact that panel decisionmaking is common on high courts and that panels almost found a home on the Supreme Court reveals that there is nothing inevitable about en banc decisionmaking on the Court. Nonetheless, we suspect that many Court observers find the prospect of Supreme Court panels troubling. The idea of a panel deciding *Roe v. Wade*[103] or *Bush v. Gore*,[104] as two highly salient examples, might be unsettling to some because of the possibility that the three Justices assigned to those cases might have reached different conclusions than the Court as a whole. If a panel system had been in place in 1973 or 2000, would we live in a world without abortion rights and with *President* Gore? For two reasons, the answer to these questions is "no."

First, as we explain in greater detail in Section C, below, we advocate that the Court retain en banc review for specified cases. Under our proposal, both *Roe v. Wade* and *Bush v. Gore* would qualify (as would similar cases). Thus, truly significant cases—whose properties we identify below—would receive en banc review either initially or following a panel decision, meaning that landmark cases would come out the same way under a panel system as they do under the en banc system.

Second, and more significantly for the run-of-the-mill case, it turns out that randomly assigned panels are likely to produce Court outcomes that essentially mirror those the Court would reach as a whole. We developed this latter argument in our earlier article devoted to panel decisionmaking, so we will dispense with the detailed analysis that leads us to this conclusion. We do want to provide enough detail, however, to support our argument.

As a first approximation, a majority of Justices must agree on the outcome for the Court to issue an opinion, and if a majority agrees, then a majority of panels made up of those Justices would also agree. This fact, in and of itself, suggests that there would be a high degree of consonance between most panels that might be assigned and the en banc Court (assuming, as we do, sincere voting).

As a second approximation, we examined every merits case the Court decided from 1953 to 2007. During this period, the Court decided 6,133 cases.[105] The Court decided many of these cases by a

103. Roe v. Wade, 410 U.S. 113 (1973).

104. Bush v. Gore, 531 U.S. 98 (2000).

105. *See* SPAETH, *supra* note 44 (presenting the data from which we calculate these numbers).

wide margin, either unanimously or with one dissenting Justice.[106] In these cases, *every* potential three-Justice panel that might have been assigned would have reached the same conclusion as the Court as a whole. Because nearly 50 percent of the cases were decided without dissent or with only one dissenting Justice,[107] we know then, based solely on these cases, that a minimum of about half of the Court's cases would have come out the same way if the Court had used a panel system. (And, it turns out, even 7–2, 6–3, and 5–4 decisions are fairly lopsided, resulting in panels reaching the same outcomes as the en banc Court in roughly 92 percent,[108] 77 percent,[109] and 60 percent[110] of cases.)

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

Unanimous	2347 (38.3%)
8–1	492 (8%)
7–2	625 (10.2%)
6–3	908 (14.8%)

106. *See infra* Table 1: U.S. Supreme Court Cases, October Terms 1953–2006.

107. The Court decided 3,042 cases with no or one dissent, or 49.6 percent of all decisions. *Id.*

108. If two Justices dissent, then the probability that three-Justice panels will change the outcome is: Pr(d) = C7,1 / 84 = 7/84 or 8.33 percent. The formula reflects that both dissenting Justices would have to be on a three-Justice panel for it to reach a different outcome than the one reached by the en banc Court. Those two Justices could serve on a three-Justice panel with any one of the seven Justices in the majority. Hence, there are 7 panels, out of the 84 possible panels, that would produce a different outcome.

109. If three Justices dissent, then the probability that a three-Justice panel will change the outcome is: Pr(d) = ((C3,2) * (C6,1) + (C3,3)) / 84 = 19/84 = 22.62%. The formula reflects that a three-Justice panel will support a different outcome if it has two dissenting Justices and one majority Justice or all three dissenting Justices. The possible combinations of two dissent and one majority is the number of combinations of two dissenters out of a pool of three {(C3,2) = 3} times the number of majority Justices {(C6,1) = 6}, or 18 possible panels with two dissenters and one majority Justice. In addition, a panel would change the outcome if all three dissenters were on the panel. Thus, there are 19 panels that would reach a different outcome while 65 would reach the same outcome.

110. If four Justices dissent, then the probability that a three-Justice panel (k = 3) would produce a different outcome is: Pr(d) = $((C_{4,3}) * (C_{5,0}) + (C_{4,2}) * (C_{5,1})) / C_{9,3}$ = ((4 *1) + (6 * 5)) /84 = 34/84 = 17/42 = 40.48%.

5–4	982 (16%)
7–1	153 (2.5%)
6–2	241 (3.9%)
5–3	224 (3.7%)
Other	206 (3.4%)
Total	6133 (100%)

These data show that panel decisionmaking is unlikely to lead to outcomes that differ from those decided en banc, but they do not tell us exactly what percentage of cases would come out the same way under a panel system as under the system currently in place. To calculate such a figure, we examined the vote outcome in every case, and we considered every possible panel that could have been assigned (eighty-four in each case, given nine Supreme Court Justices[111]). We found that 87.4 percent of Supreme Court cases would have come out the same way if decided by a panel as by the Court as a whole.

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

	All Cases	Percentage decided the same way	Number remaining the same
Unanimous	2347	100.0%	2347
8–1	492	100.0%	492
7–2	625	91.7%	573
6–3	908	77.4%	703
5–4	982	59.5%	585
7–1	153	100.0%	153
6–2	241	89.3%	215
5–3	224	71.4%	160

111. *See supra* note 108.

Other	206	87.9%	181
Total	*6133*	*87.4%*	*5363*

This analysis reveals that the Supreme Court would have reached the same result in nearly 90 percent of its prior cases whether it sat as a full Court or in three-Justice panels.[112] Assuming Supreme Court behavior during the past half-century is predictive of Supreme Court behavior in the future, the analysis also suggests that the Court would reach vastly similar results in future cases whether sitting in panels or as a full Court.[113] And, if the Court retained an en banc procedure for selected cases, the fear that panels would produce different decisions from the Court as a whole should dissipate, if not disappear entirely.

C. Retain Limited En Banc Review

By expanding the size of the Court, and by deciding cases in panels, Congress can dramatically increase the decisionmaking capacity of the Court. If the Court retained and exercised the discretion to hear some cases en banc—either in the first instance or on review—it would reduce some of these capacity gains. Nonetheless, we advocate that Congress grant the Court authority to exercise en banc review because some cases, at least some of the time, may call for the Court to speak as a whole.

If Congress deprived the Court of the ability to act as a collective body, the Court might suffer a loss of institutional legitimacy in the eyes of at least some members of the public.[114] Given the Court's lack of enforcement power, its institutional legitimacy is

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

113. The composition of the Court's docket might have changed under a panel system. To the extent that Justices consider the likely outcome if they vote to grant certiorari, the panel system changes a Justice's estimates. For a discussion of the role of such strategic calculations in the certiorari process, see generally Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824, 829–36 (1995) ("While most justices appeared to grant certiorari when they disagreed with the lower court, the extent to which the predicted level of support they would receive on the merits mattered was dependent on whether they would affirm if the case were decided on the merits.").

114. Other countries' high courts act entirely through divisions or panels without an apparent loss in legitimacy. In the United Kingdom, for example, both the Privy Council and the House of Lords hear cases in panels, although panel size may grow in very important cases. *United Kingdom*, *supra* note 99, at 1697–700.

important, at least in those cases involving deeply controversial issues. To give effect to rulings desegregating the public schools,[115] effectively deciding the winner of a presidential election,[116] or prohibiting capital punishment in the states,[117] the Court might need to stand together as a whole, even if the Justices are not fully in agreement with one another.

In thinking about Supreme Court decisionmaking approaches, four possibilities present themselves. The status quo, at one end of the spectrum, calls for the Court to decide all of its cases en banc. As we have indicated here and elsewhere, we reject this decisionmaking approach. At the other end of the spectrum, the Court could decide all of its cases in panels. The advantage of this "mandatory panels" approach is that it would enable the Court to capture all of the capacity gains associated with the move from a small en banc Court to a larger Court deciding in panels. The disadvantage to this approach, however, is that the Court would not have the discretion to decide key cases en banc, which *might* harm the Court's legitimacy (although this does not seem to be a problem in at least some other countries[118]). For this reason, we reject this approach. Two "mixed" approaches to decisionmaking lie between the en banc–only approach at one end of the spectrum and the panels-only approach at the other end of the spectrum. One of these two approaches, the "discretionary panels" approach, calls for the Court to decide most cases en banc but authorizes the Court to decide specified cases in panels. The other approach, the "discretionary en banc" approach, calls for the Court to decide most cases in panels but authorizes the Court to decide cases en banc in those rare instances in which a majority of Justices so orders in response to a party's suggestion or a Justice's recommendation. We recommend that Congress adopt this latter approach, which mirrors decisionmaking on the U.S. courts of appeals,[119] because it expands Court capacity substantially while retaining Court discretion to address unusually significant cases as a full body.

115. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

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

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

118. *See supra* note 114.

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

If Congress enacted the discretionary en banc approach we advocate, when should the Court exercise its discretion to depart from its default approach of panel decisionmaking to hear a case en banc? The Court should—and in our view, would—hear only its most significant cases en banc. The statutory authorization should direct the Court to sit en banc to resolve challenges to the constitutionality of federal statutes, to overturn Court precedent, and to answer other questions of exceptional importance.

Determining what cases are most significant is a matter of some debate, but we believe two types of cases would fall into this category. First, we believe those cases in which the Court exercises judicial review, declaring an act unconstitutional, are among the most significant cases the Court decides.[120] Since 1953, the Court has declared a statute unconstitutional 461 times, or in nearly 8 percent of all cases.[121] Second, it seems likely that the Court would take the position, which is universal in the circuits, that any case in which the Court would overturn precedent is also significant and therefore worthy of en banc consideration.[122] Since 1953, the Court has overturned precedent in only 134 cases or roughly 2 percent of the total number of cases. In light of prior decisions, then, we would expect the Supreme Court to sit en banc in approximately 10 percent of its cases under this discretionary en banc approach.[123] We expect that the two cases we mentioned earlier—*Bush v. Gore* and *Roe v.*

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120. Other countries' high courts have singled out such cases for special treatment. For example, Australia's court of last resort, which generally uses panels, usually sits en banc for cases involving the interpretation of the constitution. High Court of Australia, About the Court: Operation of the Court, http://www.hcourt.gov.au/about_03.html (last visited Feb. 8, 2009).

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

Id.

121. Congress has ordered the courts of appeals to sit en banc when hearing challenges to the constitutionality of certain statutes. *See, e.g.*, Federal Election Campaign Act, 2 U.S.C. § 437 (2006).

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

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

Wade—would have been heard en banc, in one instance because of the political importance (*Bush v. Gore*), and in the other because the constitutionality of a state statute was at issue (*Roe v. Wade*).

Under this approach, the Court should be able to keep an active panel docket while sitting en banc in a handful of important cases. This approach captures most of the efficiency gains of the mandatory panels approach; at the same time, it reduces the likelihood that panels will make decisions that fail to reflect the Court's overall view. And it ensures that the Court chooses to act en banc in controversial or divisive cases.

III. PROPOSAL PROS AND CONS

We have argued that Congress should expand the Supreme Court's decisionmaking capacity by remaking the Court in the image of the U.S. courts of appeals. By expanding the size of the Court, adopting panel decisionmaking, and retaining limited en banc review, Congress would give the Court the opportunity to dramatically expand its output, perhaps increasing the number of cases it decides each year by a factor of five. This increase in decisionmaking capacity would enable the Court to provide a check against the other branches and lower courts, to generate a more understandable and accurate body of law, and to ensure greater consistency in the laws that govern citizens across the country.

The Court has discretion over its docket, so we recognize that it might choose not to use the additional capacity our proposal would make available.[124] In other words, Congress might expand the number of Justices from nine to fifteen and direct the Court to decide cases in panels, but the Court might choose to continue its practice of hearing fewer than one hundred cases per year. We think this unlikely. If the Court made this choice, Congress could require the Court to hear some minimum number of cases. We think this unlikely, too. Regardless, the three-pronged proposal we advance in this Article offers benefits, which we describe in Part III.A, *even if* the Court chooses not to use the extra decisionmaking capacity. Our proposal is

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

not without its flaws, as we acknowledge in Part III.B, but its upsides outweigh its downsides.

A. Potential Benefits

1. *Credible Threat of Review.* The increased decisionmaking capacity afforded by our proposal would arm the Court with a more credible threat of review. Even assuming the Court continued to review only a small number of federal lower court and state high court rulings and congressional and administrative agency decisions, the cost of invalidation by the Court is sufficiently high that it magnifies any increase in the probability of Court action. Thus, increased capacity, even if unused, should incentivize lower courts and the other branches to toe the line, thereby minimizing shirking by the lower courts[125] and overreaching by the other two branches.[126]

2. *Entry and Exit.* Our proposal would have salutary effects on both entry onto the Court and exit from the Court. With respect to the appointment and confirmation process, we would expect significantly fewer conflicts between the executive and legislative branches because in most instances, the stakes would be much lower due to the expanded size of the Court's membership. If each Justice accounted for 6.7 percent of the Court's total decisionmaking rather than 11 percent as at present, each Justice's relative importance would decrease significantly (unless the Court is deadlocked on critical issues of concern to the president and Congress).

For the very same reason—that is, because each Justice would be relatively less important or influential on a larger Court that

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

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

decides most cases in panels—we would expect more Justices to exit the Court in a timely fashion. Rather than calling for term limits or mandatory retirement (both of which likely pose constitutional problems), the simple expansion of the Court membership might address the widespread concerns that multiple commentators have voiced about Justices who simply stay on the Court too long for strategic (or self-important) reasons.

3. *Court Composition.* Because the confirmation stakes would be lower, and because turnover would likely be much higher, the president could take more risks in the appointment process. This, in turn, should lead to a more diverse bench. As of this writing, the bench is overwhelmingly white (88.9 percent), overwhelmingly male (88.9 percent), and overwhelmingly composed of Justices who sat previously on the U.S. courts of appeals (100 percent). We have no objection to whites (both of us are white), men (one of us is male), or prior courts of appeals Justices (alas, neither of us has served in this capacity), but we believe the Court could benefit from more Justices with different demographic characteristics and broader practice backgrounds. To take just one example, we think prior judicial experience is a very valuable attribute for a few of the Justices to possess, but it would also be desirable to have Justices on the Court who have significant experience in private business (Blackmun, for example), the elected branches (Warren and Black, for example), and the executive branch (Taft and Goldberg, for example).

4. *Court Cohesion.* We would also expect the larger Court to be less divided than the smaller Court. First, most cases would be decided by panels, thereby not involving the majority of the Court, preventing fractious decisions between essentially two halves of the Court.

Second, even in en banc cases, the likelihood of a bare-majority outcome would be much lower, as a matter of simple mathematics, on a larger Court than on the current Court. While the Court will continue to hear close cases, both theoretically and empirically the minimum winning coalitions are less likely to occur. This means 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.

5. *Judicial Education.* Finally, even if the Court opted not to exercise its expanded decisionmaking capacity to hear more appeals on its docket, it might use the additional capacity to acquaint itself with the lower courts and trial procedure. The Court could do this in three ways.

First, the Court could play a more active role in its original jurisdiction docket. Under the Constitution, the Court has original jurisdiction "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[127] Only the Court can hear controversies between states.[128] When original jurisdiction cases are brought to the Justices, the Court appoints a special master to conduct the necessary trial work.[129] Instead of proceeding in this fashion in all cases, the Court could play this role by assigning its original jurisdiction cases to a panel or to an individual Justice.

Second, Justices used to sit by designation in some district court cases. In so doing, the Justices could observe firsthand how lower courts interpret and implement higher Court rulings. By renewing this practice, the Justices could again become better acquainted with the courts they monitor.

Third, Justices used to ride circuit to become familiar with the U.S. courts of appeals. This practice has largely died, but by expanding the Court's decisionmaking capacity in the manner we propose in this Article, each individual Justice should have much more opportunity to ride circuit.

By playing a more active role in the Court's original jurisdiction docket, by sitting in district court cases by designation, and by riding circuit, the Justices would learn more about the lower courts they monitor and the trial court procedures they affect. This knowledge, in turn, should enable the Court to make better decisions as it goes

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127. U.S. CONST. art. III, § 2, cl. 2; *see also* 28 U.S.C. §1251(b) (2006) ("The Supreme Court shall have original but not exclusive jurisdiction of: (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; (2) All controversies between the United States and a State; (3) All actions or proceedings by a State against the citizens of another State or against aliens.").

128. 28 U.S.C. § 1251(a).

129. *See* SUP. CT. R. 19 (outlining the procedure for original actions). Neither the statute nor the Court's rules require appointing a special master for hearing evidence in original jurisdiction disputes. But the Court appears to have adopted that practice as reflected in the special master reports filed in every recent original jurisdiction case. *See, e.g.*, Supreme Court of the U.S., Special Master Reports, http://www.supremecourtus.gov/SpecMastRpt/SpecMastRpt.html (last visited Mar. 8, 2009).

about its business. Thus, our three-pronged proposal might ultimately enhance the quality of the Court's decisions.

B. Potential Costs

1. *Legitimacy*. Our proposal raises two potential legitimacy concerns. First, some might question the Court's legitimacy because of its expansion in size; if some find it troubling that the Court includes nine unelected members, they will find it even more disconcerting if the Court were to include fifteen unelected members, as advocated under our proposal.

This legitimacy concern does not trouble us for a couple of reasons. The U.S. courts of appeals have large, unelected memberships, and as far as we can tell, those courts and their decisions have ample legitimacy in the eyes of most members of society. And, as noted above, the expansion of the Supreme Court will erode the power of each individual Justice. Thus, although an expansion will increase the number of unelected officials serving on the high Court, each of them will enjoy less influence than is true at present.

The second legitimacy concern is more troubling. Some might question the Court's legitimacy not because of its expansion in size but because it would, under our proposal, decide most cases in panels. As far as we can tell, however, panel decisionmaking has not undermined the legitimacy of high courts in other countries; high courts in the several states that authorize panel decisionmaking; or the U.S. courts of appeals, which decide most questions of federal law.

2. *Decision Quality*. Under our proposal, three Justices, rather than the Court as a whole, would decide most cases, but the Court as a whole—a group much larger than the current Court—would decide a fraction of cases en banc. Some might worry about the impact of group size on the Court's decisions. Would panels produce inferior decisions because they are made up of three judges rather than nine? Would the en banc Court make inferior decisions because it is made up of fifteen rather than nine? The research on group decisionmaking is mixed, equivocal, and not directly relevant to appellate court decisionmaking. Nonetheless, it suggests that a larger Court might possess some decisionmaking advantages over a smaller Court and vice-versa.

The research indicates that larger groups generally possess what can be considered a "resource" advantage.[130] They often have greater ability, expertise, energy, and diversity than smaller groups.[131] They tend to deliberate longer than smaller groups,[132] and they tend to outperform smaller groups on such tasks as "information-gathering and fact-finding" because such tasks "can be broken down into different components and specific subtasks [can be] allocated to different members of the group."[133]

Smaller groups, on the other hand, tend to have "process" advantages.[134] Because they tend to be less complicated than larger groups,[135] smaller groups tend to possess communication and coordination advantages,[136] to be more cooperative,[137] to be more

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130. *See, e.g.*, MARVIN E. SHAW, GROUP DYNAMICS: THE PSYCHOLOGY OF SMALL GROUP BEHAVIOR 173–74 (3d ed. 1981) (identifying the resource advantages of large groups and the process advantages of small groups and concluding that "whether the [group] performance will become more or less effective as size increases will depend upon the degree to which added resources can be utilized and the degree to which group processes exert negative influence on group output"); Glenn E. Littlepage, *Effects of Group Size and Task Characteristics on Group Performance: A Test of Steiner's Model*, 17 PERS. & SOC. PSYCHOL. BULL. 449, 449 (1991) ("The relationship between group size and group performance shows substantial variability across studies.").

131. *See, e.g.*, SHAW, *supra* note 130, at 173 (observing that "the added resources that are available in larger groups (abilities, knowledge, range of opinions, etc.) contribute to effective group performance" and that larger groups "tend to be more diverse"); John M. Levine & Richard L. Moreland, *Small Groups*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 415, 422 (Daniel T. Gilbert et al. eds., 1998) ("As a group grows larger, it has access to more resources (e.g., the time, energy, and expertise of its members), so its performance ought to improve."); Richard L. Moreland et al., *Creating the Ideal Group: Composition Effects at Work*, *in* UNDERSTANDING SMALL GROUP BEHAVIOR: SMALL GROUP PROCESSES AND INTERPERSONAL RELATIONS 11, 13 (E.H. Witte & J.H. Davis eds., 1996) (observing that larger groups "often perform better because they have access to more resources, including time, energy, money, and expertise").

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

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

134. *See supra* note 130.

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

136. *See, e.g.*, Levine & Moreland, *supra* note 131, at 422 (observing that "in larger groups, coordination losses are also more likely"); Moreland et al., *supra* note 131, at 13 (observing that larger groups "often experience coordination problems that can interfere with their performance").

137. *See, e.g.*, Axel Franzen, *Group Size Effects in Social Dilemmas: A Review of the Experimental Literature and Some New Results for One-Shot N-PD Games*, *in* SOCIAL

cohesive,[138] to avoid such problems as "social loafing" and free-riding among some group members,[139] and to reach outcomes more expeditiously.[140] Smaller groups, in short, tend to be more "effective at using information to come to a decision."[141]

Collectively, the research suggests that our proposal might position the Court to take advantage of both smaller and larger group dynamics. Smaller groups appear to possess decisionmaking *process* advantages. Under our proposal, most Court business would be conducted in panels, allowing the Court to take advantage of this decisionmaking edge. Large groups appear to possess *resource* advantages, which might provide for a richer, if more complicated, decision environment. Under our proposal, the Court would retain discretion to decide important cases en banc, allowing the full resources of the Court as a whole to be brought to bear on these particularly significant issues.[142]

3. *Induced Certiorari.* Another potential concern is that our panel proposal might induce losing litigants to appeal. If the Court's decisionmaking capacity expands by a factor of five, losing litigants

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DILEMMAS AND COOPERATION 117, 117, 132 (Ulrich Schulz et al. eds., 1994) (observing that it is "common knowledge in the social sciences that large groups show less cooperative behavior than small groups," but finding, based on prisoner's dilemma experiments, that this is true in repeat play games only); Moreland et al., *supra* note 131, at 14 ("There is more conflict among the members of larger groups, who are less likely to cooperate with one another." (citations omitted)).

138. *See, e.g.*, PENNINGTON, *supra* note 133, at 79 ("Larger groups, of say seven or more, do have a tendency to break down into smaller subgroups.").

139. *See, e.g.*, *id.* at 56–68 (observing that social loafing is more likely to be a problem as group size increases); Steven J. Karau & Kipling D. Williams, *Social Loafing: A Meta-Analytic Review and Theoretical Integration*, 65 J. PERS. & SOC. PSYCHOL. 681, 700–02 (1993) (finding, using meta-analytic techniques, a positive correlation between group size and social loafing and noting various factors that can dampen it); Levine & Moreland, *supra* note 131, at 422 (noting that "motivation losses due to social loafing, free riding, and efforts to avoid exploitation" are more likely in larger groups).

140. *See, e.g.*, PENNINGTON, *supra* note 133, at 79 ("Research shows that smaller groups, of between three and eight, are faster at completing tasks than are larger groups of 12 or more members.").

141. *Id.*

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

might estimate that the prospect that the Court will grant their cert petitions will also rise by a factor of five. In other words, a litigant's probability of obtaining review by the Court rises. Because many losing litigants will perceive this in the same way, this could lead to a significant increase in cert petitions. In the same way that building more roads can induce more traffic, creating more opportunities for Supreme Court review might induce more cert petitions.[143]

CONCLUSION

In this Article, we elaborate on our earlier work on Supreme Court decisionmaking by making three specific proposals. First, we argue that Congress should expand the Court so that it includes fifteen Justices. Second, we recommend that Congress adopt panel decisionmaking as the norm on the Supreme Court. Third, we recommend that Congress grant the Court discretionary en banc review according to which the Court can hear selected, significant cases en banc. This three-pronged approach, if embraced by Congress, would enable the Court to hear many more cases and thereby better fulfill its varied roles. Moreover, the proposal offers a number of benefits separate and apart from those associated with increased decisionmaking capacity, and collectively, these advantages outweigh the modest disadvantages associated with the proposal. Thus, we end where we began: Congress should remake the Supreme Court in the courts' of appeals image.

143. For an analysis of induced litigation more generally, see Tracey E. George & Chris Guthrie, *Induced Litigation*, 98 NW. U. L. REV. 545 (2004).