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## ESSAY

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### REFRAMING THE CONFIRMATION DEBATE

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ADAM FELDMAN†

#### INTRODUCTION

The Supreme Court is home to nine Justices. Over the past one hundred and fifty years, there has been no variation in this number, except due to vacancies caused by death or retirement. Therefore, people have had little reason to believe that there is any flexibility in this arrangement. But nothing in the Constitution fixes the Supreme Court at this size. In fact, the size was set to seven Justices in 1866.<sup>1</sup> It was placed at ten in 1863.<sup>2</sup> Thus, the number of seats can be quite malleable.<sup>3</sup> It was not until 1869 that Congress set the size to the nine seats that we are accustomed to today.<sup>4</sup>

During the recent Supreme Court vacancy—caused by the death of Justice Antonin Scalia—and the ensuing unwillingness of the Senate to hold confirmation hearings, the issue of the Supreme Court’s size, and the duties (if any) of the other branches of the federal government to maintain its size, have come under intense scrutiny. The role of partisan politics in the Senate’s seemingly intransigent position not to hold confirmation hearings during the remainder of President Obama’s presidency exacerbates this public debate.

This Essay seeks to reframe the current debate from whether or not the Senate should be obligated to hold confirmation hearings without delay to why immediate confirmation hearings are so important for some and such an

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† Ph.D. Candidate in Law and Political Science, University of Southern California; Postdoctoral Fellow in the Empirical Study of Public Law, Columbia University Law School. I would like to thank Eric Segall for helpful comments on an earlier draft of this Essay.

<sup>1</sup> Judicial Circuits Act of 1866, 14 Stat. 209.

<sup>2</sup> Tenth Circuit Act of 1863, 12 Stat. 794.

<sup>3</sup> See generally, e.g., William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt’s “Court-Packing” Plan*, 1966 SUP. CT. REV. 347 (detailing the history behind President Roosevelt’s efforts to increase the size of the Supreme Court beyond nine Justices).

<sup>4</sup> Circuit Judges Act of 1869, 16 Stat. 44.

anathema to others. It does so by looking at how a Supreme Court of nine helps the Court fulfill its constitutional duties while also considering how nine Justices may actually thwart the Court's objectives. This Essay proceeds by examining how ideological polarization among the Justices, and not the Court's size, is the source of current (and past) tension. It also examines how the orientation and effect of the current polarization are antithetical to a well-functioning Supreme Court.

### I. WHY NINE?

Article III of the United States Constitution vests the judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>5</sup> It also lays the groundwork for the situations that warrant federal court review.<sup>6</sup> The Constitution, however, says nothing about the goals of Supreme Court adjudication.

To locate the foundation undergirding these goals in early American history, we can turn to Federalist Number 78. There, Alexander Hamilton explained:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.<sup>7</sup>

The Court's role in constitutional and statutory interpretation was of such importance to the Framers that they introduced specific safeguards into federal judgeships, such as life tenure and a guaranteed salary,<sup>8</sup> to assure that the Justices' decisions would not easily be swayed by extrinsic forces. Accordingly, Hamilton wrote:

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.<sup>9</sup>

From these statements and not from the Constitution itself, the original purpose behind the Supreme Court is set forth: maintaining the letter of the law in accordance with the Constitution.

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<sup>5</sup> U.S. CONST. art. III, § 1.

<sup>6</sup> *See id.* § 2 (providing the cases and controversies to which "[t]he judicial Power shall extend").

<sup>7</sup> THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>8</sup> *See* U.S. CONST. art. III, § 1 (providing that federal judges "shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office").

<sup>9</sup> THE FEDERALIST NO. 78, at 470-71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The goal of the Court is also conveyed in some of its most well-known cases.<sup>10</sup> Some of these historic precedents were laid down by non-nine-member Courts. The Marshall Court that decided *Marbury v. Madison*, for instance, was composed of only six Justices.<sup>11</sup>

The public dilemma regarding the size of the Court was not present in the nation's early history. Part of the reason for this had to do with the size of the Court evolving with the country's needs—the size of the early Supreme Court mimicked the number of geographic judicial circuits, so that each circuit would have its own judicial representatives.<sup>12</sup> Intra-Court ideological friction had yet to insinuate itself into the public discourse surrounding the Court, and the rule of law was at least publicly seen as the guidepost of jurisprudence.<sup>13</sup> Whether this was an accurate precept or not, there was little to challenge the sensibility that the decisions of the Supreme Court were steeped predominately in legal interpretation. But ideology soon became associated with legal decisionmaking. Professor Llewellyn, for instance, observed that the ideology of capitalism dictated American law in the early twentieth century.<sup>14</sup> Not long after, C. Herman Pritchett differentiated Supreme Court Justices' preferences along the liberal-conservative ideological continuum.<sup>15</sup>

The key point identified by judicial scholars—even by the mid-twentieth century—was that Supreme Court Justices' views accorded with those of the political elites.<sup>16</sup> Scholars realized that appointing Presidents and incumbent Congresses had strong influences on Supreme Court Justices' decisionmaking.<sup>17</sup>

<sup>10</sup> See, e.g., *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.”); see also *United States v. Nixon*, 418 U.S. 683, 703 (1974) (noting that “[m]any decisions of [the] Court . . . have unequivocally reaffirmed the holding of *Marbury* . . . that ‘[i]t is emphatically the province and duty of the judicial department to say what the law is’” (fifth alteration in original)).

<sup>11</sup> The members of this Court included Chief Justice Marshall and Justices Cushing, Paterson, Chase, Washington, and Moore.

<sup>12</sup> See Sandra Day O'Connor, Foreword, *The Changing Role of the Circuit Justice*, 17 U. TOL. L. REV. 521, 521-23 (1986) (detailing the history of Supreme Court Justices riding circuit).

<sup>13</sup> Roscoe Pound, *Theories of Law*, 22 YALE L.J. 114, 126 (1912) (“[T]he obligation of a rule of law and the obligation of a moral rule, in this view, are essentially the same. In each case there is an obligation resting upon reason, in that reason shows us the dictates of right and justice.”).

<sup>14</sup> See K.N. Llewellyn, *On Philosophy in American Law*, 82 U. PA. L. REV. 205, 207-08 (1934) (arguing that “the Business Man took hold of the ideology of America,” and it was this ideology that “underlay the private law between 1870 and, say, 1900”).

<sup>15</sup> See generally C. Herman Pritchett, *Justice Holmes and a Liberal Court*, 24 VA. Q. REV. 43 (1948).

<sup>16</sup> See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 294 (1957) (describing how the views of the Supreme Court Justices almost always align with those of the “dominant [national] alliance”).

<sup>17</sup> See Lee Epstein & Eric A. Posner, *Supreme Court Justices' Loyalty to the President* 26 (December 10, 2015) (unpublished manuscript), <http://ssrn.com/abstract=2702144> [<https://perma.cc/6V9Y-JKHR>] (concluding that “Justices are more like[ly] to vote in favor of the government of the president who appointed them than later governments, even after controlling for ideological and other relevant factors”).

Although the Supreme Court might have survived with an even number of Justices if the Justices were not clearly politically motivated, an even number of Justices is not tenable on a Court influenced by political preferences.<sup>18</sup> How could the Supreme Court come to any conclusion on impactful, substantive issues when the Justices are evenly divided between political viewpoints?

## II. PROBLEMS WITH EIGHT, PROBLEMS WITH NINE

Was the solution to a divided Court an odd number of Justices? Although Supreme Court Justices have policy preferences, they are not so obtuse as to flout them in the public domain. Strategic judicial theory helps to fill this void by providing an explanation for how preferences balance out with tactical decisionmaking.<sup>19</sup>

While an odd number of Justices puts a clear stopgap on indecision, it also puts a premium on the tie-breaking vote. Although decisive outcomes became inevitable with an odd number of Justices, the power of the tie-breaking vote did not immediately become an object of inquiry. The idea of the median Justice as a powerful member of the Court became a focal topic of discussion many years after the decision to set the Supreme Court's size at nine Justices.<sup>20</sup> Although a Court evenly divided across the ideological spectrum creates an obvious concern of stalemates, an odd number of Justices will not detract from the effect of ideology on the Justices' decisions and may merely enhance the median Justice's power (which does not exist on an eight-member Court) to decide cases based on ideological preferences.

There is vast power in a tie-breaking vote, especially when the vote favors one political direction or the other. A balance of Justices on the liberal side of the ideological spectrum helped the Warren Court to reach groundbreaking decisions, from deconstructing the doctrine of separate but equal,<sup>21</sup> to providing increased procedural rights to the criminally accused.<sup>22</sup> The shift

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<sup>18</sup> Cf. Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1186 (2004) (describing "the Court's often confounding ideological equipoise on many issues").

<sup>19</sup> See Samuel Krislov, *Theoretical Attempts at Predicting Judicial Behavior*, 79 HARV. L. REV. 1573, 1577-78 (1966) (describing the application of game theoretic models to the study of judicial behavior to better understand the judicial bargaining process).

<sup>20</sup> See Glendon Schubert, *Judicial Attitudes and Voting Behavior: The 1961 Term of the United States Supreme Court*, 28 LAW & CONTEMP. PROBS., WINTER 1963, at 100, 140 (1963) (factoring the median Justice into decision-related calculations).

<sup>21</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that "[s]eparate educational facilities are inherently unequal").

<sup>22</sup> See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding, 5-4, that "the prosecution [in a criminal case] may not use statements, whether exculpatory or inculpatory, stemming from

in the Court's ideological and partisan balance under Chief Justice Burger and later under Chief Justices Rehnquist and Roberts led to retreats from the doctrines laid down by the Warren Court.<sup>23</sup>

From the Warren Court on, the perceived political preferences of the Justices highly correlated with their voting patterns.<sup>24</sup> The ideological median of the Court became identified as the Justice with the most decisionmaking power.<sup>25</sup> With all of the rhetoric and scholarship that has tracked the political balance of the Court over the past half-century or more, there is a general silence about its role in the current confirmation crisis.

With an even number of Justices, divided along the ideological spectrum, the Court has been unable to decide on three of the most controversial cases of the 2015 Supreme Court Term. In a sense, the Court has been unable to fulfill its duty to interpret the Constitution and clarify the law according to constitutional strictures for the rest of the country.

In *Zubik v. Burwell*, the Court was asked to review challenges to the Affordable Care Act, based on the Religious Freedom Restoration Act.<sup>26</sup> Even with a prior ruling upholding corporate religious rights to bypass certain healthcare guarantees under the Act in *Burwell v. Hobby Lobby Stores*<sup>27</sup>—which was decided when Justice Scalia was still alive, a Court composed of eight Justices in *Zubik* was unable to reach a decision and instead remanded the case to the lower courts for further review.<sup>28</sup>

In a second case with implications for a large swath of the country's population, *Friedrichs v. California Teachers Ass'n*, the Court divided evenly on the question of whether non-union employees could opt out of paying public union dues if they are based on agency shop arrangements.<sup>29</sup> The Court, with only eight Justices, again failed to reach a conclusion.

Finally, in a third case with far-reaching implications, the Justices were evenly deadlocked on reaching a decision in *United States v. Texas*.<sup>30</sup> As a result

custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination”).

<sup>23</sup> See, e.g., *United States v. Leon*, 468 U.S. 897, 922-25 (1984) (establishing a good faith exception to the Fourth Amendment exclusionary rule).

<sup>24</sup> See Epstein & Posner, *supra* note 17, at 2 (noting that “numerous studies have established that Supreme Court justices engage in ideological voting”).

<sup>25</sup> See Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle*, WASH. POST (May 13, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/12/AR2007051201586.html> [<https://perma.cc/DN45-DSS3>] (noting that “[b]ecause the court so far has shown itself to be strikingly—and evenly—divided on ideological issues, Kennedy holds enormous power in pivoting between the left and right . . . He stands alone in the middle—and that enhances his importance.”).

<sup>26</sup> 135 S. Ct. 1557, 1559 (2016) (per curiam).

<sup>27</sup> 134 S. Ct. 2751 (2014).

<sup>28</sup> *Zubik*, 135 S. Ct. at 1560.

<sup>29</sup> 136 S. Ct. 1083 (2016) (mem.).

<sup>30</sup> 136 S. Ct. 2271, 2272 (2016) (mem.).

of their indecision, the lower court's opinion denying President Obama's amnesty plan for certain immigrant aliens was upheld.<sup>31</sup> In all of these decisions, there is no *stare decisis* laid down for lower courts to follow. While it is unlikely that the Court would remand these cases with nine Justices after granting certiorari, this is exactly what happened with eight.

The eight Justices on the Supreme Court without Justice Scalia are not only known to split along ideological lines, but their preferences also correlate with the political persuasions of their respective appointing Presidents.<sup>32</sup> This clear division perpetuates the public's fear that the Justices will be unable to reach consensus due to the inherent fragmentation in their voting decisions.<sup>33</sup> This fracture and delay has also catalyzed the oftentimes publicly silent Justices into commenting on and criticizing the Senate's failure to hold confirmation hearings for a ninth Justice.<sup>34</sup>

On a positive note, in an effort to reach consensus and avoid more stalemates on the eight-member Court, the Justices were forced to find points of unity that extended beyond their normal voting coalitions. We see this in instances such as the shared dissents between the often opposed Justices Sotomayor and Thomas. The two Justices dissented as many times together during the 2015 Term (four times) as they have in all prior terms where they sat on the Court together combined.<sup>35</sup>

Still, notwithstanding the benefits of increased collegiality, the eight-member Supreme Court has been unable to resolve many cases that would clearly benefit from adjudication, as detailed above, due to the Court's even number of Justices. A question thus arises: does the Court require nine Justices to prevent these even divisions? By this point it should be clear that any odd numbered amalgamation of Justices should overcome judicial stalemates. Cases in the lower appellate courts are routinely decided by panels composed of three judges.<sup>36</sup> Additionally, history has shown that an odd number of Justices will lead to decisive outcomes and will help fulfill the Court's role as arbiter of the law according to the Constitution.

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<sup>31</sup> *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

<sup>32</sup> See generally Epstein & Posner, *supra* note 17.

<sup>33</sup> See, e.g., Jess Bravin, *Divided Supreme Court Lurches to Term's End*, WALL ST. J. (June 19, 2016), <http://www.wsj.com/articles/divided-supreme-court-lurches-to-terms-end-1466328601> (noting that the Court "apparently sees little purpose in taking cases for the next term that might also deadlock").

<sup>34</sup> See Ariane de Vogue, *Supreme Court Justice Ruth Bader Ginsburg: 8 Is Not a Good Number*, CNN POLITICS (May 26, 2016), <http://www.cnn.com/2016/05/26/politics/ruth-bader-ginsburg-eight-justices/> [<https://perma.cc/PW5D-L2YT>] (quoting Justice Ginsburg saying eight justices "is not a good number for a multi-member court").

<sup>35</sup> Adam Feldman, *Odd Couples (and Trios)*, EMPIRICAL SCOTUS (June 20, 2016), <https://empiricalscotus.com/2016/06/20/odd-couples/> [<https://perma.cc/Y7T3-QXD7>].

<sup>36</sup> See 28 U.S.C. § 46(b) (1982) (setting the number of circuit judges on a panel at three).

The trouble with an odd-numbered Court is that, while issues are more easily resolved in such a setting, they may be resolved according to extra-judicial, political factors stemming from the polarization of the Justices' views. That is, Justices can vote based on their political ideology, with the dominant view at the time controlling the outcome of the case. Thus, an odd number of Justices may create a new predicament while solving another. We are forced to decide whether it is better to have a Court with outcomes hinging on political motivations, or to leave the divisions in the laws unresolved and create variation between federal geographic circuits.

### III. THE SWING JUSTICE'S COURT

So what is the real impetus behind the conversation about the ensuing but stalled confirmation hearings? It is not about the flaws in the political process but about the ideological balance of judicial decisionmaking.

In close decisions, especially those that affect public policy, dissenting Justices oftentimes accuse the majority of usurping power from the other branches of government. This is apparent in Justice Breyer's dissent in *Bush v. Gore*, a case that effectively decided the outcome of a Presidential election:

However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court.<sup>37</sup>

It is also evident in Justice Scalia's dissent in *Obergefell v. Hodges*, decrying the constitutionalization of marriage equality:

This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.<sup>38</sup>

Justices Scalia and Breyer traditionally take positions on opposite ends of the ideological spectrum, and yet they sound remarkably similar in their separate accounts of a majority of the Court playing policymaker. Both of these cases were 5–4 decisions, and both saw the more liberal Justices voting together in one direction and the more conservative Justices voting together in the other.<sup>39</sup> And while the majority opinion author in *Bush v. Gore* is

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<sup>37</sup> 531 U.S. 98, 155 (2000) (Breyer, J. dissenting).

<sup>38</sup> 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting).

<sup>39</sup> Although *Bush v. Gore* was an unsigned per curiam opinion, the dissents from the four more liberal Justices—Stevens, Souter, Ginsburg, and Breyer—betray who comprised the five Justices in the majority.

unclear, the swing Justice of the most recent Court, Justice Kennedy, wrote the majority opinion in *Obergefell*.

In fact, it is Justice Kennedy's vote that has often dictated whether the conservative or liberal position wins out in close cases.<sup>40</sup> This places the power to define the direction of Supreme Court precedent in Justice Kennedy's hands, especially in some of the most significant and contentious cases.<sup>41</sup>

The problem that the Court faces with nine Justices is similar to the problem it faces with eight Justices, although the effects are different. When Justice Scalia was still a member of the Court, four Justices tended to vote in the liberal direction (Justices Ginsburg, Breyer, Sotomayor, and Kagan) and four tended to vote in the conservative direction (Chief Justice Roberts and Justices Scalia, Thomas, and Alito). This created a vacuum of power for the swing Justice, Justice Kennedy, to usurp, causing his vote to often be decisive.<sup>42</sup>

Justice Kennedy's ability to shape the Court's opinions is further accentuated by the number of majority opinions he wrote in 5–4 cases compared to all other Justices during this period. Majority opinion assignment in close cases can be offered in exchange for a vote in a certain direction.<sup>43</sup> The figure below shows the breakdown, by opinion author, of the 183 signed 5–4 decisions from 2005–2014.

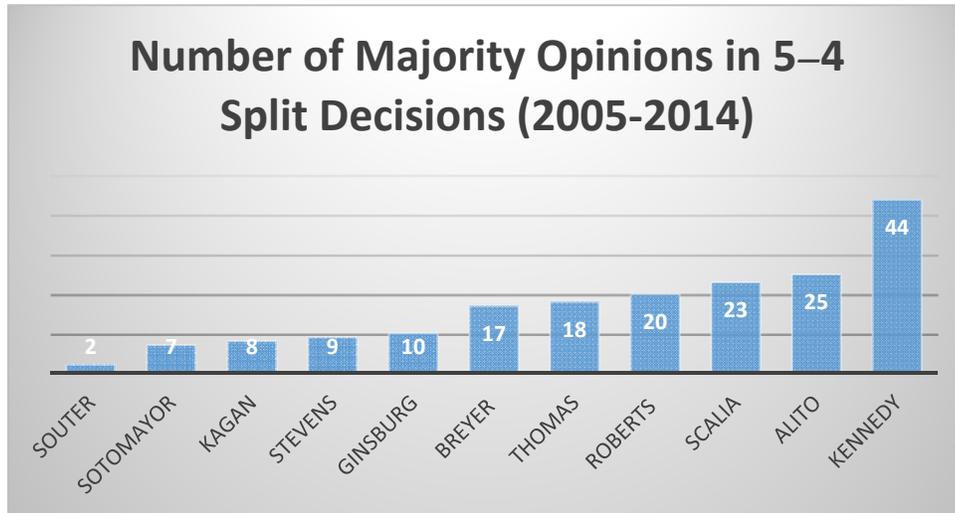
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<sup>40</sup> See Richard Wolf, *From Gay Marriage to Voting Law, Kennedy Is the Key*, USA TODAY (June 27, 2013), <http://www.usatoday.com/story/news/politics/2013/06/27/supreme-court-anthony-kennedy-race-voting-abortion-gay-marriage/2161701/> [<https://perma.cc/GBN7-GA3Y>] (discussing Justice Kennedy's pivotal role in the outcomes of various cases). Justice O'Connor sat on the Court until the 2005 Term. When Justices O'Connor and Kennedy sat on the Court together, Justice O'Connor shared the role of swing Justice with Justice Kennedy. See Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1308–11 (2005) (describing Justice O'Connor as the most pivotal Justice, along with Justice Kennedy).

<sup>41</sup> See Eric Segall, *Justice Scalia's Cruellest Irony: This is the Real Impact of a 4–4 Supreme Court*, SALON.COM (May 26, 2016), <http://www.salon.com/2016/05/28/justice-scalias-cruellest-irony-this-is-the-real-impact-of-a-4-4-supreme-court/> [<https://perma.cc/VBE4-9E3M>] (noting that, from 1988 to 2016, Justice Kennedy was in the majority of roughly 75% of the Court's 5–4 decisions, more than any other Justice).

<sup>42</sup> See *id.* (noting Justice Kennedy's decisive role in a number of cases).

<sup>43</sup> Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the U.S. Supreme Court*, 23 J.L. ECON. & ORG. 276, 277 (2007) ("If the identity of the [majority] author does matter, therefore, it must be because the bargaining protocol used by the Supreme Court confers a degree of monopoly power on the opinion writer.").



Justice Kennedy not only wrote more of these decisions than any other Justice, but he also wrote almost twice as many as the Justice with the next highest count: Justice Alito. This skewed balance of opinion writing in some of the Court's most far-reaching constitutional decisions has deep repercussions for how we perceive the Supreme Court's decisionmaking process. When the ideologically polarized Justices are split in these cases, the locus of power is, by default, delegated to the Justice in the middle.

The real implications of the Justices' positions in highly charged cases is evident from those cases where Justice Kennedy's vote defined the Court's majority voting direction. Take for instance the highly publicized decision in *Citizens United v. Federal Election Commission*.<sup>44</sup> In a majority opinion supported by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, Justice Kennedy harnessed the power of the First Amendment, holding:

We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.<sup>45</sup>

Justice Stevens, dissenting in part and joined by Justices Ginsburg, Breyer, and Sotomayor, discussed the gravity of this ruling, stating:

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<sup>44</sup> 558 U.S. 310 (2010).

<sup>45</sup> *Id.* at 341.

The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution.<sup>46</sup>

This dialogue between Justice Kennedy's majority opinion and Justice Stevens' dissent illustrates the stakes involved in a case that came down to the vote of one Justice.<sup>47</sup>

Justice Kennedy's ability to shift the balance of the Court's power in the other direction is equally evident. In *Boumediene v. Bush*, Justice Kennedy penned the majority opinion, joined by Justices Stevens, Souter, Ginsburg, and Breyer, which allowed detainees held at Guantanamo Bay to seek the writ of habeas corpus in federal court.<sup>48</sup> In dissent, Justice Scalia, who supported Justice Kennedy's decision in *Citizens United*, harshly criticized the Court's decision as violative of the separation of powers:

What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in nonetheless.<sup>49</sup>

These examples emphasize both Justice Kennedy's decisionmaking power, as well as the fact that, depending on how he voted in 5–4 decisions, he faced harsh criticism from one ideological bloc of the Court or the other. More importantly, however, they present the ideological divisions on the Court and demonstrate how, from the 2005 Supreme Court Term through the 2014 Term, this placed a high-level of unilateral power in a single Justice. When the Supreme Court's decisions come down to one Justice rather than to nine, the dispassionate judiciary envisioned by the Federalist Papers' becomes much more susceptible to scrutiny.

## CONCLUSION

The main goal of this Essay is to reframe the conversation and debate surrounding the current Supreme Court nomination stalemate. So much has already been said about the politics involved in the unprecedented delay in holding confirmation hearings.<sup>50</sup> Like the Supreme Court's current

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<sup>46</sup> *Id.* at 396 (Stevens, J., concurring in part and dissenting in part).

<sup>47</sup> For additional commentary on the implications stemming from the *Citizens United* decision, see, for example, Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217 (2010).

<sup>48</sup> 553 U.S. 723, 732 (2008).

<sup>49</sup> *Id.* at 831 (Scalia, J., dissenting).

<sup>50</sup> Compare Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 NYU L. REV. ONLINE 53 (2016) (reviewing the history of Supreme Court appointments and arguing that the Senate should not continue to delay confirmation hearings on Judge Garland), with Ilya Shapiro, *Not Giving Merrick Garland a Hearing Is the Honest Thing to Do*, CATO (March 22, 2016),

ideological divide, the current political rhetoric is ideologically divided with conservatives generally pushing to delay confirmation hearings and liberal Democrats generally seeking to press the Senate to hold them.<sup>51</sup>

If the driving force behind whether or not to hold confirmation hearings is partisanship, it is detached from normative concerns. This central element driving the confirmation debate, however, is mainly unspoken. Instead of liberals highlighting that they hope to shift the Court back in the direction of the Warren Court and conservatives rallying behind an attempt to keep the ideological balance of the Court in a similar location to where it was with Justice Scalia, the discussion largely involves the merits of expediting or delaying confirmation hearings based on a historical understanding of the principles that guide such calendaring decisions.

If the conversation is structured around the underlying issues involved, then we can begin to discuss the merits of an eight versus nine-member Court. Based on the history of the current Court, in either case, there will be a division of opinion between the Justices on many constitutional issues. This division splits the current Court evenly. This split quite likely led the Court to divide evenly in several contentious cases in the 2015 Term.<sup>52</sup>

On the one hand, such results can be read as a cautionary tale. How can an eight-member Court that splits evenly across ideological lines fulfill the Court's duty as arbiter of the Constitution? On the other hand, this situation might be instructive for the Justices and seen as a story of potential. A divided eight-member Court must learn to find common ground, as the Justices have done in reaching many decisions. A nine-member Court does not always reach fractured decisions, and even in cases where the Court is divided, the dividing lines are not always as predicted.<sup>53</sup> Perhaps an eight-member Court would lead to a greater number of unpredicted voting patterns, with the Justices forced to compromise to avoid deadlock.

In any event, given current statutory requirements, another Justice will eventually be added to the Court.<sup>54</sup> With nine Justices required to be on the Court, the debate on when to hold confirmation hearings will inevitably continue to hinge on ideological considerations. From a rule of law

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<http://www.cato.org/publications/commentary/not-giving-merrick-garland-hearing-honest-thing-do> [<https://perma.cc/HE6F-BEXE>] (arguing that little good is served by holding confirmation hearings when the Senate would simply vote to reject Judge Garland's nomination to the Supreme Court).

<sup>51</sup> Shapiro, *supra* note 50.

<sup>52</sup> See *supra* notes 26–31 and accompanying text.

<sup>53</sup> See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (involving a majority opinion written by Chief Justice Roberts and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan); see also Randy E. Barnett, *The Disdain Campaign*, 126 HARV. L. REV. F. 1, 7–10 (2012) (arguing that threats of public disdain moved Chief Justice Roberts from opposing the Affordable Care Act to upholding it).

<sup>54</sup> See *supra* note 4 and accompanying text.

perspective, however, we can only hope that the ninth Justice, whomever that may be, shifts the balance of power on the Court away from one Justice—as has been the case in recent years with Justice Kennedy. While some will disagree with the Court’s decisions, whatever they may be, removing the locus of power from one Justice will, at the very least, enhance the group debate and decisionmaking process that was inherent in the design of the Court as a multimember federal institution.

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