A CRISIS OF CONSENSUS: THE SUPREME COURT'S LEGITIMACY AND RECENT CHALLENGES THERETO

*Abby Ulman**

INTRODUCTION

The legitimacy of the Supreme Court is crucial for maintaining public trust and upholding the rule of law. The institution occupies a central role in interpreting the Constitution and shaping legal precedents. However, following a series of high-profile rulings, public approval of the Supreme Court has recently declined to its lowest point, with more than half of Americans expressing an unfavorable view of the Court.[1] What explains the dramatic decline in the Court's popularity? Some have argued it is the Court's rapid ideological evolution[2] or the countermajoritarian process by which it was constituted.[3] Nonetheless, criticism of the Court's rulings has veered into attacks on its legitimacy as an institution. Commentators, including prominent constitutional scholars, a former Attorney General, current members of

* J.D., Notre Dame Law School, 2025; B.A., in Economics and Political Science, Indiana University Fort Wayne, 2021.

1 *See* Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Aug. 8, 2024), https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low/ [https://perma.cc/7XB8-5LMV] ("The court's favorable rating is 22 percentage points lower than it was in August 2020."); Christine Zhu, *Supreme Court Faces Continued Strong Disapproval, Poll Shows*, POLITICO (Feb. 21, 2024, 1:49 PM EST), https://www.politico.com/news/2024/02/21/supreme-court-approval-poll-00142437 [https://perma.cc/932V-6GNV].

2 *See* Stephen Jessee, Neil Malhotra & Maya Sen, *A Decade-Long Longitudinal Survey Shows that the Supreme Court Is Now Much More Conservative than the Public*, 119 PROC. NAT'L ACAD. SCIS. U.S., June 14, 2022, at 1.

3 *See* Jeff Neal, *Why Has the Supreme Court Come Under Increased Scrutiny?*, HARV. L. TODAY (Nov. 16, 2022), https://hls.harvard.edu/today/why-has-the-supreme-court-come-under-increased-scrutiny/ [https://perma.cc/M6ST-RHYN] ("[F]or the first time in American history . . . we had a president who lost the popular vote successfully nominate three people in four years to the Court that were confirmed by a Senate majority representing a minority of the nation. So, it's not like it should be some great mystery why we have a Court that is out of step with where a majority or a supermajority of the . . . country is." (first and second alterations in original)).

Congress, and even some Justices have recently questioned the legitimacy of the Supreme Court.[4] Indeed, some have gone as far to suggest that the Court's legitimacy problem warrants extreme measures, such as removing life tenure or restricting federal jurisdiction, as well as impeaching Justices, disobeying decisions, and most commonly, "packing" the Court.[5]

Diminution of the Court's reputation could impact its ability to safeguard basic democratic norms, which necessitates a solution to its "legitimacy crisis."[6] Legitimacy is an illusive concept, "[b]ut in legal discourse, we have an intuitive sense that *illegitimate*" takes on a pejorative nature: "The term signifies something absolutely without foundation and perhaps ultra vires."[7] Thus, when a judicial institution lacks

4 *See id.* ("[A] panel of six scholars discussing the U.S. Supreme Court resorted to the word 'legitimacy' nearly 40 times. And not in a good way."); Eric Holder (@EricHolder), X (Oct. 6, 2018, 4:10 PM), https://x.com/EricHolder/status/1048666766677876738 [https://perma.cc/XU6U-XNT6] ("With the confirmation of Kavanaugh and the process which led to it, . . . the legitimacy of the Supreme Court can justifiably be questioned."); Nick Robertson, *Black Caucus Says Supreme Court Has "Thrown into Question its Own Legitimacy" with Affirmative Action Ruling*, THE HILL (June 29, 2023, 12:18 PM EDT), https://thehill.com/regulation/court-battles/4073706-black-caucus-says-supreme-court-has-thrown-into-question-its-own-legitimacy-with-affirmative-action-ruling/ [https://perma.cc/MG5Y-HE6K]; Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2245 (2023) (Sotomayor, J., dissenting) ("When proponents of [lost] arguments, greater now in number on the Court, return to fight old battles anew, . . . [i]t fosters the People's suspicions that 'bedrock principles are founded . . . in the proclivities of individuals' on this Court, not in the law, and it degrades 'the integrity of our constitutional system of government.' Nowhere is the damage greater than in cases like these that touch upon matters of representation and institutional legitimacy." (last alteration in original) (citation omitted) (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986))).

5 *See, e.g.*, Ramesh Ponnuru, *How Democrats Could Fix the Founding Fathers' Supreme Court Mistake*, WASH. POST (Sept. 25, 2023, 6:00 AM EDT), https://www.washingtonpost.com/opinions/2023/09/25/supreme-court-term-limits-life-tenure/ [https://perma.cc/S6K4-NBM7]; Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), https://www.bostonreview.net/articles/samuel-moyn-resisting-juristocracy/ [https://perma.cc/3H52-BMTM]; Kanishka Singh, *Alexandria Ocasio-Cortez Wants Clarence Thomas Impeached*, REUTERS (Apr. 10, 2023, 4:17 PM EDT), https://www.reuters.com/world/us/democratic-lawmaker-ocasio-cortez-wants-us-supreme-court-justice-thomas-2023-04-09/ [https://perma.cc/6VRR-HPMC]; Mark Joseph Stern, *How Liberals Could Declare War on Brett Kavanaugh's Supreme Court*, SLATE (Oct. 4, 2018, 6:53 PM), https://slate.com/news-and-politics/2018/10/brett-kavanaugh-confirmation-constitutional-crisis.html [https://perma.cc/SP2B-MRKH]; Julia Mueller, *House Democrats Tout Bill to Add Four Seats to Supreme Court*, THE HILL (July 18, 2022, 4:42 PM EDT), https://thehill.com/homenews/house/3564588-house-democrats-offer-bill-to-add-four-seats-to-supreme-court/ [https://perma.cc/85HG-DVNG].

6 Stern, *supra* note 5.

7 Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)).

legitimacy, "it may no longer be worthy of respect or obedience."[8] With no enforcement power of its own, the Supreme Court must take measures to maintain its legitimacy. The perceived legitimacy of the Court is not solely determined by its formal authority; consensus significantly influences public perceptions. This Note suggests that the institution itself may be able to ward off these Court-curbing efforts and the attacks on its legitimacy by promoting consensus. Borrowing from the fields of psychology, economics, history, and law, this Note explores the intricate relationship between consensus[9]—both within and without the Supreme Court—and the institution's perceived legitimacy.

Part I retells the history of Supreme Court decisions—from the time when Justices followed the British practice of issuing seriatim opinions to the time of Chief Justice John Marshall who instituted a policy of a single opinion for the Court. This norm of consensus lasted 140 years, during which the Court decided more than ninety percent of its cases unanimously. However, modern practice has been marked by division and dissensus, which have incited rhetoric of delegitimization. Part II examines two types of consensuses. Section A discusses internal consensus, or the extent to which the Justices agree with each other. Yet accusations that the Supreme Court is politicized or illegitimate are often another way of saying that it has strayed too far from public opinion. In turn, Section B explores the effects of external consensus—that is, the extent to which the public agrees with the Supreme Court's opinions. Part III analyzes the impact of internal and external consensus on perceptions of the Supreme Court, with a particular emphasis on the role of the Supreme Court as a judicial institution.

I. THE NORM OF CONSENSUS

Deciding cases unanimously would not be new for the Supreme Court. Over nearly a thousand years of Anglo-American jurisprudence, there have been only three widely used methods by which multimember courts have delivered judicial opinions: seriatim, "opinion of the court," and hybrid.[10] In the early stages of American judicial development, the Justices followed the English style of delivering seriatim opinions, in which each Justice issued a separate opinion.[11]

8 *Id.*

9 This Note sometimes uses the terms "consensus" and "unanimity" interchangeably.

10 M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 292.

11 *Id.* at 290–91, 303–04; *see also Seriatim Opinions*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("A series of opinions written individually by each judge on the bench, as opposed to a single opinion speaking for the court as a whole.").

However, the practice was discontinued during the tenure of Chief Justice John Marshall,[12] who promoted unanimity within the Court as a means of "institutional legitimacy and prestige."[13]

Chief Justice Marshall strongly discouraged dissenting opinions in favor of the modern "opinion of the Court," in which the Justices issued a single, unanimous opinion.[14] As he explained:

> The course of every tribunal must necessarily be, that the opinion which is to be delivered as the opinion of the court, is previously submitted to the consideration of all the judges; and, if any of the reasoning be disapproved, it must be so modified as to receive the approbation of all, before it can be delivered as the opinion of all.[15]

Thus, Chief Justice Marshall ushered in a "norm of consensus,"[16] which was believed to be a reflection of the widely held belief that "unanimity would 'greatly strengthen[] the authority' of the Court and its rulings."[17] This norm of consensus continued long after Chief Justice Marshall's tenure on the Court ended.[18] During this period, from 1801 to 1940, about ninety percent of Supreme Court cases were decided unanimously.[19] Although the Justices may have privately disagreed with the opinion of the Court, they silently acquiesced in the ruling to preserve the consensus norm.[20] The preference for silent acquiescence persisted among Chief Justices for over a century after Chief Justice Marshall's departure from the Court.[21]

---

12 Henderson, *supra* note 10, at 313–14.

13 Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 786 (2015).

14 Henderson, *supra* note 10, at 315.

15 John Marshall, Letter to the Editor, *A Friend to the Union*, PHILA. UNION, Apr. 24, 1819, *reprinted in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 80–81 (Gerald Gunther ed., 1969)).

16 *See* Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 362 (2001).

17 *Id.* (quoting William H. Rehnquist, *The Supreme Court: "The First Hundred Years Were the Hardest*," 42 U. MIA. L. REV. 475, 481 (1988) (quote corrected)).

18 *See* David M. O'Brien, *Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 91, 93 (Cornell W. Clayton & Howard Gillman eds., 1999).

19 Sunstein, *supra* note 13, at 776–777.

20 *See, e.g.*, Bank of U.S. v. Dandridge, 25 U.S. (12 Wheat.) 64, 90 (1827) (Marshall, C.J., dissenting) ("I should now, as is my custom, when I have the misfortune to differ from this Court, acquiesce silently in its opinion . . . ."); The Nereide, 13 U.S. (9 Cranch) 388, 455 (1815) (Story, J., dissenting) ("Had this been an ordinary case I should have contented myself with silence; but . . . I have thought it not unfit to pronounce my own opinion . . . ."); Mason v. Haile, 25 U.S. (12 Wheat.) 370, 379 (1827) (Washington, J., dissenting) ("It has never been my habit to deliver dissenting opinions in cases where it has been my misfortune to differ from those which have been pronounced by a majority of this Court.").

21 *See* Sunstein, *supra* note 13, at 788. For example, Chief Justice Salmon P. Chase said "that except in very important causes [filing a] dissent [was] inexpedient." *Id.* at 788

In 1941, however, the norm of consensus "collapsed."[22] Several possible explanations have been given, including the appointment as Chief Justice of the "anti-Marshall" Harlan Fiske Stone,[23] the rapid turnover of newly appointed Justices,[24] the Judiciary Act of 1925,[25] the nature of the cases decided,[26] the change in Court protocols,[27] and the power of legal realism.[28] Regardless, the modern practice of the United States Supreme Court is a hybrid between seriatim opinions and a single "opinion of the Court," in which a majority opinion is issued, but Justices decide individually whether to write separately in concurrence or dissent.[29] To illustrate, the contemporary approach generates decisions that are announced as follows:

> KENNEDY, J., announced the judgment of the Court and delivered the opinion of the Court, except as to a portion of Part II-A-1. REHNQUIST, C.J., and STEVENS and SOUTER, JJ., joined that opinion in full, and BREYER, J., joined except insofar as Part II-A-1 relied on an anticompetitive rationale. STEVENS, J., filed a concurring opinion. BREYER, J., filed an opinion concurring in part. O'CONNOR, J.,

---

(alteration in original) (quoting O'Brien, *supra* note 18, at 93). Similarly, Chief Justice William Howard Taft stated,

> I don't approve of dissentings generally, for I think in many cases where I differ from the majority, it is more important to stand by the Court and give its judgment weight than merely to record my individual dissent where it is better to have the law certain than to have it settled either way.

Id. at 788–89 (quoting O'Brien, *supra* note 18, at 93). Justice Pierce Butler agreed: "I shall in silence acquiesce. Dissents seldom aid in the right development or statement of the law. They often do harm. For myself I say: 'lead us not into temptation.'" HENRY J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 235 (7th ed. 1998) (quoting David J. Danelski, The Influence of the Chief Justice in the Decisional Process of the Supreme Court (Sept. 9, 1960), *in* THE CHIEF JUSTICE: APPOINTMENT AND INFLUENCE 34 (David J. Danelski & Artemus Ward, eds. 2016)).

22 Sunstein, *supra* note 13, at 789.

23 *Id.* at 790–91; *see also* ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 608 (1968) ("The right of dissent is an important one and has proved to be such in the history of the Supreme Court. I do not think it is the appropriate function of a Chief Justice to attempt to dissuade members of the Court from dissenting in individual cases." (quoting Memorandum from Chief Justice Harlan Fiske Stone to the Supreme Court (Jan. 13, 1944) (on file with Library of Congress))).

24 *See* Sunstein, *supra* note 13, at 791–94. *See also* Thomas G. Walker, Lee Epstein & William J. Dixon, *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 374 (1988).

25 Judiciary Act of 1925, ch. 229, 43 Stat. 936; *see* Sunstein, *supra* note 13, at 794–96.

26 Sunstein, *supra* note 13, at 796–97.

27 *Id.* at 797–98.

28 *Id.* at 798–99.

29 Henderson, *supra* note 10, at 292.

> filed a dissenting opinion, in which SCALIA, THOMAS, and GINSBURG, JJ., joined.[30]

Thus, the new norm is that of dissensus. Although the practice of consensus has largely been abandoned, the Justices have continued to recognize the importance of unanimity, especially in critical cases. Perhaps the most famous example is Chief Justice Earl Warren transforming a divided six-to-three majority into a unanimous nine-to-zero decision in *Brown v. Board of Education*.[31] More recently, concerned about the issue of legitimacy, Chief Justice John Roberts has said that he hopes to emulate the unanimity of his predecessor, Chief Justice John Marshall.[32] Chief Justice Roberts is described as stating that "[u]nanimous, or nearly unanimous, decisions are hard to overturn and contribute to the stability of the law and the continuity of the Court; by contrast, closely divided, 5–4 decisions make it harder for the public to respect the Court as an impartial institution that transcends partisan politics."[33]

Chief Justice Roberts has, at times, been successful at garnering unanimous coalitions, even when the Justices appear divided below the surface.[34] Nevertheless, the pervasiveness of dissensus remains apparent in the Court's "shadow docket":

> Evidence from the shadow docket shows that disagreements among the justices are more prevalent then [sic] their lack of dissensus in the Court's merits docket . . . suggests. . . . [As] consensus in the Court's merits docket correlates with the Court's perceived legitimacy, this could well be a calculated effort on the part of the justices . . . . In this period where the Court is highly politicized, . . . it is well worth the Court's effort to enhance the public's perception of this federal institution.[35]

Although the "shadow docket" is much less salient to the public than the Court's merits docket, which limits its ability to impact perceptions of the Supreme Court, the disparity between degrees of dissensus in the two dockets suggests that achieving unanimity is a conscious effort of the Justices.

---

30 Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 184 (1997) (citations omitted).

31 Brown v. Bd. of Educ., 347 U.S. 483 (1954) (declaring segregated schools unconstitutional); *see* S. Sidney Ulmer, *Earl Warren and the* Brown *Decision*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 343, 347 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978).

32 Jeffrey Rosen, *The Trial of John Roberts*, N.Y. TIMES (Sept. 12, 2009), https://www.nytimes.com/2009/09/13/opinion/13rosen.html [https://perma.cc/9T99-UB8D].

33 Jeffrey Rosen, *Roberts's Rules*, ATL., Jan./Feb. 2007, at 104, 105.

34 *See* Rosen, *supra* note 32.

35 Adam Feldman, *Amid Record-Breaking Consensus the Justices' Divisions Still Run Deep*, EMPIRICAL SCOTUS (Feb. 25, 2019), https://empiricalscotus.com/2019/02/25/divisions-run-deep/ [https://perma.cc/9C94-HAFB].

II. CONSENSUS ON THE SUPREME COURT

Building on the historical evolution and significance of consensus within the Supreme Court, this Part shifts focus to examine how different forms of consensus shape the institution's perceived legitimacy. This Part explores the concepts of internal and external consensus. Section A discusses the former, and Section B, the latter. However, it is important to identify that while this Note attempts to distinguish internal and external consensus, the two are naturally interconnected in that internal consensus is sought to enhance the credibility and authority of the Court's rulings—that is, to obtain external consensus.[36] Nonetheless, the following two Sections discuss how internal and external consensus individually shape public perceptions of the Supreme Court.

A. Internal Consensus

Internal consensus within the Supreme Court refers to the extent of agreement among its Justices. The justifications for obtaining internal consensus find support in those that spawned the "norm of consensus."[37] When Justices align their views and opinions, it ideally reinforces the perception of the Court as an impartial and cohesive judicial institution. This Section discusses internal consensus, with an emphasis on both the theoretical justifications for and the practical significance of this legal phenomenon.

The principal value of obtaining internal consensus is that it can be a powerful tool in persuasion.[38] Normative arguments that promote

36 In other words, the division of opinion among Justices on the Supreme Court "finds its counterpart in the differences among those who debate in other forums," especially the public forum. *See* Thomas Reed Powell, *The Logic and Rhetoric of Constitutional Law*, 15. J. PHIL. PSYCH. & SCI. METHODS 645, 647 (1918).

37 *See supra* Part I; David Orentlicher, *Judicial Consensus: Why the Supreme Court Should Decide Its Cases Unanimously*, 54 CONN. L. REV. 303, 322 (2022) ("Under a norm of consensus, the U.S. Supreme Court did not simply follow the majority position, with the minority giving an unqualified acquiescence. Rather, Justices on both sides of the ideological spectrum moved toward their counterparts to fashion an opinion onto which all could sign. The norm of consensus did much to promote the due process principle of a judicial process that lacks an ideological bias and instead reflects both sides of the ideological spectrum. And . . . the need to find consensus does not simply cause Justices to split their differences. Rather, when people with different perspectives make decisions together, they can identify win-win solutions that none of them acting alone would have recognized.").

38 However, it is important to note that internal consensus may possibly be counterproductive because such unanimity could equally be viewed as an exhibition in nondemocratic decisionmaking. For an argument in defense of this position, see generally Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006). Dissent—which, to some, may be indicative of procedural justice by exemplifying a fair and democratic decisionmaking process—could positively influence the perceived legitimacy of the

unanimity often focus on the connection between internal consensus and moral authority—that is, unanimity is regarded as adding substantive value or weight to the recommendations of the Court.[39] In this way, internal consensus among the Justices is often assumed to positively influence public perceptions by signaling clarity and unambiguity on salient issues. As Judge Learned Hand observed, "disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends. People become aware that the answer to the controversy is uncertain, even to those best qualified, and they feel free, unless especially docile, to ignore it."[40] Justice Stephen Breyer has similarly noted that in highly politicized cases, "the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself."[41]

Beyond this theoretical support for unanimity, media coverage plays a key role in shaping public perceptions of the Supreme Court's decisions. To illustrate,

> [T]he press uses voting signals from the Court when shaping coverage of rulings. The press is more likely to frame non-unanimous decisions in unfavorable terms than otherwise similar unanimous ones. This difference in coverage in turn informs public opinion about high profile rulings. The Court can foster support for its rulings by signaling its consensus to the press, which then offers favorable coverage that can increase popular approval of the Court's actions.[42]

Thus, the logic follows that by presenting a united front, the Court can encourage favorable media coverage, which, in turn, can enhance public approval of its decisions. Moreover, dissensus decisions tend to be overreported, while consensus decisions are underreported.[43] The media's framing of these rulings reveals that internal unity can serve as a strategy for strengthening public approval. The negative tenor used by the media to describe divided decisions politicizes the Court, diminishing its perceived legitimacy in the eyes of the public.

Empirical evidence supports the view that a unanimous decision by nine Justices will be more influential than would decisions by a

---

Court and, in turn, engender greater acceptance of its rulings. *See* Michael F. Salamone, *Judicial Consensus and Public Opinion: Conditional Response to Supreme Court Majority Size*, 67 POL. RSCH. Q. 320, 320–21 (2014).

39 *See generally* Paul Walker & Terence Lovat, *The Moral Authority of Consensus*, 47 J. MED. & PHIL. 443 (2022).

40 LEARNED HAND, THE BILL OF RIGHTS 72 (1958).

41 Bush v. Gore, 531 U.S. 98, 157 (2000) (Breyer, J., dissenting).

42 Michael A. Zilis, *The Political Consequences of Supreme Court Consensus: Media Coverage, Public Opinion, and Unanimity as a Public-Facing Strategy*, 54 WASH. U. J.L. & POL'Y 229, 231 (2017).

43 *See id.* at 234.

single Justice or a bare majority of Justices. Decisionmaking is widely believed to produce better outcomes when decisions are made by a group of persons who employ a diversity of strategies.[44] In general, "heterogeneous groups outperform homogenous groups on tasks requiring creative problem solving and innovation, because the expression of alternative perspectives can lead to novel insights."[45] When people with different perspectives are forced to make decisions *together*, they are able to identify novel approaches to decisionmaking: "[R]ather than merely splitting their differences, they can discover win-win outcomes that make for better overall results."[46] This evidence suggests not only that we are better off with Justices who have different approaches to constitutional interpretation, but also that we are better off with Justices who are simply *different* from one another.[47] However, the benefits of such heterogeneity are only realizable when those decisionmakers are forced to find consensus. When Justices are permitted to disagree—in other words, when the norm of dissensus sanctions a decision based on a narrower rather than broader range of perspectives—the advantages of groupthink are all but lost to majority decisionmaking.

Normative and empirical insights thus suggest a pro-unanimity hypothesis, indicating that "unanimity will increase support for Supreme Court decisions" and that "any dissent can be harmful to support for the Court's decision."[48] However, this relationship appears to be contingent on the salience of the issue. Specifically, "the public is unmoved by the majority size in highly salient decisions, . . . those predisposed to oppose the court are more receptive to divided, moderately salient cases, and . . . large majorities in cases with low salience can move public attitudes in the direction of the decision."[49] The connection between internal consensus and support for the Court also depends on *how much* individuals agree with the Court's policy position,

44 *See* Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 PROC. NAT'L ACAD. SCIS. 16385, 16385 (2004).

45 Deborah H. Gruenfeld, Elizabeth A. Mannix, Katherine Y. Williams & Margaret A. Neale, *Group Composition and Decision Making: How Member Familiarity and Information Distribution Affect Process and Performance*, 67 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 4 (1996).

46 Orentlicher, *supra* note 37, at 312.

47 *See id.*

48 Salamone, *supra* note 38, at 324 (emphases omitted).

49 *Id.* at 320–21. *But see* Steven A. Peterson, *Dissent in American Courts*, 43 J. POL. 412, 432 (1981) (arguing that there is "[i]ndirect disconfirmation" for the hypothesis that dissent negatively affects perceptions of the Supreme Court's authority).

but this does not hold for ideologically opposed individuals.[50] Thus, while there may be a link between internal consensus and public perception, this relationship bears two important caveats: first, it is limited by the lack of salience as to the Court's activities, and second, it is further limited by the level of agreement with the Court's decision.

To many, dissenting also appears to present a cost: "[A]n individual justice is likely to consider the fact that his separate opinion writing may be costly to the Court's authority."[51] The apparent corollary to this assertion is that unanimity is a form of political capital, or a benefit, to the Justices. However, not everyone agrees that dissensus necessitates a negative impact on the Court's legitimacy. To explain,

> [T]here is no reason why lack of unanimity should engender want of confidence in the courts. Of course it engenders want of confidence in any notion that constitutional law is some divine voice of which the court is merely the mouthpiece. But the fact that judges disagree, and freely express the reasons for their disagreement, should add to our confidence in their labors rather than detract from it. It indicates that the judgment was reached only after careful consideration and full discussion. . . . We may therefore lack confidence in the particular conclusions of particular judges, and yet have high regard for the institution that operates, as all human institutions must operate, through the judgments of designated individuals.[52]

Thus, dissent within the Supreme Court, although indicative of disagreement, can also *contribute to* its perceived legitimacy by signaling transparency and deliberation.

At this point, it is important to distinguish between two types of internal consensus: *intra*party consensus and *inter*party consensus. Intraparty consensus is defined as the extent to which ideologically aligned Justices on the Supreme Court agree with each other. By contrast, interparty consensus can be defined as the extent to which ideologically opposed Justices agree with each other. In the hyperpartisan landscape of American politics, these two types of consensus likely impact perceptions of the Court differently. For instance, Chief Justice Roberts's unexpected vote siding with the progressive-led effort to

---

50 *See* James R. Zink, James F. Spriggs II & John T. Scott, *Courting the Public: The Influence of Decision Attributes on Individuals' Views of Court Opinions*, 71 J. POL. 909, 915–16 (2009); *see also infra* Section II.B.

51 Gregory J. Rathjen, *An Analysis of Separate Opinion Writing Behavior as Dissonance Reduction*, 2 AM. POL. Q. 393, 394 (1974). It should be noted that there is great utility in dissenting. It can even be thought of as a means of "civil disobedience" and Justices who frequently dissent have been regarded as "romantic figures" in the history of the Supreme Court. William D. Blake & Hans J. Hacker, *"The Brooding Spirit of the Law": Supreme Court Justices Reading Dissents from the Bench*, 31 JUST. SYS. J. 1, 1 (2010).

52 Powell, *supra* note 36, at 651.

uphold universal health care legislation, against his conservative colleagues,[53] was thought to "temper . . . charges that the Court has become a predictably political institution. . . . Yet concerns about the Court's apolitical credibility are hardly alleviated."[54] Chief Justice Roberts's vote was an exercise in interparty consensus, but public opinion polls conducted around the time that *National Federation of Independent Business v. Sebelius* was decided indicated that the Court was still perceived to be hyperpoliticized.[55] Surprisingly, intraparty consensus has a similar effect. Polarized decisions—that is, decisions in which Republican-appointed Justices are on one side and Democrat-appointed Justices are on the other—have become more prevalent recently due to the supermajority that conservatives have in the Court.[56] And yet confidence in the Court has sunk to a historic low.[57] Amidst evidence that both intraparty and interparty consensus contribute to perceptions of the Supreme Court as a politicized institution, the extent to which internal consensus can mitigate concerns about the Court's legitimacy appears limited.

To add to the unlikelihood that internal consensus is driving unfavorable views of the Supreme Court, public opinion in recent terms has remained unchanged despite efforts to reach internal consensus in its decisions. To illustrate, in the 2021–2022 term, the Supreme Court decided sixty-five cases.[58] Out of those cases, only nineteen were decided unanimously.[59] By contrast, during the 2022–2023 term, the Court decided fifty-eight cases, of which twenty-nine were decided

53 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

54 David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, ATL. (June 29, 2012), https://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/ [https://perma.cc/SSR8-G6J8].

55 *Id.* ("[A]bout three in four Americans agreed that 'personal or political views influence[d]' . . . Court decisions.").

56 *See* Amelia Thomson-DeVeaux & Laura Bronner, *The Supreme Court's Partisan Divide Hasn't Been This Sharp in Generations*, FIVETHIRTYEIGHT (July 5, 2022, 1:08 PM), https://fivethirtyeight.com/features/the-supreme-courts-partisan-divide-hasnt-been-this-sharp-in-generations/ [https://perma.cc/96B4-KW9V].

57 Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/K35D-6ST3].

58 *The Supreme Court Database*, WASH. U. L., http://scdb.wustl.edu [https://perma.cc/UJD2-LWGX] (last visited Sept. 22, 2025) (follow "Analysis" tab; then enter "2021" and "2022" in the "Range of Terms" boxes).

59 *Id.* (select "9" in the "Set Majority Votes" box). Further, eleven were decided eight-to-one, three were decided seven-to-two, twenty were decided six-to-three, eleven were decided five-to-four, and one was decided four-to-four. *Id.* (to find each result, select the number of majority votes in the "Set Majority Votes" box; then select the number of minority votes in the "Set Minority Votes" box).

unanimously.[60] Between those two terms, the percentage of unanimous decisions increased from twenty-nine percent in the former term to forty-eight percent in the latter term.[61] This disparity between consecutive terms provides an opportunity to evaluate the effect that such disparate levels of internal consensus may have had on perceptions of the Supreme Court. Specifically, if internal consensus is to have a positive impact on perceptions of the Court, we would expect perceptions to improve between these two terms. However, the Supreme Court's approval ratings remained steadily low between terms,[62] and if anything, they actually decreased.[63] Thus, although theoretical wisdom may stimulate the notion that internal consensus promotes positive perceptions of the Supreme Court, that theory is unsubstantiated in reality. A possible counterexplanation to the shift in consensus decisions is that unanimity is often indicative of a "less controversial legal issue," which would suggest that the Court is "truly partisan when it comes to more controversial cases."[64] However, the data do not support this explanation. Out of the eleven six-to-three decisions during the 2022–2023 term, only six were decided along partisan lines.[65] Therefore, the data reject a narrative of a partisan Court driving decisionmaking.

B. External Consensus

While internal dynamics among Justices play a role in perceptions of the Supreme Court, this Section explores the ways in which external consensus also shapes the Court's perceived legitimacy. External

60 *Id.* (follow "Analysis" tab; then enter "2022" and "2023" in the "Range of Terms" boxes; then select "9" in the "Set Majority Votes" box). In contrast, five were decided eight-to-one, six were decided seven-to-two, eleven were decided by a majority of six, and seven were decided five-to-four. *Id.* (to find each result, select the number of majority votes in the "Set Majority Votes" box; then select the number of minority votes in the "Set Minority Votes" box).

61 *See* Michael D. Berry, *The Numbers Reveal a United Supreme Court, and a Few Surprises*, THE FEDERALIST SOC'Y (Aug. 2, 2023), https://fedsoc.org/commentary/fedsoc-blog/the-numbers-reveal-a-united-supreme-court-and-a-few-surprises [https://perma.cc/5SHR-P85A].

62 *See Supreme Court*, GALLUP, https://news.gallup.com/poll/4732/supreme-court.aspx [https://perma.cc/AXC5-M3V9] (last visited Sept. 22, 2025) (indicating that in September of both 2022 and 2023, 58% of participants disapproved of the way the Supreme Court was handling its job).

63 *See id.* (indicating that in July of 2022 and 2023, 55% and 56% disapproved of the way the Supreme Court was handling its job, respectively); *but see* Cooper Burton, *The Supreme Court Is Getting Less Unpopular*, FIVETHIRTYEIGHT (June 13, 2023, 6:00 AM), https://fivethirtyeight.com/features/supreme-court-approval-rating-polls/ [https://perma.cc/95NG-24NV].

64 Berry, *supra* note 61.

65 *Id.*; *see supra* notes 56, 58.

consensus is defined as the extent to which public opinion aligns with the opinion of the Supreme Court. In recent terms, many of the Supreme Court's five-to-four decisions have attracted the most attention and have led to the widespread belief that the Court is illegitimate or partisan. Accusations that the Supreme Court is "politicized" or "illegitimate" are often another way of saying that it has strayed too far from public opinions. That is, public opinion serves almost as a barometer of the Court's legitimacy. This Section, in turn, discusses the phenomenon from both a theoretical and practical perspective.

While the connection between internal consensus and perceptions of the Court tends to be normative in that consensus is attributable to moral rightness, the relationship between external consensus and public opinion takes on a more *strategic* role: that is, the substantive value of external consensus is its ability to promote public acceptance and implementation of the Court's decisions.[66] The psychological process that informs this theory that external consensus has the potential to alleviate illegitimacy claims leveled at the Court is known as "negativity bias."[67] In the context of Supreme Court decisions, the theory of negativity bias suggests that the public will weigh unpopular decisions more heavily than popular opinions when evaluating the legitimacy of the institution. In other words, "the harm the Court suffers from its unpopular rulings is not offset by a boost in public esteem from its popular rulings."[68]

Although this theoretical notion has been confirmed in empirical research,[69] its transferability has been tested by the disparity between theory and reality. For most of its history, the Court has enjoyed a moderate level of congruence between its rulings and public opinion, persisting both over time and across Justices.[70] In fact, between 1930 and 2020, "three-fifths to two-thirds of modern Court decisions

66 *See* Nadine El-Bawab, *How Did the Supreme Court Become So Polarized?*, ABC NEWS (Oct. 5, 2022, 3:48 PM), https://abcnews.go.com/Politics/supreme-court-polarized/story?id=90598910 [https://perma.cc/6Y8K-KFMK] ("[T]he court draws its power from the American people's acceptance of its power . . . .").

67 *See* Paul Rozin & Edward B. Royzman, *Negativity Bias, Negativity Dominance, and Contagion*, 5 PERSONALITY & SOC. PSYCH. REV. 296, 297 (2001) ("[I]n most situations, negative events are more salient, potent, dominant in combinations, and generally efficacious than positive events.").

68 Anke Grosskopf & Jeffery J. Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of* Webster *and* Texas v. Johnson *on Public Confidence in the Supreme Court*, 51 POL. RSCH. Q. 633, 636 (1998).

69 *See, e.g.*, *id.*; *cf.* Joseph Tanenhaus & Walter F. Murphy, *Patterns of Public Support for the Supreme Court: A Panel Study*, 43 J. POL. 24, 31 (1981) (showing respondents were more than twice as likely to recount recent Supreme Court actions of which they disapproved than those they approved).

70 *See* Jeffery J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. Pol. 1114, 1120 (1997).

represent[ed] public opinion."[71] The Supreme Court has also enjoyed relatively high levels of public approval, consistently exceeding that of Congress and the President.[72] However, "[t]he court's favorable rating is 22 percentage points lower than it was in August 2020."[73] If external dissensus is the cause of such a drastic decline in popularity, we would expect to see a similar decline in external consensus. Additionally, some studies have found that "the Court is more countermajoritarian when it is more institutionalized and has less ideological diversity."[74] Given the Court's current conservative supermajority, it is thus plausible that the lack of ideological diversity could be driving external dissensus.

Despite the Court's current countermajoritarian reputation, in the past its decisions were largely consistent with mass policy preferences.[75] However, that is no longer the case. Until 2020, the Supreme Court tended to reflect the views of "the average American," but "the court is now near the typical Republican and to the ideological right of roughly three quarters of all Americans."[76] The Court's recent decision in *Dobbs v. Jackson Women's Health Organization* likely represents the most obvious example of such divergence from public opinion.[77] At the time, "more than 60 percent of Americans believe[d] that *Roe v. Wade* should [have been] upheld."[78] The ability for such opinions—opinions that wade so far from public sentiment—to impact the Court's popularity has been proven. For example, the decisions handed down in *Webster v. Reproductive Health Services*[79] and *Texas v.*

71 THOMAS R. MARSHALL, AMERICAN PUBLIC OPINION AND THE MODERN SUPREME COURT, 1930–2020: A REPRESENTATIVE INSTITUTION 60 (2022). Leveraging several decades worth of public opinion polling, Marshall assesses the extent to which Supreme Court decisions are consistent with public opinion. He further specifies that "[d]ecisions on transportation, commerce, family law, and business cases most often agree with the polls. Decisions on national security, federalism, intergovernmental relations, and first amendment claims least often do." *Id.* at 62.

72 *See* Grove, *supra* note 7, at 2251 & nn.43–44.

73 Copeland, *supra* note 1.

74 Eugenia Artabe & Alex Badas, *Measuring the Countermajoritarian Nature of Supreme Court Decisions*, 52 J. LEGAL STUD. 345, 345 (2023).

75 *See* Stephen Jessee, Neil Malhotra & Maya Sen, *The Supreme Court Is Now Operating Outside of American Public Opinion*, POLITICO (July 19, 2022, 4:30 AM EDT), https://www.politico.com/news/magazine/2022/07/19/supreme-court-republican-views-analysis-public-opinion-00046445 [https://perma.cc/SPA5-2MNJ] ("For more than a decade, decisions handed down by the U.S. Supreme Court were largely in step with American public opinion on major policy issues, even as the Court's makeup grew more conservative.").

76 Jessee et al., *supra* note 2, at 1–2.

77 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

78 Jessee et al., *supra* note 75 ("Other cases—such as whether the EPA has the authority to broadly regulate emissions across the energy sector—have turned out similarly."); Roe v. Wade, 410 U.S. 113 (1973).

79 Webster v. Reprod. Health Servs., 492 U.S. 490 (1989).

Johnson[80]—two high-profile decisions that were unpopular among the public—both resulted in a substantial decline in public perception of the Supreme Court.[81] This pattern aligns with the potential existence of negativity bias: "[D]isagreement with one or both decisions substantially reduced confidence in the Court, but agreement with both edicts brought only a marginal gain in confidence."[82]

The cases previously mentioned in this Section have all been highly salient and unpopular decisions; however, the Supreme Court should still feel constrained by public opinion in its lower-visibility decisions as well. If the Justices "repeatedly issue judgments outside the public's zone of consensus," they should perceive that their decisions risk attracting negative attention even for cases "under the public's radar."[83] The Court's decisions either conform to or deviate from what is referred to as a "region of public acceptability" or "zone of acquiescence."[84] To elaborate, when Supreme Court decisions deviate from the zone of acquiescence, they risk attracting negative public attention, which could, in turn, incite claims that the institution is politicized or illegitimate.[85] However, while a lack of external consensus appears to cause at least a temporary decline in public confidence, as previously mentioned, the Court has enjoyed relatively high levels of support throughout its history.[86] In other words, "[a]fter displeasure with the Supreme Court's actions abates, people return to what is, in essence, a default judgment—confidence in the institution built on a foundation of democratic values"[87]—a default judgment that necessitates further inspection into the relationship between external consensus and perception of the Court.

Perhaps there is another factor at play related to external consensus that could be impacting public opinion of the Supreme Court: specifically, maybe "support is subject to value-based regeneration due to

80 Texas v. Johnson, 491 U.S. 397 (1989).

81 *See* Grosskopf & Mondak, *supra* note 68, at 642 ("The suspicion that attitudes regarding *Webster* and *Texas v. Johnson* account for the plummet in aggregate confidence grows when we note that the decisions were not merely salient, but also unpopular. . . . 60 percent of respondents disapproved of *Webster*, while 73 disagreed with the Court's flag-burning ruling.").

82 *Id.* at 633.

83 Peter K. Enns & Patrick C. Wohlfarth, *Making Sense of the Supreme Court—Public Opinion Relationship*, *in* ROUTLEDGE HANDBOOK OF JUDICIAL BEHAVIOR 180, 181 (Robert M. Howard & Kirk A. Randazzo eds., 2018).

84 *Id.* at. 184.

85 *Id.* at 185 ("[I]n order to preserve the long-term legitimacy of its rulings and maximize faithful compliance by other actors, justices must ensure the Court's decisions largely conform to the policy boundaries established by the zone of acquiescence.").

86 *See supra* text accompanying notes 68–70.

87 Mondak & Smithey, *supra* note 70, at 1124.

a link between the Court and basic democratic values."[88] In other words, the Court potentially enjoys diffuse support for its decisions from its institutional structure. This theory posits that "the public generally sees the Court as distinct from the political branches, trusts the Court to make reasonable decisions, and treats its decisions as authoritative, regardless of the ideological valence of a specific ruling."[89] There is also evidence of a "positivity bias" or an inherent reservoir of trust and acceptance toward the Court, which could temper the politicizing effects of even the most controversial decisions.[90] According to this diffuse-support theory, the Justices may not need to worry about diverging from public opinion, as the Court's legitimacy is upheld regardless of its ideological positions. However, public support is described as "sticky but moveable,"[91] meaning that "the Court's diffuse support could suffer once some accumulated threshold level of dissatisfaction is reached."[92]

While external consensus may be relevant in the short term, diffuse-support theory potentially provides some relief in the long term as memories fade and new information drives out old.[93] However, the Supreme Court's historically high levels of support are waning. The *Dobbs* decision was merely one case within a measurable shift over the past three years in which the Court has taken views that are widely divergent from those of the people whose interests it protects.[94] Along with this lack of external consensus has come increasing criticism that

88 *Id.* at 1114.

89 Grove, *supra* note 7, at 2252.

90 *See* Mondak & Smithey, *supra* note 70, at 1140 ("Because the institution is linked to basic democratic values, and because most rulings are consistent with majority preferences, the Court is well-positioned to withstand the shocks that accompany its most controversial edicts.").

91 Grove, *supra* note 7, at 2252.

92 James L. Gibson & Michael J. Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI 201, 207 (2014).

93 *See* Mondak & Smithey, *supra* note 70, at 1139 ("It is precisely because people do rethink their views of the Supreme Court that support stays strong. Individuals who are vehemently opposed to a decision this year may back the Court next year when memory of the case fades, and either value-based regeneration or a favorable ruling wins them over.").

94 *See* Jessee et al., *supra* note 75.

the Court is "politiciz[ed]," [95] "corrupt," [96] and "illegitimate." [97] The recent confirmations of Supreme Court Justices have also been highly politicized affairs that, although reflective of broader societal and political divisions, visibly exposed ideological rifts and partisan polarization, shaping public perceptions of the Court's legitimacy. [98] Thus, it appears as though the Supreme Court has reached that hypothetical "level of dissatisfaction" [99] from which it will be difficult to return.

III. CONSENSUS AND THE ROLE OF THE SUPREME COURT

The Supreme Court has always decided, and will continue to decide, controversial cases. As criticism that the institution is illegitimate mounts, the preservation of the Court demands a solution. This Note has sought to answer the question as to whether dissensus may be entrenching the Court's unpopularity, and in doing so, has also exposed a solution: consensus. But what kind of consensus? Although internal consensus may share a positive relationship with perceptions of the Supreme Court in theory, its practical significance is limited both by the *nature* of the decision as well as by the relevant *degree* of external consensus. [100] It may be true that narrowly decided decisions carry the same legal authority as unanimous decisions, but perhaps not the same moral authority. Nevertheless, it is not obvious that the Court should decide all of its cases by consensus:

---

95 *See, e.g.*, Jesse Wegman, *The Crisis in Teaching Constitutional Law*, N.Y. TIMES (Feb. 26, 2024), https://www.nytimes.com/2024/02/26/opinion/constitutional-law-crisis-supreme-court.html [https://perma.cc/M7Q9-CKNT] ("[T]he court's hard-right supermajority, installed in recent years through a combination of hypocrisy and sheer partisan muscle, has eviscerated any consensus.").

96 *See, e.g.*, Rachael Russell, *In-Depth Analysis: The Supreme Court's Legitimacy Is in Crisis*, NAVIGATOR RSCH. (Sept. 13, 2023), https://navigatorresearch.org/in-depth-analysis-the-supreme-courts-legitimacy-is-in-crisis/ [https://perma.cc/ZL5M-VCQQ] (revealing that when asked which terms best describe the Supreme Court, the top two terms Americans chose were "corrupt" and "unaccountable").

97 *See, e.g.*, Jill Filipovic, *It's Time to Say It: The US Supreme Court Has Become an Illegitimate Institution*, GUARDIAN (June 25, 2022, 2:40 PM EDT), https://www.theguardian.com/commentisfree/2022/jun/25/us-supreme-court-illegitimate-institution [https://perma.cc/W9LD-ZKY4].

98 *See* James F. McHugh & Lauren Stiller Rikleen, *The Politicization of SCOTUS Threatens Its Legitimacy*, BLOOMBERG L. (June 30, 2022, 4:00 AM EDT), https://news.bloomberglaw.com/us-law-week/the-politicization-of-scotus-threatens-its-legitimacy [https://perma.cc/Z9BB-9K6V]. *But see* Timothy S. Huebner, *The Supreme Court Confirmation Process Is Actually Less Political than It Once Was*, WASH. POST (Dec. 12, 2018, 6:00 AM EST), https://www.washingtonpost.com/outlook/2018/12/12/supreme-court-confirmation-process-is-actually-less-political-than-it-once-was/ [https://perma.cc/PR9W-28HS].

99 *See supra* text accompanying note 92.

100 *See supra* Section II.A.

> If the Court decided all of its cases by consensus, what would that mean for the role of the judiciary in deciding cases? Courts often are viewed as engines of social reform. If the Justices had to find common ground, would the Supreme Court change from a leader of social change into a follower of social change that is championed by the president or Congress?[101]

Nor is it obvious that the Court should decide its cases by a majority vote. Majority voting presents its own problems for perceptions of judicial institutions by potentially "exacerbat[ing] the polarized politics that plague the United States."[102]

It should also be noted that although majority voting is the norm for judicial decisionmaking, it lacks a foundation in the Constitution,[103] a federal statute,[104] or Supreme Court rules.[105] The Constitution ensures that litigants will receive "an impartial hearing before a neutral court"—that is, a court "without any personal, political, or other partiality."[106] However, the Supreme Court is not neutral. At any given time, it has either a conservative or liberal majority of Justices, which naturally disadvantages the minority.[107] Although the majority's ideology would not matter if judging entailed a purely objective application of law to the facts, ideology *does* matter.[108] As a result, "changes in the composition of the Court can lead to major changes in the Court's jurisprudence."[109]

---

101 Orentlicher, *supra* note 37, at 341.

102 *Id.* at 305 ("When a conservative or liberal majority can impose its views on the country, it gives each side of the ideological spectrum even greater incentive to fight for control of the Oval Office and the Senate so that side can control the judicial appointment process."). *But see* Jeremey Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692 (2014) (revealing that the legitimacy of majority decisionmaking is typically defended on one of three grounds: efficiency, epistemology, or political equality).

103 Orentlicher, *supra* note 37, at 305. Arguably, the Constitution could be read to *permit* a simple majority where a supermajority is not explicitly required. *See, e.g.*, U.S. CONST. art II, § 2, cl. 2 (requiring two-thirds support for approval of treaties by the Senate); *id.* art. V (requiring three-fourths of the states to approve a constitutional amendment); *id.* art I, § 3, cl. 6 (requiring two-thirds of the Senate to convict a government official on charges of impeachment). However, under this view, juries could also decide cases by a simple majority since the Constitution does not delineate specific voting rules, yet the Supreme Court has repeatedly required juror unanimity. *See e.g.*, Andres v. United States, 333 U.S. 740, 748 (1948); Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020).

104 According to federal statute, the Supreme Court "shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum." 28 U.S.C. § 1 (2018).

105 Orentlicher, *supra* note 37, at 305.

106 *Id.* at 317.

107 *Id.* at 318.

108 *See* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 103 (2013).

109 Orentlicher, *supra* note 37, at 323.

The lack of practical evidence that internal consensus provides a mechanism by which the Court can improve its public perception has important implications. When the Court is not forced to find consensus, the majority is permitted to be "bolder"[110] and "broader" in its decision.[111] Additionally, judicial decisions are better not only when they are made by "people with different perspectives,"[112] but also when they are made by people who are forced to find common ground.[113] The heuristics of social psychology lend themselves to the notion that consensus decisions are more stable, wise, fair, and thus *legitimate*: "Debate and discussion lend[] legitimacy to a decision and thereby make[] the decision more stable."[114] Nonetheless, there remains substantive value to the role of dissent in the Court:

> [T]he logic of constitutional law is the common sense of the Supreme Court of the United States. That common sense may agree with ours, or it may not. . . . This much of comfort we have, at any rate, that, whenever we come upon a decision which is particularly displeasing, we usually find that there is a minority of the court who feel as badly about it as we do. The variety of common sense which is offered by the divergent opinions of different judges is such that no intellectual palate need go without something to its taste.[115]

Given the shortcomings of internal consensus, the need for the Supreme Court to maintain its legitimacy demands another answer.

The evidence suggesting that external consensus can mitigate claims of politicization against the Supreme Court appears more promising. Although, on balance, the Court's decisions have historically been more congruent with public opinion than incongruent, the tides have turned,[116] exposing the institution to rhetorical attacks. When the Court's rulings align with emerging social norms and values, it is perceived as an "engine[]" or "champion" of "social reform."[117] Yet, conversely, when its decisions are perceived as regressive or contrary to public opinion, the Court can provoke backlash, diminishing its

110 Henderson, *supra* note 10, at 284.

111 THE ASSOCIATED PRESS, *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES (May 22, 2006), https://www.nytimes.com/2006/05/22/us/chief-justice-says-his-goal-is-more-consensus-on-court.html [https://perma.cc/JY38-WQ8N] ("The broader the agreement among the justices, the more likely it is a decision on the narrowest possible grounds.").

112 Orentlicher, *supra* note 37, at 312.

113 *See supra* notes 44–47 and accompanying text.

114 LAWRENCE E. SUSSKIND & JEFFREY L. CRUIKSHANK, BREAKING ROBERT'S RULES: THE NEW WAY TO RUN YOUR MEETING, BUILD CONSENSUS, AND GET RESULTS 13 (2006).

115 Powell, *supra* note 36, at 646–47.

116 *See supra* notes 60–78 and accompanying text.

117 *See* Orentlicher, *supra* note 37, at 341, 344.

legitimacy and potentially its authority.[118] Since negative reactions to unpopular opinions are more impactful than positive reactions to popular opinions,[119] the modern Supreme Court is more likely to be perceived as politicized or illegitimate. While such negativity bias creates a short-term issue, its long-term validity is uncertain due to the diffuse support that the public seems to afford the institution.[120] Nonetheless, external consensus appears to provide a better explanation for the way the Court is perceived in the eyes of the public.

However, this analysis of external consensus demands further discussion of the unique role of the Supreme Court. The Court undeniably serves as a cornerstone in shaping legal precedent and driving societal change.[121] However, the implications of such landmark decisions for the Court's legitimacy depend on the degree to which such opinions align with prevailing sentiments. Chief Justice Roberts has said that "criticism of [the Court's] rulings is 'entirely appropriate,' but that the court's role doesn't change because people disagree with its decisions."[122] Of course, the Supreme Court is not *required* to follow public opinion. The *Dobbs* decision confirmed that the Justices "cannot allow [their] decisions to be affected by any extraneous influences such as concern about the public's reaction to [their] work."[123] Still, surely the Supreme Court has some desire for self-preservation.

In discussing the implications of external consensus on the role of the Court, two questions must be addressed: the first is normative, and the second is descriptive. First, *should* public opinion influence the Supreme Court? There is no constitutional requirement that the Court's rulings should reflect public opinion. It is even argued that "judicial decisions are *not supposed to* reflect popular sentiment. Rather, they must respect the rule of law. Thus, on many matters, courts override the preferences of the majority to protect the rights of the

118 *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 884 (1930) ("If there is a glaring contradiction between what the judge thinks desirable and what the great majority of the community so considers, the community must, in its legislative function, limit as carefully as it can by more easily determinable categories the range within which the judge shall select his desirables.").

119 *See supra* notes 65–82 and accompanying text.

120 *See supra* notes 86–93 and accompanying text.

121 *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Texas v. Johnson, 491 U.S. 397 (1989).

122 Joel Rosenblatt, *John Roberts Decries Attacks on Supreme Court's 'Legitimacy' (2)*, BLOOMBERG L. (Sept. 10, 2022, 8:37 AM EDT), https://news.bloomberglaw.com/us-law-week/roberts-defends-high-court-against-attacks-on-its-legitimacy [https://perma.cc/HM5B-7REQ].

123 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2278 (2022).

minority."[124] Nonetheless, "public opinion"[125] and "prevailing sentiments"[126] still constrain the Supreme Court, if not in its decisionmaking, then in its perceived legitimacy. It has been said that "legitimacy depends on whether people like the results the Court is reaching. And everything flows from there."[127] The Justices "have no notion that a sanctity envelops what they write. And the sanctity that lawyers and laymen would sometimes accord to judicial opinions is more lavishly bestowed on those which meet their liking than on those with which they disagree."[128]

Second, does the Supreme Court *shape* or *solidify* public opinion? In other words, does it precede or succeed the will of the people?[129] There is evidence on both sides. The opinions of the Supreme Court may be perceived as a signal of where public opinion stands and where it is going. In this way, it may be that Supreme Court opinions shape public opinion on the issues that the Court decides, rather than the other way around. For example, "support for abortion went up after the 1973 Supreme Court decision that legalized it."[130] Similarly, after the Court's decision in *Loving v. Virginia*,[131] "support for interracial marriage climbed from under 25% to . . . over 80%."[132]

Several current and former Supreme Court Justices have contemplated this question, and in doing so, have seemed to suggest that the institution instead solidifies, or succeeds, public opinion. As Justice Sandra Day O'Connor saw it, courts are "mainly reactive

---

124 Orentlicher, *supra* note 37, at 305 (emphasis added).

125 *See* Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74 (2011).

126 *See* Powell, *supra* note 36, at 652 ("Of course the authority of the Supreme Court to interpret the Constitution is by no means an absolute authority. It is limited in part by the language of the Constitution, in part by prevailing sentiments and by existing conditions.").

127 Neal, *supra* note 3 (paraphrasing Canadian Supreme Court Justice Rosalie Abella).

128 Powell, *supra* note 36, at 653.

129 *See* James L. Gibson, Book Review, 54 PUB. OP. Q. 289, 290 (1990) (reviewing THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989)) ("[I]t is simply not clear whether the Court responds to public opinion, or shapes public opinion, or whether it responds to the same sort of factors that themselves shape public opinion.").

130 WILLIAM G. MAYER, THE CHANGING AMERICAN MIND: HOW AND WHY AMERICAN PUBLIC OPINION CHANGED BETWEEN 1960 AND 1988, at 230 (1993); *see* Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

131 Loving v. Virginia, 388 U.S. 1 (1967).

132 Margaret E. Tankard & Elizabeth Levy Paluck, *The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitudes*, 28 PSYCH. SCI. 1334, 1334 (2017). Using two groups of participants—who were told prior to the *Obergefell v. Hodges* decision that experts predicted either a favorable or unfavorable ruling on the legality of gay marriage—the researchers found that participants who were led to believe that the Court would rule in favor of gay marriage projected significantly higher support for gay marriage, compared to participants who were told the opposite. *Id.* at 1336–37; Obergefell v. Hodges, 376 U.S. 644 (2015).

institutions."[133] She continued: "Rare indeed is the legal victory—in court or legislature—that is not a careful by-product of an emerging social consensus."[134] Additionally,

> constitutional law, the distilled and clarified common sense of the judges of our high tribunal, does not "hang in the vacuum of closed speculation," but advances with the march of changing conditions. That is why it is so baffling to many lawyers, as the reason why it is so baffling to many reformers is that it follows conditions rather than leads them.[135]

With respect to the implications on legitimacy that succeeding public opinion promotes, it is believed that "[a] reactive court is not a court that drives the country into unwelcome territory. A decision anchored in social consensus is one that by definition is unlikely to ignite still more social polarization."[136] However, some have cautioned against this belief, saying that "[r]ote conformity to public opinion [is not] an antidote to politicization—it advances it, by encouraging the public to view the Court as a body whose job it is to ratify the preferences of the majority rather than check them against the Constitution."[137]

CONCLUSION

Legitimacy is a perceptual phenomenon: it is in the eye of the beholder. As a result, the Supreme Court must "earn[] its legitimacy" through its actions.[138] The public is more supportive of Supreme Court decisions that parallel their political predilections, and "individuals

133 SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 166 (Craig Joyce ed., 2004).

134 *Id.*; *see also id.* at 15 ("Most of the Court's agenda is dictated by external forces: the actions of the other branches of government, the decisions of the lower courts, and ultimately the concerns of the public. It is these forces, not secret ones within the Court, that frame the bulk of the issues we decide. The Court's role is uniquely reactive.").

135 Powell, *supra* note 36, at 657.

136 Linda Greenhouse, *What Sandra Day O'Connor Got Wrong*, N.Y. TIMES (Dec. 15, 2023), https://www.nytimes.com/2023/12/15/opinion/supreme-court-guns-abortion.html [https://perma.cc/78V4-YCYS].

137 Nicholas Phillips, *Who's Afraid of a Political Supreme Court?*, NAT'L REV. (Feb. 12, 2019, 6:30 AM), https://www.nationalreview.com/2019/02/supreme-court-politicization-left-thinks-conservative-court-means-crisis/ [https://perma.cc/8N2N-YB74].

138 Justice Elena Kagan, Address at the U.S. Ninth Circuit Court of Appeals Judicial Conference, at 13:50 (July 21, 2022) (video available at *Justice Elena Kagan on Public Confidence in the Supreme Court*, C-SPAN (July 21, 2022), https://www.c-span.org/video/?521729-1/ [https://perma.cc/972F-MEL7]) ("Overall, the way the Court retains its legitimacy and fosters public confidence is by acting like a court, is by doing the kinds of things that do not seem to people political or partisan, by not behaving as though we are just people with individual political or policy or social preferences that we're, you know, making everybody live with." *Id.* at 14:45.).

grant or deny the Court legitimacy based on the ideological tenor of the Court's policymaking."[139] Chief Justice John Roberts has expressed his opinion, stating "[s]imply because people disagree with an opinion is not a basis for questioning the legitimacy of the court."[140] Justice Alito has recently said that "someone . . . crosses an important line" when saying "that the court is acting in a way that is illegitimate."[141]

While the Supreme Court's decisions aligned with the views of the average American for most of its history, they have recently shifted sharply to the right. The Supreme Court is now much more conservative than the public, and it has exemplified a willingness to "fl[y] in the face of majority will."[142] The most recent Supreme Court terms have been marked by a number of significant and high-profile rulings—including its decisions in *Dobbs*,[143] *Students for Fair Admissions v. President & Fellows of Harvard College*,[144] and *303 Creative v. Elenis*.[145] Justices are not oblivious to public opinion, and concerns about the legitimacy of the Court continue to be leveled at the institution in response to its decisions. Exactly what impact this will have on the Court is difficult to determine. However, as the Justices face increasing challenges in garnering public approval for their rulings, this Note suggests that consensus could serve as a valuable political tool. Yet, it may also contradict the fundamental role of the Court:

> [C]onformity to the majority is not the only source of the Court's legitimacy. At least equally important is a willingness to contradict it. When that happens, it's proof that law is distinct from will, that courts operate as a check on the popular branches, and that the

139 Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 185 (2013).

140 *See* Jess Bravin, *Kagan v. Roberts: Justices Spar Over Supreme Court's Legitimacy*, WALL ST. J. (Sept. 28, 2022, 6:46 PM ET), https://www.wsj.com/articles/kagan-v-roberts-justices-spar-over-supreme-courts-legitimacy-11664394642 [https://perma.cc/GCT9-NYZZ].

141 *See* Jessica Gresko, *Supreme Court Justices Spar Over Court Legitimacy Comments*, AP NEWS (Oct. 26, 2022, 3:19 PM EST), https://apnews.com/article/abortion-us-supreme-court-elena-kagan-samuel-alito-government-and-politics-10bf92ae6830573054da5f756a029d1c [https://perma.cc/MP3U-2P4S] (quoting The Heritage Foundation, *LIVE Q&A with Justice Alito at The Heritage Foundation*, YOUTUBE, at 1:07:21 (Oct. 25, 2022), https://www.youtu.be/WzRqIcXPmKw [https://perma.cc/P43G-HMY8]).

142 Greenhouse, *supra* note 136.

143 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overturning Roe v. Wade, 410 U.S. 113 (1973)).

144 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (striking down the use of race as a factor in college admissions).

145 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (concluding that a website designer may refuse to create websites for same-sex couples).

> Framers' vision of a government of separated powers remains intact.[146]

The Supreme Court, "with no enforcement power of its own, needs to maintain its legitimacy . . . in the eyes of the public."[147] The refrain "[l]egitimacy is for losers, since winners ordinarily accept decisions with which they agree"[148] evades humor when, over time, the "losers" have "little reason to treat the [institution] as a legitimate source of authority."[149] Once confronted with the harsh reality that perhaps the Supreme Court is not self-sustaining, we must seek to resolve what can be done to fix it. This Note reveals that where we look for public perception shapes the answers that we find, and the Supreme Court's "legitimacy crisis" really is a crisis of consensus.

146 Phillips, *supra* note 137.

147 Frank Newport, *Public Opinion and Recent Supreme Court Decisions*, GALLUP (July 7, 2023), https://news.gallup.com/opinion/polling-matters/508313/public-opinion-recent-supreme-court-decisions.aspx [https://perma.cc/KQ9Z-WW9R].

148 James L. Gibson, Milton Lodge & Benjamin Woodson, *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 L. & SOC'Y REV. 837, 839 (2014) (emphasis omitted).

149 *See* Grove, *supra* note 7, at 2253.