# Good for This Day and This Day Only: A Study on Changes in Court Personnel, Precedent, and Judicial Legitimacy

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## I. INTRODUCTION

The watershed discarding of *Roe v. Wade* by the Supreme Court in *Dobbs v. Jackson Women's Health Organization*[1] predictably included a discussion of the role of *stare decisis*. After deciding that the Constitution does not protect the right to make decisions about abortion, the Court considered whether *stare decisis* counseled leaving *Roe* in place to protect the integrity of the legal process.[2] In this discussion, the majority cited *Payne v. Tennessee*,[3] a fairly obscure 1991 case regarding the admissibility of victim impact evidence in death penalty sentencing hearings.[4] In *Payne*, the Court abandoned several recent precedents, concluding that "[*s*]*tare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision," a dynamic

1. 597 U.S. 215 (2022).
2. *Id.* at 263–99.
3. 501 U.S. 808 (1991).
4. *See Dobbs*, 597 U.S. at 263–64, 286–88 (discussing Payne v. Tennessee, 501 U.S. 808 (1991)).

particularly true in constitutional cases where legislative correction is difficult.[5] As in *Payne*, the *Dobbs* Court concluded that the benefits of *stare decisis* were not sufficient to justify continued adherence to a previous decision.[6] And so, *Roe* was no more.[7]

*Payne* was a 6-3 decision and prompted a furious dissent from Justice Thurgood Marshall in what would be his last opinion before retiring the following day.[8] "This truncation of the Court's duty to stand by its own precedents is astonishing," Marshall wrote before highlighting other cases vulnerable to potential future reversal, a list that included *Roe*.[9] Though it took three decades, *Dobbs* proved this prediction correct.[10] The dissenters in *Dobbs* quoted from Marshall's dissent in registering their disagreement.[11] Marshall wrote in 1991 and Justices Breyer, Sotomayor, and Kagan echoed thirty years later that "power, not reason, is the new currency of this Court's decisionmaking."[12]

But there was more to Marshall's *Payne* critique than simply an assertion that the majority's conclusion was rooted in power rather than reason. He had leveled a more specific charge: "It takes little real detective work to discern just what *has* changed since the [Court's previous decisions]; this Court's own personnel."[13] The future meaning of the Constitution, under this view, "must be understood to depend on nothing more than the proclivities of the individuals who *now* comprise a majority of this Court."[14] By tying Court outcomes to personnel—and reversals to changes in personnel—Marshall offered one of the most damning attacks on judicial legitimacy: that results

5. *Payne*, 501 U.S. at 828 (internal quotations and citations omitted).

6. *Dobbs*, 597 U.S. at 294 ("Precedents should be respected, but sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong. When that happens, *stare decisis* is not a straitjacket.").

7. *Id.* at 302.

8. *Payne*, 501 U.S. at 844–56 (Marshall, J., dissenting).

9. *Id.* at 851–52.

10. *See Dobbs*, 597 U.S. at 215 (As Marshall predicted, *Dobbs* overturned precedent in *Roe*.).

11. *Id.* at 414 (Breyer, J., Sotomayer, J., Kagan, J., dissenting) (citing *Payne*, 501 U.S. at 844).

12. *Payne*, 501 U.S. at 844 (Marshall, J., dissenting), *cited in Dobbs*, 597 U.S. at 414 (Breyer, J., Sotomayor, J., Kagan, J., dissenting).

13. *Id.* at 850.

14. *Id.* at 851.

depend more on *who* is making the decision than what a case is about or why a result is justified.[15] When changes in Supreme Court personnel generate changed understandings of the Constitution, the rule of law is shaken, and the ripple effects are profound.

Marshall's dissent in *Payne* made this claim about a specific reversal and asserted that it signaled danger for the Court's broader authority and legitimacy.[16] But, to what extent is the claim that personnel changes dictate results that shift the meaning of the Constitution provable beyond Marshall's observation? This Article engages that question in several ways. It considers the Supreme Court transitions of the past seventy-five years to determine the extent that replacement of one justice with another impacted the balance of the Court.[17] Further, looking closely at the past thirty-five years since Marshall left the Court, it seeks to identify instances where a transition seems to have affected the outcome of a particular case.[18] Thus, this Article seeks to determine whether and how personnel changes affect the broader trajectory of the Supreme Court's work and when those changes seem to affect specific cases. The results are mixed—some Court transitions have fundamentally shifted the balance of the Court, while others have little effect.[19] Meanwhile, though instances of the Court shifting or even overruling particular doctrines are there to be found, the process is rarely as direct as in *Payne*.[20] The process may occur over a significant period of time and include multiple personnel changes, changed interpretations, or societal shifts in understanding of a particular issue. Or the process may include all of these and more.

Part II begins with a brief discussion of the claim that Court personnel (and changes on the Court) dictate outcomes, including why such an assertion significantly undermines judicial legitimacy. Part III presents several ways of measuring the impact of personnel transitions, describing the methodology and results of such measurements. Additionally, Part III identifies which justice transitions of the past seventy-five years have been the most significant. Next, this Article turns to the quest to identify specific instances where a Court transition

15. *Id.* at 850–51.
16. *Id.* at 844–67.
17. *See infra* Part III.
18. *See infra* Part V.
19. *See infra* Part V.
20. *Payne*, 501 U.S. at 808.

(or multiple Court transitions) determined the outcome of a case. These are the instances at the heart of Marshall's charge and, more than the general shifts discussed in Part III, raise the most pointed concerns about legitimacy. Part IV explores the challenges in identifying such cases, while Part V profiles several cases that seem to fit the criteria to varying degrees. The conclusion offers some observations and implications.

## II. THE PERSONNEL CHARGE AND ITS IMPACT ON JUDICIAL LEGITIMACY

Justice Marshall was not alone in noting dangers where the Court appears to be reversing course based primarily on the changing makeup of the Court's personnel. Years earlier, Justice Felix Frankfurter had written a letter to his colleague Justice Stanley Reed about the Court's recent decision in *Smith v. Allwright*,[21] which reversed a decision from less than a decade earlier and declared the whites-only party primary voting systems in Texas to be unconstitutional. Previewing what Marshall would write in *Payne*, Frankfurter wrote, "[N]ot a thing is before us now that was not before the Court in [the previous case] and no intervening event of legal or practical significance has happened except a change in the membership of this Court."[22] Justice Owen Roberts did not confine his thoughts on the case's reversal to letters, writing in a separate opinion in *Allwright* that the Court's decision "tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."[23]

Perhaps there is some irony that the successful lawyer who won *Smith v. Allwright* was Thurgood Marshall.[24]

21. 321 U.S. 649 (1944) (overruling Grovey v. Townsend, 295 U.S. 45 (1935)).

22. David M. Levitan, *The Effect of the Appointment of a Supreme Court Justice*, 28 U. TOL. L. REV. 37, 37 n.2 (1996) (citing Bradley C. Cannon et al., *Justice Frankfurter and Justice Reed: Friendship and Lobbying on the Court*, 78 JUDICATURE 224, 228 (1995)).

23. *Allwright*, 321 U.S. at 669 (Roberts, J., dissenting) ("I have no assurance, in view of current decisions, that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject.").

24. At a press conference announcing his retirement the day following the decision and his dissent in *Payne*, Marshall spoke about the Texas primary case.

Roberts went on to note that by reversing itself, the Court would "become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions."[25] For his part in *Payne*, Marshall lamented that the replacement of reason with power as the "currency of the Court" and the overturning of prior cases would "squander the authority and the legitimacy of this Court as a protector of the powerless."[26] Speaking after his retirement, Lewis Powell, one of the justices who had been replaced in the years between *Payne* and the cases it reversed, noted recent threats to judicial legitimacy in a 1989 lecture to the Bar of the City of New York.[27] "[T]he elimination of constitutional stare decisis would represent an explicit endorsement of the idea that the Constitution is nothing more than what five justices say it is," Powell said. "This would undermine the rule of law."[28]

The charge that personnel might be determinative is a charge that threatens the public perception of the Court in ways that could call into question the underlying rule of law. As Alexander Hamilton wrote in his oft-quoted argument, the federal judiciary "has neither force nor will, but merely judgment."[29] If the confidence of that judgment wanes, the Court may have nothing at all.

Still, the idea that personnel matters in the work of the Court has been evident throughout the nation's history. The foundational case giving the Court its role in the constitutional system, *Marbury v.*

*Retirement of Justice Marshall* (American History TV broadcast June 28, 1991), https://www.c-span.org/program/call-in/retirement-of-justice-marshall/13326.

25. *Allwright*, 321 U.S. at 670 (Roberts, J., dissenting). The full quote is:

> It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this court, which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions.

*Id.*

26. Payne v. Tennessee, 501 U.S. 808, 856 (1991) (Marshall, J., dissenting).

27. Lewis Powell, *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 289 (1990) (reprinting remarks of Justice Powell from an October 17, 1989 speech to the Bar of the City of New York); *Payne*, 501 U.S. at 844–67 (Marshall, J., dissenting).

28. Powell, *supra* note 27, at 288.

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

*Madison*,[30] derived from an attempt by an outgoing presidential administration to fill positions with political allies. It was presided over by a chief justice who had been appointed to maintain a presence in a new era dominated politically by a new party. And it was followed by an effort to impeach and remove another justice unfavorable to the new administration.[31] Thus, from the Court's beginning until the more recent gamesmanship regarding the filling of open Court seats during election years, presidents and politicians have sought to influence the Court's direction by influencing its personnel.

Scholars, too, have furthered the impression that personnel changes drive the Court.[32] There are numerous studies of judicial ideology and behavior that focus on the *people* on the Court, attempting to explain the jurisprudence of particular justices or the ways in which

30. 5 U.S. 137 (1803).

31. *See* Samuel R. Olken, *The Ironies of* Marbury v. Madison *and John Marshall's Judicial Statesmanship*, 37 J. MARSHALL L. REV. 391, 410–15 (2004) (describing the political context of the *Marbury* decision); Richard B. Lillich, *The Chase Impeachment*, 4 AM. J. LEGAL HIST. 49, 49–53 (1960) (describing the political backdrop to the Chase impeachment); Adam A. Perlin, *The Impeachment of Samuel Chase: Redefining Judicial Independence*, 62 RUTGERS L. REV. 725, 728 (2010) ("Had the Senate convicted Chase, the immediate impact likely would have been a dramatic shake up in the composition of the Supreme Court . . . . Federalists believed that in the wake of Chase's removal, Jefferson planned to replace Federalist judges with Democratic loyalists at all levels of the federal judiciary."). The failure of the Chase impeachment was viewed by Federalist contemporaries as a capstone of judicial independence. *Id.* at 782–84 ("In doing so, the Senate . . . answered the question of whether the elected branches may properly use impeachment because, as Giles had phrased it, '*[w]e want your offices,*' with a resounding no.") (emphasis added).

32. *See, e.g.*, Lawrence Baum, *Membership Change and Collective Voting Change in the United States Supreme Court*, 54 J. POL. 3, 21 (1992) ("Students of the Supreme Court have pointed to turnover in the Court's membership as the primary source of change in its decisional tendencies. The analysis in this Article supports that view of the Court. But it also suggests that membership change, at least as a component of collective voting change, is not as dominant as many observers think."); Levitan, *supra* note 22, at 37–38 ("My study of the evolution of constitutional doctrines leads me to the conclusion that change in membership has been the dominant cause of change in constitutional law, but I agree that major changes in the legal, political, economic, and social ideas and conditions have influenced decisions as well."); Charles Cameron et al., *Shaping Supreme Court Policy Through Appointments: The Impact of a New Justice*, 93 MINN. L. REV. 1820 (2009).

interactions among justices influence the work of the Court and the interpretation of the Constitution.[33]

There is nothing inherently wrong in shifting personnel resulting in different directions for the Court. After all, justices are appointed by elected presidents and confirmed by elected senators.[34] Thus, each new appointment could be reflective of the direction of the electorate—a direction that certainly shifts over time. Indeed, if Court decisions reflect these shifts, there is an argument that the Court's legitimacy *increases* by bringing constitutional interpretation in line with contemporary values.

Yet, jarring departures from precedent, particularly where "the salient mechanism of change is not the formal amendment process, but rather the appointment of new justices to the Supreme Court" is "dispiriting and detrimental."[35] This is so because stare decisis "operates to promote systemwide stability and continuity by ensuring the survival of governmental norms that have achieved unsurpassed importance in American society."[36] Disruptions to those norms can undo expectations and destabilize society, potentially threatening the entire constitutional order.[37] Sometimes, such disruptions are necessary. The overturning of *Plessy v. Ferguson*[38] is the quintessential example. But where the explanation for the disruption is not a change in law, fact, or societal understanding of a problem, but

33. *See, e.g.*, Leigh Anne Williams, Note, *Measuring Internal Influence on the Rehnquist Court: An Analysis of Non-Majority Opinion Joining Behavior*, 68 OHIO ST. L.J. 679 (2007); Christopher E. Smith, *The Impact of New Justices: The U.S. Supreme Court and Criminal Justice Policy*, 30 AKRON L. REV. 55 (1996); Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decision Making*, 29 J. LEGAL STUDIES 721 (2000).

34. *See, e.g.*, Gerald Gunther, *The Supreme Court, 1971 Term–Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 5 (1972) (noting that it is "entirely appropriate that changes in Supreme Court personnel should yield changed assessments of constitutional values."), *cited in* Robert S. Peck, *New Supreme Court Justices and the "Freshman Effect"*, 4 CHARLESTON L. REV. 149, 151 (2009).

35. RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT, 5–8 (Cambridge Univ. Press 2017).

36. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 749 (1988).

37. *Id.* at 750.

38. 163 U.S. 537 (1896).

rather a change in who is making the decision, the impact of perceptions of legitimacy can be dire.[39]

As Justice Byron White observed, "Every time a new justice arrives on the Court, the Court's a different instrument."[40] The extent of those differences and whether it might lead to different case outcomes is where this Article turns next.

## III. MEASURING THE IMPACT OF SUPREME COURT TRANSITIONS

Not all Supreme Court transitions are created equal. In an earlier article in this ongoing project, I compared such transitions to strikes of lightning: they are unpredictable in terms of timing and their impact depends on the precise moment and circumstances in which they strike.[41] Any study of Supreme Court transitions and their impact on individual cases must acknowledge these differences. Every new Supreme Court justice brings something new into the Court's chambers, but not every transition transforms the Court. This Part summarizes and updates my previous scholarship measuring the impact of changes in Court personnel and identifies which transitions of the past 70 years seem to have had the most impact.[42] This provides evidence of the *general* impact of changes in Court personnel, while the remainder of this Article turns to more specific ramifications of the arrival of a new justice.

39. It is worth noting that state courts may be even more vulnerable to personnel-as-determinative charges than federal due to the existence of elections for membership or retention on some state supreme courts. *See, e.g.*, Harper v. Hall, 886 S.E.2d 393, 443 (N.C. 2023) (reversing a decision from a year earlier, Harper v. Hall, 868 S.E.2d 499 (N.C. 2022), that had declared districting maps unconstitutional under state constitution; a judicial election had occurred between the two cases that altered the makeup of the North Carolina Supreme Court).

40. DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 408 (1998) *quoted in* Robert S. Peck, *New Supreme Court Justices and the "Freshman Effect,"* 4 CHARLESTON L. REV. 149, 153 (2009)).

41. Daniel Kiel, *A Bolt of Lightning: Measuring the Impact of Modern Transitions on the Supreme Court*, 42 CARDOZO L. REV. 2813 (2021).

42. *Id.*

### *A. Methodology*

There have been twenty-eight Supreme Court transitions since 1953, the first term presided over by Chief Justice Earl Warren. If Court transitions were regular, this would mean a new justice was appointed approximately every two and a half years. However, during that period, there has been a gap of over eleven years between transitions (Breyer in 1994 to Roberts in 2005) on one end of the spectrum, and the simultaneous appointment of two justices (Rehnquist and Powell in 1972) at the other. These twenty-eight appointments have thus occurred at unpredictable intervals, a fact that raises the stakes for every appointment (you never know when the next one will occur!), but they have also varied in terms of context.

#### 1. President and Senate

There are several variables that determine the likelihood of impactfulness of Court transitions.[43] First are the political actors who determine who a new justice will be. Because justices are appointed by the President with the advice and consent of the Senate,[44] impact might be judged by looking at the party of appointing presidents or the political makeup of the Senate at the time of an appointment. However, looking at the party of the appointing president ends up being of marginal use. Justices often shift ideologically during their lengthy tenures on the bench, which far outlast the terms of the appointing president.[45] Sometimes, justices appointed by presidents of different parties end up being quite aligned;[46] in other instances, justices

43. This Article focuses on the impact of Supreme Court appointments on the jurisprudential work of the Court, including its ideological balance and case outcomes. Another potential impact of a Court appointment may flow from the identity of the justice being appointed. Certainly, the barrier-breaking appointments of Justices Thurgood Marshall, Sandra Day O'Connor, Sonia Sotomayor, or Ketanji Brown Jackson have been impactful within the Court and beyond in demonstrating the potential for access to the highest ranks of the federal judiciary for people who had been previously excluded. The focus here on a specific type of Court impact is not intended to minimize other significant impacts appointments might have.

44. U.S. CONST. art. II, § 2, cl. 2.

45. Kiel, *supra* note 41.

46. Kiel, *supra* note 41. For example, while Justice Elena Kagan was appointed by a Democrat president (Barack Obama) and replaced Justice John Paul

appointed by presidents from the same party end up being very different.[47]

As for the Senate, it is difficult to quantify its impact on appointments that do occur. While the political balance in the Senate may influence who a president nominates or how many votes a nominee gets, these impacts on the process are highly context specific. Though closely contested Senate votes may have once indicated the contentiousness of a nominee, each of the past four confirmation votes have matched party lines in the Senate to an unprecedented extent.[48] None of the past four justices appointed has received more than 54 votes for confirmation or more than 3 votes from the party opposite the appointing president.[49] By contrast, three of President Reagan's nominees were confirmed unanimously while several nominees of Presidents Eisenhower, Kennedy, and Johnson were confirmed by acclamation without even taking a roll call vote.[50]

The Senate's most significant influence has been in *preventing* appointments. Since 1953, the Senate has rejected three nominees[51]

Stevens, who was appointed by a Republican president (Gerald Ford), Justices Kagan and Stevens tend to agree on many of the questions that come before the Court (though certainly not all).

47. Kiel, *supra* note 41. Chief Justices Earl Warren and Warren Burger were both appointed by a Republican president, but they did not share a perspective with one another. There are reasons to believe that the likelihood of ideological flexibility from justices may be diminishing and thus, alignment with the party of an appointing president may become a more valid indicator. The current Court is the first during the period studied (1953–present) in which justice ideology matches the party of the appointing president. Additionally, there is intense and intentional vetting of potential nominees to avoid any ideological uncertainty or future ideological drift. These dynamics, however, are beyond the scope of this Article.

48. *See Supreme Court Nominations, 1789–Present*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm#3 (last visited April 7, 2025). Justice Jackson was confirmed with fifty-three votes, including three Republicans; Justice Barrett was confirmed with fifty-two votes and no Democrats; Justice Kavanaugh was confirmed with fifty votes and no Democrats; and Justice Gorsuch was confirmed with fifty-four votes, including two Democrats.

49. *Id.*

50. *Id.*

51. *Id.* Nixon nominees Clement Haynesworth and Harold Carswell were rejected before Harry Blackmun was confirmed. Reagan nominee Robert Bork was rejected before Anthony Kennedy was confirmed.

and refused to hold confirmation hearings for Merrick Garland, nominated by Barack Obama in 2016 to replace Justice Antonin Scalia. Each of these moments represents a significant "what if" moment in Supreme Court history. The Garland nomination was especially noteworthy because the eventually appointed justice was appointed by a different president. But, as with the appointing president, there is not a consistent, straightforward way of incorporating the influence of the Senate in measuring the relative impact of Court transitions. Thus, this Article will reference those dynamics where appropriate, but not include the party of the appointing president or the political makeup of the Senate systematically.

### 2. Justice-to-Justice Comparisons

The most obvious place to turn in measuring the impact of a Supreme Court transition is the justices themselves: which justice is leaving the Court, and which justice is arriving. Thus, a straightforward way of determining the impact of replacing one justice with another is to simply compare an arriving justice to their predecessor. However, while a qualitative comparison of one justice to another is possible,[52] such comparisons do not enable comparison of one *transition* to another. A more quantitative method for comparing justices is needed. Though there are several methods out there, this Article uses the Martin-Quinn scores of each justice for each term. Martin-Quinn scores are calculated using a method devised by political scientists Andrew D. Martin and Kevin M. Quinn that use justices' votes in cases to determine an "ideal point estimate" for each justice for each term since 1937.[53] The authors maintain and share updates of

52. *See, e.g.*, Linda Greenhouse, *A Tale of Two Justices*, 11 GREEN BAG 37 (2007) (comparing justices Blackmun and Roberts on the role of race in education admissions); Matthew James Tanielian, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. UNIV. 961, 972–93 (1995) (comparing justices White and Scalia's approaches to separation of powers issues); Christopher E. Smith & Kimberly A. Beuger, *Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees*, 27 AKRON L. REV. 115, 119–35 (1994) (comparing Justices Blackmun, Scalia, Thomas, and Souter in terms of how they fulfilled, or failed to fulfill, their appointing president's expectations).

53. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL.

their data for each new term, which provides the primary basis for the justice (and therefore the transition) comparisons in this Article.[54] Generally, Martin-Quinn scores center at zero, with negative scores leaning liberal and positive scores leaning conservative. The justices' scores for the 2022 Court term are included in Figure 1.

*Figure 1: Martin-Quinn Scores of Supreme Court Justices During 2022 Term*

| Justice | 2022 Term MQ Score |
|---|---|
| Sotomayor | -4.085 |
| Kagan | -2.063 |
| Jackson | -1.712 |
| Roberts | 0.425 |
| Kavanaugh | 0.45 |
| Barrett | 0.824 |
| Gorsuch | 1.078 |
| Thomas | 2.355 |
| Alito | 2.588 |

This Article will use Martin-Quinn scores to compare outgoing and incoming justices in two ways. First, it will measure short-term differences by comparing the final term of an outgoing justice to the first term of an incoming justice. Second, it will measure longer-term differences by comparing the average Martin-Quinn scores of an

ANALYSIS 134 (2002). The authors use a Bayesian modeling strategy to determine where each justice's preferred outcomes would be, considering variation in case content over time. *See* Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1503 (2007).

54. *Project Description*, MARTIN-QUINN SCORES, http://mqscores.wustl.edu/index.php.

incoming justice with their predecessor. The results are shared in Part B, below.

### 3. Impact on Court Balance

While justice-to-justice comparisons can reveal differences between justices, they do not show how that difference impacts the Court on which those justices sit. Since each justice is only one of nine, the dynamics of the Court at the time of a transition matter significantly in determining the impactfulness of any particular personnel change. For example, even if a justice might vote differently than her predecessor, if that vote doesn't change the case outcome, the impact is limited. Measuring impact, then, should include measuring whether and to what extent a transition impacts the Court's balance.

Martin-Quinn scores enable identification of a median justice for each term. An appointment that replaces a justice on one side of that median with a justice who ends up on the opposite side of the median is a transition that alters the balance of the Court. This Article will identify the transitions where a new justice is moved to the median as a result of an appointment. It will further examine the ideological difference between the old median justice and the new one, thus exposing the average ideology of the theoretically determinative vote in 5-4 cases.[55] This measure will reveal a short-term impact of a transition on court balance. However, the depth of impact of a court balance transition depends on whether that balance holds for an extended period of time, even after subsequent transitions occur. Thus, this Article will also examine (a) whether the shift in median justice represents something new (has this justice been the median justice previously, and how often?), and (b) whether the shift in median justice represents something that lasted (for how long or how often was this justice the median justice *after* the transition?). In this way, this Article will identify those changes in Court personnel that significantly altered the balance of the Court in lasting ways.

55. Note the limitation here that the median justice is certainly not always the determinative vote in 5-4 cases since 5-4 cases do not all neatly fit the ideological scores (though many do).

### *B. Results*

The figures below share results from the evaluations described above and, cumulatively, offer a sense of how one might measure the impact of changes in personnel on the general direction of the Supreme Court. While each figure will be discussed briefly (and could be dissected in far greater depth), a few observations are worth noting at the outset. First, there are three transitions that stand out when considering these measures as a whole: (1) the 1969 transition from Chief Justice Earl Warren to Chief Justice Warren Burger; (2) the 1991 transition from Justice Thurgood Marshall to Justice Clarence Thomas; and (3) the 2020 transition from Justice Ruth Bader Ginsburg to Justice Amy Coney Barrett. Each of these transitions involved both a significant ideological shift between the outgoing and incoming justice as well as a change in the median justice that ushered in a new era of balance on the Court that lasted for a significant amount of time. It is not surprising that these three transitions stand out; in each case a liberal judicial icon was replaced by a conservative President's nominee. However, it is noteworthy that other liberal judicial icons were replaced by conservative Presidents during this period (Justice William Douglas was replaced by President Gerald Ford and Justice William Brennan was replaced by President George H.W. Bush). But those transitions did not end up being nearly as impactful because the incoming justices did not hem to a conservative ideology during their tenures.[56]

Thus, it is not a given that ideological differences between an outgoing justice and the appointing president will lead to significant difference between outgoing and incoming justices. However, the data in Figures 2 and 3 reveals that the Warren-to-Burger, Marshall-to-Thomas, and Ginsburg-to-Barrett transitions did. It is the data in Figures 4 and 5, though, that demonstrates how those changes reshaped the Court. The Warren-to-Burger transition made Justice Byron White the median justice for only the second time (the first had been in the

56. John Paul Stevens was appointed by President Ford to replace Justice Douglas in 1975, while David Souter was appointed by President Bush to replace Justice Brennan in 1990. Both Justices Stevens and Souter have first-term MQ scores that place them on the more conservative side of the ledger (Stevens in 1975 = 0.081; Souter in 1990 = 0.971), but accumulated career MQ averages that were firmly more liberal (Stevens = -1.81; Souter = -0.774).

1962 term). Further, during Chief Justice Burger's first term, Justice White was replacing Justice Brennan as the median justice, which represented the largest ideological difference in Martin-Quinn scores between median justices on either side of a Court transition. Over the following twenty-two terms, Justice White would remain the median justice fifteen additional times, demonstrating that amidst many additional changes in personnel, Justice White largely remained at the Court's center.

The next period with a consistent center came during the 1991 term when the replacement of Justice Marshall with Justice Thomas made Justice Sandra Day O'Connor the median justice for the first time. Justice O'Connor would be the central justice during ten of the first fifteen terms Justice Thomas served until her 2006 retirement. The only other median justice during that period was Justice Anthony Kennedy, who was the median justice in every term between O'Connor's retirement and his own in 2018. Thus, the Marshall-to-Thomas transition not only represents the largest long-term ideological difference between outgoing and incoming justices, but it also ushered in more than a quarter-century period where O'Connor and Kennedy controlled the Court's center.

The Ginsburg-to-Barrett transition is still too recent to know the longevity of its impact on the Court's balance, but it brought Justice Brett Kavanaugh in as median justice for the first time. Kavanaugh was the median justice during each of Barrett's first three terms. While the difference in Martin-Quinn scores between Kavanaugh and the previous median justice during Ginsburg's last term (Chief Justice John Roberts) is not large, the Barrett-to-Ginsburg transition ushered in an era where the Court's ideological balance is tilted even further in a conservative direction—Roberts' career average Martin-Quinn score of 0.86 is among the more conservative, yet he now finds himself to the left of the Court's median.

Each of these three most impactful transitions moved the Court in the same, more conservative direction. Indeed, there has not been a corresponding transition where a conservative judicial icon was replaced by a more liberal president's nomination during the entirety of the period studied.[57] That nearly occurred in 2016 when Justice

57. The closest thing might be the replacement of Justice Felix Frankfurter by President John F. Kennedy in 1962. Though appointed by President Franklin

Antonin Scalia passed away during the presidency of Barack Obama. The potential Scalia-to-Garland transition may have ended up on this list of most impactful as well; however, since Scalia ended up being replaced by Justice Neil Gorsuch, the impact was far less significant. Still, one might rightfully consider the fact that it was Gorsuch rather than Garland that replaced Scalia to be a moment as significant as Warren-to-Burger, Marshall-to-Thomas, and Ginsburg-to-Barrett in the trajectory of the Court.

These personnel changes seem to be the most significant in affecting the general direction of the Court, and they will provide a starting point for some of Part V's analysis identifying specific cases where the change in personnel was determinative.

### 1. Short-Term Ideological Impact

Figure 2 shows the twenty-nine Supreme Court transitions between 1953 and 2023, ranking them by the difference in Martin-Quinn scores of the outgoing justice's final term and the incoming justice's first term.[58]

Roosevelt, Frankfurter had drifted ideologically during his time on the Court, such that his average MQ score ended up at 0.519. He was replaced by Justice Arthur Goldberg, whose average MQ score over his brief 3-term tenure was indeed more liberal, -1.074. Goldberg's brief tenure, however, makes it difficult to evaluate the long-term impact on the Court. The Frankfurter-to-Goldberg transition does appear in Figures 4 and 5 because it brought a new median justice (Goldberg himself). That period saw several different median justices until the arrival of Chief Justice Burger in 1969 and the beginning of White's era as the predominant median justice between 1969 and 1991.

58. It is worth noting that the most significant short-term justice-to-justice difference (Douglas-to-Stevens in 1975) was not discussed as among the most impactful transitions. The most significant (Douglas-to-Stevens) is worth noting since it was not highlighted among the most significant transitions in Figure 2. There are several reasons why this largest short-term ideological gap between does not merit greater attention. First, it is caused in part by Justice Douglas' extremely liberal final term; -7.80 is by far the most liberal final term of any justice studied (The next most liberal final term was that of Justice Marshall in 1990 at -4.309.). Second, Justice Stevens' first term Martin-Quinn score of 0.81 ended up being the most conservative of his career. And finally, Justice White was the median justice before Douglas retired and remained in that spot once Stevens arrived. Thus, despite the significant difference between Douglas and Stevens, the impact on the Court was limited.

*Figure 2: Short-Term Differences in Martin-Quinn Scores for Supreme Court Transitions from 1953–2023*

| Rank | Date | Outgoing Justice | Outgoing Justice Last Term MQ Score | **Incoming Justice** | Incoming Justice First Term MQ Score | Magnitude of Change in MQ Score | Direction of Change |
|---|---|---|---|---|---|---|---|
| 1 | 1975 | Douglas | -7.8 | **Stevens** | 0.081 | 7.881 | Conservative |
| 2 | 1991 | Marshall | -4.309 | **Thomas** | 2.734 | 7.043 | Conservative |
| 3 | 1990 | Brennan | -3.18 | **Souter** | 0.971 | 4.151 | Conservative |
| 4 | 2020 | Ginsburg | -2.92 | **Barrett** | 0.985 | 3.905 | Conservative |
| 5 | 1969 | Warren | -1.308 | **Burger** | 1.986 | 3.294 | Conservative |
| 6 | 1962 | Frankfurter | 1.794 | **Goldberg** | -1.152 | 2.946 | Liberal |
| 7 | 1972 | Harlan | 0.78 | **Rehnquist** | 3.574 | 2.794 | Conservative |
| 8 | 1970 | Fortas | -1.096 | **Blackmun** | 1.459 | 2.556 | Conservative |
| 9 | 1994 | Blackmun | -1.94 | **Breyer** | -0.332 | 1.608 | Conservative |
| 10 | 1956 | Minton | 0.834 | **Brennan** | -0.695 | 1.529 | Liberal |
| 11 | 1953 | Vinson | 1.487 | **Warren** | 0.002 | 1.485 | Liberal |
| 12 | 1962 | Whittaker | 1.142 | **White** | -0.332 | 1.474 | Conservative |
| 13 | 2010 | Stevens | -2.868 | **Kagan** | -1.446 | 1.422 | Conservative |
| 14 | 1972 | Black | -0.002 | **Powell** | 1.4 | 1.402 | Conservative |
| 15 | 2006 | O'Connor | 0.073 | **Alito** | 1.424 | 1.351 | Conservative |
| 16 | 1967 | Clark | 0.109 | **Marshall** | -1.162 | 1.271 | Liberal |
| 17 | 1981 | Stewart | 0.731 | **O'Connor** | 1.662 | 0.931 | Conservative |
| 18 | 1986 | Burger | 2.227 | **Scalia** | 1.396 | 0.831 | Liberal |
| 19 | 1993 | White | 0.582 | **Ginsburg** | -0.21 | 0.792 | Liberal |
| 20 | 1965 | Goldberg | -0.784 | **Fortas** | -1.328 | 0.544 | Liberal |
| 21 | 2017 | Scalia | 1.583 | **Gorsuch** | 1.122 | 0.461 | Liberal |
| 22 | 2022 | Breyer | -2.127 | **Jackson** | -1.712 | 0.415 | Conservative |
| 23 | 1988 | Powell | 0.883 | **Kennedy** | 1.227 | 0.344 | Conservative |
| 24 | 1958 | Burton | 1.076 | **Stewart** | 0.834 | 0.242 | Liberal |
| 25 | 2018 | Kennedy | 0.382 | **Kavanaugh** | 0.595 | 0.213 | Conservative |
| 26 | 1957 | Reed | 0.797 | **Whittaker** | 0.971 | 0.174 | Conservative |
| 27 | 2005 | Rehnquist | 1.464 | **Roberts** | 1.395 | 0.069 | Liberal |
| 28 | 2009 | Souter | -1.568 | **Sotomayor** | -1.625 | 0.057 | Liberal |
| 29 | 1955 | Jackson, R | 0.847 | **Harlan** | 0.847 | 0 | N/A |

2. Long-Term Ideological Impact

Figure 3 follows the same format but uses the justices' career average Martin-Quinn scores to reveal the long-term difference between outgoing and incoming justices. Here, Thurgood Marshall is involved in both of the most significant transitions, including the most significant gap between Marshall and Thomas as discussed above. The Warren-to-Burger transition (3rd) and Ginsburg-to-Barrett (7th) also

rank highly on this measure, which is probably the best indicator of the isolated impact of each personnel change.

*Figure 3: Career Average Differences in Martin-Quinn Scores for Supreme Court Transitions from 1953–2023*

| Rank | Date | Outgoing Justice | Outgoing Justice Average MQ Score | **Incoming Justice** | Incoming Justice Average MQ Score | Magnitude of Difference in Average MQ Score | Direction of Change |
|---|---|---|---|---|---|---|---|
| 1 | 1991 | Marshall | -2.826 | **Thomas** | 3.347 | 6.173 | Conservative |
| 2 | 1967 | Clark | 0.465 | **Marshall** | -2.826 | 3.291 | Liberal |
| 3 | 1969 | Warren | -1.257 | **Burger** | 1.89 | 3.147 | Conservative |
| 4 | 1975 | Douglas | -4.695 | **Stevens** | -1.81 | 2.885 | Conservative |
| 5 | 1956 | Minton | 1.104 | **Brennan** | -1.779 | 2.883 | Liberal |
| 6 | 1972 | Black | -1.762 | **Powell** | 0.9695 | 2.732 | Conservative |
| 7 | 2020 | Ginsburg | -1.759 | **Barrett** | 0.949 | 2.708 | Conservative |
| 8 | 2009 | Souter | -0.774 | **Sotomayor** | -3.127 | 2.353 | Liberal |
| 9 | 1953 | Vinson | 1.035 | **Warren** | -1.257 | 2.292 | Liberal |
| 10 | 1993 | White | 0.437 | **Ginsburg** | -1.759 | 2.196 | Liberal |
| 11 | 2005 | Rehnquist | 2.959 | **Roberts** | 0.8595 | 2.01 | Liberal |
| 12 | 1962 | Frankfurter | 0.519 | **Goldberg** | -1.074 | 1.593 | Liberal |
| 13 | 2017 | Scalia | 2.503 | **Gorsuch** | 1.027 | 1.476 | Liberal |
| 14 | 1972 | Harlan | 1.623 | **Rehnquist** | 2.959 | 1.336 | Conservative |
| 15 | 1970 | Fortas | -1.3245 | **Blackmun** | -0.027 | 1.298 | Conservative |
| 16 | 1994 | Blackmun | -0.027 | **Breyer** | -1.317 | 1.29 | Liberal |
| 17 | 1990 | Brennan | -1.779 | **Souter** | -0.774 | 1.005 | Conservative |
| 18 | 2006 | O'Connor | 1.016 | **Alito** | 1.95 | 0.934 | Conservative |
| 19 | 1955 | Jackson, R | 0.698 | **Harlan** | 1.623 | 0.925 | Conservative |
| 20 | 1957 | Reed | 0.374 | **Whittaker** | 1.167 | 0.793 | Conservative |
| 21 | 1981 | Stewart | 0.403 | **O'Connor** | 1.016 | 0.613 | Conservative |
| 22 | 1986 | Burger | 1.89 | **Scalia** | 2.503 | 0.613 | Conservative |
| 23 | 1958 | Burton | 1.008 | **Stewart** | 0.403 | 0.605 | Liberal |
| 24 | 2022 | Breyer | -1.317 | **Jackson** | -1.712 | 0.395 | Liberal |
| 25 | 1988 | Powell | 0.9695 | **Kennedy** | 0.6775 | 0.292 | Liberal |
| 26 | 1965 | Goldberg | -1.074 | **Fortas** | -1.3245 | 0.251 | Liberal |
| 27 | 2018 | Kennedy | 0.6775 | **Kavanaugh** | 0.559 | 0.119 | Liberal |
| 28 | 2010 | Stevens | -1.81 | **Kagan** | -1.713 | 0.097 | Conservative |
| 29 | 1962 | Whittaker | 1.167 | **White** | 0.437 | 0.073 | Liberal |

### 3. Change in Median Justice

Of the twenty-eight[59] Court transitions since 1953, fifteen have led to a change in median justice. Thus, just over half the time, a transition has altered the Court's balance in this way. Figure 4 shares those fifteen instances chronologically, including the identity of the previous and new median justice and the difference between their respective Martin-Quinn scores. As mentioned above, the most significant Martin-Quinn difference between a previous and a new median justice came during the Burger-to-Warren transition in 1969 when White replaced Brennan as the median justice.[60] Of the fifteen transitions, eleven had a difference in magnitude less than 0.5, suggesting that the difference in ideology of the resulting median justices has typically been marginal. However, the chronological presentation helps reveal how those marginal differences have accumulated over the decades. In five of the first six transitions (between 1956 and 1967), the new median justice had a Martin-Quinn score that was more liberal than the previous median justice. This suggests a Court that was becoming more liberal through this period, aligning with the tenure of Chief Justice Warren. Then, beginning in 1969, seven of the nine transitions brought a new median justice with a Martin-Quinn score more conservative than the previous median justice, reflecting the reverse trend on the Court.[61] This includes the two most recent shifts in median justice: first from Kennedy to Roberts

59. While there have been twenty-nine transitions, only twenty-eight can be considered when evaluating a change in median justice because Justices William Rehnquist and Lewis Powell joined the Court simultaneously in 1972.

60. That is also the only transition that caused such a difference with a magnitude greater than one.

61. Even the two instances where the median justice had a Martin-Quinn score more liberal than the predecessor certainly do not reveal a Court moving anywhere but in a conservative direction. In 1991, O'Connor replaced Souter as the median justice, a result that is coded as liberal because Justice Souter's first term (during which he was the median justice) was by far his most conservative; through their careers, O'Connor has a more conservative average Martin-Quinn score than Souter. Then, in 1994, the Blackmun-to-Breyer transition returned O'Connor to the median position from Kennedy. This occurred toward the beginning of the nearly three decades of O'Connor or Kennedy as median justice and involves the second smallest magnitude difference among median justices on either side of a transition. Thus, this instance is closer to a neutral change than a shift in a liberal direction.

upon Kennedy's retirement, and then from Roberts to Kavanaugh in 2020 with the appointment of Barrett. Each ushered in a median justice with a more conservative Martin-Quinn score than their predecessor.

*Figure 4: Transitions Resulting in Changes in Median Justices from 1953–2023*

| Date | Transition | Median Justice Before Transition | | Median Justice After Transition | | Magnitude in MQ Score Between Median Justice Before and After Transition | Direction of Change |
|---|---|---|---|---|---|---|---|
| | | Justice | MQ Score in term as Median Justice | Justice | MQ Score in term as Median Justice | | |
| 1956 | Brennan for Minton | Minton | 0.834 | Reed | 0.797 | 0.037 | Liberal |
| 1957 | Whittaker for Reed | Reed | 0.797 | Clark | 0.587 | 0.21 | Liberal |
| 1962 | Goldberg for Frankfurter | White | -0.332 | Goldberg | -1.152 | 0.82 | Liberal |
| 1962 | White for Whittaker | Stewart | 0.265 | White | -0.332 | 0.597 | Liberal |
| 1965 | Fortas for Goldberg | Goldberg | -0.784 | Black | -0.561 | 0.223 | Conservative |
| 1967 | Marshall for Clark | Black | -0.411 | Marshall | -1.162 | 0.751 | Liberal |
| 1969 | Burger for Warren | Brennan | -1.071 | White | 0.132 | 1.203 | Conservative |
| 1987 | Kennedy for Powell | Powell | 0.883 | White | 1.027 | 0.144 | Conservative |
| 1990 | Souter for Brennan | White | 0.881 | Souter | 0.971 | 0.09 | Conservative |
| 1991 | Thomas for Marshall | Souter | 0.971 | O'Connor | 0.701 | 0.27 | Liberal |
| 1993 | Ginsburg for White | O'Connor | 0.855 | Kennedy | 0.877 | 0.022 | Conservative |
| 1994 | Breyer for Blackmun | Kennedy | 0.877 | O'Connor | 0.838 | 0.039 | Liberal |
| 2006 | Alito for O'Connor | O'Connor | 0.073 | Kennedy | 0.499 | 0.426 | Conservative |
| 2018 | Kavanaugh for Kennedy | Kennedy | 0.382 | Roberts | 0.414 | 0.032 | Conservative |
| 2020 | Barrett for Ginsburg | Roberts | 0.333 | Kavanaugh | 0.57 | 0.237 | Conservative |

Figure 5 covers the same fifteen transitions, but it focuses on the novelty and staying power of a newly arriving median justice to determine which transitions had impacts that were both new and lasting. It ranks the transitions using a "novelty + longevity index." This is a simple calculation for each newly arriving median justice that shows the difference between the total number of terms the justice was the median justice (longevity) and how many times the justice had been median justice prior to the identified transition (novelty). For example, the 1993 White-to-Ginsburg transition scores highest on this index because it was the first of the eighteen times Kennedy was a term's median justice. It had novelty because Kennedy had never been the median justice, and longevity because he would be the median justice

another seventeen times, thus demonstrating that the transition had a lasting impact in defining the Court's center.[62]

The transitions scoring highest by this metric are those in the early years of the three justices who were median justice most often—White, O'Connor, and Kennedy. One might imagine that the Ginsburg-to-Barrett transition (currently tied for 8th) might move up this list if Kavanaugh continues to serve as median justice in future terms. At the bottom of this list are six transitions that shifted new justices into the median position for the first of only one or two terms, thus redefining the Court's center but not in a way that would last. Subsequent transitions or internal ideological shifts by a justice ended up limiting whatever impact on the Court's balance these transitions had.

Together, Figures 4 and 5 show the prevalence of the eras of median justice: a period of instability at the center (1953–1969), a period where the center was dominated by Justice White (1969–1991), a period where Justices O'Connor and Kennedy held the median position exclusively (1991–2018), and the current balance, beginning with Chief Justice Roberts and then Justice Kavanaugh as the median justice. These shifts in judicial eras track three of the more significant transitions as described above: the 1969 arrival of Chief Justice Burger moved White to the median; the 1991 arrival of Justice Thomas began the O'Connor/Kennedy era; and the 2020 arrival of Justice Barrett has

62. Again, it is worth offering some explanation for why White-to-Ginsburg is not included among the most impactful transitions discussed above even though it has the highest score on the novelty + longevity index. First, the short-term ideological difference between White and Ginsburg was in the bottom half (19th) of the 29 transitions studied. *See* Figure 2. Over time, the gap was more significant (10th most significant among average Martin-Quinn scores among outgoing and incoming justices), *see* Figure 3, but behind the three identified transitions. However, the primary reason White-to-Ginsburg does not stand out is because in this instance the novelty + longevity index is a bit misleading. While this brought Justice Kennedy to the Court's center for the first time, the era from 1991–2018 is better thought of as an era shared by O'Connor and Kennedy as the Court's median justice. It was O'Connor's movement to the center in 1991 that ushered in this era; Kennedy's arrival at the center two years later merely brings the era's second character into the mix. Overall, it seems that the White-to-Ginsburg transition had the overall effect of slightly mitigating the impact of the Marshall-to-Thomas transition and bringing Kennedy into the O'Connor/Kennedy median justice era, rather than substantially transforming the Court on its own.

moved Kavanaugh into the median position. Next, this Article will seek to determine whether and when such shifts in the balance of the Court have affected the outcomes of particular cases due to personnel changes.

*Figure 5: Novelty and Staying Power of Newly Arrived Median Justice in Supreme Court Transitions from 1953-2023*

| Rank | Date | Transition | Median Justice After Transition | Previous Terms as Median Justice | Subsequent Terms as Median Justice | Median Justice Novelty + Longevity Index |
|---|---|---|---|---|---|---|
| 1 | 1993 | Ginsburg for White | Kennedy | 0 | 17 | 18 |
| 2 | 1962 | White for Whittaker | White | 0 | 16 | 17 |
| 3 | 1969 | Burger for Warren | White | 1 | 15 | 16 |
| 4 | 2006 | Alito for O'Connor | Kennedy | 5 | 12 | 13 |
| 5 | 1991 | Thomas for Marshall | O'Connor | 0 | 9 | 10 |
| 6 | 1994 | Breyer for Blackmun | O'Connor | 2 | 7 | 8 |
| 7 | 1957 | Whittaker for Reed | Clark | 2 | 3 | 4 |
| 8 | 1987 | Kennedy for Powell | White | 14 | 2 | 3 |
| 8 | 2020 | Barrett for Ginsburg | Kavanaugh | 0 | 2 | 3 |
| 10 | 1962 | Goldberg for Frankfurter | Goldberg | 0 | 1 | 2 |
| 10 | 1965 | Fortas for Goldberg | Black | 0 | 1 | 2 |
| 10 | 2018 | Kavanaugh for Kennedy | Roberts | 0 | 1 | 2 |
| 13 | 1956 | Brennan for Minton | Reed | 0 | 0 | 1 |
| 13 | 1967 | Marshall for Clark | Marshall | 0 | 0 | 1 |
| 13 | 1990 | Souter for Brennan | Souter | 0 | 0 | 1 |

## IV. THE QUEST AND THE CHALLENGE(S)

When Thurgood Marshall penned his *Payne* dissent,[63] he spoke of the broader implications of personnel changes on the direction of the Court. But the charge was connected primarily to *a particular case*. The limitation of the information in the charts and data discussed in Part III is that it concerns only trends in the direction of the Court. Evaluating the charge that changes in who the justices are dictates

63. *See supra* Part I (quoting Justice Marshall and explaining how Justice Marshall warned about the dangers of personnel changes).

changes in how cases are decided requires a search for specific cases. While shifts in the balance of the Court can be illuminating and important, the legitimacy dangers that flow from the personnel-is-determinative argument are weightiest when particular cases are impacted. This Part will describe several methods for trying to find such cases as well as a variety of reasons those methods are not quite able to answer the question presented.

### *A. Limitations Inherent to the Workings of the Supreme Court*

In any multi-member deliberative body, it is difficult to isolate the impact of any one member even where, as in the case of the Supreme Court, members often share their reasoning (or at least endorse reasons offered by a colleague). At the Supreme Court, the task is particularly difficult because of features inherent in the judicial task. There is rarely any single variable that determines a case. Thus, any assertion that a particular case would have turned out differently but for a transition in personnel ought to proceed with caution. Several of those features complicating the task attempted in this Article are identified below, in part to acknowledge both that the cases profiled in Part V are not perfect examples and that cases that could be good examples might not have gotten the appropriate attention.

#### 1. Multiple Transitions

Isolating any particular transition as impactful is complicated by the fact that transitions are ongoing and occur at unpredictable moments. Certainly, the effect of any particular transition can persist beyond the date of a subsequent transition; however, the more changes in personnel between an impactful transition and a potentially impacted case, the more variables there are to complicate the analysis. To take the Marshall-to-Thomas transition again: from 1991 through 1993, Thomas' presence instead of Marshall's might be determinative in any number of cases if one could prove (or at least confidently assert) that the two justices would have voted differently in a particular case. However, once Ginsburg was appointed in 1993 and Breyer in 1994, the analysis would have to not only determine whether Thomas voted differently than Marshall would have, but also whether Ginsburg or Breyer voted differently than the justices they replaced. Part V

identifies several cases where that analysis is attempted with some confidence, but the multiple transitions provide reason for caution.

Similarly, a quick series of transitions makes isolating the effect of any particular one of them quite difficult. From 1969 to 1972, President Nixon made four appointments, including two justices (Rehnquist and Powell) who arrived to the Court on the same day. While Part III suggests that the first of these transitions, the Warren-to-Burger transition in 1969, was impactful, it is likely that it is the cumulative effect of four new justices arriving in such a short period that transformed the Court.[64]

### 2. Justice Evolution and the Passage of Time

The multiple transitions problem raises the question as to how long one can fairly attribute a result to an event that occurred years before. The intervening transitions provide one category of disruptors to the causal chain. Another disruptor could be changes in the justices themselves. Justices rarely remain entirely consistent through the course of their careers, particularly when they serve long tenures.[65] This creates a variety of challenges.

First, judicial evolution may complicate any assertion about how a particular justice might have voted in a subsequent case. While we can look at the actual votes a justice casts and can even trace evolution that occurs during their time on the bench, we can never really know how they might have evolved had they served longer and encountered a case heard by their successor.[66]

64. *See supra* Part III.

65. *See, e.g.*, Lee Epstein et al., *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 J. POL. 801, 810–13 (1998) (showing various patterns of justice voting preferences over time); Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 MO. L. REV. 1209, 1212–14 (2005) (following up on Epstein, et al. to focus on Justice Blackmun's change in jurisprudence over time); Lee Epstein, et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1486 (2007) ("[c]ontrary to the received wisdom, virtually every Justice serving since the 1930s has moved to the left or right or, in some cases, has switched directions several times. . . . [I]deological drift is pervasive . . . .").

66. For example, Obergefell v. Hodges, 576 U.S. 644 (2015), is not included in Part V even though it is a 5-4 case in which the junior justice (Kagan) voted in the majority. It is not included because of a presumption that Justice Kagan voted as

Additionally, judicial evolution might provide an alternative—and more convincing—explanation for a particular result. For example, in *Roper v. Simmons*, the Court held in a 5-4 decision that the execution of juveniles violated the Eighth Amendment.[67] That 2005 case overruled a 1989 case, *Stanford v. Kentucky*, where a divided court upheld the constitutionality of sentencing a 16-year-old to death.[68] While there had been several transitions between 1989 and 2005 that might explain the different outcome, Justice Kennedy voted in the majority in both *Stanford* and *Roper*, suggesting that his vote on the question had evolved. Thus, it is likely some combination of Kennedy's evolution, changes in Court personnel,[69] and the "evolving standards of decency" underlying the Court's death penalty jurisprudence that together explain the result in *Roper*.[70]

In combination with the difficulty of continuing personnel changes, judicial evolution highlights the difficulty caused by the passage of time. The further one gets from the immediacy of a

Justice Stevens (whom she replaced) would have and thus, is not an example of a case determined by a change in personnel—the case would have come out the same with either Stevens or Kagan on the Court. However, as the question was never presented to Stevens, this conclusion is not 100% certain. In this instance, given Stevens' positions in recent cases, it is a safe bet. Still, any assertion of how a justice would vote on a case they never heard requires an element of educated guesswork.

67. 543 U.S. 551 (2005).

68. 492 U.S. 361 (1989).

69. Of the four transitions between 1989 and 2005, both the Marshall-to-Thomas and White-to-Ginsburg transitions seemed to flip a vote. However, in this instance, the transitions seem to cancel one another out, thus demonstrating the Multiple Transitions problem and confirming the importance of Kennedy's evolution to the case outcome. For his part, Kennedy's death penalty voting history saw him move from a vote upholding death penalty sentences in his early tenure to a key vote in a series of early 2000s cases that reconsidered whether the death penalty was appropriately proportional in specific circumstances, including when applied to individuals with intellectual disabilities or, as in *Roper*, juveniles. *See* Carol Steiker & Jordan Steiker, *Justice Kennedy: He swung left on the death penalty but declined to swing for the fences*, SCOTUSBLOG (July 2, 2018, 11:27 AM), https://www.scotusblog.com/2018/07/justice-kennedy-he-swung-left-on-the-death-penalty-but-declined-to-swing-for-the-fences.

70. *See* Roper, 543 U.S. at 562–64 (describing the Court's trajectory on death penalty jurisprudence); *see also* Furman v. Georgia, 408 U.S. 238, 242, 269–70 (1972) (Douglas, J., concurring) (extensively discussing standards of decency in light of then-current application of the death penalty).

transition, the more attenuated any causal connection becomes, even in circumstances where there appears to be a gap between outgoing and incoming justice. In addition to changes within the justices or the Court generally, the passage of time also impacts the world outside the Court in which any case arises. Any search for cases where a change in personnel determined the outcome must take into account these potentially confounding variables.

### 3. Cases in Context

The death penalty example raises a further complication that makes pinning any particular case result on a change in personnel difficult. Since interpretation of the Eighth Amendment depends on "evolving standards" and since those standards differ at different moments, such standards present a variable outside the workings of the Court that might explain particular results.[71] But, of course, this is not limited to death penalty cases—*every* case comes in a unique context that influences its outcome. Certainly, the identity of the justices is part of that context, but other elements can play outsized roles. Each case comes with a particular set of facts, arrives in a particular moment, and presents particular arguments. Some of the Court's most noteworthy reversals, such as moving from *Plessy v. Ferguson* to *Brown v. Board of Education*, *Bowers v. Hardwick* to *Lawrence v. Texas*, or *Roe v. Wade* to *Dobbs v. Jackson Women's Health*, might be explained by changes in the social or political world outside of the Court that influence both who is on the Court and how the justices might approach a familiar question in a new way.

### 4. Grants of Certiorari

In addition to the challenge of isolating a change in personnel from the broader context of a case, another complicating factor is that who is on the Court has a significant influence on the cases the Court hears in the first place. Because the vast majority of cases heard at the Supreme Court are discretionary and appellate, the justices have to

71. *See, e.g.*, *Roper*, 543 U.S. at 562–64 (applying evolving standards doctrine); *Furman*, 408 U.S. at 242 (Douglas, J., concurring) (same).

determine which cases they will hear in any given term.[72] Thus, measuring the impact of a transition—or even comparing judicial behavior over time—is complicated by the fact that different iterations of the Court might grant the writ of certiorari to different types of cases. Because it requires four votes to hear a case, personnel can affect not only case outcomes, but also the Court's broader docket.[73] This Article's study does not consider circumstances where a Court transition might be determinative to whether or not the Court even

72. .Of around 5,000 cases filed each term, the Court grants cert in less than 100. *See* Supreme Court of the United States, *Statistics as of July 2, 2024*, JOURNAL OF THE SUPREME COURT OF THE UNITED STATES, October Term 2023, at II, https://www.supremecourt.gov/orders/journal/Jnl23.pdf. Many contend that process is at least partially ideologically tinged. *See* Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA L. REV. 727, 733–35 (2001) (analyzing cert grants on equal protection claims during 1981–1987 terms). "The data clearly indicate, however, that the Court may act to correct ideological errors committed by lower courts. The latter role adds a significant political aspect to the Court's behavior." *Id.* at 769; *see also* Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L. Q. 389, 391 (2004) (suggesting several metrics affecting justices' decisions to grant or deny cert petitions); *cf.* Karen M. Tani, *The Supreme Court 2023 Term—Forword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 13–14 (2024) (describing "curation" of docket through discretionary grants and denials). For a deep dive into more recent terms, see Adam Feldman & Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001–2015*, 61 VILL. L. REV. 795 (2016). *But see* Will Baude, *Arthur D. Hellman on The Supreme Court's Shrunken "Discuss List,"* VOLOKH CONSPIRACY (Nov. 21, 2023, 8:40 AM), https://reason.com/volokh/2023/11/21/arthur-d-hellman-on-the-supreme-courts-shrunken-discuss-list (noting the Court recently revealed only 3% of cases on cert even get to joint discussion among the Justices) (citing Supreme Court of the United States, *Statement of the Court Regarding the Code of Conduct* 11 (Nov. 13, 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf ("The Court receives approximately 5,000 to 6,000 petitions for writs of certiorari each year. Roughly 97 percent of this number may be and are denied at a preliminary stage, without joint discussion among the Justices, as lacking any reasonable prospect of certiorari review.")).

73. *See* Andrew J. Wistrich, *Secret Shoals of the Shadow Docket*, 23 NEV. L.J. 863, 919–26 (2023) (describing possible peer effects and group decision-making on the shadow docket); Charles Cameron et al., *Shaping Supreme Court Policy Through Appointments: The Impact of a New Justice*, 93 MINN. L. REV. 1820, 1825 n.21 (2009) (describing "case selection effect" as a kind of peer effect resulting from a change in justices).

hears a case, such as those instances where a new justice's vote is essential to either a grant or denial of certiorari.

### 5. Non-Merits Cases

Similarly, the Court's work is not limited to those that lead to full briefing, oral arguments, and a full decision on the merits. The Court does meaningful work in the granting or denial of stay requests from lower courts, much of which is reported without written opinions or any comprehensive documentation of how each justice voted.[74] These cases have significant effects on their litigants and can be hugely impactful. The outcomes might be determined by personnel, but they are largely excluded from the scope of this Article. Part V does note one particularly resonant series of cases of this type, though, when it discusses several stay requests that reached the Court amidst the extraordinary circumstances of the COVID-19 pandemic on either side of the Ginsburg-to-Barrett transition in 2020.[75]

#### *i. Nuance and Division*

Even among the cases that are firmly part of this Article's universe, reduction of a case to a simple vote of majority versus dissent is often a huge oversimplification of the workings of a Court. First, majorities for case outcomes might be achieved using different rationales. Thus, there might be five votes for a particular outcome, but the justices involved may have different reasons for reaching that outcome. Lumping all the justices in the majority as in agreement can be misleading. Indeed, in some instances, the controlling opinion may not even muster five votes at all, leaving only a plurality to offer the

74. The Court's work on these cases is sometimes referred to as the "shadow docket." Cases on the so-called shadow docket arise when a litigant losing in an inferior court asks the Supreme Court to stay an unfavorable ruling pending an appeal and/or a petition for certiorari. Although the Court does not consider the full merits in such cases (such consideration will occur later), the practical effect of issuing such a stay is to reverse the decision below, at least temporarily. *See* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023).

75. *See infra* Part V.

prevailing opinion.[76] Moreover, there is far more nuance in the Court's work that makes identifying cases where a particular change in personnel was determinative exceedingly difficult. A change in justice might be determinative of the Court's choice of *rationale* even if it is not determinative of outcome; yet, it is rationale that represents the crucial precedent created by a decision. Relatedly, searching for 5-4 cases (i.e., those where each vote for the outcome is essential) will miss other cases where there were more than five votes for an outcome, but only five for a particular rationale. In such instances, each vote for the prevailing rationale would be essential, even if the outcome is not determined by the presence of any particular justice.

Additionally, the process through which the justices determine how they will vote is largely opaque and determined amidst an interaction among justices over weeks or months. Justice-to-justice relationships, a variable certainly determined by who is on the Court, impact these interactions in unknowable ways that likely change over time. The dynamism of justice-to-justice relationships and the new perspective brought by even a justice who is ideologically aligned with their predecessor can influence the Court's work in a multitude of ways.[77]

Finally, while much of the analysis presented in this Article looks at the work of the Court through a broad lens, justices may bring different perspectives to different areas of law.[78] For example, while Justice Gorsuch might be considered an ideological ally of Justice Scalia, who he replaced, the two had different approaches to Native

76. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 843 (1992) (plurality of three).

77. *See* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992); Leigh Anne Williams, Note, *Measuring Internal Influence on the Rehnquist Court: An Analysis of Non-Majority Opinion Joining Behavior*, 68 OHIO ST. L.J. 679, 694–96 (2007) (using non-majority opinion joining to measure persuasive power of justices amongst one another); Scott R. Meinke & Kevin M. Scott, *Collegial Influence and Judicial Voting Change: The Effect of Membership Change on U.S. Supreme Court Justices*, 41 L. & SOC'Y REV. 909, 911–12, 933 (2007) (arguing "collegial context" affects strategic voting behavior in the short term).

78. Smith, *supra* note 33, at 58–67 (noting that justices different perspectives are often shaped by their attitudes and values).

American law that altered the work of the Court once Gorsuch joined the bench.[79]

Much of this nuance and all of the within-chambers dynamics are missed with a quantitative approach to identifying cases, yet these are undoubtedly ways transitions impact the Court.

### *ii. The Near Miss Problem*

Finally, in addition to studying the Court transitions that happened, a comprehensive study might also consider moments where transitions that might have happened did not. While not actually affecting cases or the workings of the Court, the fact that these transitions *did not happen* offers a lens through which one might view how the transitions that did happen contributed to particular case outcomes. In the studied period, there are several instances in which the Senate rejected proposed nominees as well as others where a nominee withdrew from consideration.[80] These situations add an additional wrinkle to transitions analysis. To take the most recent example, considering the impact of the Scalia-to-Gorsuch transition in 2016–2017 probably also requires considering how the proposed Scalia-to-Garland transition might have played out and how having Gorsuch instead of Garland (and not just Gorsuch instead of Scalia)

79. *See infra* Part V.E.

80. In 1968, President Johnson nominated Justice Fortas to replace the retiring Chief Justice Warren and nominated Homer Thornberry to take Fortas' place as associate justice, but Fortas' confirmation was scuttled and withdrawn by October amidst charges of ethics violations. *Supreme Court Nominations, 1789–Present*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm#3 (last visited April 7, 2025). Adam Cohen, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA, 22–29 (Penguin Press, 2021). In 1987, President Reagan nominated Judge Robert Bork to replace Justice Powell, but Bork was rejected by the Senate. Subsequently, Judge Douglas Ginsburg was nominated but eventually withdrew before Justice Kennedy was appointed. In 2005, Harriett Miers was nominated by President George W. Bush to replace Justice O'Connor, but Miers ultimately withdrew amidst pressure from Republicans. Justice Alito was ultimately nominated and confirmed. In 2016, President Obama nominated Judge Merrick Garland to replace the recently deceased Justice Scalia, but the Senate refused to hold hearings or a vote on the nomination until after the presidential election. After President Trump assumed office in 2017, he nominated Justice Gorsuch for the seat.

makes a difference. At the very least, it seems likely that having Garland instead of Gorsuch would have diluted the impact, evident in the cases profiled in Part V, of the subsequent transition from Justice Ginsburg to Justice Barrett. One could similarly wonder what having Miers instead of Alito, Bork instead of Kennedy, or Thornberry instead of Burger would have meant for the Court. Such considerations are beyond the scope of this Article.

Despite the challenges catalogued here, Part V profiles several candidate cases where a change in Court personnel seems to have played a particularly important role in delivering one outcome instead of another. However, these challenges suggest that assertions that any such transition was outcome determinative should be read with caution.

### *B. The Methodological Choice*

The data underlying Part III's analysis comes from tens of thousands of individual votes in thousands of Supreme Court cases over several decades. Any effort to identify cases where a specific transition led to a particular outcome requires narrowing and categorizing cases using criteria, such as a case's vote count and how each justice voted. This Article utilizes data from the Supreme Court Database to begin to narrow the potential universe of personnel-determinative cases.[81] At the highest level of abstraction, this Article began with most of the Court's cases from the 1953 through the 2022 terms, excluding cases with fewer than nine votes.[82] This yielded a dataset of 6,586 cases. But given the dozens of variables available in the Supreme Court Database, choices must be made in terms of which criteria to prioritize.

81. *The Supreme Court Database*, WASH. U. L., http://supremecourtdatabase.org (last visited Apr. 4, 2025).

82. The choice to exclude the cases with fewer than nine votes from this time period was made to allow for more consistent information on votes within cases. However, excluding those cases may have eliminated some number of cases that would have been candidates for further consideration. For example, there were a number of 4-4 cases decided during the period following Justice Scalia's death in February 2016 and Justice Gorsuch's swearing in in April 2017. Each vote in those cases determined the deadlocked outcome. *See, e.g.*, United States v. Texas, 579 U.S. 547 (2016) (affirming the 5th Circuit's decision striking down elements of the Obama administration's proposed deferred action for undocumented immigrants meeting certain criteria).

An initial limiting choice was to focus only on cases *after* 1991—that is, cases after Justice Marshall's charge in *Payne*. This choice was partially pragmatic (it provided more manageable numbers of cases to evaluate individually), partially strategic (it yields more contemporary cases likely to have more significant impact on current perceptions of judicial legitimacy), and partially scholarly (because other scholars have identified and analyzed potential cases where a change in personnel determined an outcome from earlier periods).[83]

Using the universe of 9-vote cases from the Supreme Court Database, datasets were created using the following criteria: (1) 5-4 cases since 1991; and (2) altered precedent cases since 1991. Cases with 5-4 decision outcomes represent those where every vote with the majority was essential to preserve an outcome. In any 5-4 case, a newly arrived justice would be the outcome-determinative vote if in the majority *and* if the outgoing justice would have voted differently. As discussed above, it is often difficult to know precisely how the outgoing justice *would have voted*, but the universe of 5-4 cases provides an important, if imperfect,[84] starting point. The second dataset began with the 144 cases from the 1953–2022 terms as having "altered

83. *See* Levitan *supra* 15, at 40 n.9 (highlighting cases, many of which are landmark decisions, that were ultimately decided by one vote); Charles Cameron et al., *Shaping Supreme Court Policy Through Appointments: The Impact of a New Justice*, 93 MINN. L. REV. 1820, 1824–33 (2009) (focusing on cases impacted by the transition from Potter Stewart to Sandra Day O'Connor); Smith, *supra* note 33, at 56–71 (focusing on criminal justice cases).

84. In many transitions, the ideological gap between outgoing and incoming justices is not significant and thus, even though a junior justice is voting with the majority, it is unlikely that their presence (rather than their predecessor) determined the outcome. For example, in *Obergefell*, a 5-4 precedent-altering decision that extended constitutional protection to same-sex marriage, the Court's junior justice (Kagan) voted with the majority. However, while Justice Kagan's vote was essential to the outcome, the *transition* from her predecessor, Justice Stevens, was not. Justice Stevens had consistently voted to protect and expand gay rights. *See* Romer v. Evans, 517 U.S. 620 (1996) (noting that Stevens voted with the majority to strike down a state constitutional amendment prohibiting localities from adopting anti-discrimination laws protecting the LGBTQ+ community); Lawrence v. Texas, 539 U.S. 558 (2003) (highlighting Stevens voted with the majority to strike down a state law criminalizing same sex sexual conduct). Similarly, focusing on 5-4 cases will miss cases, such as *Dobbs*, where there were more than five votes for an outcome, but only five votes for a particular rationale. *See infra* Part V.

precedent."[85] This dataset focuses less on the vote count and more on the impact of the case, specifically whether it has changed the law.[86]

Additionally, justice-specific datasets were created for each justice appointed since 1991 to include all cases from the first five years after appointment. The idea with these justice-specific sets was to create universes of candidate cases around each appointment, again focusing on 5-4 cases and those coded as altering precedent. While it is certainly possible that a Court transition can be impactful for many years, the likelihood of confounding variables makes it virtually impossible to peg a particular case outcome to a particular transition increases with distance from the transition.

These methods yielded a number of cases, including many that showed up in multiple datasets. Because this Article aims to merely identify examples—and not necessarily find every single instance where a transition might have been case determinative—the cases generated in these datasets were evaluated qualitatively to identify candidate cases. What follows in Part V are profiles for several cases that seemed to have powerful arguments that a change in personnel was outcome-determinative.

## V. CASE PROFILES

Using the methods described above and cognizant of the identified limitations, this Article profiles several cases that might be

85. According to the database's code book, cases will be coded as altering precedent "if the majority opinion effectively says that the decision in this case 'overruled' one or more of the Court's own precedents" or if the dissent states "clearly and persuasively that precedents have been formally altered." The code book notes that the code will not include cases where the Court merely "distinguishes" precedent. *The Supreme Court Database: Online Code Book*, WASH. U. L., http://supremecourtdatabase.org/documentation.php?var=precedentAlteration.

86. This, too, is an imperfect measure. Focusing only on the 144 precedent-altering cases misses a wide variety of other cases where a transition *might* have been determinative. First, the Database's coding captures only the cases where precedent was clearly or explicitly overruled, thus leaving out the enormous number of cases in which interpretations are adjusted without formally overruling a previous case. Court transitions can certainly be determinative in such cases. Further, each vote is just as essential in a 5-4 case *upholding* precedent as in one where precedent is discarded. Focusing only on the cases coded as altering precedent will not identify those cases where a Court transition helped preserve the law, which is just as important an outcome.

examples of the type of case Justice Marshall mentioned as being determined merely by changes in the personnel of the Court. Each case profile will analyze the transition that might have impacted its outcome along with acknowledgements of other potential explanations beyond personnel.

### *A. Commerce*—United States v. Lopez

For six decades following the Great Depression, the Supreme Court deferred to Congress on questions connected to congressional authority under Article I's Commerce Clause. Carefully and divisively at first,[87] the Court interpreted congressional authority with increasing breadth and consensus.[88] Beginning in the 1960s, this deference had been institutionalized in a test that asked merely "whether Congress had a rational basis for finding that [a regulated activity] affected commerce" and "whether the means it selected to eliminate that evil are reasonable and appropriate."[89] However, this era of uninterrupted deference came to an end in 1995 when the Court struck down the Gun Free School Zones Act of 1990 as beyond the commerce power of the federal government.[90] In *United States v. Lopez*, a 5-4 Court concluded that since gun possession was neither an economic activity nor one that Congress had found substantially affected commerce, it could not be validated under the Commerce Clause. *Lopez* offered a new and more restrained framework for evaluating Commerce Clause cases, one that subsequently resulted in several other statutes being struck down as beyond congressional authority.[91]

87. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (noting a 5-4 decision upholding congressional authority to pass the National Labor Relations Act under the Commerce Clause).

88. *See* Heart of Atlanta Model, Inc. v. U.S., 379 U.S. 241 (1964) (unanimous decision upholding congressional authority to pass portions of the Civil Rights Act of 1964 under the Commerce Clause).

89. *Id.* at 258.

90. United States v. Lopez, 514 U.S. 549 (1995).

91. *See* United States v. Morrison, 529 U.S. 598 (2000) (striking down the Violence Against Women Act as beyond Commerce Clause authority); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (striking down portions of the Affordable Care Act as beyond Commerce Clause authority); *see also* Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1 (2004).

The *Lopez* majority included Chief Justice Rehnquist, the majority opinion author, along with Justices O'Connor, Scalia, Kennedy, and Thomas. Thus, *Lopez* is a 5-4 case where every vote was essential to the case's outcome. While the two most recently appointed justices (Ginsburg and Breyer) were not in the majority, the next most junior justice (Thomas) was. These three transitions provide the proper scope of analysis for determining whether the 1991 Marshall-to-Thomas transition determined the outcome in *Lopez*.

As demonstrated in Part III, the ideological difference between Marshall and Thomas was historically large.[92] While that does not prove that they would have disagreed in every closely divided case, there is little doubt that they would have disagreed in *Lopez*. During his career, Marshall adhered to the prevailing deference to Congress in Commerce Clause cases without dissent.[93] More specifically, when a defendant challenged his conviction for possession of a firearm under the Omnibus Crime Control and Safe Streets Act of 1968, Justice Marshall authored a 7-1 majority opinion upholding the conviction and applying a highly deferential standard for establishing the requisite nexus between the gun possession and commerce.[94] Federal prosecutors must merely prove that the possessed firearm "traveled at some time in interstate commerce."[95]

Eighteen years later, the Court considered another federal criminal statute punishing possession of a firearm in *Lopez*. One significant difference was that the Gun Free School Zones Act did not require proof of any nexus to commerce to convict a defendant. Thus, the statute dispensed even with the highly deferential standard Marshall

92. *See supra* Part III.*B*.2. (Figure 3) (noting the difference in career average Martin-Quinn score between Marshall (-2.826) and Thomas (3.347) was significantly larger than any other career average difference among outgoing and incoming justices).

93. *See, e.g.*, Hodel v. Va. Surface Min. and Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981) (Marshall authoring majority opinion applying rational basis test to uphold Commerce Clause challenge to Surface Mining Control and Reclamation Act).

94. Scarborough v. United States, 431 U.S. 563 (1977); *see* United States v. Bass, 404 U.S. 336, 350–51 (1971) (Marshall authoring majority opinion noting that government can meet its burden of establishing nexus between gun possession and commerce "in a variety of ways," including by proving that the firearm had previously traveled in interstate commerce).

95. *Scarborough*, 431 U.S. at 568 (laying out the government's position, which the Court ultimately adopted).

had endorsed. This proved fatal, with Thomas providing not only a fifth vote for reining in federal commerce authority, but also a concurring opinion calling for a wholesale reconsideration of the Court's Commerce Clause jurisprudence.[96] *Lopez* provided Thomas his first opportunity to expound upon his originalist understanding of the commerce power, which included an expansive review of the work of the Founders and the Court's early Commerce Clause cases. He continued with a critique of the "substantial effects" test, which he noted "suffers from the further flaw that it appears to grant Congress a police power over the Nation" that has no limits.[97] In short, Thomas was not only unconvinced that the gun possession statute at issue in *Lopez* was beyond federal authority; he seemed willing to reconsider the breadth of the Commerce Clause entirely.[98] This was a position far from that of his predecessor.

While there is little doubt, then, that the Marshall-to-Thomas transition delivered one of the five votes leading to the *Lopez* outcome, just how determinative that vote was requires consideration of the votes of the other recently arrived justices relative to their predecessors. In *Lopez*, both Ginsburg and Breyer were in the dissent. Given the multiple transitions since Thomas' 1991 arrival, the Thomas vote cannot be determinative unless it can be shown that Justices White and Blackmun would have been in the dissent as their successors were.[99]

96. United States v. Lopez, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) ("In an appropriate case, I believe that we must further reconsider our 'substantial effects' test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.").

97. *Id.* at 599–600.

98. In *Lopez*, Thomas interestingly offers a footnote suggesting that *stare decisis* might limit how far the Court ought to go in undoing existing Commerce Clause jurisprudence. *Lopez*, 514 U.S. at 601, n.8 (Thomas, J., concurring) ("Although I might be willing to return to the original understanding, I recognize that many believe it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.").

99. If, for example, White would have voted in the majority in *Lopez*, that would have resulted in a 6-3 outcome in which Thomas' vote was not essential. However, if White would have voted with the dissent (as Ginsburg did), then the White-to-Ginsburg transition would have made no difference and the Marshall-to-Thomas transition would be determinative.

While such analysis requires some speculation, there is little in the records of White or Blackmun to suggest they were eager to alter the Court's deferential approach to the Commerce Clause.[100] Thus, *Lopez* is among the strongest examples where it seems that a transition from one justice to another—here, Marshall to Thomas—changed the outcome of a case.

### *B. Equal Protection: Strict Scrutiny for Affirmative Action*—Adarand Constructors v. Pena

During the 1960s and into the 1970s, governments faced a bit of a dilemma. Amidst the pressure and moral clarity of the Civil Rights Movement, racial discrimination, against African Americans in particular, had been deemed unlawful. However, merely ending legal restrictions was not sufficient to level the playing field of opportunity. As President Lyndon Johnson articulated it during a commencement address at Howard University, "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair."[101] With this in mind, governments began to take affirmative action to close the gap in economic, employment, and educational opportunities. But when these actions were challenged, federal courts had to make an important decision. Having developed strict scrutiny

100. For example, within the six decades of largely unfettered deference to Congress, the Court considered several minimum-wage related cases that divided the Court on the Commerce Clause question. In both 5-4 cases, Justices White and Blackmun voted in favor of greater deference to Congress. *See* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (5-4 majority holding that 10th Amendment prohibits Congress from using Commerce Clause to regulate labor market for state employees that did not include either White or Blackmun); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (overruling *Usery* and holding in a 5-4 majority opinion authored by Blackmun and joined by White that a public employer could be subject to federal oversight via the Commerce Clause).

101. President Lyndon B. Johnson, *Commencement Address at Howard University: "To Fulfill These Rights,"* THE AM. PRESIDENCY PROJECT (June 4, 1965), https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights; President Lyndon B. Johnson, *Howard University Commencement Address*, C-SPAN (June 4, 1965), https://www.c-span.org/program/commencement-speeches/howard-university-commencement-address/405899.

review for "all legal restrictions which curtail the civil rights of a single racial group,"[102] courts had to determine whether the Equal Protection Clause required the same strict scrutiny of government action aimed to *benefit* groups that had been previously discriminated against. For more than a decade, the Supreme Court failed to definitively resolve this question, with cases generating splintered decisions and varied opinions.[103] In 1989 and 1990, the Court issued conflicting decisions on the question, with one opinion applying strict scrutiny to a city's contracting quota[104] and another, a year later, applying less scrutiny to a federal one.[105]

In the 1990 case, *Metro Broadcasting, Inc. v. FCC*, Justice William Brennan for the first time marshalled five votes (including Justices White, Marshall, Blackmun, and Stevens) for the conclusion that "benign race-conscious measures" need not withstand the Court's strictest scrutiny, but rather would be constitutionally permissible so long as they served important governmental objectives and were substantially related to achievement of those objectives.[106] However, over the next half decade, four of those justices (Brennan, Marshall, White, and Blackmun) would be replaced. When the question next reached the Court in 1995, three of their replacements (Souter, Ginsburg, and Breyer) would similarly vote to apply this intermediate scrutiny to race-conscious measures.[107] One replacement—Clarence Thomas—would not.

102. Korematsu v. U.S., 323 U.S. 214, 216 (1944) (declaring any such restrictions immediately suspect and going on, "That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.").

103. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (generating six opinions in a case about affirmative action in higher education admissions); Fullilove v. Klutznick, 448 U.S. 448 (1980) (generating five opinions in a case about affirmative action in federal contracting); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (generating five opinions in a case about affirmative action in employment).

104. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

105. Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).

106. *Id.* at 564–65 (applying this standard when Congress has mandated the race-conscious measures, thus distinguishing the case from *Croson*).

107. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 242–76 (1995) (Stevens, J., Souter, J., Ginsburg, J. dissenting).

In *Adarand Constructors, Inc. v. Pena*, the four dissenters from the 1990 case (Justices O'Connor, Rehnquist, Scalia, and Kennedy) were joined by Thomas in applying strict scrutiny and striking down a federal program incentivizing the awarding of highway contracts to businesses owned by socially and economically disadvantaged individuals. Echoing her argument in dissent in *Metro Broadcasting*, O'Connor wrote for the *Adarand* Court, "we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny . . . . To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled."[108]

In both opinions, O'Connor took aim not at the effect of changes in Court personnel in changing the law, but rather at the judicial evolution of one justice in particular, Justice Stevens. In *Adarand*, after declaring strict scrutiny to be the appropriate standard, the Court responded to Stevens' dissent with citations to Stevens' own writing in prior cases.[109] "These passages make a persuasive case for requiring strict scrutiny of congressional racial classifications," the Court concluded.[110] However, while Stevens had certainly evolved on this topic over his two decades on the Court,[111] the replacement of Marshall with Thomas between 1990 and 1995 was the determinative change.

108. *Id.* at 227; *see also Metro Broad.*, 497 U.S. at 602–03 (O'Connor, J., dissenting) (recognizing the Court's prior use of strict scrutiny).

109. *Adarand*, 515 U.S. at 228–29. The Court references to Stevens' dissent in *Fullilove v. Klutznick*.

> [A] statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception—especially when fostered by the Congress of the United States—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor.

*Id.* at 229 (quoting 448 U.S. 448, 545 (1980) (Stevens, J., dissenting) (emphasis omitted)). The Court again referenced Stevens' concurrence in *Croson* that "[a]lthough [the legislation at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries." *Id.* (quoting *Croson*, 488 U.S. at 516–17 (Stevens, J., concurring)).

110. *Id.* at 229.

111. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 408 (Stevens, J., concurring in part) (exemplifying a change in Stevens' opinion).

For his part, Thomas authored a brief, but powerful, concurrence in *Adarand* that asserted an even more skeptical position of all government classifications based on race. "These programs not only raise grave constitutional questions," Thomas wrote, "they also undermine the moral basis of the equal protection principle."[112] This was a decidedly different approach than Marshall had taken over the years. Not only had Marshall been in the majority in *Metro Broadcasting*, he had long articulated his belief that applying the same scrutiny to race-conscious classifications designed to further remedial goals was the wrong approach.[113] In a vigorous dissent from the Court's 1989 *Croson* opinion applying strict scrutiny to the minority contracting program in Richmond, Marshall called the majority's opinion a "full-scale retreat" and a "cramped vision of the Equal Protection Clause."[114] Marshall recognized it as a "welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination."[115] Marshall lamented the Court's premature intervention, asserting that "[t]he battle against pernicious racial discrimination or its effects is nowhere near won."[116]

Yet, in 1995, it was Thomas' vision that carried the Court and signaled its future direction on affirmative action. "In my mind,

112. *Adarand*, 515 U.S. at 240–41 (Thomas, J., concurring) (continuing on to note "[b]ut there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination."). Like O'Connor, Thomas also utilized Stevens' prior writings to make his point. *Id.* (Thomas, J., concurring) (citing *Adarand*, 515 U.S. at 242 (Stevens, J., dissenting)) ("I believe that there is a 'moral [and] constitutional equivalence' . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."). *Id.* (Thomas, J., concurring) ("Justice Stevens once recognized the real harms stemming from seemingly 'benign' discrimination.") (citing Fullilove v. Klutznick, 448 U.S. 448, 522 (1980)) (Stevens, J., dissenting)).

113. *See Bakke*, 438 U.S. at 359 (Brennan, J., dissenting) (joint opinion of Brennan, White, Marshall, and Blackman); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 301–02 (1986) (Marshall, J., dissenting); *Fullilove*, 448 U.S. at 517–19 (Marshall, J., concurring); Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).

114. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 561 (1989) (Marshall, J., dissenting).

115. *Id.* at 528.

116. *Id.* at 561.

government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice," Thomas wrote in *Adarand*. "In each instance, it is racial discrimination, plain and simple."[117] The years since *Adarand* have seen the Court apply strict scrutiny whenever race-conscious government action has been challenged, though often over dissent.[118] However, it would take time, and additional Court transitions, for Thomas' position to be fully embraced.

### *C. Equal Protection: Diversity in Schools*—Parents Involved In Community Schools v. Seattle School District

Just over a half-century after *Brown v. Board of Education*,[119] the Supreme Court was still considering problems related to the racial makeup of American public schools. By 2007, the policies that ended up before the Court were starkly different from those the Court considered in *Brown*. In 2007, the Court considered student assignment policies from Louisville and Seattle that explicitly considered a student's race as a factor to consider in making student assignments, with the goal being to preserve as much racial diversity as possible in schools.[120] These race-conscious policies were similar to other policies the Court had confronted in the context of higher education only a few years prior. In 2003, the Court had upheld the limited use of race in the admissions policies of the University of Michigan Law School in *Grutter v. Bollinger*.[121] The *Grutter* majority opinion was written by Justice O'Connor, who by 2007, had been replaced by Justice Alito. In *Parents Involved in Community Schools* ("*PICS*"), Alito joined a 5-4 majority striking down the school districts' race conscious assignment policies, distinguishing *Grutter* and limiting the reach of affirmative action in education.

Consistent with the conclusion from *Adarand*, the Court in *Grutter* applied strict scrutiny equal protection analysis in a case

117. *Adarand*, 515 U.S. at 241 (Thomas, J., concurring).

118. *See, e.g.*, Parents Involved In Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 836–37 (2007) (Breyer, J., dissenting) (arguing for a more contextual approach to scrutiny).

119. 347 U.S. 483 (1954).

120. *Parents Involved In Cmty. Schs.*, 551 U.S. at 836–37.

121. 539 U.S. 306 (2003).

brought by a white plaintiff who had been denied admission to the law school. O'Connor's majority opinion held that the school's pursuit of the educational benefits of diversity constituted a compelling interest sufficient to justify the use of race in the admissions process. Further, the majority found that the limited use of race among other factors as part of a holistic review of applicants was sufficiently tailored to survive strict scrutiny's narrow-tailoring requirement.

In *PICS*, the Court also applied strict scrutiny in a case brought by white plaintiffs who were unable to attend the school of their choice due to a race-conscious policy. The *PICS* majority limited *Grutter*, asserting that just because pursuing the educational benefits of diversity was a compelling interest in higher education, it did not automatically make diversity a sufficiently compelling interest in the K-12 context. Ultimately, however, the Court left open the question of compelling interest,[122] determining that the school districts' assignment policies did not engage in the type of holistic individual consideration permitted in *Grutter*. While the Court discussed the differences between higher education and K-12 public schools, the case turned on the differences in the policies' use of race. In *PICS*, the Court found that the use of race was determinative on its own—even though it was not used in every student assignment, when it was employed, it served as *the* determinative factor in deciding where a student would be assigned.

In *Grutter*, O'Connor's majority included Justices Stevens, Souter, Ginsburg, and Breyer—the four justices who found themselves in dissent in *PICS*. In between the two cases, Chief Justice Rehnquist (who was in the dissent in *Grutter*) was replaced by Chief Justice Roberts (who wrote the majority opinion in *PICS*), a transition that did not flip any votes because it seems likely Rehnquist would have similarly voted against the school districts. But O'Connor had also been replaced by Justice Alito in 2006. In *PICS*, Alito was the junior justice, voting in the majority in a 5-4 case.[123] Thus, if O'Connor would

122. Kennedy's concurrence suggests that there remained a majority of justices who would have found the interest of pursuing the educational benefits of diversity compelling.

123. The O'Connor-to-Alito transitioned occurred within the several decade period (1991–2018) where the Court's median justice was either O'Connor or Kennedy. In *Grutter*, O'Connor was the swing justice (with Kennedy voting to strike down the law school's policy), while in *PICS*, it was Kennedy. While that difference

have voted differently, *PICS* could represent a case where the transition from O'Connor-to-Alito was outcome determinative.

It is clear that O'Connor and Alito's views do not precisely align in the affirmative action context. When the Court subsequently heard a case more directly on point with *Grutter*, Alito voted to strike down the university's admissions policy. In *Fisher v. University of Texas*, Alito wrote a dissent after the Court permitted another race-conscious admissions policy to survive in 2016.[124] Alito wrote that the Court's result was "remarkable—and remarkably wrong."[125] It is reasonable to conclude that Alito would have voted differently than O'Connor did had he been on the Court for *Grutter* in 2003.

What is less clear is how O'Connor might have voted had she still been on the Court for *PICS* in 2007. Although O'Connor authored the *Grutter* opinion embracing the educational benefits of diversity as a compelling interest, her position on the types of policies universities could adopt was more nuanced. The same day as *Grutter*, O'Connor also authored a majority opinion in *Gratz v. Bollinger*, another 5-4 decision, this one *striking down* the race-conscious undergraduate admissions policies at the University of Michigan.[126] O'Connor distinguished the two cases by noting that the mechanical, automatic use of race at the undergraduate level failed the narrow-tailoring test. There, students who were classified as being from an underrepresented minority group were automatically given a certain number of points on their admission index. This was contrary to the holistic review permitted for the law school.

may not have been hugely significant since O'Connor and Kennedy were not so distant ideologically (both have career average Martin-Quinn scores on the moderately conservative side of the scale—O'Connor's was 1.016, while Kennedy's was 0.6775), it might have been outcome determinative in the context of affirmative action between 2003 and 2007. Though in *PICS*, Kennedy embraced the premise that the quest for the educational benefits of diversity could be a compelling interest, he voted to strike down the districts' policies. *Parents Involved In Cmty. Schs.*, 551 U.S. at 782. Subsequently, Kennedy moved closer to O'Connor's position, voting to uphold a university's admissions policy in *Fisher* in 2016.

124. *Fisher v. Univ. of Tex.*, 579 U.S. 365, 389 (2016) (Alito, J., dissenting) (noting that the university had both failed to adequately describe how its policy resulted in educational benefits and failed to narrowly tailor its use of race).

125. *Id.* at 437.

126. Gratz v. Bollinger, 539 U.S. 244 (2003).

The policies considered in *PICS* were different from those considered in *Grutter* and *Gratz*. Not only were the policies regarding assignment to elementary and secondary schools rather than admissions to colleges or graduate schools, but the assignment policies did also not utilize race in the vast majority of cases. Contrast this with *Gratz* where a student's race determined whether they received the automatic points in every case. On the other hand, the *PICS* court focused on the fact that, where race *was* considered, it was determinative—unlike the policy considered in *Grutter*. Would O'Connor have found these assignment policies—policies that did not incorporate the use of race very often, but when they did use it, race was determinative—more like the policy she blessed in *Grutter* or the one she rejected in *Gratz*? Perhaps O'Connor would have joined Kennedy's concurrence in *PICS*, which rejected the school's policies, but affirmed the effort to achieve diversity in schools and identified other means school districts might use. Had she done so, such a result would have altered the controlling rationale in the case, an important impact on its own.

As it was, Alito joined Roberts' opinion in *PICS*, a decision that provided precedent for the *Students for Fair Admission* cases that would overturn *Grutter* itself sixteen years later.[127]

### *D. Campaign Finance*—Citizens United v. FEC

In January 2010, President Barack Obama took the opportunity in his State of the Union address to offer his critique of a Supreme Court decision issued only a week before. "With all due deference to separation of powers," Obama said to an audience that included several Supreme Court justices in the front rows, the Court had reversed a century of precedent to "open the floodgates to special interests, including foreign corporations, to spend without limit in our elections."[128] Cameras then caught Justice Samuel Alito shaking his

127. Students for Fair Admissions, Inc. v. Harvard, 600 U.S. 181 (2023).

128. Adam Liptak, *For Justices, State of the Union Can Be a Trial*, N.Y. TIMES (Jan. 23, 2012), https://www.nytimes.com/2012/01/24/us/state-of-the-union-can-be-a-trial-for-supreme-court-justices.html; *Remarks by the President in State of the Union Address*, THE WHITE HOUSE: OFF. OF THE PRESS SEC'Y (Jan. 27, 2010), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-state-union-address.

head and mouthing words that were interpreted as "not true."[129] The case Obama was citing was *Citizens United v. Federal Election Commission*[130] and its outcome may have only been possible because Alito had replaced Justice Sandra Day O'Connor four years before.

*Citizens United* considered provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") that regulated spending, including by corporations and labor unions, on communications intended to influence the outcome of federal elections. A multitude of suits were filed immediately after the adoption of BCRA and a variety of constitutional challenges reached the Supreme Court in 2003 in *McConnell v. Federal Election Commission*.[131] In a comprehensive case with a dizzying array of opinions,[132] the Court narrowly upheld

129. Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), https://www.nytimes.com/2010/01/29/us/politics/29scotus.html.

130. 558 U.S. 310 (2010).

131. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 132–33 (2003).

132. Here is the text of the caption from *McConnell*:

> STEVENS and O'CONNOR, JJ., delivered the opinion of the Court with respect to BCRA Titles I and II, in which SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., delivered the opinion of the Court with respect to BCRA Titles III and IV, in which O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined, in which STEVENS, GINSBURG, and BREYER, JJ., joined except with respect to BCRA § 305, and in which THOMAS, J., joined with respect to BCRA §§ 304, 305, 307, 316, 319, and 403(b), *post,* p. 707. BREYER, J., delivered the opinion of the Court with respect to BCRA Title V, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined, *post,* p. 712. SCALIA, J., filed an opinion concurring with respect to BCRA Titles III and IV, dissenting with respect to BCRA Titles I and V, and concurring in the judgment in part and dissenting in part with respect to BCRA Title II, *post,* p. 720. THOMAS, J., filed an opinion concurring with respect to BCRA Titles III and IV, except for BCRA §§ 311 and 318, concurring in the result with respect to BCRA § 318, concurring in the judgment in part and dissenting in part with respect to BCRA Title II, and dissenting with respect to BCRA Titles I, V, and § 311, in which opinion SCALIA, J., joined as to Parts I, II–A, and II–B, *post,* p. 729. KENNEDY, J., filed an opinion concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II, in which REHNQUIST, C. J., joined, in which SCALIA, J.,

provisions from Title II of BCRA restricting corporate spending from general corporate funds on "electioneering communications," those that refer to a clearly identified candidate for federal office.[133] The Free Speech challenges to those provisions were rejected in an opinion co-authored by Justices Stevens and O'Connor and joined by Justices Souter, Ginsburg, and Breyer. The opinion asserted that even if some protected speech would be inhibited, that assumption would not merit striking down the provisions as unconstitutional on their face unless the amount of affected speech was substantial.[134] However, upholding the provision against a facial challenge did not preclude future plaintiffs from arguing that its application violated their speech rights in a future case.

The Court decided such a case in 2007.[135] Between *McConnell* and the subsequent case, *Federal Election Commission v. Wisconsin Right to Life, Inc.*,[136] there had been two changes in Court personnel: Chief Justice Roberts had replaced Chief Justice Rehnquist, and Justice Alito had replaced Justice O'Connor. In *Wisconsin Right to Life*, the two junior justices carried the Court, with Roberts announcing the Court's judgment in an opinion joined in full only by Alito. The Roberts opinion considered the applicability of the corporate spending restrictions to particular advertisements, specifically those that do not

> joined except to the extent the opinion upholds new FECA § 323(e) and BCRA § 202, and in which THOMAS, J., joined with respect to BCRA § 213, *post,* p. 742. REHNQUIST, C. J., filed an opinion dissenting with respect to BCRA Titles I and V, in which SCALIA and KENNEDY, JJ., joined, *post,* p. 777. STEVENS, J., filed an opinion dissenting with respect to BCRA § 305, in which GINSBURG and BREYER, JJ., joined, *post,* p. 784.

*See id.* at 114 (summarizing the majority, concurring and dissenting opinions).

133. *McConnell*, 540 U.S. at 204 (quoting Bipartisan Campaign Reform Act of 2002 §§ 201, 203).

134. *Id.* at 207.

135. FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 464 (2007) ("After all, appellants reason, *McConnell* already held that BCRA § 203 was facially valid. These cases, however, present the separate question whether § 203 may constitutionally be applied to these specific ads.").

136. *Id.*

qualify as "express advocacy" regarding a candidate,[137] and found no interest sufficiently compelling to justify the regulation's impact on speech.[138] Justices Scalia, Kennedy, and Thomas were ready to go further and strike down the challenged provision as facially unconstitutional[139]—the position rejected four years earlier by O'Connor—but neither Roberts nor Alito felt that necessary in 2007. Alito, however, noted in his own concurrence that "[i]f it turns out that the implementation of the as-applied standard . . . impermissibly chills political speech, we will presumably be asked in a future case to reconsider the holding in *McConnell*."[140] That case was *Citizens United*.

There, the remaining dissenters on this point from *McConnell* (Scalia, Kennedy, and Thomas) were joined by Roberts and Alito in striking down the challenged BCRA provision and drawing Obama's ire. Whereas Roberts had replaced Rehnquist, who similarly dissented in *McConnell*, Alito had replaced O'Connor, a co-author of the overruled portion of the opinion. In *Citizens United*, Justice Kennedy wrote the majority opinion discarding distinctions between corporate and other political speech and, as a result, striking down the BCRA provisions prohibiting corporate spending on such communications within thirty days of a primary election and sixty days of a general election.[141]

137. *Id.* at 451, 455 (noting that an ad is the functional equivalent of express advocacy "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" and finding that the ads in question do not meet that standard).

138. *Id.* at 477–81 ("A corporate ad expressing support for the local football team could not be regulated on the ground that such speech is less 'core' than corporate speech about an election, which we have held may be restricted . . . . That conclusion is clearly foreclosed by our precedent.").

139. *Id.* at 483–84 (Scalia, J., concurring in part) ("[I]t is my view that no test for such a showing can both (1) comport with the requirement of clarity that unchilled freedom of political speech demands, and (2) be compatible with the facial validity of § 203 (as pronounced in *McConnell*). I would therefore reconsider the decision that sets us the unsavory task of separating issue-speech from election-speech with no clear criterion.").

140. *Id.* at 482–83 (Alito, J., concurring) (citation omitted).

141. Citizens United v. FEC, 558 U.S. 310, 337 (2010) (describing the challenged portion of BCRA); *id.* at 365–66 (overruling the anti-distortion principle in *Austin v. Michigan Chamber of Com.*, 494 U.S. 652 (1990) that had justified

Due to the change in Court personnel, these limited restrictions on corporate campaign speech (in the form of expenditures) disappeared. O'Connor's opinion in 2003 had left open the potential for as-applied challenges and the years since offered evidence of the extent to which the provisions might have been chilling protected political speech.[142] Thus, the Court in 2010 had more information than it had in 2003, so there is perhaps more than the personnel change driving the Court's change in course. However, given O'Connor's status as the most recent justice to have had to run as a candidate for election,[143] the loss of her perspective on the value of regulating campaign spending likely influenced the outcome in *Citizens United*.

### *E. Impactful What Ifs*

Of the ten Supreme Court transitions since Thurgood Marshall stepped down due to poor health in 1991, seven transitions have enabled a justice to voluntarily step down and thus control at least the timing of their replacement. While no justice is an exact replicate of their predecessor and there has historically been some unpredictability in judicial behavior, this ability to control when a change in personnel occurs allows justices the opportunity to influence how impactful their outgoing transition will likely be. As a result, several of the transitions occurring under such circumstances have been among the least impactful.[144]

However, in that time, three justices have passed away while on the Court—Chief Justice Rehnquist, along with Justices Scalia and

regulation of some corporate speech, and, as a result, overruling the portions of *McConnell* that had upheld BCRA's regulation of corporate expenditures against a facial challenge). Notably, Kennedy's opinion and Roberts' concurrence also cited to *Payne* on the topic of overruling precedent. *Id.* at 365 (citing *Payne* to highlight the reliance interest at stake); *id.* at 377, 380 (Roberts, C.J., concurring) (quoting *Payne* to emphasize the role of *stare decisis* in the judicial process).

142. *See* McConnell v. FEC, 540 U.S. 93, 224 (2003) (leaving open the possibility for more constitutional challenges by stating, "[m]oney, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day.").

143. O'Connor served in the Arizona state legislature from 1969–74, winning two elections. Hon. Mary M. Schroeder, *Tribute to Justice O' Connor*, 56 ARIZ. STATE L. REV. 26 (2025).

144. *See infra* Part III.

Ginsburg. These changes in personnel were unexpected and occurred, at least in the cases of Scalia and Ginsburg, under circumstances the justice would not have chosen based on a lack of ideological alignment with the then-seated President. As a result, these unexpected transitions had the potential to exert an outsized influence on the direction of the Court.[145]

The death of Chief Justice Rehnquist in September 2005 came several months after President George W. Bush had nominated John Roberts to replace the retiring Sandra Day O'Connor. The day after Rehnquist's death, Bush transferred the Roberts nomination to the chief justice position, and Roberts was easily confirmed within the month so that he began the Court's 2005–06 term as its Chief Justice.[146] However, Rehnquist's death and the transfer of Roberts from O'Connor's seat meant that President Bush had another vacancy to fill. His first nominee, Harriett Miers, was subjected to harsh criticism from Republicans uncertain about her approach.[147] Miers eventually withdrew herself from consideration, at which point Bush nominated Samuel Alito to fill O'Connor's seat. The O'Connor-to-Alito transition does not score particularly high on either short-term (15th) or long-term (18th) ideological difference between outgoing and incoming justices, as discussed in Part III.[148] However, as discussed in the previous two sections,[149] the O'Connor-to-Alito transition seems to have been highly

145. A note on the death of Chief Justice Rehnquist. Prior to Rehnquist's death, Justice O'Connor had announced her resignation to care for her ailing husband and President Bush had nominated John Roberts to replace her. However, when Rehnquist passed away while Roberts' nomination was pending, Bush switched the Roberts nomination to the chief justice position, thus replacing Rehnquist with a jurist who had once clerked for him. The Rehnquist-to-Roberts transition has not been significantly impactful. However, since O'Connor had already resigned, Rehnquist's death provided Bush another opportunity to shape the court.

146. *Supreme Court Nominations, 1789–Present*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm#3 (last visited April 7, 2025).

147. *See* Dan Coats, *Anatomy of a Nomination: A Year Later, What Went Wrong, What Went Right and What We Can Learn from the Battles Over Alito and Miers*, 28 HAMLINE J. PUB. L. & POL'Y 405, 409–13 (2007).

148. *See supra* Figures 2 and 3.

149. One might add to *PICS* and *Citizens United* the possibility that O'Connor-to-Alito led to the Court's 5-4 result in *D.C. v. Heller*, 554 U.S. 570 (2008), the landmark decision in which the Court expanded its understanding of the Second

influential on several high-profile cases.[150] Chief Justice Rehnquist's passing thus resulted in several of the candidate cases profiled here, though in a roundabout way.

Justices Scalia's and Ginsburg's deaths presented moments where the Court's balance could be more directly and significantly shifted. The transition from Justice Ginsburg to Justice Barrett is discussed in the case profiles that follow. But the transition following Justice Scalia's death merits some attention. The Court's history is filled with "what if" transitions over the past seventy years—what if President Johnson had succeeded in naming Justice Fortas chief, instead of failing and essentially gifting President Nixon two appointments? What if Robert Bork had been confirmed instead of Anthony Kennedy? What if Harriett Miers had been confirmed instead of Samuel Alito? But the question of what if Justice Scalia had been replaced by Merrick Garland rather than Neal Gorsuch might be the most significant. Scalia's replacement by President Barack Obama might have disrupted the relative balance on the Court for the first time in a quarter century. However, as has been discussed by many scholars and observers, the Senate refused to hold hearings on the Garland

Amendment to strike down gun control laws. *Heller*, and the subsequent application of the same principle to the states in McDonald v. City of Chicago, 561 U.S. 742 (2010), are not included among the cases profiled here because it is not entirely clear where Chief Justice Rehnquist or Justice O'Connor would have come out on those cases. The difficulty of knowing how a justice *might have* voted is one of the variables that makes pinning any particular result on a change in personnel exceedingly difficult.

150. Given these high-profile cases, one might wonder why O'Connor-to-Alito doesn't rank higher on the Martin-Quinn analyses. In part, it is due to the observation that O'Connor and Alito have had similar trajectories, just in reverse. Whereas O'Connor started conservative (average Martin-Quinn score during her first five terms of 1.633) and become more moderate (average Martin-Quinn score during her last five terms of 0.170), Alito started conservative (average Martin-Quinn score during his first five terms of 1.424) and become more conservative (average Martin-Quinn score during his most recent five terms of 2.374). Thus, the overall averages do not capture the difference between, for example, late-term O'Connor and current Alito (a Martin-Quinn difference over 2.0, though still outside the top ten among averages). In addition, it may be that O'Connor's moderation was at its most significant in the types of close, resonant cases (such as *Grutter*, described above, or *Casey*, described below), and that Alito has not shown similar tendencies in those cases. By that theory, the difference between O'Connor and Alito in those cases is obscured by their similarities in the broader swath of cases at the Court. The tools to evaluate that hypothesis are beyond the reach of this author at this time.

nomination from March 16, 2016, until the end of Obama's second term early the following year, a period of over nine months in which the Court operated with only eight justices.[151] Of course, since a Republican (Donald Trump) won the 2016 election, Scalia's eventual replacement with Neal Gorsuch did not have near the impact as a Scalia-to-Garland transition might have.

During his first five years as a justice, Gorsuch was an essential vote in forty five 5-4 cases.[152] That included seven cases the Supreme Court Database coded as "altering precedent." In addition, there are four cases from this period where Gorsuch was part of a 6-3 majority in a case coded as "altering precedent." These cases cover topics on union organizing,[153] executive power,[154] political gerrymandering,[155] criminal procedure,[156] the death penalty,[157] and abortion.[158] It is difficult to know the extent to which having Justice Gorsuch instead of a hypothetical Justice Garland made a difference, though it is likely that Garland would have reached a different outcome or utilized different reasoning in at least some of them.[159]

151. *See* Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089 (2017); Peter Nemerovski, *McConnell's Gamble*, 83 LO. L. REV. 493 (2023); Adam Liptak et al., *How a Vacancy on the Supreme Court Affected Cases in the 2015–16 Term*, N.Y. TIMES (June 27, 2016), https://www.nytimes.com/interactive/2016/02/14/us/politics/how-scalias-death-could-affect-major-supreme-court-cases-in-the-2016-term.html.

152. *See supra* note 81(compiling data from the Supreme Court database).

153. *See* Janus v. Am. Fed'n of State, Cnty., and Mun. Emp., 585 U.S. 878 (2018) (5-4 decision); *see also* Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021) (6-3 decision) (not coded as altering precedent).

154. *See* Trump v. Hawaii, 585 U.S. 667 (2018) (5-4 decision); *see also* Seila Law LLC v. Consumer Prot. Bureau, 591 U.S. 197 (2020) (5-4 decision) (not coded as altering precedent); Trump v. New York, 592 U.S. 125 (2020) (6-3 decision) (not coded as altering precedent).

155. Rucho v. Common Cause, 588 U.S. 684 (2019) (5-4 decision). Also on voting, see Brnovich v. Democratic Nat'l Comm., 594 U.S. 647 (2021) (6-3 decision) (not coded as altering precedent).

156. Ramos v. Louisiana, 590 U.S. 83 (2020) (6-3 decision).

157. Shinn v. Ramirez, 596 U.S. 366 (2022) (6-3 decision).

158. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (6-3 decision).

159. One might look to Garland's record on the D.C. Circuit for clues, but that is beyond the scope of this Article.

That being said, several of Gorsuch's highest profile opinions during his early tenure may have actually aligned with Garland and differed from Scalia. That impression suggests that potentially case-determinative transitions are not found exclusively in the transitions where there is a substantial ideological difference between justices. One example could be *McGirt v. Oklahoma*, in which a 5-4 Court with Justice Gorsuch writing for a majority that included Ginsburg, Breyer, Sotomayor, and Kagan held that significant portions of Oklahoma remained Indian Country due to established treaties with, among others, Muscogee Nation.[160] This result meant that the state lacked jurisdiction to try Native Americans for crimes that took place on Native lands.[161] However, the next unexpected Court transition limited the reach of the *McGirt* holding. After Justice Ginsburg was replaced by Justice Barrett in 2020, the four dissenters from *McGirt* (Thomas, Roberts, Alito, Kavanaugh) were joined by Barrett in finding concurrent jurisdiction between state and federal authorities to prosecute non-Native defendants for crimes occurring on Native lands.[162] Justice Gorsuch authored the dissent, an opinion that might have been a majority opinion had Ginsburg still been on the Court.[163] However, as discussed below, this was not the only context where the Ginsburg-to-Barrett transition appeared determinative.

### *F. Free Exercise —The COVID-19 Cases*

As the world encountered the COVID-19 pandemic, governments at all levels worked to mitigate the harm of the virus using a wide range of tools. In the United States as elsewhere, those tools included unprecedented restrictions on movement and gatherings

160. 591 U.S. 894 (2020). It is not clear where Scalia would have voted on this case as the question was novel. Scalia had a mixed record on Indian Law. Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads:* McGirt v. Oklahoma *and the Future of Federal Indian Law Canon*, 51 N.M. L. REV. 300, 322, 343 (2021) (comparing Gorsuch's and Scalia's Indian law jurisprudence).

161. Another example might be Bostock v. Clayton Cnty., 590 U.S. 644 (2020) (holding that Title VII protections against sex discrimination in employment prohibited employment discrimination based on sexual orientation), though that was a 6-3 decision with Roberts joining Gorsuch, Ginsburg, Breyer, Sotomayor, and Kagan.

162. Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022).

163. *Id.* at 656 (Gorsuch, J., dissenting).

aimed at minimizing the spread of the virus so that overwhelmed healthcare systems could better handle the growing numbers of serious cases. Many of these restrictions were unpopular among some Americans and courts were asked to consider the scope of governmental authority to impose them in this extraordinary moment. One argument that gained traction was brought by plaintiff religious institutions arguing that the restrictions on gathering infringed on religious liberty. Several such cases reached the Supreme Court in 2020 and 2021. Though the Court initially deferred to state and local governments to take actions to ensure community health, as the pandemic persisted, the Court started to embrace the religious liberty argument and strike down restrictions. The Court's change in course seemed to be caused by the replacement of Ruth Bader Ginsburg with Amy Coney Barrett in October 2020.

In May 2020, a group of plaintiffs encompassing several religions filed suit in California challenging restrictions to in-person services. The lead plaintiff was South Bay United Pentecostal Church, which typically held up to five Sunday services every week, attracting hundreds of congregants.[164] California had implemented a timeline for reopening that included churches in "Stage 3," a category that would be able to open after schools, dine-in restaurants, outdoor museums, and shopping malls. The Church would not be able to offer in-person services until a date later than these other establishments. Within two weeks, the Church's requests for injunction—on the grounds that placing churches in Stage 3 rather than Stage 2 violated the Free Exercise clause—had been denied at both the district court and Ninth Circuit Court of Appeals.[165] Before the end of the month, the request for an injunction had reached the Supreme Court.

164. S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938, 940 (9th Cir. 2020) (Collins, J., dissenting).

165. S. Bay United Pentecostal Church v. Newsom, 20-CV-865, 2020 WL 2814636 (S.D. Cal. May 15, 2020) (denying temporary restraining order); S. Bay United Pentecostal Church v. Newsom, No. 20-cv-865-BAS-AHG, 2020 WL 2529620 (S.D. Cal. May 18, 2020) (denying request for injunction pending appeal); S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938 (9th Cir. 2020) (affirming denial of injunction pending appeal).

The Court denied the injunction without explanation,[166] though Justices Thomas, Alito, Gorsuch, and Kavanaugh indicated that they would have granted the requested relief, with Kavanaugh explaining his rationale in a dissent.[167] For his part, Chief Justice Roberts concurred in the denial, noting that questions on when to lift which restrictions in the pandemic were "dynamic and fact-intensive" and highlighting his reluctance to submit local officials' decisions to "second-guessing by an unelected federal judiciary."[168] Thus, the Court split 5-4 on the question of granting the preliminary relief, with Justice Ginsburg voting to deny the requested injunction and allow the pandemic restrictions to apply to the Church. This dynamic was repeated in a similar case from Nevada later that summer, as the Court denied relief 5-4 while Justices Thomas, Alito, Gorsuch, and Kavanaugh indicated their greater willingness to consider the applicability of pandemic restrictions to religious institutions a Free Exercise violation.[169]

However, the death of Justice Ginsburg on September 18, 2020, and her quick replacement with Amy Coney Barrett, who joined the Court on October 26, 2020, threatened to disrupt this balance. Within a month, when the Court was presented with another request for relief from religious institutions, the impact of the Ginsburg-to-Barrett transition was apparent. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court enjoined New York's pandemic restrictions on attendance at religious services, concluding that the plaintiff religious institutions were likely to succeed on the merits of their Free Exercise claim.[170] The four dissenters from the Court's previous cases earlier in the year were joined by Barrett. In early 2021, this new majority returned to the California case and enjoined the state's prohibition on indoor worship services on Free Exercise grounds (though other

166. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (denying injunctive relief).

167. *Id.* at 1614 (Kavanaugh, J., dissenting).

168. *Id.* at 1613–14 (Roberts, CJ., concurring) (internal quotes omitted).

169. *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (denying injunctive relief).

170. 592 U.S. 14 (2020) (granting injunctive relief).

restrictions, such as restrictions on singing, were left in place).[171] The change in personnel seemed to have been decisive.

At first glance, the Court's reversal in these religious liberty cases seems to be the clearest example of a transition dictating outcome. However, it must be noted that these cases arrived at the Court in the procedural posture of a request for an injunction pending appeal[172] and so were not fully briefed or argued as a traditional merits case would have been. Still, they were high-profile decisions, and the switch from Ginsburg to Barrett resulted in different outcomes over a matter of months.[173]

Even though other factors may have played a role in this context, there can be little doubt that the gap between Ginsburg and Barrett on issues of Free Exercise impacted not only these COVID-19 cases, but also the Court's religious liberty jurisprudence more broadly. The foundation of the Free Exercise claim in these cases was in the comparability of the treatment of religious institutions to other institutions—the plaintiffs claimed that they were being restricted more stringently than similar establishments and thus being discriminated against based upon religion.[174] Under prevailing First Amendment doctrine, a state law that was neutral and generally applicable (i.e., did

171. *See S. Bay United Pentecostal Church*, 141 S. Ct. 716 (partially granting injunctive relief); *see also* Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 1289 (2021) (partially granting injunctive relief).

172. FED. R. APP. P. 8.

173. One additional potential explanation for the difference is the shifting dynamics of the pandemic. The initial California decision in May 2020 came during the pandemic's earliest months, when information was sketchy and fear was high. By November, when the Court enjoined New York's restriction, or February 2021, when it gave the California church a partial victory, more was understood about transmission of the virus. It is difficult to know the extent to which this evolution of the pandemic informed the justices, but it is likely to have impacted the public reception to their decisions. By late 2020 and into 2021, there was a larger portion of the public ready to loosen the restrictions coming before the Court.

174. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting) ("The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries."); *see also Calvary Chapel Dayton Valley*, 140 S. Ct. at 2605 (noting that while houses of worship in Nevada may admit no more than fifty people, bowling alleys, breweries, fitness facilities, and casinos are not so bound).

not target religious exercise) would be subjected to a more deferential standard of review than the strict scrutiny that applied when a law or its application facially discriminated.[175] The question in the COVID-19 cases was whether the distinctions lawmakers were drawing between religious institutions and other establishments constituted facial discrimination that would trigger elevated scrutiny.[176] From the outset, there were four justices who felt the answer was yes. As Justice Kavanaugh argued in his dissent from the initial denial of an injunction in the California case, "What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap."[177] Thus, the cases were about the larger question of what counts as neutral and generally applicable state action for Free Exercise purposes.

Prior to COVID-19, the Court had been signaling a more aggressive approach to Free Exercise cases, enlarging the category of state action that counted as facially discriminatory against religion.[178] Following the Ginsburg-to-Barrett transition, the Court expanded that category even further.[179] As it stated in another California COVID-19 case, "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more

175. *See* Emp. Div. v. Smith, 494 U.S. 872 (1990) (discussing decisions made by the Court related to the neutral and generally applicable laws); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

176. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546 (requiring strict scrutiny when facially neutral statute evinced evidence of an intent to burden a religion's free exercise).

177. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting). For his part, Chief Justice Roberts was more willing to defer to local authorities on such line drawing. *Id.* at 1613 (2020) (Roberts, C.J., concurring) (noting that only dissimilar activities were treated more leniently than religious services).

178. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017) (prohibiting exclusion of religious institutions from eligibility for public benefits).

179. Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 18 (2020) ("Because the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest.").

favorably than religious exercise."[180] Thus, Free Exercise analysis now often requires inquiry into which secular activities are comparable in order to determine the appropriate level of scrutiny.[181]

The ultimate effect has been to consistently shrink what counts as "neutral and generally applicable" government action, a move that has called into question the continued viability of the foundational case considering that category, *Employment Division v. Smith*.[182] While the Court has yet to formally overrule *Smith*, the COVID-19 cases—specifically, the direction of those cases following the Ginsburg-to-Barrett transition—seem to be pushing in that direction. Regardless of the broader impact on religious liberty,[183] the change in Court personnel in the middle of the pandemic determined the scope of

180. Tandon v. Newsom, 593 U.S. 61, 62 (2021) (granting injunctive relief). Applying strict scrutiny, the Court consistently conceded that responding to the pandemic was a compelling interest, but, after the Ginsburg-to-Barrett transition, did not find restrictions narrowly tailored when they impacted religious institutions. *But see* Dr. A v. Hochul, 142 S. Ct. 552 (2021) (denying injunctive relief from vaccination requirement for health care workers that did not include an exception for religious beliefs); Doe v. Mills, 142 S. Ct. 2569 (2022) (denying certiorari on same); Does 1-3 v. Mills, 142 S. Ct. 17 (2021) (denying injunctive relief from vaccination requirement for healthcare workers that did not include an exception for religious beliefs).

181. *See* Fulton v. City of Philadelphia, 593 U.S. 522, 610–11 (2021) (Alito, J., concurring).

182. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 526 (2022) ("A government policy will fail the general applicability requirement if it 'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way' or if it provides 'a mechanism for individualized exemptions.'") (citing *Fulton*, 593 U.S. at 533).

183. One might reasonably note that the post-COVID-19 religious liberty cases, *Fulton* and *Kennedy*, do not seem to have been determined by the Ginsburg-to-Barrett transition. In *Fulton*, for example, Barrett authored a concurrence that considered whether *Smith* should be overruled, what grounds would support that result, and what standard would replace it. She expressed skepticism that the result would automatically be strict scrutiny, a position embraced by both Kavanaugh and Breyer. *Fulton*, 593 U.S. at 543–44 (Barrett, J., concurring). Roberts' majority opinion avoided the *Smith* question, concluding that the city's actions were not neutral or generally applicable. *Id.* at 533. Meanwhile, *Kennedy* was a 6-3 decision with a majority that included both Barrett and Roberts. It is arguable, and perhaps even likely, that the expansion of religious liberty portended by the later COVID-19 cases was coming regardless of the transition. Roberts' deference may have been limited to the unique circumstances of the COVID-19 cases (both factually and procedurally). After all, Roberts had also authored the majority opinion in *Trinity Lutheran*.

government power to restrict activities as they related to religious institutions.

### *G. Abortion*—Dobbs v. Jackson Women's Health

When Clarence Thomas was appointed to the Supreme Court in 1991, he was the eleventh consecutive justice to be appointed by a Republican President. Indeed, the last justice appointed by a Democrat had been Thomas' predecessor, Thurgood Marshall. With Thomas' confirmation, Justice Byron White would be the only remaining member of the Court to have been appointed by a Democrat (John F. Kennedy in 1962). If appointments dictate outcomes and presidents can predict the jurisprudence of appointees, such a run of appointments should have delivered to Republican politicians one of their highest stated priorities through the 1980s—the reversal of *Roe v. Wade*. However, though cases had chipped away at reproductive rights through this period,[184] at the time Thomas arrived to the Court, *Roe*'s protection of abortion remained the law.[185]

While by 1991 the topic of abortion was a significant organizing force in American politics—Republicans wished to strike down *Roe*, while Democrats wanted it upheld—a look at the vote in *Roe* itself demonstrates that the situation was not always so politically divided. In *Roe*, three of the justices at the beginning of that run of eleven consecutive Republican appointees voted in the majority (Justice Blackmun, the opinion's author, along with fellow Nixon appointees Chief Justice Burger and Justice Powell), while White (Kennedy

184. *See, e.g.*, Maher v. Roe, 432 U.S. 464 (1977) (permitting states to exclude abortion services from Medicaid coverage); Harris v. McRae, 448 U.S. 297 (1980) (upholding Hyde Amendment prohibiting federal funding for abortion services); H.L. v. Matheson, 450 U.S. 398 (1981) (upholding law requiring parental consent for abortions); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (upholding law requiring tests for viability after twenty weeks and prohibiting state employees from participating in abortion services).

185. *See, e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (striking down a variety of abortion restrictions, including waiting periods, parental notification requirements without judicial bypass, and certain abortions performed outside of hospitals); Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (striking down law requiring information discouraging abortion to be provided before informed consent to an abortion could occur).

appointee) was in dissent. Blackmun and White, who were still on the Court Thomas joined, maintained their positions for and against protecting abortion respectively, even as the Court remained sharply divided. Arriving the term prior to Thomas, Justice David Souter had generated excitement among Republicans about the possibility of overturning *Roe* with a vote allowing prohibitions on federal funding going to any family-planning facility that offered abortion counseling.[186] Thomas was thought to be another vote on the Court to seal *Roe*'s fate and a case from Pennsylvania was on the Court's docket during his first term.

However, in *Planned Parenthood v. Casey*, Souter joined with Justices O'Connor and Kennedy to craft a joint plurality opinion upholding *Roe*, but also upholding several of the challenged provisions, such as a 24-hour waiting period and informed consent requirement.[187] The plurality discarded *Roe*'s trimester-by-trimester analysis, but maintained its constitutional protection of abortion prior to viability and prohibited any regulations that imposed an undue burden on a woman's choice.

While *Casey* was hugely significant doctrinally, the plurality also emphasized its *stare decisis* analysis. Perhaps with Marshall's final dissent from *Payne* the term before in mind, with its accusation that "neither the law nor facts" had changed, only the Court's personnel,[188] the *Casey* plurality exhibited significant caution in overturning prior precedent. "Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown)," the plurality wrote, "the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973."[189] More than personnel changes would be required to overturn *Roe*, the plurality asserted.

Abortion cases continued to reach the Court in the decades that followed. And while *Roe* remained a target, the foundational holding

186. Rust v. Sullivan, 500 U.S. 173 (1991). The 5-4 vote in *Rust* included Chief Justice Rehnquist along with Justices White, Scalia, Kennedy, and Souter in the majority, and Justices Blackmun, Marshall, Stevens, and O'Connor in dissent.

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

188. Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

189. *Casey*, 505 U.S. at 864.

that the Constitution protected, at least to some extent, the right to choose whether to continue a pregnancy remained.[190] As late as June 2020, a 5-4 Court struck down a Louisiana law found to have an undue burden on abortion access.[191] The decisive vote in that case, *June Medical Services, LLC v. Russo*, was Chief Justice Roberts, who had voted differently in a previous case on the same issue. In between the two cases, Justice Kennedy (who voted to strike down the similar provision in the earlier case)[192] had been replaced by Justice Kavanaugh, another change in personnel providing hope for anti-abortion advocates that *Roe* would finally fall. However, while Roberts emphasized that he thought the prior case was wrongly decided, he wrote in his concurrence, "The question today however is not whether [the prior case] was right or wrong, but whether to adhere to it in deciding the present case."[193] Like the *Casey* plurality before him, Roberts offered an extensive analysis of the benefits of *stare decisis*.[194] Finding the current case "nearly identical"[195] to its recent predecessor and noting that "[*s*]*tare decisis* instructs us to treat like cases alike," Roberts concurred with the Court's conclusion that the law was unconstitutional.[196]

190. *Compare* Stenberg v. Carhart, 530 U.S. 914 (2000) (striking down state prohibition on particular abortion procedure) *with* Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding similar federal prohibition on same procedure). Notably, between *Stenberg* and *Carhart*, Justice Alito replaced Justice O'Connor. The *Stenberg* majority (5-4) had been Justices Breyer, Stevens, O'Connor, Souter, and Ginsburg, while the *Carhart* majority (5-4) was Justices Kennedy, Roberts, Scalia, Thomas, and Alito. Thus, the O'Connor-to-Alito transition seems to have been of great impact. The *Gonzales v. Carhart* Court did not re-examine *Roe* or *Casey*, but instead simply found that restricting the procedure, described in the federal legislation as "partial-birth abortion," did not impose an undue burden. *See also* Whole Women's Health v. Hellerstedt, 579 U.S. 582 (2016) (striking down laws requiring specific admitting privileges and surgical center requirements that limited the number of locations able to offer abortion services).

191. June Med. Servs., LLC v. Russo, 591 U.S. 299 (2020).

192. *Whole Women's Health*, 579 U.S. 582. *Hellerstedt* was a 5-3 case (Scalia had passed away in the middle of the 2015–16 term) with Justices Breyer, Kennedy, Ginsburg, Sotomayor, and Kagan voting in the majority, and Chief Justice Roberts and Justices Thomas and Alito in dissent.

193. *June Med. Servs. LLC*, 591 U.S. at 344 (Roberts, C.J., concurring).

194. *Id.* at 344–58.

195. *Id.* at 355.

196. *Id.* at 358.

However, two weeks prior to the *June Medical* decision announcement, yet another abortion case was presented to the Court. The State of Mississippi petitioned the Court for a writ of certiorari in a case over a law prohibiting abortion after fifteen weeks gestation (with limited exceptions).[197] The cert petition in the case, *Dobbs v. Jackson Women's Health Organization*, asked the Court to reconsider *Casey*'s holding that all pre-viability prohibitions on abortions were unconstitutional.[198] Initially, the state was asking the Court to reject the "bright line"[199] rule centering on viability and establish a new analytical framework for determining when an abortion restriction was unconstitutional.[200] In its reply brief, which was filed after the Court's *June Medical* decision, the State argued that *Casey*'s undue burden test should apply to *all* abortion restrictions.[201] Thus, the request in *Dobbs* was for a change in how *Casey* applied (removing the prohibition on pre-viability restrictions), not for a discarding of the right to abortion entirely.

The state's reply brief was filed on September 2, 2020. On September 18, Justice Ruth Bader Ginsburg passed away. By the end of October, Justice Amy Coney Barrett had been sworn in to replace her, offering the potential that Roberts, whose vote had proved pivotal in *June Medical* six months earlier, was no longer the decisive vote on the topic.

The Court granted certiorari in May 2021[202] and the state offered its brief during the summer. In contrast to its initial petition for certiorari nearly a year earlier, the state now made a more significant ask. "The Constitution does not protect a right to abortion," read the

197. Petition for Writ of Certiorari, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392), 2020 WL 3317135.

198. *Id.* at *i.

199. *Id.* at *15.

200. *Id.* at *20–28.

201. Reply Brief for Petitioners on Petition for Writ of Certiorari at 15–16, *Dobbs*, 597 U.S. 215 (No. 19-1392), 2020 WL 5370458, at *11–12.

202. Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019), *cert granted*, 89 U.S.L.W. 3388 (U.S. May 17, 2021) (No. 19-1392) (granting certiorari as to question 1: "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional" was the Court's only undertaking (quoting Petition for Writ of Certiorari, *supra* note 189, at *i)).

first sentence of the brief's argument.[203] Describing the Court's abortion jurisprudence as "egregiously wrong"[204] and "hopelessly unworkable,"[205] the state proposed a highly deferential rational basis review of abortion restrictions and the discarding of *Roe*, *Casey*, and all talk of viability or undue burden.[206] The rest, as they say, is history.

In June 2022, the Court explicitly overruled *Roe* and *Casey* and abandoned any constitutional right to choose to terminate a pregnancy.[207] Not only would Mississippi's fifteen-week ban be allowed, but any state's absolute prohibition on abortion would as well.[208] The Ginsburg-to-Barrett transition had provided the crucial vote for this outcome. Justice Alito's opinion carried five votes (Alito, Thomas, Gorsuch, Kavanaugh, and Barrett); Chief Justice Roberts, however, merely concurred in the judgment. In his concurrence, Roberts offered a "more measured course," upholding the Mississippi law and discarding the viability line, but going no further.[209] However, where Roberts had been decisive in 2020, his vote had become superfluous in 2022. The Ginsburg-to-Barrett transition had altered not only the arguments Mississippi offered the Court, but the reasoning controlling the case.

Given this, it was no surprise that the joint dissenters would turn to the dismayed words of Justice Marshall's *Payne* dissent thirty years prior.[210] Marshall had lamented that a change in personnel could

203. Brief for Petitioners at 22, *Dobbs*, 597 U.S. 215 (No. 19-1392), 2021 WL 3145936, at *11.

204. *Id.* at *14.

205. *Id.* at *19.

206. *Id.* at *36. In Part II of the argument within the brief, the State reiterated its initial argument that the Court should discard the viability line. *Id*. at *38.

207. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022).

208. *See* Larissa Jimenez, *60 Days after Dobbs: State Legal Developments on Abortion*, BRENNAN CTR. FOR JUST. (Aug. 24, 2022), https://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion.

209. *Dobbs*, 597 U.S. at 348 (Roberts, C.J., concurring).

210. *Dobbs*, 597 U.S. at 414 (Breyer, J., Sotomayor, J., Kagan, J., dissenting) (quoting Payne v. Tennessee, 501 U.S. 800, 844 (Marshall, J., dissenting)). The broader discussion of *stare decisis* in the *Dobbs* opinions led to additional references to the *Payne* majority in several opinions. *See Dobbs*, 597 U.S. at 264, 286, 288; *id.* at 357 (Roberts, C.J., concurring); *id.* at 364, 388 (Breyer, J., Sotomayor, J., Kagan, J., dissenting).

determine the outcome of a significant case; the dissenters charged that they had just witnessed that occur.

## VI. CONCLUSION—RARE BUT RESONANT

The cases profiled here suggest that there are some cases where a change in personnel appears to have a substantial impact on case outcome. But it is important not to overstate the case. The percentage of cases in which even a credible case of an outcome-determinative personnel change can be made is quite small. Certainly, the overall personnel of the Court matters in *every* case; the trends on the broader direction of the Court can be glimpsed by looking at the data from Part III. But being able to tie a particular case outcome to a particular Court transition is quite rare.

Some perspective. The cases profiled above come from the first five years after three particularly impactful transitions: Marshall-to-Thomas (1991), O'Connor-to-Alito (2006), and Ginsburg-to-Barrett (2020). While *Lopez* and *Adarand* are significant cases and seem to turn on the replacement of Marshall with Thomas, they are the exception rather than the rule. During his first five years on the Court, Thomas was an essential vote in forty-two cases—these are cases that were coded as 5-4 and on which Thomas voted in the majority.[211] This was out of a total of 479 cases in the Database from those five terms. Thus, less than 9% of Thomas' earliest cases even required Thomas' vote to reach a particular outcome. For Alito, the numbers are higher—60 of the 335 (17.9%) cases during his first five terms were decided 5-4 with Alito in the majority, the highest percentage of such early cases among justices since 1991. Meanwhile, a smaller percentage of cases during the two terms for which Barrett's votes are included were 5-4 with Barrett in the majority (7.02%).[212] In other words, in the vast majority of cases, no single transition can possibly be determinative on its own because most cases are not 5-4 decisions.

211. *See supra* note 81. This data includes only nine-vote cases. Thomas was on the losing end of thirty-five 5-4 cases during those five years. For what it's worth, only three of those cases with Thomas in the majority, including *Adarand*, is coded as altering precedent.

212. *Id.* Interestingly, but perhaps unsurprisingly, Justice Barrett has the highest share of cases from her earliest terms that are decided by a 6-3 vote in the database (25.7%). She voted in the majority in all but two of those forty-four 6-3 cases (95.5%).

However, while the cases profiled may be rare, they are also resonant. They represent cases of great significance and, in most cases, widespread public attention. These are cases that matter. And they are not the only ones. Among the 5-4 cases Justice Thomas voted in the majority on during his first five years, there are also cases on racial gerrymandering[213] and school desegregation,[214] the death penalty[215] and the Establishment Clause,[216] that also might be strong candidates as being determined by Thomas' presence rather than Marshall's. There is a similar range among Alito's early 5-4 cases in which he was in the majority,[217] while Barrett's early terms have included a number of high-profile 5-4 and 6-3 cases in which she has voted in the majority.[218]

It is thus possible to come away with a perception that Marshall's charge that the Court's currency is power—accumulated through personnel—is true. But, as this Article seeks to demonstrate, the reality is far more complicated. Not only do these cases represent a small percentage of the Court's work, it is also extremely difficult to reduce a case to any single variable. Who were the lawyers? What were the facts? What did the record from below look like? Any number of things impact how cases turn out.

Complicating things further, perceptions of legitimacy are in the eye of the beholder. This Article explores one potential dynamic that might impact perceptions of legitimacy: that a decision was dictated

213. Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995); Bush v. Vera, 517 U.S. 952 (1996).

214. Missouri v. Jenkins, 515 U.S. 70 (1995).

215. Johnson v. Texas, 491 U.S. 397 (1989); Graham v. Collins, 506 U.S. 461 (1993).

216. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

217. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124 (2007) (abortion); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *overruled by legislative action* (Jan. 29, 2009) (employment discrimination); District of Columbia v. Heller, 554 U.S. 570 (2008) (gun control); McDonald v. City of Chicago, 561 U.S. 742 (2010) (gun control).

218. *See, e.g.*, Trump v. New York, 592 U.S. 125 (2020) (executive privilege); Brnovich v. Democratic Nat'l Comm., 594 U.S. 647 (2021) (voting rights); New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (gun control); Shinn v. Ramirez, 596 U.S. 366 (2022) (death penalty); 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (free speech and LGBT rights); West Virginia v. EPA, 597 U.S. 697 (2022) (administrative law).

by a change in personnel. But how that argument hits any potential audience will likely depend significantly on whether they agree with the Court's decision in the first place. In other words, to say that a decision was determined by personnel is not an argument that the case is right or wrong. While some certainly feel the Court's decision in *Dobbs* (or any of the other cases) reduced judicial legitimacy and may point to changes in Court personnel as a cause, others see *Dobbs* as a vindication of the Constitution that *increases* judicial legitimacy. For the latter audience, there is no trouble with the changes in personnel. Indeed, the changes are welcomed. Perception of legitimacy, then, is impacted by variables beyond whether personnel is actually dictating outcomes.

When dealing with judicial legitimacy, perception matters. If people believe the Court's work to be dictated by controlling who sits on the bench, their belief in the rule of law is challenged. Rather than a government "of laws and not of men,"[219] the strategy is to change the justices to change the law. Even if case outcomes can rarely be so simply explained, as this Article argues, the perception can be supported by resonant examples. The general public's interaction with the work of the Court (to the extent there is such an interaction at all) is largely limited to news coverage of a small number of difficult cases and of increasingly politically polarizing confirmation hearings. These glimpses of the Court only further fuel impressions that personnel is determinative—why else would confirmation fights grow so ugly?

This Article seeks to evaluate the extent to which those perceptions match reality. The data suggests that transitions *can* matter, though they vary widely in impact. It also suggests that connecting that impact to specific cases is complicated and speculative and might only plausibly apply to a small percentage of cases. Still, those close and difficult cases probably carry outsized importance in perceptions of the Court's legitimacy. As scholars and jurists continue to discuss both jurisprudential questions, such as the utility of *stare decisis*, and practical ones, such as whether to adopt term limits or other reforms to the Court, Justice Marshall's personnel-as-determinative charge should continue to be evaluated. For an institution that relies

219. *See The Report of a Constitution or Form of Government for the Commonwealth of Massachusetts 28–31* (Oct. 1779), FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/06-08-02-0161-0002.

on "merely judgment,"[220] it is legitimacy that is the most valuable currency of the Court.

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