ON THE ROLE OF IDEOLOGICAL HOMOGENEITY IN GENERATING CONSEQUENTIAL CONSTITUTIONAL DECISIONS†

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I. INTRODUCTION

In 1984, when the U.S. Supreme Court agreed to hear the case of *Berkemer v. McCarty*,[1] speculation mounted that the Burger Court would finally overrule *Miranda v. Arizona*.[2] After all, beginning in the 1970s, the Justices had gradually narrowed *Miranda*'s reach, and *Berkemer* seemed to present an enticing opportunity to remove it from the books altogether.[3]

That step the Justices did not take. Writing for a unanimous Court,[4] Justice Marshall may have held against the defendant, but his opinion reaffirmed a "central principle" established in *Miranda*: "if the police take a suspect into custody and then ask him questions

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1 468 U.S. 420 (1984).

2 384 U.S. 436 (1966).

3 *See, e.g.*, LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 539 (6th ed. 2007) ("As the Burger Court gradually narrowed the circumstances under which police had to inform suspects of their rights, many thought that the Court would overrnle *Miranda*, and *Berkemer v. McCarty* (1984) seemed the perfect vehicle.").

4 The vote was 9-0. Justice Stevens concurred in part and concurred in the judgment. *Berkemer*, 468 U.S. at 422, 445.

without informing him of the rights enumerated [in *Miranda*], his responses cannot be introduced into evidence to establish his guilt."[5] The problem for defendant McCarty, according to the majority, was that his "routine" roadside "traffic stop" did not constitute "custody" for purposes of *Miranda*.[6]

To be sure, *Berkemer* was not a trivial decision. Not only did it hold that *Miranda*'s "central principle" applies to all crimes, it also elaborated upon the definition of "custody." But it was hardly the blockbuster that many anticipated. *Miranda*, though wounded, limped on.[7]

Flash forward a decade—to *Seminole Tribe of Florida v. Florida*.[8] When the Justices granted certiorari, presumably to consider the question of whether the Eleventh Amendment prevents Congress from authorizing tribal suits against the states, their action was greeted with a collective yawn;[9] even oral arguments failed to attract attention.[10] But not so of the decision handed down some six months later. The five-person majority opinion, which precluded Congress from abrogating state immunity, received front-page coverage in the

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5 *Id.* at 429.

6 *Id.* at 435, 442.

7 If anything, and consistent with the overall thesis of this Article, *Berkemer* muddied preexisting understandings of custody, moving from a relatively formal test involving the freedom of the suspect to leave, to one examining whether it is one of those types of situations in which the concerns that powered the *Miranda* decision are implicated. *Id.* at 434.

8 517 U.S. 44 (1996).

9 An "all file" search on Lexis News for "seminole tribe and date(geq (1/20/1995) and leq (1/25/1995))" retrieved three full stories on the Court's decision to grant cert. T.L. Henion, *Ruling May Affect Scope of Authorized Gambling*, OMAHA WORLD-HERALD, Jan. 23, 1995, at 2; David Lightman, *Top Court to Hear Indian Gaming Case*, HARTFORD COURANT (Conn.), Jan. 24, 1995, at A1; and James Wallace, *Court to Rule on Casinos—Tribe-State Dispute on Constitutional Issue Will Be Heard*, SEATTLE POST-INTELLIGENCER, Jan. 24, 1995, at B1. In addition, brief mentions appeared in the *Washington Post*, the *New York Times*, and the *Birmingham News*. Joan Biskupic, *Ruling Gives Death Row Inmates Better Chance for Federal Review*, WASH. POST, Jan. 24, 1995, at A3; Linda Greenhouse, *Justices Rule for Employee in a Bias Suit*, N.Y. TIMES, Jan. 24, 1995, at AI; *High Court to Use State Case to Weigh Punitive-Award Caps*, BIRMINGHAM NEWS (Ala.), Jan. 23, 1995, at 8A.

10 In an article appearing the day after oral argument, Linda Greenhouse featured *BMW v. Gore*, No. 94-896, only mentioning at the end of the story that

> [t]he Court also heard arguments today [in *Seminole Tribe*]. . . . With gambling in Indian-rnn casinos now a $27-billion-a-year business, the case . . . is of substantial importance to the states and tribes. But in this argument as well, it appeared that the Justices had developed doubts about whether they could decide the constitutional issues that had attracted them to the case in the first place.

Linda Greenhouse, *High Court Examines, Gingerly, Issue of Punitive Damages' Limit*, N.Y. TIMES, Oct. 12, 1995, at A18.

Los Angeles Times,[11] the *New York Times*,[12] the *Baltimore Sun*,[13] and even *USA Today*.[14] Nina Totenberg saw fit to devote part of the next day's "Morning Edition" to the case, interviewing the Seminole Tribe's attorney, the Governor of Florida, and several law professors.[15] Less than two months later, the Senate Committee on Indian Affairs held hearings to study *Seminole Tribe*'s impact on congressional power;[16] and nowadays it is standard fare in constitutional law casebooks.

This tale of two cases raises an obvious question: Why did *Berkemer* go out with a whimper and *Seminole Tribe* with a bang? More generally, assuming that the Justices in the majority can transform any constitutional dispute into a major (or minor!) ruling, what explains their choice? Several possibilities present themselves, but here we focus chiefly on the effect of ideological diversity on the nature of the decisions the Justices render. We argue that the greater the homogeneity of the majority, the higher the likelihood of a consequential decision.[17] Under this argument, it is no accident that *Berkemer* was a less consequential decision than *Seminole Tribe*, for the *Berkemer* Jus-

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11 David G. Savage, *High Court Curbs Federal Lawsuits Against the States*, L.A. TIMES, Mar. 28, 1996, at A1.

12 Linda Greenhouse, *Justices Curb Federal Power to Subject States to Lawsuits*, N.Y. TIMES, Mar. 28, 1996, at A1.

13 Lyle Denniston, *Court Cuts U.S. Power over States*, BALT. SUN, Mar. 28, 1996, at 1A.

14 Tony Mauro, *Court Ruling Big Boost to States' Rights*, USA TODAY, Mar. 28, 1996, at 1A.

15 *Morning Edition: U.S. Supreme Court Rules in Favor of States' Rights* (NPR radio broadcast Mar. 28, 1996) (available on LexisNexis).

16 The decision came down on March 27, 1996; hearings were held on May 9, 1996. *See The Impact of the U.S. Supreme Court's Recent Decision in* Seminole Tribe of Florida v. State of Florida*: Hearing Before the S. Comm. on Indian Affairs*, 104th Cong. (1996) (statements of Seth Waxman, Associate Deputy Att'y Gen., United States Department of Justice; Richard Collins, Professor, University of Colorado School of Law; and others regarding the impact of the *Seminole* case on congressional powers).

17 This sort of hypothesis stands in some contrast to more common approaches in the legal academy that see the nature of judicial rulings as a choice the Justices consciously make regarding whether to be minimal and whether to formulate a rule or a standard. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–5 (1999) (arguing that "decisional minimalism," "the phenomenon of saying no more than necessary to justify an outcome, and leav[ing] as much as possible undecided," both promotes democracy and "makes a good deal of sense when the Court is dealing with a constitutional issue of high complexity about which many people feel deeply and on which the nation is divided . . . ." (emphasis omitted)); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 26–27 (1992) (exploring, among other areas, "what might drive the Court's divisions over . . . choices between rules and standards and how such explanations might shed light on the surprising moderation" of the Court's 1991 Term).

tices were a far more heterogeneous lot than those who decided *Seminole Tribe.*[18]

In what follows we test whether our claim and intuition really hold across a larger set of cases. We attempt to answer this question through a systematic analysis of the Court's constitutional docket since the 1953 Term. We begin, in Part II, by contemplating what constitutes a "consequential" Supreme Court decision. Although there is no way to capture this concept with absolute precision, what we have in mind is a decision that makes or changes the law in significant ways.

Next, in Part III, we offer a theory for explaining the emergence of consequential decisions. A variety of factors could influence whether Supreme Court decisions are consequential, and in our empirical analysis we attend to a number of them. Our primary theoretical insight, however, is that there is a relationship between homogeneity of the Justices' preferences and noteworthy policy output. We would note that although this claim is novel in constitutional law circles, it is widely accepted in the extant literature investigating group decisions in a variety of other contexts. In Part IV, we turn to our empirical methodology. We first describe our measures of consequentiality as well as ideological homogeneity on the Supreme Court. Then, in Part V, we analyze our data, concluding that in fact a strong relationship exists between ideological homogeneity and the generation of consequential decisions. Part VI offers some thoughts about what this relationship might imply for the making of constitutional law.

II. CONTEMPLATING (IN)CONSEQUENTIAL CONSTITUTIONAL LAW DECISIONS

Throughout this Article we speak of decisions that are "consequential," "noteworthy," "important," and "path-breaking," but what do we mean by those terms? We are trying to capture one central insight: the Justices' decisions will have a greater impact on the law when those deciding the cases are of a like mind. Thus, in using "consequential" and similar terms, we are indicating that certain

18 As we explain in Part IV, we assess ideological diversity by computing the standard deviation of Martin and Quinn's ideal point estimates for members of the majority vote coalition such that the lower the standard deviation, the higher the homogeneity. Between the 1953 and 2005 Terms, the mean standard deviation was 1.84. That figure was 2.31 for the nine-person majority in *Berkemer* and 1.27 for the five-member majority of *Seminole Tribe.*

cases, as a relative matter, make or change the law in significant ways. In this Part, we elaborate on this definition and provide some tangible examples.

To begin, a decision may be consequential if it makes law that is clear and effective. So, for example, *Mapp v. Ohio* required state courts to apply the exclusionary rule when the Fourth Amendment was violated.[19] This ruling was crisp, and tidal in its impact. Although no states were claiming an entitlement to ignore the Fourth Amendment, the strong negative reaction of officials indicated *Mapp* would require a great change in their practices. Criminal procedure expert Professor Yale Kamisar said that to listen to the reaction of the police "[y]ou would have thought we had just passed the Fourth Amendment at a constitutional convention."[20] Kamisar quoted New York City's Deputy Police Commissioner, who said the case "was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants."[21] The same was true of *Engel v. Vitale*,[22] which prohibited prayer in schools. "For several days," reported Anthony Lewis in the *New York Times*, "all the serious business of the Congress of the United States was put aside while members spent their time denouncing the Supreme Court."[23]

Even if a decision does not make clear, new law, it can still be noteworthy, however, if it signals a major change in the Court's direction. *Reed v. Reed*[24] stands as an example here. *Reed* was the first case in which the Supreme Court struck down as unconstitutional a distinction based on sex. It established little in the way of a new rule; the Court seemed only to apply rational basis scrutiny in deciding the case. Yet, no one watching could doubt that a shift had occurred. As Gerald Gunther said in reaction, "It is difficult to understand [the *Reed*] result without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis."[25]

One particular kind of change in direction may be even more noteworthy: the overruling case. Thus, *Gideon v. Wainwright*[26] measures up under two criteria. It established a clear rule that felony de-

19 367 U.S. 643, 655 (1961).

20 Yale Kamisar, *When* Wasn't *There a "Crime Crisis"?*, 39 F.R.D. 450, 459 (1965).

21 *Id.* at 458.

22 370 U.S. 421 (1962).

23 Anthony Lewis, *Court Again Under Fire*, N.Y. TIMES, July 1, 1962, at 114.

24 404 U.S. 71 (1971).

25 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, 34 (1972).

26 372 U.S. 335 (1963).

fendants facing jail time were entitled to have lawyers provided if they were indigent. And *Gideon* scores again as an overruling case: the majority overturned (without much sympathy) the prior "special circumstances" rule of *Betts v. Brady*.[27] Overruling cases, by their nature, often will establish a clear rule (the opposite of the pre-existing rule). Yet, even when they are less clear about the precise legal rule, they may still signal an important change of direction. In *Garcia v. San Antonio Metropolitan Transit Authority*[28] the Supreme Court clearly overruled *National League of Cities v. Usery*.[29] What precisely *Garcia* portended was a matter of some doubt, as the Court's later federalism cases made quite clear. Still, it was well understood at the time that an important shift had occurred.

Some cases are important because of what they do as much as what they say. A Supreme Court decision overturning an Act of Congress is almost always consequential. Of course, there are some laws that were so trivial, or that were invalidated in such trivial respects, that perhaps the law changes little.[30] An example might be *Monongahela Navigation Co. v. United States*,[31] in which the Court struck down a law concerning the amount of money the United States would pay to companies for the purchase of a lock and dam in the Monongahela River. Still, most of the time when a congressional law is overturned, the impact is important. The Justices at least state rhetorically that they think long and hard before overturning congressional enactments, and these are relatively rare events.

These four types of cases—those that issue a clear and concise new legal rule, signal a new policy direction on a salient issue, overrule precedent, or strike down a federal statute—are just a few examples of the judicial policies that we believe make a decision noteworthy and important in the legal canon. Assuming that the foregoing is a fair, if incomplete, representation of "consequential" cases, for purposes of empirical analysis we need to be able to distinguish between these cases and those that are only minor contributions to the law. Before we grapple with this measurement issue, however, we explain why we believe that ideological homogeneity on the Court will influence the emergence of consequential Supreme Court decisions.

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27 316 U.S. 455 (1942).

28 469 U.S. 528 (1985).

29 426 U.S. 833 (1976).

30 *See* LAWRENCE BAUM, THE SUPREME COURT 169 (2004) ("[M]any of the Court's decisions declaring statutes unconstitutional have been unimportant to the policy goals of Congress and the president . . . .").

31 148 U.S. 312 (1893).

III. THEORIZING ON THE EMERGENCE OF CONSEQUENTIAL PUBLIC POLICY DECISIONS

In this Article, we seek to understand why some, but not all, Supreme Court majorities produce consequential or noteworthy opinions, as defined above. In our analysis of the question, we focus primarily on one distinct dimension of the institutional context that we expect to be highly correlated with Supreme Court decisions of consequence: the ideological make-up of the majority coalition. We hypothesize that when the Justices are closely aggregated around a single ideal point in terms of political preferences, the likelihood of a consequential decision will substantially increase. We discuss our theory for why homogeneity of political preferences is linked to certain types of outcomes in Part III.A below. In Part III.B, and for purposes of specifying a complete model of consequential decision making, we very briefly highlight other factors that are likely to be correlated with the production of these cases.

A. Ideological Diversity and the Nature of Supreme Court Decisions

In this Part, we lay out our theory of consequential decision making. Before we elaborate on *why* ideological homogeneity enables consequential decision making, however, we ought to note that we are not the first to consider the role of preference dispersion in the context of policy output. Indeed, these ideas can be traced back to the work of James Madison. Madison worried quite a bit about the possibility that a single group with shared preferences would dominate the national government and would proceed to make laws and policies that advantaged that group over all other individuals and communities in society.[32] In *The Federalist No. 10*, Madison empha-

32 *See* THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961). Madison argued that faction need not he a dreaded component of society. His words are worth quoting:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interest; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked, that where there is a consciousness of unjust or dishonourable purpose, communication is always checked by distrust, in proportion to the number whose concurrence is necessary.

sized the importance of diversity as a means to weaken the ability of any single, politically homogeneous group to gain control over the legislative process; Madison, in effect, sought to assure competition among various groups and to increase the likelihood of compromise and negotiation in the lawmaking context, all in an effort to dilute the extremism that he thought would emerge from a national legislature controlled by a single narrow-minded group.[33] In short, Madison had the intuition—one that we adopt here—that a diverse group of decision makers will produce policies and programs that look quite a bit different than those fashioned by a group with homogeneous preferences. (In our context, however, we make no judgment about whether decisions by ideologically homogeneous Justices are good or bad. We simply observe that they are different.)

Madison's instinct has been borne out in numerous studies in a variety of different contexts. Social scientists have found that important and noteworthy laws are far more likely to emerge when the same political party controls both Congress and the Executive Branch; a divided government, by contrast, impairs the lawmakers' ability to enact consequential law.[34] Within the House and Senate chambers individually, scholars also have found that when the majority party becomes more homogeneous, it becomes both more powerful and better able to achieve its policy ambitions.[35]

These findings about group effectiveness are, we hasten to note, quite robust and replicated in many different contexts, including those outside the government sector. Scholars interested in decision making in the private firm environment, for example, have found that management teams tend to be quite a bit more successful when they consist of like-minded thinkers than when they are populated by

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33 *Id.*; *see also* Kevin R. Gutzman, *A Troublesome Legacy: James Madison and "The Principles of '98,"* 15 J. EARLY REPUBLIC 569, 576 (1995) (noting that Madison adopted the counter-argument to Montesquieu's position that homogeneous majorities assured a more effective republic).

34 *See* John J. Coleman, *Unified Government, Divided Government, and Party Responsiveness*, 93 AM. POL. SCI. REV. 821 (1999) (argning that a unified government produces more significant legislative enactments and is more responsive to the public mood); Sean Q. Kelly, Research Note, *Divided We Govern? A Reassessment*, 25 POLITY 475 (1993) (arguing that divided government negatively impacts the emergence of innovative legislation). *But see* Keith Krehbiel, *Institutional and Partisan Sources of Gridlock: A Theory of Divided and Unified Government*, 8 J. THEORETICAL POL. 7 (1996) (theorizing that unified governments should be no more effective than divided governments).

35 *See* David Brady, Richard Brody & David Epstein, *Heterogeneous Parties and Political Organization: The U.S. Senate, 1880–1920*, 14 LEGIS. STUD. Q. 205 (1989) (noting that homogeneous parties are able to appoint powerful and effective committee leaders).

individuals with diverse preferences.[36] Similarly, interest groups, unions, and religious organizations appear to be more powerful and effective in their missions when they are comprised of individuals with homogeneous preferences.[37]

Our questions are: Do these findings hold in the context of the U.S. Supreme Court? Do majority coalitions with homogeneous preferences produce a different kind of opinion than majorities with ideologically dispersed preferences? In analyzing these questions we assume—as do many other scholars interested in the role of ideology in the decision-making process—that we are able to array the individuals in the group (here, the decision coalition) along an ordinal left-right policy dimension. It then seems apparent that dispersion of ideological preferences among the members of winning coalitions will lead to greater levels of conflict than those observed when members are all located at exactly the same point on a policy continuum. It is this very conflict and disagreement among members of the Court, or a decision coalition, we argue, that ultimately impedes the production of a consequential decision.

We believe the Court's decision will be a function of the homogeneity of the majority coalition. Consider first a case of unusual and extreme homogeneity: every single member of the majority coalition has preferences that rest on the same ideal point in a given policy space. In this instance, just as Madison suggested, the majority coalition sharing great unity of mind has the ability to adopt whatever rule it would like, and to impose its preferences on the law. Absent other constraints (which we do not consider here, though we acknowledge their existence),[38] that majority coalition will seek to maximize its preferences.

Contrast the case of a coalition with unified preferences with one in which the preferences of the majority coalition are widely dis-

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36 *See* Martin Kilduff, Reinhard Angelmar & Ajay Mehra, *Top Management-Team Diversity and Firm Performance: Examining the Role of Cognitions*, 11 ORG. SCI. 21 (2000) (finding diversity in top management negatively correlated with market share increases).

37 *See* Brad Christerson & Michael Emerson, *The Costs of Diversity in Religious Organizations: An In-Depth Case Study*, 64 SOC. RELIGION 163 (2003) (finding that multi-ethnic religious organizations impose high personal costs on their members); Rebecca S. Demsetz, *Voting Behavior in Union Representation Elections: The Influence of Skill Homogeneity and Skill Group Size*, 47 INDUS. & LAB. REL. REV. 99 (1993) (finding that groups consisting of workers from the same skill level are more successful at union organizing than are groups of workers from various skill levels).

38 *See* Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the U.S. Supreme Court*, 23 J.L. ECON. & ORG. 276 (2007) (describing the semantic difficulty of drafting an opinion and legal rule right at an ideal point).

persed. Though the Justices agree on the case disposition, they simply cannot reach concord on how to get there. In one case, some Justices in the majority coalition want to overrule a prior precedent, while others would distinguish it. In another, the inability of the coalition of Justices to agree on a clear rule leads to adoption of a muddy standard. In each of these instances, we expect that the likelihood of the Court adopting a consequential decision is minimal, due to the divergence of viewpoints.

The authority of a majority coalition of ideologically dispersed Justices is further minimized by the ability of each Justice to write his or her own opinion explaining the judgment. When the preferences are homogeneous, indeed identical, there is little incentive to write separately. But the greater the ideological dispersion among the Justices, the more complicated the decision to write separately becomes. If the median Justice is writing, and a Justice in the coalition agrees as to the disposition of the case but, because of sharply divergent ideological preferences, disagrees as to the rule that justifies that disposition, that Justice must decide among these options: (a) join the median Justice opinion, compromising his ideals; (b) write separately, perhaps depriving the majority of a single binding opinion; or (c) force the median Justice to compromise her views in drafting an opinion they both can join. Any choice but (a) likely will minimize the consequentiality of the decision. Yet, as anyone remotely familiar with Supreme Court decision making is well aware, choices (b) and (c) are common ones.[39]

Indeed, it is the ability of each Justice to write separately that explains why the predominant median justice theory does not undercut our intuition that ideological heterogeneity leads to less consequential decisions. Median justice theory holds that the median Justice can (and will) control the decision, because if she is not satisfied with

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39 Thus our argument turns importantly on the distinction between the judgment and the opinion in a case. In most (though perhaps not all) instances it is the opinion of the Court, and not its bottom-line judgment, that determines the consequentiality of the decision. The Supreme Court's choice to award the money to *X* or to *Y*, to admit (or not) the fruits of a police search, to uphold or strike down agency action, matters less to the future course of the law—and thus to the way behavior is shaped—than how the Court explains why it is doing so. What is of importance is the way the opinion is written, and the impact of the opinion on the development of the legal canon. In taking whatever action it does, the important aspect is how the Court goes about reaching its judgment, what new approach the Court carves out to guide future conduct. For example, does the Court simply distinguish its prior precedents, or does it overrule them? Does the Court adopt a flexible standard, or a clear, bright-line test? These are the sorts of questions that bear upon the consequentiality of a decision.

the outcome she can always threaten to defect to the other side. It is true that the median Justice holds enormous power over the Court's judgment, i.e., who wins or loses the case. But it does not follow that the median Justice can control every detail of the written opinion. First, the median Justice cannot always credibly threaten to change sides and dispose of the case differently if she does not get her way in terms of the content of the opinion. It is unlikely that the median Justice, who strongly believes a murder conviction must be upheld, will vote to let the murderer go free simply out of concern that the opinion admitting the crucial evidence is not written the way she would like or includes an extra paragraph she believes is superfluous to the underlying issue in the case. Second, because each Justice may choose to write separately, if the median Justice does not like the majority opinion she either will persuade the opinion writer to alter it down, or will write separately herself. Thus, ideological dispersion will result in a muddied explanation or a fragmented majority, either of which will limit the consequentiality of the decision.[40]

The notion that homogeneous groups are more likely to produce significant output is not a new idea, as we noted above, and it has been validated in many empirical studies of decision making. We believe these same insights ought to hold for the Supreme Court; as the literature in the field of judicial politics makes clear, the Justices bargain their way to outcomes and this bargaining impacts the set of possible policy outcomes. Members of the Court need not—and most likely do not—commonly sign onto decisions unless those decisions (a) reach a result with which they agree and (b) are expressed in an opinion that is at least minimally acceptable. Recognizing this, Forrest Maltzman, James Spriggs, and Paul Wahlbeck argue that if the winning coalition is comprised of an ideologically heterogeneous group, the author of the opinion will make an effort to accommodate her colleagues.[41] This suggests that heterogeneity is likely to result in diffusion of the original author's opinion and perhaps then of its impact.

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40 For an elaboration and empirical test, see Cliff Carruba, Barry Friedman, Andrew Martin & Georg Vanberg, Does the Median Justice Control the Content of Supreme Court Opinions? (Oct. 25, 2007) (unpublished manuscript, on file with authors).

41 FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000).

B. *Other Factors that May Lead to a Consequential Decision*

For the reasons we just offered, we believe ideological homogeneity plays a role in generating the type of cutting-edge decisions that attract the attention of legal experts and society-at-large. But only a role; other factors likely come into play as well. At least three strike us as useful to incorporate in any effort aimed at explaining consequential constitutional law: the number of Justices in the majority, the ideology of the majority, and the total number of cases decided in the Term.[42]

Starting with the size of the majority, while it does not necessarily follow that the larger the coalition the more heterogeneous it is, it is plausible that as more Justices sign on to a majority opinion, the less it would accomplish. This is because as each additional Justice agrees to sign on, each presumably with his or her preferences, the decision becomes more and more diluted and thus produces less of an impact than could be achieved by five simpatico Justices. There are times when the Justices seek to present a united front, but, and perhaps contrary to the received wisdom in doing so, they may well limit what it is they are seeking to accomplish.

Consider in this regard *Brown v. Board of Education.*[43] Because it was, after great internal effort, a unanimous decision, it would seem to disprove our working hypothesis that the smaller the majority vote coalition, the better positioned it will be to issue a noteworthy decision. But *Brown*'s subsequent decree "all deliberate speed"[44] lacked almost any clarity or authoritativeness at all. Viewed in this way, *Brown* might actually support the point: to do what needed to be done, and unanimously, the Court may well have sacrificed a decision that would have required something clear and unambiguous. Along similar lines, *Reed v. Reed*[45] was also a 9-0 decision, and so too would seem counter to our point ahout the size of the majority. Note, though, that the next major sex discrimination case was *Frontiero v. Richardson.*[46] There, a four Justice plurality adopted strict scrutiny for

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42 Other possibilities include the ideological congruency among the branches of government and between the Supreme Court and the lower courts. We plan to explore these in future papers.

43 347 U.S. 483 (1954).

44 Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) ("[T]he cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed . . . .").

45 404 U.S. 71 (1971).

46 411 U.S. 677 (1973).

gender classifications. Though four other Justices agreed that the law in question should be struck down, they were unprepared to adopt this strict standard while numerous states across the country were considering the possibility of an Equal Rights Amendment. The sharp vote disparity between the two decisions shores up, rather than undercuts, the hypothesis. Then there is our tale of two cases, *Berkemer* and *Seminole Tribe*.[47] We emphasized the role of ideological diversity in generating (in)consequential constitutional law, but was it a coincidence that *Berkemer* was unanimous and *Seminole Tribe* was decided by the slimmest of majorities? Our hypothesis suggests not.

The second factor that the ideology of the majority, rather than the dispersion of this ideology, captures is the (admittedly arguable, though nonetheless pervasive) view that majorities populated with liberals are more likely to render cutting-edge decisions. This is not unrelated to the frequent claim of conservatives about liberal activists. Although conservatives can plainly be as activist as liberals, it is nonetheless true that since 1937 liberal activism has more frequently taken the form of expanding constitutional meaning, and thus might garner more attention. This particularly is the case given that, as some have argued, the conservative revolution at times has been one more of "stealth," quietly cutting back on existing rules rather than doing so overtly. Thus, during the Burger Court, commentators warned of a "covert counterrevolution."[48] Writing in *Harper's Magazine*, one professor said that though "it might seem that the Court Mr. Nixon has created has proved far more 'liberal' than the one he envisioned," still "far more is going on than meets the eye."[49] He described "[t]he techniques of subtle erosion"—the distinguishing of prior cases or refusal to extend them, the "[s]mall verbal changes" that have "enormous potential impact."[50]

Finally, it is possible that the sheer number of cases the Court decides in any given Term may impact the likelihood of consequential decisions; the larger the workload, the less able any given majority is to produce big decisions. This may not hold: doing important things does not necessarily take many words. Still, given the possibility, we

47 *See supra* notes 1–18 and accompanying text.

48 Gene R. Nichol, Jr., *An Activism of Ambivalence*, 98 HARV. L. REV. 315, 319 (1984) (reviewing THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983)).

49 Paul Bender, *The Techniques of Subtle Erosion*, HARPER'S MAG., Dec. 1972, at 18.

50 *Id.* at 20.

believe it important to consider and control for the number of majority opinions issued.

IV. ASSESSING THE RELATIONSHIP BETWEEN IDEOLOGICAL DIVERSITY AND CONSEQUENTIAL CONSTITUTIONAL LAW

To explore our intuition about the relationship between a homogeneous majority and important decisions, we rely on Harold J. Spaeth's U.S. Supreme Court Database, which contains information on all Supreme Court cases decided on their merits between the 1953 and 2005 Terms.[51] Because our study focuses exclusively on constitutional law, we selected for analysis only those decisions implicating state or federal constitutional matters.[52] The resulting 2,573 cases constitute our unit of analysis;[53] that is, for each decision, we determine whether it was especially consequential and, ultimately, whether the degree of homogeneity increased the odds of it being so (even after controlling for other relevant factors).

This brings us to the crucial parts of our project: devising measures of (1) our dependent variable, whether a constitutional law decision is consequential; (2) the key causal variable, ideological diversity; and (3) additional covariates that may generate important constitutional law. In what follows, we explain our approach to each.

A. Identifying Consequential Decisions

Assuming that our discussion of consequentiality offered in Part II is a fair, if incomplete, representation of consequential cases in the sense we mean, how do we measure the concept? We might read all constitutional cases and code them. Yet, it is apparent that some types of important cases will be far easier to identify than others. The database created and maintained by Spaeth already keeps track of overruling decisions, for example. But at least one of the most important types of consequential cases will be hard to identify—the case that creates clear law. Virtually all Supreme Court decisions provide

51 The Database is available at: http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm. For this Article we rely on the October 2006 version, with analu=0 and dec_type=1 or 7. *See also infra* note 52.

52 That is, from the Spaeth Database, *supra* note 51, we selected on authdec1/authdec2=1, 2, or 7.

53 *Infra* note 70 houses descriptive statistics for all variables used in our statistical model.

some impact on the pre-existing jurisprudence, but it is difficult to code them reliably and validly in terms of their legal impact.[54]

The proxy we adopt for purposes of identifying important Supreme Court cases is to track those cases reported on the front page of the *New York Times* on the day after the Justices handed down their decision (hereinafter the "NYT measure").[55] David Mayhew introduced this approach in his now famous book, *Divided We Govern*,[56] investigating important legislation emerging from Congress during periods of divided government. He defined "important" as those laws reported in the *Times*.[57] Since 1991, countless legislative scholars have also used this measure; at the same time, Epstein and Segal found it to be an especially reliable and valid mechanism for identifying salient Supreme Court cases.[58] For our purposes, it stands to reason that if the Supreme Court issues an opinion of consequence, a newspaper of record like the *Times* ought to cover it. Take for example *Roe v. Wade*.[59] As history has born out, *Roe* was an important case. Yet, on the day that the Court handed it down, Lyndon Johnson died, Henry Kissinger arrived in Paris for the last round of the Vietnam peace talks, and GM recalled 37 million cars. Nonetheless, *Roe* still made it to the front page.

The potential difficulty with using the NYT measure is that it might encompass a variety of cases that are newsworthy but not noteworthy. If the Court decides a case involving a very notable person or a major corporation, or just one involving a lot of money, that case might make it onto the front page, although none of these are necessarily very important from a legal standpoint. Consider *Dickerson v. United States*,[60] in which the Supreme Court did not overrule *Miranda v. Arizona*.[61] The decision *not* to overrule was news and deservedly so, yet in any other sense *Dickerson* was a thoroughly inconsequential decision.

Notwithstanding the measurement error in our dependent variable, we can remain confident about our choice to rely on the NYT

54 Take our word for it—we're trying!

55 *See infra* note 69 for a description of this variable and all others in the analysis.

56 DAVID MAYHEW, DIVIDED WE GOVERN 9 (1991) (introducing the concept of media publicity as a measure of identifying important Supreme Court decisions).

57 *Id.* (defining landmark Supreme Court decisions as those reported on the front page of the *New York Times*).

58 Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66 (2000) (noting the benefits of using media coverage to determine the importance of legal issues).

59 410 U.S. 113 (1973).

60 530 U.S. 428 (2000).

61 384 U.S. 436 (1966).

measure for purposes of identifying consequential decisions. Classical measurement error of the sort we have is absorbed into the disturbance term, which means that the coefficient on our variable of interest will not be biased—but it will be less efficient. In short, our empirical model will suffer from increased standard errors, making it more difficult to identify a correlation between ideological homogeneity on the Court and landmark decisions; our measurement strategy has thus made it more difficult, rather than easier, to prove our hypothesis.[62]

Finally, we ought to mention that even with this potential problem, the NYT measure has several advantages over other possible approaches. Primarily, it is reliable, capable of updating (and backdating), and *not* biased in favor of liberal or conservative decisions or particular types of cases.[63] Further, in important regards, the NYT measure is a valid measure of the concept we seek to animate. While a small fraction of cases might have made it onto Epstein and Segal's list because they were newsworthy, and not noteworthy, we would challenge scholars to identify an important, consequential, or cutting-edge case that the *Times failed* to cover on its front page.

B. Ideological Diversity[64]

If our measure of the dependent variable in this account, consequential constitutional law, is not without its share of difficulties, our approach to ideological homogeneity or, if you prefer, heterogeneity is less freighted. Actually, political scientists have offered a number of creative approaches to assess it. For our purposes, though, the Martin-Quinn ideal point estimates, derived from the votes cast by the Justices and a Bayesian modeling strategy, are, well, nearly ideal.[65]

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62 *See, e.g.*, WILLIAM H. GREENE, ECONOMETRIC ANALYSIS 84–85 (5th ed. 2003).

63 *See* Epstein & Segal, *supra* note 58, at 73–77 (subjecting the NYT measure to a battery of tests to assess biases and cross-validating it). The NYT measure performs well on all their tests. They also demonstrate that the "percentage of liberal decisions (58.2) covered on the front page of the *Times* roughly matches the overall figure of 52.2 percent." *Id.* at 76.

64 While the majority vote coalition in any given case could be diverse on any number of dimensions—family background, religious affiliation, jurisprudential approach, and so on—our account stresses ideological diversity: the more homogeneous the majority, the more likely it will be to issue a consequential opinion. The measure sketched in this Part follows from that account.

65 Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002). The updated ideal point estimates, along with all other data used in this study, are available at: http://epstein.law.northwestern.edu/research/homogeneity.html. For the sake of completeness, we also conducted the following analyses substituting the Segal-Cover scores for

They are dynamic, valid, reliable, and, last but not least, available for each Term and Justice in our study.[66]

With the Martin-Quinn ideal point estimates in hand, we turned to the Spaeth Database to identify the members of the majority vote coalition in each constitutional case decided between the 1953 and 2005 Terms. To each member we attached his or her Martin-Quinn estimate and then computed a simple but powerful measure of homogeneity: the Martin-Quinn *standard deviation* of the majority coalition in each case.[67]

C. *Other Factors that May Lead to a Consequential Decision*

For the reasons we offered in Part III, we believe ideological homogeneity plays a role in generating cutting-edge decisions. But only a role; other factors likely come into play as well. At least three strike us as useful to incorporate in any effort aimed at explaining consequential constitutional law: the number of Justices in the majority, the total number of cases decided in the term, and the ideology of the majority.[68] The first two are self-explanatory. For the ideology of the majority, we take the mean of the Martin-Quinn scores for Justices in the majority vote coalition.

Two other variables tap particular circumstances that almost certainly will be consequential: when the Court alters its own precedent or overturns a law passed by Congress. The rarity of these events

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the Martin-Quinn estimates. The results are statistically and substantively indistinguishable.

66 We, of course, are not the first to deploy the Martin-Quinn estimates. To the contrary, despite their relative youth, they have received a good deal of play in the law reviews. *See, e.g.*, Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123, 135 (2003) (explaining that the Martin-Quinn estimates do not consider the influence of Congress upon the Supreme Court's decision-making process); Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1307–15 (2005) (applying the Martin-Quinn method to map the ideological shift of Justice O'Connor and to determine whether President George W. Bush can influence the Court's ideological shift); Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 MO. L. REV. 1209, 1213 (2005) (using the Martin-Quinn estimates to illustrate the dramatic shift in Justice Blackmun's voting preferences); Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1754 (2006) (employing the Martin-Quinn estimates to explain Chief Justice Rehnquist's decision to assign opinion writing to a variety of Justices with different ideologies).

67 *See infra* note 69 for a description of this variable and all others in the analysis.

68 Other possibilities include the ideological congruency among the branches of government and between the Supreme Court and the lower courts. We plan to explore these in a future paper.

likely also makes them more newsworthy—a concept our dependent variable, for better or worse, surely taps—and so these should be in our model. To incorporate them, we rely on Spaeth's codings under his variables "alt_prec" (alteration of precedent) and "uncon" (overturn federal law).[69]

V. RESULTS

In sum, for this preliminary analysis we posit that three variables, in addition to ideological diversity, are likely to affect the ability of the Court's majority to produce a consequential decision: its size, its ideology, and the number of decisions handed down in a given Term. The measurement of our dependent variable also counsels in favor of analyzing precedential and congressional overrulings.

We begin, though, with a simple inspection of the basic relationship we seek to assess, between ideological diversity and the eminence of the constitutional law the Court produces. To conduct it, we estimated a bivariate logistic regression of whether a decision is consequential on the degree of ideological homogeneity.

Though the results are of limited value, they are not unencouraging. For starters, the coefficient on Ideological Diversity is statistically significant ($p \leq 0.05$) and correctly signed; in other words, higher degrees of ideological homogeneity are statistically associated with higher odds of producing a consequential decision.[70] Moreover, the

69 A description of the variables in our analysis is as follows (N=2573):

Variable	Mean	Std. Dev.	Min.	Max.
Consequential Cases	0.23	0.42	0	1
Ideological Diversity of the Majority	1.85	0.57	0.36	3.99
Number of Justices in the Majority	6.83	I.54	4	9
Ideology of the Majority	0.15	0.97	-2.25	2.01
Number of Cases	115.15	24.98	65	15I
Overturn Precedent	0.04	0.19	0	1
Overturn Federal Law	0.03	0.16	0	1

Note that for Ideological Diversity of the Majority and Number of Justices in the Majority, we define "majority" as the vote majority, and not the opinion majority. Because using the opinion majority would, if anything, bias the results in favor of our hypothesis, we begin with the tougher test. In future work, we will consider both types of majority membership.

70 The estimates are as follows (where * indicates $p \leq 0.05$, and Std. Errs. are robust):

	Coefficient	(Std. Err.)
Ideological Diversity of the Majority	-0.343*	(0.083)
Intercept	-0.563*	(0.156)
N	2573	
Log-likelihood	-13.91.056	
$X^2_{(1)}$	17.06	

effect of Ideological Diversity is substantively noticeable. Moving from the most homogeneous majorities, to mean levels, to the most heterogeneous precipitously decreases the odds of a noteworthy decision, from 0.33 to 0.23 to 0.13.[71] Overall, we predict a 21% decline in the likelihood of producing important constitutional law as Ideological Diversity changes from its minimum (lowest standard deviation) to its maximum (highest standard deviation) values.

A. *Multivariate Analysis*

These initial findings may seem impressive, but do they hold when we control for the other factors that may affect the probability of a consequential decision? From a statistical standpoint, as Table 1 below shows, the answer is straightforward: the estimate of Ideological Diversity remains statistically significant and correctly signed. Ditto for the other coefficients.

TABLE 1

THE EFFECT OF IDEOLOGICAL DIVERSITY ON THE CREATION OF A CONSEQUENTIAL CONSTITUTIONAL LAW DECISION

Variable	Coefficient	(Std. Err.)
Ideological Diversity of the Majority	-0.428 *	(0.116)
Number of Justices in the Majority	-0.164 *	(0.037)
Ideology of the Majority	-0.288 *	(0.058)
Number of Cases	-0.006 *	(0.002)
Overturn Precedent	1.110 *	(0.210)
Overturn Federal Law	1.547 *	(0.258)
Constant	1.259 *	(0.315)
N	2573	
Log-likelihood	-1319.573	
$X^2_{(6)}$	153.783	

* represents $p \leq 0.05$. Standard errors are robust.

71 The 95% confidence intervals are [0.28, 0.39], [0.22, 0.25], and [0.09, 0.17], respectively. Produced using SPost, available at http://www.indiana.edu/~jslsoc/spost.htm.

The far more important question, though, is whether the statistical results—especially those pertaining to ideological diversity—exert strong substantive effects on constitutional law. To address it, we consider several plausible scenarios, with Figure 1 displaying the most relevant for our project. There we show the effect of homogeneity on the probability of the Court producing an important constitutional decision when we set the size of the majority at 5, 7, and 9 persons—in other words, the (approximate) minimum, mean, and maximum values of Number of Justices in the majority.

FIGURE 1

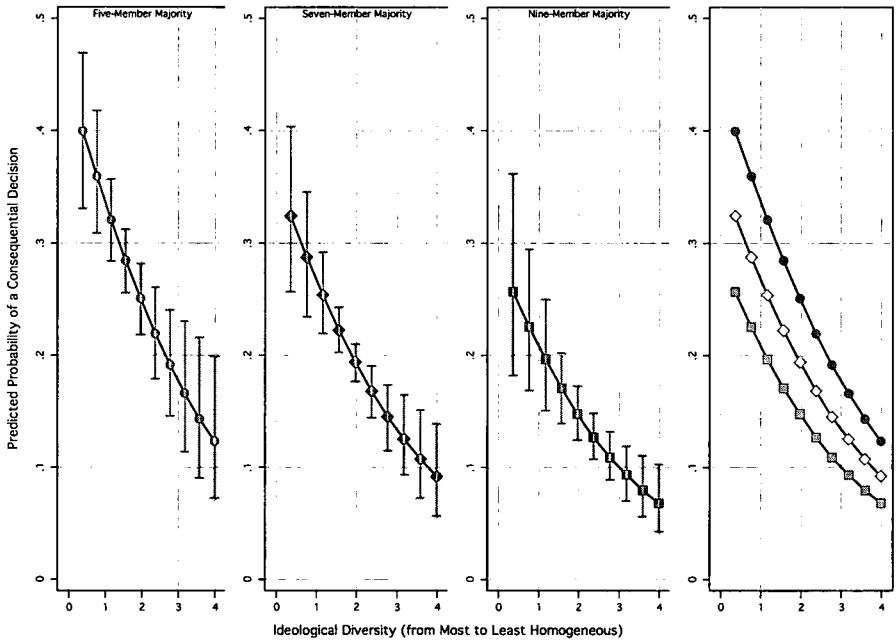

Figure 1: The effect of ideological diversity, for three sizes of the majority vote coalition, on the likelihood of a consequential constitutional law decision. The panels show the predicted probability of the Court producing an important constitutional decision when we set the size of the Court's majority at its (approximate) minimum (5), mean (7), and maximum (9) values over the range of Ideological Diversity (the closer to 0 the more ideologically homogeneous the majority). In all panels, Ideology of the Majority and Number of Cases are set at their means, and Overturn Precedent and Overturn Federal Law are set at their modes (0). The vertical lines represent 95% confidence intervals. We generated this figure using SPost, with bootstrapped confidence intervals.

Focusing first on our primary intuition about the relationship between ideological diversity and important constitutional law, the takeaway from Figure 1 is obvious: regardless of the size of the majority, the more homogeneous the Court, the more likely it is to produce a consequential decision. With all other variables held at their mean (or mode), including the Number of Justices, the probability of an extremely heterogeneous majority generating a noteworthy decision is just 0.09;[72] that figure increases to 0.33[73] if the majority is extremely homogeneous.

As we can observe, though, the size of the majority is hardly substantively irrelevant. All else being equal, a minimum winning majority (e.g., five votes out of a nine-Justice Court if all are hearing the case) will produce a consequential decision in about one out of every four cases.[74] At the highest levels of homogeneity, that figure increases to 40 %.[75] For unanimous majorities, conversely, the predicted probability of generating an important decision never exceeds 0.26, even when they are highly homogeneous;[76] the odds drop as low as 0.07 when they are highly heterogeneous.[77] Hence, conventional wisdom aside, it is the homogeneous, five-person coalition—and not a unanimous Court—that is more likely to generate decisions of consequence.

Where the conventional wisdom may have it right is about ideology. For decades, various political communities have contended that liberals are more likely to produce "big" decisions, and our data suggest that they are not wrong. Consider Figure 2, in which we depict the change in the predicted probability of a consequential opinion across the range of values of Ideological Diversity for very liberal, "average," and very conservative majority coalitions.[78] Notice that the predicted probability of even an extremely homogeneous conservative majority generating a consequential decision is a rather unlikely 0.22; that figure increases to 0.50 when it is extremely liberal (and homogeneous). We stress, yet again, that these results obtain in a post-1937 world; the outcomes might well differ were we examining the period of conservative activism during the *Lochner* era.

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72 The 95% confidence interval is [0.06, 0.15].

73 The 95% confidence interval is [0.26, 0.41].

74 The probability is 0.26, with a 95% confidence interval of [0.23, 0.29].

75 The 95% confidence interval is [0.33, 0.47].

76 The 95% confidence interval is [0.18, 0.36].

77 The 95% confidence interval is [0.04, 0.10].

78 The other variables are set at their mean or mode.

FIGURE 2

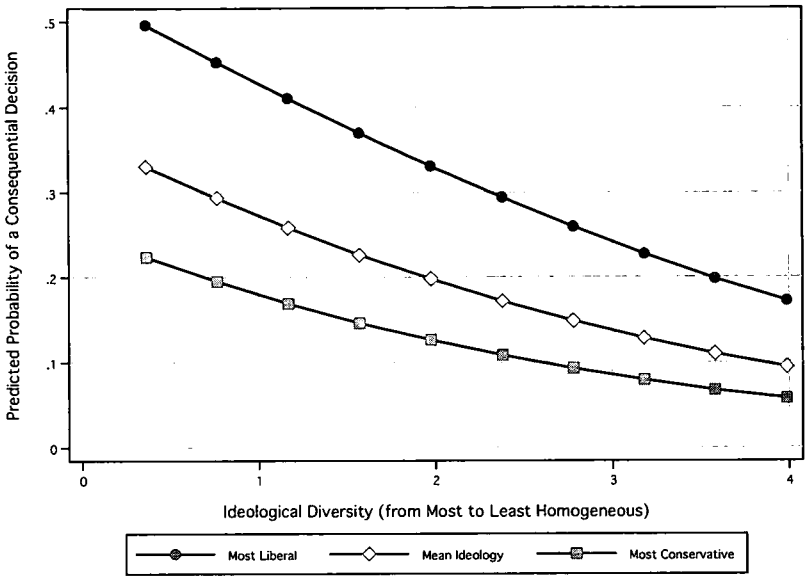

Figure 2: The effect of ideological diversity, by the ideology of the majority vote coalition, on the likelihood of a consequential constitutional law decision. The figure shows the predicted probability of the Court producing an important constitutional decision when we set the ideology of the majority coalition at its most liberal, average, and most conservative levels over the range of Ideological Diversity (the closer to 0 the more ideologically homogeneous the majority). Number of Justices in the Majority and Number of Cases are set at their means, and Overturn Precedent and Overturn Federal Law are set at their modes (0). We generated this figure using SPost.

B. The Roberts Court

Owing to the scenarios they depict, Figures 1 and 2, while interesting, may be uninformative about the contemporary Roberts Court. For example, in Figure 1 we set Ideology of the Majority at its mean level (0.15), which is a good deal more liberal than the current Court (0.36). Likewise, for Figure 2, in which we varied Ideology of the Majority, we set the number of cases per Term at its mean (115) which, for the 2005 Term, is high (72 in 2005).

To consider the implications of our results for the current Court, some adjustments are thus in order. They are reflected in the two panels in Figure 3 below, in which we allowed the 2005 Term to dictate the hypothetical. The top display emphasizes the effect of ideological diversity by the size of the majority when Ideology of the Ma-

jority and Number of Cases are at their 2005 Term means; the bottom panel highlights ideology, showing the most liberal, average, and most conservative values during the Roberts Court.

FIGURE 3

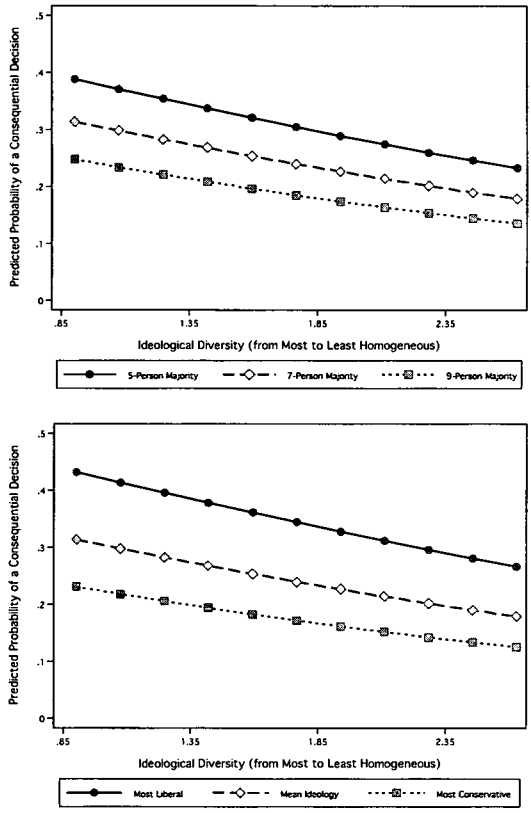

Figure 3: Ideological diversity and the first Term of the Roberts Court. The panels show the predicted probability of the Court producing an important constitutional decision across the 2005 Term's range of Ideological Diversity (the closer to 0 the more ideologically bomogeneous the majority). The top panel emphasizes the size of the Court's majority at its (approximate) minimum (5), mean (7), and maximum (9), when we set Ideology of the Majority and Number of Cases at their 2005 Term means and all other variables at their means or modes. The bottom panel highlights the ideology of the majority at its 2005 most liberal, average, and most conservative values, when we set the size of the majority and the number of cases at their 2005 Term means and all other variables at their means or modes. We generated this figure using SPost.

As even a mere glance at Figure 3 would reveal, the patterns are quite similar to those we ohserve for the entire period: increases in the size of the majority and its relative conservatism are associated

with decreases in the predicted probability of a consequential decision across the range of Ideological Diversity. Depending upon the particular scenario, however, the substantive effects may not be as strong. Consider, for example, the formation of a minimum winning coalition of the most liberal and, crucially, the most homogeneous Justices—in other words, the scenario across our data most likely to produce a consequential decision.[79] Were such a majority to emerge, we would predict, on average, the generation of important law in nearly six out of every ten decisions;[80] for the Roberts Court, the figure is closer to about 50 percent.[81] Were the current Justices to decide more cases per Term—an end the Chief Justice seems to endorse—the production of consequential constitutional law would decline even further. Adding approximately 25 cases would bring the predicted probability to under 0.50;[82] moving to 115 cases, the mean level across the fifty year period, would likely result in a further reduction.[83]

Even more to the point, a constitutional law maximizing coalition (i.e., very liberal, homogeneous, and small) certainly does not predominate on the Roberts Court. In only two of the thirty-one constitutional law cases of the 2005 Term did such a majority form (Breyer, Ginsburg, Souter, and Stevens, plus O'Connor or Kennedy). And, even when it did, as the results above suggest, it was more conservative than the five- and six-person vote coalitions of the Warren Court years.

VI. DISCUSSION

Word has it that Justice William J. Brennan, Jr. would ask his law clerks to tell him the most important rule in constitutional law. He would then hold up his hand, showing all five fingers. His point? Five was the minimum number of Justices required to make constitutional law.

What this Article indicates is that Brennan's rule gets it only partially right. Were Justice Brennan writing for himself and a random draw of four others, our analysis predicts a far higher likelihood of

79 Or at least when Overturn Precedent and Overturn Federal Law are set at 0.

80 The probability is 0.57, with a 95% confidence interval of [0.46, 0.69].

81 The probability is 0.51, with a 95% confidence interval of [0.43, 0.60].

82 The probability would be 0.47, with a 95% confidence interval of [0.40, 0.55].

83 The probability would then be 0.45, with a 95% confidence interval of [0.37, 0.53].

producing a decision of some import than if he were writing for all his colleagues.[84]

Where Brennan's answer falls short is in treating all votes as the same. They are not. Based on our analysis, we would be prepared to bet that an opinion written by Brennan (or any other Justice) would have a greater impact if his four *closest allies* joined it than if he were forced to cobble together a majority from across the Court's ideological spectrum. The decision of a five-person homogeneous majority is three times more likely than the decision of a five-person heterogeneous majority to generate consequential constitutional law.

If we are right, then perhaps it is no accident that so often in history when the Supreme Court has been under siege it is for a string of 5-4 decisions. During the *Lochner* era, for example, members of Congress, frustrated by the number of important decisions striking laws by the slimmest of margins, proposed requiring a supermajority before the Court could strike a federal statute.[85] Although this proposal went nowhere, a similar requirement was adopted in four states.[86]

Complaints of this nature have been leveled more recently at the decisions of the Federalism Five of the Rehnquist Court. It stands to reason that discontent with the Court will track the periods of complaint about 5-4 decisions. On balance, a strong five may be able to do more, and thus rouse more controversy.

While the positive explanation for this phenomenon is interesting, the normative implications are less clear. What our analysis suggests is that the objection to 5-4 decisions is not merely that the Court was closely divided, but paradoxically, that it is in precisely these cases that the Court is accomplishing most. To the extent that public acceptance of Supreme Court decisions is tied to the size of the decision majority, and there is some evidence that it is, the Court will be acting in the less acceptable manner at precisely the same time that it is having the largest impact on the existing body of law.

What one does with this insight is complicated, but still it is instructive. For example, there have been instances in history in which

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84 The difference in probability is 0.26 [0.23, 0.29] versus 0.15 [0.13, 0.18], with all variables held at the mean or mode, except size.

85 *See, e.g., Borah for Limiting High Court's Veto*, N.Y. TIMES, Feb. 6, 1923, at 4 (noting the introduction of a bill that would require at least seven votes for the Supreme Court to declare an Act of Congress unconstitutional).

86 The original four states were Ohio, North Dakota, Nebraska, and South Carolina; North Dakota and Nebraska retain a supermajority requirement today. *See* Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 954 (2003).

calls have been made to require a supermajority before the Justices strike down an Act of Congress. Though there are strong countervailing arguments, it is easy to see why such calls have been made. It is undoubtedly easier, as we explain, to get five votes to overturn a congressional law than to get more.

On the other hand, suggestions that the Justices work harder to reach agreement may prove counterproductive. These suggestions are made on the theory that greater consensus lends greater legitimacy and clarity to the law. Yet our analysis would indicate that the more Justices who join in an opinion, the less clear the law might be, depending on the ideological homogeneity of the Court. Thus, it might be that requiring at least five Justices makes sense, so that there is a majority opinion, but if clarity is what one is after, there may be diminishing returns thereafter.

Finally, the implications for the appointments process are evident, even though what one should prefer may not be. To the extent one wants an activist court, the means of accomplishing this are obvious: appoint at least five Justices of like mind. On the other hand, ideological diversity will diminish activism. Thus, allowing any one President, or several congruent Presidents of the same party, to appoint several Justices is likely to increase activism, especially in an environment in which ideology is such an important determinant of who gets appointed. Recent proposals to regularize appointment to the Supreme Court are indeterminate, as what matters is who gets to do the appointing and who gets appointed.