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IN FOCUS

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Supreme Court Decisions Without a Majority

Since 1869, the size of the U.S. Supreme Court has been set by statute at nine Justices. By longstanding Court practice, all of the Justices participate in most merits decisions and many other types of decisions, and the Court determines the outcome by majority vote, meaning that the disposition that garners the support of five or more Justices is how the Court rules. Some matters, however, can be decided without the support—or sometimes even the participation—of a majority of the Justices.

There are several circumstances in which the Supreme Court may issue a decision without the support of a majority of the Justices. First, certain matters that the Court considers do not require a majority vote. Second, an even number of Justices may hear a matter, and the Court may be equally divided. Third, in some cases, the Court issues fractured decisions in which no opinion receives the support of a majority (or half) of the participating Justices. This In Focus discusses each of those circumstances in turn, then concludes with selected considerations for Congress related to Supreme Court voting rules.

Matters Not Requiring a Majority Vote

Supreme Court cases generally proceed before the full Court and are decided by majority vote, but different voting rules apply to some matters. Perhaps the most prominent example of this is petitions for writs of certiorari, also called "cert petitions."

Most cases that reach the Supreme Court do so via cert petitions. When a party files a cert petition seeking Supreme Court review of a decision of a lower federal court or the highest court of a state, the Supreme Court has discretion whether or not to hear the case. (A minority of cases reach the Court via mandatory appeals or are commenced directly in the Supreme Court.) Under a longstanding practice known as the "rule of four," the Court will grant a cert petition if at least four of the nine Justices vote to hear the case. The rule of four is not required by the Constitution and is not set out in any federal statute or in the published Rules of the Supreme Court.

Some other matters before the Supreme Court can be considered and decided by a single Justice. An individual Justice may rule on some procedural matters such as applications to extend time to file a cert petition. A single Justice can also consider certain requests for interim relief. One example is an application for a stay pending appeal, in which litigants ask the Court to pause a lower court ruling or other government action while an appeal is litigated.

Each of the federal judicial circuits has an assigned "Circuit Justice" who is responsible for considering single Justice matters arising from that circuit. If the Circuit Justice denies a stay, the Rules of the Supreme Court allow the applicant to present the request to another Justice, though renewing a denied request is disfavored. The Rules also allow an individual Justice to refer matters such as stay applications to the full Court for consideration. Justices have done this in some high-profile cases, meaning that requests for relief originally submitted to a single Justice were ultimately granted or denied by a majority of the full Court.

Decisions of an Evenly Divided Court

While the Supreme Court currently has nine seats, there are times when fewer than nine Justices consider a case. This may occur when there is a vacancy on the Court or when a Justice does not participate in a particular case—for example, due to recusal. In addition, the Supreme Court has not always had nine members. Congress sets the size of the Court by legislation and changed the Court's size numerous times between the Founding and the Reconstruction Era. Thus, the Court has sometimes had an even number of members, ranging from six to ten.

When an even number of Justices participate in a case, it is possible for the Justices' votes to be evenly divided between two possible outcomes. When the Justices split evenly on whether to affirm or reverse a lower court decision, the lower court decision stands. Such a disposition binds the parties to the case, but, unlike a majority decision of the Court, an affirmance by an equally divided Court is not binding precedent in other cases.

Fractured Decisions

Sometimes, there are more than two possible outcomes in a Supreme Court case or multiple possible legal justifications for reaching a certain outcome. In these circumstances, the Court may issue a fractured decision with the Justices divided into three or more groups. The Court's written opinions usually explain what a fractured ruling means for the parties to the case, but fractured decisions may raise questions about how they apply as precedent in future cases.

In *Marks v. United States*, the Supreme Court explained, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193 (1977) (internal quotes and citation omitted). The narrowest opinion may not be the same as the plurality opinion—that is, the opinion that receives the most votes without obtaining a majority. This means that the controlling rationale may not be the one that received the most support from the Justices. Lower courts have sometimes struggled

with the *Marks* rule, and the Supreme Court subsequently opined that the "test is more easily stated than applied."

Considerations for Congress

Lawmakers and commentators have proposed numerous reforms related to Supreme Court voting rules. The most common of these are supermajority voting requirements—proposals that would require the agreement of more than a simple majority of the Justices before a law could be held unconstitutional. Since the 19th century, Congress has considered multiple bills that would have imposed supermajority requirements in judicial review of federal or state statutes or state constitutional provisions. Another proposal advocated for a less stringent voting requirement, requiring only four votes to stay an execution.

No such proposals have been implemented by legislation. Therefore, there is no Supreme Court precedent considering the scope of Congress's authority in this area. As discussed below, it appears that Congress has some authority to enact legislation affecting Supreme Court voting rules. However, there is limited historical precedent for doing so, and the Constitution may impose limits on such legislation.

The Supreme Court's current, longstanding practice of deciding most matters by majority vote is not laid out in the Constitution or any federal statute. Instead, as noted in the 2021 Report of the Presidential Commission on the Supreme Court of the United States (Commission Report), "From the beginning, ... the Court appears to have assumed that a simple majority vote was sufficient to determine its rulings—a conclusion generally consistent with the practices of Anglo-American multimember courts of the time."

As a general historical matter, both Congress and the Supreme Court have played a role in specifying Supreme Court procedures. Since Congress first established federal courts in the Judiciary Act of 1789, it has set the size of the Supreme Court and has specified how many Justices constitute a quorum. Congress has also enacted legislation regulating procedures for federal courts, some of which apply to the Supreme Court, but has generally deferred to the Court to make its own procedural rules.

With respect to congressional control over Supreme Court voting rules, commentators raise several constitutional questions. One is what source of constitutional authority, if any, empowers Congress to legislate in this area. Congress might draw the power to impose voting rules from the Exceptions Clause in Article III of the Constitution, which grants the Supreme Court appellate jurisdiction over certain cases "with such Exceptions, and under such Regulations as the Congress shall make," but it is debatable whether voting rules constitute regulations of "jurisdiction." Moreover, if Congress were to rely on the Exceptions Clause to impose Supreme Court voting rules, it would not be able to reach cases brought under the Court's original jurisdiction.

It is also possible that Congress could rely on the Necessary and Proper Clause in Article I of the Constitution, which authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers and other powers vested in the federal government. Congress has relied on that clause to regulate the Supreme Court in other ways, such as setting the size of the Court and specifying when and where the Court sits. However, some might distinguish supermajority legislation from existing Court regulations and argue that legislation that would limit the Court's power to strike down laws does not help to "carry[] into Execution" the legislative or judicial powers granted by the Constitution in the way legislation structuring the Court or defining its term does.

If the Constitution grants Congress authority to legislate with respect to Supreme Court voting rules, separation of powers limitations may nonetheless limit the exercise of that power. Since *Marbury v. Madison*, the Court has held that "it is emphatically the province and duty of the judicial department to say what the law is." The Court has struck down legislation that it held improperly directed the courts to decide cases in certain ways as well as legislation in which Congress interpreted constitutional rights differently from how the Court interpreted them. The Court has also limited or struck down exceptions to its appellate jurisdiction that could remove its ability to consider certain constitutional questions.

The Court might apply these and similar precedents to hold that legislation regulating Supreme Court voting improperly intrudes on the Court's authority under Article III, though some argue that such legislation would be constitutional. By comparison, there is substantial precedent for Congress enacting legislation that establishes a standard of review for the courts to apply in particular types of cases, including review that is deferential to the findings or actions of executive branch agencies and state courts. However, prior legislation applied only in limited contexts—generally to cases based on statutory rather than constitutional rights.

Congress has historically exercised authority to regulate the Court in some ways that indirectly affect the Court's voting—for example, by changing the size of the Court. To illustrate the impact of potential future size changes, if Congress expanded the Court from nine to ten members, under the Court's existing voting rules, a 6-4 majority (60% of the Justices) would be required for the Court to issue a binding precedential decision. With a six-Justice Court, a 4-2 (or two-thirds) majority would be required. Such majorities would be required in order to *reverse a lower court*, but an equally divided Court would affirm a lower court's decision. Changing the size of the Court to an even number of Justices could therefore increase the extent to which case outcomes depended on how the lower court ruled.

The section of the Commission Report on "Proposals for Supermajority Rules or Deference Rules at the Supreme Court" discusses considerations related to the effectiveness of supermajority voting proposals. It also includes legal and practical analysis related to deference rules—rules that would make it more difficult for the Court to reverse certain rulings of lower courts—which may raise related considerations. For legal analysis of other ways in which Congress might seek to regulate the Court, see CRS Report R47382, *Congressional Control over the Supreme Court*, by Joanna R. Lampe (2023).

Joanna R. Lampe, Legislative Attorney

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